

(1995) 03 AHC CK 0020

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 942 of 1994

BDA Limited

APPELLANT

Vs

State of Uttar Pradesh and others

RESPONDENT

Date of Decision : 02-03-1995

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 2
Trade and Merchandise Marks Act, 1958 — Section 36
Uttar Pradesh Excise Act, 1910 — Section 11(2)

Citation : AIR 1995 All 277

Hon'ble Judges : P.N. Nag, J;A.P. Misra, J

Bench : Division Bench

Advocate : Sri N.B. Singh, for the Appellant;

Judgement

P.N. Nag, J.—The petitioner by a writ of certiorari seeks quashing of the order dated Sept. 9, 1994 (Annexure 1) passed by respondent No. 2, whereby respondent No. 2 has reviewed his earlier order dated May 17, 1994 and permitted respondent No. 3 to manufacture and sell, inter alia, three brands, namely, Officer's Choice, Calypso Rum and 1000 Guineas.

2. The relevant facts material for determination the controversy, as set up by the petitioner are that one Cruickshank and Company Ltd. (hereinafter referred to as C.L.) by a registered deed of assignment dated Feb. 26, 1991 assigned and transferred in favour of the petitioner (hereinafter referred to as B.D.A. or petitioners) three trade marks/labels in respect of Indian made Foreign Liquor (hereinafter referred to as IMPL), namely, as Officer's Choice, 1000 Guineas and Calypso Rum. Cruickshank and Company Ltd. had conceived and adopted the aforementioned three trade marks/labels. According to the petitioner by the aforesaid deed of assignment dated Feb. 26, 1991 the aforementioned trade marks have been transferred absolutely and for ever in favour of the petitioner and thereby the petitioner has acquired exclusive right to the use of the said trade marks covered by the deed of said assignment. The C.L. had earlier

entered into an agreement dated April 7, 1989 (Annexure B) with respondent No. 3, Karamchand Thapar and brothers (hereinafter referred as K.C.T.) for manufacturing and the sale of these three brands and the other agreement dated Feb. 27, 1989 (Annexure C) for using and adopting trade marks of the brands. According to the petitioner there were various litigations in various courts relating to the ownership of the band and the Supreme Court vide its order dated May 10, 1992 has transferred all the proceedings to Delhi High Court. A Division Bench of Delhi High Court in F.A.O. No. 195 of 1993 and F.A.O. (OS) No. 183 of 1993 by judgment dated April 11, 1994 has held that the petitioner is the owner of the trade marks in question and is entitled to the prayer of injunction sought for. The copy of the judgment has been annexed as Annexure-D.

3. In the proceedings initiated in the City Civil Court Bombay, that court vide its order dated July 27/28, 1992 while granting injunction in favour of the petitioner had made an exception for the goods of K.C.T., respondent No. 3 and the agreement of K.C.T. with C.L. That was obvious for the reason that at the relevant point of time the agreement of C.L. with K.C.T. for five years was subsisting, as the period of five years, as per terms of the agreement had not expired. That Order of injunction of Bombay City Civil Court in favour of petitioner, however, was upheld by Delhi High Court in F.A.O. No. 195 of 1993. However, the matter has been left open as regards the exception carved out in favour of K.C.T. as referred to earlier by Delhi High Court in F.A.O. No. 196 of 1993 and is pending.

4. In a proceeding instituted by the petitioner at Agra to enforce the negative covenant, provided in the deed of assignment aforementioned, during the pendency of the agreement, the case set up by respondent No. 3 is that prior to entering into an agreement of assignment by C.L. with the petitioner on 26th February, 1991, C.L. had entered into an agreement with K.C.T. on April 7, 1989 and Feb. 27, 1989 referred to hereinbefore, for a period of five years permitting K.C.T. to use the said trade marks and the labels therefore in respect of the aforementioned whisky and K.C.T. has been using the said trade mark ever since.

5. Similar stand has been taken in Civil Revision No. 639 of 1993 pending before Delhi High Court, arising out of the proceedings instituted at Bangalore i.e. suit No. 14 of 1993 and it has been averred therein by the respondent that by the agreements dated April 7, 1989 and Feb. 27, 1989 K.C.T. has been allowed to use the trade marks of the aforementioned labels in respect of whisky for five years for consideration and on the terms and conditions contained in those agreements.

6. All the aforementioned proceedings instituted at Agra, Bangalore, City Civil Court Bombay and Delhi High Court, according to the petitioner, clearly demonstrate that respondent No. 3 could use the trade mark and manufacture the whisky brands only during the period provided under the agreement i.e. five years, which expired on April 1, 1994 and thereafter respondent No. 3 had no right to use the trade name and the labels of whisky by efflux of time and the

exception granted in the case of K.C.T. in the City Civil Court Bombay has become in-fructuous on April 1, 1994. By the assignment deed dated Feb. 26, 1991, the petitioner has become the sole exclusive owner of the trade marks/labels and is only entitled to manufacture the aforementioned brands of whisky.

7. According to the petitioner, the agreement dated April 7, 1989 between respondent No. 3 K.C.T. and C.L. under which the right claimed by respondent No. 3 is only for a period of five years. According to clause 24 such agreement shall be initially for a period of five years and may be renewable by mutual consent between the parties for a further period of five years and this agreement shall be effective from 1st April, 1989. This agreement, however, shall be determined upon completion of the period of five years, if a notice of termination is served by either party giving six months' notice prior to the expiry of the period of five years and during the extended period by a notice of termination by either party giving the other party 180 days prior notice to the parties. Upon termination of the agreement, K.C.T. i.e. respondent No. 3 shall cease to be a licensee of registered user of the trade marks of brand names of C.L. and shall not use such trade marks or brand names thereafter. According to the aforementioned clause there is no right of renewal in favour of respondent No. 3 K.C.T. but only a provision for renewal on mutually agreed terms. Since under the aforementioned deed of assignment dated Feb. 26, 1991 the trade marks have become the property of the petitioner and being a successor of C.L., the petitioner alone has exclusive right to renew the agreement dated 7th April, 1989. According to the petitioner the licence has not been renewed and it has come to an end on 1-4-1994. after the expiry of the period of five years. Therefore, respondent No. 1 filed an application before respondent No. 2 Commissioner of Excise, Uttar Pradesh, on Feb. 25, 1994 for grant of permission and renewal of the licence for the year 1994-95 which was disposed of by respondent No. 2 by order dated May 17, 1994 after finding that C.L. had lost all proprietary rights in the trade marks and that respondent No. 3 had no right or title to bottle and manufacture the brands for and on behalf of C.L. after the expiry of the period of agreement. Further permission to manufacture and bottle certain brands on behalf of Shaw Wallace was also on the ground that there was no such licence in favour of respondent No. 3 and Shaw Wallace to manufacture and bottle for and on behalf of M/s. Shaw Wallace and, therefore, there could not be any renewal of such licence. Once the application of respondent No. 3 for grant of permission and renewal for the year 1994-95 was rejected by respondent No. 2, he had no jurisdiction to retrospectively approve the licence for renewal on the basis of certain alleged facts having come into existence subsequent to the application for renewal. Thereafter, respondent No. 3 made a review application in the form of written submission to respondent No. 2 for vacation of the order passed on May 17, 1994 although the case was finally concluded and its application dated 25th Feb. 1994 had been finally disposed of by respondent No. 2 by a speaking order. The copy of the order dated 17th May, 1994, has been annexed as Annexure F. In the application for renewal for

the year 1994-95 no case set out by respondent No. 3 that the agreement between C.L. and K.C.T. dated April 7, 1989 has been renewed. The review application, it appears, was made on June 4, 1994. The hearing of the review application was fixed on 23rd June, 1994 and one Lady Advocate argued before respondent No. 2 on behalf of respondent No. 3 and time was sought on behalf of respondent No. 3 to place all material and for personal hearing and the date was fixed in the case on 25th June, 1994 by respondent No. 2. Meanwhile reply dated 24-6-1994 was filed by the petitioner on 25th June, 1994 in which personal hearing was requested. On 25th June, 1994 respondent No. 2 did not attend the office till 6.30 p.m. due to his official work at Lucknow and the counsel and the Advocate from Delhi remained present for hearing on behalf of the petitioner. Respondent No. 3 was also represented. The representatives of the petitioner as well as respondent No. 3 were informed by the notice of the respondent No. 2 that a fresh date would be intimated to the petitioner indicating the date of the personal hearing. The petitioner, however, did not receive any notice. According to the petitioner while the matter was pending with respondent No. 2, the respondent No. 3 made a representation before respondent No. 1 pursuant to which respondent No. 1 addressed a communication dated August 26, 1994 to the respondent No. 2. The file of respondent No. 2 was also summoned and called for by respondent No. 1. It is not known as to what transpired between respondent No. 1 and respondent No. 2 but ultimately without any further notice to the petitioner, behind its back the impugned order dated Sept. 9, 1994 was passed by respondent No. 2.

8. The petitioner has challenged the impugned order on various grounds, inter alia, that no remedy of review has been provided under the United Provinces Excise Act, 1910, applicable to Uttar Pradesh and the only remedy provided under the aforesaid Act is that of appeal and revision. The power of review cannot be availed of and exercise as a matter of right, but only if the same is specifically conferred by any Act or Statute. The impugned order of respondent No. 2 is without jurisdiction. Further the order has been passed in complete violation of the principles of natural justice as the petitioner was categorically told that the hearing was fixed on 25th June, 1994 which was later on adjourned as the Presiding Officer did not attend the court on that day. But the subsequent date of hearing was never intimated to the petitioner and the impugned order was passed without any notice suddenly on Sept. 9, 1994. While passing the impugned order respondent No. 2 has not taken into consideration the relevant factor which postulates a valid grant of licence and such an order is passed on extraneous consideration and is a biased order. The agreement of 1989 has never been reviewed by C.L. and K.C.T., respondent No. 3 and such a case was never set out while applying for renewal of licence by respondent No. 3 and such a case is an afterthought. There is error apparent on the face of the record and the impugned order is liable to be set aside.

9. In the counter affidavit filed by Satish Chandra Upadhyay, Assistant Excise Commissioner, Law Officer of the Excise Commissioner, U.P. Allahabad, the stand

taken by respondent No. 2 is that the petitioner had misrepresented the fact which led to the passing of the order dated 17th May, 1994. Respondent No. 3 represented against that order and requested for personal hearing, vide his representation dated 4th June, 1994 alleging that the agreement between K.C.T. and C.L. had already been executed in Feb. 1989, prior to the deed of assignment executed between B.D.A. and C.L. and K.C.T. was not a party to the deed of assignment and that the Bombay City Civil Court in its judgment kept the agreement between K.C.T. and C.L. out of the purview of the injunction order. Even Delhi High Court has kept the controversy of agreement between K.C.T. and C.L. aforementioned open which question is directly involved in FAO No. 196 of 1993 and is still pending,

10. Further more the petitioner had suppressed material facts in his representation regarding litigation between the petitioner C.L. and K.C.T. in various courts which are of decisive natures. In these circumstances, respondent No. 2 ordered the matter for personal hearing on 3rd June, 1994. However, the petitioner again submitted a written reply dated 24th June, 1994 which was duly considered before passing the impugned order dated 9th Sept. 1994. Since the petitioner's counsel was also present on 23rd June, 1994 during the hearing of the case before the. Excise Commissioner and was given opportunity to put up his case and he was also permitted to put his written contentions, there was, no need to grant any more time. The written submission dated 24th June, 1994 was considered and thereafter the order was passed on 9th Sept. 1994 by the respondent No. 5. On 23rd June, 1994 the petitioner's counsel Sri N.B. Singh was personally present and he was given full opportunity to explain and put up his case. It was further denied in the, counter affidavit that the order was passed on extraneous consideration and at the behest of the State Government. The State Government vide its letter dated 26th August, 1994 simply instructed the Excise Commissioner, U.P. to take proper decision on the basis of the merit and de-merit of the case. The agreement between K.C.T. and C.L. is still effective and the agreement dated 7-4-1989 has been extended for a period of five years from 1-4-1994. In substance the order passed by respondent No. 2 dated 9th Sept. 1994 has been supported by the counter affidavit.

In the counter affidavit filed by one Om Prakash Dewan, on behalf of respondent No. 3, various preliminary objections/ submissions have been raised and reply on merits also has been filed. According to respondent No. 2, the petitioner has not approached this Court with clean hands and is guilty of suppression very and/or suggestion falsi and, therefore, is not entitled to invoke the writ jurisdiction of this Court. The petitioner has also not availed of the alternative remedy available to him by way of statutory appeal u/s 11(2) of the U.P. Excise Act to the Secretary, State of Uttar Pradesh.

11. The petitioner, as a matter of fact, according to respondent No. 3, has made false allegations that the alternative remedy of appeal would be completely illusory and the order dated 9th Sept. 1994 has been passed by respondent No.

2 in violation of the principle of natural justice and that the respondent No. 2 had renewed the licence under the directions of the appellate authority i.e. Secretary, U. P. Excise upon the communication dated 26th August, 1994 addressed by the Secretary Excise to respondent No. 2. The aforementioned letter dated 26th August, 1994, in fact has conveyed to the respondent No. 2 that he is to take a decision in the matter of his own on consideration of the merits as the matter is quasi judicial in nature. Further more no prejudice has been caused to the petitioner even if it is assumed that the principle of natural justice has been violated. The petitioner also has raised disputed question of facts which can appropriately be decided in appeal and not in the writ petition. Further the grant-renewal of 3rd respondent's FL 3A. licence is a matter exclusively between the concerned authority and the 3rd respondent and the petitioner is not concerned in any manner with the same.

12. The petitioner has suppressed from this court various facts which are of decisive nature. The petitioner had made a representation dated 25th April, 1994, to respondent No. 2 for de-registration of excise/manufacturing licence of the respondent No. 3 in respect of the said three brands and this representation was full of misrepresentations and suppression of material facts. The petitioner has been suppressed the said representation dated 25th April, 1994 and the same has not been annexed with this petition. The petitioner has further suppressed that after making such false representation, the petitioner has secured an ex parte order dated 17th May, 1994 from the respondent No. 2 which has been reviewed by the impugned order. The order dated 17th May, 1994 was passed by respondent No. 2 without even affording the respondent No. 3 any opportunity of being heard and was passed completely behind the back of respondent No. 3. The petitioner having acted thus unfairly by securing the order dated 17th May, 1994 cannot now seek to make any grievance as sought to be made in so far as the order dated 9th Sept. 1994 is concerned. The said order was passed by respondent No. 2 after affording opportunity of being heard and observing the principle of natural justice.

13. According to respondent No. 3 the purported deed of assignment dated 26th Feb. 1991 whereby C.L. has purported to assign the said three trade marks to the petitioner does not affect the right of respondent No. 3. The agreement inter se between C.L. and the respondent No. 3 is prior in point of time and as such purported assignment to which the respondent No. 3 was not a party, cannot be binding on the respondent No. 3. The purported assignment is also bad in view of Section 38 of the Trade and Merchandise Marks Act, 1958 as the purported assignment does not assign the entire goodwill in the business.

14. According to the answering respondent, the petitioner has suppressed from this Court as well as before the respondent No. 2 the various litigations pending in various courts of all over country.

15. Upon the basis of the purported deed of assignment the petitioner filed a suit against C.L. in Bombay City Civil Court, being suit No. 4421 of 1992, and applied

for an injunction against C.L. in order to restrain them from using the labels pertaining to the said three brands. The answering respondent was not party to the said proceedings. The learned Judge who heard the matter granted an injunction against C.L. but exempted the agreement between C.L. and K.C.T. entered into by them in 1989 and thereby exempted respondent No. 3 K.C.T. Further the learned Judge has observed that according to the admission of the plaintiff himself there has been continuation of tie up agreement between the defendant and K.C.T. and, therefore, the agreement between C.L. and K.C.T. continues.

16. Another suit was filed by the petitioner before the Civil Judge, Agra, being suit No. 643 of 1992 against the answering respondent i.e. K.C.T. and C.L. The aforesaid suit was filed for permanent injunction to restrain the respondent No. 3 from using in relation to any IMFL, the said three trade marks/labels or any other mark or marks or labels deceptively similar thereto without obtaining the prior written consent of the petitioner. In this suit the petitioner has claimed itself exclusively and absolutely entitled to the user of the said three trade marks and labels. Further the petitioner has claimed that the agreement inter se between C.L. and the respondent No. 3 cannot defeat the petitioner's exclusive right under the deed of assignment. The petitioner has failed to obtain any interim stay order to the above effect in this suit, although the matter was heard number of times.

17. The petitioner again made another attempt to seek the same relief against the respondent No. 3 by obtaining an ex parte ad interim stay against the use of such label by the respondent No. 3 on behalf of C.L. before the Civil Judge, Bangalore. The ex parte stay granted on 27th March, 1993 by the Civil Judge was stayed in revision by the Bangalore High Court after hearing both the parties.

18. Prior thereto another attempt was made by the petitioner and the petitioner set up two entities, viz., Scotch and Company and Tracster Investment Pvt. Ltd. before the Calcutta High Court to seek and obtain in effect a stay against the manufacturing and marketing of Officer's Choice Whisky by the respondent No. 3 for and on behalf of C.L., within West Bengal. The answering respondent was not made party in this proceeding. An ex part stay order was granted by the Calcutta High Court in favour of the petitioner which was challenged by respondent No. 3 before the Supreme Court and the Supreme Court stayed the operation of that order dated 9th Dec. 1992, and thus permitted the respondent No. 3 to continue manufacturing and marketing under the same label. That order was ultimately confirmed after hearing both the parties at length and the SLP was disposed of accordingly.

19. The petitioner being aggrieved against the said order of the learned Judge of Bombay City Civil Court dated 28th July, 1992 whereby the agreement of respondent No. 3 with C.L. had been exempted from the purview of injunction order, filed an appeal to the Bombay High Court. All litigations pertaining to the said three brands have been transferred by the Supreme Court to Delhi High

Court, including the aforesaid appeal and this appeal has now been numbered as FAO No. 196 of 1993. This appeal together with two other appeals filed by C.L. being FAO No. 195 of 1993 and FAO (OS) 183 of 1993 were taken up for final hearing by Delhi High Court on 24th Feb. 1994. FAO No. 195 of 1993 is directed against the order dated 27/28th July, 1992 passed by the City Civil Court Bombay granting injunction in favour of the petitioner. FAO (OS) No. 183 of 1993 arises from the order of single Judge of Bombay High Court whereby injunction was refused to C.L. The Division Bench of Delhi High Court delinked FAO No. 196 of 1993 from the hearing and kept with matter open. According to the answering respondent, the judgment delivered on 11th April, 1994 does not cover the aforesaid appeal and the exemption granted from the purview of injunction because the agreement of C.L. and K.C.T. continues and this judgment does not prevent the answering respondent from manufacturing the aforesaid three brands.

20. The petitioner having taken recourse to the civil proceeding, is bound to abide by the decision of the various courts in the civil proceedings and it would not be appropriate for the petitioner to invoke the writ jurisdiction of this Court and also for this Court to entertain such petition.

21. The petitioner has also misrepresented that the third respondent's agreement with C.L. is only for a period of five years. The agreement vide clause 24.1 contains a renewal clause enabling the renewal thereof for a further period of five years. There being no injunction in respect of agreement, C.L. and the respondent No. 3 i.e. K.C.T. were entitled to renew the same and which accordingly was done.

22. The petitioner has falsely alleged that the personal hearing was fixed on 23rd June, 1994 by the respondent No. 2. In fact from the file it is apparent that the petitioner's counsel Sri N.B. Singh has been heard on 23rd June, 1994 and he has made submission on that day on behalf of the petitioner. The petitioner was given notice of hearing, has remained present at the bearing and has participated in the hearing. It appears that notice of hearing was issued by the Excise Commissioner by fax on 16th June, 1994 and from 16th June, 1994 upto 23rd June, 1994 the petitioner did not take any steps to take the copy of the representation made by the respondent No. 3. In fact the answering respondent had made endorsement of the stand taken by the Excise Commissioner in this respect. The allegation of mala fide on the part of the respondent No. 2 are devoid of any merit. The order has been passed by the respondent No. 2 after giving opportunity to both the parties and after hearing both the parties on the relevant considerations, after forming its own opinion and without being guided by the higher authorities. Since the earlier order dated 17th May, 1994 was procured by the petitioner by misrepresentation of facts and fraud, the respondent No. 2 was within its legitimate right to review its own order.

23. In the rejoinder affidavit the case set up by the respondents Nos. 2 and 3 has been controverted and the allegations made in the writ petition have been

reiterated. It has been denied that the petitioner is guilty of suppression veri and/or suggestion falsi. Further since the impugned order has been passed by the respondent No. 2 by way of review, which is not maintainable and the same having been passed in violation of the principle of natural justice, the said order is void and no appeal, can lie from an order which is void and non est. Further the right of appeal in the facts and circumstances of the case is an illusory. In the rejoinder affidavit the petitioner has highlighted that Delhi High Court in the judgment passed in FAO No. 195 of 1993 and FAO (OS) No. 183 of 1993 has upheld the validity of the deed of assignment entered into by C.L. with the petitioner. In this judgment it has also been concluded that the goodwill has also been assigned in the deed of assignment to the petitioner by C.L. and the matter cannot be reopened and re-agitated by respondent No. 3. Although in FAO No. 196 of 1993 Delhi High Court has left the matter open but the agreements entered into by C.L., and K.C.T. on April, 7, 1989 and Feb. 27, 1989 have expired on April, 1994 and after the expiry of the aforesaid agreements, no agreement survived between respondent No. 3 and C.L. as the latter has been held by Delhi High Court not the owner or proprietor of the said three trade marks. The exception which was carved out by the learned Judge, City Civil Court Bombay in its judgment dated 27th July, 1992 was confined to the alleged agreement which were at that time subsisting between C.L. and K.C.T. The said agreements have expired due to efflux of time. The exception, therefore, has become infructuous. Further it has been highlighted that there has been no renewal of the agreements by respondent No. 3 with C.L. and the documents have been fabricated with a view to demonstrating that there has been renewal of the agreement of 1989.

24. Mr. G. Ramaswami, on behalf of the petitioner, submitted that the impugned order of review is void and non est being in violation of the principles of natural justice. In the review application filed by respondent No. 3, the hearing was first fixed on 23rd June, 1994. One lady Advocate appeared before respondent No. 2 and sought time to place all the materials and for personal hearing and thereafter the case was fixed for 25th June, 1994 by respondent No. 2. Meanwhile the reply was also filed by the petitioner. On 25th June, 1994 respondent No. 2 did not attend the office till 6.30 p.m. due to his official work at Lucknow and the counsel and Advocate from Delhi remained present there for hearing on behalf of the petitioner. In the written submission filed by the petitioner and the various subsequent letters addressed to respondent No. 2 wherein again personal hearing was requested. However, respondent No. 2 by the impugned order dated Sept. 9, 1994 without further notice to the petitioner, reviewed his order dated 17th May, 1994 and granted licence in favour of respondent No. 3 permitting it to manufacture and sell under the approved brands for and on behalf of Cruakshank & Company Ltd. Since respondent No. 2 could not hear the matter on 25th June, 1994 because of the official engagements, he should have given further date for personal hearing or at least he should have considered the written statement filed by the petitioner on 25th

June, 1994.

25. It was next submitted that there is no remedy, power or jurisdiction of review provided under the United Provinces Excise Act, 1910 applicable to the whole of Uttar Pradesh or any other Act, the order of review, therefore, is wholly without jurisdiction and a nullity. As is apparent from the impugned order, respondent No. 2 has simply reviewed the order on the ground that there are many instances that in the interest of justice on the basis of solid arguments the authorities have reviewed the orders and as such he can also review the order. Respondent No. 2 now cannot be permitted to take the plea that he has inherent power to recall the order as the earlier order was obtained by the petitioner by misrepresentation or practising fraud on him.

26. The next contention raised by the counsel for the petitioner was that the petitioner had reasons to believe that the respondent No. 3 i.e. K.C.T. made a representation to respondent No. 1 i.e. State Government, on the basis of which respondent No. 1 addressed a communication dated August 26, 1994 to respondent No. 3. The file of respondent No. 2 was also summoned and called for by respondent No. 1. After the inspection of the file, certain relevant documents (Annexures-1 to L) have been placed on paper book Vol. II by the petitioner. It appears from the annexures that in respect of dispute between M/s. Karam Chand Thapar & Company Ltd. and B.D.A. vide letter dated 15th July, 1994 the Government wanted to have certain information with a view to intimating the same to the Chief Minister, which was not received and thereafter the letter dated 1st August, 1994 was sent by the under Secretary, Govt. of Uttar Pradesh to the Excise Commissioner, U.P. Allahabad inviting attention of the earlier letter dated 15th July, 1994 and that respondent No. 2 was asked to furnish the desired information in respect of the dispute with his opinion for sending the same to the Chief Minister. Thereafter respondent No. 2 sent the comment to the Excise Commissioner vide his letter dated 9th August, 1994 finally the Under Secretary to the Government vide letter dated 26th August, 1994 informed the Commissioner that the matter being quasi judicial in nature, it is not relevant for the Government to issue direction on administrative level. Respondent No. 2 should decide the matter on merits/de-merits of the case and on the basis of the written statement and oral submissions put forth by M/s. Karam Chand Thapar & Company Ltd. and B.D.A.

27. In view of the aforementioned facts and circumstances of the case, if taken cumulatively according to the petitioner create in the mind of a reasonable man the impression that there is likelihood of bias in the mind of respondent No. 2, the Enquiring Officer and that a person will not get justice from respondent No. 2. In order to render the order illegal and void should be likelihood of bias and actual bias need not be proved.

28. It was lastly contended that there is apparent error on the face of it, and is liable to be set aside.

29. The subject matter of dispute has been under litigation in various courts, namely, Bombay, Bangalore, Agra and since now transferred to Delhi High Court, the stand, of K.C.T. respondent No. 3, has been that it entered into agreement dated 7th April, 1989 and Feb. 27, 1989 with C.L. for a period of five years with effect from 1st April, 1989 prior to the deed of assignment dated Feb. 26, 1991 entered into by C.L. with the petitioner. The period of five years have elapsed on 1st April, 1994 by efflux of time. After the expiry of the aforesaid agreement, no agreement survives between respondent No. 3 and C.L. The exception carved out in favour of K:C.T. by the learned Judge, City Civil Court Bombay exemption it from the purview of injunction has expired by efflux of time and has become infructuous.

30. The case on behalf of respondent No. 3 has been argued by Mr. Singhvi and Mr. Shiraz Rahimtoola and on behalf of the State by the Standing Counsel. The Standing counsel has endorsed the stand of respondent No. 3. The counsel for respondent No. 3 has vehemently argued that the petitioner has not come to the court with clean hands and is guilty of suppression veri and/or suggestion falsi. The petitioner had filed civil suit in various courts, namely, Bombay, Agra, Bangalore and Calcutta and prayed for grant of injunction against respondent Nos. 3 and C.L. restraining them from manufacturing the aforementioned brands or using the trade marks, but has failed to obtain orders, from any of the court in its favour and against respondent No. 3 which facts have deliberately been suppressed not only from this Court, but also in representation dated 25th April, 1994 addressed to respondent No. 2.

31. It was contended by the counsel for the respondents that the impugned order had not been passed in violation of the principles of natural justice. In fact the petitioner has made misrepresentation before this Court and this itself is a ground for dismissal of the writ petition. As a matter of fact, respondent No. 2 has fixed 23rd June, 1994 for personal hearing and the counsel for the petitioner on that date was heard, However the petitioner (B.D.A.) submitted a written reply dated 25th June, 1994 on 25th June, 1994 which was duly considered by respondent No. 2 before passing the impugned order dated September 9, 1994, Since the petitioner's counsel was also present on 23rd June, 1994 during the hearing of the case before the Commissioner and was heard, there was no need to grant any further hearing. The written submissions were, however, also considered by respondent No. 2 before passing the impugned order.

32. It was again contended that the Court or Tribunal has inherent power to recall its orders, if such orders have been secured by practising fraud and misrepresentation on it. In the present case in the representation filed by the petitioner dated 25th April, 1994 before respondent No. 2, gross misrepresentation of facts have been given. The petitioner has purposely and deliberately fact that it had failed to secure any order of injunction in its favour and against respondent No. 3 from the court of Bombay, Agra, Bangalore and Delhi High Court. It had suppressed the material fact from respondent No. 2

about the exception carved out in favour of K.C.T. by the Bombay City Civil Court exempting it from the purview of the injunction order granted in favour of the petitioner.

33. It was next submitted that in the facts and circumstances of the case no question of likelihood of bias can arise in the mind of respondent No. 2 in deciding this matter. The letter dated 26th August, 1994 written by the Under Secretary to the Excise Commissioner clearly demonstrates that the State Government is not interested in the decision either way and it was made clear that in quasi judicial matter, like this, the State Government should not issue direction on administrative level of the administration. Respondent No. 2 should decide the matter on the merit and de-merits of the case and on the basis of the legal argument put forward by K.C.T.

34. On merit it was strenuously urged that no injunction was issued in respect of the agreement entered into by Cruickshank & Company Ltd. and respondent No. 3 i.e. K.C.T. dated 7th April, 1989 and February 27, 1989 and the City Civil Court Bombay while issuing injunction in favour of the petitioner has carved out exception in favour of K.C.T. exempting it from the purview of the injunction so issued and this matter has been left open by Delhi High Court in FAO No. 196 of 1993 where the proceedings have been transferred by the Supreme Court. The matter is still pending in Delhi High Court. Further more, according to the agreement entered into by respondent No. 3 with C.L., respondent No. 3 has been given a licence to manufacture the aforementioned three brands for a period of five years. According to Clause 24(i) "this agreement shall be initially for a period of five years and may be renewable by mutual consent between the parties for a further period of five years. This agreement will be effective from 1st April, 1989." This agreement, according to respondent No. 3 has been renewed further for a period of five years, before the expiry of the period of five years which is apparent from the letter dated 21st March, 1994 filed by respondent No. 3 i.e. K.C.T., therefore the tie up agreement by respondent No. 3 K.C.T. with C.L. vide agreements dated 7th April, 1989 and February 27, 1989 will continue to operate and the right to manufacture is not lost by the agreement entered into by Cruickshank & Company (C.L.) with the petitioner on 26th February, 1991. It was reiterated time and again that since the agreement has been renewed for another period of five years and respondent No. 3 has been exempted from the order of injunction by the Bombay City Civil Court and the matter is still pending in the FAO No. 196 of 1993 in Delhi High Court, respondent No. 3 was absolutely within its right to renew the licence, which is done.

35. In addition to the preliminary submission made on behalf of the respondents that the petitioner is guilty of suppression veri and/or suggestion falsi, further preliminary submissions have been made in as much as that the petitioner has not availed of the alternative remedy and the matter in controversy being seized by the Civil Court, it would not be appropriate for this Court to entertain such

petition and the decision of the Civil Court which are pending now in the High Court should be awaited.

36. At the very outset we propose to deal with the preliminary submissions made on behalf of the respondent and also on merits. The respondents, as stated above, have vehemently, time and again, and repeatedly canvassed before the Court that the petitioner has not come with the clean hands and is guilty of suppression of material fact which is of decisive importance in the case. The learned counsel has repeatedly pointed out the various litigations pending in various courts aforementioned and which has been transferred to the High Court. His main thrust of argument is that the petitioner has suppressed from the Court that City Civil Court Bombay had made an exception for the goods of M/s. Karan Chand Thapar and Brothers (K.C.T.) and has specifically excepted the agreement entered into between K.C.T. and C.L. as discussed earlier. Had the exception carved out by the Bombay City Civil Court exempting the agreement of C.L. with the petitioner from the purview of injunction brought to the notice and highlighted before this Court, the writ petition would not have been entertained by this Court. Further the appeal FAO No. 196 of 1993 touching this controversy is pending in Delhi High Court and the matter has been left open, which fact has also been suppressed from this Court. This submission is completely devoid of force. A bare perusal of para 7 and paragraph 16 clause (M) of the writ petition would demonstrate that the petitioner referred to an exception made by the City Civil Court, Bombay for the goods of K.C.T. Further the judgment of Delhi High Court dated April 11, 1994 has been annexed as Annexure-D to the writ petition. The judgment clearly reveals that FAO No. 196 of 1993 dealing with the controversy relating to the exception made in respect of agreement of K.C.T. with C.L. has been left open and that this appeal is still pending.

37. The learned counsel for the respondent has further strenuously urged that the petitioner has initiated various proceedings in different parts of the country. In the proceedings initiated in the City Civil Court, Bombay, Agra, Bangalore and now Delhi High Court were all such proceedings have been transferred by the Supreme Court, he has failed to get an injunction order against the respondent No. 3 K.C.T. Further, proceedings were initiated in respect of this controversy at the behest of the petitioner in Calcutta High Court where initially ex parte injunction was issued by that Court against K.C.T. although it was not a party in those proceedings. In SLP filed by respondent No. 3 K.C.T. the Supreme Court stayed the operation of that order till the stay matter was heard and finally decided by the learned single Judge of Calcutta High Court. These facts have been suppressed not only from this Court but also before the respondent No. 2 by the petitioner. This submission of the learned counsel for the respondent again has no force. Admittedly in Calcutta High Court the petitioner is not a party. In the petition there is a clear mention of the litigation between the parties initiated in the Bombay City Civil Court, Agra, Bangalore and Delhi High Court. In this context it is suffice to say that the matters relating to injunction between the petitioner and respondent No. 3 K.C.T. are still pending before Delhi High Court

which facts have been clearly placed by the petitioner in the writ petition and also are apparent from the judgment of Delhi High Court filed as Annexure-D by the petitioner. It may be noticed at this stage that two FAO No. 195 of 1993 and 183 of 1993 have been disposed of by Delhi High Court whereby the validity of the deed of assignment entered into by L.C. with the petitioner has been upheld and injunction has been granted in favour of the petitioner and against C.L. in such circumstances no question of suppression of material facts of decisive importance arises.

38. Suppression of the representation of the petitioner dated April 25, 1994 on the basis of which and earlier order was passed by the respondent No. 2 on May 17, 1994 as alleged is also of no consequence as these facts are not so material which can be of decisive importance. However, it may be noticed that even the representation dated April 25, 1994 has been mentioned as Annexure-G and H to the writ petition.

39. The next submission made by the respondent that the petitioner has not availed of the alternative remedy of appeal before the State Government is equally devoid of force. In the facts and circumstances of the case that the State Government has already looked into the matter and at one stage asked for the comments of the respondent No. 2 about this controversy which possibly can create a suspicion in the mind of a litigant about the likelihood of a bias and such a submission was in fact raised by the learned counsel for the petitioner. Although we may not consider it necessary to decide this question finally and would like to keep this matter upon as would be discussed hereinafter, but we consider it safer in the interest of justice not to relegate the petitioner to avail of the alternative remedy of appeal before the State Government. Even otherwise the existence of alternative remedy is not a complete bar and does not oust the jurisdiction of the court to the entertainment of the writ petition. It is a self imposed rule which courts have laid down exercise of their discretion.

40. The third preliminary submission raised by the learned counsel for the respondents that the matter in controversy in FAO No. 196 of 1993 is pending in Delhi High Court and the various litigations in this regard have also been transferred to Delhi High Court. As such it would not be appropriate for this Court to entertain and decide this writ petition. There is no force in this submission as well. In this context suffice it to say that in the litigation aforementioned the controversy of renewal and continuation of agreement of C.L. and K.C.T. dated 7th April, 1989 and 27th February, 1989 after the expiry of the period of agreement on 1-4-1994 is not involved and such an issue cannot be decided in those proceedings.

41. We may now deal with the submission of the counsel addressed on merits of the case as already noticed earlier. The crucial question requires determination in the case is whether there has been error apparent on the face of the record or a clear violation of law which has led to passing of the impugned order. By the impugned order dated 9th September, 1994 the earlier order passed by the

respondent No. 2 dated May 17, 1994 has been reviewed and thereby FL -- 3A licence to K.C.T. has been reinstated and renewed for the year 1994-95. Earlier restrictions imposed on K.C.T. vide order dated May 17, 1994 have been withdrawn with immediate effect. In the earlier order dated May 17, 1994 passed by respondent No. 2, K.C.T. was ordered not to bottle the aforementioned three brands of C.L. In this order licence of K.C.T. for bottling Shaw Wallace brand of IMFL was not renewed on the ground that K.C.T. had never any licence for bottling the same earlier. The respondent No. 2 vide impugned order dated September 9, 1994 has reviewed his earlier order dated May 17, 1994 mainly on the ground that the right to bottle the three brands of C.L. with K.C.T. was on the basis of the agreement executed between them in February, 1989. Before the expiry of five years being validity period of this agreement, the second agreement was made in February, 1991 between C.L. and B.D.A., according to which the right of bottling the aforesaid three brands was given to B.D.A. The respondent No. 2 has found that in the agreement of February 26, 1991 between C.L. and B.D.A., K.C.T. was not a party and that further the agreement of February 1989 executed between K.C.T. and C.L. has been timely renewed vide letter dated 3I-3-1994 for a further period of five years in accordance with clause 24 of the original agreement of February, 1989. In such a situation the earlier agreement of 1989 shall continue to operate in spite of the deed of assignment of February, 1991 and consequently K.C.T. shall continue to have the right to the bottling of three brands of whisky on behalf of C. L. The other ground on which the licence has been granted to K.C.T. is that Bombay City Civil Court in suit No. 4421 of 1992 dated 27th/28th July, 1992 has kept K.C.T. outside the ambit of injunction order and its agreement of February, 1989 with C.L. The appeal filed by the petitioner against this order of Bombay City Civil Court has been transferred to Delhi High Court which has been numbered as FAO No. 196 of 1993 and which is still pending, which shows that the order of City Civil Court, Bombay has not been superseded. The petitioner has also failed to obtain interim orders from other courts at Bombay, Bangalore etc.

42. There has been a lot of controversy between the parties about the renewal of the agreement of April 7, 1989 entered into between C.L. and K.C.T. in accordance with Clause 24 of that agreement with effect from April 1, 1994. According to the petitioner this renewal agreement vide letter dated March 31, 1994 has been relied upon, for the first time during the pendency of Review petition before the respondent No. 2. Such a document was not relied upon, earlier in various proceedings before West Bengal Excise Directorate, Excise Commission, Goa etc. after March 31, 1994. The so-called extension/renewal appears to be an afterthought and fabrication. On the other hand the learned counsel for the respondent submits that such a document is a genuine document and there should be no reason why such a document should not be relied upon. Whether or not this document is fabricated or a genuine involve disputed question of fact and cannot be decided in this writ petition and we are assuming for argument sake that the agreement of 7-4-1989 between K.C.T. and C.L. has

been factually renewed for a further period of five years with effect from April 1, 1994.

43. The next crucial question which arises for consideration is whether it is permissible in law for C.L. to renew the agreement with K.C.T. after the expiry of period of five years as provided in the agreement dated 7-4-1989 and thereby allow the K.C.T. to further manufacture the aforementioned three brands of whisky on behalf of C.L. and use the trade mark/label of such brands for a period of five years in the face of deed of assignment dated February 26, 1991 between C.L. and the petitioner B.D.A. In case it is found that the C.L. by deed of assignment dated 26-2-1991 has transferred all its proprietary rights, title and interest in the trade marks to the petitioner B.D.A. and left with no interest with it whatsoever, in that situation the licence in our opinion legally cannot be renewed vide letter dated 31-3-1994 as none can as a rule transfer to another what he himself is not entitled to. A transferee cannot have a better title than what the transferor himself has in the thing transferred. In this context three documents, which have been admitted by both the parties, are relevant to be noticed. (1) Deed of assignment dated 26-2-1991 between C. L. and the petitioner B.D.A. (2) Manufacturing agreement dated 7-4-1989 between K.C.T. and C.L. (3) User-ship agreement dated 27-2-1989 between C.L. and K.C.T.

44. The relevant clauses of the deed of assignment may be reproduced below :--

"This deed of assignment made at Bombay on this 26th day of February, 1991 between Cruickshank and Company Limited, a company incorporated and established under the Companies Act, 1956, having its Registered office at 4/5, Bankshall Street, Calcutta-700001 and branch office at No. 3 Walchand Hirachand Marg, Bank of Baroda Building, 2nd Floor, Ballard Estate, Bombay 400038, hereinafter referred to as "The Assignor" (which term and expression shall unless repugnant to the context or meaning thereof be deemed to mean and include its successors administrators, executors and assigns) of the one part and B.D.A. Breweries & Distilleries Limited, a company incorporated and established under the Companies Act, 1956 having its Registered office at Udyog Bhavan, 29, Walchand Hirachand Marg, Ballard Estate, Bombay 400038 hereinafter referred to as "The Assignee" (which term and expression shall unless repugnant to the context or meaning thereof be deemed to mean and include its successors, administrators, executors and assigns) of the other part.

XXX XXX XXX XXX

To assign and transfer all the benefits titles, interests and rights including the common law rights along with the goodwill of the business relating to the said goods bearing the said trade marks for which the said trade marks have been used; and whereas the Assignee being desirous of acquiring the said Trade marks along with the goodwill of the business relating to the said goods bearing the said trade marks and the entire rights, titles, interests and benefits vested in the said Trade marks Applications for the commercial expediency and diverse other

reasons has agreed to acquire the said Trade marks along with the goodwill of the business relating to the said goods bearing the said trade marks in consideration of the payment of rupees fifteen lacs and covenants hereinafter contained and on the part of the parties hereto to be observed and performed.

In consideration of the payment of the sum of Rs. 15 lacs by the Assignee to the Assignor, the receipt of which is acknowledged by the Assignor and the mutual covenants and obligations herein given and undertaken by and between the parties hereto, the Assignor as the owner Doth hereby Assign and transfer unto the Assignee.

a. All the proprietary rights including common law rights, titles, interest and benefits in and to the said Trade marks along with the goodwill of the business relating to the goods in respect of which the said Trade marks are used.

b. All the benefits, rights, titles and interests vested in the said Trade marks Application, this assignment shall operate to vest the same in the name of assignee together with the goodwill of the business relating to the goods and to hold the same unto the assignee absolutely from the date hereof in perpetuity in consideration of the payment of the said sum of Rupees 15 lacs by the Assignee to the Assignor the receipt of which is acknowledged herein by the Assignor."

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6. The assignor further covenants that the Assignee shall have and enjoy quite and absolute possession of the said Trade marks being the subject matter of the said Trade mark applications uninterrupted or disturbed in any manner whatsoever by the Assignor or any person claiming under or through or in trust or the assignor.

7. The assignor agree and undertakes that the Assignor shall not use the said trade marks and/or any other marks deceptively similar in any manner whatsoever to the said trade marks being the subject matter of the said trade mark application in respect of the goods for which the said Trade marks have been used by the Assignor and/or in respect of the goods for which the said Trade mark applications will be granted registration under the Trade and Merchandise Marks Act, 1958."

45. The aforementioned clause of the deed of assignment in particular and other clause of assignment (Annexure-A) leave no manner of doubt that C.L. being proprietor of the aforementioned trade marks/labels for a consideration of Rupees 15 lacs has transferred to the petitioner B.D.A. all proprietary rights including common law rights, titles interests and benefits in and to the said Trade marks along with the goodwill of the business relating to the goods in respect of which the said Trade marks are used. It further provides that the C.L. will hold the Trade marks unto B.D.A. absolutely in perpetuity for a consideration of rupees 15 lacs. This finding, however, is without prejudice to or adjudication to be made in the pending cases in Delhi High Court.

46. It may further be noticed that there is a negative covenants provided in the agreement that C.L. shall not use said trade marks and/or any other marks deceptively similar in any manner whatsoever to the said trade marks being the subject matter of the said trade mark Application in respect of the goods for which the said Trade marks have been used by the Assignor and/or in respect of the goods for which the said Trade Mark Applications will be granted registration under the Trade and Merchandise Marks Act, 1958, This makes the intention of C.L. further clear that it has transferred all the proprietary rights on trade marks along with the business of manufacturing and sale of IMFL products to the B.D.A. petitioner.

47. The validity of this agreement was considered by Division Bench of Delhi High Court in the judgment dated 11-4-1994 in FAO No. 195 of 1993 and FAO (OS) No. 183 of 1993. FAO No. 195 of 1993 was directed against the order dated 27/28th July, 1992 passed by Smt. R. S. Dalvi, Judge, City Civil Court, Bombay granting an ad interim injunction in favour of B.D.A. and against C.L. restraining C.L. from in any manner directly or indirectly using in relation to any Indian made Foreign Liquors the trade marks and/or labels mentioned in the deed of assignment or any other mark or marks or labels deceptively similar thereto. FAO (OS) No. 183 of 1993 arises from an order dated 25th January, 1993 passed by a learned single Judge of the Bombay High Court in the suit filed by C.L. against B.D.A. and others refusing to grant an ad interim order in favour of C.L. After having considered the matter the Court found that the deed of assignment clearly records the assignment of the three trade marks together with goodwill attached thereto and the business of manufacturing and sale of IMFL products. It further enjoins C.L. to hold the same (the trade marks) unto B.D.A. absolutely. The Court has further held that prima facie on the basis of the material on record at this stage B.D.A. has been able to satisfy the Court that the Deed of Assignment was duly executed between the parties and was also acted upon and therefore relief on its basis should flow. Therefore the B.D.A. is entitled to the ad interim relief sought by its prayer "A" of notice of motion No. 3761 of 1992 in the Bombay City Civil Court which is to the following effect :--

"That the defendants by themselves their servants and agents or anyone claiming by or under them or otherwise howsoever be restrained by order and injunction by this Hon'ble Court from in any manner, directly or indirectly, using in relation to any Indian made foreign liquors the said trade marks and/or labels mentioned in Annexures to the Deed of assignment Exhibit "A" hereto or any mark or marks deceptively similar thereto."

48. The aforementioned two appeals were decided accordingly. However, FAO No. 196 of 1993 dealing with the exception made in the impugned judgment in favour of C.L. regarding this agreement with K.C.T. was not decided and is still pending and the matter has been left open.

49. The other agreement is the manufacturing agreement dated April 7, 1989 between K.C.T. and C.L. This agreement relates to the manufacturing of three

brands. The second agreement is the usership agreement dated 27th February, 1989 permitting K.C.T. to use the said three trade marks. On cumulative reading of the clauses of both these agreements, it is clear that C.L. is the sole proprietor of the trade marks of the aforementioned brands and K.C.T. has no right, title or interest therein and shall not at any time claim any right whatsoever to use the aforementioned brands and labels. C.L. has authorised K.C.T. as a licensee under user-ship agreement to manufacture and market the aforementioned brands. In Clause 8 of the usership agreement, it has been provided that this agreement shall be co-existent with that of the Manufacturing Agreement and shall terminate upon the termination/determination of the manufacturing agreement for any reason whatsoever. The manufacturing agreement has been given effect to with effect from 1st April, 1989 and duration of such agreement is for five years, as such both the agreements are to expire on 1st April, 1994. Respondent No. 3, K.C.T., are claiming their rights under Clause 24 of the Manufacturing Agreement. The relevant extract of this clause is quoted below :--

"24. (i) This agreement shall be initially for a period of five years and may be renewable by mutual consent between the parties for a further period of five years. This agreement will be effective from 1st April, 1989.

(ii) Notwithstanding anything contained in clause (i) hereof this agreement shall cease and stand determined :

(a) Upon completion of the period of five years if a notice of termination is served by either party by giving six months" notice prior to the expiry of the period of five years.

(b) at any time during the extended period a notice of termination is given by either party by giving the other party 180 days" prior notice in writing by registered post sent to the address of such other party without giving any reason whatsoever."

50. The case of respondent No. 3 is that though by a purported Deed of Assignment dated 26th February, 1991 C.L. has purported to assign the said three trade marks, namely, Officer's Choice, Calypso and 1000 Guineas to B.D.A., the purported deed of assignment does not affect their rights. The agreement dated 27th February, 1989 inter se between C.L. and K.C.T. is prior in point of time to the purported Deed of Assignment and as such, any purported assignment to which K.C.T. are not parties nor to which their consent was taken cannot be binding on them.

51. According to the learned counsel for the respondents the agreement dated 7-4-1989 subsists as the same has been renewed for a further period of five years vide letter dated 21-3-1994 in accordance with Clause 24(i) of the agreement and this agreement will continue to operate and that the right to manufacture is not lost by the agreement entered into by C.L. with the petitioner on 26-2-1991. No doubt Clause 24(i) provides for renewal of the agreement by mutual consent between the parties for a further period of five years but as

already held that after deed of assignment C.L. has transferred all its proprietary rights including common law rights, titles, interest and benefits and to the said Trade marks along with the goodwill of the business relating to the aforementioned brands of whisky. The validity of the agreement has been upheld by Delhi Court. Since no proprietary rights including common law rights are left with C.L. it has no power to renew the earlier agreement of 1989 with K.C.T. after the expiry of the period of those agreements i.e. after 1-4-1994. It is settled principle of law that nobody can as rule transfer to another what he himself is not entitled to.

52. Once it is held that all proprietary rights of C.L. has been transferred to the petitioner B.D.A., the respondent No. 2 could not have permitted the respondent No. 3 K.C.T. to manufacture for C.L. In the the case reported in Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd., . it has been held that in respect of trade marks, there can be only one mark, one source and one proprietor. It cannot have two origins.

53. Viewed from another angle in the deed of assignment between C.L. and B.D.A., C.L. has been referred to assignor (which terms and expression shall unless" repugnant to the context or meaning thereof be deemed to mean and include its successors, administrators, executors and assigns). After the deed of assignment C.L. is left with no right, title. and interest in the trade marks and B.D.A. assignee became its successor and as such it alone has the right to renew the agreement and not the C.L.

54. However, the learned counsel for the respondents placed reliance on Clause 24(i) of the Manufacturing agreement dated 7-4-1989 and submitted that this clause provided for renewal of agreement by mutual consent between the parties for a further period of five years and under this clause the parties had every right to renew the contract which in fact was renewed. This clause of the contract cannot be assigned by the deed of assignment as this clause confers right and obligation between the parties for renewal of the contract. Reliance was placed on certain observations of Supreme Court in the case of Kharda & Co. v. Raymon & Co. (India) reported in AIR 1962 SC 1810 that as a rule obligations under contract cannot be assigned. Rights, however, to the contract are assignable. The facts of that case are entirely different and has no relevance to the instant case. Suffice it to say that this case relates to the assignment of contract where rights and obligations of the parties were involved in the subsisting contract. The clause of renewal contemplates the renewal of contract for future. The contract may be renewed or may not be renewed or may be renewed with modification. The clause of renewal provides for renewal by mutual consent between the parties. This clause does not create any obligation or rights in either parties for renewal of such agreement.

55. Learned counsel for respondent No. 3 again attempted to support the order of respondent No. 2 by submitting that FAO No. 196 of 1993 dealing with this controversy is still pending in Delhi High Court. This appeal arises from the order

dated 27/28th July, 1992 passed by Bombay City Civil Court in suit No. 4421 of 1992 and the learned Judge in a suit pertaining to the said three brands filed by the petitioner on the basis of deed of assignment, granted injunction against C.L. but specifically exempted from the purview of the said injunction the agreement inter se between C.L. and the respondent No. 3 although the respondent No. 3 was not a party in the suit.

56. Being aggrieved by the said order i.e. specifically exempting respondent No. 3 from the purview of the said injunction, the petitioner filed an appeal in Bombay High Court. All litigations pertaining to the said three brands have been transferred by the Supreme Court to the Delhi High Court including this appeal i.e. FAO No. 196 of 1993 dealing with this controversy.

57. The agreements between K.C.T. and C.L. were for a period of five years. Both the agreements expired on April 1, 1994 and after the expiry of the aforesaid agreements no agreement has survived between C.L. and K.C.T. and that C.L. has been held not to be the owner or proprietor of the said trade marks/label. The exception which was carved out by the City Civil Court Bombay in its judgment dated 27/28th July, 1992 was only confined to the agreement which was at that time subsisting between C.L. and K.C.T. and in view of the fact that the agreement having expired by efflux of time on April 1, 1994, the exception has become infructuous and C. L. is or was not in a position to renew the agreement at any time after its expiry since after February 26, 1991 B.D.A. was the sole and exclusive owner of the trade names/ labels and entitled to manufacture and market the same exclusively. In the said FAO No. 196 of 1993 neither there is any pleading nor any issue pertaining to the renewal of document dated 31-3-1994 and the pendency of the case would have no effect for a cause of action for a subsequent period.

58. It is thus apparent that the impugned order has been passed by respondent No. 2 in clear violation of law and there is apparent error on the face of the record and the impugned order is liable to be set aside.

59. Further respondent No. 2 by setting aside the earlier order has acted clearly in violation of law and has committed error apparent on the face of the record. In the earlier order, which has been reviewed, licence (application) of K.C.T. for renewal of such licence for bottling Shaw Wallace brand of IMFL was refused on the ground that K.C.T. had never any such licence earlier for bottling Shaw Wallace brand. Although no review has been filed against this finding, this part of the order also has been reviewed which is another error apparent on the face of the record. The submission of Mr. Ramaswamy is. therefore, well founded.

60. Since the petitioner succeeds on the aforementioned grounds on merits, it is not necessary to deal with other submissions made by the counsel for the petitioner.

61. In the result the writ petition succeeds and is allowed with costs. The impugned order dated 9th September, 1994 is set aside and the order dated 17th

May, 1994 stands restored.

62. Petition allowed.