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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(I) (COMM.) 122/2018

RACHANA INFRASTRUCTURE LTD. ..... Petitioner

Through: Mr Purvish J. Malkan, Mr Utkarsh Tiwari and Ms Dharita Malkan, Advocates.

versus

FERNAS CONSTRUCTION INDIA PVT. LTD. ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **19.03.2018**

<u>I.A. 3740/2018</u>

1. Exemption is allowed, subject to all just exceptions.

2. The application stands disposed of.

<u>O.M.P.(I) (COMM.) 122/2018</u>

3. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

> (a) This Hon'ble Court be pleased to, by way of interim measure of protection, restrain the respondent, their men, agents, subordinates, from shifting, transferring, taking away or selling construction equipments, construction materials, machines and scraps lying at Dahej in the premises of ONGC Petro Additions Limited (OPAL) at ACZ Dahej dist Bharuch Gujarat.

4. Briefly stated, the relevant facts are that ONGC Petro Additions Limited (OPAL) had entered into a contract with the respondent company

for integrated utilities and off sites packages for Dahej Petrochemical Complex at Dahej, Gujarat. The respondent company in turn entered into a contract with the petitioner for execution of part of the road works.

5. The petitioner claims that the respondent company issued a Letter of Intent (LOI) dated 21.12.2011, which was followed by a Work Order dated 13.08.2012 for a contract value of ₹55,25,02,869/-.

6. The petitioner claims that it has completed works to the extent of ₹66,41,18,018/-; however, the entire amount has not been released to the petitioner. The petitioner further claims that as per its books of accounts, a sum of ₹7,94,66,478/- is due and recoverable from the respondent.

7. The petitioner also claims that the parties entered into a settlement agreement dated 29.01.2014 for release of the performance bank guarantees. It is claimed that the said settlement agreement also contains an arbitration clause.

8. The petitioner claims that despite being called upon to do so, the respondent has not discharged its dues.

9. It is seen from the above that the petitioner is, in effect, seeking an attachment of the respondent's movable assets lying at the premises of OPAL at Dahej. It is relevant to state that there is no averment in this petition, which would indicate any reasonable grounds for apprehending that the respondent would alienate its equipments and/or act in a manner that would frustrate the award that may be granted in favour of the petitioner. The only relevant averment is found in paragraph 16 of the petition, which

reads as under:-

> "16. The Petitioner submits that the construction equipments, construction materials, scraps and machineries approximately costing Rs.35 Crores belonging to the Respondent are lying with the ONGC Petro Additions Limited (OPaL) in the premises of Dahej which the Respondent is trying to shift with a view to dupe the dues of the petitioner. Under the circumstances it has become necessary to approach this Hon'ble Court for interim measure of protection as per the provisions of Section 9 of the Arbitration and Conciliation Act, 1996 as amended in 2015."

10. The petitioner has also not pleaded any particulars that would establish any reasonable ground for apprehending that the respondent is acting in a manner so as defeat the realisation of any arbitral award that may be passed subsequently in favour of the petitioner.

11. It is well settled that the principles for grant of interim measures of protection under Section 9(1)(ii) of the Act are the same principles that are applicable to the proceedings before a Court. The order restraining the respondent from removing any of its immovable assets would, in effect, be an order of attachment before judgment. Thus, the principle, as applicable for grant of such orders in proceeding before a Court (that is, as applicable under Order XXXVIII Rule 5 CPC), would be applicable for grant of any relief under Section 9(1)(ii)(b) of the Act.

12. In ***Raman Tech. & Process Engineering Co. and Anr. v. Solanki Traders: (2008) 2 SCC 302***, the Supreme Court had, in the context of Order XXXVIII Rule 5 CPC, observed as under:-

“4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words “to obstruct or delay the execution of any decree that may be passed against him” in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims

> are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for-out-of court settlements, under threat of attachment."

13. In view of the above, it would be necessary for the petitioner to establish not only a strong, *prima facie,* case but also to establish that the respondent is acting in a manner so as to defeat the realisation of a decree/award that may be passed in his favour.

14. In the facts of the present case, the petitioner has been unable to establish that that there is any reasonable ground for apprehending that the respondent would defeat the enforcement of an award by secreting or alienating its assets.

15. *Prima facie*, it is also does not appear that the disputes sought to be raised by the petitioner (that is, recovery of a sum of ₹7,94,66,478/-) in respect of the Work Order dated 13.08.2012 are referable to arbitration in terms of the arbitration clause contained in the Settlement Agreement executed between the parties. A plain reading of the arbitration clause in the said agreement indicates that the same pertains only for reference of any disputes or differences arising out of or relating to the settlement agreement (and not the Work Order).

16. In view of the above, the present petition is dismissed.

VIBHU BAKHRU, J

MARCH 19, 2018/RK