

Mala Shukla v Jayant Amritanand Shukla (Danialle An, co-respondent)
[2002] SGHC 96

Case Number : Div P 2792/2000, RA 720022/2002
Decision Date : 02 May 2002
Tribunal/Court : High Court
Coram : Woo Bih Li JC
Counsel Name(s) : Imran Khwaja and Michelle Jeganathan (Tan Rajah & Cheah) for the petitioner;
John Thomas and Anita Thomas (Col in Ng & Partners) for the respondent
Parties : Mala Shukla — Jayant Amritanand Shukla (Danialle An, co-respondent)

*Conflict of Laws – Natural forum – Stay of proceedings on ground of forum non conveniens
– Petitioner and respondent both Indian citizens – Filing of divorce petition in India by both parties
– Divorce proceedings underway in India – Wife filing divorce petition in Singapore – Whether
Singapore court can entertain petition – Whether India or Singapore more appropriate forum
– Principles governing grant of stay – Whether petitioner losing personal and juridical advantages if
stay given a sufficient reason for stay of petition in Singapore – Whether still having money in
Singapore a factor – Whether multiplicity of actions a decisive factor for stay of petition*

Cur Adv Vult

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Introduction

The petitioner Mala Shukla (‘Mala’) and the respondent Jayant Amritanand Shukla (‘Jayant’) are Indian citizens. They were married in India on 27 August 1976 under the Hindu Marriage Act. After the marriage, Mala and Jayant (‘the parties’) resided in London where Mala qualified as a chartered secretary and Jayant qualified as a chartered accountant.

They resided in India from 1984 to 1989 or 1991. In the meantime, two sons of the marriage were born: (1) Zorawar on 8 April 1985; and (2) Sikandar on 9 February 1990.

Between 1989 or 1991 to 1995, the couple and the children moved to Hong Kong as Jayant was working there as an employee of Standard Chartered Bank.

At the end of 1995 or early 1996, they moved from Hong Kong to Singapore where Jayant was still working as an employee of Standard Chartered Bank.

In June 1999, Mala’s mother passed away in India and she went to India with the two children for the funeral.

According to Mala:

- (1) After her mother’s funeral, she went to London and Paris with the two sons for a holiday as Jayant had told her he was going to Australia with Danialle to attend a course.
- (2) In London, she learned that Jayant and Danialle were spending time together at Sea Gypsy Resort in Malaysia.

- (3) Danialle was also staying at the matrimonial home in Singapore.
- (4) Jayant had sent an e-mail dated 31 July 1999 to end the marriage.
- (5) She could not return to Singapore and stayed temporarily in India with her sister.

Except for two short trips back to Singapore in mid-October 1999 and July 2000, Mala and the two children have resided in India since July 1999. The children study at The British School in New Delhi, India.

Sometime between July/August and October 1999, Mala and Jayant entered into negotiations to resolve the question of a divorce and other issues like division of property, custody of and access to the children and maintenance. Mala's brother Pranab Barna (`Pranab`) participated in the negotiations. He is the managing director of a multinational company in India, Reckitt and Coleman Ltd, and is resident in India. The negotiations were carried out through e-mail, faxes and meeting(s) in New Delhi, India.

A settlement was achieved and on 14 or 15 October 1999, the parties filed a joint petition for divorce by mutual consent under s 13-B(1) of the Hindu Marriage Act 1955 (No 25 of 1955) as amended by the Marriage Laws (Amendment) 1976. This is No 1139/99 (`the first petition`). This was filed in the Court of the District Judge, Delhi, India. The terms of the settlement are set out in the first petition which was signed by each of the parties. It covers permanent alimony under which immovable and moveable property are dealt with, custody of the children which includes visiting rights for Jayant and maintenance and support of the children.

Paragraphs 10, 11 and 12 of the first petition state that the settlement contains the entire understanding of the parties, there is no collusion between them and the consent of either party has not been obtained by any force, fraud, undue influence or coercion whatsoever. There were supporting affidavits signed by each of the parties. There was also a joint statement signed by both the parties confirming, inter alia, that their consent for divorce was without any force, fraud or undue influence.

The first motion with regard to the petition was heard on 16 October 1999 by the District Judge Shri MC Gary. The district judge allowed the first motion and stated that the parties could apply for their second motion (hearing) if they failed to patch up their differences in the meantime.

The first petition was then amended to correct the unit number of the permanent residential address of Mala in New Delhi, India.

On 25 May 2000, Mala filed two applications. The first was to withdraw her consent to the first petition and to seek the dismissal thereof on the basis that she was compelled to sign it under extreme duress, coercion and undue influence from Jayant. The second application was for an injunction to restrain Jayant from giving effect to the terms of the settlement pending the hearing of and decision on the first application.

On 25 July 2000, the district judge decided that it was for Mala to decide whether to join in the second motion (hearing) in respect of the first petition and no order was necessary in respect of her application to withdraw her consent and to dismiss the first petition.

Jayant then filed another petition No 816/2000 on 26 or 27 July 2000. This was also under s 13-B(2) of the Hindu Marriage Act 1955 (`the second petition`). This was on the same ground as the first petition, ie that the parties have been living separately for one year or more and the divorce is sought by consent. He also filed two applications. The first was for directions to compel Mala to sign and verify the second petition. The second application was for visiting rights in respect of the two children.

The second petition and the application to compel Mala to sign the second petition were dismissed by the district judge on 29 July 2000 on the basis that it was not maintainable as it was not signed by Mala and there was no procedure to compel her to sign it. Jayant then filed an appeal on 2 September

2000 to the High Court of Delhi.

On 4 September 2000, Mala filed the present divorce petition in Singapore. Mala's petition in Singapore is based on the alleged adultery of Jayant with the co-respondent Danialle An ('Danialle') and on the alternative ground that the marriage has broken down irretrievably in that Jayant has behaved in such a way that Mala cannot reasonably be expected to live with him.

On 28 September 2000, Jayant filed SIC 751910/2000 in Singapore to seek an order declaring that the Singapore court should not exercise jurisdiction over Jayant and Danialle on any issue under the divorce petition and that the proceedings be stayed or dismissed; alternatively, that Singapore is not an appropriate forum and that the proceedings under the divorce petition be dismissed or stayed on the ground of forum non conveniens.

On 29 September 2000, the papers for Jayant's appeal to the High Court of Delhi were served on Mala, after some earlier unsuccessful attempts at service.

Subsequently, Mala also applied in Singapore by way of SIC 650813/2001 filed on 4 May 2001 for an order for interim maintenance for herself and the two children on the basis that the maintenance provided by Jayant, presumably pursuant to the settlement, is inadequate. This application has not been heard presumably in the light of Jayant's application for a stay.

On 6 September 2001, the High Court of Delhi dismissed Jayant's appeal.

On 14 February 2002, District Judge Yap Siew Yong dismissed Jayant's application with no order as to costs. On 19 February 2002, Jayant filed an appeal against this decision to our High Court and the appeal has come before me. Pending the conclusion of arguments and my decision, I ordered an interim stay of the existing proceedings in Singapore by Mala.

In the meantime, Jayant has applied for special leave to petition to the Supreme Court of India in respect of the decision of the High Court of Delhi and on 22 March 2002, he was allowed such special leave. The special leave was granted by two judges of the Division Bench of the Supreme Court of India. At the hearing of the application for special leave, Jayant's counsel also sought an interim order to restrain Mala from proceeding with her divorce petition in Singapore but this was not granted. According to his Indian counsel, the Supreme Court, however, was of the view that his appeal should be disposed of urgently and directed the parties to apply to the Chief Justice of India for the appeal to be heard on an urgent basis.

I would add that prior to the settlement, Jayant had sought to persuade Mala to come to Singapore to resolve the question of the divorce and issues arising therefrom. He had wanted the divorce proceedings to be in Singapore. While Mala did not expressly say that she wanted the divorce proceedings to be in India, the fact is she declined to return to Singapore to deal with such issues. Also, her e-mail dated 5 August 1999 did seem to suggest that she preferred such matters to be dealt with in India. The settlement was with a view to the parties commencing divorce proceedings in India but thereafter Mala has taken the position that the settlement is not valid and Singapore is the more appropriate forum while Jayant says India is the more appropriate forum to decide on the divorce and issues arising therefrom.

My decision

Section 93(1) and (2) of our Women's Charter (Cap 353, 1997 Ed) states:

Jurisdiction of court in matrimonial proceedings

(1) Subject to subsection (2), the court shall have jurisdiction to entertain proceedings for divorce, presumption of death and divorce, judicial separation or nullity of marriage only if either of the parties to the

marriage is -

(a) domiciled in Singapore at the commencement of the proceedings; or

(b) habitually resident in Singapore for a period of 3 years immediately preceding the commencement of the proceedings.

(2) In proceedings for nullity of marriage on the ground that the marriage is void or voidable, the court may, notwithstanding the requirements in subsection (1) are not fulfilled, grant the relief sought where both parties to the marriage reside in Singapore at the time of the commencement of the proceedings.

Mala's divorce petition in Singapore is based on the ground that both Jayant and her have been habitually resident in Singapore for a period of three years immediately preceding the filing of her divorce petition here. It seems to me that she was not habitually resident in Singapore from July 1999. After she went to India for her mother's funeral, she continued to reside there because of her marital woes. Be that as it may, it is not disputed that Jayant was habitually resident in Singapore for a period of three years immediately preceding the filing of Mala's divorce petition.

Although Jayant's first prayer in his application had sought a declaration, his application was really for a dismissal or a stay of Mala's divorce petition on the ground of forum non conveniens.

The principles of an application for a stay on the ground of forum non conveniens are not in dispute. I quote from the judgment of Chao Hick Tin JA in **PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings)** [2001] 2 SLR 49 at [para]16:

*Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff [in **The Spiliada** [1987] AC 460], 'there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions' (hereinafter referred to as 'the unless question' or 'unless proviso' as may be appropriate in context). One such factor which would warrant a refusal of stay would be if it can be established by objective cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice. We would emphasise that in determining the 'unless question' all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.*

I have set out some of the undisputed facts regarding the parties. As for domicile, nothing is said in Mala's divorce petition about the domicile of Jayant and herself. It seems to me that her domicile is India. As for Jayant, Mr Thomas said that his domicile was Singapore although this is not asserted in any of Jayant's affidavits and it appeared to me during arguments that Mr Thomas was equating residence with domicile.

Although Singapore was the last place where the parties last lived as husband and wife, I am of the

view that they were residing in various jurisdictions depending on where Jayant was working. Having said that, I was informed by Mr Thomas that Jayant has permanent resident status in Singapore.

As for Mala, she claims to be a non-resident Indian (para 41 of her affidavit filed on 13 January 2001) but she did not elaborate as to what that means given that she has been habitually residing in India since July 1999.

The assets of the parties are `internationally placed`, to use a term from the submissions of Mala`s counsel, Mr Imran H Khwaja. As derived from Jayant`s affidavit filed on 31 October 2000, and based on estimates of exchange rates, they are:

Moneys

- (1) In Singapore - about S\$110,000 to S\$120,000 (excluding household goods)
- (2) In Hong Kong - about S\$500,000
- (3) In United Kingdom - about S\$50,000

Immovable property

- (4) In London, a property at 44 Wellington Court, which was in both the names of the parties. It was mortgaged. The property has been sold and presumably the mortgage has been paid. There is apparently a surplus but I was not told what the surplus was.
- (5) In India, Jayant owns two properties:
 - (a) The first is a flat with a terrace on the 2nd Floor at A-53, Nizammuddin East, Delhi, estimated by Mala to be worth about S\$180,000 to S\$190,000.
 - (b) The second is a piece of land in Victoria Meadows, Bangalore, estimated by Mala to be about S\$30,000.
- (6) Neither Jayant nor Mala own any immovable property in Singapore. They were staying in rented premises here.

I stress that the above is not a finding of fact by me as to what the parties` assets are as more information and more supporting evidence must be given to establish the assets.

Notwithstanding Mala`s contention in para 25 of her affidavit filed on 13 January 2000 that the terms of the settlement are void in view of the decision of the district judge of 29 July 2001 in respect of the second petition, Mr Imran quite properly conceded that he could not go so far as to say that there had actually been a ruling on the validity of the settlement. It is not in dispute that the settlement was with a view to the filing of a divorce petition by consent in India and that it contained terms relating to the division of property, custody and maintenance.

In these circumstances, Mr Imran did not dispute that India is the most appropriate forum to determine the validity of the settlement and its effect on the present appeal by Jayant to the Supreme Court of India as well as in any other matrimonial proceeding that either side may file there. He, however, submitted that the settlement is not a factor in deciding which is the more appropriate forum for Mala`s divorce petition and that it went into the merits of any claim by either party.

He further submitted that even if the settlement had not been entered into involuntarily by Mala, our courts and the Indian courts would not hold her to it as its terms were manifestly unfair to Mala. On this point, he highlighted that under the settlement, she was to receive only 30,000 rupees, equivalent to about S\$1,200, a month for the maintenance of the children irrespective of the income

of Jayant. On the other hand, I note that this is not the only term of the settlement. For example, under it, Jayant is to purchase educational policies for the two children guaranteeing the equivalent of fees of a minimum sum of US\$152,000.

For his part, Mr Thomas stressed the existence of the settlement, the fact that it was entered into with the assistance of Pranab and that there is a pending appeal to the Supreme Court of India based on the settlement. Jayant also alleged that the parties have acted upon the settlement although this is denied by Mala.

Mr Imran countered with the argument that even if Jayant succeeds in his appeal to the Supreme Court of India, there is no evidence before me that the Supreme Court will grant a divorce as opposed to sending the case back to the district court to deal with.

Cheshire and North`s Private International Law (13th Ed, 1999), states at p 347:

(iii) Multiplicity of proceedings

*If litigation involving the same parties and the same issues is continuing simultaneously in two different countries, this is referred to as a case of **lis alibi pendens**. In such cases the issue facing the English courts is not simply that of deciding to which of the alternative fora the claimant should have to go to bring his action. Instead, the choice is between, on the one hand, trial in England **plus** trial abroad (if a stay is refused) and, on the other hand, trial abroad (if a stay is granted). It is very undesirable to have concurrent actions in England and abroad: this involves more expense and inconvenience to the parties than if trial were held in merely one country; it can also lead to two conflicting judgments, with an unseemly race by the parties to be the first to obtain a judgment and to subsequent problems of estoppel.*

At p 349:

A stay will also be refused if there is no country which is a natural forum for trial, even if this will mean a multiplicity of proceedings ... The weight to be attached to the factor of multiplicity of proceedings will depend on the circumstances of the case. It is not a decisive factor in the sense of automatically making a foreign forum clearly more appropriate and shifting the burden of proof to the claimant to justify trial in England.

In my view, existing proceedings in another jurisdiction can be a decisive, although not an automatic, factor depending on the circumstances of the case.

The proceedings in India are based on Mala`s consent, whether given voluntarily or not. Jayant is exercising his right of appeal and, indeed, he has been granted special leave to appeal to the Supreme Court of India. I accept Mr Thomas`s argument that Jayant`s proceedings are not in the initial stages even though he has not been able to proceed beyond the filing or the attempt to file the second petition. I also agree that the second petition was not filed just to show the availability of a forum other than Singapore. It seems to me that the appropriate approach is to await the outcome of the appeal to the Supreme Court of India rather than to allow Mala to race towards getting a decision from a Singapore court that might thwart the outcome of that appeal. Even though the success of the appeal will not in itself necessarily mean that a divorce will be granted by the Supreme Court of India, I do not think that the doctrine of **lis alibi pendens** should be construed as narrowly as Mr Imran had advocated. It is sufficient if the decision is likely to have an effect on a divorce petition

filed in India in respect of the marriage of the parties and issues arising therefrom.

However, I do not rest my decision on this ground alone. Even if Jayant`s appeal is not successful, it is open to him to file a fresh petition for divorce based not on consent but on other grounds. His lawyer has suggested that he may avail himself of the ground of cruelty and/or desertion. Whether he will succeed is another matter.

In any event, the question before me is whether there is a more appropriate forum for Mala to proceed in.

Mr Imran submitted that there was no evidence before me that the courts in India would have jurisdiction to entertain a divorce petition by either of the parties although he accepted that there was no evidence denying such jurisdiction. I note that the Indian lawyers for each of the parties have given advice as to the available grounds of divorce in India. This must pre-suppose that India has jurisdiction in the first place. Moreover, Mala`s complaint is not that India has no jurisdiction but that proceedings in India take `quite long and are often delayed` and she would have difficulty in establishing in India the adultery of Jayant (paras 45 and 42 of her affidavit filed on 13 January 2001). In the circumstances, India`s jurisdiction was never in issue and it was not open to Mr Imran to suggest otherwise.

As for proving Jayant`s adultery, Mr Imran argued that the witnesses relating to Jayant`s adultery will be in Singapore as the adultery took place in Singapore and Jayant and Danialle are, or at least, were, resident in Singapore at the material time. I am not much swayed by this argument.

First, it is possible for Mala to commence proceedings in India for a divorce by consent under s 13-B of the Hindu Marriage Act since the parties have since August 2000 been living separately for more than a year. This is alluded to in an opinion from Jayant`s lawyer in India, Mr Rajesh Yadav, in his opinion dated 30 April 2001. Indeed Mr Yadav goes on to say that if Mala is unhappy with the settlement then she can revive her claim even in the Indian courts. This opinion is not disputed by Mala`s lawyers in India.

Second, Mala herself has stressed that Jayant has admitted adultery with Danialle in various e-mail from him. Indeed Mr Imran said that this is pervasive in the e-mail. The allegation of adultery has also been stated in her affidavits before the Singapore court and the adultery has not been denied by Jayant in the body of his affidavits filed in Singapore, although he has denied the adultery in his rejoinder affidavit for his appeal to the Delhi High Court. However, in an opinion dated 9 August 2001 from Mala`s lawyer in India, Sanjoy Ghose, he said that Jayant has in his own appeal to the Delhi High Court admitted to having committed adultery.

Mr Imran also submitted that a private investigator`s report about the adultery will have to be obtained by Mala, as is usually the case in Singapore, and such a report will have to be obtained by a private investigator in Singapore. However, Mala`s divorce petition in Singapore was filed without the benefit of such a report. I infer that she was confident that Jayant`s e-mail to her, in addition to her allegations of what she herself had discovered and Jayant`s alleged confession to her, were sufficient evidence and I do not see why her confidence should change if she was proceeding in India instead.

Third, there are the other issues such as division of property, custody and maintenance to be dealt with.

These issues were supposed to have been settled. To me, India is the most appropriate forum to determine whether Mala entered into the settlement voluntarily and whether the parties have acted

upon the settlement, given that the settlement was with a view towards the filing of a divorce petition in India and Pranab and Mala are resident in India. Whether the settlement is unfair to Mala and, if unfair, whether it should still be taken into account, should also be determined by Indian courts.

Even if there was no settlement, these other issues should still be resolved by Indian courts.

For example, as regards division of property, Mr Imran submitted that the moneys of the parties are controlled from Singapore at the time Mala's petition was filed here. In my view, even if the moneys are controlled from Singapore, this is because the parties were both residing in Singapore last before the events from July 1999. In any event, I find this connection with Singapore tenuous. Indeed, Mr Thomas has signed an affidavit to say that he has been informed by Jayant that Jayant has withdrawn all moneys from his bank accounts with Standard Chartered Bank in Singapore for living expenses in India. This is allegedly because Jayant has left his job with the bank since 1 July 2000 and was allegedly unable to secure alternative employment in Singapore, USA or elsewhere. I digress to say that there is no evidence as to how Jayant came to lose his job with the bank and it was not made clear to me whether he was asked to leave or whether he initiated his own departure. If the latter, it is arguable that it was done in order to frustrate Mala's claim for maintenance. It is also arguable that if indeed he has withdrawn all moneys from Standard Chartered Bank in Singapore, and he has gone to India, this was with a view towards severing his connections with Singapore for the purpose of the present appeal. Be that as it may, even as at the date of Mala's petition, the moneys were not located solely in Singapore.

As for Mr Imran's argument that Jayant was working in Singapore at the time Mala's petition was filed, Jayant was not working only in Singapore during the marriage. Also, this connection can be severed without too much difficulty and indeed it has been severed.

As for the parties' immovable property, it is evident that the one in London has been sold, there are still two pieces of immovable property in India and none in Singapore.

As regards custody of and access to the children, they are children of Indian citizens and are residing in India. India is the most appropriate forum to make orders in respect of them.

Even for maintenance, while a court may wish to consider the previous standard of living of the family in Singapore, it may also want to consider the cost of living at the place where the mother and the children are at present residing.

As Lee Seiu Kin JC said in **Low Wing Hong Alvin v Kelso Sharon Leigh** [2001] 1 SLR 173 at [para]21, 'it is more important that the same court consider and decide these matters [meaning the divorce and ancillary matters such as custody and access] than to divide the issues to be decided in separate courts simply because the assets are in another jurisdiction'. It also seems to me that the real reason why Mala has commenced divorce proceedings in Singapore is not so much to obtain a divorce. As she herself has indicated, it is Jayant, not her, who wanted the divorce. There is also an e-mail from Jayant stating his intention to be engaged to Danialle. In my view, Mala has proceeded in Singapore because she thinks she will get a better deal here for the division of property and maintenance.

In all the circumstances, I find that India is clearly the most appropriate forum to decide on any divorce petition, whether filed by Mala or Jayant, and questions arising from or in relation to the divorce or the failed marriage such as division of property, custody and maintenance.

However, Mr Imran sought to persuade me that even if I should make this finding, I should not order a stay otherwise Mala would lose legitimate personal or juridical advantages. Based on the opinion from Mala`s lawyer, Indira Jaising, dated 7 April 2001, these are:

- (1) Proceedings in Singapore will be heard faster than in India.
- (2) Indian law does not recognise a wife`s contribution as a homemaker and does not provide for equal division of matrimonial assets.
- (3) Orders of Indian courts in respect of properties and assets outside India cannot be enforced outside India.

I note that the proceedings in India in respect of Jayant`s appeal to the Delhi High Court and for special leave to appeal to the Supreme Court of India have not been unduly slow. Even if, for the sake of argument, divorce proceedings will be dealt with more slowly than in Singapore, this is not sufficient to me to avoid a stay. Likewise, even if Indian law does not recognise a wife`s contribution as a homemaker. Otherwise, so long as the Singapore courts have jurisdiction, there will be a gravitation of matrimonial proceedings from a more appropriate foreign forum to the Singapore courts so that the petitioner can get a quicker hearing and a better deal. I will add that Singapore law does not provide for equal division of matrimonial assets as such. It all depends on the facts.

As for the enforcement of an Indian court order, this can be enforced directly in Singapore (if there are still moneys here) by registration of the order if it relates to the payment of a sum of money and emanates from a superior court in India or by the commencement of fresh proceedings in Singapore. Such a step does not result in duplicity or multiplicity of proceedings, as such, as Mr Imran was suggesting. It is not a sufficient reason to refuse a stay.

At this point, I digress briefly to say that I was informed by Mr Thomas that Jayant has stopped making any maintenance payment pending his appeal to the Supreme Court of India. In my view, this does not reflect well on him. If, as he maintains, the settlement is binding on the parties, then he should be acting consistently with his own position and not that of Mala`s. This is all the more so when his own lawyer, NK Kashyap, has opined on 1 March 2002 that the Delhi High Court has `decided and settled the issue of interim maintenance pending the outcome of the appeal to the Supreme Court` (see also Mr Kashyap`s opinion dated 25 March 2002 which is to the same effect, `The orders on maintenance were made ...`). On the other hand, Mala has taken the position that no such order for interim maintenance was made by the Delhi High Court. Whatever the true position, it is for her to seek such redress as she may be advised but not by way of the divorce petition or SIC 650813/2001 in Singapore.

As for a suggestion that much work has already been done in Singapore, I am of the view that such work was primarily in relation to Jayant`s application in Singapore for a dismissal or a stay and therefore cannot be a factor in avoiding a stay.

In all the circumstances, I allow the appeal and order a stay of all proceedings in DP 2792/2000 including SIC 650813/2001.

I will hear the parties on costs.

Outcome:

Appeal allowed.