

\$~6

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 673/2017 & CM No.23246/2017 (for stay)
M/S BIBA CHEM PVT LTD Petitioner
Through: Mr. Pankaj Gupta & Ms. Rimpay
Gupta, Advs.
Versus
M/S HI-TECH CARBON Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **23.10.2017**

1. This petition under Article 227 of the Constitution of India impugns the order [dated 10th March, 2017 in Ex.No.24533/2016 of the Court of Additional District Judge-06 (ADJ), Central District, Tis Hazari Courts, Delhi] allowing the application of the respondent / decree-holder for revival of the execution petition.
2. The counsel for the petitioner was partly heard on 31st August, 2017 when it was found that the petitioner / judgment-debtor has not placed all the relevant records of the Executing Court before this Court and for which liberty was granted. The petitioner / judgment-debtor has filed additional documents and the counsel for the petitioner / judgment-debtor has been heard.
3. An *ex parte* decree dated 22nd April, 1998 for recovery of Rs.6,71,675.52 paise with interest and costs was passed in favour of the respondent / decree-holder and against the petitioner / judgment-debtor.

4. The counsel for the petitioner / judgment-debtor on enquiry states that though the petitioner / judgment-debtor took steps for setting aside of the said *ex parte* decree but without any success. The decree thus attained finality.

5. The respondent / decree holder applied for execution of the said decree and of which Execution Petition notice was issued and the counsel for the petitioner / judgment-debtor was appearing.

6. On 25th November, 2010, the following order was passed in the Execution Petition:

“25.11.2010

Present: Sh. Rajeev Shankar Bhatnagar, Advocate for DH.

Sh. Raghav, Advocate for JD.

It is submitted by Ld. Counsel for DH that appeal filed by present JD have already been dismissed by the District Judge Sonbhadra. Photocopy of an order dated 4/09/10 is shown in this regard. On previous date the JD has sought adjournment stating that decree in question has been stayed by High Court of Allahabad to file copy of any such order. No such order has been shown. While as per DH there is no such order at all. At the same time Ld. Counsel for DH seeks a short adjournment to file list of properties of JD which can be attached. Be filed on next date.

To come on 6/01/10 as requested.”

7. On 6th January, 2011 none appeared either for the respondent / decree-holder or for the petitioner / judgment-debtor and the petitioner / judgment-debtor had also not filed the list of properties as it had been directed to file. Accordingly, the execution petition was dismissed in default.

8. The respondent / decree-holder applied for restoration of the execution petition and which application came up before the Executing

Court on 20th January, 2011, when, accepting the explanation of the counsel for the respondent / decree-holder that he had become late in reaching the Court on 6th January, 2011, the application was allowed subject to costs of Rs.1,000/- to be deposited with Delhi Legal Services Authority (DLSA) and the execution petition restored to its original position.

9. The grievance of the counsel for the petitioner / judgment-debtor is twofold. Firstly, it is stated that the application filed for restoration was under Order IX Rule 9 of the CPC when it should have been under Order XXI Rule 106 of the CPC. Secondly, it is contended that the Sub-Rule (2) of Rule 106 prohibits any order to be made on an application for restoration unless notice of the application is served on the other party but the execution petition was restored to its original position without even issuing notice to the petitioner / judgment-debtor.

10. A perusal of the additional documents filed by the petitioner / judgment-debtor shows that on 10th February, 2011, to which date the execution petition was adjourned after restoration thereof on 20th January, 2011, the respondent / decree-holder filed an application under Order XXI Rule 41 of the CPC when notice of the application was ordered to be issued to the petitioner / judgment-debtor for 24th March, 2011. The said notice remained unserved despite repeated opportunities. On 26th October, 2012, the counsel for the respondent / decree-holder requested for the execution petition to be adjourned *sine die* with liberty to the respondent / decree-holder to revive the same as and when the correct address of the petitioner / judgment-debtor was available. The said request was accepted and the execution petition adjourned *sine die*.

11. The counsel for the petitioner / judgment-debtor states that the petitioner / judgment-debtor learnt of the order dated 20th January, 2011 reviving the execution petition only when the respondent / decree-holder before this Court, in an appeal arising from a different suit between the same parties, stated that monies were due to the respondent / decree-holder from the petitioner / judgment-debtor under the decree aforesaid.

12. As far as the aforesaid two arguments of the counsel for the petitioner / judgment-debtor are concerned, with respect to the first, I may state that merely filing an application under a wrong nomenclature has in ***Challamane Huchha Gowda Vs. M.R. Tirumala*** (2004) 1 SCC 453, ***N.K. Palanisamy Vs. N. Arumugham*** (2009) 9 SCC 173 and ***J. Kumaradasan Nair Vs. Iric Sohan*** (2009) 12 SCC 175 been held to be of no avail.

13. A perusal of the additional documents shows that the respondent / decree-holder on 6th November, 2015 applied for revival of the execution petition and which application was dismissed in default of appearance of the respondent / decree-holder on 20th November, 2015. The respondent / decree-holder thereafter in or about July, 2016 filed another application for restoration of the application for revival of the execution petition and which application was allowed vide order dated 29th July, 2016 and the earlier application for revival of the execution petition was restored to its original position. Vide impugned order dated 10th March, 2017, the application for revival of the execution petition has been allowed.

14. It is the contention of the counsel for the petitioner / judgment-debtor that the application for restoration of the application for revival of the execution petition was filed after more than six months of the dismissal of

the application for revival while Sub-Rule (3) of Rule 106 provides the period of 30 days for moving an application for restoration of the execution petition.

15. As far as the last of the aforesaid contentions is concerned, no merit is found therein. The application for restoration of the application for revival is not within the domain of Rule 106 of the CPC and the period prescribed for filing of application under Rule 106 would not apply to such an application.

16. As far as the earlier contention of the counsel for the petitioner / judgment-debtor, of the application for restoration of the execution petition having been allowed on 20th January, 2011 without issuing notice thereof, is concerned, though undoubtedly Sub-Rule (2) of Rule 106 provides for the application for restoration to be not allowed unless notice thereof has been served on the other party but I am not inclined, in exercise of jurisdiction under Article 227, to interfere for the following reasons:

- (i) The mistake if any in allowing the application without issuing notice is of the Court and it is the settled principle of law that the mistake of a Court cannot prejudice any party. Reference in this regard can be made to ***A.R. Antulay Vs. R.S. Nayak*** (1988) 2 SCC 602, ***Neeraj Kumar Sainy Vs. State of U.P.*** 2017 SCC OnLine SC 258 and ***Ranbeer Shokeen Vs. State of NCT of Delhi*** 2017 SCC OnLine Del 8504. A fresh execution petition by the respondent now would be barred by time and the respondent / decree-holder, once its application for restoration had been allowed, was not expected to file a second execution petition;

- (ii) The petitioner / judgment-debtor was also absent on 6th January, 2011, when the execution petition was dismissed in default; and,
- (iii) Rule 105 of Order XXI provides that where on the day fixed or on any other day to which the hearing of the execution petition has been adjourned, the decree-holder does not appear, the execution petition may be dismissed; Rule 106 provides for an application for restoration to be filed in such a contingency; A perusal of the order dated 25th November, 2010 set out hereinabove shows the date of 6th January, 2011 to be not for hearing but only for filing of the list of properties of the judgment-debtor;
- (iv) A decree in favour of the respondent / decree-holder which has attained finality after the attempt of the petitioner / judgment-debtor to have the same set aside, cannot be permitted to be nullified on such ground.

17. It is however clarified that the petitioner / judgment-debtor shall be entitled to contest the execution petition on all other grounds available in law.

18. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

OCTOBER 23, 2017

‘gsr’..

CM(M) 673/2017

Page 6 of 6