

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 2ND DAY OF JANUARY 2019

THE HON'BLE MR. JUSTICE M.SUNDAR

A.No.1049 of 2018

in

C.S.No.81 of 2018

C.T.Sundaram
S/o.Late K.Chinnathambi
No.157, 3rd Cross Street
Shankar Nagar, Pammal
Chennai - 600 075.

...Applicant/Plaintiff

-Vs-

1.M/s.Varsha Construction
A registered Partnership Firm
Having its Southern Regional Office at
II Floor, 187-A, 4th Main Road
Sri Ayyappa Nagar, Chinmaya Nagar
Chennai - 600 092.

And their principal place of business at

i)Millennium Plaza, 25-26, II Floor
Raipur, Chhattisgarh
Pin Code - 492 001

And theirs Residential Address at

ii) Door No.736, Avanthivihar Extension
Telibandha
Raipur, Chhattisgarh, Pin Code - 492 006
Represented by its Partners

- (a)Mr.Kamal Chand Jain
- (b)Mr.Vineeth Jain
- (c)Smt.Nirmala Jain
- (d)Mr.Barun Jain

2.Military Engineering Services (Mes)
Chennai Zone, Island Grounds

Chennai 600 009
Represented by its Chief Engineer

3. Madras Regimental Centre (MRC)
Wellington - 643 231
The Nilgiris District, Tamil Nadu
Represented by its Garrison Engineer

...Respondents/Defendants

Application praying that this Hon'ble Court be pleased to direct the 1st Respondent/1st Defendant to furnish security for a sum of Rs.2,65,00,900/- failing which, an order of attachment before judgment of the movables belonging to the 1st Respondent/1st Defendant lying at Millenium Plaza, 25-26, II Floor, Raipur, Chattisgarh, Pincode 492 001, and its partners at Door No.736, Avantivihar Extn, Telibandha, Raipur, Chattisgarh, pin code 492 006 as mentioned in Schedule - II of mentioned below pending disposal of the above suit.

This Application coming on this day before this court for hearing the court made the following order:

There is a sole plaintiff and there are three defendants in the main suit.

2. Sole plaintiff in the main suit is the lone applicant herein. Defendants 1, 2 and 3 in the main suit are respondents 1, 2 and 3 respectively in the instant application. From hereon, parties to this instant application i.e., A.No.1049 of 2018 shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity.

3. A.No.1049 of 2017 has been taken out under XXXVIII Rule 5 of 'The Code of Civil Procedure, 1908' (hereinafter 'CPC' for brevity) with a prayer for 'Attachment Before Judgment' (hereinafter 'ABJ' for brevity). To be noted, the prayer is to the effect that first defendant should be directed to furnish security for suit claim of Rs.2,65,00,900/- (little over 2.65 Crores) failing which, an order of attachment has been sought for qua movables belonging to first defendant in the first defendant's office and in the residence of the partners of the first defendant firm.

4. Third defendant has been duly served in the main suit on 17.03.2018 and third defendant has been set ex-parte on 05.12.2018. With regard to second defendant, Ms.C.Jayachitra, learned counsel on record is before this Commercial Division.

5. In the main suit, there is no relief has been sought for against defendants 2 and 3, but they are proper parties, who may throw light on the certain aspects of this lis, is learned plaintiff counsel's say. It may not be necessary to delve into those aspects of the matter in the instant ABJ application. Suffice to say that in the instant ABJ application, prayer is only against the first defendant. Learned counsel for second defendant submitted that they remain neutral. In other

words, second defendant is neither opposing nor supporting this ABJ application in the light of there being no prayer against defendants 2 and 3. With regard to first defendant, a counter affidavit has been filed and plaintiff has filed a reply affidavit. No separate typed set of papers have been filed in the instant ABJ application and learned counsel for plaintiff submitted that typed set of papers dated 12.10.2017 filed along with the plaint containing the plaint documents (28 documents in all) alone will be pressed into service in the instant ABJ application. This completes details of pleadings in the instant ABJ application and the supporting documents which have been placed before this Commercial Division by way of typed set of papers.

6. Before I proceed with the instant ABJ application, it may be necessary to set out that the entire lis pertains to three projects of the second and third defendants which are defense establishments. The three projects are as follows:

'(i) work at Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu.

(ii) work at what is known as ASC Centre Bangalore, Karnataka and

(iii) work at INS Rajali, Arakonam, Tamil Nadu.'

7. Central theme of this lis is that first defendant which is a partnership firm entered into an arrangement with the plaintiff for execution of aforesaid three projects of defendants 2 and 3 after being awarded work orders for the same by defendants 2 and 3. To be noted, work orders were given to the first defendant firm.

8. Subsequently, the arrangement between first defendant firm and the plaintiff fell apart, leading to the instant suit claim by the plaintiff. The suit claim of over Rs.2.65 Crores made by plaintiff is based on monies which (according to plaintiff) have been spent by plaintiff in execution of one of the aforesaid three projects i.e., Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu. To be noted, it is plaintiff's case that understanding was between the first defendant and the plaintiff for three projects but ultimately plaintiff was given only the first project at Wellington and the same shall hereinafter be referred to as 'said project' for the sake of convenience and clarity.

9. It is not in dispute before this Commercial Division that plaintiff was permitted to operate the bank accounts of the first defendant firm in Chennai for the purpose of said project.

10. To be noted, the instant ABJ application is supported by an affidavit dated 21.03.2018, which is a

common affidavit supporting the instant ABJ application as well as an injunction application being O.A.No.104 of 2018. Suffice to say that injunction application pertains to certain material which was lying at the site in the said project which according to the plaintiff belongs to him. Injunction sought for at the time of inception of suit before service of notice on the defendants was to restrain the first defendant from using those materials for the said project. An interim order came to be passed in the injunction application on 07.02.2018 and the same reads as follows:

'Sole plaintiff in the main suit is the lone applicant in this application. Defendants 1, 2 and 3 in the main suit are respondents 1, 2 and 3 respectively in this application.'

2. Parties in this application are referred to by their respective ranks in the main suit for the sake of convenience and clarity.

3. I have heard Mr. Joshva Samvel, learned counsel for M/s. Paul and Paul [Law Firm] for plaintiff. It is submitted that the plaintiff has vast experience in Civil Engineering Industry, particularly on cost analysis for tender and execution of various types of projects at economical rates. It is also averred by the plaintiff

that, it offers services not only as Consultant in the initial stages but also on execution, management and completion of projects.

4. Learned counsel for plaintiff submits that the first defendant firm has sought the plaintiff's help with regard to three projects. To be noted, the three projects are for defendants 2 and 3 and notice inviting tenders were issued. The three projects, I am informed, are as follows:

- (i) work at Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu
- (ii) work at what is known as ASC Centre Bangalore, Karnataka and
- (iii) work at INS Rajali, Arakonam, Tamil Nadu.

5. Learned counsel submits that though the first defendant agreed to issue work order to the plaintiff for all the three aforesaid projects, first defendant had not issued a work order in respect of ASC Centre, Bangalore, Karnataka and Arakonam project i.e., 2 and 3 supra. In other words, work orders were issued only for the work to be carried at Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu.

6. It is also the further case of the plaintiff that notwithstanding the work order not being issued, they had assisted

the first defendant firm and the work also had commenced.

7. Under such circumstances, arrangement between the plaintiff and the first defendant fell apart and the first defendant is now proceeding with the project inter alia using some of the materials of the plaintiff.

8. As far as this application is concerned, prayer is for an interim order restraining the first defendant from using any of the materials belonging to the plaintiff lying at project No.1 supra i.e., Wellington project site at Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu- 643 231.

9. The materials have been set out in the schedule to the judges summons and it reads as follows:

PARTICULARS (Materials lying at the site)	VALUE
Steel doors/Windows and ventilators	Rs.15,99,972/-
P.C.C. Blocks 620 Nos. @ Rs.55/- each	Rs.34,100/-
M-Sand 3 loads @ Rs.25,000/- per load	Rs.75,000/-
River Sand 1 load	Rs.37,000/-
Various size of aggregates L.S.	Rs.40,000/-
Water in the sump L.S.	Rs.10,000/-
Total	Rs.17,96,072/-

10. I have heard Mr. Joshva Samvel and I have also perused the affidavit filed in support of the injunction application.

11. The main suit is for a money claim.

12. I am convinced that all the three parameters for grant of ex-parte injunction i.e., prima facie case, balance of convenience and irreparable injury capable of compensation are present in the instance case warranting an order of ex-parte injunction. There shall be an order of ex-parte injunction as prayed for for a period of three weeks i.e., upto 28.02.2018.

13. It is made clear that notwithstanding the injunction, first defendant can proceed with the project at the Wellington project, but shall not use the materials, which is subject matter of the injunction application, which according to the plaintiff belongs to them.

14. Though obvious, plaintiff shall comply with Order XXXIX Rule 3 of Code of Civil Procedure, 1908.

15. List on 28.02.2018.

11. After entering appearance, first defendant took out an application in A.No.1650 of 2018 in the injunction application i.e., O.A.No.104 of 2018 with a prayer to furnish Bank Guarantee and use or remove the material from the site which was subject matter of the injunction application. After hearing both sides, the application came to be disposed of by an order dated 28.03.2018 of this Commercial Division and the said order reads as follows:

'First defendant in the main suit has taken out the instant application i.e., A.No.1650 of 2018. Plaintiff in the main suit is the lone respondent in this application. Considering the nature of the application, the submissions and the order I propose to pass, this order will dispose of A.No.1650 of 2018 and O.A.No.104 of 2018. At the time of institution of the suit, I granted an ex parte interim injunction in O.A.No.104 of 2018 on 07.02.2018, which reads as follows:

Sole plaintiff in the main suit is the lone applicant in this application. Defendants 1, 2 and 3 in the main suit are respondents 1, 2 and 3 respectively in this application.

2. Parties in this application are referred to by their respective ranks in

the main suit for the sake of convenience and clarity.

3. I have heard Mr. Joshva Samvel, learned counsel for M/s. Paul and Paul [Law Firm] for plaintiff. It is submitted that the plaintiff has vast experience in Civil Engineering Industry, particularly on cost analysis for tender and execution of various types of projects at economical rates. It is also averred by the plaintiff that, it offers services not only as Consultant in the initial stages but also on execution, management and completion of projects.

4. Learned counsel for plaintiff submits that the first defendant firm has sought the plaintiff's help with regard to three projects. To be noted, the three projects are for defendants 2 and 3 and notice inviting tenders were issued. The three projects, I am informed, are as follows:

(i) work at Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu

(ii) work at what is known as ASC Centre Bangalore, Karnataka and

(iii) work at INS Rajali, Arakonam, Tamil Nadu.

5. Learned counsel submits that though the first defendant agreed to

issue work order to the plaintiff for all the three aforesaid projects, first defendant had not issued a work order in respect of ASC Centre, Bangalore, Karnataka and Arakonam project i.e., 2 and 3 supra. In other words, work orders were issued only for the work to be carried at Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu.

6. It is also the further case of the plaintiff that notwithstanding the work order not being issued, they had assisted the first defendant firm and the work also had commenced.

7. Under such circumstances, arrangement between the plaintiff and the first defendant fell apart and the first defendant is now proceeding with the project inter alia using some of the materials of the plaintiff.

8. As far as this application is concerned, prayer is for an interim order restraining the first defendant from using any of the materials belonging to the plaintiff lying at project No.1 supra i.e., Wellington project site at Madras Regimental Centre at Wellington, Nilgiris, Tamil Nadu- 643 231.

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PARTICULARS (Materials lying at the site)	VALUE
Steel doors/Windows and ventilators	Rs.15,99,972/-
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M-Sand 3 loads @ Rs.25,000/- per load	Rs.75,000/-
River Sand 1 load	Rs.37,000/-
Various size of aggregates L.S.	Rs.40,000/-
Water in the sump L.S.	Rs.10,000/-
Total	Rs.17,96,072/-

10. I have heard Mr. Joshua Samuel and I have also perused the affidavit filed in support of the injunction application.

11. The main suit is for a money claim.

12. I am convinced that all the three parameters for grant of ex-parte injunction i.e., prima facie case, balance of convenience and irreparable injury capable of compensation are present in the instance case warranting an order of ex-parte injunction. There shall be an order of ex-parte injunction as prayed for for a period of three weeks i.e., upto 28.02.2018.

13. It is made clear that notwithstanding the injunction, first defendant can proceed with the project at the Wellington project, but shall not

use the materials, which is subject matter of the injunction application, which according to the plaintiff belongs to them.

14. Though obvious, plaintiff shall comply with Order XXXIX Rule 3 of Code of Civil Procedure, 1908.

15. List on 28.02.2018."

2. Thereafter, the first defendant entered appearance and the first defendant has taken out the instant application i.e., A.No.1650 of 2018.

3. As the order passed on 07.02.2018, which has been extracted and reproduced supra, gives the facts in a nutshell, I am not restating the facts here, to avoid prolixity and to avoid this order becoming verbose. Suffice to say that scope of the application i.e., A.No.1650 of 2018, is limited as the first defendant has offered to furnish a Bank Guarantee in a sum of Rs.18 Lakhs (Rupees Eighteen Lakhs only) in favour of the Registrar General, High Court, Madras to the credit of the main suit i.e., C.S.No.81 of 2018, in lieu of which they shall be permitted to use the construction materials lying at the site, which has been set out in Paragraph 9 of my earlier order dated 07.02.2018 (extracted and reproduced in this order supra).

4. Obviously, the Bank Guarantee will be kept in force till the disposal of the main suit.

5. Learned counsel for first defendant Ms.Jayshree of M/s.Surana and Surana, Law Firm, undertakes to furnish the Bank Guarantee in a sum of Rs.18,00,000/- (Rupees Eighteen Lakhs Only) on or before 11.04.2018.

6. Learned counsel for Plaintiff Mr.Joshua Samuel submits that though this may give quietus to the instant application i.e., A.No.1650 of 2018 and O.A No.104 of 2018, he has much to say with regard to A.No.1049 of 2018 which has been taken out by the plaintiff with a prayer for Attachment Before Judgment ('ABJ' for brevity) under Order XXXVIII Rule 5 of Code of Civil Procedure, 1908.

7. First defendant has filed their counter affidavit in A.No.1049 of 2018 and learned counsel for plaintiff submits that it has become necessary to file a reply affidavit as certain facts need to be dealt with.

8. Therefore, these two applications i.e., A.No.1650 of 2018 and O.A.No.104 of 2018 are disposed of and A.No.1049 of 2018 shall be listed after two weeks by which time, plaintiff undertakes to file reply together with advance copy to the learned counsel for the first defendant. Though

obvious, it is made clear that the ABJ application will be heard and disposed of, uninfluenced by and without being swayed by disposal of instant two applications/this order.

9. Coming back to the instant applications, after the first defendant furnishes Bank Guarantee in a sum of Rs.18,00,000/- as aforesaid on or before 11.04.2018, it will be open to them to use the construction materials, details of which have been set out in Paragraph 9 of my order dated 07.02.2018, which has been extracted supra.

10. Though obvious, it is made clear that this order will work itself out and the injunction granted on 07.02.2018 will continue, if Bank Guarantee is not so produced on or before 11.04.2018.

11. Though these two applications are disposed of, there is some issue regarding transportation charges of the construction materials which are subject matter of these two applications. There are also some issues regarding valuation of the materials. Submissions and contra submissions are made by both sides in this regard. These issues are left open to be decided in the course of the suit.

12. With the above observation, these two applications are disposed of.

Registry is directed to list A.No.1049 of 2018 after 11.04.2018. '

12. Today in the hearing of this ABJ application, Mr.Joshua Samuel of M/s.Paul and Paul (Law Firm) on behalf of plaintiff, Mr.Kalyan Jabhak of M/s.Surana and Surana (Law Firm) on behalf of first defendant and Ms.C.Jayachitra on behalf of second defendant are before this Commercial Division.

13. I heard all the three learned counsel. As mentioned supra, learned counsel for second defendant submitted that they are neither opposing nor supporting the instant ABJ application and the second defendant remains neutral *inter alia* as there is no prayer against the second defendant both in the main suit and in the instant application.

14. Be that as it may, with regard to injunction application being O.A.No.104 of 2018 and A.No.1650 of 2018 therein (orders made therein have been extracted and reproduced supra), both learned counsel i.e., counsel for plaintiff and counsel for first defendant submitted that Bank Guarantee for Rs. 18,00,000/- (Rupees Eighteen Lakhs only) has since been furnished, the same is alive and the project at Wellington is nearing completion. It is also submitted that orders in O.A.No.104 of 2018 and A.No.1650 of 2018 referred to supra were not carried in appeal,

they have attained finality and the orders are now operating as the bank guarantee is being kept alive.

15. It is under the aforesaid circumstances, the instant ABJ application falls for consideration. To be noted, besides short facts that have been set out supra, some other aspects of factual matrix also comes to light from the orders made in the injunction application and application taken out by first defendant therein. The orders made therein have been extracted and reproduced supra so that the same may also be usefully referred to and read as adumbration of facts which are necessary for appreciating this order.

16. As far as the ABJ application is concerned, the ingredients necessary to make out a case for ABJ are now well settled. The plaintiff will have to make out a *prima facie* case qua the suit claim and the plaintiff should also to be able to show that the first defendant is attempting to dispose of whole or any part of its property and move the same (from the local limits) outside the jurisdiction of this Court with the intention of obstructing the execution of any decree that may be passed against the first defendant. As far as the ingredients are concerned, the same have been set out in paragraph No. 9 of the affidavit filed in support of the ABJ application and the same reads as follows:

'9.I say and submit that the 1st Defendant has its principal place of business at Raipur. The 1st Defendant had set up its Southern Regional Office at the Second Floor of my premises at No.187/A, 4th Main Road, Sri Ayyappa Nagar, Chinmaya Nagar, Chennai - 92. The said Southern Regional Office was overseeing the execution of all the three projects, i.e., the Bangalore Project, Wellington Project and Arakonam Project. I say and submit that in view of the illegal and arbitrary actions by the 1st Defendant, the 1st Defendant, with the intention of obstructing the execution of any Decree that may be passed against them are planning to remove their property withing the jurisdiction of this Hon'ble Court and move outside the jurisdiction of this Hon'ble Court. I say and submit that I have expended substantial amounts in respect of Wellington Project and Arakonam Project. In the event the 1st Defendant is not directed to furnish security in order to be sufficient to satisfy the Decree, great loss and hardship would be caused to me.'

17. After referring to paragraph No.9, Mr.Joshua Samuel learned counsel for plaintiff drew my attention to paragraph No. 23 of the reply affidavit filed in ABJ application where there is an enumeration of several sums of money said to have been transferred to the first

defendant's account from the plaintiff's account. Besides this, various amounts said to have been paid to various suppliers by plaintiff from his account on behalf of first defendant have also been set out in paragraph No.23 is learned counsel's say.

18. Therefore, crux and gravamen of plaintiff's case is that paragraph No.9 of the affidavit filed in support of the ABJ application and paragraph No.23 of the reply affidavit which has been referred to supra, form the basis for ABJ order that has been sought for.

19. Responding to this, learned counsel for first defendant submitted that paragraph No.9 does not satisfy the ingredients of Order XXXVIII Rule 5 of CPC, as a mere averment that first defendant with the intention of defeating execution of any decree that may be passed against it is 'Planning' to remove it's property within the jurisdiction of this Court, without any amplification or elaboration of the same and without any shred of material to support the same does not help the plaintiff in any manner is learned counsel's say. In any event, this averment is denied by the learned counsel for first defendant. Learned counsel for First defendant submits that Wellington Project is nearing completion and there are other ongoing projects for the first defendant in

Chennai.

20. With regard to paragraph 23 of the reply affidavit, which has been adverted to supra, learned counsel for first defendant points out that there is no averment to this effect in the plaint. It is a clear case of afterthought and in the absence of averment in the plaint to this effect, the same cannot be looked into at this stage is his say. Besides this, it was submitted by learned counsel for first defendant that it is a matter for trial, as it is the case of the first defendant that authority given by the first defendant to the plaintiff for operating bank accounts of the first defendant in Tamil Nadu has not been used properly leading to several claims in this regard. It is pointed out that first defendant has presented a written statement on 23.03.2018. To be noted, written statement is dated 21.03.2018 and it has been presented on 23.03.2018. Also to be noted, written statement has been filed along with 28 documents. More importantly, a counter claim has been made in the written statement.

21. There is no dispute or disagreement before this Commercial Division that the entire transaction is on the basis of 'Running Accounts' which are referred to as 'RAs' for brevity.

22. Under such circumstances, learned counsel for

plaintiff, adverting to paragraph 2 of the reply affidavit submitted that once the first defendant completes their project in Tamil Nadu, they will wind up their activities in Tamil Nadu and if any decree is passed in the main suit, plaintiff will have to go to Raipur to execute the same. With regard to first defendant's office in Chennai at II Floor, 187-A, 4th Main Road, Sri Ayyappa Nagar, Chinmaya Nagar, Chennai - 600 092 is concerned, it is not in dispute that the entire premises belongs to the plaintiff, plaintiff had let out the second floor to the first defendant as part of the understanding for said project and the first defendant has vacated the said office premises after understanding between the plaintiff and first defendant fell apart.

23. In this backdrop, learned counsel for plaintiff pressed into service a judgment rendered by a learned single Judge of Bombay High Court reported in **2018 SCC Online Bom 550** being **Reliance Communications Limited Vs. Ericsson India Private Limited** case and ors. Learned counsel for first defendant pressed into service a judgment of Hon'ble Supreme Court in **Civil Appeal No.6171 of 2001 [Raman Tech. And Process Engg. Co and Ors. Vs. Solanki Traders]** decided on 20.11.2007.

24. Relying on Reliance Communications Judgment made by a learned single Judge of the Bombay High Court, learned counsel for plaintiff submitted that once a *prima facie* case is made out, plaintiff is entitled to an ABJ order.

25. Per contra, relying on Solanki judgment of Hon'ble Supreme Court, learned counsel for first defendant submitted that to be entitled to an order of ABJ, plaintiff should also establish that the defendants' attempt to remove or dispose is fully with the intention of defeating the decree that may be passed. It was also submitted that power under Order XXXVIII Rule 5 of CPC is a drastic and extraordinary power.

26. In the light of the aforesaid rival submissions and case laws placed before this Commercial Division, this Commercial Division carefully examined the rival submissions and the case laws pressed into service in support of the same.

27. With regard to *prima facie* case, it transpires that the entire transaction is based on running accounts which is referred to as RAs as mentioned supra and it is matter for trial to come to any conclusion regarding liability qua party to the lis or the other particularly owing to the position that the first defendant has made a counter claim. Furthermore, it is to be noted, that with

regard to first defendant's counter claim, plaintiff has completed pleadings by filing a written statement on merits to the counter claim and the same also has to be gone into in trial. Therefore at this *prima facie* stage, suffice to say that these are all matters for trial. Notwithstanding this considered view, this Commercial Division also examined the second determinant/parameter qua an ABJ application i.e., parameter as to whether the first defendant is attempting to remove or dispose of the movables with the intention of defeating the decree that may be passed as alluded to supra. Primary submission made by learned counsel for plaintiff is that the plaintiff will ultimately have to go to Raipur, Chhattisgarh to realize the fruits of the decree, if the decree is passed in favour of the plaintiff. To my mind, in my considered view, this cannot be set up as a ground for pursuing the instant ABJ application. The reason is, the plaint itself was filed against first defendant when it's office is in Raipur and leave of this Commercial Division has been obtained *inter alia* under Clause 12 of Letters Patent. If the plaintiff ultimately succeeds and gets a decree, it follows as a necessary sequitur that plaintiff will have to necessarily launch execution proceedings only in Chhattisgarh. This obtaining position was abundantly clear to plaintiff at the time of

inception of suit/presentation of plaint. Under such circumstances, it cannot be gainsaid that the plaintiff will have to go to Chhattisgarh to execute the decree. That cannot be a ground for acceding to the prayer in a ABJ application.

28. Turning to the second case law that has been pressed into service before this Commercial Division, as mentioned supra, **Reliance Communications case reported in 2018 SCC OnLine Bom 550** is a judgment made by a learned single judge of Bombay High Court and learned counsel for plaintiff very fairly submitted that it has only persuasive value. Be that as it may, a careful reading of the said case law reveals that it deals more with the scope of an Arbitral Tribunal to pass orders under Section 17 of 'The Arbitration and Conciliation Act, 1996' (hereinafter 'A & C Act' for brevity) than ABJ ingredients/parameters.

29. Nevertheless most important aspect of that case law is that an Arbitral Tribunal secured the claims of a party and that was called in question in the Bombay High Court. A perusal of the case law reveals that before the Arbitral Tribunal, a clear case was made out that the financial position of the entity concerned was precarious and that there was every possibility of the entity transferring their assests with the intention of

defeating the decree if ultimately passed. It has also been articulated by learned judge that the Arbitral Tribunal had rightly held that the creditor is entitled to an order to protect its assets as it has been shown that there was an imminent threat of possibility of transferring their assets with the intention of defeating a decree if it is ultimately passed. To be noted, Arbitral Tribunal had ultimately granted interim measures restraining the entity concerned from transferring, alienating, encumbering or disposing of any of its assets without prior permission/leave of the arbitral tribunal. This interim measure of arbitral tribunal was sustained. The aforesaid aspect regarding factual matrix of the case in Bombay High Court is articulated in paragraph No. 29, which reads as follows:

'29. A perusal of the averments made in the application filed under Section 17 of the said Act by the respondent no.1 clearly indicates that it was a specific case of the respondent no.1 that the Reliance Group was trying to transfer their assets with the intention to defeat the decree if passed in favour of the respondent no.1. The respondent no.1 had also averred in that application as well as in the counter claim that its claims were much in excess of the admitted debt of

Rs.1012 crore. Despite the admitted liability, the Reliance Group failed to pay the amount due to the respondent no.1. The respondent no.1 had also averred that the financial position of the Reliance Group was precarious and they had taken contradictory stands in relation to their liability and had defaulted in payment of their dues. The Reliance Group had reported loss of Rs.2709 crore compared with a profit of Rs.62 crore in the previous year.'

Therefore this case law does not help the plaintiff in the instant ABJ application.

30. With regard to Solanki case, the trial Court had rejected an application for ABJ and the High Court on revision had reversed the order and acceded to the prayer for ABJ. When this was carried to Supreme Court, the order of the High Court was set aside holding that the High court ought not to have been interfered with the order of the Trial Court in rejecting the application.

31. It has been held in this case law i.e., Solanki case that it is well settled that merely having a just or valid claim or a *prima facie* case, will not entitle a party to an ABJ order, 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 ultimately be passed. It is equally well settled that even where the defendant is removing or disposing of his assets, an ABJ prayer will not be acceded to, if the plaintiff is not able to satisfy that he has a *prima facie* case. It has also been established as alluded to supra, that power of ABJ order under Order XXXVIII Rule 5 is a drastic and extraordinary power which is articulated in paragraphs 4 and 5 of said case law and the relevant portion of paragraphs 4 and 5 read as follows:

'4.....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 be 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.....'

32. To be noted, this Commercial Division has already held that the transaction on RAs basis, is a matter of trial to ascertain liability. Also to be noted, there is a counter claim.

33. Besides the aforesaid two case laws pressed into service by both learned counsel, this Commercial Division also falls back on an order made by a Division Bench of this Court in *Shinago Holdings Private Limited and anr. Vs. M.Ethiraj and anr.* in O.S.A.Nos.125 and 126 of 2017 dated 11.08.2017. To be noted, this is a Division Bench order of this Court. Also to be noted, I have written the said judgment for the Division Bench. Most relevant portions are sub-paragraphs xiv, xv and xvi of paragraph 6 of the said order and the same read as follows:

'6(xiv) We, therefore, examined the matter in the light of settled principles and in the light of parameters and ingredients governing grant of an order under Order XXXVIII Rule 5 CPC.

6(xv) A prayer to furnish security followed by attachment in the event of default will be acceded to, only when a person making the prayer is able to demonstrate and establish before the Court that the property that is being sought to be preserved is under imminent danger of being removed from the jurisdiction of the court or is under imminent threat of being

liquidated and the party making such prayer should also be able to satisfy the court that such attempts for removal / liquidation of assets and properties are being done with an intention of defeating a possible decree (in arbitration proceedings, decree should be read as Award).

6(xvi) When we embarked upon the exercise of examining the interim prayers in the light of the above said principle, we only searched in vain for averments in this regard. Not only are there no averments, there is absolutely no shred of material whatsoever that has been placed before the Court to support the complaint of M.Ethiraj as contained in paragraph 35 of the common affidavit filed in support of Section 9 applications. To be noted, paragraph 35 has been extracted supra.'

34. One other aspect of this ABJ application is, pleadings are complete in the main suit with regard to plaintiff and first defendant. With regard to second defendant, it is submitted by learned counsel for second defendant that suit summons on second defendant was served on 25.09.2018. I had also called for the vakalatnama from the Registry with regard to second defendant. The vakalatnama is in the form of memo of

appearance as it is a senior panel counsel of Government of India who has entered appearance on behalf of the second defendant. Memo of appearance is dated 01.10.2018 and it has been filed on 08.10.2018. Even, if 25.09.2018 is taken out as the reckoning date, 120 days time lines prescribed for the second defendant to file written statement if any, is yet to expire but is going to expire. To be noted, under amended CPC as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity) if second defendant does not file written statement within the aforesaid prescribed time lines, the second defendant will forfeit it's right of defence. In any event, second defendant, as alluded to supra, has submitted that there is no prayer made against the 2nd and 3rd defendants in the main suit as well as the instant application and therefore they remain neutral with regard to the pleadings.

35. Be that as it may, if the second defendant does not file written statement within 120 days i.e., by 23.01.2019 with advance copies to learned counsel for plaintiff and counsel for first defendant, second defendant (obviously with appropriate application for condonation of delay) it will forfeit it's right of defence. Third defendant has already been set ex-parte.

36. This will take the parties to the next stage of suit under amended CPC as amended by said Act which is 'Inspection of Documents' followed by 'Admission and Denial' under Rules 3 and 4 respectively of Order XI of amended CPC as amended by said Act. Total time line is six weeks from date of completion of pleadings and the trial will be expedited by resorting to 'Case Management Hearing' ('CMH' for brevity) as contemplated under Order XV-A of amended CPC.

37. Necessary proceedings in the main suit are being made to proceed after expiry of 120 days, for expediting the trial by resorting to aforesaid stiff and strict time lines that have now been prescribed under amended CPC as amended by said Act.

38. In the light of all that have been set out supra and in the light of the narrative supra, this Commercial Division is of the considered view that the plaintiff is not entitled to an order of ABJ in the instant application.

39. The instant application fails and the same is dismissed. Parties are left to bear their respective costs considering the nature of the proceedings and the trajectory of the hearing.

40. Though obvious, it is made clear that all observations made in the instant order are for the

limited purpose of disposing of this ABJ application and will not have any bearing whatsoever on the disposal of the main suit on merits.

Sd./- M.S.J.

02.01.2019

//Certified to be a true copy//
Dated this the day of 2019.

DL/22.01.2019

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



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