
(2011) 08 BOM CK 0192

In the Bombay High Court

Case No : Notice of Motion No. 767 of 2011 in Suit No. 566 of 2011

Anil Madhavdas Ahuja

APPELLANT

Vs

Marvel Fragrances Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Companies Act, 1956 — Section 397, 398, 399(4)

Citation : (2011) 5 BomCR 486 : (2011) 113 BOMLR 3142

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : Ravi Kadam, General, Ashish Kamat, Tanmayi Gadre and Ranjit, instructed by Ranjit and Co, for the Appellant; Sanjay Jain, Swapnil Bangur and Deepak Shukla, instructed by Vinod Mistry and Co., for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—This is a derivative action filed purportedly on behalf of the first Defendant-company essentially to restrain Defendant Nos. 2 to 6 from, in any manner, dealing with and/or conducting business by using the word, trade-name and/or mark "Marvel Fragrances Company" or any other mark deceptively similar to the first Defendant's trade mark "Marvel Fragrances" so as to pass off their goods, business and/or trade as and for the trade and business of Defendant No. 1. Although certain other reliefs are also claimed in prayer (b) I did not understand the learned Advocate General to have pressed the same except insofar as it may concern the action for passing off.

2 The Plaintiff and Defendant Nos. 3 to 6 are the members of the Ahuja family. Defendant No. 4 is the wife of Defendant No. 3. The Plaintiff and Defendant No. 5 are their sons. Defendant No. 6 is the wife of Defendant No. 5. Defendant Nos. 3, 5 and 6 are the partners of the second Defendant firm - Marvel Fragrances Company.

3. The Plaintiff, Defendant No. 3 and Defendant No. 5 hold approximately

26.83%, 46.11% and 27.01% of the issued, subscribed and paid up equity capital of the first Defendant.

4. I will, for the purpose of this Notice of Motion, ignore the allegations as to which of the parties are responsible for the decline in the performance of the first Defendant. The marks in question are identical. It is reasonable to presume that the mark is valuable and has acquired a reputation and goodwill sufficient, absent anything else, to maintain successfully an action for passing off. The parties must in any event be deemed to have admitted the same - the Plaintiff by bringing the action to protect the mark and the Defendants by resisting it and insisting on being entitled to use it pursuant to a family arrangement I will refer to. It is, therefore, not necessary to refer to the sales figures and the promotional expenses incurred to develop the mark. The question is whether despite the same reliefs against passing off ought to be granted in this derivative action.

5. The Plaintiff, as stated above, is a minority share holder in the first Defendant and has brought this suit as a derivative action contending that his father - Defendant No. 3 and his brother - Defendant No. 5 have illegally used the first Defendant's trade mark and being in control and management of the company including its Board of Directors will obviously not take any action or file any proceedings on behalf of the first Defendant.

The main defence on merits is that a family settlement was entered into in July, 2007, by which the various rights and properties have been distributed among the Plaintiff and Defendant Nos. 3, 4 and 1. As per the family arrangement, Defendant No. 5 was entitled to use the mark "Marvel".

6. Mr. Jain raised preliminary objections as to the maintainability of this suit. Firstly, he submitted that an action in tort can only be filed by the owner of the right infringed and cannot be brought as a derivative action. He submitted that the only action that a shareholder can take is to stop the company and its directors from committing a breach of their duty towards the company.

7. The submissions are based on a fundamental misconception of the nature of a derivative action. It is true that as a rule, it is for the company to sue in its own name for any wrong that may be done to it. The shareholders cannot ordinarily assume to themselves the right of suing in the name of the company. However, to this general rule is the exception permitting shareholders to file derivative actions. The exception is founded on the basis that the company being managed by miscreant directors or shareholders will not institute proceedings for protecting or enforcing the rights of the company. Though a derivative action is filed by a shareholder, the company is joined as a co-Defendant and the relief is sought not on behalf of the person bringing the action, but on behalf of the company. The person bringing a derivative action is entitled to assert the rights of the company in the same manner and to the same extent that the company itself can. Thus, even in a derivative action to prevent infringement and the tort

of passing off, the relief is not and cannot be sought for or on behalf of the shareholders bringing the action, but on behalf of the company. This is axiomatic for the shareholders bringing the action have no proprietary right or interest in the trademarks of the company in their personal capacity and, therefore, cannot seek reliefs for or on their behalf personally.

8. The question then is whether a derivative action is maintainable to restrain the infringement of a company's trademark and to challenge a tort of passing off on behalf of the company.

9. It is unnecessary for the purpose of deciding this question to discuss at length the ingredients of goodwill or the nature of a proprietor's right in respect of a trademark, registered or not. It is sufficient to note that a proprietor of a trademark has a valuable right therein entitling him to the protection thereof by bringing an action for infringement or passing off. Goodwill is a species of personal property capable of being sold or charged or of being bequeathed by will. Goodwill in a mark, in any event, is an asset and the proprietor of the mark has a right therein. The purpose of a claim in passing off is to protect goodwill from damage to it. Intellectual property rights are no less important or valuable than any other right or asset of a company. They very often are more and, in some cases, the most valuable rights of a company. A company is entitled to protect its intellectual property rights as much as it is entitled to protect its other rights and assets.

10. There is no reason or justification then to consider the intellectual property rights of a company to be different from its other rights when it comes to derivative actions. If the company can do so on its own, I see no reason why a derivative action cannot be brought to protect such a right if the other ingredients of a derivative action are otherwise present. A derivative action is but a mode devised on principles of justice and equity to protect the rights and assets of a company. I find nothing in principle that ought to prevent a party from bringing a derivative action to protect a company against infringement or the tort of passing off. My attention has not been invited to any authority to the contrary either.

11. If Defendant No. 2 had been dishonestly conferred the right to use the first Defendant's trademark by the majority shareholders or the Board of Directors of Defendant No. 1, it is obvious that they would never file proceedings to restrain the second Defendant from using the first Defendant's trademark.

12. Thus, had I not come to the conclusions I have in favour of the Defendants, especially as regards the family arrangement, I would have granted an injunction for, absent these findings, it would have followed that the majority shareholders of the first Defendant had expropriated the first Defendant's right in respect of the trademark for their own benefit by permitting the second Defendant to use the same at the expense of the first Defendant and the minority shareholders viz the first plaintiff.

13. Mr. Jain also submitted that this suit is not maintainable as a derivative action on the ground that as the Plaintiffs hold more than ten per cent of the issued, subscribed and paid up equity capital of the company they are entitled to maintain a petition under Sections 397, 398 of the Companies Act, 1956. He submitted that only a person holding less than ten per cent of the equity shares in a company can maintain a derivative action as he is not entitled to file a petition u/s 397, 398.

14. Once it is accepted that a derivative action is maintainable by a shareholder who holds less than ten per cent of the equity shares of the company, there is no warrant for coming to the conclusion that a shareholder holding more than ten per cent of the equity shares of the company cannot maintain a derivative action and must be relegated to filing a petition under Sections 397, 398. The submission is founded on the erroneous basis that a party holding less than ten per cent of the equity shares is absolutely barred from filing a petition under Sections 397, 398. In view of Section 399(4) of the Companies Act, 1956, even such a shareholder is entitled to file a petition under Sections 397 and 398 with the permission of the Central Government.

15. This brings me to the merits of the case.

16. It is necessary to note only a few facts.

The first Defendant was incorporated on 15th June, 1992 in the name of Bam Synthetics Private Limited. It was taken over by the Ahuja family on or about 15th December, 1995, which changed its name to the present name. On 24th March, 2004, the first Defendant applied for registration of the trade mark "Marvel" claiming user from 15th June, 1992 under class 3. The application was abandoned or rejected. The mark is not registered.

On 14th October, 2008, the Defendant No. 5 made an application seeking registration of the trade mark "Marvel Fragrances". The application was advertised in the Trade Marks Journal on 16th January, 2010. The Plaintiff filed his opposition thereto on 26th April, 2010. The Plaintiff contends that this amounts to an attempt on the part of the Defendant No. 5, a Director of Defendant No. 1, to use and/or misappropriate the properties of Defendant No. 1. The same constitutes a breach of the fiduciary obligation owed by Defendant No. 5 to Defendant No. 1. It is further alleged that Defendant Nos. 2 to 6 are using the impugned trade mark on their goods/packaging and are, therefore, guilty of the tort of passing off.

17. Had Defendant Nos. 2 to 6 been strangers, absent anything else, an action for passing off by or on behalf of Defendant No. 1 may well have succeeded. All the parties, however, are part of the family. The question is whether there was any understanding pursuant to which the Plaintiff agreed to the use of the mark "Marvel" by the Defendants. Although Defendant No. 1 is in law an independent legal entity, it is but a glorified partnership comprising of the members of the family. If all the members/shareholders agreed to the arrangement including of

Defendant No. 5 being permitted the use of the mark "Marvel Fragrances", I would, at least at this interlocutory stage, readily consider it to be an act of the first Defendant company itself. I have come to the conclusion that the Defendants have made out a strong prima facie case establishing the family arrangement.

18. According to the Defendants, on or about 30th July, 2007, a family settlement was arrived at between the parties herein with the intervention of family and friends. The parties had agreed to split the family businesses. It was agreed that the Plaintiff would take over the entire shareholding of the business entities carrying on business under the trade name "Mysore" and Defendant No. 5 would take over the entire shareholding of the business entities carrying on business under the trade name "Marvel". It was further agreed that the Plaintiff would be entitled to carry on business under the trade name "Mysore" and Defendant No. 5 would be entitled to carry on business under the trade name "Marvel". The Plaintiff and Defendant No. 5 would not claim any right in respect of the trade mark "Marvel" and "Mysore" respectively. The Plaintiff was to hand over the shares in Defendant No. 1 to Defendant No. 5 and Defendant No. 5 would be entitled to start and carry on business under the trade name "Marvel". In consideration thereof, the Plaintiff would receive ownership and exclusive control of the business entities carrying on business under the trade name "Mysore" as well as other assets. This settlement was acted upon by the Plaintiff and Defendant Nos. 3 and 5.

19. There are several factors which establish prima facie the family settlement pleaded by the Defendants. I will refer to only a few of them.

20. There are two family firms - Mysore Fine Agarbatti Factory (Bombay) and Mysore Fine Agarbatti Factory (Kandla). I will, for convenience, refer to them as Mysore Fine Bombay and Mysore Fine Kandla. The family settlement was acted upon, inter-alia, by transferring the interests in the firms to the Plaintiff and/or his son. This was done in the following manner.

21. Prior to 15th February, 2008, Defendant No. 3 and the Plaintiff had a 70% and 30% share respectively in Mysore Fine Bombay. Pursuant to the family arrangement, Defendant No. 3 transferred his share to the extent of 65% share in the firm to the Plaintiff and his son. Consequently, the Plaintiff, his son Sanjay and Defendant No. 3 held a 90%, 5% and 5% share in Mysore Fine Bombay respectively.

22. The Defendants stated that this transfer took place without the Plaintiff or his son paying anything for the same. In the affidavit in rejoinder, there is a mere denial to this. The Plaintiff has offered no explanation for the reconstitution of the firm by inducting the Plaintiff's son and for Defendant No. 3 having given up his share to the extent of a 65% share in the firm. The intention obviously was to ensure that the Plaintiff and/or his son gain full control of the firm.

In these circumstances, I am inclined to accept the case of Defendant No. 3 that

he retained only a 5% share in this firm only to ensure the return of the amounts due to him from the firm. The return of any amounts due to a retiring partner cannot by itself constitute consideration for the partner relinquishing his share in the firm. In these circumstances, I am of the view that the third Defendant's case that the same was done pursuant to the family settlement is correct. It is common ground that there were disputes between the parties prior to the reconstitution of the firm and the adjustment of the shares of the partners therein. The only explanation for the reconstitution of the firm and for Defendant No. 3 to have given up his share to the extent of a 65% share in the firm without any consideration is that it was pursuant to the family settlement.

23(A) The firm Mysore Fine Kandla was renamed Mysore Scents Company. Prior to the family settlement, the shares of the parties in the firm were as follows:

Plaintiff

30%

Plaintiff's son Sanjay

05%

Defendant No.3

30%

Defendant No.5

30%

Defendant No.6

(wife of Def.No.5)

05%

In other words, the Plaintiff and his son had a 35% share and Defendant Nos. 3, 5 and 6 had a 65% share in the firm.

24. A deed of settlement was executed by the Defendants in respect of Mysore Scents Company. Recital 2 thereof expressly refers to the family settlement and reads as under:

2. And whereas the retiring partners as per the family settlement between them have agreed to retire from the said partnership w.e.f. 1st DAY OF APRIL, 2008 leaving the continuing partners to continue the same business as partners of the said firm.

[emphasis supplied]

The Plaintiff, Defendant No. 5 and Defendant No. 6 were the retiring partners. The Plaintiff has offered no explanation for the reference to the family settlement in this deed.

25(A) A partnership deed dated 23rd July, 2008 was executed which recorded that the Plaintiff, Defendant No. 5 and Defendant No. 6 retired. The Defendants contend that the same was pursuant to the family settlement. Defendant No. 4 (wife of Defendant No. 3 and the mother of the Plaintiff and Defendant No. 5) was admitted as a partner. Under this deed the Plaintiff's son Sanjay and Defendant Nos. 3 and 4 had a 35%, 50% and 15% share respectively in the firm.

26. The partnership deed and the conduct of the parties, however, establishes the Defendants case regarding the family settlement and their contention that Defendant Nos. 3 and 4 continued in the firm Mysore Scents Company only to ensure the repayment of the amounts due to them by the firm Mysore Scents Company.

(A) Defendant Nos. 3 and 4 never participated in the business of the firm. The Plaintiff and/or the Plaintiff's son managed and controlled the business of the firm on a day-to-day basis.

(B)(i) The Defendants contention in this regard and as regards the family settlement is established by Clause 11 of the partnership deed which reads as under:

11. RETIREMENT OF PARTNER: In the event of the party to this deed intending to retire from this partnership such party shall give minimum 120 days notice in writing to the other party. Where upon the accounts up in the date of intended retirement shall be refunded his capital and accumulated profits in a phased manner as mutually decided and looking to the financial position of the partnership provided that a partner intending to retire shall not be entitled to any share in the goodwill of the partnership. Continuing partners shall not impose any restrictions of whatsoever nature on the retiring partners.

It is also agreed between the continuing partners and the admitted partners that SHRI MADHAVDAS DEEPCHAND AHUJA (Defendant No. 3) and Smt. CHAMPA MADHAVDAS AHUJA (Defendant No. 4) shall retire from the partnership after 2(Two) years and shall assign their share in the partnership only in favour of SHRI SANJAY ANIL AHUJA (Plaintiff's son). On their retirement no good will or revaluation of any assets of the company shall be done and accounts shall be settled as mutually agreed.

(ii) The second paragraph of Clause 11 has three ingredients of vital importance which support the Defendants contentions.

Firstly, it provides for the retirement of Defendant Nos. 3 and 4 after two years. Secondly, it requires them to assign their share in the partnership only in favour of the Plaintiff's son.

No explanation has been offered by the Plaintiff for such a provision. The purpose of the clause is clear. It was to ensure the retirement of Defendant Nos. 3 and 4 irrespective of anything else virtually without any right or share in the assets of the firm. In effect, therefore, Defendant Nos. 3 and 4 had no vested right or

interest as partners in the firm as is normally understood.

(iii) The doubt, if any, in this respect is set at rest by the third ingredient which appears in the last sentence of Clause 11. Upon retirement, Defendant No. 3 and 4 were not entitled to their share in all the assets of the firm. Most important they were not entitled to the goodwill. The provision disentitling the Defendant Nos. 3 and 4 to the goodwill itself establishes the value of the goodwill. If it had no value, the Plaintiff and/or his son would not have insisted upon such a provision. Equally important and, in financial terms probably even more important, is the fact that the assets were not to be revalued. Anybody familiar with accounting would immediately understand the significance, relevance and need for such a provision. The book value would obviously be far less than the market value of the assets. It must be remembered that this firm was constituted many years ago.

27. Thus, the intention to transfer all the assets of the firm Mysore Scents Company to the Plaintiff and/or his son without any consideration and, in any event, at a relatively negligible consideration is clear.

28. The firm admittedly has valuable assets, including immovable properties. When the family settlement was arrived at, the turnover was almost Rs. 7.00 crores. That, today, under the Plaintiff's and/or his son's management, it may have reduced to about Rs. 1.50 crores is another matter altogether. In fact, it is alleged that this is one of the reason why the Plaintiff now wants to look to the other assets allotted to the Defendants. It was contended on behalf of the Plaintiff that despite the said clause, Defendant Nos. 3 and 4 had not retired from the firm. The Defendants contended that it was for the Plaintiff/Plaintiff's son to have forwarded the documents necessary to complete the formalities regarding their retirement. I appreciate that the modalities of the retirement have not been complied with yet. What is important, however, is not what the parties have done pursuant to the partnership deed, but the intention of the parties in having entered into such a partnership deed. There is nothing to indicate that Defendant Nos. 3 and 4 have in any manner obstructed the Plaintiff and/or his son from conducting the affairs/ business of Mysore Scents Company. They have fairly stated that they consider themselves as having retired and will cooperate to give effect to the retirement.

29. The Defendants have not used the "Mysore" mark at all.

30. The effect of the conduct of the parties in respect of the firm Mysore Fine Bombay and Mysore Scents Company strongly supports the Defendant's case. Why else would the Plaintiff's father - Defendant No. 3 have given up his share to the extent of 65% of the share in Mysore Fine Bombay. Why else would the Defendants have, for all practical purposes, given up their share to the extent of 65% of the share in Mysore Scents Company. Why else would the Defendants have refrained from using the mark "Mysore". The answer appears reasonably clear. All this was pursuant to the family settlement. The attempt on the

Plaintiff's part is now only to poke holes to deny the same.

31. The Plaintiff knew about the formation and existence of Defendant No. 2 from inception i.e. 30th May, 2007. He admittedly knew about it, latest in the year 2008. He filed the petition under Sections 397, 398 before the Company Law Board in the year 2010. I do not for a moment suggest that this action for passing off, although a derivative action, is liable to be dismissed merely on the ground of delay. The inaction of the Plaintiff regarding the alleged tort of passing off for a period of two years is not indicative of delay alone. It is very strong prima facie evidence of the existence of a family arrangement which included an agreement between the parties to permit the exclusive use of the word "Marvel" by Defendant No. 5 and not by the Plaintiff or his son Sanjay and the use of the word "Mysore" by the Plaintiff and/or his son and not by the Defendants. The Defendants' case, therefore rests on surer footing than mere acquiescence or waiver on the Plaintiff's part. It rests on the surer footing of the Plaintiff's agreement to permit the Defendants to use the mark for valuable consideration which he received, has appropriated and enjoyed during this period. To permit him now to challenge the Defendants' right to use the mark would be a travesty of justice.

32. Defendant No. 3 stated that an office premises at Noida belonging to Defendant No. 1 was given to the Plaintiff at its face value/original purchase value of Rs. 25,00,000/-. The Plaintiff thereby benefitted by about Rs. 75,00,000/-. In the rejoinder, the Plaintiff states that Mysore Scents acquired the property. The Plaintiff further stated that he has retired from Mysore Scents. That, however, makes no difference. As stated above, for all practical purposes, all the assets of Mysore Scents Company have in effect been transferred to the Plaintiff's son. The Plaintiff's son cannot possibly be distanced from the entire settlement. There is no explanation as to why shares have been transferred to the Plaintiff's son. It was obviously pursuant to the family settlement.

33. Mr. Jain's submission that the reliefs claimed in the suit have also been claimed in the petition before the Company Law Board, however, is not well founded. An analysis of the petition including the prayers therein indicates that the reliefs claimed in this suit have not been made the subject matter of the petition filed before the Company Law Board.

34. It is pertinent to note that a petition under Sections 397, 398 has been filed by the Plaintiff against the Defendants. The present action, prima facie, at least, does not appear to be bona fide for the benefit or protection of Defendant No. 1, but as a part of the overall litigation and in respect of the disputes between the Plaintiff and the Defendants. The Plaintiff's conduct even otherwise does not appear to have been for the benefit of or keeping in mind the interests of the first Defendant company. The Plaintiff has himself acted contrary to the interests of the first Defendant and in furtherance of his personal interests, inter-alia, through Mysore Fine Bombay and Mysore Scents Company.

35. The Plaintiff sent an e-mail dated 29th September, 2008, on behalf of Mysore Scents to one of its customers, the relevant part whereof reads as follows:

Until April 2008 Mysore Scents Company was a part of Marvel Group, however the production facility of Marvel Fragrances Pvt. Ltd. at Mumbai has been shut down and ever since all production has been shifted to Mysore Scents Company which is now run by Mr. M.D. Ahuja, Founder & Chairman of Marvel Group and me, Mr. Sanjay Ahuja.

36. The first part of the paragraph indicates that Mysore Scents Company is now not a part of the Marvel Group. This would support the Defendants case of a family arrangement, inter-alia, to separate the Mysore and Marvel marks. The paragraph further wrongly states that the production of the first Defendant has been shifted to Mysore Scents Company. The suggestion is that the business hitherto being carried on by the first Defendant is transferred to Mysore Scents Company. This is adverse to the interests of the Defendant No. 1, especially after the separation.

37. By another e-mail also dated 29th September, 2008, addressed on behalf of Mysore Scents, the Plaintiff informed another customer as follows:

We would like to take the opportunity to introduce to you our new firm - Mysore Scents Company, one of the leading manufacturers and exporters of Home Fragrances in India.

Until April 3008, Mysore Scents Company was a part of Marvel Group, however the constitution of the said firm has changed ever since and Mysore Scents is now run by Mr. M.D. Ahuja, Founder & Chairman of Marvel Group and me Mr. Sanjay Ahuja.

The second paragraph quoted above again suggests that Mysore Scents Company is now not a part of the Marvel Group.

38. The customer, by its reply enquired what the change meant for it stating that they had in the past dealt with Defendant No. 5. By an e-mail dated 30th September, 2008, the Plaintiff stated, inter-alia, as follows:

Until April 3008, Mysore Scents Company was a part of Marvel Group, however the constitution of the said firm has changed ever since and Mysore Scents is now run by Mr. M.D. Ahuja, Founder & Chairman of Marvel Group and me Mr. Sanjay Ahuja.

Further, we wish to inform you that Mysore Scents Company was earlier (under April, 2008) marketed under the name of Marvel Fragrances Pvt. Ltd., Mumbai. We are attaching herewith the last invoice for the goods you bought from us - for your reference only.

39. It appears, therefore, that after the family settlement, the Plaintiff has been trying to divert the business of Defendant No. 1 to Mysore Scents Company in which his son has, for all practical purposes, an exclusive interest. This conduct is

contrary to the interest of Defendant No. 1. A derivative action at the instance of such a party ought not to be encouraged.

40. The Plaintiff has also been acting against the interest of the Defendant No. 1, inter-alia, by informing third parties that there are disputes between the Directors and anybody dealing with Defendant No. 1 would do so at their own risk. For instance, a letter dated 30th December, 2009, by the Plaintiff to M/s. Merck Limited indicates that the Plaintiff and his son had been informing M/s. Merck Limited about the internal disputes in respect of the first Defendant company. The first Defendant desired to let out its factory premises for a monthly compensation of Rs. 12,00,000/- with an interest free security deposit of Rs. 1.00 crore for a period of six years with an annual escalation of 7.5% to M/s. Merck Limited. It is obvious that the Plaintiff and his son dissuaded M/s. Merck Limited from entering into the transaction, inter-alia, by the said letter. The letter concluded by informing M/s. Merck Limited that if they continued with the negotiations they would do so entirely at their risk of any litigation, both civil as well as criminal. It is difficult to understand what purpose this conduct could possibly have served, except to further the Plaintiff's personal interests in relation to his disputes with the family. If the Plaintiff was genuinely concerned about the compensation amount being siphoned off by the Defendants, he could have taken steps to safeguard the same. Instead, he took steps to the detriment of the first Defendant by ensuring that the transaction fell through, thereby depriving the first Defendant of valuable income by way of licence fees amounting to crores of rupees.

41. Notices had been published by the Plaintiff in the Free Press Journal stating that there were disputes between the shareholders of the first Defendant and that anybody dealing with the first Defendant would do so at their own risk. The attempt obviously was to affect the functioning of the first Defendant.

42. It is important to note that the brochure/website of Mysore Scents Company uses the prominent logo/device which has been created for the first Defendant. There is no explanation why the Plaintiff has not filed any proceedings against Mysore Scents Company for infringement of the mark/logo. This does not indicate a concern for the company.

43. The contention that the Defendants' action is not bona fide as Defendant No. 2 was constituted on 30th May, 2007 i.e. prior to the family settlement is of no relevance. The family settlement may well have been entered into on 30th July, 2008. It can hardly be suggested that the disputes started, the negotiations ensued and the family settlement was arrived at all in a single day. In all probability, these disputes were going on for some time and the broad parameters thereof were settled or were likely to be settled. It is not unnatural that in anticipation thereof, parties took steps, including the formation of the second Defendant.

44. In the circumstances, the Notice of Motion is dismissed with costs fixed at Rs.

15,000/-which shall be paid within eight weeks from today.