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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6924 OF 2022**

Mrs. Anisha Rafiq Padania and Anr. Petitioners.
V/s
Kumar Builders, Mumbai and Ors. Respondents.

Mr. Omprakash Pandey a/w Suchita Pandey a/w Prajapati Pramila i/b
M/s Pandey and Co. for the Petitioners.

Mr. Ranjeet Thorat, Senior Advocate a/w Sneha Agarwal, Rakhi
Sakpal and Murlidhar Kumar for Respondent Nos. 1 and 2.

Mr. S.R. Rege for Respondent No.4.

CORAM: NITIN W. SAMBRE, J.

DATE: JUNE 16, 2022

P.C.:-

1] Heard.

2] By consent, delay stands condoned.

3] This Petition is by the obstructionists, thereby objecting
execution proceedings being Execution Application No. 477 of 2015
arising out of the judgment and decree passed in T.E. & R. Suit
No.64/77 of 2005 on 26/04/2011.

4] Impugned in the Petition are the orders passed by the Executing Court and the Revisional Court, whereby vide order dated 23/3/2022 Appellate Bench of the Small Causes Court has directed the Petitioners/obstructionists to deposit entire due amount of arrears from October, 2015 till the date of final order within one month. Failing to comply with the said order is informed to be resulting into the order of Trial Court dated 28/02/2020 passed below Exhibit-32 shall be given effect to.

5] The order below Exhibit-32 passed by the Trail Court on 28/02/2020 is under Order 39 Rule 11 wherein necessary consequences for breach of the order of the Court are provided. It appears that Respondent Nos. 1, 2 and 3 preferred T.E. & R. Suit No.64/77 of 2005 for eviction of Bharat Petroleum Corporation Ltd. (For short "BPCL") which was decreed on 26/04/2011. Such decree passed against the Defendant-BPCL is informed to be confirmed up to this Court in Civil Revision Application No.62 of 2015 decided on 22/04/2015. The Respondents/decreed holders based on the aforesaid decree dated 26/04/2011 brought execution proceedings. During

execution of warrant of possession, Petitioners who claimed to be inducted by BPCL as its agents for operating petrol pump, obstructed the said possession warrant. As such, obstructionist notice No. 767 of 2015 came to be registered in the aforesaid execution proceedings.

6] Respondents/decreed holders in the light of the law laid down by the Apex Court in the matter of *Ms. Marshall Son's & Co. (I) Ltd. vs. M/s. Sahi Oretrans (P) Ltd & anr*, reported in **AIR 1999 Supreme Court 882**, took out an application seeking compensation/mesne profit. Relying on Valuer's Report, it is claimed that decree holders will be entitled for damages/compensation pending decision on the obstructionist proceedings @ Rs 3 lakhs and odd. Said prayer was resisted by the obstructionists i.e. the Petitioners. However, Executing Court passed the order thereby directing the Petitioners to deposit an amount of Rs 1 lakh per month towards compensation in the Court.

7] The said order dated 17/11/2018 whereby the Petitioners were directed to deposit a amount of Rs 1 lakh per month from the date of possession which is quantified in the impugned order to be from

October, 2015 is informed to have attained finality before this Court. In the aforesaid back-drop, Respondents/decreed holders took out an Application below Exhibit-32 in which order dated 28/2/2020 was passed whereby defense of the obstructionists i.e. Petitioners herein was directed to be struck off from the record for not honouring the order of the Court whereby Petitioners were directed to pay compensation.

8] Submissions of Mr. Pandey, learned Counsel appearing for the Petitioners are, provisions of Section 47 read with Order 21 Rule 97 of the Civil Procedure Code contemplate remedy to the Petitioners they having been in actual and physical possession of the suit property when the decree is sought to be executed against them being strangers and not party to the suit proceedings. According to him, procedural law, as such, contemplates that obstruction proceedings are to be registered and to be decided independent of the execution and other proceedings. According to him, as apparently decree which is sought to be executed against the Petitioners was obtained behind the back of the Petitioners, as they were neither impleaded as parties to the suit

nor were put to notice, decree itself is not executable against them. That being so, he would claim that there is substance in the obstructionist proceedings and there is every likelihood that the Petitioners will succeed in getting relief from the Court, thereby upholding their objection/obstruction. In the aforesaid background, his contentions are, at the most, Petitioners should have been put to condition of deposit of monthly accommodation charges instead of compensation, as has been directed. In this background, he would urge that the Court below committed an error in invoking provisions of Order 39 Rule 11 of the Civil Procedure Code, thereby passing the order impugned.

9] So as to substantiate the aforesaid contentions, Mr. Pandey has drawn support from the judgment of this Court in the matter of *Udyavara R. Acharya vs. Mr. Jugal Kishor Jagannath Sharda* reported in **2020(3) ALL MR 421** so as to substantiate his claim under Section 47 read with Order 21 Rule 97 of the Civil Procedure Code.

10] While opposing the aforesaid prayer, Mr. Thorat, learned Senior

Counsel for Respondent Nos. 1 and 2 would urge that the order of awarding compensation @ Rs 1 lakh has already attained finality before this Court and since the said order is not complied with, by virtue of statutory fiction, provisions of Order 39 Rule 11 are rightly taken recourse to by the Executing Court so as to order striking out defense of the Petitioners. According to him, even today also, Petitioners have not shown bonafides of depositing the amount of compensation and are intending to enjoy the property without paying any accommodation charges so also compensation and that being so, this Court should be slow in causing interference.

11] I have considered the aforesaid submissions.

12] Though the Petitioners are not parties to the suit and decree proceedings, however, fact remains that Petitioners claim to be in possession of the suit property by virtue of being agents of Defendant to the suit i.e. BPCL.

13] Petitioners have obstructed execution of decree for possession.

In the aforesaid backdrop, they appear to be enjoying the possession over the suit property. As a sequel of above, Respondents/decreed holders were justified in moving the application, thereby praying for issuance of directions to the Petitioners to deposit compensation. The order of deposit of compensation is already informed to have been upheld before this court and as such, the said order, in my opinion, does not call for any second re-look. Once such order has attained finality against the Petitioners, least that was expected of the Petitioners was either to honour the decree or to comply with the order of deposit of compensation, as has been directed.

14] Fact remains that the Petitioners have no intention today to deposit the amount of compensation, as no such submission to that effect is made. In this backdrop, if we consider the scheme of Order 39 Rule 11, it is quite apparent as is rightly so claimed by learned Senior Counsel for Respondent Nos. 1 and 2 that by statutory fiction, Petitioners have made themselves liable for consequences as provided under Order 39 Rule 11 of the Civil Procedure Code.

15] In this backdrop, order impugned dated 23/03/2022 whereby the Petitioners were directed to deposit entire due amount of arrears from October, 2015 till date within one month of the passing the order appears to be quite justified.

16] Apart from above, facts remains that order of award of compensation of Rs 1 lakh is based on enough material and source as is reflected from the judgment of this Court in the matter of *Ms. Marshall Son's & Co. (I) Ltd.* (supra).

17] As far as claim of Counsel for the Petitioners Mr. Pandey that Petitioners have fair chances of succeeding in obstructionist proceedings in view of their right under Section 47 read with Order 21 Rule 97 of the Civil Procedure Code is concerned and also reliance placed by him on the judgment of this Court in the matter of *Udyavara R. Acharya* (supra), it will be appropriate in my opinion to refer to the observations in paras 66 and 67 of the said judgment, which read as under:-

“66. Usually, the appellate court or sometimes the executing Court requires the tenant to pay compensation pending the appeal on the execution so that the appealed decree could be stayed. Lest the tenant should face a summary eviction. Here, the obstruction proceedings are deemed original proceedings. Had the Obstructor failed in those proceedings, in the appeal he would have been compelled to pay the compensation. True, here, he did fail. But now that judgment stands set aside, and the matter remanded. So, the parties have been relegated to their original position. Therefore, we cannot compel the Objector to pay compensation.”

“67. In paragraph No.43 of the impugned judgment, the Appellate Bench of the Small Causes Court has observed thus:

“The Executing Court will require to decide whether it can pass order in respect of mesne profits against the Appellant who were lawful subtenant and paying rent to the original tenant their status as a protected tenant, if any. It will also require to decide than anyone and what could be the effect of withdrawal of application for making profits against original tenant without liberty and whether the obstructionists if found in unlawful possession they are entitled to be heard on quantum of mesne profits. All these issues and other relevant issues require adjudication.”

This Court has caused interference while dealing with the claim of the

obstructionist was sensitive to the fact that the judgment of which execution was taken out was set aside, which is not the case in hand. Though Mr. Pandey was justified in claiming that obstructionist proceedings are to be decided independent of the execution proceedings, however, it is made clear that decision on the obstructionist proceedings has to be in terms of the procedure as is provided while dealing with obstructionist proceedings, which gives right to the Respondents/decreed holders to seek compensation as provided under Civil Procedure Code.

18] In this view of the matter, claim put-forth by the Petitioners that in view of pendency of obstructionist proceedings, Petitioners ought not to have been directed to pay compensation is without any basis. That being so, Petition fails and same stands dismissed.

(NITIN W. SAMBRE, J.)