

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2016

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE R.MAHADEVAN

O.S.A.No.61 of 2010
and
M.P.No.1 of 2010

M/s.Hotel Kalinga International Pvt. Ltd.,
No.66, Fort Main Road,
Salem-636 002
rep. by its Managing Director Mr.A.Prakash. .. Appellant

vs

V.A.Krishnamurthi .. Respondent

Appeal filed under Order XXXVI, Rule 9 of Original Side Rules
read with Clause 15 of Letters Patent against order in C.A.No.1295 of
2009 in C.P.No.66 of 1990, dated 30.10.2009.

For Appellant .. Mr.K.K.Muralitharan

For Respondent .. No Appearance

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JUDGMENT

(Judgment of the Court was delivered by The Hon'ble Chief Justice)

The appellant seeks to assail the impugned order passed by
the learned Company Judge in Company Application No.1295 of 2009
in Company Petition No.66 of 1990, the Company Petition having been

initiated for winding up of the appellant company. Respondent filed the suit before the Principal Sub Court, Salem (O.S.No.209 of 1996) on 02.04.1996, after the Company Petition for winding up was filed in 1990. However, the company was wound up subsequently by order dated 08.11.1996. The appellant raised the issue in the suit proceedings by filing the written statement on 05.07.1999 before the Principal Sub Court, Salem, but apparently chose not to appear thereafter, with the result that an exparte decree was passed on 15.11.2002 without taking note of the issue of the winding up order having been passed.

2. The order of winding up was however recalled on 21.10.2008 and the company now stands revived.

3. The relief sought for in the application filed before the learned Company Judge was to declare the exparte decree dated 15.11.2002 passed by the Principal Sub Court, Salem in O.S.No.209 of 2006 as null and void. The learned Company Judge has opined in the impugned order that though decree passed by the Principal Sub Court, Salem on 15.11.2002 would be a nullity, the bar under Section 446 of the Companies Act, 1956 is applicable both to initiation as well as

continuation of the proceedings. The person initiating proceedings is obliged to take leave of the Company Court either to initiate fresh proceedings in any other Forum or to continue the proceedings already initiated before any other Forum. Normally, permission to continue the proceedings initiated already would apply to the proceedings initiated before a petition for winding up was filed. But there was nothing under the said Act which results in the proceedings itself being erased. This is coupled with the fact that the order for winding up in the case of the appellant was recalled by a subsequent order, which would also relate back to the date of the petition, as would the winding up order.

4. It is in the aforesaid circumstances that the learned Company Judge opined that the appellant has to work out its remedies before the same Civil Court on the ground that the decree passed by the Civil Court was a nullity and seek the Civil Court to proceed afresh with the suit for appropriate determination of the issues. This finding is also in the context of the revival of the company, which resulted in the Official Liquidator standing discharged and thus, no proceedings in the Company Petition are pending for consideration.

5. We are in full agreement with the view expressed by the learned Company Judge. There is no question of declaration of the decree as null and void by the Company Court, when the proceedings before the Company Court itself are not pending. No doubt, as observed by the learned Company Judge, the decree would be a nullity. But that is an aspect to be pointed out before the trial Court, so that the suit proceedings can begin afresh, as the pleadings are already complete in 1999. The proceedings have not been wiped out from the record. We are in fact surprised as to why the appellant did not move the trial Court with this order. The learned counsel for the appellant states that an application has been filed for setting aside the decree. But the problem is that execution proceedings have also been initiated and warrants of arrest were issued against the Directors of the appellant-company. Interim stay was granted on 26.02.2010, which was extended till further orders on 23.03.2010 qua the prayer of the appellant to stay further proceedings in E.P.No.20 of 2010.

6. We are thus of the view that ends of justice would be served if the execution proceedings remain stayed till the disposal of the application filed by the appellant before the trial Court seeking to

set aside the decree. We say so as even the impugned order opines that the decree would be a nullity.

7. The appeal is thus dismissed with the aforesaid directions. No costs. Consequently, M.P.No.1 of 2010 is closed. Copy of this judgment be communicated to the Principal Sub Court, Salem.

(S.K.K., CJ.) (R.M.D.,J.)
30.08.2016

Index : Yes/No
Internet : Yes/No
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To
The Sub Assistant Registrar,
Original Side, High Court, Madras.

The Hon'ble Chief Justice
and
R.Mahadevan, J.

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