

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****APPEAL NO.1091 OF 2010****IN****CHAMBER SUMMONS NO.1058 OF 2009****IN****EXECUTION APPLICATION (LD) NO.382 OF 2009****IN****ARBITRATION NO.111 OF 2009**

1. Mother India Logistics)
 & Minerals Pvt. Ltd.,)
 No.21/B, Lakshminivas, Serpentine)
 Road, Kumarpark (W), Bangalore)
 - 560020)
 Also at)
 Malik's Embassy, 1st Floor,)
 Union Street, Infantry Road,)
 Bangalore 560 01)

2. D. Anil Kumar,)
 No.21/B, Lakshminivas, Serpentine)
 Road, Kumarpark (W), Bangalore)
 560 020)
 Also at)
 Malik;s Embassy, 1st Floor,)
 Union Street, Infantry Road,)
 Bangalore 560 01)

)...Appellants (Original
 Defendant Nos.1 & 2)

V/s

1. L & T Finance Ltd., a Company)
 incorporated under the provisions)
 of the Companies Act, 1956,)
 having its registered Office at L &)
 T House, Ballard Estate, Mumbai)

400001 and inter alia, Corporate)
 Office at 8th Floor, 'E' Block,)
 Bandra-Kurla Complex, Bandra (East))
 Mumbai 400 051)

and

2. Evershine City New Projects, Vasai)
 No.86/92, Cluster, Evershine City)
 Vasai (East), Mumbai.)

3. The Managing Director,)
 Indu Projects Ltd. No.1009, Indu)
 Fortune Fields, 13 Phase, KPHB Colony,)
 Hyderabad 500 072.)

4. The Managing Director,)
 VDB Projects Pvt. Ltd., No.307, 6th Main)
 Indira Nagar Hal Phase, Bangalore)
 560038.)

5. The Commissioner, Corporation of)
 Madurai, Arignar Anna Maligai, Outpost)
 Thallakulam, Madurai 625 002.)

6. The Commissioner, Nanded)
 Waghela City Municipal Corporation,)
 Nanded Town and Division,)
 Maharashtra 432 601.)

7. The Company Secretary, Gammon)
 India Ltd., Gammon House, Veer)
 Savarkar Marg, Prabhadevi,)
 Mumbai 400 025.)

)...Respondents
) (Respondent No.1
 (Original Plaintiff &
 Respondent Nos. 2 to
 7 are the Garnishees)

Mr. Pankaj Vijayan i/b M/s. Intra Legal for the Appellant.
Mrs. Shakuntala Joshi alongwith Mr. Anand Poojari, Ms. Nikita Pawar and Ms. Jalpa Pithadia i/b S.I. Joshi & Co. for Respondent No.1.

**CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.**

DATE: 3rd February, 2016

ORAL JUDGMENT: (Per V.M. Kanade, J.)

1. Appellants have filed this Appeal, challenging the order passed by the learned Single Judge dated 02/08/2010 in Chamber Summons No.1508 of 2009. For the sake of convenience parties shall hereinafter be referred to as "Plaintiffs" & "Defendants".

2. Plaintiffs had taken out Chamber Summons No.1058 of 2009 in Execution Application (Lodging) No.382 of 2009, seeking the following reliefs:-

"(a) that the Defendants be directed to deposit decretal amount a sum of Rs 2,53,92,445/- with further interest from 01.03.2009 @ 36% p.a. as per Consent Terms filed before the Tribunal till payment and/or realisation thereof;

(b) the Defendants be directed to disclose whereabouts/exact location of the suit

vehicles or to surrender the same to the Plaintiffs as agreed before the Arbitral Tribunal;

(c) that the Garnishees be directed to deposit in this Hon'ble Court the amounts due and payable to the Defendants as per order 21 Rule 46(b) of the Code of Civil Procedure;

(d) that the Defendants abovenamed be required by an order of this Hon'ble Court to file their Affidavit stating particulars of their properties etc., as provided under Order 21 Rule 41 of the Civil Procedure Code, 1908 since the Decree/Award dated 28.03.2009 passed by the Learned Arbitral Tribunal has remained unsatisfied for more than 30 days from the date of its passing;

(e) that this Hon'ble Court be pleased to direct this Chamber Summons to appear on board of this Hon'ble Court after the period of 15 days from the date of passing of order under prayer (d) hereinabove for the following further reliefs;

(f) that pending the hearing and final disposal of the Chamber Summons the order of injunction restraining the Defendants their servants and agents or any person claiming through them from transferring or creating any third party rights on the properties disclosed by the Defendants on affidavit as prayed in prayer clause (d) above;

(g) Pending the hearing and final disposal of this Chamber Summons the Court

Receiver High Court Mumbai be appointed as a Receiver on suit vehicles and also on the properties disclosed by the Defendants as prayed for in prayer clause (d) above;

(h) that in failure to comply with prayer clause (d) the Defendants be Ordered to be detained in Civil Prison.

(i) the judgment debtors be arrested and detained in civil prison as per the provision of section 51 of the Code of Civil Procedure.

(j) the properties and salary of the judgment-debtor be attached and the Plaintiffs be allowed to recover their dues from the same;

(k) for ad-interim reliefs in terms of prayer clause (a) to (k) hereinabove;

(l) cost of this Chamber Summons;

(m) such other and further reliefs may be granted as this Hon'ble Court deem fit."

3. The learned Single Judge, by the impugned order, was pleased to direct that the warrant of arrest be issued against Defendant No.2 and the Chamber Summons was allowed in terms of prayer clause (i) in so far as Defendant No.2 was concerned. The period of arrest and detention of Defendant No.2 was to be three months as per section 58 of the Civil Procedure Code, 1908.

4. Being aggrieved by the aforesaid order,

Appellants/Defendants have preferred this appeal.

5. It is necessary to give a brief chronology of events, which is as under:-

CHRONOLOGY OF EVENTS:

6. Plaintiffs - L & T Finance Limited had entered into six Loan-cum-Hypothecation Agreements dated 26/03/2007 with the Defendants and six Letters of Guarantee also dated 26/3/2007 were entered into between the parties. Agreement provided that in the event of any default or dispute between the parties, matter shall be referred to the sole Arbitrator. Accordingly, on non-payment of the amount which was due and payable, the matter was referred to the sole Arbitrator. Both the parties filed Consent Terms in the Arbitration Proceedings and the Award therefore was passed in terms of the Consent Terms alongwith the letter of confirmation.

7. Despite undertaking given by Defendant No.2, the Respondent No.2 in the Arbitration Proceedings, he did not make payment as provided in the Consent Terms and therefore Execution Application was filed. Plaintiffs filed three Execution Applications on 15/06/2009 since the Defendants did not make any payment whatsoever.

8. Plaintiffs, thereafter, moved the Chamber Summons and sought orders under Order 21 Rule 41 and section 51 of the CPC. The learned Single Judge vide order dated 31/08/2009 was pleased to direct the Defendants to file an affidavit of disclosure of their assets. On the next date i.e. on 14/10/2009, the Court observed that Defendants had not filed their affidavit of disclosure of assets and, therefore, show-cause notice, asking the Defendants to show cause why they should not be detained in civil prison for disobedience of the order passed by the Court was issued. Notice was made returnable on 10/11/2009. On the next date, since the service report was not received, time to serve the notice was extended till 16/12/2009. Thereafter, Advocate for Defendants sought time to file an affidavit and to comply with the directions given by this Court.

9. The matter, thereafter, appeared on board on 09/02/2010 and the Court observed that the directions given by this Court were not complied with and Defendants had not filed an affidavit of disclosure of assets and therefore by order dated 09/02/2010 the Court issued fresh show cause notice to Defendants with a direction to Defendants to remain present in Court. Defendants thereafter filed their affidavit and they showed the vehicles financed by the Plaintiffs as their own movable properties and also raised an

issue of jurisdiction and maintainability of the proceedings in this Court.

10. Thereafter, the Court on 14/06/2010 directed the Defendants to file an additional affidavit within two weeks. The Court had directed the Defendants to point out as to how and when the garnishees came in possession of the suit vehicles. This affidavit has not been filed till today. On the next date, the Defendants were directed by the Court to bring back all vehicles and handover the same to the Plaintiffs. However, Defendants have not complied with the directions given by this Court dated 28/06/2010. Thereafter, the matter appeared on board on 26/07/2010 and the Court observed as under:-

“In all these chamber summonses, the affidavits have been filed stating that the movables, being vehicles, have been abandoned and are not in the power and control of the defendants. It is seen that in the affidavit filed on 20th January, 2010 the *affiants* profess to have no other immovable or movable properties. In this view of the matter, the only mode by which the execution can be pursued is by arrest of the defendants/directors. In the above circumstances, leave to amend the execution application to add further modes by assistance from the Court.”

2. Amendment to be carried out within one week.

3. List the matter on 2nd August, 2010.
4. Three Affidavits tendered are taken on record.”

11. Thereafter, Plaintiff amended the Chamber Summons and incorporated provisions of section 51 of the Civil Procedure Code, 1908. Both the show cause notices issued by the Court; one dated 14/10/2009 and the other dated 26/07/2010 under section 51 of the CPC were duly served and acknowledged by the Defendants. However, Defendant No.2 remained absent.

SUBMISSIONS:

12. We have heard the learned Counsel appearing on behalf of the Plaintiffs and Defendants on several occasions. Both have filed their written submissions.

13. The learned Counsel for the Appellants/Defendants submitted that the impugned order is in violation of Section 51 of the Civil Procedure Code. It is submitted that the learned Single Judge failed to comply with the provision of Section 51(e). It is submitted that as per the said provision, an opportunity had to be given to the judgment-debtor to show cause why he should not be imprisoned and the Court

should be satisfied that the judgment-debtor is likely to abscond after institution of the suit and that he has dishonestly transferred or concealed his property or has means to pay at least substantial part of the amount and has refused to pay the amount. According to Defendants, no such case had been made out by the Plaintiffs. It is submitted that affidavit-in-support of the Chamber Summons shows that the judgment-debtors do not have any property. Secondly, it is submitted that the learned Single Judge has not complied with the procedure mentioned in Order 21 Rule 37 and 40 of the CPC. It is submitted that under the said Rule the Court had to issue notice only if it was satisfied from the pleadings that the case had been made out for holding enquiry. It is submitted that during enquiry, proof of means had to be adduced by the decree-holder and thereafter judgment-debtor was to be given a chance to adduce evidence in support of his defence and only thereafter Court could pass the order of arrest. He submitted that unsatisfactory affidavit was not the ground for arrest of judgment-debtor under section 51.

14. The learned Counsel for the Appellants/Defendants then submitted that during the pendency of appeal, Division Bench of this Court directed the Appellants/Defendants to deposit an amount of Rs 1 crore as pre-condition for granting stay to the execution of award. It is an admitted

position that since the amount of Rs 1 crore was not deposited, Division Bench directed that execution would not be stayed. However, the appeal was admitted. Defendants challenged this order by filing SLP in the Supreme Court. However, the SLP was dismissed and the order of the Division Bench was confirmed. It is submitted that non-payment of the said amount would not result in dismissal of the appeal but had the effect of not staying the execution of award.

15. The learned Counsel for the Appellants/Defendants then submitted that the appeal is maintainable against the order issuing warrant of arrest since it amounted to determination of some right or liability of the parties.

16. On the other hand, Mrs. Shakuntala Joshi, the learned Counsel appearing on behalf of the Plaintiffs submitted that sufficient opportunity was given to the Defendants to file an affidavit of disclosure of assets and in spite of directions given by the Court to Defendants, they did not file the same though the matter was adjourned from time to time and when it was filed, the ownership of vehicles was shown as that of the Defendants when the vehicles were financed by the Plaintiffs. No further affidavit of disclosure of assets was filed. Thereafter, show cause notice was issued to Defendants on two occasions but the Defendants neither

disclosed their assets nor complied with the directions of this Court to hand over the vehicles to the Plaintiffs. Defendants even did not give any reply to the show cause notice. She submitted that therefore there was sufficient compliance of Section 51 and Order 21 Rule 37 and 40 of the CPC. She submitted that even after direction was given by Division Bench to the Appellants/Defendants to deposit Rs 1 crore, payment was not made.

17. The learned Counsel for Respondent No.1/Plaintiffs then submitted that after the warrant was issued, police tried to serve the warrant. Report was submitted that the Appellant No.2/Defendant No.2 was absconding and had left the country. She submitted that the Appellants/Defendants were given loan and on that basis the vehicles were purchased. Appellants/Defendants did not pay a single installment. Even the direction given by Division Bench to deposit Rs 1 crore was not complied with. Appellant No.2 i.e. original Defendant No.2 also did not remain present in Court on a single date and therefore a show cause notice was issued under section 51 and for non-disclosure of the assets under Order 21 Rule 40. No further enquiry could be held since there was no co-operation on the part of the Appellants/Defendants and there was complete non-compliance of the orders passed by this Court.

FINDINGS AND CONCLUSION:

18. In our view, there is much substance in the submissions made by the learned Counsel for the Respondent No.1/Plaintiffs. We have perused all the orders passed by this Court from time to time. Despite several orders being passed, none of them has been complied with. The learned Single Judge was therefore constrained to issue warrant of arrest as contemplated under Section 51. The submission of the learned Counsel for the Appellants/Defendants that there is non-compliance of Order 21 Rule 37 and 40 and section 51 of CPC is absolutely without any substance. Every conceivable opportunity was given to the Appellants/Defendants and yet Defendant No.2 did not co-operate with the Court and did not remain present and Defendants also did not give any reply to the show cause notice and therefore all the ingredients of section 51 were satisfied since despite giving opportunity to show cause, no reply had been filed by the Defendants/judgment-debtors. Secondly, the the judgment debtor/Defendant No.2 was, in fact, absconding and he never turned up and appeared in the Court and had gone abroad. Thirdly, it was obvious that he dishonestly transferred and/or concealed his property and only a bald statement was made in the affidavit-in-reply that he did not own any property. This clearly indicates the intention of Defendant No.2 of concealing his property

though he had means to pay atleast substantial part of the award. The contention of the Appellants/Defendants that the order was passed in a mechanical manner and without application of mind is incorrect since perusal of all orders passed by the learned Single Judge shows that passing of all these orders culminated in passing the impugned order which discloses clear application of mind and also that the learned Single Judge was satisfied that this was a fit case where warrant of arrest should be issued on account of non-compliance of all the clauses of Section 51 of the CPC. There is absolutely no merit in the submissions made by the learned Counsel appearing on behalf of the Appellants/Defendants. The ratio of the judgments which are relied upon by the Appellants do not apply to the facts of the present case.

19. Appeal is therefore dismissed. Fresh warrant of arrest be issued against the Appellant No.2/Defendant No.2. Police is also directed to issue red corner notices through out the country and they shall trace the whereabouts of Appellant No.2/Defendant No.2 through interpol.

20. Appeal is accordingly disposed of.

(REVATI MOHITE DERE, J.)

(V.M. KANADE, J.)