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(2015) 09 DEL CK 0346

In the Delhi High Court

Case No : CS (OS) 301/2003 and 470/2004

International Tractors Ltd. and Others — APPELLANT

Vs

Punjab Tractors Ltd. and Others — RESPONDENT

Date of Decision : 08-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 20 Rule 5, Order 20 Rule 5(3), Order 22 Rule 1, Order 22 Rule 10

General Clauses Act, 1897 — Section 3(42)

Citation : (2015) 09 DEL CK 0346

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : Amit Sibal, Sr. Advocate, Jagdish Sagar, Munish Mehra and Geetanjali Visvanathan, Advocates, for the Appellant; T.K. Ganju, Senior Advocate and Atishi Dipankar, Advocate, for the Respondent

Judgement

Valmiki J. Mehta, J.

I.A. No. 6720/2011 in CS(OS) 301/2003 (filed by plaintiff-International Tractors Ltd. u/O 22 R 4 CPC) & I.A. No. 6721/2011 in CS(OS) 301/2003 (for condonation of delay)

1. Defendant in the suit was a company-Punjab Tractors Limited. Defendant-company ceased to exist as it was amalgamated with Mahindra and Mahindra Limited in terms of the orders dated 9.1.2009 and 16.1.2009 passed by the High Courts of Bombay and Punjab & Haryana.

2. By I.A. No. 6720/2011, the successor entity Mahindra and Mahindra Limited is therefore sought to be substituted with the defendant-Punjab Tractors Ltd. There is no opposition to this application because indeed Punjab Tractors Ltd. has now merged into Mahindra and Mahindra Limited. Application is therefore allowed and Mahindra and Mahindra Limited is substituted in place of defendant-Punjab Tractors Ltd. including by condoning the delay of nine days in filing the application for substitution.

Both the applications stand disposed of accordingly.

I.A. No. 6733/2011 in CS(OS) 470/2004 (filed by plaintiff-Punjab Tractors Ltd. u/ O 1 R 10 , O 6 R 17 , O 22 R 9 , O 22 R 10 CPC and 151 CPC)

I.A. No. 6206/2011 in CS(OS) 470/2004 (filed by defendant-M/s. International Tractors Ltd. u/S 151 CPC for direction that suit has abated)

3. These two applications are being disposed of together because issue in both the applications is the same as to whether M/s. Punjab Tractors Limited should be substituted by M/s. Mahindra and Mahindra Limited. The application filed on behalf of M/s. Punjab Tractors Limited and now M/s. Mahindra and Mahindra Limited states that M/s. Mahindra and Mahindra Limited has to be substituted in place of M/s. Punjab Tractors Limited because of the amalgamation orders dated 09.01.2009 and 16.01.2009 passed by the High Courts of Bombay and Punjab & Haryana sanctioning the scheme of amalgamation.

4. M/s. International Tractors Limited argues that M/s. Mahindra and Mahindra Limited cannot be substituted in place of M/s. Punjab Tractors Limited, and in fact, CS(OS) No. 470/2004 has abated and consequently I.A. No. 6206/2011 be allowed by holding that CS(OS) No. 470/2004 has abated.

5. These suits were consolidated for the purposes of trial by the order dated 15.02.2005 passed by a learned Single Judge of this Court. Common issues for both the suits were thereafter framed by a learned Single Judge of this Court on 09.01.2006 and which issues are 18 in number. The disputes between the parties essentially pertain to which party to the suits has the Copyrights in the drawings with respect to manufacture of components and parts of tractors.

6. I need not reinvent the wheel so as to say by allowing long winding arguments as to whether Order 22 Rules 3 and 4 CPC applies or Order 22 Rule 10 CPC applies, inasmuch as, this issue is no longer res integra and is covered by a Division Bench judgment of this Court in the case of Yapi Kredi Bank (Deutschland) AG Vs. Mr. Ashok. K. Chauhan and Others, . The Division Bench by its judgment set aside the judgment passed by a learned Single Judge of this Court by which the learned Single Judge had held that where there is an amalgamation of a company there is death of the company and consequently Order 22 Rule 10 CPC does not apply but what apply are the provisions of Order 22 Rules 3 and 4 CPC. The Division Bench by its judgment dated 17.01.2013 held that the provisions of Order 22 Rules 3 and 4 CPC do not apply in the scenario and situation of amalgamation of a company with another company pursuant to a scheme of amalgamation sanctioned by the Courts, and that actually the provision of Order 22 Rule 10 applies. The relevant conclusions of the Division Bench are contained in paras 16 to 27 of the judgment and these paras read as under:-

"16. The conclusion of the learned Single Judge that the amalgamation of one company with another, results in the death of the former (i.e. the transferee

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company) cannot be faulted. Yet, that factor alone cannot, in the opinion of this Court, be dispositive of the question thrown up in these proceedings. While extinguishment of the corporate personality, or "corporate death" as it were, in the event of a final winding up of a company or amalgamation of one company with another, may be a reality, that alone cannot afford an answer to what happens to a litigation to which the amalgamating company is a party. It is here that the analogy with either a company finally wound up, in dissolution proceedings, or the death of an individual, ends. In the case of winding up of a company, the final order directing dissolution, after all steps to settle its affairs are taken, and the Court is satisfied that such order as necessitated, is in fact made. The process of "winding up the affairs" includes settlement of claims against the company, in satisfaction of the creditor''s rights; it also includes the right of the Official Liquidator to be impleaded in a pending suit, or other litigation, to which the company is party as a defendant, or which is instituted by it, and press the claim, or defend them. Thus, the "death" unlike in the case of an individual is not sudden; it is preceded by a series of steps - some of which include issuance of orders adjudicating rights of the company, and third parties- mandated by law, under the overall supervision of a judicial forum, i.e. the Company Court. In the case of amalgamation, however, such a detailed inquiry is not mandated by law; the company has to be satisfied that the terms of amalgamation or merger, as it were, provide adequately for the protection of interests of shareholders, creditors and other such parties. The terms in the most part are a result of negotiation, and the merger is itself in the nature of an arrangement whereby the two corporate entities - for reasons best determined by each of them, decide to amalgamate into one. In the case of amalgamation, the question of rights and liabilities and the right to succession in pending proceedings instituted or pending against the merging company need not necessarily be a matter engaging attention of the company court. It might well depend on the terms of the amalgamation scheme, or operation of law, as the case may be. In India, Sections 390 to 396A of the Companies Act govern the subject matter.

17. The distinction noticed by this Court between a corporate death, as a consequence of final winding up order, under Section 481 of the Companies Act, on the one hand, and the extinguishment of the corporate personality of the transferee (or amalgamating/merging) company cannot be lost sight of, because the element of voluntariness inherent in the latter circumstance together with the willingness of the transferee company to "take over" the property, liabilities and functioning of the transferee company is lacking in the case of a company which is dissolved after all steps to wind it up are completed. In the latter eventuality, the question of any loose threads in the form of liabilities or assets for which no provision is made would not arise; the Liquidator who takes charge of its assets and affairs would have, in the course of the winding up process, provided for, or sought orders in respect of each eventuality. The Court is also mindful of Section 394 (2) which provides for the transfer of liabilities or property

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of the transferee company to the transferor company. In Saraswati Industrial Syndicate, this was precisely noticed, when the Supreme Court held that the "..true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there can be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation." This position was again underscored in Singer (supra).

18. The question identical to the one posed to this Court in this case arose for consideration before the Bombay High Court. A learned Single Judge of that Court in Re. Delta Distilleries Limited, Mumbai v. (1) Shaw Wallace and Company Limited, Calcutta; (2) Shaw Wallace Distilleries Limited; (3) United Spirits Limited, 2008 [1] Mah.LJ 899) held that:

"The effect of a Scheme of Amalgamation, as held by the Supreme Court in Singer India Ltd. Vs. Chander Mohan Chadha and Others, is that as a result of amalgamation of two Companies into one, "the Transferor Company loses its entity as it ceases to have its business". The respective rights or liabilities are determined under the Scheme of Amalgamation but the corporate entity of the Transferor Company ceases to exist with effect from the date the amalgamation is made effective. The concept of abatement is inapposite where a merger takes place in the course of a Scheme of Amalgamation in pursuance of a sanction received from the Company Court. The transferor in such a case merges with the transferee who becomes the successor in interest of the assets, liabilities and business to the extent contemplated in the Scheme. There is in other words a devolution of interest. In law, what takes place in the course of a Scheme of Amalgamation is the devolution of the interest of the Transferor upon the Transferee."

The above views of the learned Single judge were confirmed by the Division Bench, of the Bombay High Court by its decision dated 11-02-2010 in Appeal No. 26/2008.

19. Similar questions arose on occasions in the Courts in England, which were called upon to decide the question whether claims and suits abated when plaintiff companies amalgamated with others. In Mercer Alloys Corporation v. Rolls Royce Ltd. , [1971] 1 W.L.R. 1520 the Court held that:

".where a plaintiff company is merged in its parent company so that it has itself ceased to exist as a separate corporate entity, the court has power to substitute the parent company as the plaintiff in the action, even after judgment, both under this rule and under its inherent jurisdiction."

The matter was examined in detail, with reference to decided authorities, and the statutory provisions, in Toprak Enerji Sanayi A.S. v. Sale Tilney Technology Plc. [, 1994 (3) All E.R. 483] , where a Turkish transferor company claimed that it succeeded to the claims, in litigation (in the UK) of a transferee company, after

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amalgamation. The relevant discussion by the Court is as follows:

"First, these authorities do not consider a situation where during the course of English proceedings there is a transmission of interest from one party to another by virtue of the doctrine of universal succession or a foreign statute having similar effect. In Baytur S.A. v. Finagro Holding S.A. [1992] Q.B. 610, 619, the question for decision was whether an assignment of the rights and obligations of the buyers which took effect under a traite de scission in accordance with French law had the effect, without more, of rendering the assignee a party to an English arbitration as soon as the assignment took effect. The Court of Appeal held that it did not but expressly reserved the position "where the foreign law creates a universal successor, as in National Bank of Greece & Athens S.A. v. Metliss [1958] A.C. 509." The comment in the judgment of Lloyd L.J.[1992] Q.B. 610, 619 that "there cannot be a valid arbitration when one of the two parties has ceased to exist," must be read subject to the same possible exception. The question I have to consider remains, on the authorities, an open one.

The second observation is that while the reported cases show quite clearly that a corporation which has ceased to exist is not entitled to maintain any legal proceedings, they do not show that where the dissolution occurs in the course of pending proceedings this necessarily deprives the court of any power to do what is just and convenient in the particular case. There are a variety of principles which apply in different situations and, so far as I am aware, there is no reason why the court should not be entitled to mould a procedure which takes account both of the interests of the parties and the needs of justice following a transmission of interest.

It was urged upon me that it is a general principle of English law that if a plaintiff or defendant named in English proceedings does not exist at the date the proceedings were commenced, then the proceedings are a nullity and must be set aside: see Lazard Bros. & Co. v. Midland Bank Ltd. [1933] A.C. 289. That principle is not in point since Enerji was a legal entity at the date the writ was issued. In any event the principle is not absolute since it is subject to the exception that where a mistake has occurred in naming a party, that mistake may be cured under Ord. 20, r. 5(3) , see Dubai Bank Ltd. v. Galadari (No. 4), The Times, 23 February 1990. Consequently, if the transmission of interest has occurred before the writ is issued and by a mistake the transferor and not the transferee is named as plaintiff in the proceedings, then even though the transferor has ceased to exist, the misnomer can prima facie be cured so as to substitute the transferee as plaintiff: see The Sardinia Sulcis [1991] 1 Lloyd''s Rep.

It was also urged that it is a general principle of English procedural law that where a plaintiff or a defendant to pending proceedings is a corporation and the corporation is dissolved during the course of the proceedings, this event brings the proceedings to an end for all time and they cannot subsequently be revived. This, I think, is to express the position far too broadly. As the reported cases

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seem to indicate, it is necessary to draw a distinction between those situations where the action has merely "abated" so that it can be subsequently revived and those cases where the action has died for all time.

In Foster Yates & Thom Ltd. v. Edgehill Equipment Ltd., The Times, 29 November 1978, the plaintiff commenced proceedings in February 1975 but on 24 December 1975 a resolution was passed for voluntary winding up. At the end of December 1976 the final accounts of the plaintiff were passed and the requisite returns were filed for registration with the result that under section 290(4) of the Companies Act 1948 the plaintiff was dissolved after the expiry of three months in March 1977. On 7 April 1978 an order was made under section 352(1) of the Act (corresponding to section 651 of the Companies Act 1985) declaring the dissolution to be void. It was held that the effect of that declaration was prospective only and did not validate acts done since the dissolution in March 1977. Consequently, once the company had been dissolved there was no possibility that proceedings which took place thereafter could subsequently be validated with the result that the action pending at the date of dissolution "ceases, not temporarily and provisionally, but absolutely and for all time:" per Megaw L.J."

Both in Morris v. Harris [1927] A.C. 252 and in the Foster Yates & Thom case a distinction was drawn between a restoration under section 352 of the Act of 1948 (section 223 of the Companies (Consolidation) Act 1908) which was prospective only and other provisions of the Companies Acts which had retrospective effect and provided that "the company shall be deemed to have continued in existence as if its name had not been struck off:" section 353(6) of the Act of 1948; section 242 of the Act of 1908. In the Foster Yates & Thom case the Court of Appeal rejected the submission that where a restoration took place under section 352 of the Act of 1948, so that the restoration was prospective only, the action merely "abated." But both Megaw and Cumming-Bruce L.JJ. discussed the meaning of "abatement," and Cumming- Bruce L.J. said:

''upon the failure of an action for want of a plaintiff or of a plaintiff with an interest in the proceedings the action would abate but could revive if and when appropriate steps were taken to enable the action to proceed.''

It was accepted that abatement did not put an end to an action but merely suspended it.

In Tymans Ltd. v. Craven [1952] 2 Q.B. 100 the Court of Appeal held that where a plaintiff company had been struck off the register pursuant to section 353(5) of the Act of 1948 and was therefore a non-existent person at the time certain county court proceedings were commenced, those proceedings were subsequently validated when an order was made under section 353(6) that "the company shall be deemed to have continued in existence as if its name had not been struck off." That decision was applied by Evans J. in Eastern Capital Holdings Ltd. v. Fitter (unreported), 19 December 1991, where a plaintiff

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company was dissolved after proceedings had been commenced and, before any order for restoration had been made, an application was made by the defendant for the action to be dismissed on the ground that the plaintiff company had ceased to exist. It was held by Evans J. that an action which might be revived under section 653(2) or (3) of the Act of 1985 (corresponding to section 353 of the Act of 1948) should not sensibly be dismissed but should be stayed.

I do not find anything in these authorities which should lead me to the conclusion that because Enerji ceased to exist on 30 November 1990 Seniteri cannot be substituted as plaintiff under Ord. 15, r. 7. It is true that on the evidence there remained no possibility after the merger that Enerji could be revived as a legal entity. But the provisions of Turkish law which resulted in the death of Enerji as a legal person included an element not present in the provisions of the Companies Acts considered in Morris v. Harris[1927] A.C. 252 and the Foster Yates & Thom case, The Times, 29 November 1978, namely, that by virtue of the same statutory provisions, all the assets and liabilities of Enerji were transferred to the absorbing company which thenceforth stood in the shoes of Enerji....

20. The above decision, and conclusions recorded in it were approved in a Division ruling of the Court of Appeal, in Yorkshire Regional Health Authority v. Fairclough Building Ltd. & Anr 1996 (1) All ER 519 where the Court observed that:

"......When a litigant dies, or becomes bankrupt, the litigation does not cease, unless the cause of action is personal to him. It may be carried on by his personal representatives, or his trustee in bankruptcy, in their own names. There is, not surprisingly, provision in the RSC for the change in the identity of the party to be duly made: R.S.C., Ord. 15, r.7. A corporate plaintiff does not die, but it may cease to exist. A particular example is when the corporation, which is a creature of statute, is terminated by statute and its rights and liabilities are transferred to some other person. When that occurs, the new person may become a party to pending proceedings in place of the old.

Although the identity of the party changes, the nature of the claim does not. It is, in legal terms, the same cause of action as it was before. There is no question of a new claim or cause of action being asserted, even though in the particular circumstances the claim is being made by a different person. Because it is the same cause of action, there is no scope for a limitation defence. The defendant cannot say that the time for bringing proceedings has expired when the new claimant replaces the old, because the essential point is that no new claim is being put forward.

Until 1980, this was entirely clear. Ord. 15, r. 7 regulated the change in the identity of the party. Ord. 15, r. 6 and Ord. 20, r. 5 provided for the quite different situation where a new or an existing party seeks to introduce a new claim into the proceedings after the relevant time-limit has expired.

The second defendants say that all this was changed by section 35 of the Limitation Act 1980 and by amendments to the Rules of the Supreme Court since

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that Act was passed. They say that the effect of the change in the identity of the claimant, if it takes place after the limitation period has expired, is to extinguish the claim, so that in the present case they, the defendants, fortuitously go scot-free.

The short answer to this submission, in my judgment, is that limitation defences have nothing to do with a change in the identity of a party under Ord. 15, r. 7. It is quite obvious that the statute and the rule changes were not intended to have this extraordinary effect. It is equally obvious that if the so-called literal construction were to compel the conclusion for which the second defendants contend, then it would be as the result of an unfortunate oversight by Parliament and the draftsman of the rules.

Only if the court was obsessed by the strictly literal interpretation and oblivious to the common sense of the matter could the conclusion be entertained.

21. It would be relevant to notice, at this stage, the observations of the Supreme Court, in Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others, , where the Court held that in as much as abatement results in denial of hearing on the merits of the case, the provisions for abatement are to be construed strictly; likewise, a request for setting aside abatement and the dismissal consequent upon abatement has to be considered liberally. What cannot be lost sight of in the discussion is that while upon the death of an individual plaintiff or claimant, the court is empowered to substitute the legal heir or representative, failing which an abatement of action occurs - even that can be overcome if the heir or representative (who might not be aware of his rights, or might be in the dark about the litigation itself) applies for setting aside the abatement; if the time provided for doing so lapses, the residuary Article in the Limitation Act, 1963 applies, enabling such a course of action. The underlying thought is that a cause of action is not extinguished; the court has to trace, or at least make an effort to trace the rightful successor to prosecute the claim, or defend the proceeding. The argument based on Section 3(42) of the General Clauses Act, 1897 is also of no assistance, because even if a company is a person, and winding up results in its death, as explained earlier, there is a radical difference between an amalgamation and a final winding up order, after all affairs of the company have been taken care of by the Court. It is therefore held that the conclusions of the learned single judge that the suit had abated by virtue of Order 22 Rule 3 , on the "death" of the original plaintiff, cannot be sustained.

22. As regard the second question, i.e. applicability of Order 22 Rule 10 , those provisions are enabling provisions meant to further ends of justice. This was held in S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others, :

"26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights to citizen under personal, property

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and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 of CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 rule 1 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice."

....

"31. But, in our view also, as to what those circumstances are to be cannot be exhaustively enumerated and no hard and rule for invariable application can be devised. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law, inevitably necessitates it. Consequently, having regard to the nature of the proceedings under the Act and the purpose of reference proceedings and the appeal therefrom, the Courts should adopt a liberal approach in the matter of condonation of the delay as well as the considerations which should weigh in adjudging nature of the decree, i.e., whether it is joint and inseparable or joint and severable or separable."

23. In the opinion of this Court, the law declared by the Supreme Court regarding the legal effect of a merger, or scheme of amalgamation, upon pending proceedings, in Bhagwan Das Chopra (supra) that "subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding, filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken place in those proceedings will continue to operate against and the binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule-10 of Order-22 of Code of Civil Procedure, 1908" affords the clearest guidance in such circumstances. Neither Saraswati Investment Syndicate, nor Singer nor any of the decisions is a direct authority on the question of succession to legal proceedings before a civil court. Even though Bhagwan Dass was rendered in the context of industrial adjudication, the Court expressly relied on Order 22 Rule 10 , and spelt out its application in these circumstances. For these reasons, the conclusion of the learned Single Judge that as the suit had abated under Order 22 Rule 3 , CPC,

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resulting in the consequent inapplicability of Order 22 Rule 10 , appears to be based on a textual reading of that provision. Order 22 Rule 10 , CPC applies in cases like the present; the Court would have then, to necessarily embark on an inquiry - albeit a prima facie or rudimentary one, to decide if indeed the applicant concerned is the successor entitled to the carriage of the legal proceeding, i.e. the suit. In fact, though in General Electric Canada Inc (supra) the learned Single Judge seems to rely on the proposition of corporate death, the decision itself indicates that the terms of amalgamation were considered, and the claim to succession (of the applicant) was turned down.

24. It is pertinent to note that procedural laws are meant to regulate the object of doing substantial and real justice and not to foreclose adjudication on merits. The court is mindful of the fact that barring the application of the principle action personalis moritur cum persona, (i.e. a personal right of action dies with the death of the person) other claims do not extinguish, and can be continued. A creditor''s claim to his dues therefore does not die. Even where abatement occurs, in the sense that the time prescribed for the setting aside of abatement expires - under Article 120 of the Schedule to the Limitation Act expires, the creditor/claimant, through the successor, or the successor, as the case may be, can request the court to condone the delay in moving an application, under Section 5 of the Limitation Act.

25. The Merger deed specifies that the entity as such has not ceased to exist but is continuing for limited purposes:

"Within liquidation, our activities are limited to the collection of our receivables and settlement of our liabilities."

26. This Court, however desists from pronouncing on the issue, as that would be the subject matter of inquiry under Order 22 Rule 10 , CPC, by the concerned court. As the learned Single Judge held that since Bank Kreiss AG the sole plaintiff, ceased to exist on and from 09.10.2001, it would be considered to be ''dead'' and the suit abated and he further held that Order 22 Rule 10 CPC does not apply, there was no inquiry about the claim made regarding succession. Having regard to the conclusions reached by this Court, in the earlier portions of this judgment, it is just and appropriate that the claims of Yapi Kredi Bank, and its claimed successor, C.H. Financial Investments, should be inquired into under Order 22, Rule 10 CPC by the learned single judge. The said applications are accordingly restored to their original position on the file of the Court.

27. As a result of the above discussion, this Court is of the opinion that the impugned judgment and order of the learned single Judge are unsustainable; these are set aside. The matter is remitted for inquiry, as to who is the successor entitled to continue with the suit. The learned single judge would undertake that inquiry in accordance with the procedure applicable under Order 22 Rule 10 , CPC. All rights and contentions of the parties, on the facts and merits of the rival claims are reserved. The appeal is allowed in the above terms without any order

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as to costs."

(emphasis is mine)

7. I have reproduced in extenso the complete arguments and discussion in the judgment in the case of Yapi Kredi Bank (Deutschland) AG (supra) as that discussion and ratio squarely covers the issue in question. The final ratio of the Division Bench in Yapi Kredi Bank (Deutschland) AG''s case (supra) is contained in paras 23 and 27 and which ratio categorically lays down that Order 22 Rule 10 CPC applies in the scenario where a party to a suit is a company and such a company ceases to exist because of an order of amalgamation. Of course, whether or not in the facts of the case in Yapi Kredi Bank (Deutschland) AG''s case (supra) actually devolution of interest had or had not taken back because there was a dispute under the assignment/transfer deed, and therefore on the facts whether devolution of interest did take place or not, to apply provision of Order 22 Rule 10 CPC was left open to be decided by the learned Single Judge, however the ratio of the judgment in Yapi Kredi Bank (Deutschland) AG''s case (supra) is very clear that once there is amalgamation of one company with another company pursuant to a scheme of merger sanctioned by a Court Order 22 Rule 10 CPC applies and not Order 22 Rules 3 and 4 CPC.

8. Learned counsel for M/s. International Tractors Limited very strenuously and emphatically seeks to distinguish the judgment of the Division Bench of Yapi Kredi Bank (Deutschland) AG''s case (supra) by relying upon the order of the Supreme Court passed in challenge to the judgment of the Division Bench of this Court of Yapi Kredi Bank (Deutschland) AG''s case (supra). Reliance was also placed upon a Division Bench judgment of this Court in the case of General Electric Canada v. National Hydroelectric Power Corporation Limited & Anr., FAO(OS) 299/2012 decided on 06.12.2012.

9. Let me at this stage, with respect to first argument, reproduce the entire order of the Supreme Court passed in Special Leave Petition Nos. 18757-18758/2013 titled as ''Ashok K.Chauhan & Ors. Vs. Yapi Kredi Bank (Deutschland) '' dated 09.05.2013 and this order reads as under:-

"Heard Mr. Mukul Rohtagi, learned senior counsel for the petitioners.

Special leave petitions are dismissed.

However, it is clarified that if by lapse of time, right, title or interest in the successor company has extinguished, such plea of limitation may be raised by the respondent in the written statement and upon such plea being raised the issue will be framed and tried in accordance with law. In view of above, no order on the applications for permission to file SLP and to serve the respondent through Attorney is necessary and the said applications also stand disposed of."

10. I do not find anything in the order of the Supreme Court dated 09.05.2013 which in any manner whittles down or sets aside the ratio of the Division Bench judgment of this Court in the case of Yapi Kredi Bank (Deutschland) AG (supra)

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that in case of amalgamation of one company with another company pursuant to a scheme of merger sanctioned by a Court it is Order 22 Rule 10 CPC which would apply and not Order 22 Rules 3 and 4 CPC. The Supreme Court in its order dated 09.05.2013 only left the issue of merits as regards whether the main suit itself is time barred, and this issue of merits of limitation was left open to be framed in the main suit. It is not the order of the Supreme Court that there is a limitation period for filing an application under Order 22 Rule 10 CPC. As seen from the order of the Supreme Court dated 09.05.2013 the SLP against the judgment of a Division Bench of this Court in Yapi Kredi Bank (Deutschland) AG''s case (supra) was dismissed except making observations with respect to the entitlement to get an issue of limitation framed of merits in the main suit and not of limitation qua the application under Order 22 Rule 10 CPC. As stated below the Supreme Court has already held in the judgment in the case of Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, that there is no period of limitation for filing an application under Order 22 Rule 10 CPC.

11. Therefore, reliance placed by M/s. International Tractors Limited on the order of the Supreme Court dated 09.05.2013 for arguing that the ratio of Division Bench in the case of Yapi Kredi Bank (Deutschland) AG (supra) is not applicable is a misconceived argument and rejected.

12. So far as the reliance placed by M/s. International Tractors Limited on the judgment of the Division Bench of this Court dated 06.12.2012 in the case of General Electric Canada (supra) is concerned, the same is in fact not even understood by this Court as to how can this judgment be cited at all because this judgment not only does not uphold the ratio of a Single Judge in the case of CS(OS) No. 675/1999 titled as M/s. Bank Kreiss AG v. Mr. Ashok K. Chauhan & Ors., decided on 23.10.2007 which was set aside by this Court in Yapi Kredi Bank (Deutschland) AG''s case (supra), but also the judgment of the Division Bench in General Electric Canada''s case (supra) holds that the company General Electric Canada in the facts of that case did not ''die'' and there was never an amalgamation of that company with any other company and hence the issue on facts did not arise with respect to applicability of the ratio of the Single Judge in M/s. Bank Kreiss AG''s case (supra) and which ratio in any case was specifically set aside by the Division Bench in its judgment dated 17.01.2013 in Yapi Kredi Bank (Deutschland) AG''s case (supra) as discussed above.

13. In view of the above, the following conclusions emerge:-

(i) The provision of Order 22 Rule 10 CPC applies in case of amalgamation and merger of a company and not the provisions of Order 22 Rules 2 , 3 and 4 CPC.

(ii) Once, it is the provision of Order 22 Rule 10 CPC which applies, and there is devolution of interest, that there does not arise any issue of any limitation for filing of an application under Order 22 Rule 10 CPC and as held by the Supreme Court in the judgment in the case of Dhurandhar Prasad Singh (supra).

(iii) The factual position with respect to passing of the orders of amalgamation

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and merger by the Bombay High Court and Punjab and Haryana High Court remain undisputed and with the consequential effect as per the relevant provisions of the Companies Act and the scheme of amalgamation and merger, the rights and liabilities etc of M/s. Punjab Tractors Limited now get devolved upon M/s. Mahindra and Mahindra Limited.

14. I may note that in this suit the present set of applications which are being disposed of by this Court were filed in the year 2011 i.e valuable time of around five years has been lost on account of frivolous objections raised on behalf of M/s. International Tractors Limited in opposing the application of M/s. Punjab Tractors Limited and which application was nothing but only for continuing the suit with the new successor company, namely, M/s. Mahindra and Mahindra Limited, pursuant to amalgamation and merger orders. Besides valuable judicial time having been wasted, there has been expenses incurred by M/s. Punjab Tractors Limited over these five years in contesting the subject applications which have been disposed of by this order. Therefore, while allowing I.A. Nos. 6733/2011 in CS(OS) 470/2004 and I.A. No. 6720/2011 in CS(OS) 301/2003 and dismissing I.A. No. 6206/2011 in CS(OS) 470/2004, I impose actual costs upon M/s. International Tractors Limited with respect to the fees paid by M/s. Punjab Tractors Limited / M/s. Mahindra and Mahindra Limited to its Advocates for contesting these applications. The entire fees paid by M/s. Mahindra and Mahindra Limited/ M/s. Punjab Tractors Limited for contesting the applications I.As 6733/2011 and 6206/2011 be filed in the form of an affidavit in this Court along with the certificate of the lawyers of having received the said fees within a period of four weeks from today and such fees paid to the Advocates will be the costs in favour of M/s. Mahindra and Mahindra Limited and against M/s. International Tractors Limited for disposal of these applications. Costs be paid within four weeks after the affidavit of costs is filed by M/s. Mahindra and Mahindra Limited.

CS(OS) 301/2003 & CS(OS) 470/2004

15. In these connected suits evidence of Punjab Tractors Limited / M/s. Mahindra and Mahindra Limited already stands concluded. It was the evidence of M/s. International Tractors Limited which was being recorded and at which stage the subject applications came to be filed. Accordingly, list both the suits before the Joint Registrar for fixing dates of remaining evidence to be led on behalf of M/s. International Tractors Limited on 16th November, 2015.

I.A. No. 24250/2014 in CS(OS) 470/2004 (filed by defendant nos.1 to 3 u/O 7 R 11 CPC)

16. List for hearing on 8th January, 2016.

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