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

\+ CM(M) 455/2022 & CM APPL. 23180/2022, CM APPL. 23181/2022

M/S GALLUS CHATTELS PVT. LTD AND ORS ..... Petitioners

Through: Mr. C.P. Vig, Adv.

versus

ISHWAR INDUSTRIES LTD. ..... Respondent

Through: Ms. Ekta Mehta, Adv. with Ms. Akansha Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (ORAL)

% **17.05.2022**

1. This petition, under Article 227 of the Constitution of India, challenges an order dated 1st April, 2022, passed by the learned Additional District & Judge ("the learned ADJ"), in Execution Petition 245/2021.

2. Execution Petition 245/2021, preferred by the respondent against the petitioner, sought execution of a judgment and decree dated 19th February, 2020, passed by the learned ADJ in CS 9831/2016 (***Ishwar Industries Ltd. v. M/s Gallus Chattels Pvt. Ltd.***).

3. The operative portion of the said judgment reads thus:

> "(i) A decree is passed thereby the defendants are directed to handover the physical vacant possession of the suit property i.e. Block No.4 as shown in site plan (Ex.PW1/4)

within 30 days to the plaintiff after removing their additions, alternations, stocks, furnitures, fixtures, fittings, constructions and installations. If the defendants do not remove the same, the possession will be delivered in the same position to the plaintiff and the plaintiff will not be liable to pay any damages/ amount of said constructions/installations.

(ii) A decree of permanent injunction is also passed in favour of the plaintiff and against the defendants and the defendants are restrained to alienate, transfer, charges or parting with possession of the said suit property and to carry out any further alterations or additions, or to carry out any business from there (except for prayer (i)

(iii) A decree of damages 1 mesne profit is also passed in favour of the plaintiff 'and against the defendant @ Rs. 75/- per sq. feet w.e.f. 23.11.1996 for the area of 2500 sq. feet (which comes out to be Rs. 1,87,5001- per month) till the date of delivery of possession.

(iv) A decree is also passed in favour of the plaintiff and against the defendants by granting a reasonable interest @ 12% p.a. on the aforesaid amount for the period prior to filing of the suit till the date of decree i.e. w.e.f. 23.11.1996 till date. If the defendants do not hand over the vacant physical possession of the suit property within 30 days to the plaintiff, the interest will be applicable @ 15% per annum for the future period after said 30 days at the same rate of mesne profit till delivery of possession.

(v) In the case of Salem Advocates Bar Association Vs. Union of India, 2005 (6) SCC 344 the Hon'ble Supreme Court of India has dealt with the relevant provisions under the CPC 1908 for award of compensatory and punitive cost in favour of successful party. The Hon'ble Supreme Court of India in this landmark judgment has suggested a hike in the quantum of cost on persons including in frivolous and vexatious litigations which are clogging up the justice delivery system in the country, in view of the said judgment and the conduct of the defendants this court award an explanatory punitive cost of Rs. 3,00,0001- out of which Rs. 2,00,000/- shall be paid to the plaintiff and Rs. 1,00,0001- to be deposited either with the Prime Minister's Relief Funds or the Chief Minister Relief fund, Govt. of NCT of Delhi within 30 days and receipt therefore be placed on record.

(vi) All the defendants are jointly and severally liable in respect of aforesaid reliefs/directions.

Ordinary cost of suit is also awarded in favour of the plaintiff and against the defendants as per rule as under:

Sl. No.	Plaintiff	Rs.	P.	Defendant	Rs.	P.
1.	Stamp for plaint	38150	00	Stamp for plaint		
2.	Stamp for power	05		Stamp for power		
3.	Stamp for exhibits	-		Pleader's fees		
4.	Pleader's fees	-		Subsistence of witness		
5.	Subsistence of witness	-		Service of proof		
6.	Commissioner's fees	-		Commissioner's fees		
7.	Service of proof	22		Miscellaneous		
8.	Miscellaneous	276				
9.	Total	38453	00			

4. This is the third petition, under Article 227 of the Constitution of India, being preferred by the petitioner against the respondent, in the said execution proceedings.

5. Learned Counsel for the respondent has vehemently contended – and I must admit with, possibly, some justification – that such repeated petitions are being moved before this Court only so as to thwart the execution process.

6. Article 227 of the Constitution of India was invoked by the petitioner, for the first time, by way of CM(M) 645/2021, challenging an order dated 19th June, 2021, passed by the learned ADJ in the aforesaid Ex. 245/2021, restraining the petitioner from creating any third party interest in the suit property to the extent of the decretal amount and from transferring any amount from its bank account except the amount related to the payment of the decretal amount till further orders. This petition was withdrawn by the petitioner on 29th September, 2021, on the ground that the petitioner had moved an application before the learned ADJ seeking modification of the order dated 19th June, 2021, which was under challenge.

7. The second recourse, by the petitioner, to Article 227, was by way of CM(M) 1099/2021, which challenged a subsequent order dated 16th November, 2021 passed by the learned ADJ, directing issuance of warrants of recovery of possession in respect of the property forming subject matter of the decree and warrants of attachment of movable assets of the petitioner, to the extent of the decretal amount.

8. The petitioner has not chosen to place a copy of the said petition on record.

9. All the three petitions were, I may note, moved by Mr. C. P. Vig, the learned Counsel who has moved the present petition and has argued the present matter before this Court. CM(M) 1099/2021 was disposed of by the order dated 2nd December, 2021. This Court clearly held that it was not interfering with the order dated 16th November, 2021 passed by the learned ADJ and, subject to handing over of vacant and peaceful possession of the suit property by the petitioner to the respondent on or before 2nd December, 2021, stayed the directions issued by the learned ADJ to the bailiff to take possession of the suit property.

10. The present petition is the third bite at the Article 227 cherry, by the petitioner. The impugned order decides an application filed by the petitioner before the learned ADJ on 6th August, 2021 under Section 151 of the Code of Civil Procedure, 1908 (CPC), averring that the execution petition was not maintainable for want of requisite court fees. The respondent informed the learned ADJ that court fees, sufficient to cover the decretal amount, till the date of passing of the decree, stood paid by him, whereupon the learned ADJ has, by the impugned order, treated the execution petition as maintainable for the decretal amount till the date of passing of the decree and, granting liberty to the respondent to file the deficient court fees for the balance amount which, thereupon, would be included in the decretal amount.

11. To a query from the court as to whether the ground of insufficient court fees having been paid by the respondent was taken as a ground in CM(M) 1099/2021, Mr. Vig submits that he does not recollect whether he had done so but that, in all probability, he may have. He seeks time in order to ascertain this petition.

12. For the reasons which would become apparent presently, I am not willing to accede to the request.

13. Though Mr. Vig has sought to contend that the court fees deposit was insufficient to cover the decretal amount, I do not find any such ground having been taken in the application filed by the petitioner for seeking dismissal of the execution petition for want of payment of sufficient court fees. No such argument appears to have even been advanced before the learned ADJ, as is apparent from the impugned order dated 1st April, 2022, which was, as Mr. Vig acknowledges, dictated in court.

14. It is well settled that, if a submission made before a court is not recorded in the order, the remedy with the party is to move that court, pointing out that a submission advanced has not been recorded. One may refer, in this context, to ***Mohd. Rafique v. State of W.B.***[1], ***State of Maharashtra v. Ramdas Shrinivas Nayak***[2], ***Bhavnagar University v. Palitana Sugar Mill (P) Ltd.***[3], ***Commissioner Of Customs v. Bureau Veritas***[4] and ***Roop Kumar v. Mohan Thedani***[5].

15. Without moving the said court, it is not permissible for the party to raise the issue before the higher court

16. Nonetheless, Ms. Ekta Mehta, learned Counsel for the respondent, has fairly stated that she is willing to convince the learned ADJ that, in fact, the court fees deposited by her client were sufficient to cover the decretal amount till the date of decree.

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[1] **(2008) 15 SCC 289**
[2] **(1982) 2 SCC 463**
[3] **(2003) 2 SCC 111**
[4] **(2005) 3 SCC 265**
[5] **(2003) 6 SCC 595**

17. Accordingly, this aspect is left open to be re-agitated before the learned ADJ. It is made clear that the court is so directing only as a matter of indulgence and in view of the fair statement made by Ms. Mehta.

18. The learned ADJ is, therefore, directed, on the next date of hearing, to satisfy himself once again that the court fees deposited by the respondent was sufficient to cover the decretal amount till the date of decree.

19. Mr. Vig submits, however, that irrespective of this issue, the execution petition ought either to have been dismissed or to have been stayed till the respondent-petitioner deposited the requisite court fees, covering the entire amount decreed by the learned ADJ in his judgment dated 19th February, 2020. He relies, in this context, on Section 11 of the Court Fees Act, 1870, which reads thus:

> "**11. Procedure in suits for mesne profits or account when amount decreed exceeds amount claimed.-**
>
> In suits for mesne profits or for immoveable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer. Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court

shall fix, the suit shall be dismissed."

20. To my mind, Section 11 of the Court Fees Act does not, in any manner, support the submission of Mr. Vig.

21. Section 11 is in two parts. The first part of Section 11 deals basically with a situation in which a suit is decreed for an amount in excess of that claimed in the suit and on the basis of which the suit is valued by the plaintiff. In such a case, Section 11 proscribes execution of the decree till the difference between the court fees actually paid and the court fees which would have been payable at the suit covered the amount finally decreed, is finally paid by the decree holder. It does not, in any manner, either expressly or by necessary implication, hold that the execution petition *is not maintainable* for the want of payment of requisite court fees or that the execution petition could be dismissed on that ground.

22. The order passed by the learned ADJ, in my view, is eminently in accordance with Section 11 of the Court Fees Act. The learned ADJ has treated the execution petition as covering, for the present, only the amount as would be covered by the court fees deposited by the respondent. He has given liberty to the respondent to pay the balance court fees and has specifically directed that it is only when the balance court fees is paid that the balance amount would be included in the executable decretal amount.

23. This, in my view, is exactly what Section 11 envisages.

24. Insofar as the contention of Mr. Vig that the execution petition ought to have been stayed is concerned, if one refers to the second part of Section 11, it contemplates such a stay only where the amount of *mesne* profits is left to be ascertained in the course of execution of the decree and it is found that the profits ascertained exceed the profits claimed.

25. That stage has not even been reached till date. As such, the submission that the execution petition is liable to be stayed is also without merit.

26. That part, the application which was disposed of by the impugned order dated 1st April, 2021 of the learned ADJ was filed on 6th August, 2021. It was thereafter that CM(M) 1099/2021 was moved by the petitioner before this Court and was disposed of by this Court, holding against the petitioner, on 2nd December, 2021.

27. *Prima facie*, it cannot be believed that the ground of insufficient court fees was not taken in the said case, though Mr. Vig, despite having been the counsel in that matter, is not willing to make a clear statement on the point as already noted hereinbefore. That apart, even if it were to be assumed, *arguendo*, that the ground of insufficient court fees was not taken in CM(M) 1099/2021, it appears doubtful as to whether the petitioner can be permitted to take that argument now, as a petitioner cannot be permitted to compartmentalize his contentions, to be raised at different stages in different petitions according to his whim and fancy. To the same effect is Order II Rule

2 of the Code of Civil Procedure, 1908.

28. In view thereof, subject to the direction in para 18 *supra* which directs the learned ADJ to satisfy himself that the amount of court fees deposited by the respondent is sufficient to cover the decretal amount till the date of decree, I see no reason, whatsoever, to interfere with the present petition.

29. As already noted, the petitioner has, after the execution petition was filed by the respondent, filed three petitions before this Court under Article 227 of the Constitution of India.

30. The Supreme Court has in ***Rahul S. Shah v. Jinendra Kumar Gandhi***[6] deprecated, in no uncertain terms, efforts made to stultify execution proceedings and ensure that the proceedings do not continue.

31. I am, *prima facie*, convinced that the attempts of the petitioner in the present case are not bonafide and that the petitioner is, for reasons recondite, making every efforts to see that the execution proceedings do not move forward.

32. The present petition deserves, therefore, to be dismissed with heavy costs. Nonetheless, as a word of warning, I am restraining the costs imposed on the petitioner, for the present, to a token amount of ₹ 3,000/- to be paid by the petitioner to the Delhi High Court Legal

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[6] **2021 6 SCC 418**

Services Committee (DHCLSC), by way of a crossed cheque, within a period of four weeks from today.

33. It is hoped that the petitioner would not continue to thus abuse the process of the court and would allow the execution petition to proceed unhampered. Needless to say, the petitioner would always be entitled to take all legitimate grounds as are available to him in the execution proceedings.

34. Subject to the aforesaid observations, this petition is dismissed.

C. HARI SHANKAR, J.

MAY 17, 2022
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