

\$~10

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

%

Date of decision: 20th August, 2015

+ EFA(OS) 29/2015 and CM No.14729/2015

SATISH MEHTA

..... Appellant

Through : Mr. Harish Malhotra, Sr.
Adv. with Mr. Lovkesh
Sawhney, Adv.

versus

SASKEN COMMUNICATION
TEHCNOLOGIES & ORS

..... Respondents

Through : Mr. Neeraj Sharma and Ms.
Archana Lakhotia, Adv. for
R-1 to 3.
Mr. Vedanta Varma, Adv.
for R-5.

+ EFA(OS) 30/2015 and CM No.14731/2015

SATISH MEHTA

..... Appellant

Through : Mr. Harish Malhotra, Sr.
Adv. with Mr. Lovkesh
Sawhney, Adv.

versus

INTEL CAPITAL CORPORATION & ORS.. Respondents

Through : Mr. Neeraj Sharma and Ms.
Archana Lakhotia, Adv. for
R-1 to 3.
Mr. Vedanta Varma, Adv.
for R-5.

+ EFA(OS) 31/2015 and CM No.14733/2015

SATISH MEHTA Appellant
Through : Mr. Harish Malhotra, Sr.
Adv. with Mr. Lovkesh
Sawhney, Adv.

versus

CITI CORP FINANCE (INDIA) LTD & ORS.. Respondents
Through : Mr. Neeraj Sharma and Ms.
Archana Lakhotia, Advs. for
R-1 to 3.
Mr. Vedanta Varma, Adv.
for R-5.

+ EFA(OS) 32/2015 and CM No.14746/2015

AJEET SAREEN Appellant
Through : Mr. Harish Malhotra, Sr.
Adv. with Mr. Lovkesh
Sawhney, Adv.

versus

CITI CORP FINANCE (INDIA) LTD & ORS.. Respondents
Through : Mr. Neeraj Sharma and Ms.
Archana Lakhotia, Advs. for
R-1 to 3.
Mr. Vedanta Varma, Adv.
for R-5.

+ EFA(OS) 33/2015 and CM No.14753/2015

AJEET SAREEN Appellant
Through : Mr. Harish Malhotra, Sr.
Adv. with Mr. Lovkesh
Sawhney, Adv.

versus

SASKEN COMMUNICATION TECHNOLOGIES LTD &
ORS

..... Respondents
Through : Mr. Neeraj Sharma and Ms.
Archana Lakhotia, Advs. for
R-1 to 3.
Mr. Vedanta Varma, Adv.
for R-5.

+ **EFA(OS) 34/2015 and CM No.14757/2015**

AJEET SAREEN

..... Appellant
Through : Mr. Harish Malhotra, Sr.
Adv. with Mr. Lovkesh
Sawhney, Adv.

versus

INTEL CAPITAL CORPORATION & ORS.. Respondents

Through : Mr. Neeraj Sharma and Ms.
Archana Lakhotia, Advs. for
R-1 to 3.
Mr. Vedanta Varma, Adv.
for R-5.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE I.S.MEHTA

GITA MITTAL, J (Oral)

1. The appellants assail the orders dated 30th July, 2015 passed by the learned Single Judge in Execution Petition Nos.5/2008, 16/2008 and 17/2008 directing non-bailable warrants to issue against them for their arrest and detention in civil prison for a period of three months. By the same order, it has been directed

that the period of arrest of three months in each of the execution petitions would run consecutively. As a result, these appellants stand directed to undergo civil imprisonment for a total period of nine months.

2. The record of Execution Petition Nos.5/2008, 16/2008 and 17/2008 have been received.

3. Issue notice to the respondents. Mr. Neeraj Sharma, Advocate accepts notice on behalf of the respondent nos.1 to 3. Mr. Vedanta Varma, Advocate accepts notice on behalf of respondent no.5.

4. With the consent of learned counsels for both the sides, these appeals are taken up for hearing and consideration. As the appeals are premised on the same set of facts and raise identical questions of law, they are being disposed of by this common judgment.

5. We have heard Mr. Harish Malhotra, learned Senior Counsel for the appellants as well as Mr. Neeraj Sharma and Mr. Vedanta Varma, learned counsel for the respondents. We have also been carefully taken through the record.

6. We briefly note hereunder, the manner in which the execution proceedings have proceeded as placed by both sides before us.

7. So far as this litigation which has resulted in the filing of the execution petitions and passing of the impugned orders is concerned, the facts are convoluted. The appellants before us were directors of M/s Prime Telesystems Ltd. This company entered into financial transactions with the respondents. Disputes between

the parties culminated in arbitral award dated 3rd September, 2007 against the company and the appellants. Objections thereto under Section 34 of the Arbitration and Conciliation Act stood dismissed on 18th December, 2009. The review petitions before the learned Single Judge with regard to the objections were dismissed on 23rd April, 2010. The orders dismissing the objections were assailed by way of FAO(OS)No.558/2010. In the appeal proceedings before the Division Bench, the respondents contend that Shri Satish Mehta (appellant in EFA(OS)Nos.29/2008, 30/2008 and 31/2008 herein) had given an undertaking on 28th September, 2010 to pay the decretal amount.

8. In the meantime, the respondents filed Execution Petition Nos. 5, 16 and 17 of 2008 seeking execution of the arbitral award dated 3rd September, 2007. In these execution cases on the 29th November, 2010, a further statement was made on behalf of the judgment debtor company that the order of the Division Bench would be complied with before the 11th of January 2011. In view thereof, the decree holder agreed to disposal of the execution petitions without prejudice to its rights to recover the amounts in case of default.

It is not disputed that the company defaulted in making this payment.

9. The respondent has drawn our attention to a second undertaking given by Shri Satish Mehta on the 4th of February 2011 in FAO(OS)No.558/2010, which was filed against the dismissal of Review Petition No.83/2010 with regard to objections being OMP

No.35/2008, which stood dismissed on 18th December, 2009, that the decretal amount shall be deposited within a period of six weeks. This undertaking was accepted by the court. It is not the appellant's case that it has deposited the amount in terms of the undertaking. On the 11th of July 2011, FAO(OS)No.558/2010 was withdrawn without making any payments. At this stage, the Division Bench permitted the respondent to proceed with the execution proceedings.

10. The respondent's application for revival of Execution Petition Nos.5/2008, 16/2008 and 17/2008 was allowed on 27th November, 2012. Learned counsels for both sides submit that the execution cases are pending even on date. It is also submitted that the judgment debtors, which include the company and the present appellants, have not paid any amount towards the satisfaction of the decree to the judgment debtors.

11. On 5th August, 2014, Shri Satish Mehta was present before the executing court and yet again submitted that he would make payment by the 30th September, 2014. It is truly unfortunate that the event of satisfaction of the decree has not occurred till date.

12. It appears that these execution petitions were listed before the learned Single Judge on 30th July, 2015. The record shows that though the appellants have been represented in the court, however, on the 30th July, 2015, the appellants were neither present nor represented.

13. In this background, the learned Single Judge was compelled to note that over Rs.11 crores would be the dues from the company

and the appellants in the three execution petitions and that despite the aforementioned undertakings as well as statement, the amounts had not been paid. The learned Single Judge also noted that even after the passing of the award in the year 2007, credit of several crores of rupees was available with the company which amount had been utilized for making various payments including those to the Income Tax Department. It is also recorded that the operation of the account was in violation of the orders passed in the proceedings initiated by the decree holder under Section 9 of the Arbitration and Conciliation Act. The order of the learned Single Judge fairly records that CCP No.225/2011 in this regard was pending.

14. The learned Single Judge also observed that the appellants (judgment debtor nos.2 and 3) were not only the judgment debtors but were also the persons duly authorized by the company to do all material acts and responsible for its affairs. The order manifests the anguish of the learned Single Judge that in spite of specific agreements before the Division Bench to deposit the decretal amount before the Registrar General, yet no amount has been deposited. On these findings, the learned Single Judge came to a conclusion that the provisions of Sections 51 and 58 of the CPC stood complied with and proceeded to pass the impugned directions in each of the execution petitions that the appellants be committed to civil prison for three months from the date of their arrest and directed non-bailable warrants to issue against the appellants.

15. Several grounds of challenge have been placed before us by

Mr. Harish Malhotra, learned Senior Counsel for the appellants. The appellants vehemently dispute the correctness of the findings so far as the liability to pay the amount to the Income Tax Department is concerned. It has been submitted that in fact, the Income Tax authorities had attached the account of the company which was maintained with the Citi Bank. It is also contended that so far as the violation of the court orders are concerned, the appellants are already facing contempt proceedings in CCP No.225/2011 and in case the conduct of the appellants were to be held contumacious, appropriate orders of punishment would follow. Placing reliance on the pronouncements of the Supreme Court reported at *AIR 1980 SC 470, Jolly George Varghese & Anr. v. The Bank of Cochin* and *(2014) 8 SCC 470, Subrata Roy Sahara v. Union of India*, it is contended that it is only if the court comes to a conclusion that a judgment debtor is possessed of the means to pay the decretal amount and deliberately fails to do so, he can be confined to a civil prison. Learned Senior Counsel would also contend that the impugned order fails to comply with the mandate of Section 51 of the CPC and Order XXI Rule 37 of the CPC. It is pointed out that in terms of proviso to Order XXI Rule 37, it is mandatory for the decree holder to make an application for execution wherein the decree holder is required to request that the decree be executed by arrest of the judgment debtor before the order to confine him in prison can be passed. It is also urged that the appellants were entitled to an opportunity to contest such application. The submission is that the appellants were statutorily

entitled to a notice to show cause why they should not be arrested before any order directing so could be passed.

16. Inasmuch as strong reliance has been placed on the proviso to Order XXI Rule 37 of the Code of Civil Procedure ('CPC' hereafter), for the reason of expediency, the statute is hereunder :

“37. Discretionary power to permit judgment debtor to show cause against detention in prison.-

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the court shall, instead of issuing a warrant for his arrest, issue a notice calling upon on him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of the jurisdiction of the court.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment debtor.”

17. The scheme of Order XXI of the CPC would show that the legislature has contemplated that an oral request on behalf of the decree holder for appropriate orders in execution proceedings by way of Rule 11(1) of Order XXI which permits a decree holder to

make an oral application only at the time of passing of the decree for immediate execution thereof. In the case in hand, no such request was made by the decree holder when the decree was passed.

18. Rule 11 (2) of Order XXI provides the manner in which the written application would be made. The respondents have filed Execution Petition Nos.5, 16, 17 of 2008 in compliance with this Rule.

19. We may also advert to the requirements of Rule 11A of Order XXI CPC which stipulates the requirements to be met by a decree holder if seeking arrest of the judgment debtor. This provision reads as follows :

“11A. Application for arrest to state grounds.- Where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for.”

20. An executing court contemplating confining of a judgment debtor to civil imprisonment impacting his violatable rights in Article 21 of the Constitution of India must necessarily strictly abide by the letter of the law. Undoubtedly, the requirement of Rule 11A of Order XXI requiring a written application for arrest of the judgment debtor, setting out the grounds on which the prayer is made coupled with an affidavit also setting out the grounds for which the prayer for arrest is made, is mandatory.

21. It is submitted by Mr. Harish Malhotra, learned Senior Counsel for the appellants that before such an order could have

been made, apart from the requirements of the application under Rule 11A of Order XXI and affidavit setting out grounds, the appellants were entitled under Rule 37, specifically to an opportunity to show cause as to why the order of arrest was not merited. It has been submitted that the service of such notice was mandatory before passing the impugned order.

22. This submission of learned senior counsel is certainly supported by the provisions of Rule 37 of Order XXI wherein, a mandate is given to executing court to issue notice to show cause to a judgment debtor as to why he should not be arrested, before such an order can be made. The only exception postulated by the legislature is if the judgment debtor is going to abscond, such notice to show cause is not necessary.

23. The reading of the statutory provisions would thus show that in accordance with Rule 11A of Order XXI, a decree holder has to make a written application setting out grounds on which arrest is applied for such application has to be accompanied by an affidavit also stating the grounds. If the court is of the prima facie view that the conduct of the judgment debtor is such that arrest was the only manner in which the execution could proceed, it is essential to comply with Rule 37 to serve a notice to show cause to the judgment debtor granting him an opportunity to explain as to why an order for arrest ought not to be made against him. The record of the execution cases show that no such application was made before the learned Single Judge in any of the pending execution cases and that the learned Single Judge had *suo motu* passed the order dated

30th July, 2015. Given the impact of deprivation of personal liberty, the stipulation imposed by Rule 11A of Order XXI, is not simply an idle procedural formality. Its compliance is mandatory.

24. Learned counsel for the respondents have not seriously contested this aspect of the matter given the clear mandate of the statutory provisions. It has however, been vehemently contested that the appellants have deliberately dragged execution proceedings since as back as 2008 and that they are not entitled to the exercise of any discretion or indulgence in their favour. The learned Single Judge has premised his observations and findings with regard to the defaults and conduct of the appellants, on the record of the cases. These observations could not be faulted. However, the statutory compliances are mandatory. This having not been done in the execution proceedings prior to making of the orders dated 30th July, 2015, the said orders cannot be sustained.

25. Mr. Neeraj Sharma, learned counsel for the respondent nos.1 to 3 submits that given the conduct of the company and these appellants, the pronouncement in *Jolly George Varghese* would have no application to the instant case. Learned counsel submits that the law laid down in *Subrata Roy Sahara* supports the respondents. Inasmuch as we are predicating the instant order on a reading of the statutory provision and the mandatory procedural requirements therein, we are not going into the submissions made by the appellants placing reliance on these judicial pronouncements of the Supreme Court. We leave this issue open. These judgments and the submissions may be placed for consideration before the

learned Single Judge.

26. It is submitted by Mr. Neeraj Sharma, learned counsel for the respondent nos.1 to 3 that this court must bind the appellants to appear before the executing court. A grievance is made that Shri Ajeet Sareen has never appeared before the executing court despite several orders.

27. It is submitted by Mr. Harish Malhotra on instructions from Mr. Lovkesh Sawhney, learned counsel for the appellants in these matters that the appellants shall abide by every direction made by the learned Single Judge and shall positively appear on any date as will be fixed by the learned Single Judge. It is submitted that Shri Ajeet Sareen is bed ridden and unable to travel. This submission may be placed for consideration before the learned Single Judge. We accept the statements made on behalf of the respondents and they shall remain bound by the same.

28. We are informed that these execution cases are listed on 23rd September, 2015 before the learned Single Judge.

29. In view of the above, we direct as follows :

(i) The orders dated 30th July, 2015 passed in Execution Petition Nos.5/2008, 16/2008 and 17/2008 are hereby set aside and quashed.

(ii) It shall be open for the learned Single Judge to make all appropriate orders and directions in accordance with law including the directions for confining of appellants to civil imprisonment after compliance with the requirements of law.

(iii) The parties shall appear through counsel before the

executing court on the 23rd September, 2015, the date already fixed.

(iv) The appellants shall remain bound by the statements made on their behalf before this court and shall ensure their appearance before the court on all dates directed by the learned Single Judge.

These appeals are allowed in the above terms. Pending applications shall consequently also stand disposed of.

Dasti.

GITA MITTAL, J

I.S.MEHTA, J

AUGUST 20, 2015

aj