(2012) 06 CAL CK 0020

In the Calcutta High Court

Case No : C.S. No. 373 of 1992, G.A. No''s. 2252 of 2006 and 1678 and 2205 of 2011

Shaw Wallace and Co. Ltd. APPELLANT

Vs

Kishore Rajaram Chhabria RESPONDENT

Date of Decision : 25-06-2012

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 10, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4

Citation : (2013) 1 CHN 238 : (2013) 112 CLA 570 : (2012) 116 SCL 633

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : S.N. Mookherjee, R. Banerjee, J. Munin and T. Aich, for the Appellant; P. Chatterjee, Sudipto Sarkar, A.K. Chatterjee, S. Mitra and M. Bhattacharyya, for the Respondent

Final Decision : Dismissed

Judgement

I.P. Mukerji, J.

Developments:

1. Both the plaintiffs stand dissolved by operation of law. The first plaintiff (SWC) was dissolved on 7th September, 2009 by an order of this Court. It was made in connection with a scheme application under the Companies Act, 1956. The second plaintiff (SWDL) stood similarly dissolved in September 2006 by orders of the Karnataka and Bombay High Courts. Another company, United Spirits Limited wants to continue this suit in place of the plaintiffs. They seek certain amendments to the existing plaint. They also want some interim orders in the suit. Mr. Kishore Rajaram Chhabria, the first defendant and the sixth defendant (BDA), a company BKC Enterprises Private Ltd. (BKC) and Allied Blenders and Distilleries Private Limited (Allied) unitedly opposed the prayers. They are collectively described as "the defendants". At one point of time SWC was a giant company dealing in spirits. It had a long chain of subsidiaries, large

undertakings, a big market, reputation and so on. Cruickshank & Company Ltd. (CCL) was a wholly owned subsidiary of SWC. A company Parganas Investments Ltd. (PIL) was a subsidiary of CCL. PIL held the controlling number of shares in another company, Arunava Investments Ltd. (AIL). Thus, AIL was or was always believed to be a subsidiary of SWC. In any event SWC, AIL, CCL and PIL were part of a chain of holding and subsidiary companies or group companies of which the flagship was SWC. The sixth defendant (BDA) was incorporated on 25th February, 1986 as a private company limited by shares. AIL acquired the entire paid up share capital of BDA. These were 25,000 equity shares of Rs. 10 each. Therefore, BDA was also added to the chain, in or about 1988. The name of the CCL was changed to SWDL.

2. Manohar Rajaram Chhabria had taken control of SWC in 1987. His brother is Mr. Kishore Rajaram Chhabria. It is said that Manohar Rajaram Chhabria brought up Kishore. The latter was elected as a director of SWC at its general meeting held on 27th March, 1987. He was appointed the Managing Director of the Company on 24th June, 1987.

3. What happened between 1990 and 1992 is this. On or about 3rd August, 1990, a company Intrust Securities and Investments (P) Ltd. (Intrust) acquired the 25,000 equity shares of Rs. 10 each in BDA. This was followed, on or about 27th March 1991 by further allotments. The result was that the shares of BDA were held as follows: Intrust 49%; Mercury Breweries & Distilleries Ltd. 49% and Madan Dwarkadas Chhabria 2%. It was alleged that Mr. Kishore Rajaram Chhabria was behind all this and that as the Managing Director of SWC, he abused his position to acquire control of BDA. The above entities holding shares in BDA were in his absolute control.

4. Now, B.D.A. had a large liquor business with a distillery at Aurangabad.

5. SWC and AIL, which were the original plaintiffs filed the above suit in the year 1992, inter alia, alleging that Mr. Kishore Rajaram Chhabria was guilty of taking over control of B.D.A. and thereby divesting SWC of this subsidiary. It was said that he was in breach of his fiduciary duty as a director of SWC. Simultaneously, an interim application was filed inter alia to restrain Mr. Kishore Rajaram Chhabria from diverting the liquor business of SWC, by taking over its subsidiary BDA. This Court, on 5th May, 1992 promptly granted an injunction. Padma Khastgir J. directed maintenance of status quo of the distillery of BDA at Aurangabad regarding its managerial staff and marketing of its products. Mr. Kishore Rajaram Chhabria appealed to the Division Bench. The appeal was heard extensively before that bench. Ultimately by its judgment and order pronounced on 27th August, 1993, the Division Bench held that Chhabria was not guilty of any wrong doing. The matter was carried in appeal to the Supreme Court. The Supreme Court on 19th November, 1993 affirmed the view of the Division Bench of this High Court.

"Herbertsons", "East Coast", "Endeavour" and "Consolidated", all incorporated companies and part of the U.B. group acquired BDA, on 14th December, 1993. All these companies acquiring BDA were controlled by Mr. Vijay Mallya. Thereafter in 1994 BDA became a wholly owned subsidiary of Herbertsons.

6. Mr. Vijay Mallya and Mr. Kishore Rajaram Chhabria entered into a settlement. This agreement was entered into on 11th February, 2005. Herbertsons Ltd. would be retained by Mr. Vijay Mallya. B.D.A. would be delinked from Herbertsons and given to Mr. Kishore Rajaram Chhabria. Therefore, 100% shares of B.D.A. were transferred to two entities, Mozzart Traders (P) Ltd. and Cacomistle Finlease Investments (P) Ltd., two companies controlled by Mr. Kishore Rajaram Chhabria, Mr. Chhabria would give up his stake in Herbertsons. At that point of time, it appears that Mr. Vijay Mallya was negotiating the acquisition of SWC by the UB Group. The Vijay Mallya group bought the controlling interest in SWC on 14th June, 2005. He was appointed its chairman on the same day. Herbertsons merged with Mc Dowell & Co. Ltd., a Vijay Mallya Company. Mc Dowell changed its name to United Spirits Ltd., the present applicant. On 23rd June, 2006 the Karnataka High Court sanctioned a scheme under the Companies Act, 1956. On 5th September, 2006 the Bombay High Court sanctioned a similar scheme. The result was that all the assets and the liabilities of SWDL together with its rights and obligations vested in United Spirits.

7. Thereafter, Mr. Kishore Rajaram Chhabria promoted another company Chhabria Marketing Ltd. A scheme was presented before the Bombay High Court for transfer of the liquor business of BDA to this company. On 23rd February, 2007 this scheme was approved by that Court. In about two months, on 16th April, 2007 the name of Chhabria Marketing Ltd. was changed to Allied. It is submitted that its present liquor business consists not only the liquor business of BDA but also the liquor businesses of two other companies Ashoka Liquors Pvt. Ltd. and Tracstar Investments Pvt. Ltd. Officer''s Choice Spirits Pvt. Ltd., BKC, Dipak Roy, and Allied, all under the control of Mr. Kishore Rajaram Chhabria presently hold 100% shares in BDA, in place of Mercury Distilleries and Breweries Ltd., the eighth defendant and Intrust, the seventh defendant.

8. As a result of orders passed by a Single Judge of this Court on 16th January, 2009, and its division bench on 3rd and 25th March, 2009 and the order dated 21st August, 2009 passed by the Supreme Court, all assets, liabilities, rights and obligations of SWC in the suit were transferred to an vested in United Spirits Ltd. The schemes specifically provided so.

9. By the application (G.A. No. 1678 of 2001) the applicant United Spirits Ltd. wants the following reliefs:

(a) Leave be given to serve a copy of this application on Allied Blenders And Distillers Private Limited, BKC Enterprises Private Limited, Officer''s Choice Spirits Private Limited and Deepak Roy:

(b) Allied Blenders And Distillers Private Limited, a company incorporated under the provisions of the Companies Act, 1956 and carrying on business, inter alia, at

10/1/H, 1st Floor, Diamond Enterprises Private Limited, a company incorporated under the provisions of the Companies Act, 1956 and carrying on business, inter alia, at 394-C Lamington Chambers, Lamington Road, Mumbai-400 004, Officer''s Choice Spirits Private Limited, a company incorporated under the provisions of the Companies Act, 1956 and carrying on business, inter alia, at 21/24 Khetan Bhawan, 198 Jamshedji Tata Road, Churchgate, Mumbai-400 020, and Deepak Roy working for gain at 394-C Lamington Chambers, Lamington Road, Mumbai-400 004, be added as parties to the instant suit and the cause title of the plaint be amended as indicated in green ink in Annexure "ZL";

(c) The plaint relating to the instant suit be amended as indicated in green ink in Annexure "ZL" hereto;

(d) Such amendments be carried out and incorporated in the plaint already filed herein within a fortnight and all necessary and consequential directions be given to effect such amendments and to re-verify the plaint after the amendments are incorporated;

(e) Injunction restraining the defendant Nos. 1 to 5, 6, 10 and 11 and Allied Blenders And Distillers Pvt. Ltd. from issuing and/or causing to be issued any further shares of and in the defendant No. 6 and/or Allied Blenders And Distillers Pvt. Ltd.

(f) Injunction restraining the shareholders of defendant No. 6 and/or Allied Blenders And Distillers Pvt. Ltd. i.e. BKC Enterprises Private Limited, Officer''s Choice Spirits Private Limited and Deepak Roy from dealing with, transferring or alienating their shareholding of and in the defendant No. 6 and/or Allied Blenders And Distillers Pvt. Ltd., as the case may be, in any manner whatsoever;

(g) Injunction restraining BKC Enterprises Private Limited and Deepak Roy from altering the share capital of ABADPL in any manner whatsoever;

(h) If necessary, leave be granted under clause 12 of the letters patent and/or clause 14 of the letters patent to proceed with the instant suit in the event of leave to amend being granted as prayed for.

(i) Ad interim orders in terms of prayers above.

(j) Costs of and incidental to this application be paid by the defendant Nos. 1 to 6, 10 and 11;

(k) Such further orders or directions be given as this Hon''ble Court may deem fit and proper.

And, your petitioner, as in duty-bound, shall ever pray.

When this application was moved before me, I passed the following interim order on 25th November, 2011:

....Yet in my opinion, there is no immediate cause for the Court to interfere in the management of any company. Therefore the following orders are passed.

(a) A copy of this application, if not already served, be served on Allied Blenders & Distillers Private Limited.

(b) Direction for filing of affidavits is made. Affidavit-in-opposition be filed by 9th December, 2011. List this application on 22nd December, 2011 along with item no. 51 of today''s list. Affidavit-in-reply may be filed in the meantime.

(c) Allied Blenders & Distilleries Private Limited may be free to raise a sum of INR 2 billion as stated in the website, because the Court does not wish to interfere in its management or consider this issue without the company being before it.

(d) The first and sixth defendants are restrained from doing any act with the above sum that would result in change in the paid-up capital of the sixth defendant or Allied Blenders & Distillers Private Limited, without the leave of this Court.

Stay of operation of this Court is prayed for by Mr. Pratap Chatterjee. Considering the contentions involved, stay of this order is granted for one week from date.

All parties are to act on a signed photocopy of this order on the usual undertakings.

The contentions which arise in this application may be summarised now.

Contentions

10. United Spirits Ltd. wants to be substituted as the plaintiff in place of SWC and SWDL. According to them, by the schemes of merger and demerger sanctioned by the Calcutta, Karnataka and Bombay High Courts, the right of the plaintiffs to proceed with the instant suit has vested in them.

11. The defendants contest this claim. They submit that both the plaintiffs stand dissolved. They are dead in the eye of law. Their corporate entities ceased a long time ago. The suit has abated. It cannot be revived by United Spirits Ltd.

12. The next contention of United Spirits Ltd. is that the cause of action of SWC and Shaw Wallace Distilleries Ltd. against Mr. Kishore Rajaram Chhabria and BDA still survives. Therefore, United Spirits is entitled to pursue its claim in the suit against Mr. Kishore Rajaram Chhabria and B.D.A.

13. B.D.A. has branched out into Allied to which the liquor business of BDA has been transferred. United Spirits is entitled to trace the liquor business to those hands into which the business has been transferred.

14. It was submitted by Mr. S.N. Mookherjee learned senior Advocate that in paragraph 9 of the plaint in the Bombay suit, Mr. Kishore Rajaram Chhabria made some disclosures which would show that he had a hand in the taking over of BDA and which was suppressed from this Court. This was a fresh circumstance necessitating passing of the interim orders prayed for.

15. It was also submitted by him that corporate entities are not like individual

persons. When settlements are reached between living persons, it does not, in normal circumstances, create any right or obligation in body corporates. The settlement of 2005 was between Mr. Mallya and Mr. Chhabria.

16. Before the settlement B.D.A. was a subsidiary of Herbertson. As a result of the settlement and resultant schemes of merger, demerger etc. B.D.A. was demerged from Herbertsons. Herbertsons merged with Mc. Dowell, the name of which company was changed to United Spirits Ltd. There is no dispute that Herbertson, Mc. Dowell and United Spirits Ltd. are controlled by Mr. Vijay Mallya and the control of B.D.A. was given to Mr. Kishore Rajaram Chhabria. But the schemes of merger, demerger etc. which were a result of this settlement remained a settlement between corporate entities. Therefore, when Herbertsons merged with Mc. Dowell, its rights and liabilities merged with Mc. Dowell and later United Spirits Ltd. But this demerger of B.D.A. and merger of Herbertsons with Mc. Dowell and United Spirits Ltd. did not destroy the cause of action of Mc. Dowell against Mr. Kishore Rajaram Chhabria and B.D.A. and later United Spirits Ltd. which acquired the rights and obligations of SWC and SWDL.

17. In the suit filed at the instance of Mr. Kishore Rajaram Chhabria in the Bombay High Court being C.S. No. 1301 of 2006 he asked for some orders which tantamounted to stay of this suit. That prayer was refused in the judgment and order passed by the Bombay High Court on 21st July, 2006 which was affirmed on appeal by a Division Bench of that Court on 29th August, 2006.

18. It was submitted by Mr. Sudipto Sarkar, learned Senior Advocate and supplemented by Mr. Pratap Chatterjee and Mr. Ajoy Krishna Chatterjee, learned Advocates that these corporate entities or this mesh of holding and subsidiary companies is a veil. The real persons in control are Mr. Vijay Mallya and Mr. Kishore Rajaram Chhabria, of the respective companies and their subsidiaries. The disputes of the parties have to be seen in this perspective. Now, this liquor business cannot be reclaimed in another garb, Mr. Vijay Mallya wearing the garb of SWC and SWDL after their fusion with United Spirits Ltd. cannot now reclaim the liquor business which was part of the original claim of SWC against Mr. Kishore Rajaram Chhabria.

19. Furthermore, it was submitted that the order of this Court passed in appeal had recorded that Mr. Kishore Rajaram Chhabria was prima facie not guilty of any wrongful act. Therefore, prima facie, the take over of B.D.A. by Intrust, was held not to be wrongful by the Division Bench of this High Court. This order was not disturbed by the Supreme Court. Therefore, at that point of time the link in the chain between SWC and BDA. was broken. Twenty years have passed since the above order. Since there was no restraint order upon Mr. Kishore Rajaram Chhabria, he and B.D.A. had arranged their business affairs in a manner so that the liquor business of B.D.A. was transferred to Allied, a separate corporate entity. It has other distilleries apart from the distillery acquired from B.D.A. No doubt it is controlled by Mr. Kishore Rajaram Chhabria. Now after twenty years the original claim in the suit, which is dead according to Mr. Sarkar should not be

permitted to be revived. It would be most unjust and inequitable for the applicant to try to reopen an issue which is closed.

20. Now, I come to the contention of the petitioner regarding substitution and amendment. According to Mr. S.N. Mookerjee, the rights and liabilities of SWC and SWDL have come to vest in United Spirits, by virtue of schemes of merger, demerger, amalgamation and so on sanctioned by the Calcutta, Karnataka and Bombay High Courts. Therefore, SWC and SWDL are dissolved by operation of law. Their rights and liabilities including the right to sue have vested in the petitioner as devolution of interest. This is described as devolution of interest of a party contained in Rule 10 of Order XXII of the Code of Civil Procedure. This devolution of interest is to be distinguished from the effect of death of a natural person.

21. After the 2005 settlement, United Spirits moved this Court for effecting the necessary amendments. They were opposed by Mr. Kishore Rajaram Chhabria and his group raising the selfsame objections. The amendments were allowed by this Court. So they cannot raise these objections now.

22. According to the defendants the dissolution of SWC and SWDL is to be equated with death. Furthermore, this death is also to be equated with the death of a natural person. According to them, only Rules 1, 2 and 3 of Order XXII will apply. Those rules deal with consequences of, inter alia, the death of the plaintiff or the defendant. If the right to sue survives the suit does not come to an end. In the event of survival of the right to sue there is prescribed a specific time for the legal representative of the deceased plaintiff or defendant to make an application for recording the death and for substitution of the legal representative. This application is hopelessly barred. The suit has long abated. Considering the above submissions, leave to continue the "dead" suit should not be granted.

I will discuss the cases cited by the learned Counsel when I discuss the issues.

Discussion

Abatement:

23. The scheme of Order XXII clearly shows that a difference is drawn between the consequences to the suit upon devolution of interest by death of a natural person and devolution of interest otherwise. It is in this way. Rules 3 and 4 under Order XXII provide that upon death of a plaintiff or defendant, an application has to be made. His legal representative is substituted. Under Rule 5 the Court has the power to determine who is the legal representative of a deceased party. Rule 4A provides that if the deceased has no legal representative, the Administrator General is to represent his estate.

24. There can be no legal representative of a company. The term "legal representative" is defined in section 2(11) of the CPC 1908. It provides that a legal representative represents the "estate of a deceased person". A plain and

ordinary interpretation of the term "legal representative" does not, in my opinion, include any successor-in-interest of a dissolved company, even by the most liberal canons of interpretation. This is because, the natural or ordinary grammatical meaning of the word "death" implies death of a natural person and not extinction of anybody corporate. (See the Oxford Dictionary & Stroud''s Judicial Dictionary of words and phrases Vol. I 6th Edition Pg. 610) shown by Mr. S.N. Mookherjee.

25. Furthermore, the Administrator General has no known powers of looking after the affairs of dissolved companies or their successors.

26. If Rules 1 to 5 of Order XXII were also to include, according to the intention of the legislature, devolution of interest on the dissolution of a body corporate, a large part of Rule 10 of Order XXII would become redundant. It is trite that the legislature does not enact anything which is superfluous. Furthermore, the opening words of Rule 10 are "in other cases". This plainly signifies that the legislature indicated a definite distinction between the death of a natural person and devolution of interest with regard to a body corporate. The case of Shree Choudhary Cold Storage (1972) Vs. Ruby General Insurance Co. Ltd., cited by the defendants stops saying that dissolution is equivalent to extinction of a company. The Court had no occasion to consider devolution of interest along with dissolution.

27. Therefore, rules 1 to 5 of Order XXII and consequently rules 6 to 9 do not apply to body corporates. (See Dhurandhar Prasad Singh Vs. Jai Prakash University and Others,

28. In its wisdom, the legislature provided that on the devolution of interest other than by death of a natural person, which includes devolution of interest arising out of schemes of merger and demerger between companies, a person on whom the interest devolves, does not have to make any formal application. Rule 10 does not say so. Such a person has to only obtain the leave of the Court, to continue the action which is not interrupted by devolution. Justice Mathew, speaking for the Supreme Court opined as follows in Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (Deceased) through his Chela Shiam Dass,

8. This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22, Rule 10, is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of

the temple may be substituted as a party under this rule. The word ''interest'' which is mentioned in this rule means interest in the property i.e., the subject matter of the suit and the interest is the interest of the person who was the party to the suit.

Dhurandhar Prasad Singh (supra) followed Rikhu Dev, Chela Bawa Harjung Dass (supra) and went further to pronounce that there was no consequence of leave not being obtained, apart from the "obvious risk that the suit may not be properly conducted by the plaintiff on record" (See also the case of Jaskirat Datwani Vs. Vidyavati and Others, ; See also our High Court judgment in Rai Charan Mandal v. Biswanath Mandal AIR 1915 Cal 103. All these cases were cited by Mr. S.N. Mookerjee. I do not think that after the above Supreme Court dicta, Goutami Devi Sitamony Vs. Madhavan Sivarajan, , Seth Raghunath Dass Harakchand Vs. Seth Purushotham Dass, , Devisahai Premraj Mahajan Vs. Govindrao Balwantrao and Others, and Sukhdip Singh Vs. Arjan Singh Mihan Singh and Another, cited by the defendants are good law on this specific issue.

Hence, there was no abatement of this suit.

Leave:

29. In my judgment this leave is to be granted by the Court upon being satisfied that there is devolution of interest. The Court cannot make any further enquiry. If the Court is satisfied that devolution of interest has taken place, the Court will allow the applicant to be substituted as a party in place of the party whose interest has devolved upon the applicant. The Court may also allow consequential amendments to the pleadings. In my opinion, in considering such leave, the basic procedure of Order XXII should be followed by the Court, so that the devolution is recorded in an orderly way.

30. On examination of admitted facts, i.e. schemes sanctioned by the three High Courts of Calcutta, Bombay and Karnataka, it is plain and I hold so that the right of this suit in SWC and SWDL has vested in the applicant, United Spirits Ltd. "by devolution of interest".

Hence, in the circumstances, leave under XXII Rule 10 cannot be withheld.

Dead cause of action:

31. Now, the argument of the defendants that the cause of action is dead.

32. The argument of Mr. Sarkar is that there is only one person who can be equated with the various corporate bodies which claim to be merged with the applicant United Spirits Ltd. He is Mr Vijay Mallya. Similarly there is only one person behind the corporate bodies constituting Mr. Kishore Rajaram Chhabria''s group of companies. That person is Mr. Kishore Rajaram Chhabria. So having agreed to give up B.D.A. which necessarily included its liquor undertaking and business to Chhabria, Mr. Vijay Mallya cannot turn around and claim it back. He and his companies are bound by the settlement.

33. In my opinion, this submission is not correct. First of all, that these two persons are the alter ego or the actual face of the companies that they control, have to be established at the trial. It is not established on affidavits. Secondly, on examination of the schemes of arrangement, amalgamation, merger and demerger etc., I find that body corporates are involved. For example, Herbertsons relinquished its interest in B.D.A. Now, relinquishment of its interest in B.D.A. by Herbertsons is not equivalent to United Spirits relinquishing their rights against Mr. Kishore Rajaram Chhabria or B.D.A. or its subsidiaries or group companies. It is also not equivalent to SWC or SWDL relinquishing their right and interest in the suit at the time when United Spirits acquired, inter alia, the rights of these two companies. Therefore, it follows that it cannot be inferred at this stage that United Spirits had given up their cause of action in the above suit against Mr. Kishore Rajaram Chhabria and BDA. It is nowhere found in the schemes of arrangement or amalgamation or mergers or demerger sanctioned by the Calcutta, Karnataka and Bombay High Courts. It is a fine technical issue but nevertheless it is an issue and this issue cannot be resolved except upon the trial of the suit. Mr. Kishore Rajaram Chhabria and his group of companies would have to show that he and Mr. Vijay Mallya are the alter ego of the respective network of holding and subsidiaring companies and that the agreement of 2005 bound the companies controlled by them.

34. Furthermore, in an interlocutory application, in my opinion, there is no power in the Court to adjudge facts on affidavits and come to a conclusion that the cause of action in a suit is extinguished. There is no such provision, to my knowledge in the Code of Civil Procedure. The plaint may be rejected when the plaint discloses no cause of action or the suit has become barred by law (See Order VII Rule 11). Nothing stares on the face of the affidavits to warrant such a conclusion. Neither do I find any provision in the CPC to permit this Court to declare on affidavits that the suit has served its purpose and should be dismissed. That decree can only be passed upon trial of the suit.

Hence, at this stage, it cannot be held that the cause of action is dead.

Interim Order:

35. Now comes the question of passing of an interim order.

36. As I have been able to understand the primary grievance of SWC and AIL and later SWC and SWDL in the suit was that Mr. Kishore Rajaram Chhabria as the Managing Director of SWC had misused his fiduciary relationship by causing the take over of BDA, which was always considered as a subsidiary of SWC. Consequently there was also a take over of its liquor business. The distillery of BDA at Aurangabad was divested from SWC and its network of subsidiaries and group companies. However, in the suit, the then plaintiffs were unable to obtain any interim order with regard to this distillery, even up to the stage of Supreme Court. Mr. Sarkar appears to be right in his submission that at that point of time there was a break in the chain. On 14th December, 1993 four U.B. Group

Companies which were under the control of Mr. Vijay Mallya, Herbertsons, East Coast, Endeavour and Consolidated purchased the entire share capital of 1,00,000 equity shares of BDA. This included the 25,000 shares, the transfer of which was the subject matter of this suit. Therefore, BDA came to be controlled by Mr. Vijay Mallya. Subsequently on 7th February, 1992 there was a further allotment of 54,000 equity shares to Herbertson after increasing the share capital of BDA from 1,00,000 equity shares to 1,54,000 shares of Rs. 10/- each. Thereafter East Coast, Endeavour and Consolidated transferred their shares to Herbertson. BDA became a wholly owned subsidiary of Herbertson. Then came the settlement of 2005. The control of BDA came back to Mr. Kishore Rajaram Chhabria, as discussed above. After this, on 5th September, 2006 Herbertson merged with Mc Dowell Company Limited whose name was changed to United Spirits Ltd., the applicant. As there was no interim order Mr. Kishore Rajaram Chhabria made further expansion and diversification. The result was formation of the company Allied. The liquor business, including the said distillery was transferred to this company. Apart from this distillery this company also owns other distilleries which it has acquired from Tracstar and Ashoka Liquors.

36A. Although I was shown paragraph 9 of the plaint in the Bombay suit, I do not think that any averment in that paragraph, prima facie, shows that Mr. Kishore Rajaram Chhabria was guilty of any wrong doing when BDA was divested from SWC, which was suppressed from this Court when it was considering the interim application.

37. There is some substance in the submission of Mr. Pratap Chatterjee and Mr. Sudipto Sarkar that Mr. Vijay Mallya and his group of companies did not challenge the transfer of the shares of BDA in favour of Cacomistle and Mozzart in February 2005, which was made by Herbertson. Neither was any challenge made to the subsequent dissolution of Herbertson. Neither was any challenge made, when in 2007, BDA transferred, its liquor business and distillery at Aurangabad to Allied under a scheme which was sanctioned by the Bombay High Court.

38. It is also absolutely true that if Mr. Kishore Rajaram Chhabria and his group of companies thought that by the schemes of merger and demerger the original cause of action of SWC was being given up, they were sadly mistaken. May be, his advisors had advised him that after the settlement of 2005, the said cause of action was gone. But that is not true. The settlement between two individuals cannot bind anybody corporate. That is an elementary principle of company law. It can only bind a body corporate if it is shown that a particular person was its alter ego. That can only come out at the time of the trial of the suit. On my examination of the schemes of merger and demerger I am convinced that they were schemes between body corporates. No clause suggests that the cause of action of the original plaintiffs was extinguished. If the shares of BDA or its distillery were to be transferred to another company or group of companies, that transfer was subject to the original cause of action which the original plaintiffs

had against Mr. Kishore Rajaram Chhabria and BDA. That had to be expressly given up at the time of transfer of undertakings and other assets under the schemes. But I do not think that any part of the original cause of action was given up. This point of view finds support in the judgment of the Bombay High Court of 21st July, 2006 which was upheld by its Division Bench on 29th August, 2006.

39. As I have held before the applicant has acquired the original cause of action of the plaintiffs. That cause of action is an action by the company against the allegedly errant director, Mr. Kishore Rajaram Chhabria. If that cause of action is saved and the applicant succeeds in the suit then Mr. Kishore Rajaram Chhabria has to give back what he had taken out from the original plaintiffs or if that is no longer possible its money equivalent. In those circumstances any disposition after filing of the suit, which includes the distillery at Aurangabad which at that time belonged to BDA would have to abide by the result of the suit. In those circumstances the applicant would be entitled to trace the assets of the original plaintiffs into those hands into which they may have come.

40. All observations with regard to extinction of the cause of action and passing of an interim order are prima facie.

Reliefs:

Therefore, I declare that there is devolution of interest of the original plaintiffs upon the applicant, United Spirits Ltd. I grant them leave to prosecute the suit in place of the original plaintiffs. Order in terms of prayers (b) and (c) of the Notice of Motion in G.A. No. 1678 of 2011. Such amendments are to be carried out by the department within a period of four weeks from the date of communication of this order.

I refuse any further interim order. The interim order dated 25th November, 2011 will continue with the modification in Clause (d) at page 6 of the Order that the first and sixth defendants will be free, but the first defendant should not lose control of the company, Allied and its distillery at Aurangabad without the leave of this Court till the disposal of the suit for four reasons:

(i) The interim order is continuing for seven months, without challenge.

(ii) Its stay was prayed for and granted by the trial court but no appeal was preferred.

(iii) The order does not interfere with the management of any entity and thus, does not come into conflict with any existing order.

(iv) The prima facie case as it stands today, as discussed above and the balance of convenience is in favour of the order continuing with the above modification.

The application G.A. 1678 of 2011 is accordingly disposed of. The other applications being G.A. No. 2252 of 2006 being an application by the seventh and eighth defendants and G.A. No. 2205 of 2011 being an application by the sixth defendant for dismissal of the suit are also disposed of, by this judgment and order. No order as to costs.

