

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 863/2010

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Reserved on: 5th September, 2011

Decided on: 2nd January, 2012

MORGARDSHAMMAR AB

.....PLAINITFF

Through: Mr. Suhail Dutt, Sr. Adv.
with Mr. Abhixit Singh, Mr.
A. Singh Gyani and Mr. Qazi
Riaz Masood, Advs.

Versus

MORGARDSHAMMAR
INDIA PVT. LTD & ANR.

.....DEFENDANTS

Through: Mr. Rajive Sawhney, Sr.
Adv. with Mr. Deepak
Khurana and Ms. Aditi
Sharma, Advs.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. Plaintiff has filed the present suit for permanent injunction against the defendants for restraining the infringement of plaintiff's trademark and trade name, passing off, delivery up of the infringing material and rendition of accounts.

2. Plaintiff's case, as set out in plaint is that the plaintiff is a company registered in Sweden. It is engaged in the business of

manufacturing, designing, fabricating and delivering revamps of all sorts of rolling mills including guide system, equipments and spare parts of the rolling mills. The plaintiff was formerly known as PREMIARAKTOREN 689 AKTIEBOLAG and NYA MORGARDSHAMMAR AKTIEBOLAG. Plaintiff has extensive business worldwide and has proprietary rights in the trade name “MORGARDSHAMMAR” and trademarks “MORGARDSHAMMAR (LABEL)” and “MH ARROW DEVICE”. Several companies have been incorporated by the plaintiff in USA and other parts of the world with the said trade name “MORGARDSHAMMAR”.

3. Centro MORGARDSHAMMAR AKTIEBOLAG (hereinafter referred to as “Volvo”) had applied for and obtained registration in India in respect of trademark “MH MORGARDSHAMMAR (LABEL)” bearing no.393277 in Class 7 with respect to rolling mills machinery, parts thereof and fittings. Volvo was also the proprietor and owner of the trademark “MH ARROW DEVICE” with respect to rolling mills machinery, parts thereof and fittings.

4. Pursuant to a Collaboration Agreement and a Shareholders Agreement, both dated 3rd July, 1982, between S.K.Gupta & CS (OS) No. 863/2010

Associates and Volvo and between Modi Group and Volvo respectively, defendant No.1 (a joint venture company of Volvo and Modi Group) was incorporated in India in the year 1983, for the purpose of designing, planning, fabricating, constructing, manufacturing, sub-contracting, providing, supplying, installing, commissioning, working, operating, purchase import, exporting, selling and dealing in all kinds of rolling mills including guide systems equipments, spare parts for rolling mills and accessories thereof, acting as consulting engineers, supplier of process know-how and technology in hot and cold rolling of ferrous and non-ferrous metals. The technical knowhow was provided to the defendant No.1 by Volvo. 60% shareholding was held by the Modi Group; whereas 40% shareholding was held by Volvo in the defendant No.1. The defendant Nos.2 to 8 are Directors of defendant No.1 Company.

5. Volvo, vide a non-exclusive Trade Mark License/Registered User Agreement(hereinafter referred to as “TMLA” for short) dated September 10, 1984, permitted the defendant No.1 to use its aforementioned trademarks/trade name i.e., “MH MORGARDSHAMMAR” (LABEL), “MH ARROW DEVICE” and “MORGARDSHAMMAR” on the terms and conditions as

stipulated in the said Agreement. Defendant No.1 had been using the aforesaid trademarks/trade name for the purposes of its business on the basis of permissive rights given under the said TMLA and the Name License Agreement dated 19th April, 1983 (hereinafter referred to as “NLA” for short). In terms of Clause 15(a) of the TMLA, the right of permissive user of aforesaid trademarks/trade name was to come to an end upon the shareholding of Volvo in the defendant No.1 Company becoming lower than 25%. The said Clause 15(a) reads as under:

“15. This agreement shall take effect from the date of signing hereof and shall be without limit of period subject to termination as hereinafter provided:

(a) By the proprietors giving to the Users notice in writing of its intention to terminate this Agreement forthwith upon the equity participation of the Proprietors with the User being reduced to less than twenty-five percent of the paid up equity share capital of the Users”.

6. Clause 15 (a) was also incorporated in the Articles of Association of defendant No.1 in Article 219.

7. Vide Asset Purchase Agreement dated June 16, 1987 (hereinafter referred to as “APA” for short), Volvo transferred its assets, business trademarks, patents etc. to the plaintiff along with

an option to buy from Volvo the 80,000 equity shares held by Volvo in the defendant No.1. Vide Agreement dated 22nd December, 1993, the said 80,000 equity shares held by Volvo in defendant No.1 were formally transferred by Volvo to plaintiff. However, defendant No.1 refused to effect the transfer of shares, thus, Volvo filed a petition bearing no. 40/111/95-CLB before the Company Law Board, Northern Region Bench, New Delhi (“CLB”, for short), against the defendant seeking registration of the transfer of 80,000 equity shares held by Volvo in favour of plaintiff and the delivery of share certificates to the plaintiff, who was impleaded as 2nd respondent in the said petition. Defendant No.1 was fully aware about the APA and the transfer of the trademarks etc. by Volvo to the plaintiff in the said petition. Defendant No.1 opposed the said petition, however, vide judgment dated 16th June, 1998, said petition was allowed. Thereafter, 80,000 equity shares held by Volvo in defendant No.1 were transferred and registered in the name of the plaintiff in the records of defendant No.1. The Directors of Volvo on board of defendant No.1 resigned after the execution of APA and transfer of shares.

8. Plaintiff applied for change of name of the proprietor/owner in respect of the trademark No.393277. As required by Trade Mark

Authorities, a Confirmatory Deed of Assignment (hereinafter referred to as “CDA” for short) dated August 13, 2008 was executed between Volvo and plaintiff and subsequently, on September 23, 2008, plaintiff’s name was recorded as a proprietor/owner of the said trade mark by the Trade Mark Registry. Plaintiff permitted the defendant No.1 to continue to use the aforesaid trademarks/trade name on the assumption that it had stepped into the shoes of Volvo with regard to its 40 % shareholding.

9. In November-December 2009, plaintiff came to know that without the plaintiff’s knowledge, resolution to amend the Articles of Association of defendant No.1 had been passed and Article 219 had been deleted from its Articles of Association. On January 25th 2008, the defendant No.1, in connivance and collusion with majority shareholders of the Modi Group and the defendant Nos. 2 to 8, allotted 7,50,000 equity shares of the defendant No.1 to defendant No.2, thereby increasing equity shareholding of the Modi Group which resulted in reducing the percentage of shareholding of the plaintiff in the defendant No.1 from 40% to 8%. As plaintiff’s equity shareholding in the defendant No.1 had been reduced below 25%, as per Clause 15 (a) of the TMLA, the defendant No.1 was

liable to cease and desist from using the trademarks and trade name “MH MORGARDSHAMMAR (LABEL)”, “MH ARROW DEVICE” and “MORGADSHAMMAR”.

10. Accordingly, plaintiff served cease and desist notice dated March 15, 2010 upon defendant No.1 calling upon it to discontinue the use of aforesaid trademarks/trade name “MH MORGARDSHAMMAR (LABEL)”, “MH ARROW DEVICE” and “MORGADSHAMMAR” for the purpose of business within 21 days of receipt of notice. However, despite the receipt of notice, defendant No.1 continued to use the registered trademarks “MH MORGARDSHAMMAR”, “MH ARROW DEVICE” and the corporate name “MORGARDSHAMMAR”. The defendant No.1, in its reply dated 9th April, 2010, has taken a stand that TMLA was in perpetuity; plaintiff had no concern with the said agreement; and no notice of assignment had been given to the defendant No.1.

11. In the written statement, defendant No.1 has taken certain preliminary objections besides replying on merits. It is alleged that the plaint did not disclose any cause of action, thus, was liable to be dismissed; there was no privity of contract between the plaintiff and defendant No. 1, as a third party, namely, Volvo alone had a right to terminate the agreement which was entered into between Volvo and

defendant No.1. Since, Volvo never exercised those rights, Volvo has waived, surrendered and abandoned its rights to terminate the TMLA. Defendant No.1 has denied that Volvo had sold its trademarks to the plaintiff. Upon the alleged transfer of 80,000 equity shares held by Volvo in defendant No.1 in favor of plaintiff in 1993, Volvo ceased to hold any shares in the defendant No.1 and since it chose not to exercise its rights to terminate the said agreement with the defendant No.1, it rather had abandoned, released, waived and relinquished its rights to and in favor of the defendant No.1. There has been no assignment by Volvo of its rights under the TMLA dated 10.09.1984 executed in favor of the defendant No.1. The assignment of rights could have been only with the consent and acceptance given by defendant No.1. As no such consent/acceptance had either been sought from or given by the defendant No.1, the plaintiff is a stranger to the contract between the defendant No.1 and Volvo.

12. It is also the case of defendant No.1 that the suit is barred by limitation. The cause of action, if any, arose when Volvo allegedly transferred its shares in defendant No.1 to the plaintiff way back in the year 1993. Upon the said transfer, Volvo ceased to hold any shares in the defendant No.1 and at that stage rights under the

TMLA could have been exercised, which, however, were not exercised. In any case, the same could have been exercised within three years from the date of transfer of shares by Volvo to plaintiff. It was further alleged that the notice of Annual General Meeting of shareholders, which was held on 27th September, 2007, was issued to all the shareholders on 24th August, 2007. However, plaintiff did not attend the said meeting. Subsequently, 7, 50,000 shares were allotted in favor of defendant No.2 in the meeting of Board of Directors of defendant No.1, held on 25th January, 2008. That apart, notice of Extra Ordinary General Meeting held on 20th March, 2006, whereby resolution to delete Article 219 from the Articles of Association was passed, had also been given on 20th February, 2006. The case of defendant No.1, as set out in the written statement, is that the trademarks in dispute are its property and the said trademarks are associated with the name, reputation and goodwill of the defendant No.1. It has been using these trademarks from the period much prior to the alleged purchase of shares and other assets by the plaintiff. Assignment of trademarks as stipulated in the APA was subject to defendant No.1's consent, however, no notice of the alleged CDA dated 13th August, 2008 was given to the defendant No.1. Receipt of legal notice dated 15th

March 2010 has been admitted by the defendant No.1, however, its contents have been denied. It has been denied that plaintiff is proprietor/owner of the trademarks/ trade name “MORGARDSHAMMAR (LABEL)”, “MH ARROW DEVICE” and “MORGARDSHAMMAR”. It is categorically alleged that the, plaintiff has no right to demand from the defendants to cease and desist the use of aforesaid trademarks/ trade name.

13. In the replication, plaintiff has denied the contents of the written statement and reiterated the averments made in the plaint.

14. On the pleadings of the parties following issues were framed on 2nd December, 2010:

“1. Whether the civil suit filed by the plaintiff does not disclose any cause of action and is liable to be dismissed under Order 7 Rule 11 of the CPC, as alleged by the defendants? (OPD)

2. Whether the suit is barred by limitation as alleged by the defendants? (OPD)

3. Whether the plaintiff has exclusive rights and is the proprietor of trade mark? ‘MH MORGARDSHAMMAR’ (label) and ‘MH ARROW DEVICE’, trade name / corporate name ‘MORGARDSHAMMAR’ and is entitled under Trade Mark Agreement/ Registered User Agreement or under law to restrain the defendants from using the said trademarks and trade name? (OPP)

4. Whether the assignment by VOLVO to the plaintiff of the trademarks and trade name, which is the subject matter of the suit, was subject to prior consent of defendant No. 1? (OPP)
5. Whether the plaintiff is entitled to relief(s), as prayed for? (OPP)
6. Relief.”

15. In FAO (OS) No. 666/2010, vide order dated 22nd November, 2010, parties agreed that the affidavits in evidence, along with documents, be filed by both the parties and that the witnesses need not be cross-examined. It was also agreed between the parties that the documents filed by the respective parties may be read in evidence, in terms of the affidavits filed by the parties. It appears that the parties agreed to this course as entire case is based on the documentary evidence and not on ocular evidence.

16. Plaintiff filed affidavit of Lars Fors, who had been working with the plaintiff right from 1987 onwards. Initially he worked as General Manager (Finance & Administration) from 1989 to 2000 and thereafter Managing Director from 2000-2003. In his affidavit, he reiterated the averments made in the plaint which have already been narrated hereinabove. Collaboration Agreement and the Shareholders Agreement both dated 3rd June, 1982 executed

between S.K. Gupta & Associates and Volvo and Modi Group have been exhibited as Ex.PW1/1 and Ex.PW1/2 respectively. Supplementary Collaboration Agreement dated 18th August, 1982 has been exhibited as Ex.PW1/3. Trade Mark License/Registered User Agreement dated 10th September, 1984 executed between Volvo and defendant No.1 has been proved as Ex.PW1/4. Name License Agreement dated 19th April, 1983 executed between Volvo and defendant No. 1 has been proved as Ex.PW1/5. Asset Purchase Agreement executed between Volvo and plaintiff has been exhibited as Ex.PW1/6. Annual Report of defendant No. 1 has been proved as Ex. PW1/7. Share Purchase Agreement dated 22nd December, 1993 executed between Volvo and plaintiff in respect of shareholding of Volvo in defendant No. 1, i.e. 80,000 shares, has been exhibited as Ex. PW1/8. Judgment dated 16th June, 1998, passed by Company Law Board, in a petition filed by Volvo thereby directing the defendant No. 1 to register 80,000 equity shares of Volvo in favour of the plaintiff, has been exhibited as Ex.PW1/9. Confirmatory Deed of Assignment dated 13th August, 2008 executed between Volvo and plaintiff has been exhibited as Ex.PW1/10. Certification of Trademark Registry certifying the ownership of plaintiff in respect of registered trademark number

393277 namely “Morgardshammar” (Label) has been exhibited as Ex.PW1/11. “Morgardshammar” (Label) has been exhibited as Ex.PW1/12. Copy of Minutes of Meeting of Board of Directors of defendant No.1 dated 31st July, 1998 has been exhibited as Ex.PW1/13. In the said meeting the Minutes of Board Meeting dated 26th October, 1998 were approved and the same have also been annexed with Ex.PW1/13. Legal notice dated 15th March, 2010 whereby plaintiff revoked the TMLA and called upon the defendant No. 1 to stop using the trademarks/trade name within 21 days of the receipt of the notice has been exhibited as Ex.PW1/14. Reply dated 9th April, 2010 of defendant No. 1 has been exhibited as Ex.PW1/15.

17. Defendant No. 1 has filed affidavit of its authorized signatory, namely, Brajeshwar Dayal Garg. Certain documents have been filed along with the affidavit and given exhibit marks as PW1/1 to PW1/12. It may be noted that these documents are of the defendant and ought to have been marked as DW1/1 to D1/12. Accordingly, these exhibits shall be read as DW1/1 to DW1/12 instead of PW1/1 to PW1/12. Letters dated 8th March, 1999, 16th March, 1999 and 18th May, 1999 received by defendant No. 1 from the nominee directors of Volvo on the Board of defendant No.1

have been exhibited as Ex. DW1/1 to DW1/3 respectively. Certified copy of notice dated 20th February, 2006 with regard to convening the Extraordinary General Meeting (EGM) has been exhibited as Ex.DW1/4. Postal receipt in respect of service of notice on the plaintiff has been exhibited as DW1/5. Form No. 23 submitted with the Registrar of Companies (ROC) by defendant No.1 pursuant to the said meeting has been exhibited as Ex.DW1/6. Certified copy of Minutes of Annual General Meeting (AGM) of shareholders of defendant No. 1 dated 27th September, 2007 has been proved as Ex. DW1/7. Certified copy of Annual Report for the financial year 2006-07 has been proved as Ex. DW1/8. Certified copy of Form 20B filed with ROC in respect of filing of Annual Return for the financial year 2006-07 has been exhibited as Ex. DW1/9. Certified copy of Form 23 in respect of meeting dated 27th September, 2007 has been exhibited as Ex.DW1/10. Certified copy of Board Resolution dated 25th January, 2008 has been exhibited as Ex.DW1/11. Certified copy of Form-2 filed with the ROC has been exhibited as Ex.DW1/12. In his affidavit, witness of defendant No.1 has supported the averments made in the written statement.

18. It may be noted here that in its written arguments, defendant No.1 has mentioned that during the hearing of final arguments, it

has filed an application under Section 47 and 57 of the Act for removal/rectification of the trademark registration No.393277 in Clause 7 for mark “MH MORGARDSHAMMAR” device, before the Intellectual Property Appellant Board, Chennai. However, no application under Section 124 of the Act was filed inasmuch as, no argument was advanced before the conclusion of hearing about the effect of this event. Accordingly, no cognizance of this fact can be taken at this stage when only judgment is to be pronounced.

19. I have heard Mr. Sohail Dutt learned senior counsel for the plaintiff and Mr. Rajive Sawhney learned senior counsel for the defendants and have perused the entire material on record and my issue-wise findings are as under : -

Issue Nos. 1, 3 and 4

20. These issues require common discussions and are decided together.

21. It emerges from the record that the defendant No. 1 was set up in India as a Joint Venture of Volvo and Modi Group. Initially, a Collaboration Agreement was entered into between Volvo and S.K. Gupta & Associates as one of the promoters of defendant No.1. On the same day, Shareholders Agreement was also executed

between Volvo and Modi Group. As per the Shareholders Agreement, Modi Group was to have 60% shareholding; whereas Volvo was to retain 40% of the shareholding in defendant No.1. Defendant No. 1 was set up for fabrication, construction, manufacturing and supply of rolling mills guide system equipments; spare parts for the said system as well as spare parts for rolling mills. Volvo was having enriched experience of several years in the designing, fabrication, construction and manufacturing of rolling mills guide system, spare parts for rolling mills and accessories thereof. Volvo was to provide knowhow and technology for the designing, fabrication, construction and manufacturing of such equipments to the defendant No.1, after its incorporation. Volvo also agreed to allow the defendant No. 1 to use its Intellectual Property for marketing the products manufactured by defendant No.1 as also its corporate name. Relevant is Clause 18 of the Collaboration Agreement in this regard, which reads as under:-

“18. PRODUCT AND CORPORATE NAME

18.1 Subject to the approval of the relevant Government authority in India, if required, the said Equipment manufactured by the new Company shall be sold under the name “MH Morgardshammar India” or any other name indicated by MH and approved by the new Company. MH and the new Company shall

jointly make an application to the Registrar of Trade Marks under the Indian Trade and Merchandise Marks Act 1958 for the appointment of the new Company as exclusive registered users of the trade mark “MH Morgardshammar India”, the registration of which is being applied for by MH in India, in respect of Roller Guides and spare parts for Rollar Guides as provided in Part I and Part II respectively of Annexure A hereto.

18.2 The use by the new Company of the name and trade mark set out in para 18.1 and the right to use the work “Morgardshammar in its corporate name as per Clause 3 above is conditional upon the said Equipment being manufactured by the new Company strictly in accordance with the specifications laid down, directions given, know-how, Drawings and information supplied and technical advice tendered by MH and of quality set out in Clause 13 hereof. In the event that the said Equipment should not any longer comply with the said requirements MH and the new Company shall first make joint efforts to rectify any drawbacks on agreed terms between MH and the new Company. If, however, within a period of Ten (10) months such rectification is not possible, then MH may terminate the right of the new Company to use the said corporate name and trade mark with immediate effect without any right to compensation to the new Company. Provided MH shall be entitled to purchase the inventory of finished goods and/or goods in progress of the said Equipment at the time of termination at the cost price of the new Company meaning

the ex-factory price less profit. If MH should not exercise the said option to purchase within Three (3) months after the termination, the new company shall be allowed to sell the inventory under the said trade mark within a period of one year. In such a case MH shall be entitled to receive the amount of royalty stipulated in Clause 1J hereof to the extent of Fifty percent (50%) thereof.

18.3 MH may stipulate the conditions it deems fit for the use of the “Morgardshammar” name in the new Company’s activities. The use of the symbol, logo and trade mark in plain letters and/or distinctive style on the stationary, in sales leaflets and other sales promotion material and on the products of the new Company shall be subject to prior approval in writing by MH.

18.4 The right of the new Company to use the word “Morgardshammar” in its corporate name or to use the trade name and trade mark, referred to in para 18.1 or the logo, symbol or design of MH or any other trade mark, trade name, corporate name, symbol, logo or design identical with or resembling those used by or registered for MH shall, without any right to compensation to the new Company, terminate on the equity participation of MH with the new Company being reduced to less than 25% of the paid-up equity share capital of the new Company upon written request being made by MH at any time thereafter to the new Company, or if this Agreement is terminated in accordance with para 21.2 or 21.3. All registrations which the new Company may

have obtained with or without the consent of MH shall be transferred to MH without any right to compensation to the new Company. Subject to the provisions of Clause 18.2 hereof, the new company shall have the right to use such trade name or trade mark on the said Equipment already manufactured or which is in the course of manufacture on the date of such termination.

18.5 Should the right to use the word “Morgardshammar” in its corporate name terminate as provided in para 18.2 or 18.4 above, the new company shall take all necessary steps to make clear to all concerned that the new Company has no business connection with MH and shall forthwith adopt a new corporate name excluding the word “Morgardshammar”.

18.6 All units of the said Equipment manufactured by the new Company in accordance with this Agreement shall display in a conspicuous manner by means of name plates or otherwise that they are manufactured under a license from MH and the text and the place thereof shall be subject to prior approval in writing by MH.”

22. Clause 21.1 of the Collaboration Agreement provided that the agreement shall remain valid for a period of five years from the date of commencement of commercial production provided such commencement of commercial production is not delayed beyond the period of three years from the date of the agreement i.e. for a

maximum period of eight years from the date of agreement. Clause 31.2 provided that clause 18, amongst certain other clauses, shall survive the expiration or termination of the agreement.

23. Clause 1.1 of the Share Holders Agreement provided that Memorandum and Articles of Association of the company shall as far as possible incorporate the terms of the agreement. It further provided that after incorporation of the company, issue of share holding between Volvo and Modi Group would be 40% and 60% respectively. Clause 5.1 provided that in the event Volvo or any of the Indian Shareholders decides to dispose of wholly or partly of its beneficial ownership or any shares owned by it, the other party shall have first right to refusal. Relevant Clauses 5.1 and 5.7 read as under:-

“5.1. In the event that MH or any of the Indian Shareholders decides to dispose wholly or partly of its/his beneficial ownership or any shares owned by it/him, the Indian Shareholders pro rata to the number of shares already held by each of them in the company (in the case of MH wishing to sell) and MH or its appointee (in the case of any of the Indian Shareholders wishing to sell) shall have the right of first refusal at a fair value to be mutually agreed between seller and buyer and, failing such agreement, to be conclusively determined by the Auditors of

the Company acting as experts and not as arbitrators whose decision shall be final and binding on the parties. In case the Company has joint Auditors and such joint auditors do not agree upon a common price they shall refer the matter to a third auditor who shall conclusively determine such price. In case the joint Auditors do not agree to the appointment of the third auditor, the name of such third auditor shall be determined by the Institute of Chartered Accountants in India. Such price shall, however, be subject to the approval (if required) of the Government of India and the Central bank of Sweden.

5.7 If pursuant to this Agreement a transfer of shares in the Company is made to a person who is not a party hereto, the Transferor shall on the sale thereof secure that the proposed Transferee agrees to be bound by the terms of this Agreement and shall procure that the Transferee enters into a legally binding Agreement containing the terms hereof.”

24. Clause 8.1 further, inter alia, provided that so long as Volvo holds not less than 25% of the paid up share capital of the company by itself or along with SWEDFUND or a similar Swedish body referred to in Clause 1.8, the agreement shall remain in force subject to, however, “Force Majeure”.

25. It appears that commercial production of defendant No.1 commenced sometime in the year 1984. Admittedly, TMLA was

executed by Volvo in favour of defendant No.1 on 10th September, 1984 whereby defendant No.1 was permitted to use trademarks as mentioned in the Schedule A to the agreement which reads as under:-

SCHEDULE 'A'

Sl. No.	Trade Mark	Registration/Registration Application No.	Class	Specification of goods
1.	MH Arrow Device MORGARDS HAMMAR	378015	7	Rolling Mill Machinery and Equipment
2.	MH Arrow Device MORGARDS HAMMAR India	393277	7	Rolling Mill Machinery and Equipment and parts and Accessories therefor.

26. It has specifically been mentioned in the TMLA that the license and permission granted was without assigning any proprietary right in favour of defendant No.1 over the aforesaid

trademarks. The relevant clauses of TMLA in this regard are reproduced herein under:-

“1.(b) Sole license and permission to use the trade mark bearing no.393277 on or in relation to the Roller Guides and parts and accessories thereof to be assembled and/or manufactured and marketed by or for the Users under the strict supervision and control of the Proprietors as hereinafter mentioned in this Agreement;

(c) non-exclusive license and permission to use the trade mark No.393277 in relation to the Rolling Mill machinery and equipment and parties and accessories therefor except the Roller Guides and parts and accessories therefor (for which a sole license and permission is given to the Users as mentioned in sub-Clause (b) above) also to be assembled and/or manufactured and marketed by or for the Users under the Strict supervision and control of the Proprietors as hereinafter mentioned in this Agreement.

The licenses and permissions granted under this clause shall extent to and is for goods to be manufactured and marketed in India by the Users as well as for goods to be exported by the Users from India to all countries except Sweden, Finland, West Germany, United Kingdom, Spain, U.S.A., Canada, Brazil and Japan.

5. The Users recognize the ownership of the said trade marks by the Proprietors and the Users do not acquire by this Agreement

any right, title or interest whatsoever in the said trademarks other than in respect of the rights of user explicitly provided for in this Agreement and any additional goodwill accruing to the said trade marks by the Users use of them shall belong to the Proprietors without any right to any compensation whatsoever;

9. No royalty or other payment is made or shall be made by the Users to the Proprietors in respect of the permitted use of the said trade marks. The use hereby permitted of the said trade marks by the Users is without any consideration, direct or indirect;

10. Nothing herein contained or implied shall give the Users any right now or hereafter to acquire the said trade marks whether for valuable consideration or otherwise.

11. The Users shall not assign or transfer, in any manner in whole or in part, their rights or obligations under this Agreement to any other party without the previous written consent of the Proprietors;

15. This Agreement shall take effect from the date of signing hereof and shall be without limit of period subject to termination as hereinafter provided:

(a) By the Proprietors giving to the Users notice in writing of its intention to terminate this Agreement forthwith upon the equity participation of the Proprietors with the Users being reduced to less than twenty-five

per cent of the paid up equity share capital of the Users.

(b) In the event of any breach or default by the Users in observance or performance of any of the terms and conditions of this Agreement on the Proprietors giving to the Users a minimum of three months notice in writing of such termination, provided always that if the Users shall effectively remedy the breach or default upon which such notice is based, within the period of the notice, such notice shall not become effective and this Agreement shall remain in full force;

(c) Forthwith upon the bankruptcy or insolvency of the Users or upon the appointment of a Receiver of the Users.

16. In all instances the termination shall be without any right to compensation to the users and the Users agree that in the event of termination of this Agreement for any reason whatsoever the Users have no right to claim any compensation from the Proprietors for publicity work, advertising or other activity with regard to the said trade marks.

17. Upon termination for any reason whatsoever the Users shall forthwith stop using the said trade marks and shall transfer to the Proprietors all registrations of the said trade marks or any other trade mark confusable therewith which the Users may have obtained with or without the consent of this Proprietors without any right to compensation to the users. The Proprietors

or their designee shall have the right to purchase the inventory of finished goods and/or goods in process at the time of termination at the cost price of the Users meaning the ex-factory price less profit. If the Proprietors should not exercise said option to purchase within Three (3) months after the termination, the Users shall be entitled to sell the inventory under the said trade mark within a period of one year thereafter.”

(emphasis supplied)

27. Perusal of TMLA, some of the clauses whereof have been quoted hereinabove, clearly indicates that Volvo was proprietor, manufacturer and dealer of the goods shown in Schedule A, i.e. rolling mills machinery, equipment, parts and accessories thereof, in respect of the trademark “MH Morgardshammar” and it had permitted the use of the said trademark by the defendant No.1 during the continuance of TMLA without assigning any proprietary rights in favour of defendant No.1. Defendant No. 1 had unfettered right to use the trademark only, without any limit of period, subject to however, termination in the circumstances as stipulated in clause 15 of TMLA which provided that in case equity participation of the proprietors i.e. Volvo is reduced to less than 25% of the paid up equity share capital, TMLA shall be open for termination. TMLA could have also been terminated by the proprietors in the event of

any breach or default by defendant No.1 in observance or performance of any of the terms and condition of the TMLA. Continuous use of the trademarks by the defendant No.1 will not vest any proprietary rights in favour of defendant No.1. Prior to execution of TMLA, Volvo had also executed a NLA on 19th April, 1983 in favour of defendant No.1, whereby it permitted the defendant No.1 to use the word “Morgardshammar” as a part of its corporate name, trading style as also to use its logo in connection with the activities within the main objects clause of Memorandum of Association of defendant No.1. NLA also contained a termination clause. Relevant clauses in this regard read as under:-

“6. Notwithstanding anything contained in this Agreement MH SWEDEN shall be entitled to terminate this Agreement forthwith upon the happening of any or all of the following events:

(a) Upon MH SWEDEN and/or its nominees, parent, subsidiary or associate companies or bodies corporate or assigns or any company or body corporate in or with which MH SWEDEN is merged or amalgamated and the parent, subsidiary or associate company or body corporate of any such company or body corporate with which MH SWEDEN is merged or amalgamated ceasing to hold atleast 25% of the issued,

subscribed and paid-up equity share capital
or MH INDIA;

(b)xxxxxxxxxxxxxxxxxxxxxx

(c)xxxxxxxxxxxxxxxxxxxxxx

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8. With a view to effectuate the provisions of this Agreement, MH India have inserted and shall continue to retain the following provision of their Articles of Association:

(1) Upon Morgardshammar ceasing to hold atleast 25% of the issued and paid-up equity share capital of the Company, or 25% of the total voting power of the shareholders for the time being of the Company, for any reason whatsoever, Morgardshammar shall be entitled, at any time thereafter by a written notice to the Company, to call upon the Company to discontinue the use of the word “Morgardshammar” in any form or manner as a part of its corporate or trade name or trading and operating style and the use of the “Morgardshammar” Logo and to change its name in such manner as to delete the word “Morgardshammar” appearing in the name of the Company. The Company

shall from the date of receipt of such notice immediately discontinue the use of the “Morgardshammar” logo in any form or manner, and take such steps as may be necessary to adopt a new logo. Such logo which the Company may adopt shall not consist or the word “Morgardshammar” or any abbreviation thereof or coined therefrom or any name or expression in any language, alphabet or script similar, phonetically or in sound, appearance, meaning or otherwise howsoever, to the name or word “Morgardshammar”.

(2) Within thirty days from the date of receipt of such notice, the Company shall take all such steps as may be necessary to convene a General Meeting of shareholders for the purposes of passing of such resolution, the Company shall also do all acts, deeds and things as may be necessary to effectuate such change of name. Such name which the Company may adopt shall not consist of the word “Morgardshammar” or any abbreviation thereof, or coined therefrom, or any word, name or expression in any language, alphabet or script similar phonetically in sound, appearance, meaning or otherwise howsoever to the name or word “Morgardshammar”.

9. Upon termination of this Agreement, MH India shall forthwith discontinue the use of MH Sweden’s logo or corporate logo in any form or manner as a part of MH india’s logo, trading style or trade name.

10. Upon termination of this Agreement, MH India shall forthwith and not later than 120 days from the date of such termination:

(a) discontinue the use of the name “MORGARDSHAMMAR” in any form or manner as a part of its corporate name, trading style or trade name and change its corporate name, trading style or trade name in such manner as to delete therefrom the name “MORGARDSHAMMAR” and

(b) take all such steps as may be necessary or desirable for the purpose of changing the name or style as aforesaid and discontinuing the use of the name or word “MORGARDSHAMMAR” as a part of its trading style or operating style or trade name and further that any new corporate name, trade name or trading style or symbol which MH INDIA may adopt, shall not consist of any word, name, expression or device in any language, script or alphabet similar or deceptively similar in sound and appearance to the name “MORGARDSHAMMAR” or any word or words which is in abbreviation thereof or coined therefrom or any word, name, expression or device or in any language alphabet or script similar phonetically or in sound appearance or meaning or otherwise howsoever, to the name or word “MORGARDSHAMMAR”. All members and shareholders of MH INDIA shall be deemed to have undertaken to exercise their rights as members and especially their voting rights in such manner so as to enable MH INDIA to comply with

or implement, the provisions hereof and shall be deemed to have joined MH INDIA on this basis.”

28. A perusal of NLA also depicts that defendant No.1 was permitted to use the word “Morgardshammar” as part of its corporate name, trading name and style, subject to condition stipulated therein, more particularly, till the time Volvo retains 25% share holding in defendant No.1. Defendant No.1 was further under obligation to stop using the word “Morgardshammar” and the logo on termination of the agreement in any other event as provided under the said agreement.

29. Vide APA dated 1st July, 1987, Volvo sold the plaintiff its land, building, machinery, equipments, intellectual property rights, common name, technology etc. Relevant clauses in respect of intellectual property rights, company name, license and agreements read as under:-

“4. Intellectual Property Rights, Company name- Seller hereby sells to Buyer all its patents, registered designs, trademarks, copyrights and other intellectual property rights including but not limited to those which have been specified in the attached Appendix 3.

Seller warrants that Seller has the sole and exclusive right, except as disclosed in

Appendix 3 and in Appendix 7, to these rights and that all intellectual property rights in the widest sense of this expression have been transferred to Buyer without any limitation. Seller further warrants that there are no claims or disputes relating to the validity, ownership or in any other respect regarding the intellectual property rights now sold and that all fees, costs etc which are necessary to keep such rights in force have been paid. Seller is not aware of any infringements of the intellectual property rights sold.

Seller undertakes to co-operate with Buyer in order to have all these intellectual property rights legally and validly assigned to Buyer immediately after the Effective Date and to execute all such formal documents which may be necessary for such assignment.

Seller undertakes to eliminate immediately after the Effective date the names Centro and Morgardhshammar from its company name and from the name of any subsidiary of Seller or from any other entity within the Volvo Group of companies and shall not use any of these names as a company name, trade mark or similar except as disclosed in Appendix 3. The names of such subsidiaries, the shares of which Buyer has an option to acquire according to 8 below, shall not be changed unless Buyer does not make use of the option. In the event that Buyer does not make use of the option with regard to the Spanish or Brazilian company

then the Centro and Morgardshammar names shall also be eliminated from their company names and shall not be used as a trade mark or similarly by these companies.

Seller also agrees that Buyer uses the names Centro and Morgardshammar in its company name, as a trade mark or otherwise.

Seller has informed Buyer that as long as Seller owns more than 25% of the share capital of Morgardshammar India Private Ltd. that company is allowed to have Morgardshammar as part of its company name. If Buyer does not make use of its option to buy Seller's shares of Morgardshammar Private Ltd. Seller shall arrange so that the name of this company will be changed during 1988.

10. Licenses and similar agreements

In the attached summaries Appendix 7 all licenses granted Seller have been listed. Seller is not liable for any inaccuracies in such summaries. Seller warrants that all these license agreements are valid in accordance with their terms, that no other licenses exist which are of any significance for the activity transferred, and that Seller has fulfilled all its obligations under such license agreements until this date. Seller is not aware of any breaches by the Licensors under such agreements except as disclosed in Appendix 7.

Seller and Buyer shall co-operate with each other in order to have these agreements transferred to Buyer.

Seller shall use its best efforts to have the following three important licenses assigned to Buyer and shall in any case be responsible to arrange that Buyer will be in the position as from the Effective Date on to continue Seller's production of the products for which these licenses may be necessary:

Licensor	Date of License Agreement	Product
Rexnord, USA	From before 1940 and renewed successively	Symon's cone crushers
Sumitomo Electric Industries (SEI) Japan	August 11, 1972	Cooling of hot rolled wire
Centre de Recherches Metallurgiques (CRM Beligum)	September 24, 1974	Cooling of hot rolled wire

The licenses granted by Seller to Nya Stavanger Staal A/S, Norway, to Morgardshammar India Private Ltd. and to ISPL Pvt. Ltd., Bombay, India, and the agreement with WL-produkter AB, Sweden shall be assigned to Buyer on the Effective Date provided that the licensees and WL-produkter AB accept such assignments.”

30. Later on, vide Share Purchase Agreement dated 22nd December, 1993 plaintiff purchased 40% share holding of Volvo i.e. 80,000 equity shares of defendant No.1. Later on, Volvo also executed a CDA of trademark with goodwill on 13th August, 2000 in favour of the plaintiff. It was specifically mentioned therein that from 16th June, 1987 the Assignor (Volvo Group) and the Assignee (plaintiff) entered into an Asset Purchase Agreement, wherein the Assignee, with effect from 1st July, 1987 purchased the Assignor's assets including land and buildings, machinery, equipment, inventory, intellectual property rights (including the Indian Trade Mark bearing registration No. 393277 and the good will attached to the said Trade Mark), and technology related to the activities necessary to run the Assignor's business for a consideration as defined under the APA. It was stipulated that in accordance with mutual consent and pursuant to the APA dated 16th June, 1987, Assignor has assigned the trade mark "MH MORGARDSHAMMAR" (Indian Registration no. 393277) to the Assignee for USD 10 (Ten dollars only).

31. However, shares were not registered in the name of the plaintiff. Accordingly, Volvo filed a petition being CP No. 40/111 of 1995 before the CLB. This petition was vehemently opposed by

the defendant No.1. Main contention of the defendant No.1 before CLB was that Volvo group of Sweden, to which the petitioner belonged, had sold some of the assets to a company belonging to another group, namely, Danieli Group of Italy (plaintiff herein). Volvo had also sold the name “Morgardshammar” to the Danieli Group, which name is now assumed by the plaintiff. This fact was not disclosed to the defendant No.1. No intimation was given to the defendant No.1 about the change of name or about the purported transfer in the year 1987. In 1989, when the nominee director of Volvo wrote a letter regarding the transfer, the board of directors of defendant No.1 resolved that there would be no objection subject to the necessary legal formalities. In September, 1993, the formalities to be complied with for issue of duplicate share certificates were also communicated to Volvo. In July, 1994 a request was received to transfer the shares to the plaintiff. It is at that stage, defendant No. 1 came to know that the transfer of shares has taken place from Volvo group to Danieli Group. Transfer was opposed on the ground that the agreement entered into between Volvo and plaintiff was in violation of the Shareholders Agreement and the Collaboration Agreement. As per the Shareholders Agreement between Volvo and Modi Group, the right to acquire the shares at

the first instance vested with the Indian share holders i.e. Modi Group. It was further contended that without the consent of Modi Group shares could not have been transferred in favour of the plaintiff. However, despite opposition by the defendant No.1, CLB directed the defendant No.1 to rectify the register by changing the name of existing holder and issue duplicate certificates and thereafter, register the transfer of shares of defendant No.1 in the name of plaintiff. Paras 36 and 37 of the order passed by the CLB read as under:-

“36. Coming to the facts of the case, it is an admitted position that the petitioner-company has entered into certain contracts in 1987 and 1988 for the transfer of their business and also certain assets including the impugned shares to the second respondent-company. It is also clear from the records that these transfers were within the knowledge of the first respondent-company. The case of the first respondent-company is that it was under a misapprehension based on information furnished by the petitioner-company that the transfer is within the same group. Incidentally the original name of the petitioner-company, viz.; the Morgardshammar AB is assumed by the second respondent-company. We have to now proceed to analyze the facts on two presumptions, namely, (a) that the first respondent-company was really misled to

believe that the transfer is within the same group and (b) that the first respondent-company was fully aware that the transfers are outside the group. We have already dealt in detail with the various correspondence between the second respondent and the first respondent to show that the first respondent-company was actually aware that the transfer is to another group. In fact the correspondence refers to the coming in of the Danieli group to India as a major shareholder of the first respondent company instead of the Volvo group which is the original shareholding group. In fact the Danieli group also expressed a desire to increase their percentage of holding in the first respondent company. It is further evident that there had been meetings between the executives of the first respondent and the second respondent companies. A careful study of the copies of correspondence from pages 35 to 51 of the counter reply shows clearly that the first respondent-company was aware that the shares have been transferred to the Danieli group. The crucial letters in January and February, 1993, indicate the real issue which appears to be the controlling interest in the first respondent-company and the threat of the Danieli group to choose another alternative by starting a Danieli company. Thereafter a Danieli company has come to be established. This appears to be the rub when the first respondent-company started adopting a hostile attitude. As such the objections are unrelated to the transfer of shares. In the circumstances it is difficult

for us to accept that the first respondent-company was not aware that the transfer is to a different group.

37. Even the contention that the transfer is outside the Volvo group and hence cannot be allowed was also considered by us. If the transfer from an existing group to another group is not to be allowed such a provision should be contained in the articles of association of the company. The first respondent-company being a public company, its articles do not contain any restrictive clause with regard to the transfer of the shares even though it does incorporate some of the covenants of the shareholders agreement with regard to the composition of the board, use of brand name, etc. We are in agreement with Dada that so long as there is no restrictive stipulation in the articles of association, the board of directors of the company cannot enforce the contents of a private agreement between two shareholders. On this the case law is unambiguous and, therefore, the petition has to be granted. Even the restrictive stipulation contained in the shareholders' agreement does not bar a transfer of the shares but only prescribes two conditions; namely, that (a) before transferring to any other persons, the shares shall be offered to the other party to the agreement; (b) it is the burden of a transferring party to ensure that the transferee is bound by the shareholders' agreement. The petitioners have complied with the first part by offering the shares to the other party to the agreement which,

however, has not been accepted. As regards the second stipulation, it is for the other party to enforce the provisions of the shareholders' agreement through appropriate proceedings. The company, however, has no prerogative to stop or stall the transfer on this score since it is not a party to the agreement."

(emphasis supplied)

32. It may be noted that the plaintiff was respondent No.2 and defendant no.1 was respondent No.1, before the CLB.

33. This order of CLB was not challenged further by the defendant No.1 and has become final. Rather, defendant No.1 has accepted and complied with this order. Following Board Resolution was passed on 31st July, 1998 by defendant No.1 regarding transfer of shares:-

“Resolved that the transfer of 80000 equity shares bearing distinctive numbers from 60001 to 100000 and from 160001 to 200000 standing in the name of Volvo Lastvagnat Komponenter AB be made in favour of Morgardshammar AB being the successor of the original shareholder namely Centro Morgardshammar AB and that necessary endorsement be made on the share certificates

Further resolved that on transfer of the said shares Morgardshammar AB being the successor of Centro Morgardshammar AB

shall be bound by all those agreements/restrictions as applicable to Centro Morgarshammar AB”

(emphasis supplied)

34. Subsequently, in the Board Meeting dated 26th October, 1998 defendant No. 1 confirmed the Minutes of Meeting dated 31st July, 1998 in the following manner :-

“The Chairman informed the Board that minutes of meeting held on 31st July, 1998 as finalized by him were signed on 21st August, 1998. A draft of the minutes were also circulated to all the Directors and were confirmed by them all.

Mr.D B Engineer, Nominee of Morgardshammar AB however stated that he wish certain modifications to be recorded in the minutes. In this connection he also drew attention to his letter dated 16th October, 1998. The Directors noted that Mr Engineer had also approved the draft minutes and had countersigned the same and sent a copy to the company. The directors unanimously disagreed with Mr Engineer’s contention at Para 2 of Page no.2 of aforementioned letter and confirmed that Mr Engineer had himself confirmed that Morgardshammar AB is the successor of the original share holder namely Centro Morgardshammar AB. The Chairman and other directors accepting the statement of Mr Engineer had agreed to accept the transfer of shares and in these circumstances, it was

agreed not to further challenge the decision of Company Law Board.

The Directors were unanimously of the view that minutes as recorded were true and no changes are required to be made and took due note of the fact that Mr Engineer have also confirmed the minutes in writing.”

35. Lars Fors (PW1), witness of the plaintiff, in his affidavit has deposed that plaintiff permitted the defendant No.1 to use the aforesaid trademarks/trade name of the plaintiff on the basis of the TMLA and NLA executed between the Volvo and defendant No.1. In the month of December, 2009 plaintiff through its advocates conducted the search of the records of Registrar Of Companies, Delhi (ROC), in respect of defendant No. 1 and came to know that defendant No. 1, without the knowledge of the plaintiff and without any notice, had allotted its 7,50,000 equity shares to defendant No.2- Mr. U.K. Modi, thereby increasing shareholding of Modi Group and reducing the shareholding of plaintiff from 40% to 8%. As shareholding of plaintiff was reduced from 40% to 8%, plaintiff got the right to call upon the defendant No. 1 to discontinue using trademarks/trade name as per the TMLA. Accordingly, legal notice dated 15th March, 2010 revoking the TMLA was issued whereby defendant No. 1 was called upon to stop using the trade marks/trade name within 21 days of the receipt of the notice.

36. Brajeshwar Dayal Garg (DW1), witness of the defendant No. 1 has not disputed the fact that shareholding of the plaintiff has been reduced to less than 25%. Allotment of 7,50,000 equity shares of defendant No. 1 to defendant No. 2- Mr.U.K. Modi has also not been disputed. It is alleged that in the Annual General Meeting dated 27th September, 2007 of the defendant No.1, decision was taken to allot 7,50,000 equity shares to Mr.U.K. Modi. Notice of the said Annual General Meeting was issued to all the share holders. Despite notice plaintiff did not chose to attend the meeting. Later on, 7,50,000 equity shares were allotted to defendant No.2 in the meeting of Board of Directors of defendant No. 1 held on 25th January, 2008, pursuant whereof requisite Form - 2 was filed with the ROC. Form - 23 was also filed with the ROC in relation to the meeting dated 27th September, 2007. Defendant No. 1 had taken all the actions in accordance with the applicable provisions of law. Plaintiff's witness has denied that plaintiff had received any notice of the Annual General Meeting. It is alleged that UPC of the purported meeting appears to be a fabricated document.

37. From the material placed on record it is established that Volvo was proprietor of trademark "MORGARDSHAMMAR" in

respect of Rolling mills Guide System Equipment, as well as spare parts for rolling mills, accessories thereof etc. Volvo was also doing business under the trade name/corporate name Morgardshammar AB, which company was registered under the laws of Sweden. Volvo and Modi Group decided to establish a joint venture in India for fabrication, construction, manufacture and supply of the equipments relating to rolling mill guide system and its spare parts thereof. Accordingly, Collaboration Agreement was entered into between Volvo and one of the promoters of defendant No.1, Mr. S.K. Gupta. Plaintiff was to provide technical knowhow, its trade name and trademarks. Shareholders Agreement was also executed simultaneously with the Collaboration Agreement. As per these agreements, plaintiff was to own 40% shareholding in the joint venture; whereas Modi Group was to retain 60% share holding. Defendant No. 1 was incorporated and production commenced. TMLA was executed by Volvo on 10th September, 1984 whereby defendant No. 1 was permitted to use the trade marks/trade name without a limit of period, subject to the termination by Volvo in case its shareholding being reduced to less than 25% of the paid up capital share of defendant No.1. Vide NLA dated 9th April, 1983 defendant No. 1 was permitted to use the name

“MORGARDSHAMMAR” as part of its corporate name/trade name and trading style and also to use the “MORGARDSHAMMAR” logo. NLA was also subject to the termination in case paid up capital of Volvo being reduced to less than 25%. Defendant No. 1 was permitted to use the trade mark, logo and corporate name. Volvo had not sold/assigned the trade mark and the corporate name to defendant No.1 vesting the propriety rights in favour of defendant No. 1 in respect of the trade mark/logo/trade name in defendant No.1. Defendant No. 1 was simply “permissive user” as regards the said trade mark/logo/trade name. Volvo sold its land, building, assets, intellectual properties rights and company name to the plaintiff against consideration vide APA dated 1st July, 1987. Option was also given to the plaintiff to buy 40% share holding of Volvo in defendant No. 1. It was stipulated in the APA that in case the option is not exercised by the plaintiff, Volvo will take steps for changing the name of company during the year 1998. Volvo had sold all its patent, registered design, trade mark/copy right and other intellectual property rights including the one specified in Appendix 3 attached with the APA. The plaintiff exercised its option to buy 40% share holding of Volvo in the year 1993. After selling the shares to the plaintiff

Volvo requested the defendant No.1 to effect the transfer of shares held by Volvo in defendant No.1 in favour of the plaintiff. However, this request was objected to by the defendant No.1, consequently, Volvo approached CLB and filed a petition seeking appropriate directions. Despite opposition of defendant No. 1, Volvo succeeded in its petition and defendant No. 1 was mandated to register the transfer of shares in the name of plaintiff. After purchasing the assets, intellectual property rights etc. as also the shares, plaintiff stepped into the shoes of Volvo for all practical purposes. Having sold all its assets in respect of rolling mills unit, Volvo was divested of its rights or any of the assets and properties including intellectual property rights, having transferred the same in favour of the plaintiff. Thus, the plaintiff became successor in interest of Volvo for all practical purposes and this fact has even been accepted by the defendant No. 1 in its Board Resolution(s) which have been reproduced hereinabove, inasmuch as, defendant No. 1 had made it known to the plaintiff that it was bound by all the agreements entered between it and Volvo. Subsequently, based on the above documents of transfer executed by Volvo in favour of the plaintiff, including CDA dated August 18, 2008, Trade Mark Registry has registered the plaintiff as owner/proprietor in respect

of trade mark “MH MORGARDSHAMMAR” in respect of rolling mill machinery, parts and fittings thereof under Class 7. Having purchased the trademarks as aforesaid, plaintiff had become proprietor of the said marks. Plaintiff permitted the defendant No. 1 to continue to use its trade marks, in terms of TMLA since it had stepped into the shoes of Volvo, inasmuch as, in the TMLA itself it was mentioned that defendant No. 1 had unfettered right to use the trade mark only, till its termination on the conditions as stipulated in clause 15 of the TMLA. Defendant No. 1 has admittedly reduced the shareholding of plaintiff, who had succeeded Volvo, to less than 25%, thus, plaintiff became legally entitled to terminate the license, in terms of TMLA, which it did by issuing a notice immediately on becoming aware of the fact that its shareholding has been reduced to less than 25%. After the license was terminated by the plaintiff, being proprietor of the trade mark “MH MORGARDSHAMMAR”, defendant No.1 has no right to continue to use the same and such use tantamounts to infringement of the trade mark of the plaintiff.

38. Learned senior counsel for the defendants has contended that plaintiff did not become the successor in interest of Volvo by virtue of APA since the same was in violation to the three agreements entered into between the Volvo and defendant No.1, namely,

Collaboration Agreement, Shareholders Agreement and TMLA which have to be read in harmony with each other, inasmuch as, said agreements were personal contracts and rights and obligations therein cannot be assigned without the consent of defendant No.1. Plaintiff was not a party to any of the said agreements executed between Volvo and defendant No.1. Rights and obligations flowing from the said agreements could not be transferred by the Volvo in favour of the plaintiff without prior consent of the defendant No.1. For becoming party to these agreements and for stepping into the shoes of Volvo, it was necessary for Volvo to assign its rights and obligations under the said agreements to the plaintiff, which was not done. Thus, plaintiff was totally stranger to the aforesaid three agreements and cannot enforce the rights flowing therefrom. It is not the case of the plaintiff that Volvo had assigned three agreements which it had entered with the defendant No.1 in favour of the plaintiff, thus, only purchase and assignment of the trademark by the plaintiff from Volvo will not affect the rights of the defendant No.1 flowing from the three agreements i.e. Collaboration Agreement, Shareholders Agreement and TMLA. The rights and obligations of Volvo, plaintiff and defendant No. 1 have to be determined from the admitted four agreements i.e.

aforesaid three agreements entered into between Volvo and defendant No. 1 and fourth being APA executed between Volvo and plaintiff. Plaintiff was not a party to the three agreements entered into between Volvo and defendant No. 1, thus, there was no privity of contract between the plaintiff and defendant No.1 in relation to these three agreements. Similarly, defendant No. 1 was not a party to APA and there is no privity of contract between plaintiff and defendant No.1 in relation to the said APA. Thus, it is contended that plaintiff had no right to terminate the TMLA nor any cause of action has arisen in its favour to file the present suit against the defendants for infringement of the trademarks etc. Reliance has been placed on *Sethi Construction Company vs. Chairman & Managing Director, NTPC & Anr. 2002 (65) DRJ 732* and *Indu Kakkar v. Haryana State Industrial Development Corporation Ltd. & Anr. AIR 1999 SC 296* to support the argument that there is no privity of contract between the plaintiff and defendant No.1. Defendants have also relied on *S. Chattanatha Karayalar vs. The Central Bank of India Ltd. & Ors. AIR 1965 SC 1856* in respect of the contention that three agreements i.e. Collaboration Agreement, Shareholders Agreement and TMLA relate to one transaction and being contemporaneous documents, same have to be read together.

It is contended that in view of Clause 15 of the Shareholders Agreement which provides “this Agreement and all rights and obligations hereunder are personal as to the parties hereto and none of the parties hereto shall assign or attempt to assign any such rights or obligations without first obtaining written consent of all the other parties”, the rights and obligations flowing from the said agreement, being personal to the parties to the agreement, could not have been assigned by the Volvo in favour of the plaintiff without the consent of defendant No.1. Reliance has been placed on ***Khardah Co. Ltd. Vs. Raymon & Co. (India) (P) Ltd AIR 1962 SC 181***. It has been further contended that the plaintiff could not have terminated the license even if its shareholding was reduced to less than 25 %. It is the Volvo alone who could have enforced the rights flowing from the aforesaid three agreements, which it failed to do. Volvo alone could have terminated the license under the aforesaid agreement(s), only after its shareholding was reduced to less than 25%, inasmuch as, such right could have been exercised by Volvo immediately upon its share holding going below 25%. This right arose in favour of Volvo on 26th December, 1993 when it sold its shareholding in defendant No.1 to the plaintiff. At that stage Volvo could have exercised the right to terminate the license in terms of

Collaboration Agreement, Shareholders Agreement and TMLA, which right Volvo did not exercise. Even the plaintiff did not exercise its right under the APA to call upon Volvo to terminate any of the three agreements signed between Volvo and defendant No.1. Thus, according to learned senior counsel for the defendants, suit is without any cause of action. It has been further contended that perusal of APA makes it clear that assets including intellectual property rights were sold by Volvo to the plaintiff, subject to rights of defendant No.1 to use the trademark in terms of TMLA and a reference in this regard has been made in sub para 2 of Clause 4 of the APA wherein it has been mentioned that Volvo had no exclusive right on the trademarks as those rights had been licensed to defendant No.1 in India and without limit of period. By placing reliance on Clause 10 (sub para 4) which states that “The licenses granted by Seller to Nya Stavanger Staal A/S. Norway, to Morgardshammar India Private Limited and to ISPL Pvt. Ltd., Bombay, India, and the agreement with WL-produckter AB, Sweden shall be assigned to Buyer on the Effective Date provided that the licensees and WL-produckter AB accept such assignments”, it is contended that it was Volvo’s obligation to assign the rights under the licenses granted to the plaintiff from the effective date i.e.

1st July, 1987, subject to the condition that the licensee (defendant No.1) accepts such assignment. As per the learned senior counsel, defendant's consent was not obtained, inasmuch as, same has not been pleaded in the plaint, thus, plaintiff did not step into the shoes of Volvo with regard to the agreements executed between Volvo and defendant No.1.

39. The arguments advanced by the learned senior counsel for the defendants appear to be attractive at the first blush but have no force. Sufficient material has come on record in this case that the plaintiff is successor in interest of Volvo and had stepped into the shoes of Volvo after acquiring assets including trademarks by virtue of APA and subsequently by purchasing 40% shareholding of Volvo in the defendant No.1 which, in fact, has not only been acknowledged by the defendant No. 1 but has also been accepted in categorical terms in its Board Resolutions. Defendant No. 1 cannot be permitted to feign ignorance about the sale of its entire assets by Volvo to plaintiff vide APA including intellectual property rights as also the shareholding of Volvo in defendant No.1. A categorical finding in this regard has been returned by the CLB and which finding has not been assailed by the defendant No.1 in any higher forum, inasmuch as, has been accepted by registering the transfer of

shares in the name of plaintiff. Tacit consent of defendant No.1 with regard to the transactions between Volvo and plaintiff can be deduced from the judgment of CLB, inasmuch as, defendant No. 1 was offered to buy 40% shareholding of Volvo, which offer was declined by it and which fact has been mentioned in the judgment of CLB. Even after coming to know about the transactions between Volvo and the plaintiff, defendant No.1 did not challenge the same before any forum, instead, has accepted the plaintiff as successor in interest of Volvo, which is evident from the Board Resolution dated 31st July, 1998 of defendant No.1. It has been specifically mentioned in the Board Resolution that “Morgardshammar AB” (plaintiff) being the successor in interest of “Centro Morgardshammar AB” (Volvo) shall be bound by all those agreements, restrictions as applicable to “Centro Morgardshammar AB”. Defendants cannot be now permitted to take a somersault to contend that the plaintiff is not the successor in interest of Volvo or it has not stepped into the shoes of Volvo. On the one hand, by accepting the plaintiff as successor in interest of Volvo defendant No.1 has derived benefit of continuous use of the trademarks/trade name “MORGARDSHAMMAR” for all these years, in spite of the fact that plaintiff having purchased assets of Volvo in respect of

rolling mills unit including intellectual property rights, became proprietor of the trademarks and had a right to revoke the license of 'permissive user' in favour of defendant No.1. Plaintiff's witness has categorically deposed that plaintiff had permitted the defendant No. 1 to use the trademarks/logo on the assumption that it had stepped into the shoes of Volvo as for all practical purposes. This fact is further fortified from the action of the plaintiff as it permitted the use of trademarks by the defendant No.1 and has initiated legal action of infringement only after its shareholding in defendant No. 1 had gone down below 25% and not prior thereto. This itself strengthens the plea of the plaintiff that it permitted the defendant No. 1 to continue to use the trademark/logo in terms of TMLA since it had stepped into the shoes of Volvo for all practical purposes. Having accepted the plaintiff as successor in interest of Volvo and availed the benefit thereunder, defendant No.1 cannot be permitted to take a shifting stand at this stage to contend that plaintiff had not stepped into the shoes of Volvo in respect of TMLA and it is the Volvo alone which could have terminated the TMLA on reduction of its shareholding to less than 25%. Even otherwise, Volvo being the proprietor/owner of the trademarks, had unfettered right to sell, transfer, or assign the same and for which purpose no consent of

defendant No.1 was required, inasmuch as there was no such stipulation in the TMLA that prior consent of the defendant No.1, who was merely a permissive user, was required to be taken by Volvo before selling, transmitting and assigning the said trademark to any third party.

40. Judgments relied upon by the defendant No. 1 are in the context of different facts and are not applicable to the facts of the present case. In Sethi Construction (supra), works contract for the construction of a school building was awarded by NTPC to M/s. Gangotri Enterprises Limited(GEL). Arbitration agreement was also between NTPC and GEL. Since GEL failed to complete the work on time, the said work was assigned to Sethi Construction. Disputes arose between Sethi Construction and NTPC regarding payment of work, pursuant whereof, Sethi Construction filed application for appointment of an arbitrator in terms of Clause 56 of General Conditions of Contract between GEL and NTPC. Court dismissed the application holding that NTPC was not concerned with the underlying contract/ agreement between GEL and Sethi Construction and there was no privity of contract between Sethi Construction and NTPC. It was observed that “An assignment is in the nature of a transfer by one to another of his interest or rights is

one's property and vests in the latter the former's interests, rights and remedies in respect of the subject matter. In such a case, the latter by virtue of the assignment in his favor will be in position to enjoy the rights of the former in his own name. Obviously, the factum of an assignment or for that matter a transfer of the contract has to be gathered from a specific document in this behalf or at least from contemporaneous action/contract on the part of the parties.”

In *Indu Kakkar vs. Haryana State Industrial Development Corporation Ltd.* (supra), a plot of land was allotted to M/s York Printers by Haryana State Industrial Development Corporation Limited (HSIDC). Possession was given and Deed of Conveyance was also executed in favour of M/s York Printers in the year 1977. M/s York Printers failed to raise industrial unit on the said plot, thus, plot was resumed by HSIDC in 1984. M/s York Printers challenged this resumption. During the pendency of the suit, the said plot was sold by M/s York Printers to Ms. Indu Kakkar (petitioner). She was impleaded as second plaintiff in the suit. Suit was decreed in favour of M/s York Printers and Indu Kakkar. Appellate Court reversed the decree and dismissed the suit on the ground that Indu Kakkar has no locus standi as the sale in her favour was hit by Section 52 of the Transfer of Property Act. In

second appeal, High Court observed that Indu Kakkar has no locus standi to question the validity of resumption. There was no privity of contract between Indu Kakkar and HSIDC. Matter reached upto the Supreme Court wherein order of the High Court was upheld. It was observed that a party to a contract cannot transfer his liabilities under the contract without the consent of the other party. Where a contract involves mutual rights and obligations as assignee of a right cannot enforce that right without fulfilling the co-relative obligations. The agreement was entered into between the Corporation and the allottee (M/s York Printers). HSIDC and M/s York Printers as a sequel to the request made by the allottee to give him an industrial plot for the purpose of setting up an industry. HSIDC reciprocated to the request on being satisfied that M/s York Printers was able to carry out the obligations so as to accomplish the purpose of allotment. If the allottee evacuates from the scene after inducting someone else into the plot without consent of the HSIDC it is not legally permissible for the inductee to compel the HSIDC to recognize him as the allottee.

41. In the instant case, Volvo had sold its assets including land, building and intellectual property rights which fact was within the knowledge of defendant No.1 as is evident from the order of the

CLB, inasmuch as, plaintiff even purchased the shareholding of Volvo in defendant No.1. Defendant No.1 recognized such transfer by registering the transfer of shares in favour of the plaintiff, inasmuch as, has passed Board Resolution that plaintiff, being successor in interest of Volvo, shall be bound by the agreement executed between the promoters of defendant No.1 and Volvo. Such transfer was not only accepted but defendant No. 1 made it clear that plaintiff shall remain bound by the terms of the agreements including the TMLA.

42. Section 2 (v) of the Trade Marks Act, 1999 (hereinafter referred to as 'the Act') envisages that a registered proprietor, in relation to a trade mark, means the person for the time being entered in the register as proprietor of the trade mark. Supreme Court in *American Home Products Corporation vs. Mac Laboratories Pvt. Ltd. Air 1986 SC 137* has observed that when a person gets his trademark registered, he acquires valuable rights by reason of such registration. It was observed that registration of a trademark gives him the exclusive right to the use of that trademark in connection with goods in respect of which it is registered, and if there is any invasion of this right by any other person using the mark, which is same or deceptively similar to his trademark, he can protect his

trademark by an action for infringement in which he can obtain an injunction, damages or an account of profits made by the other person.

43. Section 45 of the Act enables a person, who has become entitled by assignment or transmission to a registered trade mark, to apply with the Registrar to register his title, and on receipt of such application, registrar shall register him as the proprietor of the trade mark in respect of the goods or services in respect of which the assignment or transmission has effect. In this case plaintiff has already been registered as a proprietor in the record of the Trade Mark Registry in respect of the trade mark in question, thus, has become registered proprietor thereof. Defendant No.1 being permissive user does not acquire any proprietary rights in the trade mark in issue, even a registered user of a trade mark does not acquire proprietary right in a trade mark which he has been permitted to use by the registered proprietor. Section 48 (2) of the Act envisages that the permitted use of a trade mark shall be deemed to be used by the proprietor thereof, and shall be deemed not to be used by a person other than the proprietor. Thus, merely because defendant No.1 has been using the trade mark for a long time will not vest any proprietary right in the defendant No.1. Once

the registered proprietor revokes the license, permissive user has to stop using the same. In *Marie Stops Int. vs. Parivar Seva Sansthan, 2010(43) PTC 141 (DEL)*, in the context of Section 48 (2) of the Act it has been held that use of a mark by a permissive user is deemed to be the owner's use.

44. After the license has been terminated by the plaintiff, who is a registered proprietor of the trade mark in respect of trade mark in issue, defendant No.1 has no right to continue to use the same and such use tantamounts to infringement within the meaning of Section 29 of the Act. Defendant No.1 cannot even use the trade mark as its trade name or name of its business concern or part of the name of its business concern in view of sub-Section 5 of the Section 29 of the Act which provides that a registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered. That apart, the Name License Agreement also stands revoked since the shareholding of plaintiff's has been reduced to less than 25% and defendant No.1, thus, has lost the right to use the said trade mark/trade name as its corporate name.

45. In *Fedders North American vs. Show Line & Others* 2006(32) PTC 573 (DEL), it has been held that after termination of the agreement dated 21st May, 1956, plaintiff had given right to defendant No.18 to use the trade mark “Fedders” for a period of five years, by virtue of the agreement dated 11th October, 1963. It was held that after this period came to an end in the year 1968, use of trade mark “Fedders” by defendant No.18 from 1968 onwards was not in line with the rights available to the plaintiff as a registered proprietor of trademark “Fedders”. In *Velcro Industries B.V. & Anr. vs. Velcro India Ltd.*, 1993(1) Arb.LR 465, the facts involved were more or less similar to the present case. In the said case, Velcro Industries (plaintiff) had entered into collaboration agreement with the Indian Directors and pursuant thereof Velcro India Ltd. (Defendant) came in existence. Defendant was granted trademark license vide a License Agreement which was renewed and subsequently, defendant was permitted to use the word “Velcro” as part of its trade name. Renewed agreement also expired on 30th September, 1986, thereafter plaintiff called upon defendant to stop using the mark of the plaintiff which was not complied with. Accordingly, plaintiff approached the Bombay High Court wherein defendant was restrained from using the mark

“Velcro” as their trade name in India. It was held that after the license expired, defendants had no right to use the same as that of their corporate name/trade name.

46. For the forgoing reasons, issue Nos.1, 3 and 4 are decided in favour of the plaintiff and against the defendants.

Issue No. 2

47. Onus to prove this issue was on the defendant, however, it has failed to point out as to in what manner suit is barred by limitation. Plaintiff had purchased the assets of Volvo including intellectual property rights vide APA dated 16th June, 1987. Subsequently, in the year 1993 plaintiff has purchased 40% share holding of Volvo in the defendant No.1. Defendant No.1 declined to register transfer of shares in the name of plaintiff, thus, forcing the Volvo to approach CLB. Ultimately, 40% share holding of Volvo in the defendant No. 1 was transferred in favour of the plaintiff, by the defendant No.1, only in the year 1998. Defendant No. 1, in its Board meeting, which took place in the year 1998, recognized the plaintiff as successor in interest of Volvo. Plaintiff

permitted the defendant No.1 to continue to use the trade marks/trade name till 15th March, 2010 on which date, it revoked the TMLA, by giving a legal notice, upon share holding of the plaintiff being reduced to 8 % from 40%. Only thereafter, cause of action arose in favour of the plaintiff to file the suit for infringement. The suit has been filed in the year 2010, thus, by no stretch of imagination it can be said to be barred by limitation. 40% share holding of the plaintiff was admittedly reduced in the year 2008. Even if it is presumed that this fact was within the knowledge of the plaintiff and right to terminate the license accrued in its favour in 2008 itself, then also the suit cannot be said to be barred by limitation.

48. Even if the matter is viewed from another angle then also it cannot be said to be barred by limitation. Law of limitation per se does not apply to the action of infringement or passing off. In ***Bengal Waterproof Limited versus Bombay Waterproof Manufacturing Company and Another (1997) 1 SCC 99***, Supreme Court has held that an action for passing off is a common law remedy being an action in substance of deceit under the Law of Torts. Wherever and whenever fresh deceitful act is committed the person deceived would naturally have a fresh cause of action in his

favour. Thus, every time when a person passes off his goods as those of another he commits the act of such deceit. Similarly, whenever and wherever a person commits breach of a registered trade mark of another he commits a recurring act of breach of infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved.

49. Learned Senior counsel for the defendant No.1 has contended that the plaintiff has acquiesced in the defendant's use of the trademarks and trade name for a period of more than 21 years. During this period of 21 years, the plaintiff knowingly promoted and encouraged the defendant to use the trademarks, invest in the development and promotion of its business and to hold out to the world at large, that the defendant company has the right and goodwill in the said trademarks. Defendants have relied on ***Khoday India Limited vs. Scotch Whisky Association &Ors. AIR 2008 SC 2737.***

50. In ***M/s Power Control Appliances and others vs. Sumeet Research and Holdings, (1994) 2 SCC 448***, Supreme Court has held that acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark,

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trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches. In *Ramdev Food Products (P) Ltd. vs. Arvinbhai Rambhai Patel and others*, (2006) 8 SCC 726, Supreme Court has held that Acquiescence is a facet of delay. The principle of acquiescence would apply where: (i) sitting by or allowing another to invade the rights and spending money on it; (ii) it is a course of conduct inconsistent with the claim for exclusive rights for trade mark, trade name, etc.

51. I do not find any force in this contention of learned senior counsel that the plaintiff had acquiesced in the defendants use of trademarks/ trade name for a period of more than twenty one years after the plaintiff acquired the ownership of trademarks/ trade name. Plaintiff has made a categorical averment that after purchasing the assets of Volvo including the intellectual property rights, it permitted the defendant No.1 to use its trademarks/trade name till such time the plaintiff's share holding in the defendant No. 1 did not fall below 25%. It is, thus, clear that the continuous use of trademark by defendant No. 1 was with the permission of plaintiff and till the time plaintiff's equity participation in the defendant No.1 remained above 25%. The moment plaintiff came to know that defendant No. 1 had reduced the share holding of the plaintiff

to 8%, it revoked the license vide notice dated 15th March, 2010. Accordingly, use of the trademarks/trade name of the plaintiff by the defendant No. 1 was with the permission of the plaintiff and the defendant No.1 was not a hostile user. It is not the case of the defendants that after acquiring the propriety rights in the trademarks/trade name from the Volvo, plaintiff objected to the use thereof by the defendant No. 1 and thereafter remained mum for an unusually long period and has brought this action after about two decades, thus, has acquiesced in the use of trademarks/ trade name by the defendant No.1. Share holding of the plaintiff in the defendant No. 1 has been reduced by the defendant No.1 to 8% in the year 2008 and within a reasonable period there from, plaintiff has exercised its right of revoking the license, by issuing legal notice dated 15th March, 2010 and called upon the defendant No. 1 to desist from using the trademarks/trade name or corporate name of the plaintiff, even if it is assumed that plaintiff was aware of reduction of its share holding in the year 2008 itself. Thus, it cannot be said that the plaintiff has acquiesced the defendant in using the trademark /trade name for an unusually long period of 21 years.

52. Khoday's case (supra) is of no help to the defendants being rendered in the context of different facts. In the said case, respondents came to know of the Khoday Ltd. using "Peter Scot" mark for its whisky on 20th September, 1974. However, no action was taken till 21st April, 1986, when an application for rectification of the trademark was filed. During this period respondents took action against several other persons all over the world whoever was found using words Highland Chief, Scotch Terrier, Glenfiddich, Rare Blend etc. In this context, Supreme Court has held that in the peculiar facts and circumstances of the case the action of the respondents was barred under the principles of acquiescence and/or waiver. In this case, after acquiring intellectual property rights in respect of trademarks/trade name from Volvo, plaintiff permitted the defendant No.1 to use the same till the time its share holding was not reduced below 25%. Prompt steps have been taken by the plaintiff to revoke the license on coming to know about the factum of reduction of share holding, as also, the suit has been filed within a reasonable period of time.

53. Learned senior counsel for the defendant has further contended that defendant No. 1 has invested large sums of money in setting up its business; has established a market in respect of

products/goods manufactured/marketed and sold under the trade mark of the plaintiff during the last twenty one years, thus, plaintiff is estopped from challenging the use of trademarks by the defendant No.1. I do find any force in this argument either. Defendant No. 1 has to blame itself for the revocation of the license. Till the time defendant No.1 maintained the share holding of the plaintiff above 25%, plaintiff has permitted the defendant No. 1 to use the trade mark/trade name. It is only when defendant No. 1 reduced the share holding of the plaintiff in defendant No. 1 to less than 25%, plaintiff has exercised its option of revoking the license.

54. For the foregoing discussions, issue no. 2 is also decided against the defendant no.1 and in favour of the plaintiff.

Issue No. 5

55. During the course of arguments, the learned senior counsel for the plaintiff did not press for the relief of rendition of accounts, delivery of infringing material and damages and confined his prayer to grant of injunction against use of the trade name “MORGARDSHAMMAR” and the trademarks “MORGARDSHAMMAR LABEL” and “MH ARROW DEVICE” or any other mark identical or deceptively similar to the trademarks/

trade name “MORGARDSHAMMAR LABEL” and “MH ARROW DEVICE” and “MORGARDSHAMMAR” of the plaintiff.

56. In view of the findings returned on Issue Nos.1 to 4, plaintiff is entitled for a decree of permanent injunction against use of its trademarks/ trade name by the defendants, thus, the suit of the plaintiff is decreed in terms of prayers (a) and (b) of the plaint. Plaintiff shall also be entitled to cost. Decree sheet be drawn accordingly.

A.K. PATHAK,J.

JANUARY 02, 2012

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