

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

+ **EFA(OS) 36/2012 and CM No.11070/2013 (stay)**

MOHAN MURTI

..... Appellant

Through: Appellant in person with Ms. Ananya
Bhattacharya, Advocate.

versus

DEUTSCHE RANCO GMBH

..... Respondent

Through: Ms. Tasneem Ahmadi, Advocate.

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Date of Decision : September 24, 2013

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE PRATIBHA RANI

J U D G M E N T

: REVA KHETRAPAL, J.

1. The Appellant in this appeal seeks to challenge the order dated 4.7.2012 passed by a learned Single Judge of this Court in Execution Petition whereby the learned Single Judge allowed the application being E.A. No. 356/2006 of the Respondent/Decree Holder under Order XXII Rule 10 of the Code of Civil Procedure to bring on record Invensys Deutschland GmbH in place of the original Decree Holder Deutsche Ranco GmbH, and also allowed the application for restoration of the Execution Petition which was dismissed in default on 7.8.2007, being E.A. No.36/2008.

2. Shorn of details, the facts relevant for the decision of the present Appeal are that the Respondent/Decree Holder filed Execution Petition No.58/1994 which was dismissed in default vide order dated 13.1.1999 and subsequently restored vide order dated 16.10.2003 passed by the learned Single Judge on the Respondent/Decree Holder filing an application under Order IX Rule 3, being E.A. No.96/1999. Subsequently the Execution Petition was again dismissed in default on 7.8.2007 and E.A. No.36/2008 was filed for its restoration, which was allowed vide order dated 25.1.2008. The Appellant/Judgment Debtor preferred a Review Petition, being E.A.(OS) No.187/2009. This Review Petition was allowed by the learned Single Judge vide order dated 28.7.2009 relying upon the judgment of the Supreme Court in the case of ***Damodaran Pillai vs. South Indian Bank Ltd., (2005) 7 SCC 300.*** It may be noted at this juncture that in the said case of ***Damodaran Pillai (supra)*** the Supreme Court held that an execution application when the same is dismissed in default cannot be restored after a period of 30 days and which period also cannot be extended inasmuch as Section 5 of the Limitation Act, 1963 does not apply to execution proceedings.

3. Aggrieved by the said order of the learned Single Judge recalling the order dated 25th January, 2008 whereby the Execution Petition had been restored, the Respondent/Decree Holder filed an Appeal, being EFA(OS) No.32/2009. This appeal was allowed by the Division Bench vide order dated 30.11.2010. In effect, the Division Bench in Appeal remanded the matter to the learned Single Judge calling upon him to consider whether sufficient reason had been made

out for the invocation of Section 151 of the CPC for the purpose of granting or denying the relief prayed for, i.e., restoration of the petition; but before doing so to dispose of the application for substitution of the Decree Holder under Order XXII Rule 10 (which now forms subject matter of E.A. No.356/2006).

4. It is deemed appropriate to reproduce the relevant extract of the order of the Division Bench, which reads as under:-

“10. For these manifold reasons, we are of the opinion that the impugned order deserves to be set aside inasmuch as the learned Single Judge has first proceeded under Order IX Rule 4 of the CPC and thereafter under Order XXI Rule 106 of the CPC. We remand the Execution to the Board of the learned Single Judge requesting him to consider whether sufficient reason has been made out firstly for the invocation of Section 151 of the CPC and secondly for granting or denying relief thereunder. Keeping the uniqueness and singularity of the circumstances in perspective, it seems to us that the learned Single Judge should first dispose off the application for substitution of the Decree Holder, namely, Deutsche Ramco GmbH by the transferee, namely, Invensys Deutschland GmbH. Depending on the conclusions arrived at, the learned Single Judge would thereafter, or even simultaneously, consider the conundrum of whether Execution Proceedings deserve to be restored. The Remand is necessary and proper since it would be inappropriate for the Appellate Court to return a finding as to whether the relief could have been granted or denied under Section 151 of the CPC, an exercise which has not been undertaken by the learned Single Judge.”

5. Upon remand, both the applications, being E.A. Nos.356/2008 filed under Order 22 Rule 10 of the Code of Civil Procedure for

restoration of the appeal and E.A. No.36/2008 were decided by the learned Single Judge vide order dated 4.7.2012, which order is impugned in the present Appeal by the Appellant/Judgment Debtor. The grounds for impugning the order passed in E.A. No. 36/2008 are similar to the grounds raised before the learned Single Judge as encapsulated by the learned Single Judge in paragraph 6 of the order and are as follows:-

- “(i) No valid power of attorney has been filed on behalf of the applicant in support of the application under Order 22 Rule 10 CPC and therefore there does not arise the issue of the application for restoration being allowed.
- (ii) The relevant Decree Holder is not before the Court and the present applicant has no locus standi or legal rights to appear before this Court.
- (iii) The provision of Section 151 CPC cannot apply for restoring an application which has been dismissed in terms of provision of Order 21 Rule 105 CPC. Reliance is placed upon the decision of the Supreme Court in the case of ***Damodaran Pillai (supra)***.
- (iv) Finally, reliance is sought to be placed upon the German Law to canvass that unless and until there is a Court order confirming merger of the two companies this Court cannot allow the applicant to seek restoration of the Execution Petition which was dismissed in default on 7.8.2007.”

6. Additionally, the following grounds were pressed before this Court, many of which overlap with the grounds raised before the learned Single Judge:-

- (I) The learned Single Judge ought to have first considered the application seeking restoration and then only the application seeking substitution filed in the Execution Petition could have been taken up.

- (II) The learned Single Judge failed to appreciate that the restoration application was barred by the law of limitation.
- (III) The learned Single Judge could not have exercised powers under Section 151 CPC to enable restoration of the petition.
- (IV) The learned Single Judge failed to appreciate that assuming but not admitting that the alleged Merger took place in 2003, the Respondent did not file the application seeking substitution for more than six years. Thus, the application seeking substitution itself is clearly barred by the law of limitation.
- (V) The learned Single Judge failed to appreciate that the document of Merger filed along with the application is not a notarized document. Further, even the original has not been filed by the Respondent.
- (VI) The Respondent had failed to prove that the Merger document was in consonance with the law of the land, viz., Germany where the applicant Company is situated. Further, the Respondent instead of filing the law of the land filed an opinion of a law firm to prove that the Merger is valid in the eyes of law.
- (VII) The learned Single Judge has overlooked the fact that one and the same person, namely, Mr. JorgWinneswerg, who is a German citizen but is not acting in his own name, rather is acting as a Power of Attorney Holder of three different entities, viz., (1) Power of Attorney of Invensys Deutschland GmbH, (2) Power of Attorney Holder of Deutsche Ranco GmbH and (3) Power of Attorney Holder of Invensys European Holdings –

executed the alleged Merger Document and that too not in Germany but in Basel, and the Merger Document is not even signed by a single Party. It is further submitted that not even a single Power of Attorney in favour of the Mr. JorgWinnesberg has been filed.

7. In order to rebut the aforesaid contentions of the Appellant/Judgment Debtor, Ms. Tasneem Ahmadi, the counsel appearing on behalf of the Respondent/Decree Holder has taken this Court through the orders passed by this Court from time to time and the documents placed on record particularly those relating to the merger. The Appellant, who appeared in person, assisted by Ms. Ananya Bhattacharya, Advocate has not disputed the orders passed by this Court from time to time, as indeed he could not have, nor disputed the documentary evidence on record except to raise the submissions noted hereinabove.

8. Before embarking upon a discussion on the various aspects of the matter, a significant fact which requires to be noted at the outset is that the original Decree Holder, namely, Deutsche Ranco GmbH itself has not raised any objection at any point of time to the Merger Contract and the related documents placed on record. Another significant fact which deserves to be highlighted is that the original Decree Holder Deutsche Ranco GmbH and the applicant Invensys Deutschland GmbH are for all intents and purposes indistinguishable for, as is set out in the Merger Contract, the latter is the sole shareholder of the Company being acquired. Further, as noted in the Merger Contract, there is no consideration for the merger because all

shares in the Company to be acquired are owned by the acquiring Company, that is, Invensys Deutschland GmbH.

9. Dealing first with the contention of the Appellant that there is no valid Power of Attorney filed on behalf of the applicant in support of the application under Order XXII Rule 10 CPC and, therefore, there does not arise the issue of the application for restoration being allowed, the learned Single Judge has noted and rightly so that a similar objection regarding Power of Attorney raised by the Appellant was rejected by order of the learned Single Judge dated 16.10.2003 and the restoration of the Execution Petition which was earlier dismissed in default was allowed. An Appeal carried by the Appellant/Judgment Debtor to the Division Bench challenging the order dated 16.10.2003 was dismissed *in limine* by the Division Bench vide its order dated 10.12.2003 in EFA(OS) No.19/2003. The learned Single Judge has also rightly noted the law laid down by the Supreme Court in the context of objections raised as to the improper prosecution of a case on behalf of a company, in the decision rendered by the Supreme Court, reported in ***United Bank of India vs. Naresh Kumar and Others, (1996) 6 SCC 660***. The ratio of the said judgment is that technical objections should not be allowed to result in dismissal of suits involving substantive rights filed by banks and companies. The learned Single Judge has held that this ratio will apply *mutatis mutandis* to execution proceedings and we see no reason to differ, for to dismiss the Execution Petition on hyper-technical grounds where huge amounts of money are to be recovered [in the instant case amounting to ₹ 10,42,73,564.75, which increases

per month by ₹ 2,27,250/-, being the interest accruing on the decreed amount of ₹ 1,51,50,000/-] would be both unjust and unacceptable. Further, we find that the Power of Attorney in the instant case is executed before and authenticated by the Assistant Consular Officer of the High Commission of India in U.K. and we, therefore, are bound to presume the validity thereof under Sections 85 and 57 of the Evidence Act, 1872.

10. The next objection raised by the Appellant/Judgment Debtor that the relevant Decree Holder is not before the Court and the present applicant has no *locus standi* or legal right to appear before this Court, in our opinion, is also wholly untenable in the light of the documents relating to Merger placed on record, including the certified translations of the Merger Contract and the extract from the Trade Register duly notarized before the Notary Public in Basel (Switzerland) on August 14, 2003, in the presence of Mr. Jorg Winnesberg, a German lawyer, c/o Ernst & Young AG, acting as representative by virtue of the attached notarial Power of Attorney dated July 8, 2003 for Invensys Deutschland GmbH (the applicant in the application under Order XXII Rule 10 CPC), notarial Power of Attorney dated July 8, 2003 for Deutsche Ranco Gesellschaft mit beschränkter Haftung (erstwhile Decree Holder) and notarial Power of Attorney dated July 21, 2003 for Invensys European Holdings. The relevant extracts of the Merger Contract and pertaining Consent Resolutions are reproduced hereunder for the sake of ready reference:-

***“Merger Contract and pertaining Consent
Resolutions***

between Invensys Deutschland GmbH

*entered in the trade register of the lower court of
Karlsruhe under HRB 2494E*

and

Deutsche Ranco Gesellschaft mit beschränkter Haftung

*entered in the trade register of the lower court of
Karlsruhe under HRB 2652 E*

I.

Preamble

*By virtue of this Contract, Deutsche Ranco
Gesellschaft mit beschränkter Haftung is merged with
Invensys Deutschland GmbH.*

*Sole shareholder of the company being acquired is
Invensys Deutschland GmbH, with fully paid shares
totaling EURO 1,025,000.00.*

*Shareholder of the acquiring company is Invensys
European Holdings S.à.r.l. with fully paid shares
totaling EURO 4,100,000.00.*

II.

Merger Contract

*Article 1
Asset Transfer*

1. *Deutsche Ranco Gesellschaft mit beschränkter Haftung transfers all of its assets in whole with all rights and duties attached thereto by way of dissolution without liquidation pursuant to Section 2 No.1, Sections 4 et seq., Sections 46 et seq. of the German Act on the Transformation of Companies (UmwG) to Invensys Deutschland GmbH.*
2. *The merger is effected on the basis of the balance sheets of Deutsche Ranco Gesellschaft mit beschränkter Haftung as of December 31, 2002 which is referred to as the closing balance.*
3. *The transfer of assets is effected internally upon the end of December 31, 2002 (relevant transfer date for tax purposes). As of January 2003 (relevant merger date for company-law purposes), any acts and businesses transacted by Deutsche Ranco Gesellschaft mit beschränkter Haftung shall be deemed transacted for the account of Invensys Deutschland GmbH.*

Article 2 Consideration

There is no consideration, because all shares in the company to be acquired are owned by the acquiring company, Section 5 para 2, Section 54 para 1 No.3 first sentence of the UmwG.”

11. The aforesaid document bears the seal and signature of the notary and certifies the document to be a true and correct translation of the original German text. Significantly, this document also contains the consent of the Shareholders of Invensys Deutschland GmbH providing for a merger of Deutsche Ranco Gesellschaft mit beschränkter Haftung with Invensys Deutschland GmbH [Article 9 of the Merger Contract] and the consent of the shareholders of Deutsche

Ranco Gesellschaft mit beschränkter Haftung [Clause IV of the Merger Contract]. No cogent reason could be pointed out by the Appellant for doubting the authenticity of this duly notarized document. There is also on record the legal opinion of a German law firm certifying that the original contract in German including the Merger has been provided which is notarized by a Swiss notary in the canton Basel-Stadt. It is stated therein that in Germany, it is settled law that the agreements on transfer of shares of a limited liability company, which also require notarization, may be effectively notarized by Swiss notaries in Basel-Stadt. It is further set out therein that any failures with regard to the formal requirements of a merger and related agreements shall be remedied by a registration of the merger with the commercial register of the acquiring company. The merger between Invensys and Ranco has been registered with the commercial register of Invensys at the Lower Court of Karlsruhe. It is further stated that in the instant case a certified translation of the merger registration has been provided and hence pursuant to the German law any possible failures with regard to the formal requirements of the agreement concluded between Invensys and Ranco have been remedied by this registration.

12. The registration document from the commercial register – Dept. B Karlsruhe Local Court is also placed on record along with the translation thereof running into nearly 28 sheets. The entire intent and purport of this document is to show that by resolution of the shareholders meeting of Invensys Deutschland GmbH on August 14, 2003 and by resolution of the shareholders meeting of Deutsche

Ranco GmbH of August 14, 2003, the aforementioned company merged with Invensys Deutschland GmbH based on the Merger Agreement of August 14, 2003, “by means of transfer of its assets as a whole to the Company (assuming legal entity) pursuant to Section 2(1) UmwG”. The document further shows that jurisdiction to maintain the commercial register which earlier vested in Dept. B Karlsruhe Local Court has since been transferred to Mannheim Local Court and by Court order of the Karlsruhe Higher Regional Court dated 8.21.2006, i.e., location identification code “E” is no longer used.

13. The aforesaid material on record, in our opinion, completely shatters the contention of the Appellant/Judgment Debtor that the present applicant has no *locus standi* or legal right to appear before this Court. The related contention that unless and until there is a Court order confirming merger of the two companies this Court cannot allow the applicant to seek restoration of the execution petition dismissed in default is also rendered meaningless. There is nothing placed on record to counter the stand taken up by the applicant Company that as per the German law the applicant Company is to be treated as a successor-in-interest of the original Decree Holder Company and the Merger Contract filed with the application under Order XXII Rule 10 CPC, which is a duly notarized document, is valid in law and in any event, is rendered valid through registration in the Commercial Register maintained pursuant to Section 20 No.4 UmwG. Moreover, nothing has been placed on record to show that such Merger Contracts must have the imprimatur of a Court order.

14. The only other contention raised before the learned Single Judge, which has been reiterated before us, is that the provisions of Section 151 CPC cannot apply for restoring an application which has been dismissed in terms of the provisions of Order XXI Rule 105 CPC. In our considered opinion, it was not open to the Appellant to have raised this submission before the learned Single Judge at all. We say so for the reason that this submission of the Appellant has been taken care of by the Division Bench of this Court in its order dated 30.11.2010 in E.F.A. No.32/2009. The relevant portion of the judgment dealing with this aspect of the matter is reproduced herein for the sake of ready reference:-

7. Where no provision of law can be located for alleviating a grievance, resort to Section 151 of the CPC is the available recourse with the Civil Courts. The learned Single Judge has poignantly mentioned that the caption of an application, or to say it differently, the provisions of law which have been invoked in an application should not deter the Court from applying the correct legal provision. This amply finds enunciation in Ram Sunder –vs- Union of India, (2007) 13 SCC 255, J. Kumaradasan Nair –vs- Iric Sohan, (2009) 12 SCC 175 and Vijaya Bank –vs- Shyamal Kumar Lodh, (2010) 7 SCC 635. Having said so, the Court ought not to have felt inhibited or circumscribed in any manner in applying the correct law. In the present case, the learned Single Judge has, in our opinion, incorrectly applied Rule 106 of Order XXI of the CPC whereas he ought to have proceeded under Section 151 of the CPC.”

15. We note that the learned Division Bench after laying down that the learned Single Judge ought to have proceeded under Section 151

of the CPC in a subsequent paragraph, i.e., paragraph 10 of the judgment (extracted above) remanded the Execution Petition to the Board of the learned Single Judge requesting him to consider the application and to examine whether sufficient reason has been made out for the invocation of Section 151 of the CPC and for granting or denying relief thereunder.

16. Adverting to the contention of the Appellant that the provisions of Section 151 CPC cannot apply for restoring an application which has been dismissed in terms of the provisions of Order XXI Rule 105 CPC and the reliance placed by him upon the case of ***Damodaran Pillai (supra)***, the Appellant is no longer at liberty to make the aforesaid contention. The earlier Division Bench in its order dated November 30, 2010 categorically stated that the learned Single Judge had erroneously proceeded under Order IX Rule 4 of the CPC and thereafter under Order XXI Rule 106 of the CPC and directed the learned Single Judge to proceed under Section 151 of the CPC. The reliance placed upon the case of ***Damodaran Pillai (supra)*** is also misplaced as the Division Bench has clearly held that the judgment in the case of ***Damodaran Pillai (supra)*** will not apply to the facts of the present case. We concur with the said finding rendered by the Division Bench.

17. The plea with regard to the restoration application being barred by limitation is also not available to the Appellant/Judgment Debtor. As noted in the impugned order, the contention of the Judgment Debtor is that an application under Section 151 CPC for restoration cannot be filed after a period of 12 years of the passing of the original

decree. The learned Single Judge found this plea to be wholly understandable and in our opinion rightly so. Undoubtedly, the limitation period for filing an execution petition from an original decree is 12 years from the date of the passing of the said decree, but the same cannot hold good for an application filed for restoration of an execution petition. Thus, the argument that there cannot be restoration of an execution petition if it is dismissed in default after 12 years and its restoration is sought after 12 years of the passing of the decree is wholly untenable. Faced with this situation, the Appellant sought to contend that the application for restoration having been filed after 187 days with no application for condonation of delay deserves to be dismissed on the ground that the period of limitation for filing an application under Order IX Rule 4 CPC is 30 days. Assuming this to be so, such technicalities, in our opinion, cannot be allowed to defeat substantial justice. Even otherwise, we find from the record that it is asserted in the application EA 36/2008 that the counsel for the Decree Holder/Respondent for the first time came to know of the disposal of the suit on 15.1.2008. He thereafter took urgent steps to inspect the Court file on 17.1.2008 and filed the present application on 22.1.2008, i.e., within 30 days of the date of his knowledge of the dismissal of the petition. An affidavit in this regard of the counsel for the Respondent/Decree Holder is also on record.

18. The only other argument sought to be pressed into service by the Appellant is that the learned Single Judge ought to have first considered the application seeking restoration and then only the

application seeking substitution filed in the execution petition could have been taken up. This argument is being stated for the sake of being rejected. A clear direction was given to the learned Single Judge by the Division Bench in its order dated 30th November, 2010 that he should first dispose of the application for substitution of the Decree Holder, namely, Deutsche Ramco GmbH by the transferee, namely, Invensys Deutschland GmbH and depending upon the conclusions arrived at, the learned Single Judge would thereafter or even simultaneously consider whether the execution proceedings deserve to be restored. This being the mandate of the Division Bench, the learned Single Judge, in our opinion, proceeded first to deal with the application under Order XXII Rule 10 and simultaneously disposed of the restoration application on the same date.

19. In view of the aforesaid discussion, we find no merit in the present appeal. The appeal is accordingly dismissed. CM No.11070/2013 also stand disposed of.

**REVA KHETRAPAL
JUDGE**

**PRATIBHA RANI
JUDGE**

September 24, 2013
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