

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Ex. No. 87/2004

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Date of decision: 11th May, 2009

NOVARTIS A.G.

.....Decree Holder

Through: Mr. P.V. Kapur, Sr. Advocate with Ms.
Binny Kalra, Mr. Varun Menon,
Advocates.

Versus

WANDER PVT. LTD.

..... Judgment Debtor

Through: Dr. A.M. Singhvi & A.K. Nigam, Sr.
Advocates with Mr. Sudhanshu Batra
& Mr. Bhuvan Gujnani, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. Execution is sought of a compromise decree dated 28th August, 2002 in CS(OS) No.372/2002.
2. The decree holder had instituted the suit inter-alia for the relief of permanent injunction restraining the judgment debtor from using the word WANDER or any other word deceptively similar thereto as part of its name and trading style and/or from using the trademarks TRIAMINIC, TRIOMINIC, TRIATUSSIC or WANDER or any other mark deceptively similar to the said marks in relation to goods being marketed or manufactured by the judgment debtor. The relief of accounts of profits made by judgment debtor by use of trading style Wander Pvt Ltd and decree for amount so found due was also claimed.

3. The compromise application under Order 23 Rule 3 of the CPC was filed by the parties even before the judgment debtor filed the written statement. It was inter-alia stated in the said application:-

(A) That the plaintiff and defendant had settled the dispute subject matter of the suit and other related disputes by agreeing to enter into the distributorship and marketing agreement on the terms & conditions recorded in the compromise application.

(B) That the defendant agreed and declared that it be restrained from using WANDER and other trademarks with respect to which the suit had been filed. It was thus prayed that the decree of injunction in terms of prayer (a) & (b) be passed against the defendant.

(C) The parties further agreed that the decree in terms of prayer clause (a) i.e. with respect to WANDER shall not come into operation until 1st August, 2004.

(D) Clause 4 of the compromise application as under:-

“ The Defendant agrees and undertakes to this Hon’ble Court that well before 1st August, 2004 it shall take the necessary steps for amending its corporate name and/or trading style so as to delete therefrom the word Wander and substitute in its place the word having no confusing similarity with the word ‘WANDER’. The Defendant shall supply to the Plaintiff proof of steps taken to have the Company name changed as soon as such steps are taken and in any event not later than 1st August, 2004.”

(E) The defendant also agreed and undertook to the court to withdraw from the market/destroy the unsold stocks etc., to destroy the labels, wrappers, cartons bearing the infringing trademark, not to challenge the plaintiff’s

rights in the said trademark, to withdraw the rectification applications for cancellation of the registration of the plaintiff's trademark, to withdraw the applications for registration of the said marks, to withdraw the suit filed by the defendant against the plaintiff and certain other parties, to transfer the tenancy rights in a premises at Mumbai, to make certain other payments to the plaintiff under the prior agreements between the parties, to assign and transfer to the plaintiff certain other trademarks etc.

(F) The defendant also agreed that during the term of distribution and marketing agreement to be separately entered into between the Novartis Consumer Health India Private Limited (not a party to the suit) and the defendant and copy of which was filed as Annexure 'A' to the said application, not to engage in manufacture or sale of any pharmaceutical preparation which was earlier manufactured or sold by Novartis Consumer Health India Private Limited or its affiliates or any other pharmaceutical preparation having the same composition and competing in the same therapeutic classes as TRIAMINIC.

(G) It was further agreed that the said distribution and marketing agreement shall come into force only after obligations as mentioned in certain other paragraphs of the application had been acted and performed by the defendant to the satisfaction of the plaintiff and its affiliates. The said clauses inter-alia included clause with

respect to the defendant suffering the decree for injunction as well as clause 4 set out herein above.

(H) Clause 15 of the said agreement is as under:-

“The Defendant agrees and undertakes to this Hon’ble Court that upon Defendant’s failure to fulfill any of its obligation hereunder or upon its failure to comply either with the terms and conditions hereinunder contained or with the conditions enumerated in the Distributorship and Marketing agreement for any reason whatsoever, it shall forthwith pay by way of damages to the Plaintiff a sum of Rs.50,000,000/- (Rupees Five Crores only) with interest @ of 18% per annum to be calculated from the date of default till the date of the payment and shall submit to the Decree of this Hon’ble Court. The defendant agrees and undertakes not to dispute correctness of this amount to be paid to the Plaintiff as aforesaid. It is further agreed and declared the Defendants liability to pay the aforesaid amount to the Plaintiff is not derogatory to and shall not in anyway affect the rights and remedies which the Plaintiff otherwise has against the Defendants and is also without prejudice to the Plaintiff’s right of action and to seek other appropriate rights and remedies against the Defendant.”

(I) The defendant under clause 8 (vi) of the compromise application also agreed to give an unconditional and irrevocable guarantee of the Bank of India, to cover due and timely performance of obligations on the part of the defendant contained in the compromise application, as also thus contained in the distributorship and marketing agreement to be executed on 1st October, 2002, if the conditions of the compromise application were to be fulfilled by the defendant. The said guarantee was to be for the sum of Rs.32,10,000/-.

4. This court finding the compromise to be lawful allowed the same to be taken on record and passed a decree in terms of the compromise application which was ordered to form part of the decree.

5. On the request of the counsels for the parties during the hearing of the execution, I have after reserving the orders called for the suit file and perused the same. I have noticed that though the compromise application at several places as aforesaid states that “the defendant agrees and undertakes”, this court neither accepted any undertaking of the defendant nor ordered the defendant or any of its official to be bound by the same.

6. The record reveals that the defendant filed I.A. No.4839/2004 in the suit for extension of time of 1st August, 2004 (Supra). It was stated therein that in true letter and spirit of the compromise, the defendant commenced taking all necessary steps for amending its corporate name with a view to delete the word “WANDER” therefrom, as envisaged in the compromise; that the defendant on 2nd February, 2004 had initiated merging process with its group company M/s Pearl Organics Ltd and for change of name of merged entity to M/s Wanbury Ltd; that the said process required an order of the High Court of Bombay, furnishing of information to the Bombay Stock Exchange and approvals/actions of certain other authorities and which was taking time; that the defendant had approached M/s Novartis Consumer Health India Pvt Ltd, being representative of plaintiff on 9th July, 2004 to allow defendant to use the old name for another three months after 1st August, 2004; that the representative of plaintiff had agreed to extension of one month and to filing joint application in court; however the plaintiff had till last day of July not sent the signed compromise application; the defendant was as such unilaterally seeking extension of effective date of order dated 28th August, 2002 restraining defendant from using “WANDER”, from 1st August, 2004 to 30th September, 2004.

7. The said application came up before the court first on 4th August, 2004 when notice was ordered to be issued to the plaintiff for 27th August, 2004. It was also ordered “in the meanwhile the judgment dated 28th August, 2002 is stayed”. However it appears that on the same day the matter was subsequently unilaterally mentioned by the counsel for the plaintiff, explaining the reasons for earlier non-appearance inspite of advance copy. On the request of the counsel for the plaintiff, the matter was adjourned to the next date and it was further ordered “till tomorrow the above order passed in the morning shall not be given effect to”.

8. On the next date or any subsequent date no further interim order was made. The plaintiff opposed the application. The application was finally dismissed on 5th October, 2004 on the ground that without consent of plaintiff, the court has no jurisdiction to extend the time. The defendant preferred FAO (OS) No.223/2004 against the said order and which is still pending consideration. Vide order dated 29th November, 2004 in the said FAO(OS), the following interim order was made “impugned order is stayed till the next date of hearing”.

9. The plaintiff preferred SLP Civil No.25981/2004 to the Apex court against order dated 29th November, 2004 (Supra). The Apex court on 4th January, 2005 dismissed the said Special Leave Petition observing that the impugned order dated 29th November, 2004 was only an interlocutory order and that both parties had agreed that they will argue the appeal on the date fixed next in the same without seeking adjournment.

10. The plaintiff instituted this execution on 25th August, 2004 stating that the sum of Rs.5 crore along with interest at 18% per annum from 1st August, 2004 was due under clause 15 of the compromise decree. The decree is sought to be executed by directing the Bank of India to immediately pay Rs.32,10,000/- to the decree holder being the sum guaranteed under clause 8 (vi) of the compromise decree and by directing the bank to pay the sum of Rs.5 crore in terms of clause 15 aforesaid of the compromise application. It is further pleaded that Mr Rayana is the principal officer of the judgment debtor and the decree is personally binding on him. His arrest and detention in civil prison is sought for willfully disobeying the order of permanent injunction which came into force on 1st August, 2004, by continuing to use the word WANDER as part of its corporate name and trading style.

11. The present execution was being taken up for consideration along with IA No. 4839/2004 in the suit and thereafter also was adjourned from time to time. The order dated 17th August, 2006 in the execution shows that while it was the contention of the judgment debtor that owing to the order aforesaid in appeal, the execution stood stayed, the decree holder contended otherwise. The same issue was raised on 28th January, 2009 also. Finding that the order impugned in the appeal was the order of rejection of the application for extension of the time which was agreed to be till 1st August , 2004 only and thus the order of the appellate court of stay of the said order could not mean a stay of the present execution and further feeling that since the Division Bench was seized of the matter, it was appropriate to give an opportunity to the judgment debtor to seek a clarification from the Division Bench, the matter

was adjourned to 13th March, 2009. On 13th March, 2009 the matter was adjourned to 24th April, 2009.

12. On 24th April the senior counsel for the decree holder contended that though the judgment debtor had applied to the Division Bench in accordance with the order dated 29th January, 2009 but the said application was not pursued resulting in the same being posted for hearing along with appeal on 6th August, 2009. It was contended by the decree holder that the judgment debtor having been given an opportunity to seek clarification and having failed to do so, there was no occasion for further deferring the execution which had already been pending for five years. The senior counsels for the judgment debtor of course contended that the order aforesaid of the Division Bench tantamounted to the stay of execution and it was contended that there could be no other meaning of the interim order of the Division Bench and the said interim order has to be interpreted meaningfully and purposively.

13. Finding the execution had remained pending for long, an option was given to the judgment debtor to either give undertaking to this court to pay the decretal amount in the event of the appeal being dismissed and subject to any further orders of the Apex court or to proceed with the execution.

14. The senior counsels for the judgment debtor contended that besides the plea of the execution having been stayed by the Division Bench, they had other objections also to the execution (to which reply has been filed) and as such they were not in a position to give an undertaking and which will tantamount to their giving up the other objections to the decree.

15. Finding that even if the order aforesaid of the Division Bench is to be construed as a stay of the execution and further feeling that at least the other objections of the judgment debtor to the execution be adjudicated so that in the event of the appeal being dismissed time thereafter is not wasted thereon, counsels were heard.

16. The senior counsels for the judgment debtor have contended that the only reason for the decree holder claiming Rs.5 crores from the judgment debtor as set out in the execution is the failure of the judgment debtor to continue using the word WANDER as part of its corporate name and trading style beyond 1st August, 2004. It was contended that under clause 4 (Supra) of the compromise application, the judgment debtor had only agreed to, before 1st August, 2004 take the necessary steps for amending the corporate name and style so as to delete therefrom the word WANDER. It is the case of the judgment debtor that the judgment debtor had never agreed or undertaken to ensure that the name will be so changed on or before 1st August, 2004. It is further contended that the judgment debtor had in fact taken the requisite steps for having the name changed, as set out in para 6 hereinabove; that the High Court of Bombay had in fact allowed the merger on 12th August, 2004. ***Mohammed Gazi Vs. State of M.P.*** (2000) 4 SCC 342 was cited to contend that none should suffer due to act of court. It was stated that delay, if any, in change of name was for the reason of the order being pronounced on the application of the judgment debtor for amalgamation resulting in change of name, on 12th August, 2004. It was further contended that the affiliate of the decree holder had in terms of the compromise application entered into the distributorship agreement with the judgment debtor and which was to be entered

into only after the decree holder satisfying itself of the judgment debtor having performed its obligations under the compromise application. It is the case of the judgment debtor that the execution of the said distributorship agreement tantamounts to waiver by the decree holder of the right, if any, to claim Rs.5 crores under clause 15 of the compromise application. It was further contended that the order of the court on a petition for amalgamation relates back to the date of presentation thereof and in the present case also, the amalgamation resulting in change of name though pursuant to order dated 12th August, 2004 related back to the date of presentation of the petition i.e. February, 2004. It is also contended that the decree holder had earlier agreed to extension but on last date did not sign the application for extension. It is further the contention that the decree holder has illegally terminated the Distributorship and Marketing Agreement also and for which claims have been made before Bombay High Court and are pending.

17. The senior counsel for the decree holder has on the contrary contended that the provision of relating back of the order on an application for amalgamation cannot be read so as to defeat the rights of the decree holder under the compromise decree. It is contended that if the same is permissible, every order of injunction in trademark matters shall be defeated by averring that amalgamation resulting in change on trade name had been applied and as and when granted, will relate back to the date of presentation of the petition. The senior counsel for the decree holder has also relied upon clause 2 of the compromise application as per which the injunction against the defendant from using the word WANDER as part of its trade name/trading style was to come into operation w.e.f. 1st August, 2004. It is contended that clause 4 has to derive its

meaning from clause 2 and clause 4 cannot be read as meaning that the obligation was only to apply for change of name and not to have the change affected by that date. It is further contended that clause 4 read alone also conveys that the change of name was to be effective from 1st August, 2004. It is stated that change of name under the Companies Act requires only a special resolution to be passed by the Board of Directors of the judgment debtor and the judgment debtor from the decree in 2002 slept over till February, 2004 and cannot escape liability under clause 15 of the compromise application. In response to the execution of the distribution and marketing agreement, it is contended that the argument of the judgment debtor is contradictory; as per clause 2 of the compromise application, subject to satisfaction whereof also the distributorship and marketing agreement was to be entered into, the change of name was to come into effect w.e.f. 1st August, 2004; the distributorship agreement was admittedly entered into prior thereto. The same could thus not be in satisfaction of or waiver of the rights of the decree holder to have the change of name affected latest by 1st August, 2004. It is further contended that the judgment debtor also understood the compromise to be so, as evident from IA.No.4839/2004 (supra) and the correspondence prior thereto.

18. The counsels for the judgment debtor in rejoinder have submitted that the name having been changed shortly after 1st August, 2004, it not being the case that the same was delayed indefinitely, the decree holder could not be permitted to illegally enrich itself. It was also contended that the judgment debtor was entitled to concession for the time during which the decree holder had represented that it was willing to extension of time and if such time is deducted, there is no delay.

19. I had during the hearing put to the counsels for the parties whether the decree such as under execution was at all executable, if the parties were found to have arrived at a fresh agreement. The senior counsel for the decree holder in response contended that though the parties had entered into a fresh distributorship and marketing agreement but the sum of Rs.5 crores provided in clause 15 of the compromise application was in terms of the claim of the decree holder for damages. However a perusal of the plaint in the suit file shows that the decree holder had in para 17 thereof stated that it estimated that it will be entitled to a sum in excess of Rs 5 lacs after the defendant had rendered accounts and there is no claims as such for damages of 5 crores.

20. The compromise application in the very preamble thereof states that the parties had settled the disputes subject matter of the suit and other related disputes by agreeing to enter into a distributorship and marketing agreement. A further perusal of the compromise application shows that though the judgment debtor agreed to suffer a decree for permanent injunction but the said decree for permanent injunction was to come into operation after nearly two years from the date of the compromise i.e., w.e.f. 1st August, 2004. The draft distributorship and marketing agreement was annexed to the compromise application.

21. The judgment debtor, besides agreeing to suffer a decree for permanent injunction as aforesaid, agreed to do several other things as enumerated in the compromise application. Clause 4 deals with the change of name. It imposes an obligation on the judgment debtor only to take steps for amending its corporate name and to

supply to the decree holder proof of having taken such steps. Though the date mentioned in clause 4 also is of 1st August, 2004, i.e., the date on which permanent injunction prohibiting the judgment debtor from using WANDER as part of its corporate name was to come into force but clause 4 conspicuously does not provide that the judgment debtor will before the said date of 1st August, 2004 ensure change of its name. That however does not compel me to interpret clause 4 as meaning that the judgment debtor was not only to take steps but also ensure change of name. That would be doing violation to the language used by parties. Had the intention of the parties been that the judgment debtor shall ensure change of name latest by 1st August 2004, nothing prevented the parties from expressly providing so. It is also significant that while with respect to the various matters, the steps to be taken by the judgment debtor and the time therefor is expressly provided, the decree holder did not insist upon the judgment debtor to undertake effecting change of name before 1st August, 2004.

22. I do not find any inconsistency in clauses 2 and 4 and the two can be read harmoniously. The principle of interpretation of deeds also is to first explore harmonious interpretation, before doing violation to literal language used or giving precedence to clause appearing first, over that appearing later. Under Clause 2, the decree for permanent injunction and by which the judgment debtor would stand prohibited from using WANDER as part of its corporate name was to come into force on 1st August, 2004. Coming into force of such decree was not dependent upon the judgment debtor taking steps for change. The central pillar of the compromise appears to be the agreement of the parties to enter into Distributorship cum Marketing Agreement. The said agreement, under clause 11 was

agreed to be executed after the decree holder had satisfied itself that the judgment debtor had performed its obligations under the specified clauses of compromise application. Clause 4 regarding change of name is one of such clauses. That appears to be the purpose of clause 4, i.e., to assure the decree holder before its affiliate enters into the Distributorship cum Marketing Agreement with the judgment debtor, that the judgment debtor intended to abide by the decree for permanent injunction which in any case would come into force on 1st August, 2004. Clause 2 was also included in the clauses specified in clause 11. The effect of inclusion of clause 2 was not that Distributorship and Marketing Agreement will be entered after 1st August, 2004. Clause 2 also provides for decree for permanent injunction qua other trademarks coming into force immediately. The decree holder was only to ensure that the judgment debtor was abiding by the said decree qua marks other than WANDER. The Distributorship and Marketing Agreement has admittedly been entered into. The execution of the said agreement signified satisfaction by the decree holder of the judgment debtor having complied with obligations under clause 4. Clause 4 as interpreted literally has admittedly been complied by the judgment debtor. The contention of senior counsel for decree holder of clause 4 being required to be read as requiring the judgment debtor to ensure change of name by 1st August, 2004, is not found tenable.

23. That brings me to (A) whether clause 15 provides for an executable decree for Rs 5 crores on the happenings of events mentioned therein and if so, (B) whether any such event has happened.

24. Clause 15 contains the agreement of the judgment debtor that upon its failure to fulfill “any of its obligations” under the compromise application or upon its failure to comply either with the terms and conditions of the compromise application or the conditions enumerated in the Distributorship and Marketing Agreement “for any reason whatsoever”, it shall forthwith pay to the decree holder by way of damages the amounts mentioned therein “and shall submit to the decree of this Hon’ble Court”.

25. The Apex Court in Ruby Sales and Services (P.) Ltd Vs State of Maharashtra (1994) 1 SCC 531 held that merely because an agreement is put in the shape of a consent decree, it does not change the contents of documents – it remains an agreement and it is subject to all rights and liabilities which any agreement may suffer; having a stamp of court affixed will not change the nature of the documents; a compromise decree does not stand on a higher footing than the agreement which preceded it. It was held, a consent decree is a mere creature of the agreement on which it is founded and liable to be set aside on any of the grounds which will invalidate the agreement.

26. The relevant aspects of clause 15 are as under:-

- A) It has no reference to the decree holder’s claim in plaint for accounts and recovery of amount found due. The accounts were sought of profits earned by judgment debtor by use of word WANDER as its trading name. The amount of Rs 5 crores in clause 15 is payable not on this account but for reason of breach of fresh obligations undertaken by the judgment debtor in the compromise application. So much so, the breach by judgment debtor of the terms and conditions of Distributorship

and Marketing Agreement to be entered into as central pillar of compromise and not with the decree holder but with an affiliate of the decree holder, was also to result in the payment envisaged.

- B) It does not provide that decree for Rs 5 crores be passed and made executable in eventualities mentioned.
- C. It provides that the judgment debtor shall not dispute the correctness of the sum of Rs 5 crores to be paid to the decree holder. This is indication of the said clause being as that of payment of liquidated damages under an agreement rather than of being a decree. Had the money been intended to become due to the decree holder as a decree of the court there could be no question of the judgment debtor disputing the correctness of the amount.
- D. It also provides that the liability of the judgment debtor for the said amount shall not affect the other rights, reliefs and remedies of the decree holder against the judgment debtor. This is again in consonance with an agreement rather than with a decree. The question of the decree holder claiming other reliefs and remedies against the judgment debtor would be arisen only if Rs 5 crores was by way of liquidated damages in a contract and not if it was by way of a decree.
- E. The words “submit to the decree of this court”, of course could mean that there was to be a decree of the court by way of compromise. However, they can also mean that the judgment debtor, in the event of such claim being preferred by a separate suit, submit to decree in this amount at least.

27. The question which arises for consideration is, where parties by way of compromise enter into fresh agreement, and provide for consequences of default thereof, are such defaults executable or to be adjudicated by separate proceedings.

28. The courts have held that the question, whether the parties had adjusted/compromised the suit by entering into a contract and the court by recording compromise has merely expressed satisfaction of claims in suit being settled by execution of such agreement OR whether the parties have by compromise extended the relationship leading to the suit and agreed to an executable decree being passed in terms thereof, is a matter of interpretation of the decree. In this regard, see:

- a) **Sudhir Kumar Vs Baldev Krishna Thapar** 1969 (3) SCC 611 where it was held that the parties had agreed to a fresh lease and the direction in the decree to vacate the suit premises at the end of the term fixed in the compromise was held to be an ineffective direction, not amounting to ejectment decree and at best a declaration of right;
- b) **Kunchanda Ramamurthy Vs Gopinath Naik** AIR 1968 SC 919, where no fresh agreement was found to have come into existence;
- c) **Godhumal Sanmukhmal Vs Mt. Bhambo** AIR 1943 Sind 11 holding that the question how far decree is capable of execution as an executory decree is entirely distinct from question of validity of the decree and further that where decree sets out penalties to be incurred for non fulfillment of certain of its terms and is concerned not so much with

present rights but as to future rights on uncertain happenings in future, it must be held incapable of execution;

- d) **Harihar Pandey Vs Mangala Prasad Singh** AIR 1986 All. 9 holding, where prohibitions and/or positive mandates mentioned in compromise to regulate future mode of conduct were intended to be enforced as injunction, then decree holder could not be driven to file fresh suit.
- e) **Prithvichand Ramchand Sablok Vs S.Y. Shinde** AIR 1985 Bom 297 laying down principles of interpretation of consent decrees.
- f). **Bibekananda Bhowal v. Satindra Mohan Deb** AIR 1996 SC 1985 holding that the default clause in the compromise in that case to be not meaning enforcement thereof by execution of the compromise in relation to breach of such clause. It was held that the question arising for adjudication in relation to the said default clause could be adjudicated only in an appropriate proceeding and not in the execution of the decree. It was further held that had the intention been that on default the decree will be executable, nothing prevented the parties from providing so. It was thus held that the consequences of the default clause were not executable and only a separate proceeding could lie therefrom.
- g) **Municipal Board Kishangarh Vs M/s Chand Mall & Co.** laying down that subsequent events can be looked into by the executing court under Section 47 CPC.

- h) **M.P.E.B. Vs M/s Central India Electric Supply Co. Ltd**
AIR 1995 SC 1456 holding that compromise providing for determination of compensation in appropriate proceeding would mean independent proceedings and not execution proceedings.
- i) **Bhavan Vaja Vs Solanki Hanuji** AIR 1972 SC 1371 laying down that though an executing court cannot go behind the decree but that does not mean that it has no duty to find out the true effect thereof and for construing the decree, in appropriate cases pleadings as well as proceedings leading to the decree can be considered.
- j) **Parkash Chand Khurana Vs Harnam Singh** AIR 1973 SC 2065 holding that executability is the main facet of a decree and that mere non mentioning of the decree being executable on happening of certain events is not determinative, if otherwise it is found intended to be executable.
- k) **Salkia Businessmen's Association Vs Howrah Municipal Corporation** AIR 2001 SC 2790 laying down that terms of compromise become order of court and courts should strictly enforce the terms and viewing breach of terms of compromise as a matter of mere contract between parties and disregarding it has disastrous effect on rule of law. This judgment does not consider the earlier judgments aforesaid and was in reference to a compromise in a writ proceeding and not in a suit.

29. The single-most factor which leads me to hold in this case that the decree in clause 15 is not an executable decree is that it in its

sweep also includes breach of terms and conditions of Distributorship and Marketing Agreement to be entered into pursuant to compromise, not between the decree holder and the judgment debtor but between a nonparty to the suit and the judgment debtor. The parties could never have intended, also in law of an executable decree on default by judgment debtor of terms of an agreement with a party not a party to the suit or the compromise. Even though the courts have held that subsequent events can be gone into in execution and can be subject matter of adjudication under Section 47 CPC, but such adjudication also is not possible in the absence of the party to the agreement of which breach is alleged. Clause 15 of the compromise does not permit of bifurcation, i.e., that in the case of breach of terms of Distributorship and Marketing Agreement, proceedings for recovery of Rs 5 crores were to be instituted and in the event of breach of terms of compromise, such breach was to be determined by execution. This reason alone, coupled with others given in para 26 above, compel me to interpret the clause 15 of the compromise decree to be not executory but merely expressing satisfaction of the validity of the agreement recorded in compromise application and on which the claim in suit was settled/adjusted. I must record that in doing so, I am conscious of the amendment of 1976 to Rule 3 of Order 23, permitting compromise decree with respect to matters other than subject matter of suit and have not relied upon judgments interpreting the decrees for the said reasoning.

30. I also find that the compromise nowhere records any admission of the judgment debtor of on accounts being taken, for which relief was claimed in the plaint, the sum of Rs 5 crores being due to the decree holder. It was thus not as if the liability in the said amount

was admitted and only executability thereof was deferred till happening of eventuality in clause 15. The eventualities mentioned are arising out of fresh agreement reached between the parties and owing to whereof, the suit was disposed of. This court thus while decreeing the suit in terms of compromise merely recorded the compromise in satisfaction of claim in suit. The rights and liabilities of parties flowing from agreement reported in compromise are to be adjudicated in a separate proceeding and not found to be intended to be adjudicated in execution. The disputes, if any, arising between the parties out of the said fresh arrangement/agreement, could not be settled in execution and or under the scope of Section 47 of the CPC. The disputes which can be entertained under Section 47 of the CPC are only those relating to execution discharge or satisfaction of the decree. Here it is not found that any decree in the sum of Rs 5 crores has been passed in favour of the decree holder and against the judgment debtor. Even after the compromise no additional court fee was paid treating the decree to be for a sum of Rs 5 crores. The decree holder had in the plaint undertaken to pay additional court fees in the event of amounts in excess of Rs 5 lacs being awarded to it.

31. It cannot also be said that because Rs 5 crore is mentioned, it could only mean that the parties intended an executable decree in the said sum. Such provisions for liquidated damages are commonly found in commercial contracts. Simply because the contract in the present case is recorded in the compromise application would not imply that upon any dispute arising between the parties out of the said contract also, that will be adjudicated in execution. A decree cannot precede a dispute.

32. The courts have in some cases mostly relating to money recoveries held decrees which provide for the decree being satisfied upon a lesser amount than due under the decree being paid within the certain time only on the principle that in those cases the decree is for the full amount. However, when there is no decree as in the present case, it cannot be executable.

33. It was also held in **J.K. Seth Vs Narendra Nath Bannerjee** AIR 1977 Cal 388 DB that where two interpretations are possible in respect of a compromise decree, that interpretation which is favourable to the judgment debtor should be accepted. The same view was taken in **Punjab & Sindh Bank Ltd Vs Jagdish Lal** AIR 1972 Punjab & Haryana 144. Of course, in relation to other decrees and on aspect of limitation, it was held in **Deep Chand Vs Mohan Lal** (2000) 6 SCC 259 that where language of a decree is capable of two interpretations, one which assists the decree holder to have the fruits of the decree should be preferred, but the same will have no application to compromise decree. The decree holder having failed to ensure language as to executability of decree and having acted in its zeal to protect the rights of a non party to the suit also, under an agreement then still to be entered into cannot be permitted to have benefit of the interpretation, since in view of ambiguous language, it cannot be said with certainty that the judgment debtor understood that it was suffering a decree for Rs 5 crores. I also do not find any merit in the contention that from IA.No.4839/2004 and other correspondence, it can be said that the judgment debtor understood the decree to be so. As aforesaid, on 1st August, 2004 the decree for permanent injunction was to come into force. The anxiety of the judgment debtor was to seek extension of coming into force of the

decree for injunction and not to avoid execution of decree for Rs 5 crores.

34. The detriment to the judgment debtor is that if clause 15 is only an agreement providing liquidated damages of Rs 5 crores, then the decree holder ipso facto does not become entitled to the said amount and will have to prove the loss. Though I may notice that the courts in **Allvarapu Subbayya Vs Jakka Peddayya** AIR 1937 Mad 234, **Biswanath Kundu Vs Smt Subala Dassi** AIR 1962 Cal 272 DB have held that where the compromise decree imposes greater liability amounting to penalty, in the event of default, the judgment debtor is entitled to relief in execution even on equitable principles contained in Section 74 of the Contract Act. Thus the principle is that if decree is for full amount but on payment by stipulated date, of lesser sum, the entire decree is satisfied, the courts, without consent cannot change the decree. However, where the decree provides for payment of decretal amount by a particular date and upon default, of more than decretal amount, such clause is by way of penalty, relief where against can be given in execution also. Though I must notice a recent pronouncement in **Deepa Bhargava Vs. Mahesh Bhargava** (2009) 2SCC 294 which has not upheld invocation of this principle in revision against an order in execution.

35. I have already held that there was no failure to fulfill obligation under clause 4. The other question is whether there was breach of clause 2 i.e., of permanent injunction, by continuing to use the name "WANDER" even after 1st August, 2004, according to

judgment debtor till 12th August, 2004 and according to decree holder till September 2004 when post merger name was changed. This is relevant because execution of decree for permanent injunction is also claimed. Irrespective of whether the change of name was effected or not the decree for permanent injunction in terms of the compromise application came into operation on 1st August, 2004. The decree holder was within its rights to enforce the said decree for permanent injunction. A decree for permanent injunction under Order 21 Rule 32 is enforceable, if the judgment debtor in spite of having had an opportunity for obeying the decree has willfully failed to obey it, by attachment of the property of the judgment debtor and by detention of the judgment debtor in civil prison.

36. The decree holder has in the execution not pleaded that the judgment debtor inspite of having had an opportunity of obeying the decree, failed to do so, though the word willfully is used. In the facts and circumstances of the case I am not inclined to give any opportunity to the decree holder to amend its pleadings in the execution, or to lead any evidence on this aspect. Though the decree for permanent injunction was to come into operation as aforesaid but in another part of the compromise application a provision was made only for the judgment debtor to take steps for change of name and trading style. The said steps were admittedly taken by the judgment debtor and change of name was in fact effected shortly after 1st August, 2004. In these circumstances, it cannot be said that the judgment debtor inspite of opportunity to obey has willfully failed to obey. The judgment debtor could have been under a bona fide impression that all that it was required to do

was to take steps before 1st August, 2004 for change of name. No ground for executing the decree for permanent injunction is thus made out. The decree for permanent injunction is executable by arrest and attachment only and not by enquiry into any damages suffered because of breach. The purpose is to ensure compliance. Even if it be held that the parties had in compromise agreed for payment of Rs 5 crores in case of breach, the same will be only when decree is found executable in terms of CPC. Since the decree has not been found executable owing to ingredient of failure to obey inspite of opportunity lacking, the question of execution by payment also does not arise.

37. Though not cited during hearing, the written note handed over by senior counsel for decree holder also refers to **Bindru Vs Kikru** AIR 1988 J & K 1 FB, **Pioneer Engineering Co. Vs DH Machine Tools** AIR 1986 Delhi 165, **Rajasthan Financial Corporation Vs M/s Man Industrial Corporation** AIR 2003 SC 4273 and **Dr. Renuka Datla Vs Solvay Pharmaceuticals** (2004) 1 SCC 149, neither of which is found to be on any of the aspects aforesaid nor persuade me to hold otherwise. Mention therein is also made of **Abro Industries Inc. Vs K.V. International** 111(2004) DLT 826 which is found applicable. However, the language of the clause in the compromise application in that case was materially different.

38. I therefore uphold the objections of the judgment debtor. I find that there is no decree for Rs 5 crores as claimed by the decree holder and which can be executed. The only decree is for relief of permanent injunctions. However, it is not found that the judgment

debtor inspite of having opportunity to obey the relief of permanent injunction has willfully failed to do so. Thus, no case for execution of the decree for permanent injunction even is made out. The execution is dismissed. However, in the facts and circumstances of the case the parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**May 11, 2009
PP**