

(2007) 10 DEL CK 0157

In the Delhi High Court

Case No : IA No"s. 8275 and 8670 of 2003 in CS (OS) 675 of 1999

Bank Kreiss Ag

APPELLANT

Vs

Mr. Ashok K. Chauhan and Others

RESPONDENT

Date of Decision : 23-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1, Order 22 Rule 1, Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 3(1)
General Clauses Act, 1897 — Section 3(42)
Income Tax Act, 1961 — Section 41, 41(1)
Limitation Act, 1963 — Article 120, 5

Citation : (2007) 8 ILR Delhi 167 Supp : (2007) 8 ILR Delhi 167

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : R.K. Anand, Shivani Lal, S.B. Sharma and Vishv Nidhi, for the Appellant; Valmiki Mehta and Vinay Garg, for Defendant No. 1 and Arun Mohan Rajesh Yadav and A.P. Singh for Defendant Nos. 2-13, for the Respondent

Final Decision : Disposed Off

Judgement

Badar Durrez Ahmed, J.—Three interesting questions arise for consideration in these applications. They are:

(1) Whether a merging company, upon merger with another company and thereby ceasing to exist as an independent entity, could be construed as having "died" upon such merger in the context of Order 22 of the Code of Civil Procedure, 1908?

(2) If yes, would a suit filed by the transferor company abate in case no application for bringing its legal representatives on record is filed within the stipulated time in view of the provisions of Order 22 Rule 3 of the Code of Civil Procedure, 1908?

(3) Whether the transferee company, after the merger referred to above, would be entitled to file an application under Order 22 Rule 10 of the Code of Civil

Procedure, 1908 and seek substitution in place of the transferor company as a plaintiff in a suit?

The Facts:

2. The facts which give rise to these questions are few. The present suit was filed by Bank Kreiss AG, a company incorporated in Germany. The suit was filed on 02.03.1999. During the pendency of the suit Bank Kreiss AG merged with and into Yapi Kredi Bank AG. The merger deed was executed on 27.08.2001 and became effective on 09.10.2001. By virtue of the merger Yapi Kredi Bank AG took over all the assets and liabilities of Bank Kreiss AG and as such on and from 09.10.2001, the plaintiff (Bank Kreiss AG) ceased to exist. On 08.08.2003, the defendant No. 4 filed the application (IA 8275/2003) for dismissal of the suit on account of the non-existence of the plaintiff. All the other defendants support this application. They submit that as the plaintiff ceased to exist on 09.10.2001 and no application under Order 22 Rule 3 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC") was made, the suit has abated. More specifically they state and submit that on 09.10.2001 the plaintiff (Bank Kreiss AG) ceased to exist as an independent entity. This meant that the plaintiff died. Consequently, an application ought to have been made for substituting the legal representatives of the "deceased" plaintiff within the time stipulated. The period prescribed under Article 120 in the Schedule to the Limitation Act, 1963 to have the legal representative of a deceased plaintiff made as a party, is 90 days from the date of death of the plaintiff. Therefore, an application for making the legal representative of the plaintiff a party could have been filed within 90 days of 09.10.2001, that is, by 07.01.2002. No such application has been filed in the present case and, Therefore, according to the defendants the suit abated on 07.01.2002 and an order of formal dismissal of the suit as having abated needs to be passed.

3. After the said application (IA 8275/2003) was filed on behalf of the defendant No. 4, Yapi Kredi Bank AG filed an application (IA 8670/2003) for substitution under Order 22 Rule 10 for leave of the Court to continue the suit in its name. This application was filed on 11.08.2003 after the application filed by the defendants for dismissal of the suit on the ground that it had abated. Yapi Kredi Bank AG contended in the application that by virtue of the merger deed, it has taken over all the assets and liabilities of the plaintiff and is the successor in interest of the plaintiff. Consequently, all the interests and rights of the plaintiff now vest with the applicant and, Therefore, the applicant is competent to continue this suit in place of the plaintiff (Bank Kreiss AG).

Questions 1 & 2 : Discussion and Conclusion.

4. The first issue that has to be examined in this case is whether the merger of Bank Kreiss AG with and into Yapi Kredi Bank AG meant that Bank Kreiss AG ceased to exist or died for the purposes of Order 22 Rule 3 CPC, which prescribes the procedure in case of death of one or several plaintiffs or of the sole plaintiff.

Sub-rule (1) of Rule 3 of Order 22, inter alia, stipulates that where a sole plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Sub-rule (2) of Rule 3 of Order 22 CPC provides that 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. It goes on to provide that if an application is made by the defendant, the Court may even award costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. Clearly, on the death of a sole plaintiff, if no application is made for bringing on record the legal representative of the deceased plaintiff within the stipulated time, then the suit shall mandatorily abate. Had the present plaintiff been a person in flesh and blood and had he died on 09.10.2001 then, if no application for bringing on record the legal representative of the deceased plaintiff had been made prior to 07.01.2002, the suit would have abated on its own. The difficulty that arises in the present case is because the plaintiff was a corporate entity or in other words, a juristic person and not a natural person. There is no difficulty with the term "death" when applies to a natural person. But, what is meant by death in the context of a company needs to be examined. According to the learned Counsel for the defendants, the moment a company ceases to exist by virtue of dissolution consequent upon winding up or by virtue of having merged into another entity, it would mean that the company died. Several decisions were cited on both sides on this and other aspects of the matter. Before I examine those decisions, it would be necessary to note that Order 22 Rule 3 CPC has no reference to the word "person" or "persons". The reference is only to the plaintiff/ plaintiffs. However, a reading of Order 1 Rule 1 CPC would make it clear that a plaintiff has to be a person. Therefore, it is safe to assume that the expressions plaintiff or plaintiffs refers to person or persons who institute the suit. Section 3(42) of the General Clauses Act, 1897 provides that in the said Act, and in all central acts and regulations made after the commencement of the said Act, unless there is anything repugnant in the subject or context, inter alia, "person" shall include any company or association or body of individuals, whether incorporated or not. Thus, a company would also be regarded as a person unless such meaning is repugnant to the context of the statute.

5. In Narendra Bahadur Tandon Vs. Shankar Lal (since deceased) by Lrs, , the Supreme Court observed that "Once the company was dissolved it ceased to exist and the liquidator could not represent a non-existing company." In Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, , the Supreme Court considered the question of amalgamation and as to what was the effect on the amalgamating company. The question arose in the context of an amalgamation between Indian Sugar and General Engineering Corporation and Saraswati Industrial Syndicate. The said Indian Sugar company was amalgamated with Saraswati Industrial Syndicate and after the amalgamation, the Indian Sugar Company lost its identity, as it did not carry on any business.

The specific question before the Supreme Court was with regard to taxability u/s 41(1) of the Income Tax Act, 1961. In order to attract the provisions of Section 41(1) for enforcing the tax liability, it was necessary that the identity of the assessed in the previous year and the subsequent year was the same. If there is any change in the identity of the assessed there would be no tax liability under the provisions of Section 41 of the Income Tax Act, 1961. The question before the Supreme Court was whether on the amalgamation of the Indian Sugar Company with Sarswati Industrial Syndicate, the Indian Sugar Company continue to have its identity and was alive for the purposes of Section 41(1) of the Income Tax Act, 1961. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29.10.2002 and ceased to be in existence thereafter. It is in this context that the Supreme Court observed as under:

5. Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending Company become substantially the share holders in the Company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company. Strictly "amalgamation" does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsbury's Laws of England 4th Edition Vol. 7 Para 1539. Two companies may join to form a new Company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third Company or one is absorbed into one or blended with another, the amalgamating Company loses its entity.

6. ...The High Court was in error in holding that even after amalgamation of two companies, the transferor Company did not become nonexistent instead it continued its entity in a blended form with the appellant Company. The High Court's view that on amalgamation there is no complete destruction of corporate personality of the transferor Company instead there is a blending of the corporate personality of one with another corporate body and it continues as such with the other is not sustainable in law. 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 but the corporate entity of the transferor Company ceases to exist with effect from the date the amalgamation is made effective.

In *Singer India Ltd. Vs. Chander Mohan Chadha and Others*, , the Supreme Court, following the aforesaid decision in *Saraswati Industrial Syndicate Ltd.* (supra), held as under:

8. In *Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax*, it has been held that there can be no doubt that when two companies amalgamate and merge into one, the Transferor Company loses its identity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation, but the corporate identity of the Transferor Company ceases to exist with effect from the date the amalgamation is made effective. Therefore, in view of the settled legal position, the original lessee, namely, the American Company ceased to exist with effect from the Appointed Day i.e. 1.1.1982 and thereafter the Indian Company came in possession and is in occupation of the premises in dispute.

6. After examining these decisions of the Supreme Court it is absolutely clear that when two companies merge into one, the transferor company loses its identity as it ceases to have its business. Although the respective rights or liabilities are determined under the scheme or deed of amalgamation or merger, but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation or merger is made effective. In the present case the deed of merger was executed on 27.08.2001 but the merger itself became effective on 09.10.2001. By virtue of the said merger, Bank Kreiss AG, being the transferor company did not have any surviving corporate identity on and from 09.10.2001. It ceased to exist. This effectively meant the death of Bank Kreiss AG. Since Bank Kreiss AG was the sole plaintiff in the present suit it meant the death of the sole plaintiff and, Therefore, the provisions of Order 22 Rule 3 became immediately attracted. Since the right to sue would survive, the suit did not abate on 09.10.2001 itself but would abate on the expiration of a period of 90 days from 09.10.2001, in case no application was filed for bringing on record the legal representative in place of Bank Kreiss AG. The factual position is that no such application was made within 90 days and, Therefore, by the operation of the provisions of Order 22 Rule 3(2) CPC, the suit abated on 07.01.2002. As a result of this discussion, the answers to the first two questions are: yes and yes.

Question 3:

7. This takes me to the discussion of the third question. Generally speaking the transferee company would be entitled to file an application under Order 22 Rule 10 CPC so as to continue the suit. But, that would depend on the stage at which such an application is made. If the application is made before the suit abates, it would be maintainable. On the other hand, if it is made after the suit has abated, it would not be maintainable. The provisions of Order 22 Rule 10 CPC apply only if there is a pending suit which can be continued. This will be clear from the discussion which follows. In the context of this case, the question, in essence is - whether the application under Order 22 Rule 10 filed on behalf of the Yapi Kredi Bank AG on 11.08.2003 would be maintainable? It was contended on behalf of

the applicants that the provisions of Order 22 Rule 10 CPC are clearly applicable. Reliance was placed on the following decisions:

- (1) Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, .
- (2) Sheela Wanti v. Kuldeep Singh and Anr. 2002 (64) DRJ 635.

In Dhurandhar Prasad Singh (supra) the Supreme Court considered the provisions of Order 22 and in particular Rule 10 thereof in the following words:

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 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 a 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 interest had devolved. The Legislature while enacting Rules 3, 4 and 10 has made clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing 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. Karab-ud-Din* (1898) 25 Cal 179 : 24 is 170 : 1 CWN 639, 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 v. Rookea Begum* 1857 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.

From the above observations several things become clear. In the cases of assignment, creation or devolution of interest during the pendency of a suit referred to in Rule 10 of Order 22 CPC, the original party, that is, the assigner or the one who creates or from whom the interest devolves continues to exist (to be alive) even after such assignment, creation or devolution of interest. This is clear from the observation that if the person on whom the interest has been assigned or devolved upon, has the option of continuing the suit with the leave of the Court or of letting the original plaintiff continue the same. But in the latter eventuality, the person on whom the interest had devolved would be bound by and can have the benefit of the decree unless it is shown in a properly constituted proceeding that the original party did not vigorously prosecute or collude with the adversary resulting in a decision adverse to the party upon whom the interest had devolved. The Supreme Court also made it clear that in cases covered under Rules 3 and 4, if right to sue survives and no application for bringing the legal representatives of a deceased party was filed within the prescribed time, there is an automatic abatement of the suit and procedure for setting aside such abatement is provided under Rule 9 of Order 22 CPC on the grounds postulated therein. Therefore, there is a distinction between Rules 3 and 4 on the one hand and Rule 10 on the other. Rule 3 applies in a case where there is a death of a plaintiff. Rule 10, on the other hand, applies where in the "lifetime" of the plaintiff an assignment, creation or devolution of the plaintiff's interest on somebody else takes place during the pendency of a suit and the plaintiff continues to be alive and in existence even after such assignment, creation or devolution. However, the moment the recorded plaintiff dies, the clock for abatement starts ticking and can only be stopped by either moving an application for substituting the legal representatives in place of the deceased

plaintiff or by resulting in abatement itself on the expiry of 90 days from the death of the plaintiff, in case no such application is made. Therefore, this decision of the Supreme Court in the case of Dhurandhar Prasad Singh (supra) does not in any way advance the case of the applicant (Yapi Kredi Bank AG).

8. The next case which was relied upon by the applicant was that of a learned Single Judge of this Court in the case of Sheela Wanti (supra). Reliance was placed on the observations contained in paragraph 5 thereof which reads as under:

5. Before advertng to the merits of the application under consideration this Court must make it clear that a substitution under Order 22 Rule 3 of the CPC and a substitution under Rule 10 of Order 22 CPC stand on altogether different footing and operate in different fields. A substitution under Order 22 Rule 3 of the CPC is to bring on record the LRs of a deceased plaintiff in whose favor the right to sue survives whereas Rule 10 covers the cases in which by way of assignment, creation or devolution of interest, during the pendency of the suit, a person has acquired a right in suit property and as such prays that he may be substituted in place of plaintiff. Rule 10 of Order 22 CPC does not prescribe any limitation for the impleadment of a person upon whom the interest in the property has devolved and as such at any time during the pendency of the suit he may be substituted. In Ghafoor Ahmad Khan Vs. Bashir Ahmad Khan (Dead) by Lrs., , the Supreme Court set aside the orders upholding abatement of an appeal for the reason that during the life time of the sole respondent/ plaintiff, there was a transfer of the property by way of gift to his wife/applicant and the case being a case of devolution of interest was falling under Rule 10 of Order 22 of the CPC and as such there was no question of abatement. Rule 9 of Order 22 of CPC permits setting aside of abatement or dismissal upon an application of an assignor also who might have acquired interest as defined in Rule 10 Order 22 CPC. Therefore upon the application of an assignor even the abatement or dismissal can be set aside and the suit may be revived.

On first impressions, this case appeared to support the contentions of the applicant (Yapi Kredi Bank AG). But, examining the facts, I find that the same is clearly distinguishable. In Sheela Wanti (supra), the application was one under Order 22 Rules 9 and 10 read with Section 151 CPC and Section 5 of the Limitation Act, 1963 for setting aside the abatement, condoning the delay, if any, in filing of the application and substituting the applicant in place of the deceased plaintiff in that suit. Whereas the application in the present case has been filed under Order 22 Rule 10 CPC. There is no application for setting aside the abatement nor is there any application u/s 5 of the Limitation Act, 1963 for condoning the delay in moving such an application. In that case the suit had abated. Even an order had been passed by the Court that the suit had abated. Shortly after abatement order had been passed by the Court, the applicant therein had, within 15 days, moved an application under Order 22 Rule 10 read with Section 151 CPC. That application was withdrawn with liberty to file a fresh

application as it did not contain any prayer for setting aside the abatement. The fresh application was also moved within 15 days of the withdrawal of the first application and it is in this context that the learned Single Judge was of the view that the applications were filed promptly after the abatement orders. The facts in the present case are entirely different and, Therefore, the decision in *Sheela Wanti* (supra) would not be of any assistance to the applicant herein.

9. The learned Counsel for the applicant had referred to *Government of Orissa Vs. Ashok Transport Agency and Others*, . But that was not a judgment of the Supreme Court. There was a difference of opinion between the two judges which constituted the Bench and, Therefore, the matter was referred to a larger Bench. The larger Bench decision is reported in *Government of Orissa Vs. Ashok Transport Agency and Others*, . That decision would also be of no help to the applicant inasmuch as the amalgamation, which was considered in that case, was a statutory amalgamation and Clause 7 of the amalgamation order itself made specific provision with regard to continuance of legal proceedings. It is only on the basis of the said Clause 7 that the Supreme Court observed that any suit, prosecution, appeal or other legal proceedings by or against the dissolved company pending on the appointed day, shall not abate or be discontinued or be in any way prejudicially affected by reason of the transfer to the resulting company, the corporation, of the undertaking of the dissolved company or of any thing contained in the amalgamation order. However, while construing the special provision made in Clause 7 of the amalgamation order, the Supreme Court made observations as to what would have normally been the case had there been no such special provision. The Supreme Court observed as under:

8. Normally, in a case covered by Order 22 Rule 10 of the CPC where rights are derived by an assignee or a successor-in-interest pending a litigation, it is for that assignee or transferee to come on record if it so chooses and to defend the suit. It is equally open to the assignee to trust its assignor to defend the suit properly, but with the consequence that any decree against the assignor will be binding on it and would be enforceable against it. Equally, in terms of Section 146 of the Code of Civil Procedure, a proceeding could be taken against any person claiming under the defendant or the judgment debtor. Similarly, a person claiming under the defendant or the judgment debtor could seek to challenge the decree or order that may be passed against the defendant by way of appeal or otherwise, in the appropriate manner. But, it would not be open to it to challenge the decree as void or unenforceable in execution in the absence of any specific provision in that regard in the statute or order bringing about such a transfer or assignment. Going by these general principles, it is possible to argue that it was for the Corporation, and subsequently for the State of Orissa, to get themselves impleaded in the suit and to prosecute a defense, not inconsistent with the defense already set up by the defendant in its written statement. Neither the Corporation nor the Government of Orissa took that step. In such a situation, normally, one would be inclined to the view that it is not open to the Corporation or to the Government of Orissa to challenge the executability of the decree as

against them. It is in this context that the impact of Amalgamation Order has to be considered.

As would be clear from a plain reading of the above observations, there is nothing therein which would go to help the present applicant.

10. Order 22 Rule 10 requires further consideration. It reads as under:

Order XXII

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.

The expression "the suit may, by leave of the Court, be continued" is of great importance and significance. Leave of the Court can be taken by the person to or upon whom the interest referred to in the said provision has come or devolved for continuing a suit by or against such person. For this provision to be applicable, there must be a pending suit. It is only a pending suit which can be continued. A suit which has abated cannot be continued. Therefore, an application under Order 22 Rule 10 would not lie in a suit which has abated and is no longer pending. The abatement of a suit can be set aside as indicated in Rule 9(2) of Order 22 CPC on the grounds indicated therein. But unless and until the abatement is set aside, no application under Order 22 Rule 10 would be maintainable because such an application is only for the purposes of continuing the suit and not for the purposes of reviving a suit which has abated. In this context three decisions referred to and relied upon by the defendants are of material significance. The first decision is of a Division Bench of the Calcutta High Court in the case of Kedarnath Kanoria and Others Vs. Khaitan Sons and Co., . Two separate but concurring opinions were given by R. S. Bachawat, J. and K.C. Das Gupta, C. J. The following observations in the opinion of Bachawat, J. are noteworthy:

20 Regarding this case as a case of assignment simpliciter, it is well settled since the decision in Rai Charan v. Biswa Nath 20 C LJ 107 : AIR 1915 Cal 103, that the suit is not arrested by reason of the assignment, that the assignee may, if he chooses, obtain leave of the Court under Order XXII, Rule 10, but if he does not do so, the original assignor plaintiff is entitled to continue the suit and the assignee will be bound by the result of the litigation. Dealing with a case where the assignor plaintiff was allowed to continue the suit in spite of the assignment of the debt which was the subject-matter of the suit, Das, C.J. pointed out in Jugalkishore Saraf v. Raw Cotton Co. Ltd. AIR 1955 SC 376 , that in the eye of the law the position of the assignor, vis a vis assignee was nothing more than that of benamdar for the assignee and that when the decree was passed for the recovery of the debt it was the assignee who was the real owner of the decree. Of course where both the assignor and the assignee are parties to the suit, the

decree cannot be passed in favor of the assignor and must be passed in favor of the assignee and such a case is dealt with by AIR 1939 170 (Privy Council)

21 In my opinion, the absence of an application under Order 22, Rule 3 in due time after the death of the sole plaintiff on the record will cause the suit to abate, though the deceased plaintiff may have parted with his interest in the subject-matter of the suit before his death.

25 It is true that the death of the assignor plaintiff simpliciter does not take away the right of the assignee to apply under Order XXII, Rule 10 of the Code of Civil Procedure. By Order XXII, Rule 1 the death of the plaintiff of itself does not cause the suit to abate. Before the suit has abated the assignee may apply for and obtain leave to continue the suit. He may also, if he chooses, apply for substitution of the legal representative of the deceased plaintiff. In a proper case the order for leave to continue the suit may be dated nunc pro tunc as of the date when the application was made. If necessary, the application for leave to continue the suit may be treated as being in substance a composite application for substitution of the legal representatives of the deceased plaintiff and thereafter of the applicant. On obtaining the necessary leave the assignee becomes the new plaintiff and the suit cannot thereafter abate on account of the death of the original plaintiff.

26 But the assignee can obtain leave only to continue a suit. If the suit has already abated, there is no suit which may be continued. The abatement terminates the suit and disposes of the plaintiff's claim as if the suit has been dismissed without a hearing. Leave to continue a suit cannot be given after the suit has terminated. It cannot be given if the suit has already been decreed or dismissed for default of appearance of the plaintiff. Similarly, leave cannot be given if the suit has already abated. The suit abates automatically in the absence of any application under Order XXII, Rule 3 within ninety days and a further order declaring that the suit has abated is not necessary. The assignee is bound by the abatement and by proceedings had in the suit before his intervention.

In the concurring opinion of K.C. Das Gupta, C. J, it was observed as under:

38. Is it possible however to give such permission to continue the suit under the provisions of Order XXII, Rule 10 of the CPC even where the suit has abated? It seems to me a contradiction in terms to say that the person on whom the interest has devolved is given leave to continue the suit after the suit has ceased to exist. Something which has ceased to exist cannot be allowed to continue and wide though the powers of the court be, and should be, in the interests of justice I am unable to persuade myself that a suit which has abated can be allowed to be continued.

11. The second decision is of a full Bench of the Kerala High Court in the case of Goutami Devi Sitamony Vs. Madhavan Sivarajan, . The relevant observations are as under:

3. The question Therefore is, whether despite the failure of the legal representative to seek to come on record on the death of the appellant an assignee from such appellant could move for being imp leaded under Order XXII, Rule 10 of the C.P.C at a time when the proceedings must be taken to have abated under Order XXII Rule 3(2) of the CPC against the legal representative.

5. ...If no application is made within the time provided for making such an application under law the suit shall abate in so far as the deceased plaintiff is concerned."

7. ...It seems to us to be plain from the scheme of Order XXII that an assignee can make an application for leave to continue the suit so long as there is a suit, so far it concerns the assignee, on the file of the court. In a suit which is not subsisting, there is no scope for seeking continuance. It is only logical that in a case where the suit has abated, the assignee cannot thereafter seek to be added as a party to the action. That this is the scheme is evident from an examination of the Order XXII of the Code of Civil Procedure.

10. ...This does not mean that the suit nevertheless survives in regard to the interest of the deceased so as to enable the assignee to seek to be imp leaded.

12. The third decision is of the Patna High Court in the case of Devkinandan Lal Vs. Jogendra Prasad and Others, . The relevant observations are as under:

4 In this application the only point that was raised by the petitioner, was that in view of the provisions of O.22, R 10 of the Civil P.C. the petitioner being an assignee of the interest of the original plaintiff, ought to have been permitted to continue the suit instituted by Narsingh Lal since there was no period of limitation for an application under Order 22, Rule 10 of the Civil P.C. There is no doubt that if it is a case which can be said to be covered by the provisions of Order 22, Rule 10 there will be no question of limitation nor would it require going into any evidence with regard to the sufficiency of the cause shown. But in my view, the argument of Mr. Sinha proceeds upon an inherent fallacy. The provisions of Order 22, Rule 10 of the Civil P.C can apply to the facts of a particular case only where any of the previous Rules is not applicable. The effect of any other rule prior to Rule 10 of Order 22 cannot be got rid of by a resort to this rule. It is also well settled that where there are two devolutions of interest, namely, one by death of a party covered by the provisions of Rule 3 and 4 of Order 22 and the other by transfer of his interest prior to his death, the transferee has a right to be imp leaded under Order 22, Rule 10, and the mere death of the party concerned cannot take away this right. That is so, because there is no abatement under Order 22, Rule 10. But the position is entirely different where the suit has already abated on the death of the assignor plaintiff. In such an event, if once the suit has abated, the assignee cannot continue the suit under Order 22, Rule 10 of the Civil P.C. inasmuch as there is no suit pending to be continued at the instance of the assignee. A suit having abated, there is nothing for the assignee to continue. That is the precise scope of Rules

3, 4 and 10 of Order 22 read conjointly....

Conclusion:

13. The position, Therefore, is clear that Order 22 Rule 10 CPC cannot apply in a situation where the suit has abated. And, as observed by K. C. Das Gupta, C.J in Kedarnath Kanoria (supra) it is a contradiction in terms to say that the person on whom the interest has devolved is given leave to continue the suit after the suit has ceased to exist. Since I have already held that the suit abated after 90 days of the date on which the merger became effective, the application under Order 22 Rule 10 filed on behalf of the applicant (Yapi Kredi Bank AG) much after the said abatement is not maintainable. It is perhaps open to Yapi Kredi Bank AG to apply for setting aside the abatement under Order 22 Rule 9(2) CPC, accompanied by an application for condensation of delay. But no such applications have been filed by the applicant and unless and until the suit is pending or the abatement is set aside, no application under Order 22 Rule 10 CPC can be entertained. Consequently, is 8275/2003 is allowed and is 8670/2003 is dismissed.