
(2015) 04 BOM CK 0160

In the Bombay High Court

Case No : Appeal No. 54 of 2015 in Notice of Motion No. 3567 of 2011 in Suit No. 2932 of 2011 No. 1

Darius Rutton Kavasmaneck

APPELLANT

Vs

Gharda Chemicals Limited and Others

RESPONDENT

Date of Decision : 07-04-2015

Acts Referred:

Patents Act, 1970 — Section 25(1)(a), 64(1)(a)(b), 64(1)(b), 64(a)(b)
Trusts Act, 1882 — Section 56, 88

Citation : (2015) 5 BomCR 162 : (2015) 64 PTC 76

Hon'ble Judges : N.H. Patil, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Virendra Tulzapurkar, Senior Advocate, Mayur Khandeparkar, Shriraj Dhru and Meenal Desai i/b. Dhru and Co., for the Appellant; Nishad Nadkarni and Vaibhav Keni instructed by Legasis Partners, Advocates for the Respondent

Final Decision : Dismissed

Judgement

N.H. Patil, J.—Admit.

By consent heard finally.

2. The appellant is the original plaintiff in Suit No. 2932/2011. The suit is filed for derivative action by the appellant-plaintiff as minority shareholder. The defendant No. 2-Mr. Keki Hormusji Gharda is the Chairman and Managing Director of defendant No. 1- Company i.e. Gharda Chemicals Limited. Defendant No. 3 is the wife of defendant No. 2 and defendant Nos. 4 and 5 are the directors of defendant No. 1. Defendant No. 2 happens to be the uncle (mother's brother) of the plaintiff. The relations between uncle and nephew are strained as borne out from the pleadings and the arguments advanced during the course of hearing.

3. The plaintiff's grievance, in brief, is that defendant No. 2 had obtained several patents in his own name whereas the patents ought to have been applied and obtained in the name of defendant No. 1- Company. The plaintiff is raising claim

as minority shareholder on behalf of defendant No. 1- Company. As the company is in the control of defendant No. 2 being major shareholder, it is contended that the plaintiff as a minority shareholder had to file suit in the interest of the company and to protect the patents which defendant No. 2 allegedly got registered in his individual name instead of registering it in the name of the company.

4. The plaintiff filed notice of motion seeking certain interim reliefs. The relief claimed in the notice of motion is to restrain defendant No. 2 from selling, transferring, assigning, licensing, exploiting, encumbering, creating any third party rights or interest or otherwise dealing with the patents which defendant No. 2 had obtained in his individual name and/or applying for grant of any fresh patents in his individual name. The plaintiff's contention is that he has no personal interest or claim in respect of subject patents. The plaintiff's apprehension is that defendant No. 2 may transfer the patents, which he had obtained in his name, to third party or to a company i.e. Gharda Medical and Advanced Technologies Foundation ("GMATF" for short) which is founded by defendant Nos. 2 and 3, which company holds 57% shares in defendant No. 1- Company.

5. The shareholding pattern of defendant No. 1 is described in para-9 of the impugned judgment delivered by the learned single Judge of this Court. Therefore, we need not reproduce the same. Suffice it to mention that the plaintiff holds 12% shares and deceased Jer.R.Kavasmaneck (original plaintiff No. 1) was holding 5% shares in defendant No. 1-Company. The other two directors hold 13% shares. The Rebello family holds 4% shares. Defendant No. 2 holds 10.5% and defendant No. 3 holds 1.5% shares whereas GMATF holds 57% shares in defendant No. 1-Company.

6. The plaintiff's contention is that defendant No. 1 has a state of the art research department. The company spends substantial amount every year on research and development. The defendant No. 2 has been using the infrastructure facilities and investment made by the company in the research and development department to carry out research invent. The defendant No. 2, therefore, ought to have applied and obtained the patents, which he had obtained since 2008 onwards, in the name of defendant No. 1-Company. Instead defendant No. 2 applied, obtained and got the patents registered in his individual name. The plaintiff's firm contention and case is that all these patents belong to the company and not to defendant No. 2. The defendant No. 2 had used the resources of defendant No. 1- Company and, in this view of the matter, it is his fiduciary duty being Managing Director of defendant No. 1-Company to apply the patents and get it registered in the name of the company.

7. The plaintiff alleged that during the period from 2001 to 2010, defendant No. 1 had spent an amount of about Rs.186 crore on research and development. Defendant No. 2 was a full-time Managing Director and in employment of defendant No. 1. He has been receiving substantial remuneration and

commission from defendant No. 1 since last 10 years. It is alleged that so far defendant No. 2 has received an amount aggregating to Rs.27.54 crore out of which Rs.22.7 crore was received as commission. The defendant No. 2, as Managing Director, owes duty in his fiduciary capacity to the company. The plaintiff alleges that defendant No. 2 may transfer the patents to third party who are competitors of defendant No. 1-Company which would adversely affect the interest of defendant No. 1. The plaintiff submits that it is a settled position that even a minority shareholder could file suit for derivative action to protect the interest of the company, if the majority shareholders are acting against the interest of the company. The defendant No. 2 being in complete control of defendant No. 1, it is contended by the plaintiff that he had to resort to various proceedings with the sole objective to protect the interest of the company. The plaintiff neither has any personal interest nor expects any gain in initiating proceedings in the past and the present one.

8. From the pleadings and record placed before us we have noticed that the plaintiff along with other minority shareholders had filed Company Petition bearing No. 77/1990 in this Court alleging mismanagement, oppression and misappropriation of assets of defendant No. 1 by defendant No. 2. The plaintiff thereafter unconditionally withdrew the said company petition and the petition was continued by other minority shareholders. By order dated 14th November 2008, the petition came to be dismissed by this Court and the said order has become final.

The plaintiff thereafter had filed another Company Petition No. 132/2009 before the Company Law Board to agitate similar issues in respect of allegations that defendant No. 2 was misappropriating the property and technology and know-how of defendant No. 1-Company. The said petition came to be dismissed by the Company Law Board but the interim injunction granted was continued. In appeal filed against the said order, the injunction granted against defendant No. 2 and others was vacated.

9. The defendants contend that the plaintiff does not represent the interest of all the shareholders other than wrongdoers. The plaintiff is not at all entitled to sue in his own name, in the suit of this nature. The derivative suit is an exception to the normal rule. The plaintiff lacks bonafides to institute such a suit being a minority shareholder. The suit is filed to further his personal interest. The defendants allege that the plaintiff's suit is not in the interest of the company and all the shareholders. It is submitted that the plaintiff has entered into an agreement with rival business company i.e. Godrej and, in case any interim relief is granted or prima facie observations are made in favour of the plaintiff, the subject patents would get vulnerable and would be available for challenge by third party jeopardizing the interest of the company itself. It is contended that defendant No. 2 is a well known scientist and is known as father of the agrochemical industry in India. He had made application for grant of patents using his own resources. He is the inventor in respect of the inventions for which

he had sought patents. The patents are applied by him and are registered in his name. The defendant No. 2 has not assigned the patents in favour of defendant No. 1. It is contended that in the capacity of Managing Director, it was not the duty of defendant No. 2 to invent. There was, therefore, no fiduciary duty cast on defendant No. 2 to register the patents in favour of defendant No. 1. The plaint lacks material particulars and deserves to be dismissed as such. It is submitted that section 88 of the Indian Trust Act, 1882 has no application to the present case. In view of the observations and conclusions reached by the Court in different proceedings initiated by the plaintiff in the High Court the present proceeding is not maintainable. The plaintiff has an alternate efficacious remedy of approaching authorities under the Patents Act, 1970. The suit not being in the interest of the company deserves to be dismissed. The plaintiff has failed to make out a case for grant of discretionary reliefs.

10. The learned senior counsel appearing for the appellant submitted that the plaintiff is entitled to maintain suit for derivative action being a minority shareholder. Considering the subject matter and cause of action, the Company could not initiate such a proceeding as majority of shares are held by defendant No. 2. The suit is filed for the benefit of the company. The earlier proceedings initiated by the plaintiff are relevant for considering the issues raised herein. It is submitted that defendant No. 2 is likely to transfer the patents in favour of third party and/or a company i.e. GMATF which holds 57% shares in defendant No. 1-Company and, in such a situation, the interest of defendant No. 1- company will be affected. It will cause not only financial loss to the company but would jeopardize the interest and reputation of defendant No. 1-Company. It is submitted that defendant No. 2 could not have applied the patents in his name and got it registered. Defendant No. 2 has used the Research and Development department and laboratory of the company for doing research. The invention, if at all made by defendant No. 2, was made in the laboratory of defendant No. 1 and not in his mind. The defendant No. 2 is the head of the research department. Whatever research activities and inventions defendant No. 2 carried out were done during the course of his employment as a Managing Director of the company. The director is a trustee and in a fiduciary duty defendant No. 2 ought to have applied the patents in the name of the company and register the same accordingly. The plaintiff has brought on record sufficient material for appreciating prayer made in the notice of motion. The learned counsel submitted that learned single Judge has proceeded to decide the motion as if the suit was to be decided. The observations made by the learned single Judge practically decide the suit when the Court was to pass an order on the interim application. The learned senior counsel further submitted that a strong prima facie case has been made out by the plaintiff for grant of interim relief. The apprehension that in case interim relief is granted in favour of the plaintiff the patents would get vulnerable is not tenable. The plaintiff would not take any such step which would jeopardize the patents or would allow third party to initiate proceedings which would make the patents vulnerable.

Learned senior counsel further submitted that about 200 scientists work in 10 laboratories and crores of rupees are spent by the company on research and development work. Being head of Research and Development department, the defendant No. 2 ought to have applied the patents in the name of the company. Learned counsel submitted that if the intention of defendant No. 2 is clear then no prejudice would be caused in case interim relief is granted as prayed for by the plaintiff. The relief claimed by the plaintiff is that the patents should not be transferred in any way in whatsoever manner except in the name of defendant No. 1- Company.

11. The learned senior counsel for the appellant has placed reliance on the following judgments: In *Onyx Musicabsolute.com Pvt. Ltd. and Others Vs. Yash Raj Films Pvt. Ltd. and Others*, *Onyx Mobile Pvt. Ltd. and Virtual Marketing India P. Ltd.*, (2008) 5 ALLMR 26 : (2008) 6 BomCR 418 : (2010) 2 CompLJ 341 , this Court observed as under:

13. I see no reason to depart from the view which I have taken earlier. I therefore hold that a suit at the instance of a minority shareholder for a wrong done to a company is maintainable where it is shown that the wrong doers are insiders, say directors of the company or majority of the shareholders who are unlikely to take any action for the wrong done to the company. I am, however, not prepared to go thus far as to hold that even a derivative action by way of an arbitration can be taken by initiating arbitration before an arbitral tribunal, for the reasons indicated a little later.

In *Narayandas Shreeram Somani Vs. The Sangli Bank Ltd.*, AIR 1966 SC 170 : (1965) 35 CompCas 596 : (1965) 3 SCR 777 , the Supreme Court has observed as under:

"6. Now, a director of a company stands in a fiduciary position towards the company and is bound to protect its interests. For long, it has been an established rule of equity that he must not place himself in a position in which his personal interest conflicts with his duty, and unless authorised by the company's articles, he must not vote as a director on any contract or arrangement in which he is directly or indirectly interested. Standard articles give effect to this rule of equity. See *Palmer's Company Precedents*, 17th Edn., Part I, p. 553. If he votes in such a case, his vote would not be counted, and his presence would not count towards the quorum, that is to say, the minimum number fixed for the transaction of business by a board meeting, for a quorum must be a disinterested quorum, and must be comprised of directors who are entitled to vote on the particular matter before the meeting. See *Yuill v. Greymouth Point Elizabeth Railway and Coal Co.Ltd.*, 1904-1 Ch 32. If an interested director votes and without his vote being counted there is no quorum, the meeting is irregular, and the contract sanctioned at the meeting is voidable by the company against the director and any other contracting party who has notice of the irregularity, see *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Co.*, 1914-2 Ch 488; but the company may

waive the irregularity and affirm the transaction. The matter is put succinctly by Gore-Browne in Handbook on Joint Stock Companies, 41st Edn., p. 363 thus :

"According to the well-established rule that an agent cannot act on behalf of his principal in a matter in which the agent has a conflicting interest or duty, directors are precluded from taking part in any resolution under which they take a benefit or which adopts a contract that concerns them unless the Articles authorise their doing so. It must be here noted that if interested directors take part in any transaction there is an irregularity which renders the transaction voidable by the company as against the directors and any persons who have knowledge of the facts".

In *Hiralal Parbhudas Vs. Ganesh Trading Company and Others*, AIR 1984 Bom 218 , Division Bench of this Court observed as under:

"21. It was finally urged by Mr. Kale that the discretion exercised by the Deputy Register under Section 56 of the Act in the respondent's favour should not be lightly disturbed and the appellate Court should therefore not disturb the judgment and order of the learned single Judge. We ask ourselves; Pray where at all arises the question of discretion. To start with, the Deputy Registrar did not exercise any discretion under Section 56 in rejecting the appellants application for rectification. It must be remembered that the concept of discretion is distinct from that of adjudication. When the Deputy Registrar rejected the appellants application for rectification on the ground that the two marks are not deceptively similar, she did not use any discretion but adjudicated upon the rival contentions of the parties. It would be trite to say that exercise of discretion can arise in favour of a party when adjudication by the Registrar is against that party. In the present case, the Deputy Registrar's adjudication was in fact in favour of the respondents, with the result that there was no occasion for the Deputy Registrar to exercise any discretion. If the Deputy Registrar had held that the two marks were deceptively similar (which she did not) but that in exercise of her discretion she did not consider it necessary to pass an order for rectification, it could be said that the Deputy Registrar having exercised the discretion in favour of the respondents, interference with such discretion was not called for. Nothing of the kind can be said in the present case where in fact the Deputy Registrar has held that the two marks are not deceptively similar. In any event, this court having come to the conclusion that the two marks are deceptively similar, this cannot be a case for the exercise of discretion in favour of the respondents as their case is not founded on truth and also in view of the uncontroverted evidence of actual deception perpetrated and confusion caused."

In judgment dated 21st March 2012 passed by Division Bench of this Court in Appeal No. 57/2012 (*Parksons Cartamundi Pvt.Ltd. v. Suresh Kumar Jasraj Burad*), it is observed as under:

"14. It is thus clear that the concept of discretion is distinct from that of adjudication. What the learned Single Judge has done in the instant case is

making prima facie adjudication that the defendants'" trademark is not deceptively similar to that of the plaintiff. Therefore, there is no question of any discretion exercised by the learned Single Judge. We have already held that the defendant has been infringing the plaintiff's trademarks and has been attempting to pass off its playing cards as those of the plaintiff. This has happened in respect of the very trademark "MERELANE, which is registered since the year 1971 and also the label mark on the packets containing the playing cards prominently bearing the words "MERELANE No. 7". Hence, there is no question of applying the principle enunciated in the case of Wander Ltd. and Another Vs. Antox India P. Ltd., (1990) 2 ARBLR 399 : (1990) 1 SCC 727 Supp : (1990) SCC 727 Supp ."

Learned counsel for the plaintiff has also relied upon Supreme Court judgment in the case of Sanjeev Kumar Jain Vs. Raghubir Saran Charitable Trust and Others, (2012) 1 CTC 874 : (2011) 4 RCR(Civil) 903 : (2012) 1 SCC 455 : (2011) 12 SCR 744 and Division Bench Judgment of this court in the case of Godrej Industries Limited Vs. Colin Mario Rebello 501 and 502, Joanna Premises Coop Hsg Society, 10, Manual Gonsalves Road, Bandra, Mumbai 400050 and Others .

12. The learned senior counsel appearing for defendant No. 2 submitted that suit itself was not maintainable. From the earlier proceedings initiated by the plaintiff in the High Court and before Company Law Board and in view of observations and orders passed therein, it is clear that identical issues were raised by the plaintiff in those proceedings. The plaintiff failed to secure any interim order in his favour in those proceedings. The plaintiff's intentions are not bonafide. A person without bonafide intentions cannot maintain a suit for derivative action. The plaintiff had entered into Memo of Understanding (MOU) with rival competitor of defendant No. 1 i.e. Godrej. Grant of interim relief in favour of the plaintiff would jeopardize the patents and the same would become vulnerable. Learned senior counsel submitted that the suit has been filed with an ulterior motive. There is family hostility. Since last 7 years, the plaintiff has been dragging defendant No. 2, who is a person of 84 years, in to litigation. In the facts, the suit cannot be said to be on behalf of the shareholders and in the interest of the company but it is a suit filed to protect the personal interest of the plaintiff alone.

13. Learned senior counsel submitted that subject patents are applied and registered in the name of defendant No. 2 since the year 2008 and do not belong to defendant No. 1-Company. It is submitted that defendant No. 2 is a well known scientist and is known as father of agrochemical industry in India. He has done work in respect of the inventions for which he has sought patents. He has devised and created inventions and inventive steps are provided enabling disclosure for each of the invention. He submitted that defendant No. 2 made application for grant of patents using his own resources. Only individual can be an inventor. A company or firm does not have capacity to invent; and hence cannot be an inventor. The patents were not assigned by defendant No. 2 to

defendant No. 1-Company. It is further submitted that defendant No. 2 did not have duty to invent. The last contract clarifies that he is the owner of all the inventions that he had devised. The said contract has been approved by the shareholders of the company in general meeting by a requisite majority as well as approved by the Central Government. The learned counsel further submitted that in such a case derivative action cannot be maintained by the plaintiff for his personal interest. The patents cannot be made vulnerable at the instance of the plaintiff. It is submitted that plaintiff is puppet of another company and cannot be permitted to represent the interest of other shareholders or interest of defendant No. 1-Company. Learned counsel further submitted that the plaintiff has not exhausted alternate efficacious remedy available under the Patents Act, 1970 or pre-grant opposition under section 25(1)(a) of the said Act. In the submission of learned counsel, learned single Judge has passed a reasoned and discretionary order. The plaintiff has failed to make out prima facie case and balance of convenience is not in his favour for grant of discretionary reliefs.

14. The learned senior counsel appearing for the defendants has placed reliance on the following judgments: In V.B. Mohammed Ibrahim Vs. Alfred Schafraneck and Others, AIR 1960 Kar 173 , it is observed as under:

"(4) Before going into the evidence of the point, it is necessary to consider whether the plaintiff, who was a financing partner, could be deemed to be one of the inventors, or, whether the firm could be treated as an inventor such that the name of the firm itself could be registered directly as a patentee. It is not the plaintiff's case that he contributed any part of his ingenuity or skill or technical knowledge towards the invention in question. All that he says is that he gave the wherewithal viz., the finances for the running of the concern that with this help experiments were made and ultimately the invention was evolved. It is not disputed that the persons that actually laboured and found out the process were defendants 1 and 2. Under these circumstances, it is very difficult to accept that the plaintiff could be treated as an inventor."

In United State of America v. Dubilier Condenser Corporation, 289 U.S. 178-224 , it is observed as under:

"Though the mental concept is embodied or realized in a mechanism or a physical or chemical aggregate, the embodiment is not the invention and is not the subject of a patent. This distinction between the idea and its application in practice is the basis of the rule that employment merely to design or to construct or to devise methods of manufacture is not the same as employment to invent....."

In Anand Prasad Agarwalla Vs. Tarkeshwar Prasad and Others, AIR 2001 SC 2367 : (2001) 1 JT 139 Supp : (2001) 4 SCALE 149 : (2001) 5 SCC 568 : (2001) AIRSCW 2221 : (2001) 4 Supreme 69 , the Supreme Court has observed as under:

"6. It may not be appropriate for any Court to hold mini trial at the stage of

grant of temporary injunction. As noticed by the Division Bench that there are two documents which indicated that there was prima facie case to be investigated. Unless the sale certificate is set aside or declared to be a nullity, the same has legal validity and force. It cannot be said that no right could be derived from such certificate. Secondly, when the contesting respondents were in possession as evidenced by the record of rights, it can not be said that such possession is by a trespasser. The claim of the contesting respondents is in their own right. The decisions referred to by the learned counsel for the appellant are in the context of there being no dispute as to ownership of the land and the possession was admittedly with a stranger and hence temporary injunction is not permissible. Therefore, we are of the view that the Division Bench has very correctly appreciated the matter and come to the conclusion in favour of the respondents. In these circumstances, we dismiss these appeals. We may notice that the time bound directions issued by the Division Bench will have to be adhered to strictly by the parties concerned and the suits should be disposed of at an early date but not later than six months from the date of the communication of this order."

In *Wander Ltd. and Another Vs. Antox India P. Ltd.*, (1990) 2 ARBLR 399 : (1990) 1 SCC 727 Supp : (1990) SCC 727 Supp , the Supreme Court has observed as under:

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, AIR 1960 SC 1156 : (1960) 3 SCR 713

... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton and Co. v. Jhanaton*, 1942 AC 130 ".the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case".

The appellate judgment does not seem to defer to this principle."

In 1131 *Forrest v. The Manchester, Sheffield and Lincolnshire Railway Company*, (1861) 4 De Gex, Fisher and Jones 126, it is observed as under:

"..... It has been a very wholesome doctrine of this Court that one shareholder having in view the legitimate purposes of the company may be permitted in this Court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholder is permitted indisputably requires that the suit shall be a bona fide one, faithfully, truthfully, sincerely directed to the benefit and the interests of those shareholders whom the Plaintiff claims a right to represent. But can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the Plaintiff sues in that capacity any personal exception to the Plaintiff remains, and it would be in direct contradiction of every principle of truth and justice if I permitted a man to come here clothed in the garb of a shareholder of a company A., but who is in reality a shareholder in company B., and has no sympathy whatever with, no real purpose of promoting the interests of the other company. Such a thing would be so much at variance with the principles of a Court of Equity that it would be impossible for it to entertain a suit of that description which is a mere mockery, a mere illusory proceeding."

In *Patchett v. Sterling Engineering Coy.Ltd.*, 1955 (72) R.P.C. 50, it is observed by the House of Lords as under:

"It is true enough that the rule that inventions made by an employee belong to the employer is sometimes spoken of as an implied term of the contract of service. In a sense no doubt it is an implied term in that it is not written out in the contract of service, but it is a term which, given the conditions which are here present, namely, inventions made by the employee in the course of his employment which it was part of his duty to make, the law imports in to the contract....."

In *IDA Ltd. and others v. University of Southampton and others*, [2006] EWCA Civ 145, it is observed as under:

"[23] In *Henry Brothers v MOD* [1997] RPC 693 at p 706 I said:

"One must seek to identify who in substance made the combination. Who was responsible for the inventive concept, namely the combination?"

[24].....

[25] Later we said:

"What one is normally looking for is "the heart" of the invention. There may be more than one "heart" but each claim is not to be considered as a separate

"heart" on its own," 102.

[26] to [30].....

[31] The parallel with Claim 1 of Professor House's 1994 patent is exact. In 1994 the exposure was "to particles carrying an electrostatic charge"; in the patent in suit the exposure is "to a composition comprising particles containing or consisting of at least one magnetic material". In short: magnetic particles for electrostatic particles. To my mind, that is the sole key to the information in the patent in suit. That key was provided solely by Mr. Metcalfe. Putting it another way, insofar as there is anything inventive in the patent, it was provided only by him.

[32] It is true that he did not know whether his idea would work and it is true that he had not realised that if it did work it would be by adhesion to the legs of the insects, or that because of that insects could be made to pick up insecticide (what Laddie J called the "sticky poison concept"). Neither of these matters prevents Mr. Metcalfe from being the sole devisor of the invention. For neither of these matters involve the contribution of anything inventive to this idea. So far as finding out whether or not his idea worked that was a matter of simple and routine experimentation mere verification."

The learned counsel for defendant No. 2 also placed reliance on the Supreme Court judgment in the case of Esha Ekta Apartments CHS Ltd. and Others Vs. The Municipal Corporation of Mumbai and Another, AIR 2012 SC 1718 : (2012) 3 SCALE 210 : (2012) 4 SCC 689 : (2012) AIRSCW 2147 : (2012) 3 Supreme 40 .

15. We have perused the record placed before us, the impugned order passed by learned single Judge, and considered the submissions advanced. We have extensively heard the learned counsel appearing for the respective parties. We have also perused the orders passed in the proceedings initiated by the plaintiff in this Court and in Company Law Board. The plaintiff is a minority shareholder who is related to defendant No. 2, the Chairman and Managing Director of defendant No. 1 and his relations with defendant No. 2 seems to be strained since last several years. The plaintiff had resorted to filing of proceedings in the Court in respect of identical subjects. The record shows that defendant Nos. 2 and 3 are in-charge of the company. GMATF company holds 57% of shares in defendant No. 1-Company. The subject patents in respect of which the plaintiff is praying for restraining order were applied and registered in the name of defendant No. 2 since the year 2008 onwards. The patents relate to different subjects which we need not deal with. The plaintiff's apprehension is that defendant No. 2 is very likely to transfer the patents in favour of third party or in favour of the company which holds major shares in defendant No. 1-Company and, if this happens, the defendant No. 1-Company would be affected financially and otherwise. To protect the interest of all the shareholders and defendant No. 1-Company, the plaintiff prays for interim protection till the suit is finally decided.

16. We need not give a conclusive finding as to whether suit itself is maintainable

or not as the same is subject matter to be decided at the time of final hearing of the suit which is still pending. The principle as to what derivative action and at whose instance such a claim could be put forth has been, in detail, dealt with by the learned single Judge by quoting provisions of the Patents Act and judgments dealing with the said issue. We need not reiterate the same here.

17. Learned single Judge has quoted para from the order dated 14th November 2008 passed by this Court in Company Petition No. 77/1990, which reads as under:

"6. As aforesaid, the original Petitioner Nos. 1, 2, 3, 6 and 7 have withdrawn from the present proceedings unconditionally. As per their request, they have been deleted from the array of Petitioners. The effect of unconditional withdrawal from the proceedings by the said Petitioners is that they have given up their challenge with regard to the alleged acts of oppression and mismanagement. In that, those Petitioners have consciously acquiesced in the acts complained of....."

18. Learned single Judge has referred to the observations of the Court in order dated 14th June 2011 which demonstrates that the plaintiff had sought reliefs concerning assets and properties of defendant No. 1- Company. Learned single Judge has also referred to the observations made by this Court in order dated 14th June 2011 passed in Company Appeal No. 24 of 2010 whereby the said appeal was dismissed.

19. It is curious to note that a company named Western Chemical Private Limited (WCPL) promoted, controlled and owned by the plaintiff carries on a competing business with that of defendant No. 1 in manufacturing of certain products. The plaintiff had even entered into MOU with Godrej Company. This MOU was brought on record by defendant No. 2 by filing affidavit on 12th December 2011. In the said MOU the plaintiff agreed to sell his shares in defendant No. 1-Company to Godrej and also agreed to exercise all his voting rights in respect of his shares as per the directions of Godrej Company. The issue, therefore, arises as to whether the action taken by the plaintiff is a bonafide one. In the cases of derivative action, bonafides of the suitor plays a vital and significant role. The derivative action is an exception to the rule that only company can sue on its own behalf. In exceptional circumstances an individual shareholder is permitted to sue on behalf of the company and the alleged wrongdoers because the wrongdoers are themselves in control of the company.

20. As regards the ownership of the patents, as the record reflects, the subject patents were applied by defendant No. 2 and are registered in the name of defendant No. 2. As to how defendant No. 2 invented and patented inventions, what resources were utilized, how much expenditure was done, who contributed to the research activities are issues which could be determined at the time of hearing of the suit. This is possible by leading evidence by the contesting parties. As of now we can only see as to whether the plaintiff has made out prima facie

case to show that the subject patents do not belong to defendant No. 2 but belong to defendant No. 1-Company and even if the patents are registered in the name of defendant No. 2, an order of injunction is required to be clamped against defendant No. 2.

21. We have noticed that the subject patents are registered since the year 2008 onwards. So far nothing is placed on record which would fairly indicate that defendant No. 2 is selling, transferring or in any way creating third party interest in respect of patents registered in his name. This is apart from the question as to whom the patents belong to. There has not been any assignment of the patents by defendant No. 2 in favour of defendant No. 1. So prima facie material and evidence on record show that the patents are registered in the name of defendant No. 2 and the plaintiff has failed to make out a case that defendant No. 2 is going to sell or transfer or create third party interest in respect of subject patents or act in such a manner that would jeopardize the interest of the company.

22. It has come on record that defendant No. 1- Company is controlled by defendant No. 2 being its major shareholder. It is alleged that defendant No. 2 is likely to transfer the patents in the name of company i.e. GMATF. But the fact remains that the said company is still holding 57% shares of defendant No. 1- Company.

23. Another aspect is in respect of as to whether the plaintiff has shown bonafides. In the previous proceedings initiated by the plaintiff similar such issues were raised and the plaintiff failed to secure any order from this Court or from the Company Law Board.

24. Considering the provisions of the Patents Act, 1970, we find that the plaintiff has an alternate efficacious remedy before specialized forum i.e. Controller of Patents. The plaintiff could have initiated proceeding for pre-grant of patents under section 25(1)(a) of the Patents Act or could have resorted to proceeding by filing petition/application under section 64(1)(a)(b) of the said Act. We may also refer to the provisions of section 64(a)(b) of the Patents Act, which reads as under:

"64. Revocation of patents.-- (1) Subject to the provisions contained in this Act, a patent, whether granted before or after the commencement of this Act, may, be revoked on a petition of any person interested or of the Central government by the Appellate Board or on a counter-claim in a suit for infringement of the patent by the High Court on any of the following grounds that is to say-

(a) that the invention, so far as claimed in any claim of the complete specification, was claimed in a valid claim of earlier priority date contained in the complete specification of another patent granted in India;

(b) that the patent was granted on the application of a person not entitled under the provisions of this Act to apply therefor."

Under section 64(1)(b) any person can oppose patent on the ground that patent has been wrongly obtained. We find substantial force in the submission of learned counsel appearing for defendant No. 2 that it would not be in the interest of the company to expose the invention and the patents to attack by outsiders. In case this Court expresses a prima facie view that patents have been wrongly obtained by defendant No. 2 that would make the patents vulnerable and expose to attack by outsiders. There is also substance in the submission of defendant No. 2 that exposing patents to such extent making it vulnerable would jeopardize the interest of the company and could not be said to be a bonafied action on behalf of the company. It is the contention of the plaintiff that he did not intend to make the patents vulnerable. But any observation, even of prima facie nature, concerning ownership of the patents adverse to defendant No. 2 at this stage would make the patents vulnerable and available for challenge by others or third party. In the facts of the present case and considering in totality, the material brought on record we are not inclined to grant such relief in favour of the plaintiff.

25. The plaintiff's case for interim relief is based on apprehension. We are of the prima facie view that whatever serious apprehension the plaintiff may have, cannot be a ground to grant relief in favour of the plaintiff considering the serious consequences of the same. In the facts of the case and considering the record and submissions advanced, we are not convinced to hold that the balance of convenience lies in favour of the appellant i.e. original plaintiff.

26. The learned single Judge has passed a reasoned order taking into consideration the reliefs prayed for, the documents, the earlier orders passed by this Court and the facts and merits of the case. We do not notice any glaring error or perversity in the view adopted by the learned single Judge. The observations made by the learned single Judge on the maintainability of the suit could be considered to be as prima facie. The substantive issues raised by the parties in the suit would be decided after leading evidence in the suit.

27. The learned senior counsel appearing for the appellant/ plaintiff submitted that the order of awarding of costs of Rs.10 lakh is harsh and unreasonable order in the facts of the case. We modify the said order of awarding of costs from Rs.10 lakh to Rs.5 lakh. We are not inclined to grant any interim relief as prayed for in the notice of motion by the plaintiff. The said prayer is rejected. Appeal is partly allowed in the above terms.

28. After pronouncement of judgment, the learned counsel appearing for the appellant submits that the statement made by learned counsel appearing for defendant Nos. 2 and 3 and recorded by learned single Judge in order dated 1st December 2011, which was continued from time to time, be continued for further eight weeks. Learned counsel appearing for the respondents-original defendant Nos. 2 and 3 submits that he is not instructed to continue the said statement which was made earlier and recorded vide order dated 1st December 2011. It is submitted that notice of motion seeking interim injunction has been rejected by learned single Judge. Now, since the appeal is finally heard and dismissed, there

is no reason for continuing the statement made earlier.

As we have dismissed the appeal by rejecting the prayer for grant of interim injunction and in view of facts and circumstances, we are not inclined to continue the statement made by learned counsel on behalf of defendant Nos. 2 and 3. The prayer stands rejected.