IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORGINAL CIVIL JURISDICTION

Suit No.764 OF 2002

ITC Ltd. & Ors. ... Plaintiffs

Vs.

Shri Sukhkarta Finance & Leasing Pvt. Ltd. ... Defendants

Mr. Navroz Seervai, Senior Advocate with Mr. K. Setalwad, Senior Advocate with Mr. N. Kothare, Mr. S. Bharucha and Ms. Vijaylaxmi Kulkarni i/b. Nanu Hormasjee & Co. for the Plaintiffs.

Mr. Rahul Narichania a/w. Mr. S. Jagtiani, Ms. Bhatia i/b. M/s.Mulla & Mulla for Defendant Nos.2 to 9, 10 and 12.

CORAM : S. J. KATHAWALLA,J.

ORDER RESERVED ON : 17TH NOVEMBER 2011
ORDER PRONOUNCED ON: 14TH FEBRUARY 2012

PC:

1. In the above Suit, by an Order dated 12th September 2011 the following issue was framed as a preliminary issue u/s.9A of the Code of Civil Procedure, 1908 (the CPC) :

"Whether the Suit filed is barred by the Law of Limitation?"

2. The Suit was thereafter placed for directions on 20th September 2011. On 20th September 2011, Mr. Seervai the Learned Senior Advocate appearing for the Plaintiffs submitted that it is for the Defendants to lead their evidence first and the Plaintiffs be allowed to reserve their right to lead evidence in rebuttal, if necessary. In response, Mr. Narichania the Learned Advocate appearing for the Defendants submitted that the

Plaintiffs may decide whether they choose to lead any evidence on the issue of limitation or not, but they cannot be allowed to reserve a right to lead evidence in rebuttal. The issue therefore, as to who should lead evidence first and whether the Plaintiffs can be allowed to reserve liberty to lead their evidence in rebuttal came to be argued before this Court and the said limited issues are decided by the present Order.

3. Certain relevant facts in the matter are set out hereunder:-

(i) ITC Ltd., in its corporate capacity, was and continues to be a creditor of Suresh Chitalia, Devang Chitalia, EST Fibres Inc. and Lokman Establishment (the Chitalias) for the sum of U.S. $15,102,853.81, pursuant to a Judgment dated 16th February 1999 passed in New Jersey, U.S.A. against the Chitalias and in favour of ITC Ltd.

(ii) Within 7 days of the said Judgment dated 16th February 1999, Suresh Chitalia, Devang Chitalia and EST Fibres Inc. filed for voluntary bankruptcy in Florida, U.S.A. Soon thereafter, ITC Ltd. initiated involuntary bankruptcy proceedings against Lokman Establishment, in the Bankruptcy Court in Florida, U.S.A.

(iii) According to the Plaintiffs, in the bankruptcy proceedings, Trustees in Bankruptcy of the estates of the Chitalias were appointed. Thereafter, the Plaintiffs initiated proceedings to pursue hidden overseas assets of the Chitalias. According to the Plaintiffs, the Bankruptcy Court, Florida passed 6 Orders dated 8th March 2000, 12th February 2002 and 13th February 2002 (Exhibits

G, H, M, N, O and P to the Plaint), allowing ITC Ltd. to recover on behalf of the estate, the assets of the Chitalias located overseas.

(iv) The Plaintiffs thereafter filed the above Suit as representatives of the Trustees in Bankruptcy of the Chitalias. The Plaintiffs have claimed in the Suit that they have filed the Suit pursuant to the said 6 Orders passed by the U.S. Bankruptcy Court.

(v) By prayer clause (a) in the Suit, the Plaintiffs have sought to execute the said 6 Orders of the U.S. Bankruptcy Court. By prayer clause (b), the Plaintiffs have sought a declaration that the Defendants are bound to pay to the Plaintiffs (i.e. the Trustees in Bankruptcy) amounts as set out therein. By prayer clauses (c), (d) and (e), the Plaintiffs have sought payment from the Defendants of amounts allegedly belonging to the estates in bankruptcy. By an amendment to the Plaint, the Plaintiffs have added prayer clause (a1). By the said prayer clause (a1), the Plaintiffs, without prejudice to prayer clause (a) to the Suit, have sought a declaration that the various amounts set out in Exhibit GG to the Plaint have been transferred by the bankrupts to the Defendants in fraud of their creditors and are liable to be refunded with interest, subject to permissions under the Foreign Exchange Laws in force in India.

(vi) A Learned Single Judge of this Court by a common Order dated 8th December 2005, disposed of Notice of Motion No. 727 of 2002, Notice of Motion No.134 of 2002 and Notice Motion No.1704 of 2002 taken out by the Plaintiffs in the Suit. At the hearing of Appeal Nos. 91 and 92 of 2006 filed by the Plaintiffs against the said common Order, the Hon'ble Division Bench of this Court by an Order dated 2nd August 2011, with the consent of all parties, set aside the Order dated 8th December 2005 and remanded the matter to the Learned Single Judge to frame and decide the issue of limitation as a preliminary jurisdictional issue u/s.9A of the CPC. The said Division Bench Order was passed because despite objections being raised by the Defendants, the same had not been decided by the Learned Single Judge at the time of passing the said Order dated 8th December 2005.

(vii) On remand as set out hereinabove, this Court on 12th September 2011 framed the said issue:

"Whether the Suit filed is barred by the Law of Limitation?"

On 20th September 2011, the parties joined issues as to who should lead evidence first and whether the Plaintiffs can be allowed to reserve liberty to file their evidence in rebuttal. This Court placed the matter for hearing only to decide the above limited questions.

PLAINTIFFS' SUBMISSIONS:

4. The Learned Senior Advocate appearing for the Plaintiffs submitted that the present Suit has been filed on behalf of the Trustees in Bankruptcy upon the said 6 Orders of the U.S. Bankruptcy Court. Article 101 of the Limitation Act, 1963 which applies to the present Suit, prescribes the period of limitation as 3 years from the date of a foreign judgment or recognizance. The present Suit was filed on 7th March 2002 and is thus well within the 3 year period prescribed by Article 101 of the Limitation Act,

1963. The provisions of Order VII Rule 1(e) of the CPC require pleadings in the Plaint to contain particulars in connection with the facts constituting the cause of action and when it arose. In this regard, Paragraph Nos. 2, 4, 55 and 58 of the Plaint in the instant case are relevant and have been reproduced as under:

a) Paragraph No.2 (Page 5 of the Plaint):

"This Suit is being declared and filed by the Plaintiffs pursuant to orders dated 8.3.2000, 12.02.2002 and 13.02.2002 of the said Bankruptcy Court under which the Plaintiffs have been authorised to file this Suit against the Defendants on behalf of the Trustees in Bankruptcy."

b) Paragraph No.4 (Page 6 of the Plaint):

-----------------"The Chitalias and the said Chitalia Companies, along with their other group companies, have filed for bankruptcy in Florida, USA. Bankruptcy proceedings are in rem and the Plaintiffs represent the respective Trustees-in-Bankruptcy of the estates of the Chitalias and the said Chitalia Companies as set out in paragraph 1 hereinabove. There is no reciprocal arrangement for execution of decrees between India and U.S.A. as provided in Section 44A of the Code of Civil Procedure, 1908 and the Plaintiffs are required to file the present Suit to pursue the assets and monies of the Chitalias and the said Chitalia Companies transferred/secreted to India through Defendant No.2 and that the property in the same belongs to and vests in the respective estates of the Chitalias and the said Chitalia Companies."

c) Paragraph No.55 (Page 41 of the Plaint):

That the present Suit has been filed "for and on behalf of the respective Trustees in Bankruptcy.....pursuant to the orders dated 8th March 2000, 12th February 2002 and 13th February 2002 of the United States Bankruptcy Court" .

d) Paragraph No.58 (Page 42 of the Plaint):

That – "This Plaint is being filed by the Plaintiffs, pursuant to the orders dated 8th March 2000, 12th and 13th March 2002 of the Bankruptcy Court and the Suit is filed within limitation ......"

5. It is the submission of the Plaintiffs that e*x-facie* the Suit was brought within a period of 3 years from the dates of the said 6 orders of the U.S. Bankruptcy Court and is therefore within the period of limitation prescribed by Article 101 of the Limitation Act, 1963. The provisions of Order VII Rule 1(e) have also been complied with. According to the Plaintiffs, there exist 2 categories of suits with respect to the burden of proof on the grounds of limitation.

> Category 1:- where the Plaintiff under Order VII Rule 6 pleads any exemption or extension of time to bring the Suit within limitation.
>
> Category 2:- where on the face of the pleadings in the Plaint, the Suit is shown to be within time.

It is submitted that the Suit filed in the instant case falls in the category of Suits which *ex-facie* have been filed within the period of limitation, and there arises no question of the Plaintiffs having to lead evidence to prove that the Suit was within the period of limitation. The present Suit having not been instituted after the expiration of the period prescribed by the Law of Limitation, the question of claiming any exemption in that regard as required by Order VII Rule 6 and of proving the same by leading evidence does not arise. Similarly Rule 11 of Order VII of the CPC will also not apply to the facts of the present case, as the cause of action has been disclosed in the Plaint and the Suit is not barred under any law on the basis of any statement made in the Plaint. The Plaint does meet the requirements of Order VII Rule 1 and does not fall foul of Rules 6 and 11 of Order VII.

6. Further, the pleadings in the Defendants' Written Statement are governed by Order VIII of the CPC. The relevant portions of Order VIII of the CPC which, according to the Plaintiffs, inter alia deal with 'Written Statements' are as set out below:

> *"2. New facts must be specifically pleaded – The defendant must raise by his pleading all matters which show the Suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.*
>
> *3. Denial to be specific – It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*
>
> *4. Evasive denial – Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. ....*

> *5. Specific denial – (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability… ….”*

7. It is submitted that the aforementioned provisions of Order VIII of the CPC set out specific pleas which must necessarily be raised in a Written Statement; the exact manner in which allegations of facts in the Plaint must be traversed; and the legal consequences of not adhering to the same. In terms of Order VIII Rule 2 it is mandatory for the Defendants to plead that the present Suit was barred by limitation. In terms of Rule 3 it is mandatory for the Defendants to specifically deny the existence of the U.S. Bankruptcy Court Orders. Nowhere in the Written Statement have the Defendants taken the plea, expressly or by necessary implication, that the present Suit is barred by the Law of Limitation, nor have they denied the existence of the U.S. Bankruptcy Court Orders. The pleadings qua the U.S. Bankruptcy Court Orders are to the contrary; in fact, the Written Statement proceeds on the basis that the said 6 Bankruptcy Court Orders were passed by the Bankruptcy Courts and are thus in existence.

8. It is submitted that the strongest response in the Written Statement to the U.S. Bankruptcy Court Orders is non-admission of the genuineness, veracity and correctness of the contents of the same. This does not amount to a specific denial as envisaged under Order VIII. The most common meaning of the term ‘genuine’ as per various legal dictionaries is ‘authentic’ or ‘truly what something purports to be’. A challenge to the genuineness or veracity of the said orders presupposes their existence. Other than that, the Written Statement merely states that the said 6 U.S.

Bankruptcy Court Orders are not enforceable and/or executable as foreign judgments under the CPC; that they are not conclusive; that the same were passed in violation of the principles of natural justice; that they do not recognise the laws in force in India; that the Suit is not a tracing action but merely seeks execution of the said orders, etc. It is submitted that the said averments, *ex-facie* are based upon the premise and pre-suppose the existence of the said U.S. Bankruptcy Court Orders.

9. The Plaintiffs have further submitted that the specific responses of the Defendants to Paragraph Nos.2, 4, 55 and 58 of the Plaint are vital to note and decisive of the matter. In response to Paragraph No.2 of the Plaint, the Defendants do not admit that the U.S. Bankruptcy Court Orders authorise the Plaintiffs to file the Suit on behalf of the Trustees in Bankruptcy. The locus of the Plaintiffs to file the Suit, and the genuineness and veracity of the said 6 Orders are not admitted. However, the existence of the Orders is not denied. It is the same in response to Paragraph Nos.4 and 55 of the Plaint where the existence of the Orders is not denied. In response to paragraph No.58 of the Plaint, the Defendants have neither denied the existence of the said 6 Orders nor have they stated that the Suit is barred by limitation; they have chosen to ignore the averments in the Plaint altogether. It is therefore submitted that the Defendants, having failed to deny the existence of the U.S. Bankruptcy Court Orders, and having further failed to answer the point of substance which is whether the Suit is barred by limitation or not, in terms of Order VIII Rule 5, the U.S. Bankruptcy Court Orders and the averments of the Plaintiffs on the issue of limitation be taken as admitted. Consequently, the admission itself being proof, no other proof is necessary on the

part of the Plaintiffs to prove that the Suit is within the time prescribed by the Law of Limitation.

10. The Plaintiffs have relied on the decision of the Hon'ble Supreme Court in ***Badat & Co. Bombay v East India Trading Company AIR 1964 Supreme Court 538*** and the decisions of this Court in ***Laxminarayan Ramdayal v Chimniram Girdharilal (1917)ILR 41BOM 89; Rishabkumar Mohanlal v Singhai Motilal Kasturchand AIR 1949 Nagpur 21;*** and ***M Gordhandas & Company v D. Arvind Mills (1974) 76 BOM LR 119***, which set out the legal consequences of *not meeting* the mandatory requirements in respect of pleadings.

11. It is therefore submitted by the Plaintiffs, that this Court must decide the issue of limitation in the present case in favour of the Plaintiffs in view of the following:-

(a) the Plaint meets the requirements of Order VII Rule 1 and does not fall under the provisions of Order VII Rules 6 and 11;

(b) failure on the part of the Defendants to plead limitation in terms of Order VIII Rule 2;

(c) failure on the part of the Defendants to specifically deny the existence of the 6 Bankruptcy Court Orders and that the present Suit was within time in terms of Order VIII Rule 3; and

(d) the consequent admission by the Defendants of the Bankruptcy Court Orders and of the averments in the Plaint that the Suit was within time in terms of Order VIII Rule 5.

12. Repeating some of the submissions set out hereinabove, the Plaintiffs, in the alternative, have submitted that given the state of

the pleadings, the burden of proof lies on the Defendants and it is incumbent upon them to lead evidence first to prove that the Suit is barred by limitation. In support of this submission, the Plaintiffs have relied on the decisions in ***Manmohandas & Ors. V Bahauddin & Ors. AIR 1957 Allahabad 575*** (Paragraph 150 at Page 608); ***Union of India v Amar Singh AIR 1960 SC 233*** (Paragraphs 17 to 20); ***Jethmull Bhojraj v Darjeeling Himalayan Railway Co. Ltd. AIR 1962 SC 1879*** (Paragraph 23) and ***K. S. Nanji & Co. v Jatashankar Dossa AIR 1961 SC 1474***.

DEFENDANTS' SUBMISSIONS:

13. The Learned Advocate appearing for the Defendants has taken me through Paragraphs 3A (Pg.4), 3C (Pg.14), 3N(2) (pg. 39), 3N(6) (Pgs.42 and 43), 3N(10) (Pg.44) of the Written Statement. It is therefore submitted that the Written Statement, in terms, disputes the genuineness and veracity of the U.S. Bankruptcy Court Orders and the correctness of their contents. It is also submitted that the Written Statement disputes that the claims are within limitation and seeks dismissal on the ground of limitation. It is therefore submitted that the Plaintiffs are required to prove the U.S. Bankruptcy Court Orders in accordance with the law, including *inter alia*, Sections 78(6) and 86 of the Indian Evidence Act, 1872.

14. It is submitted that while drafting the Written Statement, the Defendants' Advocate relied on a copy of the Plaint attached to the Memo of Appeal. The said Paragraph 58 of the Plaint did not contain the following words:

> *"the Suit is filed within limitation"*

Due to this error on the part of the Defendants' Advocate, this sentence was not dealt with. However, on reading the Written Statement as whole, it is evident that the Defendants have disputed the maintainability of the Suit on the ground of Limitation. Further u/s. 3 of the Limitation Act, 1963 a duty is cast upon the Court to dismiss the Suit if it is found to be barred by the Law of Limitation, even if the defence of limitation has not been taken by the Defendants. The proviso to Order VIII Rule 5 of the CPC provides that notwithstanding the absence of a denial, the Court may, in its discretion require any fact so admitted to be proved, otherwise than by such admission.

15. It is further submitted that it matters little whether the Written Statement states that the 'claims' are barred by limitation or whether it states that the 'Suit' is barred by limitation since it amounts to one and the same thing. Both the words can be used interchangeably. It is therefore illogical to play with words by contending that the Written Statement contains no denial merely because it states that the 'claims' are barred by limitation and fails to state that the 'Suit' is barred by Limitation. The usage of the words 'claims are barred by limitation' is in compliance with the provisions of Section 26 and Order VII Rule 1(g) of the CPC and thus clearly resists the issue of limitation.

16. As regards the Plaintiffs' assertion that the Defendants have not disputed the 'existence' but only the 'genuineness' of the said 6 U.S. Bankruptcy Court Orders, it is submitted that the said assertion is baseless. Section 86 of the Evidence Act requires the Plaintiffs to prove the genuineness and accuracy of the U.S. Bankruptcy Court Orders. Relying on Paragraph 18 at Page No.

549 of the decision of the Hon'ble Supreme Court in ***Badat & Co. (Supra),*** it is submitted that the word 'genuineness' is the appropriate word used by the Defendants in disputing the U.S. Bankruptcy Court Orders. It is not necessary to use the word 'existence'. As the genuineness of the U.S. Bankruptcy Court Orders is disputed, the burden of proof is on the Plaintiffs to prove the U.S. Bankruptcy Court Orders in accordance with Sections 78(6) and 86 of the Evidence Act.

17. Relying on the submission of the Plaintiffs that the Defendants have 'not denied', but only 'not admitted' the U.S. Bankruptcy Court Orders, it is submitted that not admitting a document is the same as denying a document. It is pointed out that the judgment of this Court in ***M. Gordhandas & Co. (Supra)*** relied upon by the Plaintiffs, holds:

> *"The terms of O.VIII, r.3 of the Code of Civil Procedure are wide enough to cover both a denial as well as a non-admission, for what is required to be dealt with specifically is each allegation of fact of which the Defendant "does not admit the truth." (Page No.125)."*

18. In response to the Plaintiffs' contention that under Order VIII Rule 2 of the CPC, the burden of proof falls on the Defendants to show in their pleadings how the Suit is not maintainable *inter alia* on the issue of limitation, the Defendants have relied on the Judgment of the Hon'ble Division Bench of the Court of Rangoon in the case of ***Official Trustee v Mrs. Raeburn (AIR 1941 Rangoon 207)*** which holds as follows:

> *"The seemingly contradictory provisions of S. 3 Limitation Act, and O.8, R.2, Civil P.C., are easily reconcilable. S.3 makes the question of limitation a material question although not raised by the parties; but a Court is not bound to raise*

> *and decide a question of fact of its own motion. Hence, where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, the Court is bound under the provisions of S.3 to raise the question suo moto and decide it : AIR 1935 P C 85, Re. On.*
>
> *But where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O.8, R. 2, Civil P.C. to raise such question in his written statement; if he fails to do so, thereafter it is within the discretion of the Court to allow the question to be raised or not: 25 Mad 367 and A I R 1934 Rang 329, Re. On."*

19. It is therefore *inter alia* submitted that the provisions of Order VIII Rule 2 of the CPC do not change the law relating to the burden of proof which remains constant viz. upon the Plaintiffs. Section 3 of the Limitation Act, 1963 applies with all rigour notwithstanding Order VIII Rule 2 of the CPC. Thus where the question of limitation raises issues of fact not evident from the Plaint, the Defendant is bound to raise the issue/question in the Written Statement. However, if the Defendant fails to raise the issue of limitation in the Written Statement, the Court nonetheless has the discretion to allow the question to be raised.

20. As regards the burden of proof on the issue of limitation, the Defendants have relied on Section 3 of the Limitation Act, Order VII Rules 1G and 11D of the CPC, Section 101 of the Evidence Act and on the following decisions:

> **K. S. Nanji & Co. v Jethashankar Dossa (Supra)** (Paragraphs 11 & 12);
>
> **Lalchandsingh (deceased) through legal representative & Ors. v Hazarasingh (decesased) 2008 5SCC, 444** (Paragraph 13);

Sir Mohammad Akbar Khan v Mt. Motai & Ors. (Paragraph 14);

The Bank of Bombay v Fazulbhoy Ebrahim 1922 (24) BLR 518 (Page 532);

Sri Raja Kalyani Prasad Singh Deo v The Borrea Coal Co. Ltd. & Ors. AIR (33) 1946 Calcutta 123 (Page 126/127);

V. R.R.M.N.R.M Ramanathan Chetty v V.RRMCT Murugappa Chetty & Ors. AIR 1917 Madras 930 (Page 935);

P.P.Sankara Menon v Karumathil Puthumanae AIR 1940 Madras 639 (Page 640) and

Triro v Devraj & Ors. AIR 1993 Jammu & Kashmir 14 (Paragraph 8).

21. It is submitted on behalf of the Defendants that the Plaintiffs in response to the above case laws have submitted that there are two categories of Suits as mentioned in paragraph 5 hereinabove. The Defendants submit that the aforesaid categorisation made by the Plaintiffs is fallacious and misconceived. The CPC does not create or recognize Suits in different categories for the purpose of limitation. When an issue of limitation arises, the burden of proof is always on the Plaintiffs to establish that the Suit is within time and is not barred by limitation. This is the mandate of the law. It is only where the Suit is admittedly out of time that the Plaintiff is specifically required under Order VII Rule 6 of the CPC to plead grounds of exemption to show that the Suit is filed within time and is not barred by limitation. This does not mean that in other cases the burden of proof falls upon the Defendants and not upon the Plaintiffs. It is submitted that in the above cases cited by the Defendants it is held that the burden of proof qua limitation is on the Plaintiffs, and

none of these cases are cases which fall under what the Plaintiffs choose to describe as 'Category 1 Suits'.

22. It is therefore submitted that the burden of proof lies squarely with the Plaintiffs to establish that the Suit is filed in time and that it is not barred by the Law of Limitation.

23. The Defendants have, at the stage of Rejoinder, submitted that the cause of action, as averred in the Plaint in the present Suit, is not restricted to the U.S. Bankruptcy Court Orders but also on alleged fraud on the part of the Defendants as well as 6 claims raised by the Plaintiffs against the Defendants. It was argued that in order to see whether the Suit was filed within time the burden is on the Plaintiffs to establish that the Suit is filed within limitation by reasons of the provisions of Section 17 of the Limitation Act, 1963. It is further submitted that the Plaintiffs have raised 6 claims in the Suit which are barred by the Law of Limitation. The burden is therefore on the Plaintiffs to establish that the Suit filed for relief in the form of a money decree is filed within the period of limitation.

PLIANTIFFS' RESPONSE:

24. In response, the Plaintiffs have submitted that the aspect of fraud in respect of the claims in the Suit goes into the merits of the matter. The cause of action in the present Suit is limited to U.S. Bankruptcy Court Orders, namely Exhibits G, H, M, N, O & P to the Plaint. There is a very clear distinction between cause of action and reliefs claimed. The cause of action in a Suit does not depend upon the character of the relief prayed for by the Plaintiffs

nor does it have any relation whatsoever to the defence which may be set up by the Defendants.

FINDINGS:

25. I have considered the pleadings in the above Suit; the oral as well as written submissions advanced; and case laws cited by the Learned Advocates appearing for the Parties. The Plaintiffs have submitted in the Plaint as well as before this Court that the cause of action upon which the present Suit is filed is the 6 Orders passed by the U.S. Bankruptcy Court dated 8th March 2000, 12th February 2002 and 13th February 2002 (Exhibits G, H, M, N, O and P to the Plaint). In Clause 58 of the Plaint, the Plaintiffs have categorically stated:

> "*This suit is being filed by the Plaintiffs, pursuant to the Orders dated 8th March 2000, 12th and 13th February 2002 of the Bankruptcy Court and the suit is filed within limitation .....*"

It is also the case of the Plaintiffs that by the said 6 Orders passed by the U.S. Bankruptcy Court, they have been authorized to file the Suit on behalf of the Trustees in Bankruptcy. The Defendants have disputed and dealt with the said assertions in various paragraphs of the Written Statement including Paragraph No.3A (Page 4), Paragraph No.3N(2) (Page 39), Paragraph No.3N(6) (Pages 42/43) and Paragraph No.3N(10) (Page 44), the relevant portions of which are found in the Written Statement filed by the Defendants and reproduced hereinunder.

a) ***Paragraph NO.3(A) (Page 8 of the Written Statement):***

"The orders dated 8th March 2000, 12th February 2002 and 13th February 2002 ***alleged*** *to have been passed by the US Bankruptcy court (hereinafter referred to as the 'said order') are not enforceable and/or executable as foreign judgments under the provisions of Section 13 and Section 44A or any other provision of the Code of Civil Procedure, 1908.* ***Without admitting the genuineness veracity and correctness of the contents of the said orders (for which the Plaintiffs are put to strict proof), the Defendants states as follows****:..."*

b) Paragraph No.3N(2), (Page 39 of the Written Statement):

"It is not admitted that any Orders dated 8th March 2000, 12th February 2002 and 13th February 2002 (the "said Orders") have been passed by the Bankruptcy Court authorizing the Plaintiffs to file the suit on behalf of the trustees in Bankruptcy. It is not admitted that the Plaintiffs have any right, title authority or locus standi to file the present suit pursuant to the said Orders. The Plaintiffs are put to strict proof thereof. These Defendants do not admit the genuineness and veracity of the said Orders or the correctness of its contents. The Plaintiffs are put to strict proof of the same".

c) Paragraph No.3N(6) (Page 42/43 of the Written Statement):

"....................................... In particular these Defendants do not admit the genuineness or veracity of the Exhibits "A" to

<u>"H" of the Plaint</u> and the correctness of its contents, and the genuineness and veracity of the Motions and Orders referred to and the correctness of their contents. The Plaintiffs are put to strict proof thereof. .... <u>These Defendants do not admit the genuineness and veracity of the orders referred to in paragraph 13 and 14 of the Plaint respectively</u>."

d) Paragraph No.3N(10) (Page 44 of the Written Statement):

"................ These Defendants do not admit the genuineness and veracity of the Orders of the bankruptcy Court dated 8th March 2000, 12th February 2002 and 13th February 2002 at Exhibits "G", "H", "M", "N", "O" and "P" to the Plaint and the correctness of its contents, the Plaintiffs are put to strict proof of the same".

Thus, in response to the Plaintiffs' submissions in the Plaint that they have filed the present Suit pursuant to the Orders dated 8th March 2000, 12th February 2002 and 13th February 2002 of the U.S. Bankruptcy Court and the Suit is filed within limitation, the Defendants have categorically stated in their Written Statement that they do not admit the genuineness and veracity of the said Orders and have, in Paragraph Nos.3N(2), further categorically stated that:

> "*It is not admitted that any Orders dated 8th March 2000, 12th February 2002 and 13th February 2002 have been passed by the Bankruptcy Court authorizing the Plaintiffs to file the suit on behalf of the Trustees in Bankruptcy*."

26. In my opinion, once the Defendants have not admitted the genuineness of the said 6 Orders (and even if by this they have meant that the said 6 Orders are not authentic), it cannot be said as alleged by the Plaintiffs that the Defendants have not denied/disputed the existence of the said Orders. In my view, it is not necessary for the Defendants to use the word 'existence' whilst denying/disputing the said 6 Orders. The moment the Defendants submit that the documents which are produced by the Plaintiffs as purported Orders of the U.S. Bankruptcy Court are not genuine, it implies that the Defendants dispute the Orders themselves and thus their very existence. In fact, in Paragraph No.3A of the Written Statement, the Defendants have referred to the said Orders as

> "*Orders* ***alleged*** *to have been passed by the US Bankruptcy Court*."

Again in Paragraph No.3N(2) (Page 39 of the Written Statement), the Defendants have categorically stated that they do not admit that the said Orders have been passed by the U.S. Bankruptcy Court authorizing the Plaintiffs to file the Suit on behalf of the Trustees in Bankruptcy. As held in the Judgment of the Bombay High Court in **M. Gordhandas & Co. vs. D. Arvind Mills (Vimadalal, J.)** (supra):

> "*The terms of Order VIII Rule 3 of the Code of Civil Procedure are wide enough to cover both a denial as well as a non-admission for what is required to be dealt with specifically is each allegation of fact of which the Defendants "does not admit the truth*."

The submissions of the Plaintiffs that a mere challenge to the genuineness of the said 6 Orders is not enough for the Defendants to contend that they have complied with the provisions of Order

VIII of the CPC and that they ought to have denied the very existence of the said 6 Orders under Order VIII Rule 3 of the CPC, are incorrect as can be seen from Section 86 of the Indian Evidence Act, 1872 which provides as follows:

> "*86. Presumption as to certified copies of foreign judicial records.--The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.*
>
> *An officer who, with respect to any territory or place not forming part of India or Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, clause 43, of the General Clauses Act, 1897 (10 of 1897) shall, for the purposes of this section, be deemed to be a representative of the Central Government in and for the country comprising that territory or place*."

Thus, for a Court in India to presume the genuineness and accuracy of any document relied upon, which document is a certified copy of any judicial record of any country not forming part of India, the document has to be certified in the manner laid down by Section 86 of the Indian Evidence Act. The Defendants, therefore, by not admitting the genuineness of the said 6 Orders of the U.S. Bankruptcy Court, have not accepted the said documents as Orders passed by the U.S. Bankruptcy Court and have put the Plaintiffs to strict proof thereof, thereby requiring the Plaintiffs to prove the said documents as required u/s. 78(6) of the Indian Evidence Act, 1872.

27. I have already taken the view that the contention of the Defendants that the said 6 Orders of the U.S. Bankruptcy Court are not genuine and they have not admitted the same. Thus, the Defendants have complied with the provisions of Order VIII Rule 5 of the CPC, sub-rule (1) of which provides.

> *"(1): Every allegation of fact in the plaint, if not denied specifically or by necessary implication, **or stated to be not admitted** in the pleading of the defendant, shall be taken to be admitted except as against a person under disability."*

Moreover, the Defendants not being parties to any proceedings before the US Bankruptcy Court, the Plaintiffs are wrong in their contention that the Defendants have admitted the said 6 Orders having been passed by the US Bankruptcy Court.

28. The Plaintiffs have made the said 6 Orders passed by the U.S. Bankruptcy Court the basis of their Suit and have submitted that since the present Suit is filed within a period of three years from the dates of the said Orders, the Suit filed by them is within limitation as per Article 101 of the Limitation Act, 1963. The moment the Defendants disputed the said 6 Orders having been passed by the U.S. Bankruptcy Court as alleged and also their genuineness, it cannot be said that the Defendants have failed to plead limitation in terms of Order VIII Rules 2 and 5 of the CPC and have taken the Plaintiffs by surprise. For the same reasons, the Plaintiffs are incorrect in their submissions that the

Defendants have not specifically dealt with any allegation of fact. The Plaintiffs have alleged that the said 6 Orders have been passed by the U.S. Bankruptcy Court and the same has been denied by the Defendants in the aforementioned manner. The Defendants having not admitted the alleged fact asserted by the Plaintiffs, it consequently follows that the Defendants have not admitted that the Suit is filed within the period of limitation, thereby requiring the Plaintiffs to first prove/establish before the Court that the said 6 Orders were indeed passed by the US Bankruptcy Court on 8th March 2000, 12th February 2002 and 13th February 2002 as alleged. The Defendants have therefore complied with the requirements of Order VIII Rule 3 of the CPC and the submissions made by the Plaintiffs to the contrary cannot be accepted.

29. In view of the Defendants' aforementioned categorical submissions qua the said 6 Orders passed by the U.S. Bankruptcy Court, it also cannot be said that the Defendants have been evasive in their denials. The Defendants have explained that whilst drafting the Written Statement, they relied on a copy of the Plaint attached to the Memo of Appeal which did not contain the words:

> *"the Suit is filed within limitation".*

However, on a full and thorough reading of the Written Statement as a whole, I am convinced that the question of maintainability has not been admitted by the Defendants but disputed by them. In my view, the Written Statement has been drafted/ prepared by bestowing serious thought and is precise. The submissions advanced on behalf of the Plaintiffs that the Defendants have not complied with the requirements of Order VIII Rules 2 and 5 of the

CPC by not denying expressly or by necessary implication the fact that the Suit is filed within time, also cannot be accepted for the aforementioned reasons.

30. In view of the above, the Plaintiffs are incorrect in contending that the Defendants have not complied with the requirements of Order VIII of the CPC relating to Written Statements. Moreover, the Plaintiffs themselves are governed by the provisions of Order VII of the CPC. Sub-rule (1) of Rule 14 of Order VII states:

> *"Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such document in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint."*

The Plaintiffs have not produced the said 6 Orders of the U.S. Bankruptcy Court as required by Order VII Rule 14 of the CPC in Court at the time of presentation of the Plaint. Till date, only purported copies of the said 6 Orders are on record. If the Plaintiffs hereafter wish to produce the said 6 Orders before this Court and have them received and read in evidence on their behalf, they may do so only with the leave of this Court as required under Sub-rule (3) of Rule 14 of Order VII of the CPC.

31. The Plaintiffs have also submitted that the Written Statement of the Defendants proceeds on the basis that that the said 6 Orders of the U.S. Bankruptcy Court were passed by the Bankruptcy Court and thus are in existence. This submission of the Plaintiffs also needs to be rejected, as in all pleadings, the

Defendants have first referred to the said 6 Orders as ‘alleged Orders’ and after categorically not admitting that any such Orders are passed by the U.S. Bankruptcy Court and after denying/ disputing their genuineness and veracity, have made other submissions qua the said 6 Orders as regards enforceability, etc. which are obviously without prejudice to the initial objections with regard to the genuineness and veracity of the said 6 Orders.

32. The Defendants have denied/ disputed the genuineness of the said Orders and the fact that such Orders have indeed been passed by the U.S. Bankruptcy Court. This establishes beyond any doubt that the Defendants have denied/ disputed the fact that the Suit is filed by the Plaintiffs within the period of limitation. In view thereof, Section 101 of the Indian Evidence Act would also come into play, which provides that whoever desires any Court to give a judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist, and the Plaintiffs are bound to prove the existence of the said 6 Orders passed by the U.S. Bankruptcy Court to establish their legal right to file the Suit on the basis of the said 6 Orders. Sections 102 and 103 of the Indian Evidence Act also require the Plaintiffs to prove the fact asserted by the Plaintiffs namely that the Suit which is filed on the basis of the said 6 Orders passed by U.S. Bankruptcy Court is filed within the time prescribed by the Law of Limitation. The ratios laid down by various decisions of the Hon’ble Apex Court and Hon’ble High Courts including this Court are on the basis of the facts in the respective cases before the said Courts and there can be no dispute as regards the said ratios laid down therein. However in light of the facts of the present case and the reasons set out herein, I do not agree with

the submissions of Plaintiffs that it is for the Defendants to first establish that the Suit is filed beyond the period of limitation and that the Plaintiffs be granted permission to lead evidence in rebuttal. I also do not agree with the submissions of the Plaintiffs that for the purpose of deciding the issue of limitation, Suits should be categorized as Category 1 and Category 2 Suits and that in Suits which are, on the face of the pleadings time barred (Category 1), the burden is upon the Plaintiffs to show that the Suit is not time barred and in cases where the suit is *ex-facie* within time (Category 2), once the Plaintiff has complied with the provisions of Order VII Rule 1 of the CPC, if the Defendants want to non-suit the Plaintiffs on the ground of limitation, the burden is on the Defendants to establish that the Suit is in fact time barred. As set out hereinabove, the Defendants are not parties to the U.S. Court proceedings and therefore have no knowledge of the U.S. Court Orders and proceedings. The Defendants have challenged the genuineness of the said 6 U.S. Court Orders and have not admitted the fact that the said 6 Orders are passed by the U.S. Bankruptcy Court. The Plaintiffs are therefore bound to prove the said 6 Orders and establish that the Suit is filed within the period prescribed by the Law of Limitation *inter alia* as required u/s.101 of the Indian Evidence Act, 1872. The Plaintiffs are thus incorrect in their submissions that the present Suit falls under what they choose to describe as Category 2 Suits and that it is for the Defendants to establish that the Suit is in fact time barred.

33. The Defendants have, at the stage of rejoinder, tried to contend that the Plaintiffs have approached this Court with their cause of action not being restricted to the said 6 orders of the U.S. Bankruptcy Court, but being alleged fraud on the part of the

Defendants as well as an original cause of action being six claims raised by the Plaintiffs against the Defendants. Thus, the Defendants have contended that the Plaintiffs, in order to establish that the Suit is filed within time, are also required to establish as to when the alleged fraud was discovered or capable of being discovered by exercise of due diligence, etc. and the Plaintiffs should also establish how the claims of the Plaintiffs in a Suit which are in nature of a money decree are not barred by the Law of Limitation. As stated hereinabove, this Court has confined itself only to the limited issues of who should lead evidence first and whether the Plaintiffs can be allowed to reserve liberty to lead their evidence in rebuttal.

34. Keeping in mind the Plaintiffs' assertions that the Suit is filed by them pursuant to the said 6 Orders passed by the U.S. Bankruptcy Court and that thus the Suit is filed within limitation and considering the fact and reaching the conclusion that the Defendants have indeed disputed the passing of the said 6 Orders by the U.S. Bankruptcy Court and their genuineness, I hold that the Plaintiffs will have to lead evidence first and they cannot be allowed to only reserve liberty to lead their evidence in rebuttal and call upon the Defendants to first lead evidence.

35. Having decided that the Plaintiffs will have to lead evidence first, this Court does not think it necessary to decide the manner in which the Plaintiffs should establish that the Suit filed by them is within time. It is for the Plaintiffs to decide what they are desirous of establishing and the extent of evidence they wish to lead in answer to the preliminary issue raised by this Court namely:

> “*Whether the suit filed is barred by the Law of Limitation?*”

In view thereof, this Court is not dealing with submissions advanced by the Parties on the issue as to whether the cause of action in a Suit is separate and distinct from reliefs claimed.

36. S.O. to 21st February 2012 for directions.

(S.J.KATHAWALLA,J.)