

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

Rev.A.No.123 of 2019 in
C.M.A.No.3092 of 2018
and C.M.P.No13763 of 2019

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Civil Miscellaneous Appeal No.3092 of 2018
and C.M.P.No.23522 of 2018

Rev.A.No.123 of 2019

1. Venkatesh Coke and Power Ltd.,
2. Shri.Ravi Agarwal
3. Shri.Arun Kumar Swarup ... Petitioners/Petitioners

-VS-

M/s.Otto India Private Ltd.,
No.32, Ezara Street, 7th Floor, Kolkatta-700 001.
By Transferee of the Decree M/s.Papathi Travels
Represented herein by its Partner Shri.A.Narayanan,
No.138, T.H.Road, Chennai-600 019. ... Respondent/Respondent

Prayer: Petition is filed under Section 114 of CPC r/w Order 47 Rule 1 of CPC to allow the
Review Petition by reviewing the order dated 19.02.2019 passed in C.M.A.No.3092 of 2018.

For Petitioners : Mr.Ravi Kumar Paul, Senior Counsel
For Mr.S.Rajmakesh
For Respondent : Mr.M.Kalyanasundaran, Senior Counsel
For Mr.S.Ponjeggannathan

C.M.A.No.3092 of 2018

1. Venkatesh Coke and Power Ltd.,
2. Shri.Ravi Agarwal
3. Shri.Arun Kumar Swarup ... Appellants

-VS-

M/s.Otto India Private Ltd.,
No.32, Ezara Street, 7th Floor, Kolkatta-700 001.
By Transferee of the Decree M/s.Papathi Travels
Represented herein by its Partner Shri.A.Narayanan,
No.138, T.H.Road, Chennai-600 019. ... Respondent

Prayer: Appeal is filed under Order 43 Rule 1(ja) CPC against the order dated 4.8.2018 passed in E.A.No.48 of 2017 in E.P.No.128 of 2017 in Clcutta High Court in C.S.No.196 of 2005 on the file of the I Additional District Court, Thiruvallur.

For Appellants : Mr.Ravi Kumar Paul, Senior Counsel
For Mr.S.Rajmakesh
For Respondent : Mr.M.Kalyanasundaran, Senior Counsel
For Mr.S.Ponjeggannathan

COMMON ORDER

The present Review Application has been filed to review the order dated 19.02.2019 passed in C.M.A.No.3092 of 2018, by which, this Court had dismissed the appeal, on the ground that no valid ground has been made out.

2. Learned Senior Counsel for the petitioners has submitted that an exparte order was passed on 25.01.2006 in C.S.No.196 of 2005 in favour of the plaintiff / respondent herein, pursuant to which, the respondent herein had filed E.P.No.12 of 2008 for execution of the order. Subsequently, the said Execution Petition was dismissed for default on account of non-filing of sale papers by the Decree Holder / respondent herein, against which, E.A.No.29 of 2009 was filed by the respondent herein for restoration. Thereafter, E.A.No.29 of 2009 was allowed on 22.11.2011, thereby E.P.No.12 of 2008 was restored to its file and transferred to the file of I Additional District Judge, Thiruvallur by renumbering as E.P.No.128 of 2017. In the meanwhile, E.A.Nos.561 and 562 of 2016 filed by the judgment debtors for stay and to set aside the exparte order respectively were also renumbered as E.A.Nos.47 and 48 of 2017.

3. Learned Senior Counsel for the petitioners has further submitted that when E.A.Nos.47 and 48 of 2017 were taken up for hearing, the I Additional District Judge, Tiruvallur had dismissed both the appeals on the erroneous understanding that E.P.No.12 of 2008 was dismissed for default, ignoring the fact that the same was restored on 22.11.2011 itself. Aggrieved by the said order, C.M.A.No.3092 of 2018 was filed before this Court, which came to be dismissed by this Court on 19.02.2019 on the ground stated supra.

4. Learned Senior Counsel for the petitioners drew the attention of this Court to Section 446(1) of the Companies Act, 1956 to state that the Execution Application filed by the respondent herein itself is not maintainable in view of the bar in filing such application. For the sake of convenience, Section 446(1) of the Companies Act, 1956 is extracted hereunder:

“(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced. or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.”

5. Per contra, learned Senior Counsel appearing for the respondent has contended that more than Rs.11 Crores of amount is due and payable by the petitioners herein and that more than eight years had elapsed in execution of the order and in that process, the petitioners are trying to stall the entire proceedings. Learned Senior Counsel brought to the attention of this Court the provisions of Section 635 of the Companies Act, to contend that there is no hurdle for the parallel proceedings to go on and the petitioners cannot stall

the proceedings under one pretext or the other, thereby frustrating to entire claim of Rs.11 Crores already due to them. Section 635 of the Companies Act, 1956 reads as under:

“635. Enforcement of orders of one Court by other Courts. (1) Where any order made by one Court is required to be enforced by another Court, a certified copy of the order shall be produced to the proper officer of the Court required to enforce the order.”

Thus, it was contended by the learned Senior Counsel for the respondent that the order under review is perfectly in order and there is no ground made out to review the order.

6. Heard the learned Senior Counsel on either side and perused the material documents available on record.

7. Admittedly, E.P.No.12 of 2008 was filed by the respondent herein and the same was dismissed in the year 2009 itself. Though the said E.P.No.12 of 2008 was restored to its file as early as on 22.11.2011, it was not taken note of by the I Additional District Court, Tiruvallur, while passing the order dated 04.08.2017, in which the prayer sought for was to set aside the exparte order dated 22.10.2008. Of course, it is true that the parties also equally failed to bring the factum of restoration of E.P.No.12 of 2008 to the I Additional District Judge, Thiruvallur. The one line order passed by the I Additional District Judge, Thiruvallur in dismissing both E.A.Nos.47 and 48 of 2017 as infructuous under the wrong notion, which was confirmed by this Court in C.M.A.No.3092 of 2018, is, in the considered opinion of this Court, erroneous and to be reviewed.

8. The question regarding the applicability of Section 446(1) or Section 665 of the Companies Act, 1956 had not been answered or discussed in the Civil Miscellaneous Appeal and it is open to the parties to make legal submissions before the concerned Forum. Similarly, the next issue whether the delay of 8 years has been properly explained or not has to be gone into by the Court below at the first instance, as it was the case of the respondent that the petitioners had intentionally evaded service all these eight long years.

9. Since the I Additional District Court, Thiruvallur had not apprised the correct facts and dismissed E.A.No.562 of 2016 on the ground that E.P.12 of 2008 (re-numbered as 128 of 2017) was dismissed for default, this Court is of the view that the matter has got to be heard afresh and decided by the I Additional District Court, Thiruvallur on merits.

10. In view of what is stated herein-above, ***the present Review Petition is ordered.*** As a general rule, once the review petition is allowed, then the order under review will automatically get restored. In this case, since the learned Senior Counsel for the parties have advanced their arguments for both review petition and CMA, advancement of their arguments once again in the CMA after its restoration will be a futile exercise, as, ultimately, it is the I Additional District Judge, Thiruvallur, who can go into the disputed facts and decide the issue afresh. Hence, this Court is of the view that C.M.A.No.3092 of 2018 itself has got to be allowed and remanded to the I Additional District Court, Thiruvallur.

S.VAIDYANATHAN,J.

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11. Accordingly, *the Civil Miscellaneous Appeal No.3092 of 2018 is also allowed.*

The matter is remanded to the I Additional District Judge, Thiruvallur for fresh consideration and the I Additional District Judge, Thiruvallur is directed to take up the matter and proceed with the same on day to-day basis without adjourning the matter beyond two working days at any point of time and bring the issue to a logical end within 30 days from the date of 1st hearing. It is open to the parties to raise all the points available to them before the Lower Forum. It is made clear that if there was any earlier order of attachment in existence as of now, the same shall continue. No costs. Consequently, connected miscellaneous petitions are closed.

29.01.2020

Index: Yes / No

Internet: Yes / No

Speaking Order: Yes / No

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Note: Issue order copy on 11.02.2020

To:

I Additional District Court,
Thiruvallur

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