

(2016) 02 DEL CK 0367
DELHI HIGH COURT
Case No: FAO (OS) 587/2015

International Tractors
Ltd. and Others

APPELLANT

Vs

Punjab Tractors
Limited and Others

RESPONDENT

Date of Decision: Feb. 29, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 22 Rule 10, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 3(2), Order 22 Rule 4, Order 22 Rule 9, Order 6 Rule 17, Section 151
- Limitation Act, 1963 - Section 5

Citation: (2016) 229 DLT 286 : (2016) 66 PTC 539

Hon'ble Judges: Pradeep Nandrajog and Mukta Gupta, JJ.

Bench: Division Bench

Advocate: Saikrishna Rajgopal, Jagdish Chandra and Julien George, Advocates, for the Appellant; T.K. Ganju, Sr. Adv. instructed by Atishi Dipankar, Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

Mukta Gupta, J.

1. Punjab Tractors Limited (in short PTL) filed a suit being CS(OS) No. 470/2004 alleging infringement of the copyright in certain engineering drawings against the International Tractors Ltd. (in short ITL) also impleading Deepak Mittal and L.D. Mittal, Joint Managing Director and Chairman of ITL as defendant Nos. 2 and 3 respectively. During the pendency of the suit, PTL merged with Mahindra & Mahindra Limited (in short MML) under the scheme of amalgamation in terms of section 394 (3) of the Companies Act. The scheme became effective on February 16, 2009, when certified copy of the scheme sanctioned by the High Courts at Bombay and Punjab & Haryana was filed with the Registrar of Companies, Jalandhar, Punjab. Though, scheme became effective from February 16, 2009, MML filed an application

of substitution in place of PTL being I.A. No. 6733/2011 under Order I Rule 10 CPC, Order VI Rule 17 CPC, Order XXII Rule 9 CPC, Order XXII Rule 10 CPC and under section 151 CPC. I.A. No. 6733/2011 was preceded by I.A. No. 6206/2011 filed by the appellants seeking a declaration that the suit stood abated for the reason PTL itself admitted it ceased to exist pursuant to the orders dated January 9, 2009 and January 16, 2009 passed by the High Courts at Bombay and Punjab and Haryana sanctioning the scheme of amalgamation and since no application under Order XXII Rule 3(2) CPC for bringing on record the legal representative of PTL was filed within 90 days from the effective date of amalgamation, being the period of limitation under Article 120 in the Schedule to the Limitation Act, 1963, the suit stood abated on May 17, 2009 and could not be revived. Both these applications, that is, I.A. No. 6206/2011 filed by the appellants and I.A. No. 6733/2011 filed by the respondents, were decided by a common order dated September 8, 2015, which has been impugned in the present appeal.

2. Learned Single Judge vide the impugned order held that the issue whether Order XXII Rules 3 & 4 CPC would apply or Order XXII Rule 10 CPC would apply in case of amalgamation, is no longer res integra and is covered by a judgment of Division Bench of this Court, reported as , 198 (2013) DLT 697 Yapi Kredi Bank (Deutschland) AG Vs. Mr. Ashok K. Chauhan and Ors.. Noting the decision in Yapi Kredi Bank (Deutschland) AG (supra), Learned Single Judge held that in case of amalgamation of one company with another company pursuant to a scheme of merger sanctioned by a Court, Order XXII Rule 10 CPC would apply and not Order XXII Rule 3 & 4 CPC. Learned Single Judge, thus allowed I.A. No. 6733/2011 filed by the respondents and dismissed the I.A. No. 6206/2011 filed by the appellants with actual costs after affidavit of cost filed by MML.

3. Learned counsel for the appellants contends that as per scheme of amalgamation, PTL stood dissolved from the effective date, that is, February 16, 2009 and thus suit filed by PTL stood abated on May 17, 2009 under Order XXII Rule 3 & 4 CPC. Along with I.A. No. 6733/2011, the respondents also filed an I.A. No. 6734/2011 seeking condonation of delay of 703 days in filing the application under section 5 of the Limitation Act read with Section 151 CPC, which application was not pressed and withdrawn. It is contended that when a company is taken over by another company by a scheme of amalgamation, transferor company "dies" for the purposes of Order XXII Rule 3, and by this concept there is no distinction between a company and a natural person. Order XXII Rule 3 CPC and Order XXII Rule 10 CPC operate in different spheres. Even though, right to apply for substitution under Order XXII Rule 10 CPC may not be subject to limitation is nevertheless, subject to pendency of the suit and when suit itself abates, no application for substitution can be entertained. Suit filed by the respondents abated irrevocably and valuable right which had accrued to the appellants has been denied by the impugned order.

4. Learned counsel for respondents submits that in case of amalgamation of two companies, Order XXII Rule 10 CPC would apply and not Order XXII Rule 3 & 4 CPC. In *Yapi Kredi Bank (Deutschland) AG (Supra)* the Division Bench of this Court considered the amalgamation of two German Banks incorporated under the laws of Germany. In case of amalgamation, there is a fusion and undertaking continues for all intent and purpose including in regard to the properties, liabilities, employees, continuation of legal proceedings by or against the transferee company. Hence, there is no infirmity in the impugned order.

5. Division Bench of this Court in *Yapi Kredi Bank (Deutschland) (supra)* dealing with the issue whether a "company dies" within the meaning of Order XXII Rule 3 CPC and whether a suit filed against it abates upon its merger or amalgamation with another existing company held-

"16. The conclusion of the learned Single Judge that the amalgamation of one company with another, results in the death of the former (i.e. the transferee company) cannot be faulted. Yet, that factor alone cannot, in the opinion of this Court, be dispositive of the question thrown up in these proceedings. While extinguishment of the corporate personality, or "corporate death" as it were, in the event of a final winding up of a company or amalgamation of one company with another, may be a reality, that alone cannot afford an answer to what happens to a litigation to which the amalgamating company is a party. It is here that the analogy with either a company finally wound up, in dissolution proceedings, or the death of an individual, ends. In the case of winding up of a company, the final order directing dissolution, after all steps to settle its affairs are taken, and the Court is satisfied that such order as necessitated, is in fact made. The process of "winding up the affairs" includes settlement of claims against the company, in satisfaction of the creditor's rights; it also includes the right of the Official Liquidator to be impleaded in a pending suit, or other litigation, to which the company is party as a defendant, or which is instituted by it, and press the claim, or defend them. Thus, the "death" unlike in the case of an individual is not sudden; it is preceded by a series of steps - some of which include issuance of orders adjudicating rights of the company, and third parties- mandated by law, under the overall supervision of a judicial forum, i.e. the Company Court. In the case of amalgamation, however, such a detailed inquiry is not mandated by law; the company has to be satisfied that the terms of amalgamation or merger, as it were, provide adequately for the protection of interests of shareholders, creditors and other such parties. The terms in the most part are a result of negotiation, and the merger is itself in the nature of an arrangement whereby the two corporate entities - for reasons best determined by each of them, decide to amalgamate into one. In the case of amalgamation, the question of rights and liabilities and the right to succession in pending proceedings instituted or pending against the merging company need not necessarily be a matter engaging attention of the company court. It might well depend on the terms of the amalgamation scheme, or operation of law, as the case may be. In India,

Sections 390 to 396A of the Companies Act govern the subject matter.

17. The distinction noticed by this Court between a corporate death, as a consequence of final winding up order, under Section 481 of the Companies Act, on the one hand, and the extinguishment of the corporate personality of the transferee (or amalgamating/merging) company cannot be lost sight of, because the element of voluntariness inherent in the latter circumstance together with the willingness of the transferee company to "take over" the property, liabilities and functioning of the transferee company is lacking in the case of a company which is dissolved after all steps to wind it up are completed. In the latter eventuality, the question of any loose threads in the form of liabilities or assets for which no provision is made would not arise; the Liquidator who takes charge of its assets and affairs would have, in the course of the winding up process, provided for, or sought orders in respect of each eventuality. The Court is also mindful of Section 394 (2) which provides for the transfer of liabilities or property of the transferee company to the transferor company. In *Saraswati Industrial Syndicate*, this was precisely noticed, when the Supreme Court held that the "...true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there can be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation." This position was again underscored in *Singer* (supra).

18. The question identical to the one posed to this Court in this case arose for consideration before the Bombay High Court. A learned Single Judge of that Court in *Re Delta Distilleries Limited, Mumbai v. (1) Shaw Wallace and Company Limited, Calcutta; (2) Shaw Wallace Distilleries Limited; (3) United Spirits Limited*, 2008 [1] Mah.LJ 899) held that:

"The effect of a Scheme of Amalgamation, as held by the Supreme Court in *Singer India Ltd. vs. Chander Mohan Chadha*, (2004) 7 SCC 1 is that as a result of amalgamation of two Companies into one, "the Transferor Company loses its entity as it ceases to have its business". The respective rights or liabilities are determined under the Scheme of Amalgamation but the corporate entity of the Transferor Company ceases to exist with effect from the date the amalgamation is made effective. The concept of abatement is inapposite where a merger takes place in the course of a Scheme of Amalgamation in pursuance of a sanction received from the Company Court. The transferor in such a case merges with the transferee who becomes the successor in interest of the assets, liabilities and business to the extent contemplated in the Scheme. There is in other words a devolution of interest. In law, what takes place in the course of a Scheme of Amalgamation is the devolution of the interest of the Transferor upon the Transferee."

The above views of the learned Single judge were confirmed by the Division Bench, of the Bombay High Court by its decision dated 11.2.2010 in Appeal No. 26/2008."

6. Dealing with the further issue regarding the applicability of Order XXII Rule 10 CPC and the provisions being enabling provisions meant to further ends of justice, it was held-

"23. In the opinion of this Court, the law declared by the Supreme Court regarding the legal effect of a merger, or scheme of amalgamation, upon pending proceedings, in Bhagwan Das Chopra (supra) that "subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding, filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken place in those proceedings will continue to operate against and the binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule- 10 of Order 22 of Code of Civil Procedure, 1908" affords the clearest guidance in such circumstances. Neither Saraswati Investment Syndicate, nor Singer nor any of the decisions is a direct authority on the question of succession to legal proceedings before a civil court. Even though Bhagwan Dass was rendered in the context of industrial adjudication, the Court expressly relied on Order 22 Rule 10, and spelt out its application in these circumstances. For these reasons, the conclusion of the learned Single Judge that as the suit had abated under Order 22 Rule 3, CPC, resulting in the consequent inapplicability of Order 22 Rule 10, appears to be based on a textual reading of that provision. Order 22 Rule 10, CPC applies in cases like the present; the Court would have then, to necessarily embark on an inquiry - albeit a prima facie or rudimentary one, to decide if indeed the applicant concerned is the successor entitled to the carriage of the legal proceeding, i.e. the suit. In fact, though in General Electric Canada Inc (supra) the learned Single Judge seems to rely on the proposition of corporate death, the decision itself indicates that the terms of amalgamation were considered, and the claim to succession (of the applicant) was turned down.

24. It is pertinent to note that procedural laws are meant to regulate the object of doing substantial and real justice and not to foreclose adjudication on merits. The court is mindful of the fact that barring the application of the principle action personalis moritur cum persona, (i.e. a personal right of action dies with the death of the person) other claims do not extinguish, and can be continued. A creditor's claim to his dues therefore does not die. Even where abatement occurs, in the sense that the time prescribed for the setting aside of abatement expires - under Article 120 of the Schedule to the Limitation Act expires, the creditor/claimant, through the successor, or the successor, as the case may be, can request the court to condone the delay in moving an application, under Section 5 of the Limitation Act."

7. Faced with the decision in Yapi Kredi Bank (Deutschland) (supra) learned counsel for the appellant submits that the Supreme Court in the Special Leave Petition filed

against the said order has set aside the ratio of the Division Bench. The Supreme Court passed the following order in Special Leave Petition Nos. 18757-18758/2013 titled as "Ashok K.Chauhan & Ors. Vs. Yapi Kredi Bank (Deutschland) " dated May 09, 2013:

"Heard Mr. Mukul Rohtagi, learned senior counsel for the petitioners.

Special leave petitions are dismissed.

However, it is clarified that if by lapse of time, right, title or interest in the successor company has extinguished, such plea of limitation may be raised by the respondent in the written statement and upon such plea being raised the issue will be framed and tried in accordance with law.

In view of above, no order on the applications for permission to file SLP and to serve the respondent through Attorney is necessary and the said applications also stand disposed of."

8. Though the Supreme Court permitted the appellants to take the plea of limitation however the Special Leave Petitions were dismissed. The Supreme Court in no way held that in a case of amalgamation or merger of a company duly sanctioned by a Court, Order XXII Rule 3 and 4 applies and not Order XXII Rule 10 CPC.

9. Order XXII Rules 2, 3, 9 and 10 provides as under:-

"ORDER XII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

1 xx xx xx xx

2.Procedure where one of several plaintiffs or defendants dies and right to sue survives.- Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.- (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative or the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may

have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4 to 8 xx xx xx xx

9. Effect of abatement or dismissal.- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15) of 1877), shall apply to applications under sub-rule (2).

Explanation.- Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.

10. Procedure in case of assignment before final order in suit.- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

10A. to 12 xx xx xx xx"

10. Order XXII Rule 10 CPC specifically deals with the assignment, creation or devolution of any interest during the pendency of the suit. Supreme Court in the decision reported as , (2001) 6 SCC 534 Dhurandhar Prasad Singh Vs. Jai Prakash University & Ors. noting the distinction between Rules 3, 4 & 10 of Order XXII held:

"6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based

on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during its pendency but such a suit may be continued with the leave of the court by or against the person upon whom such interest has devolved. But, if no such step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom the interest had devolved. The legislature while enacting Rules 3, 4 and 10 has made a clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing the legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the legislature has not prescribed any such procedure in the event of failure to apply for leave of the court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record.

7. Under Rule 10 Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by Their Lordships of the Judicial Committee in *Moti Lal v. Karrabuldin* [, ILR (1898) 25 Cal 179 : 24 IA 170 : 1 CWN 639 (PC)] he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath Roy Chowdry v. Rookea Begum* [, (1857-60) 7 MIA 323], a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings."

11. In the present case admittedly PTL has merged with MML under a scheme of amalgamation in terms of Section 394 (3) of the Companies Act pursuant to orders passed by the Bombay High Court and Punjab & Haryana High Court. Thus we find no error in the impugned judgment dated September 08, 2015 holding that the provision of Order XXII Rule 10 CPC applies in case of amalgamation and merger of a company and not the provisions of Order XXII Rules 2, 3 and 4 CPC and once the provision of Order XXII Rule 10 CPC applies and there is devolution of interest, there does not arise any issue of limitation for filing an application under Order XXII Rule 10 CPC as held by the Supreme Court in the decision reported as Dhurandhar Prasad Singh (supra). However we set aside the impugned order to the extent of imposition of actual cost on the appellant by the learned Single Judge. We cannot lose sight of the fact that when the plea of suit having abated was taken by the appellant, the judgment of the Single Judge in Yapi Kredi Bank (Deutschland) was holding the field.

12. No cost.