
(2009) 09 DEL CK 0324
In the Delhi High Court
Case No : CS (OS) 1514 of 1994

Vinedale Distilleries Ltd. and Others

APPELLANT

Vs

S.K. Aggarwal and Others

RESPONDENT

Date of Decision : 18-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 4, Order 8 Rule 10
Companies Act, 1956 — Section 274(G)
Criminal Procedure Code, 1973 (CrPC) — Section 340
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15

Citation : (2009) 09 DEL CK 0324

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Jayant Nath, B.C. Pandey, Umesh Kumar, for Shaw Wallace and Co. Ltd., C.A. Sundram, Chetan Sharma, Arvind Nigam, Sanjay S. Chhabra, for the Sanman Group, T.K. Ganju, A.K. Thakur, C.S. Gupta, Bharat Gupta and R.K. Mishra, for the A.K. Aggarwal Group, for the Appellant; Jayant Bhushan Rishi Agrawala, Bhagvan Swarup Shukla, Mahesh Aggarwal and Akshay Ringe for S.K. Aggarwal Group, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The applications for change of court commissioner appointed vide order dated 13th February, 1995 in FAO(OS) 265/1994 by the Division Bench of this Court and the IA No.1325/2004 u/s 340 CrPC are for consideration. The suit as well as several other suits connected therewith are inter alia with respect to the control and management of the company M/s Vinedale Distilleries Limited (the company) engaged in the business of manufacture and sale of Indian made foreign liquor; the said company has its distillery at Hyderabad; at the time of the order dated 13th February, 1995 (supra) of the Division Bench there were primarily two groups claiming control of the said company i.e. the Sanman Distributors Group (Sanman Group) and the Aggarwal Group. Since then the Aggarwal Group has split into S.K. Aggarwal Group and A.K. Aggarwal Group. As such the arguments on the application for change of court commissioner have been addressed by the counsel for the said

three groups.

2. The facts need not be burden this order, having been set out in detail in the 147 pages of the order (supra) of the Division Bench. The appeal before the Division Bench was on transfer and against the order of a Single judge of the Bombay High Court on an application under Order 39 of the CPC. The Single Judge restrained the then consolidated Aggarwal Group from acting or representing or holding themselves out as directors of the said company and from interfering in the management of the said company and from entering into upon the registered office, administrative office, distillery of the company or from signing any cheques on behalf of or operating the bank accounts of the said company.

3. The Division Bench of this Court in the order aforesaid found:

a) that till the year 1988 the then consolidated Aggarwal Group held 100% shares of the company;

b) subsequently on 19th March, 1988 Aggarwal Group negotiated with Shaw Wallace and Company Ltd (Shaw Wallace) for sale of 51% shares of the company and the said 51% shares were sold to M/s Arunodaya Investment Company and M/s Mahadev Investment Company being the subsidiaries of Shaw Wallace;

c) that the company was already before the BIFR;

d) upon sale of 51% shares of the company to Shaw Wallace, application was filed before the BIFR for appointment of new directors and three nominees of Shaw Wallace were appointed on the board of the company; on 5th December, 1990 Shaw Wallace disclosed their intention to disinvest their 51% shares holding in the company and pursuant thereto the said 51% shares in the company were transferred to M/s Deccan Securities Private Limited (17%), M/s Chamunda Holdings Private Ltd (17%) and M/s Yogeshwar Holdings Private Ltd (17%) all of which companies were also controlled by the Aggarwal Group. The balance 49% shares in the company which till then were held by S.K. Aggarwal "were also transferred by him on 26th March, 1991 to M/s Deccan Holdings Private Ltd, another company of Aggarwal Group". Thus the 100% shares holding of the company came to be held by the aforesaid four companies (investment companies) part of the Aggarwal Group;

e) The Sanman Group claims that the shares of the aforesaid four investment companies were transferred to Saman Group and their nominees and were held by them; they thus claim that they, through the vehicle of the said four investment companies were in control of the company.

4. The Division Bench of this Court in the order supra, while returning a finding on the prima facie view of the respective claims of Sanman Group and the Aggarwal Group, held that -

a. that both parties had produced conflicting circumstances/materials against

each other;

b. that it is not possible without cross examination of witnesses and examining the original documents/ accounts whether one or the other version is correct or who is speaking the truth.

It was held that neither side had come forward with the whole truth and each side was unable to explain the weak points in its side but wants to point out the loopholes in the case of the opposite side. The Division Bench held that the only thing certain was that the Aggarwal Group was in management on 5th January, 1993 when the suit (out of order wherein appeal had arisen) was filed and that there was no plea of the Sanman Group that the Aggarwal Group was ousted by the Sanman Group from the management of the company. The Division Bench hence held that there was no prima facie proof that the Sanman Group ever came into management of the company or of the four investment companies on or after 9th October, 1991. The Division Bench held that there was enough material to show that the Aggarwal Group were and till then in management and control of the company but there were deficiencies in their case of title to the 100% share holding of the company; the original share certificates of the company or of the four investment companies were however found to be in the custody of the Sanman Group but serious deficiencies were also found in the case of the Sanman Group with regard to the takeover of the four investment companies by their group.

5. The Division Bench on the aspect of the balance of convenience held that the company had a big distillery with huge machinery and a large number of labourers and employees at various levels; that it was neither practicable nor feasible to disturb the management of the Aggarwal Group who had been running the company since April, 1991 and till then were doing so; that since the Sanman Group had not made out a prima facie case, there was no question of handing over the management or control of the company to the Sanman Group and the Sanman Group could not seek to stop the management and control of the company by the Aggarwal Group at that stage or for vesting of the management and control of the company in a third party receiver. It was also found that it would be very difficult for an advocate/receiver or a third party to run the factory of the company since activities of the company were regulated by the State Excise Laws, Factory Laws, Labour Laws, Provident Fund, Gratuity, Minimum wages Laws and all of which could not be handled by the third party receiver.

6. The Division Bench held that thus the only question for consideration was whether the Aggarwal Group could be allowed to manage and control and, if so, under what stipulations. The Division Bench therefore appointed the Aggarwal Group of Directors of the Company as receiver and allowed them to run the company, its factory as representatives of the court and made them accountable to the court as receiver. The Division Bench also noticed that while the Sanman Group was even then agreeable to the appointment of the Aggarwal Group as

receiver subject to certain conditions and further subject to putting a representative of Sanman Group on the board of the company, the Aggarwal Group was not agreeable to such course. The Division Bench also noticed that since the company was before the BIFR, nothing contained in that order would come in the way of the BIFR passing any order in the exercise of its powers.

7. The Division Bench directed

- i. that the Aggarwal Group of Directors of the Company shall continue in management and control of the company and the nominees of the BIFR on the board of the company shall also continue under the directions of BIFR;
- ii. The Aggarwal Group of Directors will be the joint receiver of the company and shall be answerable to this Court for their actions and omissions;
- iii. The court shall be entitled to issue directions to the receiver for implementation of the scheme/orders of the BIFR;
- iv. The Sanman group could nominate a person on its behalf to be present at every meeting of the company whether it be the board meeting, AGM or EOGM or any other statutory meeting; however the said nominee shall not be entitled to vote but shall be entitled to receive the agenda or connected papers of the meeting and offer his/her suggestions, if any;
- v. The receivers as representatives of the court shall manage and control the company and file quarterly reports in this Court in respect of all their actions or decisions and it shall be open to Sanman Group to file its objections;
- vi. that the Aggarwal Group shall furnish bank guarantee in the sum of Rs. 2 crores to meet any contingencies that might arise on account of orders to be passed by this court;
- vii. that the Sanman Group which was in custody of the original share certificates of the company and the four investment companies shall not encumber or transfer or part with possession of the same;
- viii. that it will be open to the receiver to seek appropriate orders from the court;
- ix. further orders including of modification of the said order will be passed by the Single Judge in the suit;
- x. the Aggarwal Group will not enter into agreement of sale or transfer or encumber of any of the property of the company or of the four investment companies without sanction of the court;
- xi. an inventory of the immovable and movable properties of the company was also ordered to be prepared.

8. The S.K. Aggarwal Group went to the Supreme Court against the order of the Division Bench to the extent allowing them to continue in management as receiver and allowing the nominee of Sanman Group in the meeting and asking

them to furnish the bank guarantee. The Supreme Court vide order dated 10th May, 1995 while maintaining the order of the Division Bench continuing the Aggarwal Group in management of the company ordered that the words receivers/joint receivers wherever appearing in the operative part of the order of the Division bench shall be read as court commissioner; the provisions of Order 40 CPC shall apply mutatis mutandis in so far as the court commissioners are concerned and instead of Sanman Group nominating a person at the meetings of the company, the High Court was permitted to nominate a person belonging to the Sanman Group to be present at the said meetings. The condition requiring the Aggarwal Group to furnish the bank guarantee was modified to furnishing the security in the sum of Rs. 1.50 crores and bank guarantee in the sum of Rs. 50 lacs. It was further clarified that the Aggarwal Group shall not create any third party rights in respect of the property of the company nor transfer the shares or create any encumbrance without the sanction of this court.

9. It is also the admitted position that upon split in the Aggarwal Group, it is the S.K. Aggarwal Group which is now in possession and control of the company and its affairs.

10. The Sanman Group now seeks modification/change of order aforesaid of the Division Bench as confirmed/modified by the Supreme Court of appointment of Aggarwal Group as court commissioner and seek either their own appointment as court commissioner or appointment of any other third party as court commissioner. Ordinarily such application is entertain able by the court appointing the receiver. However, since in the order appointing the receiver, itself provides for application for modification to be preferred before the Single Judge, the application has been filed in suit. A.K. Aggarwal Group while supporting removal of the S.K. Aggarwal Group contends that it is not possible for the company to carry on any manufacturing or other business activities and the main asset of the company is the valuable immovable property comprising of land at Hyderabad and orders for protection whereof need to be made. The S.K. Aggarwal Group of course contests the prayer for their removal and have sought directions against Sanman Group and A.K. Aggarwal Group from interfering with their functioning/carrying on business of the company.

11. The senior counsel for the Sanman Group has contended

a) that the purport of the aforesaid orders of the Division Bench and the Supreme Court was that in the event of the Sanman Group ultimately succeeding, they should not have merely a shell company and the idea was to preserve the running company;

b. that the Division Bench of this Court had not issued any direction with respect to the management and control of the company which was left to be decided by the BIFR;

c. that since the Aggarwal Group was allowed to run the company as receiver/ court commissioner under the directions of the court, it showed that they had no

inherent rights of running the company and had to seek directions of the court in the same;

d. that the S.K. Aggarwal Group had utterly failed to manage the company or to protect its assets. Attention in this regard was invited to the observations in the order in writ petition No. 10025/2001 of the High Court of Andhra Pradesh preferred by S.K. Aggarwal Group against the order of BIFR and AAIFR directing the change in management and control of the company. It was held in the said order that the Aggarwal Group was in management as court commissioner and were only dragging on the proceedings so as to perpetuate themselves in management of the company;

e. that since the Aggarwal Group comprising of S.K. Aggarwal and A.K. Aggarwal was appointed as the court commissioner, upon A.K. Aggarwal ceasing to be part of the Aggarwal Group, the order appointing the Aggarwal as the court commissioner in any case come to an end; S.K. Aggarwal had not sought any clarification/direction from the court that he alone was entitled to continue as the court commissioner;

f. that the company is now no longer before the BIFR because of Dena Bank being the principal creditor of the company issuing notice under the provisions of the Securitization Act and owing to the amendment in Section 15 of SICA 1985;

g. That S.K. Aggarwal Group has been wrongly claiming before the BIFR that they were in management of the company instead of stating that they were the commissioner appointed by the court;

h. that the Sanman Group is willing to pay off the Dena Bank being the only secured creditor of the company and to save the assets of the company; However, prior thereto the accounts of the company need to be audited by an independent auditor, for Sanman Group to make a definite proposal before this Court inasmuch as the Sanman Group ought not to be burdened with fictitious creditors of the company put up/cooked up by S.K. Aggarwal Group;

i. that S.K. Aggarwal Group had contrary to the directions of this Court in the orders aforesaid attempted to auction a portion of the immovable property of the company and for that reason alone they were liable to be removed.

12. The Senior counsel for the A.K. Aggarwal Group has contended:

i. that the Division Bench in the order (supra) had given control of the company to the consolidated Aggarwal Group and S.K. Aggarwal was not the person appointed as the Commissioner. Attention was invited to portions of the order of the Division Bench to show that the term Aggarwal Group used therein refers to both S.K. Aggarwal and A.K. Aggarwal;

ii. that the intention of the order of the Division Bench was to keep the business of the company running but admittedly since the year 2001 no trading/manufacturing activity was being carried out by the company;

iii. that the operations of the company had come to a standstill because of the closure order issued by the Pollution Control Board under the guidelines of the Supreme Court. The order of the Appellate Board Pollution was also handed over and it is informed that the same has attained finality; there under the manufacturing activity in the refinery of the company has been closed. It is thus contended that company cannot carry on any business irrespective of the defaults of the S.K. Aggarwal Group and the bogey raised by S.K. Aggarwal of applying for excise licence and interference by A.K. Aggarwal group in the same is irrelevant;

iv. that it was not the contention of the S.K. Aggarwal Group nor is it even now the contention of any party that it is feasible to install an effluent treatment plant at the works of the company or that the operation of the company can be carried out by installation of such a plant. Therefore no purpose would be served in trying to run the company and in fact there is no possibility of the same and thus there is no need to appoint receiver or the commissioner for running the business of the company;

v. Orders ought to be made only for preservation and protection of the assets of the company;

vi. that S.K. Aggarwal Group has not maintained any transparency in the matter and in the affairs of the company. No accounts/reports have been filed as directed; in the year 2000 for the first time accounts were given to the BIFR for the period till the year 2002 and no accounts have been produced thereafter;

vii. that S.K. Aggarwal Group has been putting fictitious losses in the company and showing fictitious expenses of modernization when neither were any such works required nor carried out;

viii. that since it is the S.K. Aggarwal Group only which has been in management of the company, clarification needs to be issued that A.K. Aggarwal Group is not liable under the order aforesaid of the Division Bench;

ix. that in fact S.K. Aggarwal Group is also falsely claiming that A.K. Aggarwal Group ceased to be the director of the company w.e.f. the year 2003 and which could not be done also because S.K. Aggarwal and A.K. Aggarwal were jointly appointed as the Court commissioners vide orders (supra);

x. that there is inter se litigation/suits between S.K. Aggarwal and A.K. Aggarwal (which suits have also been transferred to this court);

xi. that preservation of the assets of the company is possible only under a neutral independent person and S.K. Aggarwal Group should be directed to hand over possession of the factory premises, plant and equipment of the company to such independent person;

xii. that S.K. Aggarwal Group has observed each and every direction of this Court in breach and has been acting `not as a court commissioner or receiver but as

sole owner";

xiii. the submission is that an independent auditor should be appointed to go into the accounts and the list of creditors of the company and the expenses allegedly incurred by the company and to identify the misappropriation, if any, and to fix responsibility;

xiv. that S.K. Aggarwal had not even filed the statutory return of the company and had u/s 274(G) of the Company Act ceased to be eligible even to continue as the director of the company;

xv. this Court had at a preliminary stage of hearing observed as to why the parties should not be called upon to give inter se bids qua the running of the company and management be handed over to the party giving the best bid; in response to the same it was stated that no purpose would be served since because of the orders of the Pollution Control Board the company could not carry on any business.

13. The senior counsel for the S.K. Aggarwal Group has contended:

a. that Sanman and A.K. Aggarwal Group in collusion with each other are attempting to have A.K. Aggarwal Group thrown out of management;

b. that all the arguments made are of prejudice and without any basis at all;

c. that no case for any modification of the order of the Division Bench as confirmed with slight modification by the Supreme Court has been made out;

d. that there is age difference of 20 years between S.K. Aggarwal and A.K. Aggarwal and the business is of S.K. Aggarwal only and A.K. Aggarwal was included in the Board of Directors only for the reason of being the younger brother of S.K. Aggarwal and has otherwise not been involved in the management or control of the company;

e. that S.K. Aggarwal only had been found as the occupier of the company within the meaning of the Factories Act;

f. that in fact all the investments in the company were of S.K. Aggarwal only; even the Sanman Group had no investments whatsoever in the company and claimed an investment of Rs. 1.40 crores only and of another Rs 70 lacs which are disputed;

g. that the reference in the order of the Division Bench to the Aggarwal group is in fact a reference to S.K. Aggarwal only;

h. that the works of the company comprised of a brewery and distillery where blending/bottling of liquor is carried out. Only the business of brewery requires an effluent treatment plant to be installed. A statement to this effect has also been made by S.K. Aggarwal Group on affidavit;

i. that as far as the prayer for appointment of a third party as the court

commissioner/receiver is concerned, the Division Bench in its order (supra) confirmed by the Supreme Court has already held that the same is not possible/feasible;

j. that the basis of the order of the Division Bench is that Aggarwal Group has been running/managing the business of the company earlier and should be allowed to continue doing so; reference to Aggarwal Group therein is the S.K. Aggarwal only who alone been running/ carrying on business of the company and who is still in possession and no case for disturbing his possession/control is made out;

k. that the only reason why the nomenclature receiver/court commissioner was given to S.K. Aggarwal who had been running the business was that in the event of the Sanman Group ultimately succeeding, S.K. Aggarwal should not have siphoned off the assets of the company. It was thus contended that S.K. Aggarwal was not appointed as the receiver as is normally understood but only for the said purposes;

l. that S.K. Aggarwal under the order of the Division Bench is permitted to take all decisions relating to the company and was not required to rush to the court for the said purposes;

m. that in compliance with the order of the Division Bench the quarterly returns have been filed in this court;

n. that the commission for preparation of inventory ordered by the Division Bench had been executed and no objections to the report of the Commissioner had been filed by any party;

o. that the real value of the company was in the land owned by the company and if S.K. Aggarwal was permitted to continue running the factory operation of the company, the same would not affect the value of the said asset of the company;

p. that since issues had already been framed and trial is underway, no case for alternation of the arrangement devised by the Division Bench was made out;

q. that considering the various steps which were required to be taken for recommencing the business operation of the company, there was no likelihood of the same being possible before the conclusion of the evidence which has been directed by the Supreme court to be concluded in a time bound manner;

r. that the land belonging to the company was huge and even without a boundary wall and under danger of encroachment and S.K. Aggarwal till now has kept the same free from encroachment but if some third party is put into possession, the possibility of encroachment and of dissipation of the valuable asset of the company cannot be ruled out;

s. in response to the offer of the senior counsel for the Sanman Group that the Sanman Group being already in the business of liquor can commence bottling activity in the premises of the company immediately and revenue generated

there from will also settle the dues of the creditors Dena Bank, it was contended that in the transfer petition before the Supreme Court, the Sanman Group had offered to clear the dues subject to being made a secured creditor of the company; on the contrary S.K. Aggarwal had been spending monies from his own pocket for securing the assets and procuring the permissions etc for commencing the business of the company;

t. that in fact S.K. Aggarwal group had been unable to carry on the business of the company inspite of being appointed as the court commissioner owing to interference by the Sanman Group and A.K. Aggarwal Group. It was informed that within 15 days of the order of the Division Bench, prohibition had been imposed in the State of Andhra Pradesh leading to the sealing of the factory premises of the company. Though the prohibition was lifted in April, 1997 but since there were sales tax dues for the earlier period, the liquor licence of the company could not be renewed; that ultimately in or about September, 1997 a settlement with respect to the sales tax dues was reached and upon failure of the Excise Commissioner to renew the licence, a writ petition was filed by S.K. Aggarwal Group in this regard; that the licence was finally given in June, 2000; that in fact the Sanman Group had been making complaints / representations to the Excise Commissioner which resulted in the Excise Commissioner delaying issuance of the licence. The Sanman Group by making representations before all the concerned authorities created confusion as to the right of S.K. Aggarwal Group to run the business of the company;

u. S.K. Aggarwal group to be able to clear the sale tax dues of the company had entered into a bottling agreement with the United Breweries Group but Sanman Group had unnecessarily objected to the same and falsely alleged the same to be in breach of the order of the Division Bench and thus interfered with the functioning of the company;

v. that out of the monies received from the United Breweries Group, sales tax dues to the extent of Rs. 1.72 crores were paid; but thereafter the United Breweries Group backed out of the agreement, again under pressure from Sanman Group;

w. that thereafter when S.K. Aggarwal Group again got the licence renewed, Sanman Group with a view to again interfere in the functioning won over A.K. Aggarwal who filed a writ petition in the Andhra Pradesh High Court leading again to stay of issuance of licence on the ground of inter se disputes between S.K. Aggarwal and A.K. Aggarwal; that though in the aforesaid writ proceedings, order was made permitting them to continue the activity of bottling but since sales were restrained, and which order continues till date, the same was not feasible;

x. even though the aforesaid disputes were between S.K. Aggarwal and A.K. Aggarwal but again with a view to delay the disposal of the writ proceedings Sanman Group applied for impleadment therein. In the circumstances even

though the S.K. Aggarwal had made payment for liquor licence in the year 2004-2005, the same could not be issued and benefits thereof could not be availed. The position of the licence for the year 2005-2006 is the same. Thereafter Sanman Group also filed a writ petition in Andhra Pradesh High Court for cancellation of the liquor licence ordered to be issued to the company, for the reason of the order of the BIFR of change of management;

y. that Sanman Group and A.K. Aggarwal had by such and other actions scuttled all attempts of S.K. Aggarwal Group to carry on the business as permitted by the order aforesaid of the Division Bench;

z. to show its diligence it was contended that S.K. Aggarwal had filed writ petition 8549/2005 against imposition of conditions in the liquor licence but the said writ petition was ordered to be heard alongwith the writ petition filed by A.K. Aggarwal Group.

S.K. Aggarwal had been depositing approximately Rs. 50 lacs for licence for each year but which monies were wasted owing to interference by Sanman and A.K. Aggarwal Group; it was clarified that S.K. Aggarwal was showing himself as the unsecured creditor of the company; that S.K. Aggarwal had been incurring expenses on the company in the hope of succeeding in these proceedings - on the contrary Sanman group had been delaying the trial and the proceedings in the suit. It was in the aforesaid circumstances that IA. No. 3332/2007 was filed by S.K. Aggarwal in this Court for restraining Sanman Group and A.K. Aggarwal from interfering with their attempt to carry on the business of the company. It was thus contended that the company could not carry on business because of the stay order obtained at the instance of the Sanman Group and A.K. Aggarwal Group. It was contended that such persons ought not to be heard by this Court and ought not to be appointed as receiver/court commissioner in equity. It was urged that if they had any grievance against any action of S.K. Aggarwal they ought to have approached this Court instead of filing independent writ petitions as aforesaid before the High Court of Andhra Pradesh;

aa) it was further urged that they subverted the orders of this court. It was urged that when S.K. Aggarwal Group attempted to enter into an agreement with M/s Bagga Distillery to utilize the bottling capacity of the company, false allegations of Sub- leasing were made resulting in the said agreement also not materializing;

bb) with respect to the allegation of S.K. Aggarwal Group falsely issuing preference shares of the company it was contended that preference shares have no voting rights and were issued only to enable the net worth of the company to become positive and for the betterment of the company. It was contended that in the Board Meeting sanctioning issuance of preference shares the nominee of Sanman Group as well as A.K. Aggarwal Group were present;

cc) that S.K. Aggarwal in the representation filed before this Court had been making full disclosure of all happenings; that since S.K. Aggarwal has been

incurring expenses on behalf of the company and he ought to be permitted to continue in possession of the assets of the company;

dd) it was stated that ouster of any one director in the Aggarwal Group referred to in the order of the Division Bench could not be interpreted as breach the order;

ee) in fact the differences between S.K. Aggarwal and A.K. Aggarwal had occurred even prior to the filing of the SLP against the order of the Division Bench in the Supreme Court; the same was preferred by S.K. Aggarwal only and A.K. Aggarwal was shown as the respondent; it was thus contended that the Supreme Court before confirming the order of the Division Bench was aware that the Aggarwal Group did not comprise of A.K. Aggarwal and thus it could not be argued that for this reason the order needs to be modified;

ff) it was argued that A.K. Aggarwal was also guilty of trespassing on the property of the company and in which regard police complaint had been made; various other acts detrimental to the affairs of the company were attributed to A.K. Aggarwal i.e., of luring workers/employees of the company whose dues had already been settled to make further claims against the company, colluding with Sanman Group;

gg) that writ had been filed challenging the action against the assets of the company under the Securitization Act; that appeal against the disposal of this writ petition was pending; that S.K. Aggarwal was also willing to settle the dues of the Dena Bank in terms of the RBI guidelines; however the Sanman Group with a view to usurp the assets of the company was offering to pay more to Dena Bank but subject to being made a secured creditor of the company. It was argued that Sanman Group was thereby attempting to take unfair advantage;

hh) it was stated that S.K. Aggarwal had attempted to sell 13 acres of the land of the company in an attempt to pay off the sovereign debt on account of sales tax arrears. The said 13 acres was not being used and if such steps had not been taken by S.K. Aggarwal the entire property of the company was in jeopardy;

ii) in response to the reference to the order of BIFR/AAIFR and Andhra High Court in writ petition qua change of management, it was stated that BIFR proceedings terminated on 10th April, 2005 and the same were now not relevant and that the said order in any case did not bar S.K. Aggarwal Group from making the offer for taking over the management of the company and S.K. Aggarwal Group also was permitted to participate in the bids inviting new management of the company.

14. The senior counsel for the Sanman Group in rejoinder contended that S.K. Aggarwal Group has not met the specific allegations of mismanagement alleged against them; that the Sanman Group had consented to the S.K. Aggarwal Group being appointed as the court commissioner because there were a distillery to run and because there was a nominee of the BIFR on board - now there is no nominee of the BIFR on board and S.K. Aggarwal has not been able to run the

distillery. Alternatively it was suggested that S.K. Aggarwal should also be restrained from running any business in the factory of the company, pending the decision in the suit.

15. The senior counsel for A.K. Aggarwal in rejoinder contended that the security given pursuant to the orders of the Division Bench and the Supreme Court is by S.K. Aggarwal as well as A.K. Aggarwal which also demonstrates that they were jointly appointed as the receiver/court commissioner and on this basis alone insisted a change in the earlier order.

16. The Division Bench of this Court had in appeal appointed the Aggarwal Group as the receiver. The Supreme Court though substituting the word "receiver" with court commissioner has ordered that the provisions of Order 40 CPC shall apply to the said court commissioners also.

17. The receiver appointed for certain purposes and for preserving the available properties for the benefit of the party ultimately succeeding, if found to be not discharging his responsibility properly can be removed and an alternative receiver appointed to continue to discharge the functions which had been entrusted to the earlier receiver.

18. The first question which arises for consideration in this case is as to whether S.K. Aggarwal and A.K. Aggarwal were joint receivers and if so whether the order of appointment of receiver/court commissioner is no longer in force owing to the differences which have arisen between the two of them and whether that fact alone necessitates any modification in the order. The contention of the counsel for the S.K. Aggarwal Group in this regard that at the time of the affirmation of the order of appointment of Aggarwal Group as receiver in the Supreme Court, the Aggarwal Group comprised of S.K. Aggarwal only is relevant. If that be so, then A.K. Aggarwal Group and Sanman Group at that time having not sought a change in the order for the reason of the split in the group would not be entitled to do so on that ground alone now. Though there is some controversy as to the filing of the said SLP in the Supreme Court, with the senior counsel for A.K. Aggarwal contending that S.K. Aggarwal had filed the SLP representing the same to be on behalf of the A.K. Aggarwal also, it is not in dispute that A.K. Aggarwal was subsequently ordered to be impleaded as a respondent to the said SLP.

19. I thus find that the differences between S.K. Aggarwal and A.K. Aggarwal having accrued before the order of the Supreme Court, the order of the Supreme Court confirming the continuance of Aggarwal Group in management of the company is with reference to the S.K. Aggarwal only. It may be noticed that A.K. Aggarwal immediately thereafter also did not make any application in this Court for change in court commissioner on that ground. Though subsequently an application has been filed. Even otherwise the finding of the Division Bench was of the Aggarwal Group being in management and possession and the Sanman Group having never come into the management and possession of the company and its properties and inter se differences in Aggarwal Group would not change

the said position or the reasoning given by the Division Bench for allowing the Aggarwal Group to continue in management and possession. It is not the case and is not borne out that the property with respect where to court commissioner were appointed, is in medio owing to the disputes inter se Aggarwal Group.

20. I also find that it has been held in *Eastern Mortgage & Agency Co. Ltd v. Premananda Saha* AIR 1916 Cal 824 (overruled on another point in AIR 1950 FC 140) that where joint receivers are appointed of the property, retirement or resignation of one of the receivers does not put an end to the order appointing the receiver.

21. This court in application for change of receiver/court commissioner or for modification of the order appointing the receiver/court commissioner is not to examine the matter *denovo*. The findings returned by the Division Bench and confirmed by the Supreme Court even though on application for interim relief, continue to hold good. The possibility of a third party receiver and the feasibility, on the facts subject matter of the suit, of appointing the Sanman Group as receiver/court commissioner has already been ruled out and cannot be agitated again.

22. The ambit of the inquiry in these applications is only to the extent to find out as to whether the receiver/court commissioner appointed earlier is guilty of acts of commission and omission of such nature as calling for his removal or whether the purpose sought to be achieved by the court in appointing the receiver/court commissioner has been vitiated.

23. As far as the first of the aforesaid is concerned, the contentions urged by the respective parties have been noticed in detail hereinabove to obviate a discussion with respect thereto at this stage. It would be apparent from the said contentions that at this stage it cannot be said that the receiver/court commissioner earlier appointed has done any such act which would disentitle him from continuing as the receiver/court commissioner. The senior counsel for S.K. Aggarwal Group has contended that the valuable assets of the company comprising of land is secure and has been kept free from encroachment against all odds. This has not been disputed by the senior counsel for Sanman Group or A.K. Aggarwal also. It is also not their allegation that any of the plant, machinery or equipment of the company has been removed. On the contrary, the offer of the senior counsel for the Sanman Group is to commence the operations of bottling in the said plant/equipment and which is possible only with the same continuing in existence. Thus no case of the receiver being guilty of any such acts is *prima facie* made out. I may even otherwise notice that under Order 40 Rule 4 of the CPC where a receiver causes to occasion any loss to the property by his wilful default or gross negligence, the remedy is provided for by attachment and sale of the property of the receiver. This court has already while appointing S.K. Aggarwal as the receiver/court commissioner taken security from him of the amount then deemed appropriate by the court, to cover such eventualities.

24. The contentions of the attempted sale by S.K. Aggarwal Group of 13 acres of land, is of course found to be of a serious nature and violative of the order of his appointment as court commissioner. The Supreme Court while allowing Aggarwal Group to continue in management had expressly ordered that they shall not create any third party right with respect to the property of the company. The argument of the senior counsel for the S.K. Aggarwal Group of sale of 13 acres being proposed to prevent the attachment / sale of the entire property of the company for realization of the sales tax dues is not found to be convincing. The S.K. Aggarwal Group ought to have approached this Court even if sale of a portion of the immovable property was necessary to protect the remaining property

25. I have considered whether the aforesaid action of S.K. Aggarwal calls for his removal. The sale has admittedly not taken place and the possession of the entire property as aforesaid is of the company only. I am in this regard swayed by the factum of S.K. Aggarwal, since the inception of the company and acquisition of the property being in management thereof. Notwithstanding the aforesaid aberration I still consider him to be best equipped to protect the said properties of the company. However, warning is given to S.K. Aggarwal to in future not even attempt any sale, alienation or encumbrance of any of the assets of the company; if need there for is felt, application ought to be made to the court in that regard and S.K. Aggarwal Group under the orders aforesaid of the Division Bench and the Supreme Court is not competent / entitled to take said decision on their own.

26. The other action of S.K. Aggarwal Group, justifying their removal, and urged is with respect to the issuance of preference shares of the company. The response of S.K. Aggarwal thereto has also been noticed hereinabove i.e., that the decision there for was taken in the meeting in which A.K. Aggarwal as well as Sanman Group were represented. In view of the said response and without returning any finding on the truth thereof and further since it was not urged that the said preference allotment is subject matter of any challenge, I do not consider that also to be a reason for removal of S.K. Aggarwal. However, again it is clarified that under the orders aforesaid, even if in future any such thing is required, an application is to be preferred to this Court for the same and S.K. Aggarwal Group is not to take any action qua the share holding of the company also on its own. In this regard it may be noticed that the Division Bench has returned a finding that at this stage without trial, prima facie case of holding the shares of the company and/or of the investment companies cannot be returned in favour of either the Aggarwal Group or the Sanman Group. In that situation, merely because Aggarwal Group was allowed to continue in management of the company/possession of its assets does not permit S.K. Aggarwal or any other party to, acting as the holder of the shares of the company/investment companies bring a preference share or any other issue of the shares of the company.

27. Yet another factor to be considered is of the nominee of the BIFR ceasing to be on the board of the Company. In my opinion that was only noticed in the order of the Division Bench as a fact and was not a reason for the Division Bench to appoint the Aggarwal Group as receiver. This change also thus does not necessitate any change/modification of the order. The nominee of the Sanman Group has already been ordered to be present in the meetings of the company. The only change required upon differences between S.K. Aggarwal and A.K. Aggarwal is to permit the nominee of A.K. Aggarwal Group also in the said meetings on the same terms as the nominee of Sanman Group has been permitted. Upon A.K. Aggarwal Group nominating such person, the same shall be deemed to be a nominee of this Court of the A.K. Aggarwal group for the purposes of the said meetings.

28. This court had in the orders aforesaid sought security from the Aggarwal Group. A part of the security is stated to have been furnished by A.K. Aggarwal. However, since it is the admitted position that it is S.K. Aggarwal Group which is in management of the company and in custody of its assets, the liability for furnishing the entire security is of S.K. Aggarwal only. S.K. Aggarwal Group is accordingly directed to furnish the security for the amount furnished by A.K. Aggarwal Group and the security furnished by A.K. Aggarwal Group shall then stand discharged.

29. The contentions, of the BIFR, AAIFR and the Andhra Pradesh High Court finding deficiencies in the management of the company by S.K. Aggarwal and ordering the change thereof does not also in my view call for any modification/change of the order of appointment of receiver/court commissioner. The reasons cited in the orders of BIFR, AAIFR and the Andhra High Court for change of management are entirely different from that which prevailed with the Division Bench of this Court in appointing S.K. Aggarwal as the receiver. The BIFR was concerned with rehabilitation of the company and ordered change in management upon inability of S.K. Aggarwal to do so. However, the Division Bench of this Court had not considered S.K. Aggarwal to be the receiver for the reason of being better equipped than Sanman Group to rehabilitate the company. As noticed above S.K. Aggarwal was appointed as the receiver/court commissioner only for the reason of Sanman Group having not been prima facie made out to be in management and possession at any time. The rights of BIFR to order change in management were in any case preserved by the Division Bench. I may also notice that till the time the disputes as aforesaid are pending, it was unfair to expect S.K. Aggarwal Group to pump in its own funds/resources for rehabilitating the company, when their entitlement to the share holding thereof itself was in doubt. Thus no adverse inference can be drawn against S.K. Aggarwal Group for the said reason also.

30. Thus no ground for change of receiver / court commissioner for the reason of any positive act of S.K. Aggarwal is made out.

31. That brings me to the second aspect of the matter i.e., whether owing to any

omissions of S.K. Aggarwal Group or for the reason of the purpose of appointment being vitiated, any change is called for.

32. The reason which prevailed with the Division Bench of this Court for appointing receiver/court commissioner was to maintain/preserve the company in the same position as it was then and pending adjudication of disputes as to who is entitled to management and control thereof. At the time of the making of the order, the company had running business of manufacture and sale of liquor and the said business had to continue to be run / managed. This court then also noticed that running/operating such business necessarily involved compliance of various statutes/regulations and held that the could not be carried out by any third party. Today the position is that there is no running business. I have wondered whether the same can be attributed to S.K. Aggarwal Group. On the basis of contentions made I am unable to find so.

33. It is the admitted position that prohibition was imposed in the state and owing to the imposition of Pollution Control norms, the business of brewery cannot be carried out. Thus it cannot be said that the business of brewery has come to an end for any negligence or omission of S.K. Aggarwal. What has been contended by the senior counsel for Sanman Group is that the business of distilling/bottling can still be carried out. But then S.K. Aggarwal also made attempts to carry on the same by entering into agreement with the United Breweries Group and subsequently with Bagga Distillery. At this stage the authenticity of the allegations and counter allegations of such activity being not continued/possible for reasons attributable to Sanman Group and A.K. Aggarwal Group cannot be gone into. All that can be said is that Sanman Group and A.K. Aggarwal Group inspite of the court's order of appointing Aggarwal Group as the receiver / court commissioner, continued to make representation/complaints before various authorities qua management of the company by the S.K. Aggarwal Group. If that is so, then the grievance of S.K. Aggarwal would be justified. I may also notice the stand of A.K. Aggarwal Group that no business/operation, not even of distilling/bottling is possible at present. Thus S.K. Aggarwal is not to be removed for the reason of such negligence / omissions also.

34. The last limb for consideration is of the purpose/reason of the order being vitiated. As noticed above, the reason was that the business activities continue to be carried out. That has not happened. Though trial of the suits is underway but it is still likely to take some time.

35. From the submissions of Sanman Group and S.K. Aggarwal Group it appears that operations of distilling/bottling can be carried out. If that be so, the monies earned therefrom can be utilized for paying of the debts of the company. Moreover, unless the plant/equipment is used as aforesaid, the same may also be reduced to junk till the completion of trial. I therefore feel that at least an attempt should be made for utilizing the resources of the company to the extent possible. The question is, how.

36. I am reluctant to allow the Sanman Group who, everybody admits, are already in the said business and for whom it will be much easier to commence the said operations, to do so in vacuum. The effect of allowing them to do so without any assurances/targets is already evident. I am therefore, inspite of lengthy arguments having been addressed, of the same opinion as had been put to the counsel at the beginning of the hearing, to place their respective proposals before the court for utilization of the resources of the company during the trial.

37. Since the Securitisation Act has already been invoked against the company and since the said proposals would be meaningless in the absence of the ingredients of warding of the same, the proposals to also contain the said ingredient. The contention of the senior counsel for Sanman Group of their being in a position to submit the said proposal only after inspection of the premises and its plant and equipment and all the accounts of the company is just. In fact the Sanman Group has already been permitted in the order of the Division Bench as well the Supreme Court to call for examine the books of accounts and ledgers besides cash books for the purpose of keeping information about the financial matters of the company. Though S.K. Aggarwal Group claims to have filed reports in this Court and where against no objections are stated to have been preferred, the Sanman Group is permitted to again call from the S.K. Aggarwal Group all documents/information which may be required by them for the purposes of enabling them to give such proposal to this court. The proposal to also set the time for which Sanman Group, irrespective of the decision in the suit, would so run the operations of the company. The proposal to also contain the injunctions sought against the Aggarwal Group for implementation thereof.

38. Similar proposals to be also made by the S.K. Aggarwal Group. In the event of such proposals being made, if this Court requires the same to be examined by an expert to decide the feasibility thereof, appropriate orders shall be made after examining the proposals.

39. From the submissions made, I have understood that the land/immovable property of the company is much more than the premises where the works exists or where the activity of bottling/distilling is to be carried out. The proposal aforesaid would only be qua the operation of the plant and equipment of the company and not qua the immovable property of the company. S.K. Aggarwal is found to be best suitable for protecting the said assets of the company and shall continue to do so.

40. No case of breach by S.K. Aggarwal Group of any of the terms and conditions of his appointment as the receiver/court commissioner is made out. Though it was urged that the reports as directed have not been filed, it was the contention of S.K. Aggarwal group that they have been filed and copies thereof were also handed over during the course of the hearing to the Sanman Group and no grievance thereafter with respect thereto has been made.

41. The applications in various suits for removal of Aggarwal Group and for

injunctions against Sanman Group and A.K. Aggarwal Group are disposed of in above terms.

IA.NO.1325/2004(under Section 340 of the CrPC)

42. The S.K. Aggarwal Group has filed this application alleging perjury by the Sanman Group. It is contended by the senior counsel for the S.K. Aggarwal Group that the suit was originally filed in 1994. However, the parties remained embroiled in the application for interim relief only i.e. before the Single Judge of the Bombay High Court, the Division Bench of this Court and before the Supreme Court; the Sanman Group failed to file the written statement, leading the S.K. Aggarwal Group as plaintiffs in that suit, to file the application under Order 8 Rule 10 of the CPC. Perjury is alleged in relation to the reply filed by the Sanman Group to this application. The Sanman Group in reply to the application under Order 8 Rule 10 of the CPC took a stand that they had not been served with the plaint and thus their defence was not liable to be closed. It has been argued by the senior counsel for the S.K. Aggarwal Group that the perusal of the record shows the said stand of Sanman Group to be false. In fact, it is urged that filing of a false affidavit also amounts to contempt of this Court and the Sanman Group being in contempt is also not entitled to be heard. It is further urged that the Sanman Group even in reply to the application u/s 340 of the CrPC have persisted with the false stand of having not been served with the copy of the plaint in the suit. It is urged that it was not possible for the Sanman Group to contest the application for interim relief, till the Supreme Court, without being in possession of a copy of the plaint. Reference is also made to the replies filed by the Sanman Group to the application for interim relief to contend that it is apparent there from that they were in possession of a copy of the plaint. It is also contended that no grievance, at any time, was made of the plaint having not been served. On inquiry it was informed that though subsequently the Sanman Group was permitted to file the written statement subject to costs, but the question of filing of false affidavit u/s 340 of CrPC is open for consideration. Reliance in this regard is also made on Pravin C. Shah Vs. K.A. Mohd. Ali and Another,

43. The counsel for the Sanman Group in this regard has drawn attention to the orders dated 26th September, 2000 and 6th February, 2001 in the suit, of the Joint Registrar of this court, whereby the S.K. Aggarwal Group was directed to serve copies of the plaint on the Sanman Group. It is contended that the copies were never given and in fact the written statement was filed after inspecting the court records, after the S.K. Aggarwal Group filed application under Order 8 Rule 10 of the CPC. It is further contended that there was a confusion owing to several suits and that unintentionally statement has been made and no injustice has been done to the S.K. Aggarwal group.

44. This court is of the opinion that Section 340 of the CrPC or the powers of contempt cannot be invoked to satisfy a private grudge of a litigant. The court would be justified in initiating a criminal prosecution only on formation of an

opinion that person charged has intentionally given false evidence; existence of mens rea or criminal intention behind the act complained of will have to be looked into and considered before any action u/s 340 of the CrPC is recommended.

45. I am further of the opinion that proceedings u/s 340 of the CrPC or under the provisions of the contempt of court should not be allowed to be resorted to when it is intended to hamper fair trial of issues in the civil suits. With this opinion, the counsel for Sanman Group was directed to file an affidavit of apology in this Court and which has since been filed. I am of the opinion that in the facts of the present case where the parties are involved in an acrimonious litigation as to the rights to a valuable company, the lodging of a criminal prosecution or initiation of proceedings for contempt of court against anyone of the parties is not expedient and in the interest of justice.

46. Thus accepting the apology tendered on behalf of the Sanman Group the application u/s 340 of the CrPC is disposed of.