

Present: Sri Utpal Misra (JO Code:WB00659)
Judge, Commercial Court at Alipore
Money Suit No. 21 of 2022
CNR No. WBSP18-000068-2022

Order No. 22

Date: 12.10.2023

In the matter of:

Recovery of money and
declaration amounting to Rs.
2,53,46,146/-.

AND

In the matter of:

**Ultimate Digital Solutions Pvt.
Ltd.**

Vs.

In the matter of:

Indian Oil Corporation Ltd.

Order

Today is fixed for clarification of the injunction application being I.A. No. 02 of 2022.

Both sides have filed their respective haziras.

Now, the record is taken up for passing the order in respect of I.A. No. 02 of 2022.

I.A. No. 02 of 2022

1. The instant apropos captioned application has been filed by the Plaintiff/Petitioner along with the plaint pertaining to the instant money suit.
2. Petitioner moved the instant application *ex parte* on 21.05.2022 before this Court and this Court, *ex facie*, considered the same and declined to grant

any *ad interim* relief without hearing the Defendant/Respondent. Then, Defendant/Respondent entered into their appearance in the instant suit and filed objection. More so, both parties to the instant proceeding placed their substantive submissions in respect of the instant application in extenso. More so, Defendant/Respondent has filed counter-claim along with their written statement.

3. Factual matrix of the case is as follows.

4. A notice inviting tender no. HMLAA16038 was issued by the Respondent for Indian Oil Corporation Limited Refinery at Haldia in respect of which the Petitioner had placed its bid and emerged as the successful lowest bidder. Pursuant to that a letter of acceptance no. 24825595 dated 28th July, 2016 was issued by the Respondent to the Petitioner for carrying out miscellaneous and periodic maintenance jobs through unskilled and semi skilled manpower for a term starting August 2016 and ending on July 2017. The total value of the said contract between the Petitioner and the Respondent was Rs. 4,81,01,268.86/- inclusive of all taxes including service taxes calculated at 14.50%.

5. The terms of the contract and the price schedule stipulated therein provides for the wages to be paid by the Respondent to the Petitioner calculated @ Rs. 1547.01 per Man-day of work by unskilled workmen, for a total 578 Man-day amounting to Rs. 9,21,436/- (subject to deduction of 6.1% of the total contract value as per the quotation made by the Petitioner) and at similarly calculated, rates for overtime work performed by such workmen to be calculated on hourly basis @ Rs. 179.50 per hour

for each unskilled workmen and Rs. 186.08 per hour for each semi skilled workman, subject to the deduction of 6.1% of the total contract value as per the quotation made by the Petitioner.

6. It is stated by the Petitioner that the rate at which the Petitioner had paid to the workmen was much higher than the minimum wages. The Petitioner had to pay wages for 30 days every month to each worker irrespective of the fact that no work was performed on Sundays and other holidays although the workmen also claimed for the overtime at hourly basis on the working days. The quotation/tender by the Petitioner in response to the notice inviting tender as floated by the Respondent was made by the Petitioner on the basis of the rates at which the Petitioner, at its own discretion intended to make payments to the workers engaged by it at different rate for instance @ Rs. 569.10 per workman per day to 67 workmen, @ Rs. 308/- per workman 5 workmen @ Rs. 306/- per day per workman to 3 workmen, @ Rs. 299/- per day per workman to 1 workman, @ Rs. 278/- per day per workman to 1 workman, @ Rs. 444.86 per day per workman and important terms and conditions to the engagement. In any event the Respondent was never authorized to make any payment on behalf of the Petitioner to the engaged worker or any person who has no privity of contract with the Respondent Company.

7. It is further stated by the Petitioner that being alarmed that the workmen would go on strike and that the works at the Haldia Refinery would be brought to a standstill, the Respondent, by its letter dated 15th December, 2016 directed the Petitioner to relent, and accept the demands made by the Union to ensure the unimpeded and smooth continuation of work at

the Haldia Refinery. Pursuant to such instruction as received from the Engineer-in-charge of the Respondent, the Petitioner was constrained to succumb to the demand for excessive payments to be made to the workers under the legitimate and justified expectation that such excess payment made by the Petitioner to the workmen at the direction of the Respondent would be recompensed by the Respondent. Repeated communication in this regard notifying the Respondent of excess payments which Petitioner was constrained to make to the unionized workers, were issued by the Petitioner at various dates.

8. Cynosure of the cause of action embedded when upon expiry of the extended term of the contract and the satisfactory conclusion of the works envisaged in the contract, the Petitioner issued its final bill dated 6th November, 2017 for a sum of Rs. 30,34,866/- to Respondent authority. The final bill dated 6th November, 2017, issued by the Petitioner to the Respondent is inclusive of all excess payments made by the Petitioner to the workers under pressure from the workers union and on the direction of the Respondent. Then, Respondent was pleased to issue a completion certificate dated 6th November, 2017 to the Petitioner, which put on record the fact that the works envisaged in the said contract had been completed to its satisfaction by the Petitioner.
9. The contention of the Petitioner is that the Respondent has further proceeded to wrongfully and unlawfully withhold the payment for the bills raised by the Petitioner for September, 2017 and October, 2017 amounting to Rs. 59,36,894/- which were the last two months of the extended term of the contract. Thereafter, as it is alleged by the Petitioner,

the Petitioner addressed a letter dated 10th October, 2017 to the Respondent enquiring as to why the Respondent had withheld payments for the months of September, 2017 and October, 2017. The Respondent issued a show cause notice dated 30th November, 2017, demanding that the Petitioner show cause as to why it should not be black listed, debarred for being entertained for the future contracts by the Respondent and delisted from the list of approved vendors/contractors of the Respondent. The Petitioner under pursuance of Respondent also made excess payments amounting to total Rs. 31,23,421/- to the unionized workmen upon notice to and direction from the Respondent authority which will be evident from the email dated 16th December, 2016. On demanding the reimbursement of such excess payment made by the Petitioner to the unionized workmen at the Respondent's direction the Respondent wrongfully and unlawfully failed and neglected to reimburse such excess payment made by the Petitioner to the unionized workmen at the direction of the Respondent authority.

10. As such, it is contended by the Petitioner that in the aforementioned circumstances, the Respondent is liable to reimburse the Petitioner for the excess payment made by it to the unionized workmen at the Respondent's Haldia Refinery at the Respondent's direction, amounting to a sum of Rs. 31,23,421/- together with interest at the rate of 18% per annum charged thereon amounting to total sum of Rs. 38,73,042/-, calculated upto 31st December, 2018. It is also contended that the Respondent is liable to make payment of the Petitioner's bills raised for the months of September and October, 2017 amounting to Rs. 59,36,894/- which were wrongfully and unlawfully withheld by the Respondent authority, together with interest

calculated at the rate of 18% per annum amounting to sum of Rs. 71,83,642/- calculated upto 31st December, 2018. Therefore, a total sum of Rs. 2,53,46,146/- is due and payable by the Respondent to the Petitioner.

11. As it is claimed by the Petitioner, Respondent is avoiding its liability to make payment for the services rendered by in term of the contract between them and as a result the Petitioner is losing interest with respect to the money due and payable to it by the Respondent. Moreover, due to the pandemic the Petitioner is under dire financial straits as a result the business of the Petitioner had suffered greatly. The Petitioner was not being able to run and expand its business by taking on new assignments etc.

12. The Respondent contended that the prayer as sought for in the instant application, is outside the scope of the provisions of Order XXXIX Rules 1 and 2 of the CPC. Even otherwise, the Petitioner has sought to secure its alleged claims, which are unsecured by nature, without making out any ground for the same. The Petitioner has not satisfied the conditions laid down in Order XXXVIII Rule 5 for seeking the prayers in the said application. As regard, Ld. Counsel appearing for the Respondent refers to the case of *Rashmi Cement Limited v. Trafigura Beheer B.V.* reported in *AIR 2011 Cal 37* and also the case of *Raman Tech & Process Engg Co. v. Solanki Traders* reported in *(2008) 2 SCC 302*. It is further argued that the as the Respondent is a Maharanta Public Sector Undertaking and a Central Government of India Undertaking, hence there can be no risk of non-recovery of any alleged claim of the Petitioner against the Respondent.

As such, there is no case for granting the reliefs sought for by the Petitioner.

13. The further contention of the Respondent is that as per the case made out in the said application, the alleged claims of the Petitioner arose on January 19, 2018. The Petitioner has not explained the inordinate delay in filing the said claim before this Court. Thus, even on such grounds the claims of the Petitioner ought to be dismissed *in limine* for being barred by the laws of limitation. There has been no change in circumstances since January 19, 2018 warranting an Order.

14. The claims of the Petitioner are de hors the terms of the contract dated September 7, 2016 between the parties, as under the terms of the contract and under Section 21 of the Labour Act of 1970, the Petitioner was required to make payment of wages, including bonus and other benefits to its workers/employees. There are several correspondences to show that the Respondent requested the Petitioner to make payment of pending wages etc. to the workers and also to make appropriate arrangements for its workers. The Petitioner accepted such obligation and did not raise any disputes. In any event, in view of the unambiguous clauses of the contract, there is no scope for ambiguity or interpretation of the terms. Moreso, the disputes raised by the Petitioner are belated and as an afterthought. Based on the facts narrated above and due to failure on the part of the Petitioner to comply with the terms of the contract in making payments to the workers, the Respondent was constrained to issue show cause notice dated 31.10.2017.

15. It is further argued by the Respondent that upon discussion and deliberations, the Petitioner issued a 'No Claim/No Due Certificate' to the Defendant on 06.11.2017. Based on the representations and warranties of the Petitioner and based on the terms of the contract, and without prejudice to the Show Cause Notice dated 30.10.2017, the Respondent issued 'Completion Certificate' on 07.11.2017 under Clauses 5.5.2.0 and 5.5.3.0 of the General Terms and Conditions of Contract and upon declaration by the Petitioner that all dues payable to the contract workers had been paid in full. On 14.11.2017 the Petitioner replied to the Show Cause Notice making incorrect allegations and contentions.

16. By an MOU dated 19.01.2018 further settlement arrived by and between the Petitioner and the workers' Union on 19.01.2018 regarding payment of wages etc. and in view of the settlement arrived at by the Petitioner, the Respondent called upon the Petitioner to make payments to workers in terms of the same, failing which the Respondent would be constrained to deduct such amounts from the security deposit held by the Respondent. Due to failure of the Petitioner in making complete payment to its contract workers, the Respondent was constrained to deduct such unpaid amounts on 30.06.2018 from the security deposit of the Petitioner.

17. The Defendant has given sufficient notice to the Plaintiff/Petitioner before being constrained to make direct payment which has been suppressed by the Plaintiff/Petitioner. Further, by letter dated 12.09.2016 issued by Petitioner to the Respondent, the Respondent was requested to release payment to workers against outstanding bills of the Petitioner due to lack of sufficient fund of the Petitioner. The Respondent has made several other payments on behalf of the Petitioner due to failure of the Petitioner

to do so. All such amounts being a total of Rs. 23,63,237/- as on date of filing of the written statement along with interest @ 18% per annum calculated till date of payment are recoverable from the Petitioner. The Respondent has a substantial counter claim against the Petitioner.

18. The Petitioner even does not seek the leave under Section 12A of the Commercial Courts Act, 2015. Ld. Counsel for the Respondent states that on such ground alone, the present suit and the present application deserves to be dismissed or the parties be granted sufficient time to try to settle their disputes before the Mediation Facilitation Council. As regards, he refers to the case of *Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd.* reported in *(2022) 10 SCC 1*.

19. Having heard the submissions of both sides and taking into consideration of the documents available on record, it appears that the plaintiff has sought to secure its alleged claims, which are unsecured in nature. It has been held by the Apex Court in *Raman Tech & Process Engg Co. v. Solanki Traders*. (*supra*) that “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 in particular, is to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either 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 the plaintiff has a prima facie case.....It is well settled that merely having a just or claim or a prima facie case, will not entitle 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.” It has been further held by the Hon’ble Apex Court that “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 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.”

20. Here, in the instant case, it is not the case of the plaintiff/petitioner that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed against it. Moreover, after going through the material on record, this Court is of the view that the plaintiff has not been able to establish a strong prima facie case to get an order of injunction as sought for. Hence, the plaintiff’s prayer for injunction is considered and rejected.

21. Accordingly, the application being **I.A. No. 02/2022** is disposed off on contest without any order as to costs.

Fix the matter on **16.12.2023 at 11:30 a.m.** for filing written statement to the counter claim by the Plaintiff.

Both the parties are to act on the basis of the downloaded copy of the Order-sheet from the Web site/E-courts-app.

Dictated and corrected by me,

Sd/-

Judge, Commercial Court at Alipore,
for South 24 Parganas, Purba Midnapore,
Paschim Midnapore &Jhargram

Sd/-

Judge, Commercial Court at Alipore,
for South 24 Parganas, Purba Midnapore,
Paschim Midnapore &Jhargram