

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

Reserved on: 18.11.2015
Pronounced on: 08.04.2016

+ **FAO(OS) 116/2015, C.M. APPL.4426/2015**

ASHOK. K. CHAUHAN AND ORS.Appellants
Through: Sh. Akhil Sibbal, Sh. Tanmay Mehta, Sh.
Rajan Chawla and Sh. Gautam Chauhan,
Advocates.

Versus

CH. FINANCIAL SERVICES INC. PANAMARespondents
Through: Ms. Haripriya Padmanabhan and Sh.
Zeeshan Diwan, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

%

1. The defendant in a pending suit, appeals against the order of a learned Single Judge in CS (OS) 675/1999 dated 29.01.2015 which allowed an application seeking substitution as plaintiff under Order XXII Rule 10 of the Civil Procedure Code ("CPC").

Brief Facts

2. Bank Kreiss AG (the original plaintiff referred to by its name) instituted a suit bearing CS (OS) 675/99 on the file of this Court against the appellant, claiming amounts due, based on an *ex-parte* judgement passed by a German Court on 17.01.1995. The appellant was the defendant/judgment

debtor No.1 in that suit. The Appellant contends that Bank Kreiss AG, on 30.12.1998, under a deed of assignment had conveyed its receivables (including claims under the said suit) to Cukurova Holdings, Turkey (hereafter “Cukurova”), who then by the same document irrevocably assigned the said receivables to C.H. Financial Investments Ltd. Jersey [CHFI Jersey]. Bank Kreiss AG was authorized to collect loan money on behalf of Cukurova, as its collecting agent or assignee and was authorised to represent the latter in Court as well as pursue law-suits. It is further contended that the existence of the assignment deed dated 30.12.1998 came to light for the first time in 2009 in an affidavit filed by CHFI Jersey pursuant to an order of this court dated 14.10.2009 in an appeal FAO (OS) 511/2007, which was preferred by Yapi Kredi Bank AG.

3. The appellants contend that in light of these circumstances, Bank Kreiss AG could not have filed the suit as principal claiming in its own right, and at best could have filed it as agent of Cukurova or CHFI, Jersey. They further claim that there was no disclosure of the assignment deed until 2009 and that on the date of institution of the suit, Bank Kreiss AG had no claim to enforce in its own right.

4. During the pendency of the suit, Bank Kreiss AG merged with one Yapi Kredi Bank AG on 27.08.2001. As a result of this, Yapi Kredi Bank AG took over all the assets and liabilities of Bank Kreiss AG on and from 09.10.2001. The appellants contend that since Bank Kreiss AG had through the deed of assignment transferred all its claims which are the subject matter of the suit to Cukurova, (which in turn assigned it to CHFI, Jersey), there was nothing left to transfer from Bank Kreiss AG to Yapi Kredi Bank AG

during the alleged merger/amalgamation. The fourth appellant moved I.A. No. 8275/03 on 08.08.2003 for dismissal of suit on the ground that as a consequence of the merger, Bank Kreiss AG had suffered a corporate death and since no application was filed under Order XXII Rule 3 of CPC, the suit had abated. Yapi Kredi Bank AG, on 11.08.2003 moved I.A. No. 8670/2003 for substitution and continuing the suit as successor-in-interest under Order XXII Rule 10 of the CPC.

5. On 23.10.2007, a learned Single Judge of this Court while allowing I.A. No. 8275/03 dismissed I.A. No. 8670/2003 on the ground that the suit stood abated as on 07.01.2002. The learned Single Judge was of the opinion that when two companies merge, the legal effect of that is that the original company which merges with the transferee company, ceases to exist and suffers a corporate death; it loses its identity and unless an application is preferred by the concerned parties claiming to be legal representatives under Order XXII Rule 3 CPC, the suit abates. The learned Single Judge was also of the opinion that the transferee company after merger was not entitled to file application under Order XXII Rule 10 seeking substitution in place of the transferor company. Yapi Kredi Bank AG appealed the decision of the learned Single Judge (FAO (OS) 511/2007). During the pendency of the appeal a substitution application was made on behalf of CHFI Jersey on the basis of a deed of assignment dated 23.01.2008 through which claims were sold from Yapi Kredi Bank AG to CHFI Jersey for consideration. The Division Bench directed CHFI Jersey to disclose the consideration and it is here for the first time on 14.10.2009 the assignment deed dated 30.12.1998 was brought to light.

6. On 17.01.2013, the Division Bench allowed FAO (OS) 511/2007 (in the decision reported as *Yapi Kredi Bank (Deutschland) AG v Mr. Ashok. K. Chauhan & Ors* (2013) ILR 2 Delhi 841). The question considered by the Division Bench was whether amalgamation of a company (which institutes a suit, that is pending) with another, results in the corporate death and consequent abatement of the suit, or is the transferee company entitled to prosecute the suit as a successor, in terms of provisions of Order XXII Rule 10 CPC. The Court held that while the opinion of the learned Single Judge- that amalgamation of a company with another results in its corporate death, could not be faulted with, that was not the end of the issue. “Corporate death” in the event of final winding up or amalgamation, said the Court is a reality, however, that alone could not afford an answer to what happens to a litigation to which the amalgamating company is a party. The Court observed that during winding up of a company, its affairs have to be concluded which includes settlement of claims against the company to the satisfaction of its creditors. In this sense “death” as in the case of an individual, which is instant, could be distinguished from that of “corporate death” of a company.

7. The Court then discussed the scope of claims and interests of shareholders, creditors and other members of a company at the time of a merger; a detailed enquiry was not required in case of amalgamation and the company getting merged should be satisfied that terms of amalgamation or merger provide adequately for the protection of interests of shareholders, creditors and other such parties. It was decided by the Court that, even if a

company suffered a corporate death upon merger, it did not exhaust the right of the transferee company to prosecute on behalf of the original company and a request for setting aside an order of abatement and the dismissal consequent upon abatement had to be construed liberally and in the interest of justice. The Court differed with the learned Single Judge's conclusion on the suit being abated. The Court clarified that Order XXII Rule 10 is an enabling provision and applied to the claim before it. However, it stated that the applicability of the provision required, a *prima facie* inquiry if the applicant in a given case is the successor entitled to carry forward the legal proceeding in the suit. The *rationale* behind this being that procedural laws are meant to regulate the object of doing substantial and real justice and not to foreclose adjudication on merits and hence the provision did not require a detailed inquiry. The Court remitted the matter, requiring the learned Single Judge to conduct a preliminary inquiry, under Order XXII Rule 10, to determine the applicant's claim as the rightful successor in the suit.

8. On 05.03.2013, an application was moved by defendant no. 4 in disposed of appeal FAO(OS) 511/07 seeking to declare order dated 17.01.2013 a nullity, after it came to his knowledge that CHFI Jersey had dissolved on 29.11.2011 and that there was no prosecutor of appeal on record. This application was disposed of on 08.03.2013 on the ground that all such questions were left open to be determined by the learned Single Judge during trial.

9. Against the orders of this Court dated 17.01.2013 and 08.03.2013, the defendants moved the Supreme Court under Article 136 of the Constitution.

While no notice was issued, the matter was dismissed on 09.05.2013 with a clarification as under:

“Special leave petitions are dismissed.

However, it is clarified that if by lapse of time, right, title or interest in the successor company has extinguished, such plea of limitation may be raised by the respondent in the written statement and upon such plea being raised the issue will be framed and tried in accordance with law.”

10. Pertinently, after the dismissal of the SLP, the current respondent, CHFI INC Panama, filed a fresh application bearing I.A. No. 8053/2013 under Order XXII Rule 10 of the CPC claiming substitution in place of CHFI, Jersey, on the basis of a deed of assignment dated 09.09.2011 executed just before the latter's dissolution.

11. During hearing of IA No. 8053/2013 before the learned Single Judge, it was argued by the appellants herein that CHFI INC Panama had come into picture after the dismissal of the SLP before the Supreme Court. It was urged by them that the question of substitution of CHFI INC Panama as plaintiff in place of original plaintiff and their alleged successor-in-interest had to be decided in the proceedings before the learned Single Judge itself and the matter could not be left to trial.

12. The learned Single Judge relying on the decision of the Supreme Court in *Amit Kumar Shaw and Another v. Farida Khatoon and Another* [(2005) 11 SCC 403] held that only a *prima facie* inquiry had to be conducted at the time of allowing the application and that objections- if any, had to be taken up at the time of final hearing after the same had been

averred in the written statement. Allowing the application, the learned Single Judge held as follows:

“This Court is of the view that at this stage in terms of the order passed by the Apex Court on 09.05.2013 permitting the defendants to raise the objections in their written statement upon which an issue would be framed has set the matter at rest. A written statement is filed only in the course of trial. Thus it appears that the Supreme Court was of the clear opinion that the issue as to whether the applicant therein was liable to be substituted or not is a matter which requires trial upon which an issue was permitted to be framed. The ratio of Amit Kumar Shaw (supra) is also on the same lines.

Thus, at this stage, without entering into a detailed enquiry as to whether CH Financial Services INC can validly take the place of the original plaintiff and whether the interest as devolved was made by an assignment or devolution is a question which will be considered at the time of final hearing.”

13. The appellant questions the learned Single Judge’s order, in allowing the application for substitution under Order XXII Rule 10 and rejecting the contention that the matter was required to be adjudicated upon finally at the time when the applicant moved the substitution application.

14. The learned Single Judge after perusing the relevant material brought on record before the Court was of the view that the respondent’s application for substitution as plaintiff, could be allowed. The Court held that it was not required for it to conduct a detailed enquiry to adjudicate upon the substitution application moved by the respondent. What is required is a *prima facie* satisfaction that the party moving the application is the proper party for claiming those rights, which are subject matter of a dispute. No hard and fast rule of procedure has been laid down in this regard. Several

judgments of the Supreme Court as well as this Court support this proposition and have spelt out that at the time of adjudication of application for substitution under Order XXII Rule 10, an enquiry has to be made, albeit *prima facie*, to ascertain the entitlement of a successor to prosecute a suit.

15. The appellants argue that the learned Single Judge misinterpreted the order of the Supreme Court in SLP (C) No. 9399-9400 of 2013 dated 09.05.2013 and that the order was beneficial to them. It is their contention that the learned Single Judge on an incorrect application of the Supreme Court's clarification allowed substitution of the party without even conducting a *prima facie* enquiry. They also state that the order of the Supreme Court is beneficial to them inasmuch as any determination at the stage of deciding the application under Order XXII Rule 10 would not take away their right to plead limitation at the time of trial.

16. It is argued by Mr. Sibbal, learned counsel that this fact of sale/assignment of alleged claims by the original plaintiff prior to suit itself, was surprisingly disclosed only during further proceedings in the appeal in the year 2009 (after 10 years of the filing of suit) pursuant to the orders of the Division Bench. It came on record that the original plaintiff filed the suit without having any cause of action in its favor and without disclosing about the alleged deed of assignment dated 30.12.1998 and thus the suit itself was a fraud played upon the Court and all the three consecutive substitution applications filed till date are nothing but a gross abuse of process of law. It is submitted that CHFI, Jersey, stood voluntarily dissolved on 29.11.2011 leading to its death during the pendency of FAO (OS) 511/2007 but no application for substitution by the respondent was made within the

prescribed period of 90 days [Article 120 - Limitation Act] and another period of 60 days, i.e Article 121 -Limitation Act] under Order XXII rule 3 CPC. It is highlighted that this legal position was not disputed by Yapi Kredi Bank AG as well as by CHFI Jersey. The natural corollary of not filing the substitution application within the prescribed period rendered the suit/appeal abated long back and accordingly application under Order XXII Rule 10 CPC could have not been filed in an abated suit without an application seeking setting aside the abatement.

17. Learned Counsel for the respondent has relied upon *Amit Kumar Shaw v. Farida Khatoon* (2005) 11 SCC 403, *Bhagwan Dass Chopra v. United Bank of India* (1987) Supp SCC 536 and *Jawaharlal v. Saraswatibai Babulal Joshi and Ors.* AIR 1987 Bom 276 to assert the contention that only a *prima facie* inquiry and not a detailed one is required to allow a substitution application under Order XXII Rule 10. In *Amit Kumar Shaw (supra)* it has been held that no detailed inquiry is required at the stage of granting leave. The Court has only to be *prima facie* satisfied for exercising its discretion in granting leave for continuing the suit by or against a person on whom the interest has devolved by assignment or devolution.

18. As has already been laid down in a previous decision of this Court in FAO (OS) 511/2007, procedural laws are meant to further the ends of justice; these exist to regulate the adjudication of substantial rights. Order XXII Rule 10 CPC is an enabling provision and has to be construed liberally. While the power granted to the Court in granting substitution of party is discretionary, the rule is that on *prima facie* satisfaction on the entitlement of the applicant, the Court should allow the application. It is not for the Court to

get into the merits of the application and adjudicate finally at this stage; thereby foreclosing the opportunity of an interested party from asserting its rights which it could have done otherwise during trial.

19. Having said so, it is for the Court, which adjudicated upon the application to go through the relevant documents and form a *prima facie* opinion. What would constitute relevant documents can be decided only on a case by case basis. In the instant case, the Assignment and Transfer Agreement of 23.01.2008 between Yapi Kredi Bank AG and CHFI Jersey as well as the Asset and Liability Transfer Agreement dated 09.09.2011 between CHFI Jersey and CHFI INC Panama were brought on record at the time when the substitution application was moved. It is based on these documents that the learned Single Judge concluded *prima facie* that the respondent's entitlement to prosecute the suit existed. Questions relating to the validity of these documents or any other issues can be gone into only at the time of trial.

20. The appellants' contentions regarding the invalidity of the applicant's claims are at this stage without merit. If the appellants' arguments were to be accepted, the Court would, without a fuller inquiry, be holding that the documents were such that the plaintiff had no cause of action. That is not the scope of the remit of the Division Bench; also, crucially, accepting it would be akin to reading more into the order of the Supreme Court. What the clarification meant was that the appellants were free to raise the issue of limitation at the time of trial, and an adjudication at the stage of the hearing of application under Order XXII Rule 10 did not preclude their right of raising it at the time of trial.

21. The appellants had also contended that the documents produced by the respondents for the purpose of the application are a sham and bogus and that the original plaintiff Bank Kreiss AG did not have any rights on the date of filing the suit. These contentions can be decided only after issues are framed and trial has begun and necessary evidence has been brought on record. Furthermore, it is to be noticed that the provision itself enables the proceeding: *“by leave of Court to be continued by or against the person to or upon whom such interest has come to be devolved.”* The emphasis is on the subject here, i.e. *“against the person”*.

22. This Court of the opinion that there is no infirmity with the impugned order. It is open for the parties to raise these issues at the time of trial. Consequently, any question challenging the validity of the documents as well as on the issue of limitation has to be raised then and decided on merits after relevant evidence has been adduced. All rights and contentions of the parties on the facts and merits of the rival claims are reserved. The appeal is dismissed with no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

APRIL 8, 2016