(2014) 12 BOM CK 0099

In the Bombay High Court

Case No : Notice of Motion No. 3567 of 2011 in Suit No. 2932 of 2011

Darius Rutton Kavasmaneck APPELLANT

Vs

Gharda Chemicals Limited RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 — Section 56(2), 9
- Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
- Companies Act, 1956 — Section 25, 397, 398
- Patents Act, 1970 — Section 117(C), 52, 6(1)(a), 64, 64(1)(b)
- Trusts Act, 1882 — Section 88

Citation : (2015) 1 ABR 596 : (2015) 2 BomCR 100 : (2015) 127 CLA 468 : (2015) 191 CompCas 52

Hon'ble Judges : K.R. Shriram, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, Shriraj Dhru and Khyati Pandit i/b Dhru and Co, Advocate for the Appellant; Mustafa Safiyuddin, Sumeet Rane and Vaibhav Keni, Advocate for the Respondent

Judgement

K.R. Shriram, J.—This is a derivative action filed by the Plaintiff exercising his right as a minority shareholder. It is the Plaintiff''s case that the claim made in the suit is not for his personal or individual benefit but for the benefit of Defendant No. 1. Though there are five Defendants, the quarrel basically is between the Plaintiff and the Defendant No. 2. Defendant No. 2 is the Chairman and Managing Director of Defendant No. 1. 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 is the uncle of the Plaintiff (mother''s brother). The relationship between the uncle and the nephew has been estranged from what is seen from the pleadings for couple of decades. The Plaintiff has filed many legal proceedings against Defendant Nos. 2 and 3 including proceedings in Company Law Board under Sections 397 and 398 of the Companies Act, 1956 with regard to Defendant No. 1. The present suit is one such proceeding filed by the Plaintiff.

2. The grievance of the Plaintiff briefly put is that Defendant No. 2 has obtained and/or applied for several patents in his own name whereas the patents ought to have been obtained and/or applied for in the name of Defendant No. 1.

The Plaintiff, in this derivative action, is seeking to make a claim on behalf of Defendant No. 1. The supporting layer put-forth is the suit cannot be filed in the name of the Company Defendant No. 1 and Defendant No. 1 is not in a position to make such claim in its own name because the Plaintiff does not hold majority shares and the management of the Company is in the control of Defendant No. 2/ Defendant No. 3. The Plaintiff also states that Defendant No. 2 was in a fiduciary relationship as the promoter, director, majority shareholder and the Research Head of Defendant No. 1 and by registering the patents in his individual name and not in the name of Defendant No. 1, Defendant No. 2 was in breach of his fiduciary duties.

The Plaintiff, therefore, states that as the minority shareholder the Plaintiff became entitled to file and has filed the present suit.

3. The right of a minority shareholder to file a derivative action is recognised in law. It is open for a minority shareholder to take action against the wrong doers for the benefit of the Company if majority shareholders are preventing the Company itself from taking any such action as they are the people committing the wrong. Recognising a right does not mean that the action is correct or has merits. It also does not mean that in every case a minority shareholder can bring out a derivative action.

(i) Palmer''s Company Law 24th Edition paragraph 65-02, (page. 976-978):

"Alternatively, the individual shareholder may seek to enforce the company''s rights by suing in representation form on behalf of himself and all the other shareholders in the Company (except the wrongdoers) against the wrongdoers. This procedure is founded on R.S.C. 1965, Ord. 15, r. 12, but it is not a true representative action. The Plaintiff is seeking to enforce, not his own right of action, but a right of action vested in or derived from company. Hence in modern discussions the action is referred to as a derivative action. The alleged wrongdoers are made the Defendants in the action, but the Company itself is joined as a nominal Defendant in order that it can be bound by the judgment...............................

The derivative action is subject, however, to the doctrine of clean hands. As an equitable invention, the derivative action cannot be used to do injustice. This principle has been applied in cases of acquiescence by the Plaintiff shareholder in the wrongdoing of which he later complains and in cases where the Plaintiff has been regarded as the puppet of outsiders whose interests are opposed to those of the company. The requirement of clean hands does not apply to the personal action."

(ii) 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., , the Ld. Judge observed as follows:

"13............ 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....... "

(iii) In Nirad Amilal Mehta Vs. Genelec Limited and Others, , it was observed as follows:

"7. .... The suit should therefore normally be filed by the Company for setting aside the alienation. The Plaintiff who is only a shareholder of the Company would not normally have a right to file a suit on behalf of the Company as the person aggrieved is the Company and not a shareholder. More than one and a half century ago, in (Foss vs. Harbottle), (1843) 2 Hare 461, the Court laid down the rule that normally an individual shareholder would not be entitled to bring an action for a wrong allegedly done to the company. It is the Company who alone can bring an action for a wrong done to it. The rule however has been subjected to more than one exception. In BSN (UK) Ltd. and others Vs. Janardan Mohandas Rajan Pillai and others, , this Court while upholding the rule that it is the Company who is entitled to maintain an action for wrong allegedly done to it and a shareholder has no locus standi to maintain the suit, affirmed one of the exceptions to the aforesaid rule that where a shareholder can show that the wrong doers are in control of the Defendant Company and hence the Company would be unable to maintain the action, he can maintain an action."

4. The issue involved in the Notice of Motion is whether the Plaintiff is entitled to protection as sought, i.e., to restrain Defendant No. 2 from selling or transferring or assigning or licensing or exploiting or encumbering or creating any third party rights or interest or otherwise dealing with the patents which Defendant No. 2 has obtained in his individual name and/or applied for in his individual name. The Plaintiff''s case is that they want to preserve the property which belongs to Defendant No. 1 so that Defendant No. 2 does not transfer the patents to any third party and by filing this action the Plaintiff has no interest or no personal claim. The Plaintiff''s main concern as I could see is that the Defendant No. 2 may transfer the patents that he has in his name to a Section 25 Charitable Company by the name Gharda Medical & Advanced Technologies Foundation (GMATF) which is founded by Defendant Nos. 2 and 3 and holds 57% of the shares in Defendant No. 1.

5. The counsel for the Plaintiff submitted that it is not necessary to treat this notice of motion as a suit itself as the issue involved in the suit will be decided after a full fledged trial and the Plaintiff, at this stage, has to only show a prima-facie case for the grant of the reliefs and seek injunction on the well recognised principles applied for considering the application for injunction. The Plaintiff relied upon the following judgments:

"(i) Wander Ltd. and Another Vs. Antox India P. Ltd., ;

(ii) Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., ;

(iii) Zenit Mataplast P. Ltd. Vs. State of Maharashtra and Others, "

6. I am afraid, I cannot agree with the counsel for the Plaintiff because reading the plaint as a whole and in particular the relief sought in the plaint and in the motion, any order that I pass in the motion will infact have a bearing in the final reliefs sought in the suit. If I say that the Plaintiff is not entitled to maintain this action in view of the facts and circumstances of the case, the suit will come to an end. If I grant any injunction, as prayed for in this notice of motion, that itself is a final relief that the Plaintiff is seeking regarding the patents, i.e., prayer clauses-(a), (b), (c), (d), (f) and (g). Prayer clause-(e) was not argued.

7. Before we proceed further, it is necessary to give an analepsis on the case.

The Defendant No. 1 was registered and it took over an erstwhile partnership business by the name M/s. Gharda Chemicals Industries. In this partnership firm, the Defendant No. 2 was to receive 40% of the profits while the remaining 60% was to be divided amongst the others, viz. the Plaintiff''s father who was to get 30% and the remaining 30% to be shared between the mother of Defendant No. 2 who was also the Plaintiff''s grandmother and the Plaintiff''s maternal aunt. The Defendant No. 2 was to receive 40% from the profits though he had invested only 20% of the total contribution to the firm because of the expertise and ability that the Defendant No. 2 possessed. He was the person on whom the firm relied upon.

8. Defendant No. 1 is in the business of manufacture and sale of organic, inorganic chemicals, its byproducts, perfumery chemicals, cement and other materials. Therefore, the Defendant No. 2 was entrusted with the charge of the partnership firm and later of the Defendant No. 1 Company.

9. The shareholding patterns in Defendant No. 1 is as under:-

STATEMENT OF SHARES HELD BY THE PLAINTIFF

STATEMENT OF SHARES HELD/CONTROLLED BY DR. K.H. GHARDA AND MRS. K.H. GHARDA

STATEMENT OF SHARES HELD OTHERS INCLUDING EMPLOYEES

10. Defendant No. 1 has a state of the art research department and spends substantial amount every year on R & D. It is the case of the Plaintiff that Defendant No. 2 used the R & D facility, support and the R & D team of Defendant No. 1 and therefore, any patent, obtained and/or applied for, should be in the name of Defendant No. 1 and cannot be in the individual name of Defendant No. 2. The Plaintiff''s case also is that even assuming for the sake of argument, Defendant No. 2 did not use the resources of Defendant No. 1, still in view of his fiduciary duty, being the Managing Director of Defendant No. 1, the

patents should still be registered in the name of Defendant No. 1 only and Defendant No. 2 cannot take it in his own name. Defendant No. 2 as Managing Director of Defendant No. 1 (coupled with the fact that he is also the Research Head of the Company) owes a fiduciary duty to Defendant No. 1 and is not entitled to derive any benefit for himself and any patent acquired by him while he continues to be a Managing Director of Defendant No. 1 and a full time employee of Defendant No. 1 is for the benefit of Defendant No. 1. It is the Plaintiff''s case that substantial amounts have been spent by Defendant No. 1 for research and development and the same has been admitted by Defendant No. 2 and hence the patents should be in the name of Defendant No. 1."

However, it is the case of the Defendants that the patents were individual creation of Defendant No. 2 and therefore, should be in the name of Defendant No. 2 only. As regards the research and development expenditure and as regards the statement by Defendant No. 2 that some amounts have been spent by the Company for the research and development of these patents, the Defendants'' case is that the expenditure has not been for making or for granting these patented processes for products but only to fine tune how economically the Defendants can use these patents. We shall elaborate Defendants'' submissions later.

11. The Plaintiff also submitted that under Section 88 of the Indian Trust Act, 1882, where a Director of a Company bound in a fiduciary character to protect the interest of the Company gains himself any pecuniary advantage adverse to those of the Company, he must hold for the benefit of the Company the advantage so gained. The Plaintiff''s in support of this contention relied upon (i) Ultraframe UK Ltd. vs. Fielding (2004) RPC 24, (ii) Hop Extract Co. Ltd. vs. Horst [36] (supp) RPC 177], (iii) Fine Industrial Commodities Ltd. vs. Powling [71] RPC 253], (iv) Patchett vs. Sterling Engineering Coy Ltd. (72 RPC 50), (v) Triplex Safety Glass Co. Ltd. vs. Scorah (15 RPC 21), (vi) Narayandas Shreeram Somani Vs. The Sangli Bank Ltd., and (vii) Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, .

12. The Plaintiff alleged that during the period of 2001 to 2010, Defendant No. 1 has spent an amount of about Rs. 186 crores on research and development and Defendant No. 2 cannot take advantage of that and registered the patent in his own name. The Plaintiff also alleged that Defendant No. 2 has also benefited by the efforts of the employees of Defendant No. 1. It is the Plaintiff''s case that Defendant No. 2 never did any work or never made any efforts in his personal capacity but always acted on behalf of Defendant No. 1 in collaboration with other employees of Defendant No. 1 in the matter of research and development and making new inventions resulting in the grant of patents.

13. The Plaintiff''s case is in two parts. The first part as mentioned above, i.e., Defendant No. 2 used facilities of Defendant No. 1 and the second part is that the Defendant No. 2 as the Managing Director and in the whole time employment of Defendant No. 1 was obligated and devoted his whole time exclusively for the

benefit of Defendant No. 1 alone. In his capacity as the Managing Director of Defendant No. 1, Defendant No. 2 has been receiving substantial remuneration and commission from Defendant No. 1 and for the past 10 years alone, i.e., upto the date of filing of the suit, has been paid an amount aggregating to about Rs. 27.54 crores of which Rs. 22.7 crores was commission. In his fiduciary capacity as the Managing Director of Defendant No. 1, Defendant No. 2 also owes a duty to the Plaintiff as its shareholder and this fiduciary duty obligates Defendant No. 2 not to misuse the assets of Defendant No. 1 or to convert the assets to his own use. To that end and intent, Defendant No. 2 was obligated not to transfer the valuable assets and properties of Defendant No. 1, to which Defendant No. 1 is entitled to, himself or to any entities owned and/or controlled by Defendant No. 2. The Plaintiff alleged that this fiduciary duty also enjoined the Defendant No. 2 to exclusively work for Defendant No. 1 and not to compete with or divert the business or assets of Defendant No. 1.

14. The Plaintiff is also aggrieved by a notice, dated 21st August, 2013 received by the Plaintiff as shareholder from Defendant No. 1 in which it is mentioned that Defendant No. 1 has entered into an agreement with Defendant No. 2 in which Defendant No. 1 has acknowledged that Defendant No. 2 owns and shall continue to own any invention that he has invented/conceptualized, invents/ conceptualizes in future during the tenure of his engagement as the Managing Director of the Company and the Company shall not claim any ownership of such inventions unless such inventions are specially assigned to the Company. It is also clarified in the notice that any inventions of Defendant No. 2, which are used by the Company are and shall be pursuant to a permission/license granted by Defendant No. 2 and Defendant No. 1 shall not have any right, title or interest therein and Defendant No. 2 shall be entitled to apply for patents and obtain patents in his own name for his inventions.

15. This, according to the Plaintiff, amounts to distribution of assets by the Company to the detriment of all the shareholders and Defendant No. 1 does not have the permission of 100% shareholders to enter into this kind of agreement with Defendant No. 2. The Plaintiff''s case is that Defendant No. 2 is in control of Defendant No. 1 and Defendant No. 2 having misused his position as Chairman and Managing Director of Defendant No. 1 will not allow Defendant No. 1 to initiate any action against Defendant No. 2 for the protection and recovery of valuable assets. Moreover, Defendant No. 2 owned and/or otherwise controlled the majority of the equity shares in Defendant No. 1 and all the Directors on the Board of Directors of Defendant No. 1 having been appointed by Defendant No. 2, any resolution moved by the Plaintiff with Defendant No. 1 to initiate action against Defendant No. 2 will obviously be defeated.

16. The Defendants'' case is that the Plaintiff has no locus. According to the Defendants the issues raised by the Plaintiff have been decided in previous litigations and this is the third round of litigation. It was submitted that the Plaintiff, now in the garb of a derivative suit, is raising the same issues that have

been litigated and decided against the Plaintiff in other litigations between the same parties. According to the Defendants, the Plaintiff had filed a Company Petition No. 77 of 1990 where the Plaintiff had made similar allegations of mismanagement, oppression and misappropriation of assets of Defendant No. 1 Company by Defendant No. 2. During the said proceedings, an MOU, whereby the Plaintiff alongwith other Petitioners therein had agreed to sell/sold shares to Defendant No. 1 to Godrej, a competitor of Defendant No. 1-Company, came to light. Thereupon the Plaintiff withdrew from the said Petition, but the other Petitioners continued the same.

By an order dated 14th November, 2008, this Court dismissed the said Petition finding that there were no grounds of oppression or mismanagement made out. In the said order, in paragraph 6, the Court had observed that the Plaintiff (who was petitioner 1/2) withdrew from the Petition and has observed as under:-

"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."

17. The Defendants also submitted that in another order dated 14th June, 2011 of this Court, in another Petition filed by the Plaintiff against the Defendants, the Court has observed as under:-

"Thereafter the Plaintiffs filed a Company petition No. 132 of 2009 before the Company Law Board. Essentially similar allegations as in the earlier petition and in the present suit pertaining to mismanagement, oppression and misappropriation of funds were made including prayers for restraining Defendant Nos. 2 and 3 herein from transferring their shares. For example in paragraph 9.2 of the petition reads as follows:

9.2. The 2nd Respondent is required to be restrained from in any manner selling, transferring, alienating, encumbering, or otherwise dealing with the other assets and properties of the 1st Respondent. The 1st Respondent has developed considerable process/technical knowhow with regard to (i) making of rock phosphate (ii) extraction of iron ore (iii) manufacture of temperature resistant polymers and (iv) the development of high grade cement from the ash of coking coal furnaces. These processes/technical knowhow are hereinafter referred to as "the Specific Process Knowhow". The Specific Process Knowhow is developed by the 1st Respondent by the funds of using the labs of, using the resources of and research staff of the 1st Respondent. The Specific Process Knowhow is owned by the 1st Respondent and would constitute a valuable asset of the 1st Respondent. The 2nd Respondent had publicly evinced his desire to take away the Specific Process Knowhow and to encash the same for his own exclusive benefit, thereby depriving the 1st Respondent and its minority shareholders including the

Petitioners from the benefit of the Specific Process Knowhow. The 2nd Respondent, who has access to and possession of the Specific Process Knowhow is required to be restrained by this Hon''ble Bench from in any manner selling, transferring, alienating, encumbering, or otherwise dealing with the Specific Process Knowhow."

In the said Company Petition the Plaintiffs had inter alia sought the following prayer being prayer (iv) therein:

(iv) That pending the hearing and final disposal of the Petition, this Hon''ble Bench be pleased to pass a temporary order and injunction restraining Respondents directly or indirectly by themselves and/or through their servants or agents or in any manner howsoever, directly or indirectly, from selling, transferring, disposing, alienating, encumbering, creating third party rights or otherwise dealing with the assets, properties, intellectual property including but not limited to the processes, knowhow, technology and or the benefit of Research and Development (including the Specific Process Knowhow referred to in paragraph 9.2 above) of the 1st Respondent."

Therefore, the same issues are being re-agitated in the present suit.

18. The Defendants further submitted that when the Company Law Board dismissed the Petition No. 132 of 2009, the Plaintiff filed a Company Appeal No. 24 of 2010 which was dismissed by this Court and while dismissing the said Appeal, the Court inter-alia observed as follows:-

"128] ...In this behalf, it must be immediately noticed that the appellants were parties to Company Petition No. 77 of 90. Some of the instances that have been highlighted before me were part of the pleadings in this Company petition. Further, this Company petition was extensively amended. The original as well as amended petition has been dealt with by the learned Single Judge of this Court by his judgment and order dated 14th November 2008. He proceeded to dismiss the same. While dealing with self same allegations, the learned Single Judge has observed thus:-

''49. On the other hand, the respondents have not only denied material grounds and would submit that proper compliance has been observed. In addition, the respondents would contend that the petitioners should be non-suited for having approached this Court with unclean hands. In that the fact that the petitioners have already entered into a MOU with Godrej Soaps Ltd., to acquire shares in respondent No. 1 Company was kept a secret arrangement till it became known for the first time to the respondent in February 2005. It is common ground that even the present petitioners are signatories to the said MOU. In fact, even the present petitioners have sold 27 and 66 shares respectively to Godrej Soaps Ltd., without following the regime of Article 57. On the one hand, the petitioners were questioning the intention of the 2nd respondent but at the same time, the petitioners were themselves indulging in act which was not only illegal but against the interests of the company. According to the respondents, the petitioners group was bent upon selling their shares to a person who happens to be the competitor of respondent company. Besides, it is the petitioners group who on the one hand were opposed to increase of authorised share capital resulting in respondent No. 1 not being able to declare bonus shares; and on the other hand were acting against the interests of the Company by committing themselves to sell their shares to person who happens to be the competitor of respondent company. According to the respondents the present petition is a speculative petition for which reason also the grievance made at the instance of petitioners with regard to meeting dated 15th February 1990 cannot be countenanced.''

''50. The fact that even the present petitioners were party to MOU and have committed themselves to espouse the cause of the alleged competitor of the Company and in fact transferred part of the shares to an outsider, have come to the notice of the respondents only in February 2005. Those material facts have been suppressed by the petitioners. For this reason alone, the petitioners deserve to be non-suited. It is well established that no indulgence can be shown to a litigant who approaches the court with unclean hands. In any case, as observed earlier, after the withdrawal of other petitioners from the present proceedings unconditionally, thereby giving up all the allegations and claim against the respondent company, the issue regarding validity of meeting dated 15th February 1990 survives only at the instance of present petitioners. They have less than 7% of share holding in the respondent company. At their instance, therefore, the question of overturning the decisions taken in the said General Meeting particularly having referred to their conduct does not arise. Even if the matter was to be examined on facts, on its own merits, the grievance of the petitioners in respect of each of the grounds will have to be stated to be rejected. By no standards, the decision to convene meeting to consider the eight items stated in the notice dated 16th January 1990 can be said to be oppression against minority shareholders. The necessity to increase borrowing powers was in the context of expansion plans in relation to which ample explanation has been offered by the respondent company. Insofar as changing of name from private limited Company to one of public limited Company was also out of necessity. Even the explanation offered by the respondent Company to increase the authorised capital of the Company can, by no standards, be said to be oppression against the minority shareholders. No tangible material has been produced to substantiate that position. Even the amendments suggested to the A.O.A. were not to favour only the majority shareholders but would apply across the board and every member would be benefited by the said amendment. The controversy regarding deletion of Article 123 as raised is also without any substance. Besides, it is common ground that the Company has now become a public limited company. Even on account of this change, it has become redundant to entertain the grievance of the present petitioners in relation to the issues concerning extra ordinary general meeting dated 15th February 1990. More so, when the stand taken by the present petitioners at the time of arguments plainly suggests that they are interested in walking out of the Company and sell their shares at a fair price.''

129] .....

130] The argument is that the appellants were not parties to this judgment and, therefore, it does not bind them. However, it is pertinent to note that the appellants were original petitioners. They withdrew from Company Petition No. 77 of 1990. There is nothing on record to indicate that they withdrew with liberty to raise the pleas raised by them again. Once the learned Judge has found that the conduct of the remaining petitioners was entirely blameworthy and they could not substantiate the charge and/or allegation leveled of being oppressed as minority shareholders, then, I do not see how the present appellants can on the same material succeed in proving the said allegation. Apart from finding that they are raising the same issues based on the same allegations and identical arguments, I am of the opinion that the observations of the learned Single Judge would be applicable to the present appellants too. Any wider controversy, including about applicability of Order XXIII Rule 1 of CPC to a Company Petition need not be gone into and decided. Assuming that this provision and/or principles analogous thereto apply, apart from the appellants not seeking any liberty from the learned Single Judge while withdrawing themselves from Company Petition No. 77 of 1990, I find that their arguments in the present appeal are identical to those raised by the remaining petitioners in Company Petition No. 77 of 1990."

19. The Defendants submitted, therefore, that the Plaintiff should not be allowed to re-agitate the same issues now in the garb of a derivative action. The Defendants also submitted that though the Plaintiff has preferred an SLP against the order dated 14th June 2011, which has been admitted, but no stay has been granted, the findings of this Court in the above two decisions continue to hold ground. It was also submitted that mere pendency of an SLP without the grant of a stay does not affect the validity or the binding force of the judgment under Appeal. It was also submitted that the Plaintiff is not entitled to bring a derivative action and therefore, cannot ask for any relief.

20. According to the Defendants a derivative suit is an exception to the normal rule that the Company has an independent existence and shall sue in its own name to protect its own interest and a shareholder is not entitled to sue for or on behalf of the Company to protect the Company''s interest. Only in rare and exceptional cases can shareholders sue by way of a derivative suit bona-fide in the interest of the Company and the shareholders. A derivative suit cannot be filed to further a shareholder''s personal interest. A shareholder filing a derivative suit must demonstrate that he is a proper person, has come with clean hands, has no ulterior motives, is not competing with the interest of the Company and has no alternate remedy. If the suit (in the garb of a derivative action) is not bona-fide and in the best interest of the Company or if the person filing the derivative action is not a ''proper person'' or has not come with clean hands or

has filed the action with ulterior motives or has a competing interest with that of the Company or has an alternate remedy, he is not entitled to file a derivative action or atleast he is not entitled to any interim relief in the suit filed in the garb of a derivative action. If the Plaintiff does not satisfy even one of the above conditions, a derivative action by him is not maintainable or atleast he is not entitled to any interlocutory reliefs in such an action at this stage. The Defendants whilst alluding to some of the above conditions submitted that the rules which govern the circumstances in which a derivative action will be available to a shareholder remain strict.

21. The Defendants also submitted that Defendant No. 2 has no fiduciary duty to invent in the facts and circumstances of the case. It is the Defendants'' case that just because Defendant No. 2 is the Managing Director of Defendant No. 1, it does not follow that the patent devised by Defendant No. 2 in his individual capacity should belong to Defendant No. 1 or that Defendant No. 2 should hold them in trust for Defendant No. 1. It is the case of the Defendants that Defendant No. 2 is the inventor and as an inventor, he is entitled to apply for the patents as per Section 6(1)(a) of the Patents Act and there is no provision in law which provides that the employee generated patent should belong to the employer. It is also submitted that under the contract whereby Defendant No. 2 is appointed as the Managing Director of Defendant No. 1, Defendant No. 2 is only entrusted with powers of management and he is not required to do any research and development or make inventions. In fact even the other shareholders who are siblings of the Plaintiff also acknowledged the fact that the patents belong to Defendant No. 2 and not Defendant No. 1. The siblings are Percy Kavasmaneck, who is the brother of the Plaintiff, his wife Aban Percy Kavasmaneck and the Plaintiff''s sister Maharukh Murad Oomrigar, who between them hold 13% of the shares in Defendant No. 1. The Defendants have relied upon the affidavits filed by these persons, in which they have expressly stated that the patents belong to Defendant No. 2 and not Defendant No. 1. Even the independent Directors being Defendant Nos. 3 and 4 have not supported the Plaintiff''s contention.

22. The Defendants also submitted that the renewal of the contract of appointment dated 15th June, 2013 of Defendant No. 2 as the Managing Director also provides that the patents devised by Defendant No. 2 always belonged to Defendant No. 2 and the same has been approved by the shareholders resolution at their meeting held on 13th September, 2013.

23. The Defendants have also stated that Defendant No. 2 has not used the resources of Defendant No. 1 for conceiving/devising the patents. Only for consolidation/verification, small resources of Defendant No. 1 have been used in respect of some of the inventions because the Defendant No. 1 wanted to implement the inventions, and the use of such resources is by way of verification. According to the Defendants such resources have not been used in the course of conceptualizing the patents and in any event assuming for the sake

of argument, Defendant No. 2 has used some resources of the Company in devising the patents, by merely using such resources does not mean the patents belong to the Company. It was also submitted that Defendant No. 2 has given a royalty free license to the Company to use any patent as may be devised which Defendant No. 1 may require in the course of business and Defendant No. 1 continues to benefit from inventive abilities of Defendant No. 2 as it may use these inventions royalty free. It was also submitted that many of the patents listed in the revised Exhibit ''J'' as tendered by the Plaintiff during the course of the hearing, do not relate to the business of the Company at all and no R & D expenditure has been incurred in respect of these.

24. According to the Defendants, if it is to be held that Defendant No. 2 is not entitled to the patents and Defendant No. 1 is entitled to, the patents may itself get revoked or canceled. According to the Defendants, under Section 64 (1)(b) of the Patents Act, any person may apply for revocation of the patent if "the patent was granted on the application of a person not entitled under the provisions of the Patents Act to apply therefor". In such a situation, if it is held that the patent was wrongfully obtained by Defendant No. 2 rather than in the name of Defendant No. 1, then any person including the competitors of Defendant No. 1 may apply for revocation/cancellation of the patent and this can never be in the interest of company.

25. According to the Defendants, the Plaintiff''s conduct is also tainted and he has not come with clean hands because the Plaintiff has engaged the Defendants in constant litigations which demonstrates that the Plaintiff has never been and is not a well-wisher of the Company. The Plaintiff has always been on the look-out for opportunities to harass Defendants and this action also is a continuation of a series of frivolous litigations initiated by the Plaintiff to harass Defendant No. 1. Through this litigation also, the Plaintiff is subjecting Defendant No. 1 to immense costs and unnecessary spending of management time and creating uncertainty in the minds of the people with whom Defendant No. 1 deals with in an endeavor to suggest that all is not well. It was also submitted that the finding of this Court in the matters as mentioned earlier shows that the Plaintiff has been acting against the interest of the Company and he is a litigant who has approached the Court with unclean hands. To the submissions of the Plaintiff that the past conduct of the Plaintiff is not relevant and only the conduct in the present proceeding should be considered, the Defendants submitted that the entire conduct of the Plaintiff in a series of related actions is certainly relevant for the purposes of considering whether his action is in the best interest of the Company and whether he is entitled to any interim relief in this derivative suit and in any event the Plaintiff, in the garb of a derivative action, is really agitating family disputes and personal grievances and vendetta against Defendant No. 2 and Defendant No. 1 particularly to benefit the Plaintiffs competing business.

26. According to the Defendants the Plaintiff through a Company Western Chemical Industries Private Limited (WCIPL) promoted, controlled and majority

owned by the Plaintiff carries on a competing business with that of Defendant No. 1 in the manufacturing of product PV 23. The process of manufacturing this product devised by Defendant No. 2 and used royalty free by Defendant No. 1 is superior to that of WCIPL thereby reducing the market share of WCIPL and this has been admitted by the Plaintiff in his affidavit in rejoinder dated 22nd December, 2011 where the Plaintiff has alleged "I verily believe that the Defendant No. 1 forayed into PV 23 only with a view to impact my business." It is for this reason, the Defendants submit that the Plaintiff is filing this derivative action to jeopardize not only the business of Defendant No. 1 but the patents themselves. Therefore, as this conduct is contrary to the interest of Defendant No. 1, a derivative action at the instance of such a party ought not to be encouraged.

27. It is also submitted by the Defendants that the Plaintiff has suppressed in the plaint the fact that the Plaintiff had agreed to sell his shares in Defendant No. 1 to Godrej, who is a competitor and has agreed to exercise all his voting rights in respect of his shares in Defendant No. 1 as per the directions of Godrej. This MOU was brought on record by Defendant No. 2 in his affidavit of 12th December, 2011. Therefore, the Plaintiff having suppressed this MOU is disentitled to any interim reliefs. The Plaintiffs tried to argue saying that it was only a pledge. This read with the two decisions of this Court dated 14th November, 2008 dismissing the Company Petition No. 77 of 1990 and 14th June, 2011 dismissing the Company Appeal No. 24 of 2008 gives reasons to believe that the Plaintiff is only espousing the cause of Godrej, a competitor. Such an action is not bona-fide or in the best interest of the Company and hence on this ground alone, the Plaintiff is not entitled to maintain this derivative action.

28. The Defendants also submitted that the Plaintiff had even filed a criminal complaint-filed by the original Plaintiff no. 2 (mother of the Plaintiff) against her daughter Maharukh, i.e., Plaintiff''s sister and Defendant No. 2. The Police, whilst closing the case, in its report has made an observation that having regard to the age, physical and mental stage of the Plaintiff''s mother, the complaint has not been filed by the Plaintiff''s mother on her own free will but at the instance of the Plaintiff and there appears to be a family dispute qua Defendant No. 2.

29. According to the Defendants since a derivative action is an equitable relief available under exceptional circumstances and subject to the fulfillment of certain strict conditions, as an exception to the rule that the Company alone is entitled to sue for the wrongs done to it rather than any shareholder, the existence of an alternative remedy would debar the Plaintiff from continuing with the derivative action or obtaining any interim relief therein. The submissions of the Defendants under this head was split into two parts (1) the alternative remedy was available under Section 397 and 398 of the Companies Act and (2) the alternative remedy was available under the Patents Act, 1970. According to the Defendants the same issues have been raised in the proceedings commenced by the Plaintiff under Sections 397 and 398 of the Companies Act.

As regards, the alternative remedy under the Patents Act according to the Defendants the issues in the present suit relate to the question of ownership of patents. According to the Defendants, the whole scheme of the Patents Act seems to be that all questions of ownership of patents should be determined by the patent office which is a specialized forum. The scheme of the Patents Act provides opportunities at various stages for having the ownership issue determined by it-a) at the application stage before the grant of the patent by availing of pre-grant opposition proceedings, b) by availing of post-grant opposition proceedings within one year of the grant of the patent, c) by availing of proceedings for rectification of the register of patents maintained by the patents office and having the name of the rightful patentee inserted in the register (for which no time limit is prescribed), and d) by having the name of the rightful patentee substituted for the person who has wrongfully obtained the patent in revocation proceedings (for which no time limit is prescribed). Where there is a specialized forum constituted to determine patent ownership rights-the forum being the patent office, the Court will leave it to the forum to decide rather than endeavoring to make a decision itself. The Defendants also submitted that there are express provisions in the Patents Act, like section 71 read with section 117(C)&(D) and section 64(1)(C) read with sections 52 and 117(C)&(D) where jurisdiction of the Court appears to be barred. In view thereof, even if the Court has jurisdiction, it will refrain from exercising that jurisdiction, where the specialized forum (patent office) is more equipped to deal with complex issues of ownership rights in patents which is a highly technical subject. The Defendants also submitted that ownership rights is also linked with the concept of ''inventive content'' which requires specialized knowledge for correct determination of the ownership rights and hence all the more reason why such issues should be left to a specialized forum like the patent office and the Court should not grant an interlocutory injunction where the Plaintiff has not sought any reliefs before the specialized forum.

30. It was also submitted that Article 160 (a) of the Articles of Association of Defendant No. 1 empowers any Director to initiate legal action on behalf of Defendant No. 1 and that he does not need a Board Resolution for the same. The Plaintiff not having approached any Director, particularly Defendant Nos. 3 or 4, who are independent Directors for initiating the action on behalf of the Company, the Plaintiff has failed to establish that the Company has failed to initiate the action against the wrongdoers which establishment is a pre-requisite before initiating any derivative action.

31. The Defendants submitted that the Plaintiff merely holds 12% of the shares in the Company. The Plaintiff''s brother, brother''s wife and sister, who in the aggregate hold 13% of the shares in the Company are against this action and have stated in affidavit that this action of the Plaintiff is not bona-fide in the interest of the Company and infact the patents in question belong to Defendant No. 2 in his individual capacity and not to Defendant No. 1. The Defendants also submitted that the concept of collective decision making in bringing a derivative

action rather than the decision of a single shareholder is recognized by the Indian Courts.

32. According to the Defendants, Defendant No. 2 is not in control of Defendant No. 1 to such an extent as would prevent Defendant No. 1 from initiating action. According to the Defendants, Defendant No. 2 and Defendant No. 3 presently own only about 3% of the shares and the majority of the shareholding in the Company is with GMATF, which has six Directors including four independent Directors. The four independent Directors are eminent citizens of the country while one of them is a recipient of Padma Bhushan and other is recipient of Padma Vibhushan. The third one is a member of Supreme Court Committee on Solid Waste Management. It was submitted that though two out of the six Directors of GMATF were Defendant No. 2 and Defendant No. 3 and Defendant No. 2 was not in control of GMATF.

33. Therefore, derivative action is an exception to the rule that only a Company can sue on its own behalf. In exceptional circumstances an individual shareholder is permitted to sue on behalf of the Company the alleged wrongdoers because the wrongdoers are themselves in control of the Company. The requirements to be complied with to permit an individual shareholder to sue on behalf of the Company is very strict. In the present notice of motion, therefore, the Plaintiff has to cross two hurdles to be entitled to any relief and if the Plaintiff fails even in one of them he will not entitled to any relief. The Plaintiff has to prove atleast prima-facie that (a) he is entitled to maintain this action and (b) he satisfies that (i) he has a prima-facie case for grant of injunction; (ii) if injunction is not granted, irreparable loss/injury will be caused which cannot be compensated in damages; and (iii) the balance of convenience is in his favour.

34. With this background, let us proceed further:

In Palmer''s Company Law, derivative action is explained as an action where the Plaintiff is seeking to enforce not his own right of action but a right of action vested in or derived from the Company. Thus, the Plaintiff may seek to enforce the Company''s rights by suing in a representative form on behalf of himself and all other shareholders in the Company (except the wrongdoers) against the wrongdoers. Therefore, as derivative action has to be filed in a representative form, let us see whether the Plaintiff crosses that first hurdle.

The Plaintiff is the only shareholder of Defendant No. 1 who has filed this action. The Plaintiff''s own siblings namely Percy Kavasmaneck, who is the brother of the Plaintiff, his wife Aban Percy Kavasmaneck and the Plaintiff''s sister Maharukh Murad Oomrigar, who are also the shareholders in the Company and hold 13% shares between them, have, in fact, disassociated themselves from the Plaintiff. In this case, the Plaintiff holds 12% shares in the Company. In the plaint, an attempt is made to suggest that the Kavasmaneck family, of which the Plaintiff is a member, is a group of shareholders who are allegedly wronged. However, if we consider the affidavit dated 20th April 2012 of the Plaintiff''s brother Percy

Kavasmaneck in support of chamber summons No. 669 of 2012 in this suit and Plaintiff''s sister Maharukh Oomrigar''s affidavit dated 21st April 2012 in support of chamber summons No. 647/2012 also in this suit, does not give any indication that the Kavasmaneck family is entirely together. Between Percy Kavasmaneck/ Aban Kavasmaneck, wife of Percy Kavasmaneck and Maharukh Murad Oomrigar, they hold in aggregate about 13% of the shares in Defendant No. 1-Company. In fact, they have in their respective affidavits stated that this action of the Plaintiff is not bona-fide and in the interest of the Company. They have also stated that the patents which are in question in this suit belong to Defendant No. 2 in his individual capacity and not to Defendant No. 1. It appears that Percy Kavasmaneck is also a Scientist with a Phd. and has experience with patent issues. Though nothing turns out on his qualification as regards the suit in hand, the fact to be noted is the other shareholders who are also the Plaintiff''s siblings, are not with the Plaintiff in this action.

35. In the matter of Smith & Ors. Vs. Croft & Ors. [1998] Ch. 114 it was held that the views of the independent shareholders or majority of the minority shareholders ought to be determined where the derivative action is in the best interest of the Company and if use of such independent majority of the minority shareholders is against the action then the action should be disallowed. In the matter of Dr. Satya Charan Law and Others V. Rameshwar Prasad Bajoria & Ors. : AIR (37) 1950 Federal Court 133 alone the Court also recognized the concept of collective decision making in bringing a derivative action rather than the decision of a single shareholder. In Palmer''s Company Law, 25th Edition, at pages 8238 and 8239, while analyzing the English Companies Act of 2006, the relevant factor in a derivative action to be kept in mind is discussed as under:

The six other matters the statute required the Court to take into account are:

(i) Whether the member is acting in good faith in seeking to continue the claim.

....

(iv) Finally, there is a factor which is given special prominence by being out in a sub-section of its own. The court must have "particular regard" to the views about the litigation of the members of the Company who have no personal interest, direct or indirect, in the matter. This indicates a preference for collective, rather than individual, decision-making over the litigation, even if the body of shareholders in question is a minority.

36. Having regard to the aforesaid, the Plaintiff though holding 12% of the shares of the Company, is all alone in this action particularly when the other minority shareholders, who collectively own about 13% of the shares of Defendant No. 1, are against the action and do not consider it in best interest of Defendant No. 1. Therefore, in my view, such a Plaintiff should not be entitled to maintain this derivative action or any relief on this ground

37. The next point which is necessary to be considered in a derivative action is

that, the action is in the bona-fide and best interest of the Company.

38. In my view, by virtue of Section 64(1)(b) of the Patent''s Act, 1970 this action will not be in the interest of Company because if the order as prayed for by the Plaintiff is passed, there is a risk of the patents itself being lost. Section 64(1)(b) of the Patents Act, 1970 reads as under:

"Section 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) ....

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

Therefore, any person may apply for revocation of the patent, if the patent was granted on the application of a person not entitled under the provisions of this Act to apply therefor.

39. In this case, it is the case of the Plaintiff that Defendant No. 2 was not entitled to register the patent in his own name and it is the Defendant No. 1 who was entitled to the patent being registered in its own name. It is the Plaintiff''s case that the patents have been wrongly applied for or obtained by Defendant No. 2 though he is not entitled to the same and in fact it is Defendant No. 1 who is entitled to the same.

If we accept the Plaintiff''s contention then any person, it may include the Plaintiff himself, who is a competitor as explained later, or any other competitor may apply for revocation/cancellation of the patent. If the patent is cancelled then Defendant No. 1 also will not be able to use the patents, which it is now using, royalty free. It will cause a tremendous loss to the Company-Defendant No. 1. Therefore, this action can never be considered to be in the interest of Defendant No. 1

40. The next point which goes against the Plaintiff is that the Plaintiff has himself admitted that the Plaintiff is a competitor of Defendant No. 1. The Plaintiff admittedly is a majority shareholder and controls a Company by the name ''Western Industrial Chemical Company Private Limited" (WCIPL) and manufactures a chemical by the name PV-23. The Defendants submitted that Defendant No. 1 also manufactures the same product but the product was devised by Defendant No. 2 and is being used royalty free by Defendant No. 1 and the same is superior to that of WCIPL. In fact, the Plaintiff in his affidavit in rejoinder dated 22nd December 2011 has stated that "I verily believe that the Defendant No. 1 forayed into PV-23 only with a view to adversely impact my

business". Therefore, it gives a strong feeling that this action coupled with the past history between the parties which will be explained later is an attempt by the Plaintiff only to finish this competition by jeopardizing the business of Defendant No. 1. The statement of the Plaintiff in his affidavit in rejoinder explains the fact that the Plaintiff''s interests are in conflict with that of Defendant No. 1 and also the malice that the Plaintiff has against Defendant No. 1.

41. In an unreported judgment of this Court in the matter of Anil Madhavdas Ahuja Vs. Marvel Fragrances Private Limited and Ors. NMS No. 767/2011 in Suit No. 566/2011, dt. 11.08.2011 this Court has held that derivative action by a party contrary to the interest of the Company and in furtherance of his personal interest should not be encouraged. Paragraphs 34 and 39 of the said judgment read as under:

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

....

39. It appears, therefore, that after the family settlement, the Plaintiff has been trying to divert the business of Defendant No. 1 to Mysore Scents Company in which his son has, for all practical purposes, an exclusive interest. This conduct is contrary to the interest of Defendant No. 1. A derivative action at the instance of such a party ought not to be encouraged.

42. In the circumstances, the Plaintiff being a competitor with the seemingly malicious intent against Defendant No. 1, cannot be believed when the Plaintiff says that the derivative action is bona-fide and in the best interest of Defendant No. 1. On this ground also the Plaintiff cannot maintain this action and reliefs sought by the Plaintiff cannot be granted.

43. The other points which also exposes the fact that the Plaintiff has ulterior motives in filing this action is because the Plaintiff had entered into a Memorandum of Understanding (MOU) with Godrej Soaps Ltd. In the MOU, the Plaintiff had agreed to sell his shares in Defendant No. 1 to Godrej who is a competitor. In the MOU, the Plaintiff has also agreed to exercise all the voting rights in respect of his shares in Defendant No. 1 as per the directions of Godrej. The Plaintiff did not disclose about this MOU and the same was brought on record by Defendant No. 2 in his affidavit dated 12th December 2011.

44. The Plaintiff tried to brush aside this MOU by saying that it was only a pledge. However, reading a copy of the MOU, I cannot accept that it was merely a pledge particularly because the Plaintiff had agreed to sell his shares to Godrej and exercise all his voting rights in such a manner as may be directed by Godrej. The MOU further provides that "the Plaintiff shall be bound to sell and/or transfer or dispose of any rights in respect of any shares in Defendant No. 1, whether purchased with the finance made available by Godrej or not, only to Godrej". The Court of Chancery in the matter of Forrest vs. The Manchester, Sheffield and Lincolnshire Railways Company, 45 ER 1131 at page 3 has held 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 shareholders 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 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".

(emphasis supplied)

The Plaintiff did rely on certain observations of this Court in the matter 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 to contend that the Plaintiff is not espousing the cause of Godrej and Godrej is not a competitor of Defendant No. 1. The relevancy of this judgment relied upon by the Plaintiff is vastly diluted because neither Defendant No. 2 nor Defendant No. 1 were parties to the proceedings whereby Defendant No. 2 and Defendant No. 1 could have refuted the contention that Godrej was siding with Defendant No. 2. Moreover, the judgment also does not say that Godrej is not a competitor. The judgment was rendered in a section 9 petition under the Arbitration and Conciliation Act, 1996 and it is stated in the judgment that the observations therein were prima-facie and the Arbitration Petition, it appears has been filed by the Plaintiff against Godrej to enforce the MOU. Therefore, the indisputable fact is that the Plaintiff had agreed to sell his shares to Godrej.

45. A derivative action is not maintainable if the Plaintiff has an ulterior motive in bringing the action as then it cannot be regarded as bona-fide in the interest of the company. This is the principle followed in common law as is evident from the decision of the Court of Appeal in England in Barrett Vs. Duckett and Others [1995] 1 BCLC 243 where at page 250, paragraph 6 it was held:

"6. The shareholder will be allowed to sue on behalf of the Company if he is bringing the action bona fide for the benefit of the Company for wrongs to the Company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed.

....

First on the necessity for the absence of an ulterior purpose, the words of Lawton LJ in Nurcombe v. Nurcombe [1984] BCLC 557 at 562, [1985] I WLR 370 at 376 are apposite:

''It is pertinent to remember, however, that a minority shareholder''s action in form is nothing more than a procedural device for enabling the court to do justice to a Company controlled by miscreant directors or shareholders. Since the procedural device has evolved so that justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing so for the benefit of the Company and not for some other purpose. It follows that the court has to satisfy itself that the person coming forward is a proper person to do so''."

Further at page 256 it was held:

"I can well understand that Mrs. Barrett is upset at what has occurred between Christopher and Carol and that she is indignant at the supplanting of Carol by Janet. But her partiality shows through all her evidence, and it is by her behaviour in relation to the claims against Carol, in contrast to the claims against Christopher and Janet, that I have become convinced that she is not pursuing this action bona fide on behalf of the company. If she had been, she would have had to sue Carol no less than Christopher in respect of diverted moneys. She claims that she did not sue Carol because Carol does not have any assets. But when Mr. Guy was asked what assets Christopher had to make him worth suing, the first two items listed by Mr. Guy were the jointly owned former matrimonial home in Gerrards Cross and the proceeds of The Noakes in each of which Carol retains her interest. Mr. Guy sought to assure us that now that the decision had been made to sue Carol, the action would proceed against her. I am afraid that I simply do not believe that Mrs. Barrett would pursue any claim against her daughter to the point of enforcing judgment: to my mind it is improbable in the extreme that she would force her daughter and grandchildren out of their home and I quite understand why she would not. Her failure to take the order making Carol a Defendant any further speaks volumes. On the other hand I do not doubt that she would pursue the other Defendants as far as she could, regardless of whether there is any real likelihood of recovery. This is not a satisfactory basis for an action on behalf of the company".

(emphasis supplied)

46. In Barrett Vs Duckett (supra), the Court was of the view that the derivative action was in fact prompted by family hostilities which was the ulterior motive and hence was not regarded as an action bona-fide in the best interest of the Company.

47. Similarly in the case under consideration, the suit in the garb of a derivative action is really prompted by family hostilities and personal anger that the Plaintiff had against Defendant No. 2. In fact the Plaintiff/his mother had also filed a criminal complaint against Defendant No. 2 and the police whilst closing the case observed that having regard to her age and physical and mental state, the criminal complaint has not been filed by her (the mother) but at the instance of the Plaintiff and there appears to be a family dispute. Even previous litigations initiated by the Plaintiff is also evidence of family disputes/disputes of a personal nature now being again sought to be litigated in the garb of a derivative action.

Therefore on this ground also, the Plaintiff will not be entitled to any relief as sought.

48. It is also quite obvious that the Plaintiff having not succeeded in his earlier actions against Maharukh Murad Oomrigar, his sister and the Defendant No. 2, he is re-agitating the same points in the garb of a derivative suit.

49. In Company Petition No. 77 of 1990, the petitioners therein had made similar allegations of mismanagement, oppression and misappropriation of shares of Defendant No. 1 by Defendant No. 2 and others. The Plaintiff, who was also one of the petitioners, later withdrew from the petition. The said petition was, however, dismissed by this Court by an order dated 14th November 2008, inter-alia, holding that no ground of any oppression or mismanagement and misappropriation was made out. While dismissing the petition, the Court made an observation on the withdrawal by the petitioner from the petition by stating that the effect of unconditional withdrawal from the proceedings by the petitioners is that they have given up other grievances with regard to the alleged acts of oppression and mismanagement and the petitioners thereby have consciously acquiesced in the acts complained of. Though this matter was carried right up to the Apex Court, the Apex Court, while disposing of the said Appeal, has not made any observation on this point.

50. The Plaintiff had also filed a Company Petition No. 132 of 2009 before the Company Law Board where also similar allegations as in the earlier petition and in the present suit pertaining to mismanagement, oppression and misappropriation of funds appear to have been made. In the said Petition, the petitioners namely the Plaintiff herein also appeared to have prayed for restraining Defendant nos. 2 and 3 herein from dealing with or alienating or

transferring the assets, properties, intellectual property including but not limited to the processes, knowhow, technology and or the benefits of research and development of the Defendant No. 1. From the order dated 14th June 2011 in Company Petition No. 77 of 1990 filed by the Plaintiff against the Defendants which is reproduced earlier, it is quite obvious that the Plaintiff is re-agitating the same issues in the present action as well. The entire attitude of the Plaintiff appears to be get an order somehow against the Defendant No. 2 and if in one action he fails he would file another action and now in the garb of this derivative action. Therefore, this action of the Plaintiff is tainted and morally wrong. On this ground also, no relief as sought by the Plaintiff should be granted. In fact, in another matter, viz. Company Appeal No. 24 of 2010, which is reproduced above, this Court, while dismissing the Appeal vide order dated 14th June 2011, has observed that the Plaintiff herein has come with unclean hands.

In this regard, the Defendants have relied on Palmer''s Company Law 24th Edition, where at page 978 it is mentioned "the derivative action is subject, however, to the doctrine of clean hands. As an equitable invention, the derivative action cannot be used to do injustice." The Defendants also relied upon the judgment of the English Appeal Court in the matter of Nurcombe vs. Nurcombe (1985) 1 All ER 65, where at page 6 and 7 it is held as under:-

"It is pertinent to remember, however, that a minority shareholder''s action is in form nothing more than a procedural device for enabling the court to do justice to a Company controlled by miscreant directors or shareholders. Since the procedural device has evolved so that justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing so for the benefit of the Company and not for some other purpose. It follows that the court has to satisfy itself that the person coming forward is a proper person to do so. In Gower''s Principles of Modern Company Law (4th edn, 1979) p. 652 the law is stated, in my opinion correctly, in these terms:

''The right to bring a derivative action is afforded (to) the individual member as a matter of grace. Hence the conduct of a shareholder may be regarded by a court of equity as disqualifying him from appearing as Plaintiff on the company''s behalf...''"

Further at page 7 of the above decision it was held as follows:

"My understanding of these judgments is that the court is entitled to look at the conduct of a Plaintiff in a minority shareholder''s action in order to satisfy itself that he is a proper person to bring the action on behalf of the Company and that the Company itself will benefit. A particular Plaintiff may not be a proper person because his conduct is tainted in some way which under the rules of equity may bar relief. He may not have come with ''clean hands'' or he may have been guilty of delay".

(emphasis supplied)

In any event, it is trite that anyone coming to Court with unclean hands should be shown the door. The Courts have to be very strict on this and should deal with such people with an iron hand. On this ground also, therefore, the plaintiff in my view should not be allowed to maintain this action and relief sought by the Plaintiff should not be granted.

51. In view of the above, I do not see any necessity to go into the other grounds of Defendants like alternative remedy etc.

52. On the grounds of fiduciary duty alleged to have been breached by the Defendant No. 2 in filing the patents in his own name, the counsel for the Plaintiff submitted that as Managing Director of a Company any research that the Plaintiff did was done in his role as Managing Director and therefore, the patents should be registered in the name of Defendant No. 1. The alternative submission that was made was that even if Defendant No. 2 researched and invented in his own name, as he was employed by Defendant No. 1 as a Managing Director, Defendant No. 2''s fiduciary duty required that the patents should be registered in the name of Defendant No. 1.

53. The Plaintiff did not produce any document which stated that Defendant No. 2 had to, as part of his employment or role as a Managing Director, invent or do any research. Therefore, it does not follow that the patents devised by Defendant No. 2 in his capacity, should belong to the Company or that he should hold that in trust for the Company. The test is whether Defendant No. 2, as Managing Director, had a duty to invent. If Defendant No. 2 did not have a duty to invent, how can he be said to have breached a fiduciary duty.

54. A perusal of the Managing Director Contract dated 6th May 2008, that Defendant No. 1 entered with Defendant No. 2 during the subsistence of which the concerned patent applications have been made shows Defendant No. 2 is only entrusted with powers of management. There is not even an iota of indication either expressly or by implication that he was also required to devise inventions.

55. It must also be noted that the in-disputed position is that Defendant No. 2 has given royalty free license to Defendant No. 1 to use any patent as may be devised by him which may required in the course of business. The Defendant No. 1 continues to benefit from the inventive policies of Defendant No. 2 as these inventions are royalty free. If the Plaintiff''s prayers are to be allowed, that would also amount to a fetter in the inventive ability or in the passion of Defendant No. 2 to invent and give royalty free license and who in his advance age of being in the 80''s, still continues to invent. If the relief sought is granted, Defendant No. 1 will not be able to use any of the patents and that would mean loss to the Company.

Moreover, none of the judgments relied upon by the Plaintiff to buttress the second point that because Defendant No. 2 is working as a Managing Director, he has a fiduciary duty to register the patents in the name of Defendant No. 1 are applicable. I deal below with these judgments.

(a) In Triplex Safety Glass Co. Ltd. v. Scorah (Vol. LV RPC Page 21), the chemist who took out a patent in his own name was employed in the laboratories of the Plaintiff-Company. He had been directed by the Company to discover a method for producing Acrylic Acid and hence he had a duty to discover a method of Acrylic Acid as part of his employment contract. Moreover, under the employment contract, he was required to assign the patent to the Company. Accordingly, even though the employer Company did not express an interest in patents initially but did so subsequently, he was required to assign the patents to the Company as they had been invented during the course of his employment and as part of his duty to the Company.

Whilst holding that the chemist held the patents in trust for the employer Company, the Court held as under:

"....................

In a case of this kind, in my judgment it is a term of the employment, apart altogether from any express covenant, that any invention or discovery made in the course of the employment of the employee, in doing that which the employee was engaged and instructed to do during the time of the employment, during working hours and using the materials of his employers, is the property of the employers and not of the employee, and that, having made such a discovery or invention, the employee becomes a trustee for the employer of it, and he is, therefore, as a trustee, bound to give the benefit of it to his employer.

....

Under those circumstances, in my judgment, by reason of the fact that the Defendant made this discovery or invention while in the employ of the Company, during the Company''s working hours and in pursuance of the orders of the Company''s servants, he became a trustee of it for the Company and he has not ceased and cannot have ceased to be a trustee................. "

None of these circumstances are present in the case at hand. In the present case, Defendant No. 2 did not make the inventions in the course of his employment with the Defendant No. 1. Defendant No. 2 was not engaged or instructed to create the inventions during the course of his employment or during working hours. Therefore, the facts and circumstances are materially different and hence it cannot be said that Defendant No. 2 holds the inventions in trust for Defendant No. 1.

(b) Even Fine Industrial Commodities Ltd. v. Prowling (Vol. LXXI, RPC Page 253), the facts were different from the present case. In that judgment, there is a finding that Byrne sought to collaborate with the Defendant because the Defendant was the Managing Director of FIC. The whole tenor of the judgment suggests that the Defendant being the Managing Director of FIC, was engaged in conceiving or devising the patent in the course of his employment duties and during work hours. Accordingly, whilst conceiving the invention, the Defendant was acting in his capacity as Managing Director of FIC, i.e., he was acting in the course of his duties towards the Company in conceiving the invention whereas Defendant No. 2 whilst conceiving the inventions was acting in his individual capacity and did not conceive the inventions as part of his duties towards the Company or in his capacity as Managing Director. He was not required to under his contract as Managing Director with Defendant No. 1.

(c) In the case of Patchett v. Sterling Engineering Co. Ltd. (Vol. LXXII, RPC, Page 50), the employee was employed in the department of design and development of domestic electrical appliances of his employer company. The Court observed "It was not disputed that in this capacity it was his duty to put his inventive faculty and skill at the service of the company". During the course of his employment he created the inventions for which patents were obtained. It was in these circumstances that the court held "that where the employee in the course of his employment (i.e. in his employer''s time and with his material) makes an invention which falls within his duty to make (as was the case here) he holds his interest in the invention and in any resulting patent as trustee for the employer unless he can show that he has a beneficial interest which the law recognizes". Further, the court, in this case, was considering the provision of section 56(2) of an English statute which recognized the employer being entitled to the benefit of an invention created by an employee.

The facts and circumstances of the present case are therefore, distinguishable from the findings of the court in the above case as Defendant No. 2 did not create the inventions in the course of his employment. Defendant No. 2 did not have a duty to create the inventions. He was not employed to make inventions. Further, I was not shown anything in Indian statute that recognizes that employee patents belong to the employer.

(d) As regards, Hop Extract Company Ltd. (Vol. XXXVI, RPC, Page 177), relied upon by the Plaintiff, ''B'' acquired a process from one Smith which he sold for a price to a new Company he promoted (and of which he became the Managing Director) for the purposes of implementing the process. The process having been taken over by the Company and the capital having been raised with the help of ''B'', it was discovered that the process was a failure. Accordingly, the company''s chemists and employees with the resources and expenses of the Company developed an improved process which was patented in the name of ''B''. ''B'' was not a chemist nor a technician nor an inventor. It was in these circumstances and in this context, it was held that ''B'', who was also the Managing Director, held the patent in trust for the company.

The facts of the above case, therefore, are also distinguishable from the present case.

(e) Regarding Ultraframe UK Ltd. v. Fielding (2004) RPC 24), also relied upon by the Plaintiff again, principles set therein are distinguishable from the present case in that the inventions were not devised by Defendant No. 2 in his position as Managing Director of the Company. Relying on this judgment the Plaintiff sought to contend that the resolution pertaining to appointment of Managing Director passed in the shareholders meeting held on September 21, 2013 (i.e. much after the date of the suit and much after the suit inventions were conceived) which, inter-alia, contains a clause to the effect that the Company acknowledges that the patents devised by Defendant No. 2 are and continues to be his own and do not belong to the Company amounts to an attempt to ratifying an act which cannot be ratified without the consent of all the shareholders or amounts to unauthorized distribution of assets of the company.

This point of view of the Plaintiff cannot be accepted. The said resolution containing the above term does not amount to ratification at all. Also it cannot amount to unauthorized distribution of assets of the Company as the assets being the inventions in question are patented in the name of Defendant No. 2 and not Defendant No. 1. Hence, it is not a case whereby the assets belonging to the Company have been sought to be unauthorizedly distributed or misappropriated. It looks more like clarificatory. Moreover the said resolution has become final upon its passage by the requisite majority of the shareholders. The said resolution, I am told, has not been challenged by the Plaintiff in any legal proceedings and the validity thereof is not the subject matter of these proceedings and cannot be gone into in these proceedings.

56. On Plaintiff''s submissions that by virtue of Section 88 of Indian Trust Act, 1882, the Defendant No. 2 held the patents in trust for Defendant No. 1, in my view, Section 88 is not applicable. The patents have not been devised by Defendant No. 2 in his role as a Managing Director of Defendant No. 1 or to use the expression in the Section by availing himself of his character as Managing Director. I am saying this because his contract with Defendant No. 1 dated 6th May 2008 does not require him to devise any invention. Therefore, in my view, Section 88 is not applicable at all.

57. Even on the Plaintiff''s submissions that Defendant No. 1 has used the R & D expenditure of the Company to create the invention, there is nothing to indicate that the invention conceived by Defendant No. 2 were done by using funds of the Company. The un-disputed fact is that the patents were available to Defendant No. 1 to exploit royalty free. Certainly, the Company would have incurred some cost to fine tune how the patents or the process could be exploited in the best costs effective way. Therefore, it is difficult to accept, at this stage, that the entire R and D expenditure incurred by the Company was misused by Defendant No. 2.

58. In any event, assuming that the Plaintiff is correct in saying that the amount spent in R & D of Defendant No. 1 was used for the patents registered in the name of Defendant No. 2, still as mentioned above, this derivative action itself is not maintainable, I cannot grant any relief to the Plaintiff.

59. In the circumstances, to conclude, the Plaintiff has not made out a prima-facie case for grant of relief sought in the notice of motion and the motion required to be dismissed.

60. Even the balance of convenience is against the grant of any interim relief particularly in view of the fact that under Section 64(1)(b) of the Patent''s Act, the patents itself will be at risk. Moreover, the life of a patent is only for a period of 20 years from the date of application and the patents start from as far back as 2008. Even some of the patents admittedly, do not relate to the business of the Company. In addition to this, Defendant No. 1 is able to exploit the patent without payment of any royalty. By keeping in mind the interest of Defendant No. 1, in my view, the Plaintiff should not be granted any relief.

61. Therefore, the Plaintiff fails in crossing both the hurdles. The Plaintiff does not make out any case that (a) he is entitled to maintain this derivative action and (b) consequently the question of making out a prima-facie case or any irreparable loss being caused or balance of convenience being in his favour, did not arise. In any event the Plaintiff did not make out a prima-facie case for injunction nor is able to prove that any irreparable loss will be caused to the Plaintiff or the balance of convenience is in his favour.

62. In the circumstances, the notice of motion is dismissed with costs.

63. The Courts should be alert in dealing with such speculative suits and shoot down such bogus litigation at an early stage. This action of the Plaintiff, it is quite obvious is inspired by vexatious motives. I observe with regret the infliction of the ordeal upon the Courts by parties like the Plaintiff by presenting a case which was disingenuous or worse. It may be a valuable contribution to the cause of justice if such speculative and frivolous litigations are dealt with a tough hand. Substantial judicial time will be saved if such parties are saddled with substantial costs so that they would not continue the onslaught on precious judicial time. In view of the past conduct of the Plaintiff in engaging the Defendants in contesting litigations which also had a strong bearing in the Court''s time, this is one of those cases where substantial costs have to be imposed on the Plaintiff. The Plaintiff is directed to pay a sum of Rs. 10 lakhs as costs to the Defendants within four weeks.

64. The counsel for the plaintiff prays for stay of the order. In my view, no stay is required since the counsel for defendant nos. 2 and 3 makes a statement that the statement that was recorded in the order dated 1st December 2011 read with subsequent orders be continued upto and including 17th January 2015.

65. The plaintiff is also directed in the meanwhile to file an undertaking as required under Rule 148 of the Bombay High Court (OS) Rules.