

(2013) 01 DEL CK 0154

In the Delhi High Court

Case No : FAO (OS) 511 of 2007, C.M. Application 14878 of 2008 and 3645 of 2012

Yapi Kredi Bank (Deutschland) AG

APPELLANT

Vs

Mr. Ashok. K. Chauhan and Others

RESPONDENT

Date of Decision : 17-01-2013

Acts Referred:

Citation : (2013) 4 AD 245 : (2013) 2 BC 460 : (2013) 198 DLT 697 : (2013) 2 ILR Delhi 841

Hon'ble Judges : S.P. Garg, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : K.V. Viswanathan, with Ms. Hari Priya Padmanabhan, Sh. Nehul Gupta and Sh. Simon Benjamin, for the Appellant; P.V. Kapur with Sh. Vinay Garg, Advocate, for Respondent No. 1, Sh. Krishnamani with Sh. Rajesh Yadav, Advocates, for Respondent Nos. 2 to 4 and Sh. Sudhir Nandrajog with Sh. A.P. Singh and Sh. Rajan Chawla, Advocates, for Respondent Nos. 5 to 13, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Ravindra Bhat, J.—The appeal throws up an interesting question, i.e. whether the amalgamation, of a company (which institutes a suit, that is pending) with another, results in its corporate death, and consequent abatement of the suit, or does the transferee company become entitled to claim itself to be the successor, and continue with the suit, in terms of provisions of Order 22 Rule 10, CPC (variously described as "the Code" and "CPC"). The present judgment disposes of a plaintiff's appeal impugning the Order dated 23.10.2007 of a learned Single Judge in I.A. No. 8275/2003 and I.A. No. 8670/2003 in Suit No. 675/1999 ("the suit"). The impugned judgment held that the plaintiff's failure to take steps under Order 22, Rule 3, CPC (variously described as "the Code" and "CPC") resulted in abatement of its suit. The plaintiff, in its suit, had claimed a money decree, based on alleged transactions which took place in Germany. The defendants had urged that the suit was time barred; their application for

rejection of plaint was however, dismissed; that order was confirmed by the Division Bench, which had left the plea open for consideration after trial. During the pendency of the suit, the Plaintiff Bank Kriess, merged with the Yapi Kredi Bank. The merger was affected in terms of a Deed dated 27.08.2001 with effect from 09.10.2001. As a result Yapi Kredi Bank AG took over all the assets and liabilities of Bank Kreiss AG; on and from 09.10.2001, the Plaintiff bank ceased to exist. The fourth defendant filed an application (I.A. 8275/2003) for dismissal of suit on account of non-existence of the plaintiff. The fourth defendant urged that as no application was made under Order XXII Rule 3 of the Code, the suit abated. Order XXII Rule 3, CPC requires that an application should be made for substituting the legal representatives of the "deceased" plaintiff within a stipulated time, i.e. is 90 days from the death of the plaintiff. In this case, since the Plaintiff bank ceased to exist on and from 09.10.2001, therefore, the application under the said provision should have been made by 07.01.2002. Yapi Kredi Bank, the appellant in these proceedings, on the other hand, filed an application (I.A. 8670/2003) for its substitution on the record, as successor of Bank Kriess under Order XXII Rule 10 for leave of the Court to continue the suit in its name. That application was filed on 11.08.2003. It was contended by Yapi Kredi that by virtue of merger, it had taken over all the assets and liabilities of the original Plaintiff and therefore became its successor-in-interest. Therefore, the applicant contended that it was competent to continue the suit in place of the Plaintiff.

2. The defendants resisted the plea of Yapi Kredi, contending that the merger of the original plaintiff resulted in its corporate demise, in that it legally ceased to exist. Therefore, an application for substitution under Order 22 Rule 3 was the proper remedy, for succeeding to the legal proceeding; the lapse of the period stipulated for presenting that application resulted in abatement of claims in the suit. It sought for dismissal of Yapi Kredi's application, and also urged that no application under Order 22 Rule 10 could be filed, and that the consequence of abatement was that it stood absolved of defending the suit claims of Bank Kriess.

3. Learned Single Judge, on an appreciation of the facts and after considering the submissions, was of the opinion that the legal effect of a merger (i.e. amalgamation) of two companies was that the original company which merges into the transferee company, loses its identity and ceases to exist. Learned Judge was of the view that the company, therefore, dies and that unless an application is preferred by the concerned parties, claiming to be legal representatives under Order XXII Rule 3 CPC, the suit abates. The impugned judgment also proceeded to hold that a transferee company, after merger, is not entitled to file application under Order XXII Rule 10, seeking its substitution in place of the transferor company. Learned Single Judge also relied upon the decision reported as Narendra Bahadur Tandon Vs. Shankar Lal (since deceased) by Lrs, that once the company is dissolved, it ceases to exist and the liquidator cannot represent such a non-existing entity. The impugned judgment also relied upon Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, and Singer India Ltd.

Vs. Chander Mohan Chadha and Others, .

4. During the pendency of the present appeal, an application (I.A. No. 14878/2008) was filed, for substituting C.H. Financial Investments as the appellant. The applicant contended that it succeeded to the claims in the suit - and consequently to the right to prosecute the present appeal - by virtue of transfer deed executed by Yapi Kredi Bank, on 23.01.2008. A copy of that assignment and transfer deed was placed on the record. It is contended that in terms of the assignment/transfer deed, the right and obligations of Yapi Kredi Bank against Kaunsoplast and the defendants in the original suit, out of which the present appeal has arisen, were assigned to the said applicant, C.H. Financial Investments. This application was resisted by the defendant/respondent who urged that Yapi Kredi Bank's right to prosecute the suit itself is suspect and under the circumstances, the claim by C.H. Financial Investments, to be its successor in respect of the claims in the litigation cannot, therefore, be countenanced. It was contended that the impugned judgment is erroneously premised on the equation of dissolution of a company with the devolution of interests of a previous entity in the successor company. In this regard, it was submitted by learned counsel for the appellant/applicant that while dissolution or winding-up results in death of a company, in the case of devolution of interest, the existence of erstwhile company continues. The claim has to be seen as not merely that of the company but as that of the shareholders who join to incorporate a company and, therefore, in a representative capacity. In such cases, where interest devolves, the Court has to satisfy whether the claim of the successor - be it the transferee company or some other third-party, actually is prima facie borne-out. This is possible only upon an enquiry which can be properly done under the provisions of Order XXII Rule 10. It was contended that Section 394 of the Companies' Act allows "amalgamation" and "merger". After merger or amalgamation of two companies, there is devolution in the interests in the shape of assets and liabilities, upon the transferee in accordance with the scheme sanctioned by the Court. As a result, the appropriate provision, which was correctly invoked in this case, was Order XXII Rule 10, CPC. Learned counsel relied upon the decision reported as Shri Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (Deceased) through his Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (Deceased) through his Chela Shiam Dass, , to say that when a suit is instituted in a representative capacity and there is devolution of interest on the representative, the applicable provision is Order XXII Rule 10. Learned counsel also relied upon the decision of the Supreme Court in Bhagwan Dass Chopra Vs. United Bank of India and Others, to say that in every case of transfer, devolution, merger or scheme of amalgamation, in which rights and liabilities of one company are transferred or devolved upon another company, the successor-in-interest becomes entitled to the liabilities and assets of the transferor company subject to the terms and conditions of contract of transfer or merger, as it were. Contending that the principle enunciated in Bhagwan Dass Chopra (supra) applies to the facts of this case, learned counsel argued that the impugned

judgment is in error of law in holding otherwise. Reliance was also placed upon the judgment of the Lahore High Court in AIR 1936 652 (Lahore) in this regard. Learned counsel also relied upon the decision in Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, to emphasize that Order XXII Rules 3 and 4 distinguish from Rule 10 and that in case of the former, the right to sue is extinguished when legal representatives are not brought on record. On the other hand, in case of Rule 10, even if the assignee or the individual upon whom the interest devolves, does not appear in Court, but steps into the shoes of the original litigant, the consequence would be that the case would continue and the party upon whom the interest has devolved risks being bound by any judgment and order. It is submitted that apart from overlooking this important distinction, the Court also fell into error in not noticing that under Order XXII Rule 10, a detailed enquiry at the stage of granting leave is not warranted and that the Court has to be prima facie satisfied that the leave to continue to prosecute or defend the suit has to be granted, having regard to the facts and circumstances. In this regard, learned counsel relied upon the decision reported as Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, . Learned counsel for the applicant lastly relied upon the decision in Severn Trent Water Purification, Inc. Vs. Chloro Controls (India) Private Ltd. and Another, where it was held that the expression "death" has to be understood in its grammatical sense as applicable to "natural" and not "artificial persons or entities". It was emphasized here that the provisions of Order XXII Rule 3 cannot be made applicable to companies and that the correct provision would be Order XXII Rule 10.

5. Learned counsel for the defendant/respondents contended that when a company ceases to exist for any reason whatsoever - either due to winding-up or amalgamation in terms of provisions of Companies Act, it in fact "dies". He relied upon the rulings which persuaded learned Single Judge to hold that provisions of Order XXII Rule 3 apply, i.e. Narendra Bahadur Tandon (supra); Saraswati Industrial Syndicate Ltd. (supra); Singer India Limited (supra). Learned counsel also relied upon two judgments of the learned Single Judge of this Court in Nicholas Piramal v. S. Sundaranayagam (Crl. M.C. 5392/2005, decided on 23.08.2007) and another in General Electric Canada Inc. and Anr. v. National Hydroelectric Power Corporation Limited [CS(OS) 1480/2003, decided on 30.04.2012]. It was submitted that in any event, the application made by the Bank Kreiss was after the suit had been abated and the period prescribed for the setting-aside of abatement, too had lapsed. In these circumstances, the argument of the applicant or Yapi Kredi Bank, claiming that either of it is a successor to the claims of the original plaintiff, should not be gone into.

6. Learned counsel for the defendants elaborated that like natural individuals and persons, a company too can be said to die. He relies upon a more reasoned decision of the Supreme Court in Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K. Samiti and Others, where it was held that when a company court accepts the report of the official liquidator after directing winding-up and distributes the proceeds to creditors, workers and contributories, the ultimate result is the death

of the company u/s 481 of the Act. He also relied upon the decision of the Division bench in Spice Entertainment Limited v. Commissioner of Service Tax (ITA 475-476/2011, decided on 03.08.2011) for the proposition that amalgamation of two companies results in the death of amalgamating company which loses its entity.

7. It was lastly argued that C.H. Financial Investments Limited's assertion that it is the successor to the claims in the suit are unfounded and contradictory to the case set-up by Yapi Kredi Bank. In this regard, it was pointed out that Yapi Kredi Bank had stated that on 09.10.2011, the original plaintiff, i.e. Kreiss Bank ceased to exist. The suit was said to have abated by the order dated 23.10.2007. In this context, learned counsel for the defendant stated that C.H. Financial Investments Ltd. states that Yapi Kredi Bank has since merged with Fermin Credit Bank gmbH and that it ceases to exist. The assertion of C.H. Financial Investments Ltd. that it was a shareholder in Kreiss Bank and that devolution of Kreiss Bank's interest in the suit to Yapi Kredi Bank, which in turn assigned it to the said applicant (C.H. Financial Investments Ltd.) is not borne-out by the scanty documentation on the record. On the other hand, the documentation points to suppression of facts which go to establish that neither Kreiss Bank nor Yapi Kredi ever had the right to prosecute the suit. Having regard to these confusing and contradictory circumstances, which appear on a plain reading of the documents filed, it was argued that the Court should not proceed with the appeal and dismiss it. The respondents also emphasized that a case for contempt under Article 215 of the Constitution of India had been made out and pressed C.M. No. 3645/2012, filed in that regard.

8. The original claim in the suit was that Kreiss Bank granted Kaunstoplast Chemi gmbH a creditline through agreements dated 10.05.1993 and 30.04.1994, to the extent of DM 10,00,00,000/-. It claimed that the creditline was in several accounts in various currencies and meant for import/export financing. Thus, it was based on the official statements of Kaunsoplast Chemi gmbH and other defendants in the suit. The Kreiss Bank asserted that it had accepted absolute maximum suretyship to the extent of DM 12,000,000/- by a bond dated 10.05.1993. It realized that the defendants did not have the surplus projected and reported a loss to the extent of DM 53,500,000/-, which arose substantially from foreign exchange business. This resulted in dishonor of several bills furnished to the plaintiff Kreiss Bank. It discontinued its engagement with Kaunstoplast Chemi gmbH and informed its decision on 08.03.1994. It consequently invoked the bank guarantee and instituted a recovery proceedings in a Frankfurt Court. In that suit, it was claimed by Kreiss Bank that the judgment was stayed on 17.01.1995, allowing the entire claim. The liability of the defendants on the date of the judgment was DM 450,110.77/- and the total amount payable on account of interest and other liabilities - as on the date of presentation of suit by Kreiss Bank before this suit in 1997 was DM 6205477.81/-. On the strength of these pleadings, the original plaintiff Kreiss Bank sought a decree for DM 6205000 equivalent Rs. 15,30,20,000/- along with

interest pendent lite @ 18 % per annum.

9. The suit records reveal that after summons were issued, the defendants moved for rejection of the plaint, inter alia contending that the suit itself was time-barred. That application, 4237/1999, was rejected on 02.08.1999. The defendants carried the matter in appeal, being FAO (OS) 287/1999. By order dated 27.01.2000, the Division Bench of this Court held that no interference with the order dismissing the application for rejection of the application was called for. In these circumstances, on 08.08.2003, the fourth defendant moved an application, stating that he became aware that the plaintiff bank had ceased to exist with effect from 09.10.2001 as it had merged with Yapi Kredi Bank and that since there was no claim of succession of any interest in the suit on account of the original plaintiff ceasing to exist, the suit itself was liable to be dismissed. On 11.08.2003, the plaintiff Yapi Kredi Bank AG moved an application, I.A. no. 8670/2003, stating that Kreiss Bank had merged with it and that the latter (the applicant) had taken-over assets and liabilities of Kreiss Bank as a result of which it was entitled to continue the suit.

10. The learned Single Judge was persuaded to hold, upon an analysis of the decisions in Narendra Bahadur Tandon (supra), Saraswati Industrial Syndicate Ltd. (supra) and Singer India Limited (supra) that when two companies merged into one, the transferor company loses its identity as it ceases to have business. It was further held that even though rights or liabilities are determined under a scheme or deed, yet the destruction of corporate entity results in death like situation as far as the transferor company is concerned. Therefore, in view of this finding, learned Single Judge was of view that since the time for bringing on record the setting-aside of the judgment had also expired on 07.01.2002 and no application under Order XXII Rule 3 had been preferred, the suit itself abated. On the applicability of Order XXII Rule 10, learned Single Judge was of the opinion that since the suit had abated and no such application had been preferred, the question of granting leave did not arise. The impugned judgment also proceeded on a plain reading of Order XXII Rule 10, which states that "the suit may, by leave of the Court be continued" implying that "leave can be granted only in continuing proceeding and not one which is abated". In doing so, learned Single Judge relied upon Kedarnath Kanoria and Others Vs. Khaitan Sons and Co., ; Devkinandan Lal Vs. Jogendra Prasad and Others, ; Goutami Devi Sitamony Vs. Madhavan Sivarajan, .

11. Before analyzing the rival contentions, it would be worthwhile extracting the relevant provisions of the Court, i.e. Order XXII Rules 3 and 10. The same read as follows:

ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.-

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule(1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

XXXXXX XXXXXX XXXXXX

10. Procedure in case of assignment before final order in suit.-

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Analysis and conclusions

12. The first question which this Court proposes to address is whether a company "dies" within the meaning of Order 22, Rule 3, CPC and whether a suit filed against it abates upon its merger or amalgamation with another existing company. The impugned judgment relied on Narendra Bahadur Tandon (supra), where the Court held, inter alia, that "...once the company was dissolved it ceased to exist and the liquidator could not represent a non-existing company". In *Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax*, , the Supreme Court considered the question of amalgamation and the effect on the amalgamating company, in the context of income tax liability of the transferor company.

5. Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending company become substantially the share holders in the Company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company. Strictly "amalgamation" does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and

continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition.

6.....the High Court was in error in holding that even after amalgamation of two companies, the transferor company did not become non-existent instead it continued its entity in a blended form with the Appellant Company. The High Court's view that on amalgamation there is no complete destruction of corporate personality of the transferor company instead there is a blending of the corporate personality of one with the other and it continues as such with the other is not sustainable in law. 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 but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective.

Similarly, the holding in *Singer India Ltd* (supra) was that:

8...there can be no doubt that when two companies amalgamate and merge into one, the transferor company loses its identity as it ceases to have its business. However, their respective rights and liabilities are determined under the scheme of amalgamation, but the corporate identity of transferor company ceases to exist with effect from the date the amalgamation is made effective.

13. The judgment reported in *Shri Rikhu Dev* relied on by the Applicant states, inter alia, that a representative suit does not come to an end with the death of the plaintiff, who sues on behalf of a body of persons, individual or juristic entities:

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 devolution takes place as 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 temples resigns his office or is removed from office. In such a case, the successor to the head 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., subject-matter of the suit and the interest is the interest of the person who was the party to the suit.

14. The question of substitution of a transferee company in the background of amalgamation of a company that was party to a legal proceeding directly arose before the Supreme Court in *Bhagwan Dass Chopra* (supra), where it was

contended, like in the present case, that amalgamation of two companies resulted in the death of the transferor company. This theory was repelled by the Supreme Court, which held that:

In the circumstances it is reasonable to hold that in every case of transfer, devolution, merger, takeover or a scheme of amalgamation under which the rights and liabilities of one company or corporation stand transferred to or devolve upon another company or corporation either under a private treaty, or a judicial order or under a law the transferee company or corporation as a successor-in-interest becomes subject to all the liabilities of the transferor company or corporation and becomes entitled to all the rights of the transferor company or corporation subject to the terms and conditions of the contract of transfer or merger, the scheme of amalgamation and the legal provisions as the case may be under which such transfer, devolution, merger, take over or amalgamation as the case may be may have taken place. It follows 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 subject of course to any terms in the contract of transfer or merger, scheme of amalgamation or other relevant legal provisions governing the transaction under which the transferee company or corporation has become the successor-in-interest of the transferor company or corporation.

15. 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 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.

16. The distinction noticed by this Court between a corporate death, as a consequence of final winding up order, u/s 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 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).

17. 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) Delta Distilleries Limited Vs. Shaw Wallace and Company Ltd., Shaw Wallace Distilleries Limited and United Spirits Limited*, 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.

18. 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 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 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 u/s 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 u/s 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 u/s 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 u/s 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 u/s 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 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 u/s 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....

19. 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 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.

20. 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.

21. 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 Ors. and 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 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.

22. 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, 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.

23. 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, u/s 5 of the Limitation Act.

24. 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.

25. 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. 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 as to costs.