

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

% *Judgment reserved on :06.3.2013*
Judgment delivered on:13.03.2013

+ **CO.APP. 18/2013**

REAL LIFESTYLE BROADCASTING PVT LTD..... Appellant

Through: Mr.Gopal Subramaniam, Sr.
Advocate with Mr.Ritin Rai,
Mr.Santanam Swaminathan,
Ms.Kartika Sharma and Mr.Manu
Sanan, Advocates.

versus

TURNER ASIA PACIFIC VENTURES INC. & ANR.

..... Respondents

Through: Mr.Rajiv Nayar, Sr. Adv. with
Mr.Rishi Agarawala and
Ms.Malavika Lal, Advocate for
R-1.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 Company petition No.20 of 2011 was filed jointly by Real Global Broadcasting Pvt. Ltd. (RGB- hereinafter referred to as the transferor company) and Real Lifestyle Broadcasting (RLB-hereinafter referred to as the transferee company/appellant) under Section 391 read with

Section 394 of the Companies Act (hereinafter referred to as the 'said Act') seeking sanction of a scheme the qua shareholders and creditors of the aforesaid two companies.

2 The transferor company was incorporated under the said Act on 11.10.2006 having its registered office at New Delhi. It was engaged in the business of broadcasting twenty four hours entertainment television programme. 50 % of the shareholding of the transferor company was held by Turner Asia Pacific Venture Inc (hereinafter referred to as Turner - the respondent) and 50% was held by the Alva Brothers Entertainment Pvt. Ltd. (ABE).

3 ABE owned Meditech Private Limited a company promoted by Nikhil Alva and Niret Alva (Alva Brothers) who were engaged in the business of television content creation. With the extension of the domestic television broadcasting industry, ABE, in 2006 incorporated the transferor company as a wholly owned subsidiary of Meditech Pvt. Ltd. with the intention of launching a television channel under the brand name "REAL". Inter-related agreements were accordingly entered into between ABE, Meditech Pvt. Ltd. and the respondent on 12.12.2007; arrangement being that ABE would continue to control Meditech Pvt. Ltd. which would generate the television content to be supplied to the transferor company and in turn the respondent would control the transferor company in its administrative, financial and legal spheres.

4 On 14.7.2008, the transferor company and the parent company of the respondent (Turner Entertainment Networks Asia Inc.) entered into a Shared Services Agreement (SSA - 'transmission agreement') for up-linking of the 'REAL Channel; from Turner's payout facility at Hong Kong. This agreement was for a period of five years containing an arbitration clause and was to be governed by the Hong Kong laws.

5 The transferor company (after the approval on 02.9.2008 by the Foreign Investment Promotion Board (FIPB) purchased 3000 Set Top Boxes (STBs) from the respondent through its nominated manufacturer Conax which was situated in Hong Kong. These 3000 Conax boxes were delivered to the respondent's India distribution arm Zee Turner Limited. These STBs were to be distributed across the country through cable operators.

6 In 2009, ABE, Meditech and the respondent commenced discussions qua the exit of the respondent from the transferor company and Meditech. A valuation report was submitted by the Chartered Accountant M/s Suri and Sudhir to calculate the Discounted Free Cash Flow (DCF) of the transferor company under the Foreign Direct Investment Policy (FDIP). On 02.6.2010 the respondent, Alva Brothers, ABE, the transferee company and Meditech entered into a Binding Term Sheet (BTS) that replaced an earlier BTS dated 18.12.2009.

7 On 25.6.2010, the transferee company was incorporated by ABE.

8 On 01.7.2010 the transferor company and the transferee company entered into a scheme which was the subject matter of Company Petition No.20 of 2011. This scheme proposed an amalgamation of the transferor company and transferee company. A joint application supported by two affidavits, both of which had been sworn by Nikhil Alva in his capacity as the director of the transferor company as also in his capacity of director of the transferee company was filed before the Company Judge. This scheme sought to cancel the shares of the transferor company and in consideration of the cancellation of the shares of the transferor company the respondent (Turner) was to be paid as under:

USD1,500,000 (US Dollar One And Half Million only) to Turner Asia Pacific Ventures Inc. Towards consideration of the cancellation of 10,000 (Ten Thousand) Equity Shares of Rs..10/- each and 214,990,000 0% Convertible Preference Shares of Rs.10/- each held by Turner Asia Pacific Ventures Inc.

Towards consideration of the cancellation of the shares held by Alva Brothers Entertainment Private Limited, Transferor Company merges into a wholly owned subsidiary of Alva Brothers Entertainment Private Limited.

9 The justification for the aforementioned scheme of arrangement/amalgamation entered into between the two companies was described as follows:

(i) *The Transferor and the Transferee Companies are engaged in the business of broadcasting of 24 hour entertainment television programming services. The Transferee Company will benefit from this synergy in the business professional expertise of the promoters and creative intelligence of the teams and the brand name*

of both the Transferor and Transferee company and will further enhance the marketability of the services under the name of the Transferee Company.

(ii) The Transferee Company will benefit from the management expertise especially in technical areas, which are essential for critical decisions.

(iii) The amalgamation of both the companies will pave the way for better and more efficient utilization of larger resources and funds.

(iv) It would also lead to growth prospectus for the personnel and organization connected with both Petitioner Companies and thus, be in the interest of and for the welfare of, the employees of the companies concerned in this Scheme, and will also be in the larger interest of the public.

10 This scheme of arrangement was sanctioned on 29.3.2011.

11 On 30.10.2012, Company application No.2076 of 2012 was filed before the Company Judge. The prayer made in the application was that the scheme which had been sanctioned by the court on 29.3.2011 had become unworkable; it was for the reason that the respondent had not complied with his part of the scheme and had failed to discharge its obligation under the scheme; the scheme had envisaged that the “entire undertaking” of the transferor company as a “going concern” would be transferred to the transferee company which included the entire distribution network including the STBs along with the software encryption keys which the respondent had failed to honour; the payment of USD 1,500,000 payable to the respondent was only contingent upon this entire undertaking to be transferred as a working business to the transferee company and there being a violation of this obligation, it was

clear that the scheme was no longer workable and in view of the provisions of Section 392 of the said Act the scheme be cancelled and an order for winding up of the transferee company be passed.

12 Before advertng to this application (filed on 30.10.2012) certain intervening events are relevant.

13 On 21.12.2011 a letter of demand /default notice was sent by the respondent to the transferee company seeking payment of USD 1,500,000 in terms of the order dated 29.3.2011. This letter contained a warning that in case the transferee company failed to honour its commitment the respondent would have no other alternative but to take legal recourse; no reply was filed to this demand. Respondent thereafter filed a contempt petition (Contempt Case No.230/2012) stating that the transferee company has failed to comply with its obligation under the scheme. A reply affidavit dated 29.6.2012 was filed by the respondent raising certain counter claims and disputing the liability. This contempt petition was disposed of on 24.9.2012 with the following order:

“I am not impressed with the assertions made by Mr. Swaminadhan. Suffice it to say that an obligation has been undertaken by the respondents before this court, which requires compliance. In the event the petitioners are required to fulfill any reciprocal obligations, as contended by the respondents, the very least that the respondents ought to have done by now, was to take recourse to an appropriate remedy, in accordance with law. Admittedly, no steps have been taken in that behalf, though the direction to deposit flows from a judgment dated 25.03.2011. As regards the submission made by the respondents, qua their purported inability to pay, no demonstrable, legally recognized steps have been

Co.App.18/2013

taken in that regard. In these circumstances, for the moment, I propose to issue a limited direction, which is, that respondents will deposit US \$ 1.5 Million, in Indian rupees, in court, at the rate of exchange which was prevalent on the date of the judgment, within six weeks from today. On the money being deposited, the same shall be invested in an interest bearing fixed deposit with a nationalized bank, by the registry. The release of the money, if deposited, would await the approval of the RBI and further orders of this court.

List on 16.01.2013.”

14 The present application was filed by the transferee company on 30.10.2012 which is after the orders were passed on the contempt petition. The submission of the learned counsel for the respondent that this application was in fact a retaliation to the contempt order passed on 24.9.2012 cannot be overlooked for the reason that there is no explanation whatsoever as to why the transferee company had to wait for more than 18 months to raise a dispute that the respondent company has not conformed to its obligation in transferring the distribution network to the transferee company.

15 The appeal filed against the order dated 24.9.2012 was disposed of by the Division Bench on 16.11.2012. The operative portion of the order of the Division Bench reads as under”

(1) The operation of the impugned order dated 24.09.2012 shall be kept in abeyance to await the decision of the learned Company Judge in C.A. 2076/2012 (in C.P.20/2011) filed by the present appellants;

(2) The learned Company Judge seized of the said application (C.A. 2076/2012) is requested to hear the parties and dispose of the said application at her earliest convenience. For this purpose, learned counsel for the parties shall be present before the learned Company Judge on 23.11.2012. Apparently, the said application has been listed for further proceedings on 16.01.2013; the learned Company Judge is requested to take-up the matter according to the Court's earliest convenience and proceed with the application and decide it as expeditiously as possible, and if possible, within three months from today.

(3) The parties are directed to approach the learned Single Judge seized of CCP.230/2012, immediately after the decision in C.A.2076/2012.

16 The impugned order dated 20.02.2013 was passed thereafter. The impugned order has rejected the twin prayers made in the application. The plea of the transferee company that the distribution network was also part of the “complete undertaking” which was to be transferred to the transferee company, in the absence of which the scheme has become unworkable was rejected. Learned single Judge while disposing of the application had, however, not foreclosed the second prayer i.e. the right of the applicant to seek a winding up in accordance with law. It was noted that since the full facts were not before the Court, an order of winding up could not be passed at that stage. Liberty had, however, been granted to the appellant to seek winding up in accordance with law.

17 This order is the subject matter of the present petition.

18 Elaborate arguments over two hours were addressed by the learned counsel for the appellant. There is a two-fold submission which

has been made before this Court. The first submission relates to Clause 1.10 and Clause 7.1 of the scheme which scheme now stands sanctioned. Clause 1.10 defines an “undertaking”. This definition reads herein as under:

“1.10 “Undertaking” shall mean and include the following:

a) All the assets, whether movable or immovable, tangible or intangible, properties, current assets, investments, claims, authorities, allotments, approvals, consents, licenses, registration, contracts, engagements, arrangements, estates, interests, intellectual property rights, power, rights and titles, benefits and advantages of whatsoever nature and wherever situate of every description belonging to or in the ownership, goodwill, power or possession and in the control of or vested in or granted in favour of or enjoyed by the Transferor Company as on the Appointed Date (hereinafter referred to as “the said assets”) and;

b) All the present and future liability and debts, duties, liabilities and obligations of every description or pertaining to, the Transferor Company, whether secured or unsecured, as on the Appointed Date (hereinafter referred to as “the said liabilities”).

Without prejudice to the generality of the foregoing, the term “Undertaking” shall include the entire business of the Transferor Company which is being carried out under the trade name of “Real Global Broadcasting Private Limited” and shall include advantages of whatsoever nature, agreements, allotments, approvals, arrangements, authorizations, benefits, capital work-in-progress, concessions, rights and assets, industrial and intellectual property rights of any nature whatsoever and licenses in respect thereof, intangibles, investments, leasehold rights, liberties, patents, permits, powers of every kind, nature and description whatsoever, privileges, provision funds, quota rights, registrations, reserves, and all

properties, movable and immovable, real, corporeal or incorporeal, wheresover situated, right to use and avail of telephones, telexes, facsimile connections, installations and other communication facilities and equipments, tenancy rights, titles, trademarks, trade names, all other utilities held by the Transferor Company or to which the Transferor Company is entitled to on the Appointed Date and cash and bank balances, all employees engaged in the Transferor Company at their respective offices, branches at their current terms and conditions, all earnest moneys and/or deposits including security deposits paid by the Transferor Company and all other interests wheresover situate, belonging to or in the ownership, power or possession of or in the control of or vested in or granted in favour of or enjoyed by or arising to the Transferor Company.”

Clause 7.1 which describes “transfer of undertaking” and reads as under:

“7.1 Transfer of the Undertaking: With effect from the Appointed Date, and subject to the provisions of the Scheme in relation to the mode of transfer and vesting, the entire Undertaking as on the Appointed Date shall, pursuant to the provisions of Section 394 and other application provisions of the Act, without any further act, deed, instrument, matter or thing, be and shall stand transferred to and vested in or deemed to have been transferred to or vested in the Transferee company, as a going concern, so as to become the undertaking of the Transferee Company.”

19 The fulcrum of the submission of the learned senior counsel for the appellant were that the transfer of the business by the transferor to the transferee was the complete “undertaking” as a “going concern”, it included the transfer of all moveable assets both tangible and intangible. It made no business sense for the transferor company to have merely

transferred the STBs without transfer of the decryption key since the real asset was the distribution network; by failing to transfer the decryption key which was true property rights in the distribution network the respondent had destroyed the commercial viability of the transferee company; the respondent has acted in complete breach of the scheme which has been envisaged between the parties. The second and alternate submission propounded by the learned counsel for the appellant being that learned single Judge has wholly misunderstood and misinterpreted the provisions of Section 392(1)(b) of the said Act; the scheme being unviable and having failed to come into effect for non-compliance of the obligation by the respondent, the necessary alternate was to wind up the appellant company which prayer has also illegally not been granted by the impugned order.

20 Arguments have been countered. Learned counsel appearing for respondent has drawn attention of this Court to the correspondences exchange between the parties both prior to the scheme and even after scheme has been sanctioned. Submission being that the appellant was at all times willing to pay the amount and in fact vide a letter dated 07.7.2012 (page 1128 of the paper book) it was stated that efforts were being made to facilitate payment to the respondent. Submission being that the present application has been filed only as an afterthought after the orders has been passed on the contempt petition preferred by the respondent, there was no question of the transfer of the distribution network to the transferee company as it did not form a part of the

scheme and this is clear from the explicit language of the terms of the scheme which is further fortified by the fact that prior to the sanction of the scheme the various correspondences exchange between the parties evidenced the fact that the STBs and the software of the encryption key was an issue being debated interse the parties and the draft MOU which was a proposed agreement between the respondent-Turner and the transferee company which was an agreement providing of the decryption key to the transferee company was in fact never executed. Learned counsel for the respondent has also drawn attention of this court to Schedule A which is the list of properties filed along with the scheme; submission being that the description of the properties proposed to be transferred by the transferor to the transferee did not at all include the software of the decryption keys.

21 In rejoinder, learned senior counsel for the appellant has drawn an additional line of argument based on the aforementioned Schedule. Submission being that the description of the plant and machinery which includes satellite receivers encompasses the encryption key to the STBs; and this has to be necessarily read from this description of the plant and machinery.

22 Record has been perused.

23 The word “arrangement” (as has been highlighted by the learned senior counsel for the appellant) has been defined under Section 390(b) of the said Act; it reads herein as under:

390. Interpretation of sections 391 and 393.- In sections 391 and 393.-

.....

(b) the expression “arrangement” includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or, by both those methods; and

The word “arrangement” is analogous in some sense to “a compromise”.

24 A scheme of arrangement/amalgamation is sanctioned under Section 391 of the said Act. At the time when Companies seek a sanction of its scheme it is incumbent upon them to make a complete disclosure of all material facts to the court.

25 The scope of the powers available to the Court to deal with an application post the sanction of the scheme are contained in Section 392 of the said Act.

26 Section 392 Sub-Clause (1) (b) and Sub-Clause (2) are relevant to answer the controversy at hand read herein as under:

“392. Power of Tribunal to enforce compromise and arrangement.-

(1) Where the Tribunal makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it-

.....

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in

the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.”

27 Section 392(1)(b) and Section 392(2) give liberty to “any person interested in the affairs of the company” to make an application that the scheme which had been sanctioned by the court is not working satisfactorily and he can accordingly under Section 392(2) seek directions to enable the scheme to work satisfactorily with or without modifications. If the court is satisfied that the scheme cannot work satisfactorily it may in the alternate order winding up of the company. The powers of the Court under this section, however, do not go beyond the implementation of the scheme which already stands sanctioned under Section 391 of the said Act. The scheme may however necessitate certain modifications for its implementation as the court may consider necessary for the proper working of the said compromise or arrangement. While the power under this section may be of a widest amplitude but it cannot be read to be unlimited. It may be invoked only for the purpose of determination or adjudication of any right or interest claimed under the sanctioned scheme. There is no dispute to the fact that if the court comes to the conclusion that the scheme is completely

unworkable, it may in its discretion order winding up of the company. Use of the word “may” under Section 392(2) indicates the discretionary power vested upon the court. This discretion however has to be exercised fairly and in the facts of each case.

28 At this stage it would be relevant to examine the application filed by the appellant vide which he had sought certain directions against the respondent (Company Application No.2076/2012). The averments made in the application are largely to the effect that the scheme which had been sanctioned on 29.3.2011 has become frustrated and it is no longer workable; in the absence of the distribution network having been transferred by the respondent as was envisaged in terms of the scheme, the transferee company has no viable asset. The “going concern” has not been transferred; the “complete undertaking” which had to be transferred in terms of clause 1.10 of the Scheme has not been adhered to. The first prayer is that the scheme accordingly be modified and respondent be directed that the 3000 STBs and their full ownership be given to the appellant with the encryption keys in the absence of which the STBs would be a useless property. Second submission is that in case the distribution network is not restored the court should wind up the appellant company.

29 The prayers made in the aforesaid application reads herein as under:

(a) *Pass necessary Orders and directions to ensure that the Scheme is workable under Sections 392 (1) and Section 394 as referred to in Para 11.2.9;*

Alternatively,

(b) Declare the impugned Scheme dated 29.03.2011 as sanctioned by this Hon'ble Court in CP/20/2011 as unworkable and cancelled and consequently order the winding up of the Applicant Company under the Companies Act, 1956;

(c) Pass such other and further order (s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

30 Record shows that the joint company application seeking sanction of the scheme was filed by the transferor and transferee company on 10.01.2011. The scheme was sanctioned on 23.9.2011. This joint application was supported by the affidavit of Nikhil Alva both on behalf the transferor as also the transferee Company.

31 No grievance was raised by the appellant right up to 30.10.2012. It was only after the (24.9.2011) order had been passed on the application filed by the respondent seeking contempt against the appellant for not complying with the directions contained in scheme for payment of 1.5 million USD to the respondent, that the present application was filed. This was nothing but a retaliation in view of the directions contained in the said order.

32 The correspondences exchanged between the parties prior to the sanction of the scheme also reflect the intent of the parties. These correspondences/e-mail (as highlighted by the learned counsel for the appellant) were prior to the date of the sanction of the scheme. The issue about the transfer of the distribution network from the transferor

company to the transferee company was always a bone of contention. Conax in its e-mail dated 25.5.2010 had clarified that Conax's policy did not permit the transfer/duplication of the security keys to another operator system due to security reasons. The e-mails dated 01.6.2000 (between the transferee company and the respondent) evidenced that the issue of the process of change to a new transmission service involving encoding, box change and so on was complex and the respondent's reply vide e-mail of the same date reflects that the respondent was willing to extend the time period by nine months to enable the Alva Brothers (on behalf of the transferee company) to find a new service provider. Thereafter a draft MOU between the transferee company, the respondent and Conax was entered into. This is evident from the mail dated 27.7.2010; this draft MOU related to the transfer of the decryption keys to the transferee company. The fact that this draft MOU was not executed is an admitted fact. Even in the correspondence of 11.11.2010 (between the Alva Brothers and Conax) the "change for key hierarchy" was an issue.

33 It is thus clear from the aforementioned correspondences which were all prior in time to the sanction of the scheme that the parties were aware that there was no agreement for providing the decryption keys to the transferee company. This is also evident from the Schedule A of the properties attached along with the scheme. There is no mention of the distribution network. This omission of the distribution network in the

list of properties cannot be accidental; it was intentional and this is evident from the prior correspondences exchanged between the parties.

34 The specific absence of the distribution network and the decryption code of the STBs answers the argument of the learned senior counsel for the appellant that this distribution network and the decryption code of the STBs did not form a part of the undertaking which was to be transferred by the transferor company to the transferee company.

35 The Court cannot add terms to the scheme which did not exist in the original sanctioned scheme. The powers of the Court are limited to giving directions which it considers necessary for the proper working of the compromise or arrangement and in the course of these directions it may only make such modifications in the said compromise or arrangement which are necessitated for the proper working of the said compromise or arrangement. It is not within the domain of the Court to read terms which were explicitly sought to be excluded under the sanctioned scheme. The provisions of the scheme and the facts and circumstances as detailed and discussed prior to the sanction of the scheme had led the single Judge to arrive at a correct interpretation of the clauses of the scheme. The respondent was under no obligation to transfer the distribution network and the decryption code of the STBs to the transferee; this was absent in the scheme and this was deliberately and intentionally excluded in the terms of the scheme. The first prayer was rightly rejected.

36 The second alternate prayer sought for by the appellant is based on a discretionary relief. As already noted supra this power is available to the Court to be exercised according to the facts and circumstances of each case. The Court in the present case has nowhere returned a conclusion that the scheme was unworkable. The terms of the scheme as is evident from para 13 (Company Petition No.20 of 2011) details the benefits which had accrued to the transferee company. These related to benefits in management expertise especially in technical areas which were essential for critical decisions and the amalgamation of both the companies had in fact paved the way for a better and more efficient utilization of the larger resources and funds of the two companies. The growth prospects for the personnel and the organizations connected with the two companies were also better; this being in the interest of the welfare of the employees of both the companies as also be in the larger interest of the public. These benefits had already accrued to the transferee company. The appellant has also acted upon the scheme. This is clear from the communication dated 07.7.2012 addressed by the Alva Brothers (on behalf of the transferee company) wherein information was sought to facilitate the payment of the amount payable (USD 1,50,000) to Turner in terms of the sanctioned scheme.

37 Under section 392(2) of the said Act the Court will not pass an order for winding up on the basis of a mere allegation without any particulars; merely on a bald submission that the scheme as sanctioned has become unworkable would not lead to the passing of a winding up

order. Unless and until the Court is satisfied that the scheme sanctioned by it cannot be implemented, the winding up order would not follow; this is inherent and implicit in the language of the Section itself where the Legislature has intentionally used the word “may”. It is not a mandate upon the Court.

38 In facts and circumstances of the present case the second prayer was also rightly refused at that stage. The learned single Judge being conscious of the provisions of the Section 392 (2) of the said Act had not foreclosed the right of the appellant; liberty has been granted to him to move an appropriate application seeking winding up of the appellant company in accordance with law. On the second prayer also no fault is found.

39 The reliance by the learned counsel for the appellant on the judgment of J.K.(Bombay) (P) Ltd. Vs. New Kaiser-I-Hind SPG & WVG. Co. Ltd. & Ors. [1969] 2 SCR 866 is misplaced. In this case pursuant to a scheme of arrangement in terms of Clause 4 of the scheme Jalan were bound not only to procure but to personally bring in the finances sufficient to work the mills. On an application filed under Section 392 the Company Judge directed Jalan to provide the necessary finance. He dismissed the winding up petition filed by the Company and Others. The appeal court noted that since the director of the company in its affidavit had itself admitted that the company had become commercial insolvent and there being no binding obligation undertaken by Jalan to pay anything to the company and to compulsorily

provide finance, this was a case where the substratum of the company had disappeared inasmuch as its business of manufacturing cotton cloth could no longer be carried out. The whole scheme being based on the assumption that the company's debt would be paid out of the profits; this could not now be implemented; in view thereof the winding up of the company was ordered. This order of the appeal court was upheld by the Supreme Court. It was noted that it was well-known to all concerned that the company has become commercially insolvent; in fact a winding up petition was pending before the concerned High court at the time when the alternate proposal for getting a scheme of arrangement sanctioned was filed. The basis of the scheme, therefore, was that a new management would replace the old, the mills would be restarted and the creditors would be paid out of the profits so earned. The Court had noted that even assuming that Jalan were under an obligation to bring in finances including their own monies, they could not be said to be under an obligation to bring in finance if the working of the mills showed no reasonable prospects of profit. The very object of the company being to manufacture cloth, if the mills had to be closed that would mean that the very object for which the company existed and which was also the assumption on which the scheme was framed ceased to exist. The winding up petition pending prior to the filing of the joint application for the sanction of the scheme had in fact proceeded on the assumption that the company was commercially insolvent; it was only in these circumstances that the Supreme Court had noted that this scheme not being workable and the substratum of the company having been lost it

was a fit case for winding up. The said facts are clearly distinguishable and would not apply to the instant factual scenario.

40 The appeal is devoid of merit. Dismissed with cost quantified at Rs.25,000/-.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

MARCH 13, 2013
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