

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****COMPANY SCHEME PETITION NO.709 OF 2014****CONNECTED WITH****COMPANY SUMMONS FOR DIRECTIONS NO.632 OF 2014**

In the matter of the Companies Act, 1956 (1 of 1956);

AND

In the matter of Sections 391 to 394 read with Sections 52 of Companies Act, 2013 and Sections 100 of 103 of the Companies Act, 1956;

AND

In the matter of Scheme of Arrangement between Indian Seamless Enterprises Limited (ISEL).

Indian Seamless Enterprises Limited,)
a Company incorporated under the Act and having its)
registered address at Lunkad Tower, Off. Nagar Road,)
Viman Nagar, Pune-411 014, Maharashtra, India)..Petitioner Company

Mr. Virag Tulzapurkar, Senior Advocate, along with Mr. Hemant Sethi, instructed by M/s. Hemant Sethi & Co., for the Petitioner.

Mr. Shyam Mehta, Senior Advocate, along with Mr. C.J. Joy, for the Regional Director.

CORAM; S.J. KATHAWALLA, J.

Judgment reserved on : 8th May, 2015

Judgment pronounced on: 15th Sept. 2015

JUDGMENT:

1. By this Petition filed under Sections 391 to 394 of the Companies Act, 1956 (“the 1956 Act”) the Petitioner seeks sanction of this Court to a scheme of arrangement between the Petitioner and its Shareholders (“the Scheme”). By the Scheme, the Petitioner seeks to make a gift of the shares held by the Petitioner in a Company known as Taneja Aerospace and Aviation Limited (“TAAL”) to its Shareholders in the ratio of one fully paid up equity share of TAAL for one fully paid up equity share of the Petitioner and one fully paid up equity share of TAAL for every two partly paid up equity shares of the Petitioner. Pursuant to the gift of the aforesaid equity shares of TAAL to its Shareholders, the Petitioner proposes to reduce the balance lying in its Securities Premium Account (“SPA”) by the book value of the Petitioner’s investment in the shares of TAAL as appearing in the books of accounts of the Petitioner on the record date. The reduction of the SPA is sought in terms of the provisions of Sections 100 to 104 of the 1956 Act read with Section 52 of the Companies Act 2013 (“the 2013 Act”). The Board of Directors of the Petitioner Company approved the Scheme at its Meeting held on 26th June 2014.

2. By an Order dated 8th August 2014 passed by this Court in Company Summons for Directions No.632 of 2014, this Court convened Meetings of the Equity

Shareholders and Unsecured Creditors of the Petitioner Company on 15th September 2014 for the purpose of considering the Scheme. Since there were no secured creditors of the Petitioner Company, no meeting of secured creditors was convened. At the Meetings of the Shareholders and Unsecured Creditors the Scheme was unanimously approved. Thereafter the Petitioner filed the present Company Scheme Petition and served copies thereof on the Regional Director as well as the Registrar of Companies, Pune and the concerned Income Tax Department. The Regional Director has filed his Affidavit dated 6th January, 2015, placing on record his observations and comments with regard to the Scheme. The Regional Director has objected to the Scheme being sanctioned by this Court. The Petitioner Company has filed an Affidavit dated 12th February 2015 in response to the Affidavit of the Regional Director seeking to answer the objections of the Regional Director.

3. I have heard Mr. Virag Tulzapurkar, the learned Senior Counsel appearing for the Petitioner and Mr. Shyam Mehta, the learned Senior Counsel appearing for the Regional Director at some length. The Petitioner Company as well as the Regional Director thereafter filed their Written Submissions in the matter dated 29th April, 2015 and 30th June, 2015 respectively.

4. Broadly speaking the Regional Director is objecting to the Scheme on the following grounds :

a) The Scheme violates Section 205 of the 1956 Act and Section 123 of the 2013 Act, inasmuch as by gifting the shares of TAAL to its Shareholders,

the Petitioner Company is in effect giving dividend to its Shareholders in kind, which is prohibited by the aforesaid provisions.

- b) The Scheme also violates Section 281 of the Income Tax Act, 1961 inasmuch as in view of the pendency of certain demands and proceedings under the Income Tax Act against the Petitioner Company, the proposed gift of the Petitioner's shares in TAAL to its Shareholders would be void as against any claim in respect of any tax or any other sum payable by the Petitioner on account of completion of the aforesaid proceedings.

5. Before dealing with the submissions of the Parties it is necessary to advert to certain facts which are relevant for the purpose of deciding the controversy. The Petitioner Company holds a certain number of shares of TAAL as an investment. The book value of these shares as on 28th February 2014 (unaudited/provisional) is shown as Rs.14,10,32,676/- i.e. Rs.12.86 per share. TAAL is a Listed Company and its shares are traded on the Bombay Stock Exchange ("BSE"). From the information available on the BSE portal the shares of TAAL were quoted at Rs. 50/- on 9th October 2014, Rs.82.55 on 11th December 2014 and Rs.86.40 on 26th June 2015. The market value of the shares of TAAL is therefore much higher than their book value. The Petitioner Company has incurred a loss of Rs. 8,98,81,844/- as on 31st March 2013. From the unaudited/provisional financial statements as on 28th February 2014 annexed to the Petition, it appears that the Petitioner Company has made a profit of Rs.4,88,20,709/- as on 28th February 2014 after adjusting certain exceptional items. Without this

adjustment the Petitioner Company has incurred a loss of Rs.3,76,81,881/- as on 28th February 2014.

6. The concerned Income Tax Department has, after being served with a copy of the Petition, examined the Scheme and furnished its comments and observations thereon to the Regional Director. These comments and observations are contained in the letter dated 27th October 2014 of the Dy. Commissioner of Income Tax, Central Circle 2(1), Pune, addressed to the Regional Director. The Income Tax Department has informed the Regional Director that the following proceedings are pending against the Petitioner under the Income Tax Act :-

- i) Assessment proceedings in respect of AY 2013-14 i.e. FY 2012-13;
- ii) Outstanding demands of Rs.1,16,57,000/- and Rs.1,09,57,772/- in respect of AY 2006-07 and AY 2007-08 respectively.
- iii) Penalty proceedings in respect of AYs 2006-07 to 2012-13.

The Company has not disputed the fact that the aforesaid proceedings are pending against it. The Income Tax Department has also objected to the Scheme and prayed that the same ought not to be approved by the Court.

7. Coming to the objections of the Regional Director, his first and primary objection is that the Scheme is violative of Section 205 of the 1956 Act corresponding to Section 123 of the 2013 Act. Since Section 123 of the 2013 Act has come into force, I will henceforth refer only to Section 123. Mr. Mehta, the learned Senior

Counsel appearing for the Regional Director submits that the gift of the shares of TAAL by the Petitioner Company to its Shareholders constitutes payment of dividend by the Petitioner to its Shareholders. According to him Section 123 of the 2013 Act prohibits the payment of dividend by a company to its shareholders otherwise than in cash. He submits that by the Scheme the Petitioner is issuing dividend to its Shareholders in the form of the shares of TAAL and that this amounts to payment of dividend in kind, which is contrary to Section 123. Elaborating his submissions, Mr. Mehta submits that the expression “*dividend*” in Section 123 has to be understood in its ordinary sense. He submits that the definition of “*dividend*” in Section 2(35) of the 2013 Act is “*dividend includes any interim dividend*”, and the same is an inclusive definition and does not exclude from its purview the ordinary meaning of “*dividend*”. According to Mr. Mehta, the ordinary meaning of “*dividend*” will include the distribution of any property of a company in kind amongst its shareholders. In support of his contention Mr. Mehta relies upon the decisions of the Hon’ble Apex Court in the case of *Kantilal Manilal v/s CIT*¹ and in the case of *CIT v/s Central India Industries Ltd.*². He further submits that the market value of the shares of TAAL is much higher than their book value and therefore there is no doubt at all that the Petitioner is distributing the revenue or profit that it would have earned from the sale of the shares of TAAL. He submits that once it is found that the gift of the shares of TAAL by the Petitioner Company to its Shareholders amounts to payment of dividend,

¹ (1961) 41 ITR 275

² (1972) 3 SCC 311

then this is a violation of the provisions of Section 123 and is therefore illegal. He submits that it is well settled that a Scheme is required to comply with all laws including the Companies Act and that consequently if the Scheme violates Section 123 of the 2013 Act the same is illegal and ought not to be sanctioned.

8. On the other hand Mr. Tulzapurkar, learned Senior Counsel appearing on behalf of the Petitioner urged that Sections 391 to 394 of the 1956 Act are a complete code and that under these sections a company is conferred with wide powers to undertake any kind of scheme of compromise or arrangement with its shareholders, creditors etc. including a scheme involving the distribution of shares to its shareholders. He submitted that these powers cannot be taken away by the other Sections of the 1956 Act or the 2013 Act including Sections 105 and 123. He further submitted that Sections 205 and 123 have no application in the present case. According to him where a company has more than one mode available for corporate action, the choice lies with the company. In the present case the Petitioner Company has opted for the procedure under Sections 391 to 394 read with Sections 100 to 104 of the 1956 Act which is a legally permissible procedure for the Petitioner Company to follow. He further submits that once the Petitioner Company has adopted a legally permissible procedure, there can be no violation of Sections 205 and 123. Hence it is the submission of Mr. Tulzapurkar that the Petitioner Company had the option of distributing its assets viz. the shares of TAAL amongst its Shareholders by following the procedure under Sections 391 to 394 read with Sections 100 to 104 of the 1956

Act, which is a legally permissible procedure under the 1956 Act and hence the Scheme is in accordance with the law and cannot be said to be violative of Sections 205 or 123, and in fact the latter Sections have no applicability at all. In support of his contentions, Mr. Tulzapurkar relied upon the decisions of this Court in *SEBI v/s Sterlite (India) Industries Limited*³ and *PMP Auto Limited*⁴ and the unreported decisions of this Court in *Tatanet Services Limited*⁵, *Zicom Electronic Security Systems Limited*⁶, *Balkrishna Industries Limited*⁷, *Balkrishna Paper Mills Ltd.*⁸ and *Balkrishna Synthetics Ltd.*⁹ He also relied upon the decision of the Hon'ble Apex Court in *Miheer Mafatlal v/s Mafatlal Industries Limited*¹⁰.

9. Dealing with the argument of the Regional Director that the distribution of the shares of TAAL by the Petitioner amongst its Shareholders constitutes payment of dividend, Mr. Tulzapurkar submitted that the Regional Director's reliance on the decisions of the Hon'ble Apex Court in the case of Kantilal Manilal (supra) and in the

3 (2003) 45 SCL 475 (Bom.)

4 (1995) 5 Comp LJ 598

5 Unreported decision of this Court (Vazifdar, J.) dated 3rd March, 2006 in Company Petition Nos. 758 and 759 of 2005

6 Unreported decision of this Court (Khanwilkar, J.) dated 23rd November, 2007 in Company Petition No. 813 of 2007

7 Unreported decision of this Court (Bhosale, J.) dated 10th October, 2007 in Company Petition Nos. 713 of 2007

8 Unreported decision of this Court (Bhosale, J.) dated 10th October, 2007 in Company Petition Nos. 714 of 2007

9 Unreported decision of this Court (Bhosale, J.) dated 10th October, 2007 in Company Petition Nos. 715 of 2007

10 (1996) 87 Com. Cas 792

case of Central India Industries Limited (supra) is misconceived. He submitted that both these decisions relate to proceedings under the Income Tax Act, and are based on a special definition of “dividend” as provided in the Income Tax Act which was different from the definition of “dividend” under the 1956 Act as well as the 2013 Act and accordingly the said decisions of the Hon’ble Apex Court had no relevance in the present case. He further submitted that it was not permissible for the Regional Director to import the meaning of “dividend” as contained in the Income Tax Act into the 1956 Act or the 2013 Act and that the said meaning could not be relied upon in the context of the Companies Acts. He further submitted that the decisions of the Hon’ble Apex Court in Kantilal Manilal (supra) and Central India Industries Limited (supra) related to the taxability of dividend in the hands of shareholders and not the company and that as far as the Companies Act is concerned, the distribution of dividend should be considered from the company’s perspective and not the shareholders’ perspective. In support of his submissions Mr. Tulzapurkar relied on the decisions of the Hon’ble Apex Court in *CIT v/s Nalin Behari Lal Singha*¹¹, *Bangalore Turf Club Limited v/s Regional Director Employees State Insurance Corporation*¹², *Whirlpool Corporation v/s Registrar of Trade Marks, Mumbai*¹³, *Union of India v/s R.C. Jain*¹⁴, *State of Punjab V/s S.S. Singh*¹⁵, *Ranjit Singh v/s State of Haryana and Pankaj*

11 (1969) 2 SCC 310

12 (2009) 15 SCC 33

13 (1998) 8 SCC 1

14 (1981) 2 SCC 308

15 AIR 1961 SC 493

*Mehra v/s State of Maharashtra*¹⁶ . Mr. Tulzapurkar also relied on an order passed by this Court in the case of *KEC Infrastructures Limited*¹⁷ on 27th September 2005, sanctioning a Scheme involving the distribution of shares by KEC International Limited in KEC Infrastructure Limited to the shareholders of KEC International Limited and submitted that the case was similar to the present one and that this Court had already sanctioned a similar scheme in the past. Mr. Tulzapurkar further relied upon an Order dated 22nd September 1995 passed by the Hon'ble Calcutta High Court in the case of *Bata Properties Limited*¹⁸. For all these reasons Mr. Tulzapurkar submitted that the objections of the Regional Director on this count are untenable and are liable to be rejected.

10. Mr. Mehta, the learned Senior Counsel appearing for the Regional Director in response to the submissions of Mr. Tulzapurkar submitted that every scheme of compromise and/or arrangement under Sections 391 to 394 of the 1956 Act was required to comply with all laws and that the Companies Act was no exception. In other words, according to him the Scheme, even though framed under Sections 391 to 394 read with Sections 100 to 104 of 1956 Act, was also required to comply with the other provisions of the 1956 Act as well as the provisions of the 2013 Act. Merely because the Scheme was formulated under Sections 391 to 394 read with Sections

¹⁶ (2000) 2 SCC 756

¹⁷ Unreported decision of this Court (A.M. Khanwilkar, J.) dated 27th September, 2005 in Company Petition No. 416 of 2005

¹⁸ Unreported decision of Calcutta High Court (Baboo Lall Jain, J.) dated 18th September, 1995 in Company Petition No. 300 of 1995.

100 to 104 of the 1956 Act, it does not mean that the Scheme could violate the other provisions of the 1956 Act or the provisions of the 2013 Act. He submitted that none of the decisions relied upon by Mr. Tulzapurkar suggest that a Scheme under Sections 391 to 394 need not comply with the other provisions of the 1956 Act or the provisions of 2013 Act or that such a Scheme can violate the aforesaid provisions, and therefore the said decisions cited by Mr. Tulzapurkar did not assist the Petitioner's case. Mr. Mehta further submitted that he was not relying on the meaning of "dividend" as contained in the Income Tax Act to support his argument that the Scheme was violative of Section 123 of the 2013 Act, in that the Petitioner Company was issuing dividend in kind by gifting the shares of TAAL to its Shareholders, but he was relying on the ordinary meaning of the word "dividend". He submitted that the ordinary meaning of "dividend" was not excluded from the definition of "dividend" contained in either the 1956 Act or the 2013 Act, or for that matter the Income Tax Act. According to him, in the decisions of the Hon'ble Apex Court in *Kantilal Manilal (supra)* and *Central India Industries Limited (supra)*, the Hon'ble Apex Court had considered the ordinary meaning of the word "dividend" and held that the distribution of assets by a company in kind will also amount to payment of dividend. He therefore submitted that the aforesaid decisions of the Hon'ble Apex Court were squarely applicable in the facts of the present case. He further submitted that if any distribution of cash or other property by a company amongst its shareholders amounts to dividend in the hands of the shareholders, it will also constitute distribution of dividend by the company and what is dividend received by a shareholder is equally

dividend issued by a company. In the light of these submissions he submitted that the decisions relied upon by Mr. Tulzapurkar in relation to importing a meaning from one Act to another, has no relevance at all. As regards the order passed by this Court in the case of KEC Infrastructure Limited, Mr. Mehta submitted that there was no objection raised by the Regional Director or any other party in that case as has been raised in the present case and hence that order cannot be relied upon for the purpose of sanctioning the present Scheme. The same was the case with the Order passed by the Calcutta High Court in the case of Bata Properties Limited (supra). He further submitted that in any event once it was shown that the present Scheme was illegal, the Court ought not to sanction the Scheme even though a similar scheme was sanctioned in the past.

11. I have considered the above submissions of the Petitioner as well as the Regional Director. The question that arises for consideration is whether the Scheme violates Section 123 of the 2013 Act. The answer to this question depends on whether the gifting of the shares of TAAL by the Petitioner Company to its Shareholders amounts to the Petitioner giving dividend to its Shareholders. To determine this question one will have to examine the relevant provisions of the 2013 Act relating to dividend and the same are reproduced herein below for convenience :-

“Definitions.

2. *In this Act, unless the context otherwise requires --*

.....

(35) “dividend” includes any interim dividend”;

“Declaration of dividend

123(1)

(2)

(3)

(4)

(5) No dividend shall be paid by a company in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash;

Provided that nothing in this sub-section shall be deemed to prohibit the capitalization of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

Provided further that any dividend payable in cash may be paid by cheque or warrant or in any electronic mode to the shareholder entitled to the payment of the dividend.”

12. At this stage it will also be apposite to notice the definition of “dividend” as contained in the Income Tax Act, 1922 and the Income Tax Act, 1961. The definition of “dividend” contained in the Income Tax Act, 1922 is as follows :-

"2. In this Act, unless there is anything repugnant in the subject or context--

6(a) - “dividend” includes”

The definition of "dividend" contained in the Income Tax Act, 1961 is as follows:

2. Definitions:

.... ..

(22) “dividend” includes”

Except for the opening words in the above definitions of dividend, the rest of the definition is not relevant for the present purposes as it is nobody’s case that gifting of the shares of TAAL by the Petitioner Company to its Shareholders constitutes dividend as specifically defined in the various sub-clauses of Section 2(22) of the Income Tax Act, 1961.

13. I will first consider the argument of Mr. Tulzapurkar that the Petitioner Company is conferred with the widest powers to formulate any kind of scheme of compromise and/or arrangement with its shareholders under Sections 391 to 394 of the 1956 Act. According to him, where a company has more than one modality available for any corporate action, the choice lies with the company to select the one which it deems appropriate. In this case the Petitioner Company has opted for and followed the procedure prescribed under Sections 391 to 394 read with Sections 100 to 104 of the 1956 Act for the purpose of gifting its shares in TAAL to its Shareholders. He submitted that once the Petitioner Company has followed a legally prescribed procedure for entering into an arrangement with its shareholders, Section 123 of the 2013 Act will have no application and will not come in the way of such a Scheme. It is not possible to accept the aforesaid submissions of Mr. Tulzapurkar. It is trite law that every Scheme under Sections 391 to 394 of the Companies Act must

comply with all laws and must not be violative of any provision of law. It follows that apart from complying with the provisions of Sections 391 to 394, the Scheme must also comply with the other provisions of the Companies Act and must not be contrary to any of those provisions. In my view therefore it cannot be said that merely because the Scheme is propounded under Sections 391 to 394 read with Sections 100 to 104 of the 1956 Act, the Scheme need not comply with the other provisions of the 2013 Act as applicable including the provisions of Section 123 of the 2013 Act. In my opinion the Scheme must not violate any of the other provisions of the 1956 Act and the 2013 Act including the said Section 123.

14. To support his contention Mr. Tulzapurkar has relied upon the decision of the Hon'ble Apex Court in the case of Miheer Mafatlal(supra). In my opinion, far from supporting the argument of Mr. Tulzapurkar, the ratio of the aforesaid decision clearly establishes that no scheme of compromise and arrangement can be violative of any provision of law including the Companies Act. This is clear from the following extract taken from the aforesaid decision :-

“In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the company court has clearly got earmarked. The following broad contours of such jurisdiction have emerged :-

....
....

(6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.”

15. Mr. Tulzapurkar placed heavy reliance on the decision of the Division Bench of this Court in the case of Sterlite Industries (India) Limited to support his argument that the Court has the widest powers under Sections 391 to 394 to approve or sanction any scheme of compromise or arrangement and that a company is at liberty to select one of the several modalities available for any corporate action. In support of his contention, Mr. Tulzapurkar also relied upon the unreported decisions of this Court in the case of Tatanet Services Limited (supra), Balkrishna Industries Ltd. (supra), Balkrishna Paper Mills Ltd. (supra), Balkrishna Synthetics Limited (supra) and Zicom Electronic Security Systems Limited (supra). However, none of the decisions relied on by Mr. Tulzapurkar state that a scheme of compromise and arrangement under Sections 391 to 394 is required to be sanctioned even though it is found that the scheme violates some provision of the Companies Act. These decisions at best show that a company can follow the procedure under Sections 391 to 394 and enter into a scheme of compromise and/or arrangement with its shareholders and/or creditors and that by such a scheme a company may do something for which another method may also be prescribed by the Companies Act. For example, in the case of

Sterlite Industries (India) Limited this Court held that even though Section 77A of the 1956 Act prescribed the procedure for a company to buy back its own shares, the company had the option of buying back its own shares by following the procedure under Sections 391 to 394 subject to compliance with Sections 100 to 104 of the 1956 Act. Significantly, Section 77A did not prohibit the buy back of shares by a company but only prescribed a method for doing so. As such that was not a case where the Scheme in question was found to be violative of any other provision of the Companies Act. In fact this Court held that a company could buy back its shares either by following the procedure under Section 77A or the procedure under Sections 391 to 394 subject to compliance with Sections 100 to 104 of the 1956 Act.

16. As regards the unreported decision of this Court in Tatanet Services Limited relied upon by Mr. Tulzapurkar, it appears that in that case the Regional Director had raised a contention that the Petitioner therein could have transferred the undertaking of the company by availing of the provisions of Section 393(1)(a) of the 1956 Act and that it was not necessary for the Petitioners to file a Petition under Sections 391 and 394. In that context this Court held that if the Petitioners have chosen a more elaborate route which has the same object, they could not be faulted for the same. The decision in Tatanet Services was followed by this Court in the later unreported decisions in the case of Balkrishna Industries Ltd. (supra), Balkrishna Paper Mills Ltd. (supra) Balkrishna Synthetics Limited (supra) and Zicom Electronic Security Systems Limited(supra). In both these decisions there was no contention raised by the

Regional Director that the scheme in question violated any other provision of the Companies Act. The only contention raised was that there was another route available to achieve the same objective. In the circumstances neither of these decisions are of any aid to the Petitioner herein.

17. In the present case the argument of the Regional Director is not that the Petitioner Company ought to have followed another procedure for the purpose of gifting the shares of TAAL to its Shareholders. The contention of the Regional Director is that such a gift of shares is violative of the provisions of Section 123 of the 2013 Act. None of the decisions cited by Mr. Tulzapurkar deal with a case where the contention of the Regional Director was that the scheme in question was contrary to any provision of the 1956 Act. This is the material difference between the case in hand and the decisions cited by Mr. Tulzapurkar. Consequently none of the above decisions cited by Mr. Tulzapurkar are applicable in the facts of the present case and do not take the case of the Petitioner Company any further. On the other hand the decision of the Hon'ble Apex Court in Miheer Mafatlal's case categorically holds that a scheme of compromise and/or arrangement must not violate any provision of law. Consequently the decisions of this Court cited by Mr. Tulzapurkar are irrelevant in the context of the objections of the Regional Director that the Scheme is violative of Section 123 of the 2013 Act.

18. Further if one looks at Section 123 of the 2013 Act, it is clear that it does not prescribe any modality or method for declaration of dividend. It prescribes conditions

to be complied with by a company before declaring dividend. Hence Section 123 is not a modality to be followed for the purpose of issuing dividend as suggested by Mr. Tulzapurkar. It is clear that if a company wishes to issue or declare dividend it is mandatorily required to comply with the provisions of Section 123. It is therefore not possible to accept the submission of Mr. Tulzapurkar that if a company wishes to distribute its properties among its shareholders by following the procedure prescribed under Sections 391 to 394, Section 123 will not be applicable and the company therefore need not comply with the conditions prescribed by Section 123. If such a contention is accepted, it will mean that companies can declare dividends in violation of Section 123 merely by following the procedure prescribed by Sections 391 to 394. For this reason also I am of the view that even if a company distributes its assets amongst its shareholders by means of a scheme of compromise or arrangement under Sections 391 to 394, such a company will be required to comply with the provisions of Section 123 if such distribution of assets amounts to distribution of dividend. In other words no dividend can be issued by a company without strictly complying with the provisions of Section 123 of the 2013 Act.

19. This brings me to the central question that arises in the present case i.e. whether the gift of the shares of TAAL by the Petitioner Company to its Shareholders constitutes a violation of Section 123 of the 2013 Act. The submission of Mr. Mehta on behalf of the Regional Director is that the gift of the shares of TAAL by the

Petitioner Company to its Shareholders is a violation of Section 123 of the 2013 Act inasmuch as the same constitutes and amounts to payment of dividend by the Petitioner Company to its Shareholders. The question that therefore arises for consideration is whether gift of shares of TAAL by the Petitioner Company to its Shareholders constitutes and amounts to payment of dividend by the Petitioner Company to its Shareholders.

20. From the definition of “*dividend*” contained in Section 2(35) of the 2013 Act, it is evident that the same is an inclusive definition. It is well settled that an inclusive definition is expansive in nature and is used to widen the meaning of a particular word or expression. While an inclusive definition may specify the acts or things that will be covered by the definition, it does not exclude the ordinary meaning of the expression or word. Accordingly, in my view, the inclusive definition of the expression “*dividend*” in the 2013 Act will not exclude from its purview the meaning of “*dividend*” in its ordinary sense. In other words, the expression “*dividend*” used in the 2013 Act will have to be understood in its ordinary sense and be given its ordinary meaning. The only consequence of the definition of “*dividend*” in Section 2(35) of the 2013 Act is that “*dividend*” will also include interim dividend.

21. The view I have taken with respect to the meaning of “*dividend*” in the 2013 Act is supported by two decisions of the Hon’ble Apex Court relied upon by Mr. Mehta and referred to above viz. the decisions in the case of Kantilal Manilal (*supra*) and Central India Industries (*supra*). Although both these decisions were rendered in the

context of the provisions of the Income Tax Act, 1922, the ratios of these decisions will be applicable and relevant in the context of the Companies Act also in view of the fact that even the definition of “*dividend*” in the Income Tax Act, 1922 was an inclusive definition, as is clear from Section 2(6a) of the Income Tax Act, 1922 reproduced hereinabove. In *Kantilal Manilal*, the Appellants before the Hon’ble Apex Court held 570 shares of Navjivan Mills Limited. It seems that Navjivan Mills held 5000 shares of the Bank of India Limited. On 6th May 1948 the Bank of India passed a resolution increasing its share capital and approving the allotment of new shares to its existing shareholders. Navjivan Mills, as a holder of 5000 shares of the Bank of India, became entitled to receive 1666.6 shares of the Bank of India. It appears that the management of Navjivan Mills was not inclined to acquire these 1666.6 shares offered by the Bank of India. Accordingly the Board of Directors of Navjivan Mills passed a resolution to the effect that Navjivan Mills would acquire only 66 shares out of 1666.6 shares offered by the Bank of India and the right to the remaining 1600 shares shall be distributed amongst the shareholders of Navjivan Mills proportionately. The Appellants before the Hon’ble Apex Court became entitled to 1440 shares of the Bank of India which they acquired and ultimately transferred to a Private Company by the name of Jesinghbai Investment Company Limited. Sometime later the assessment of the Appellants before the Hon’ble Apex Court and of other shareholders of Navjivan Mills was reopened by the Income Tax Department on the footing that the release of the shares of the Bank of India by Navjivan Mills to its shareholders amounted to distribution of dividend and the value of the rights

released in favour of the shareholders had escaped tax. It was in this context that the Hon'ble Apex Court was called upon to decide whether the distribution of the right to acquire the shares of the Bank of India by Navjivan Mills amongst its shareholders amounted to distribution of dividend. The Hon'ble Apex Court came to the conclusion that it did. In the process, the Hon'ble Apex Court held as follows :-

*“6. Counsel for the appellants contended that the High Court was not justified, having regard to the form of the question which expressly related to the distribution of the right to the Bank of India shares being divided within the meaning of the definition in Section 2(6-A) of the Income Tax Act, in enlarging the scope of the question and in answering it in the light of its ordinary meaning. There is no substance in this contention. **“dividend” is defined in Section 2(6-A) as inclusive of various items and exclusive of certain others which it is not necessary to set out for the purpose of this appeal. “dividend” in its ordinary meaning is a distributive share of the profits or income of a company given to its shareholders. When the Legislature by Section 2(6-A) sought to define the expression “dividend” it added to the normal meaning of the expression several other categories of receipts which may not otherwise be included herein. By the definition in Section 2(6-A), “dividend” means dividend as normally understood and includes in its connotation several other receipts set out in the definition. The Tribunal had referred the question whether the distribution of the right to apply for the Bank of India shares amounted to distribution of dividend within the meaning of Section 2(6-A) and in answering that question, the High Court had to take into account both the normal***

and the extended meaning of that expression. In the question framed by the Tribunal, there is nothing to indicate that the High Court was called upon to advise on the question whether the receipts by the appellants amounted to dividend only within the extended definition of that expression in Section 2(6-A).

7. *It was also urged that in nominating its shareholders to exercise the option to purchase the new issue of the Bank of India, the Mills did not distribute any dividend. The Mills were, it is true, not obliged to accept the offer made by the Bank of India, however advantageous it might have been to the Mills to accept the offer: it was open to the Mills to renounce the offer. The Mills had three options, (1) to accept the shares, (2) to decline to accept the shares, or (3) to surrender them in favour of its nominee. It is undisputed that when the shares were offered by the Bank of India to its shareholders, the right to apply for the shares had a market value of Rs.100 per share. The face value of the new share was Rs.50 but the shareholders had to pay a premium of Rs.50, thus making a total payment of Rs.100 for acquiring the new share. The new shares were quoted in the market at more than Rs.200: and the difference between the amount payable for acquiring the shares under the right offered by the Bank of India and the market quotation of the shares was indisputably the value of the right. The Mills could not be compelled to obtain this benefit if it did not desire to do so: it could accept the shares or decline to accept those shares or exercise the option of surrendering them in favour of its nominees.*

This last option could be exercised by nominating the persons who

were to take over the shares and that is what the Mills did. The Mills requested the Bank of India to allot the shares to its nominees, and the request for allotment to its nominees amounted to transfer of the right. By its resolution, the Mills in truth transferred a right of the value of Rs.200 for each share held by its shareholders. This was manifestly not distribution of the capital of the Mills. **It was open to the Mills to sell the right to the shares of the Bank of India in the market, and to distribute the proceeds among the shareholders. Such a distribution would undoubtedly have been distribution of dividend. If instead of selling the right in the market and then distributing the proceeds, the Mills directly transferred the right, the benefit in the hands of the shareholders was still dividend.**

8. **Dividend need not be distributed in money; it may be distributed by delivery of property or right having monetary value. The resolution, it is true, did not purport to distribute the right amongst the shareholders as dividend. It did not also take the form of a resolution for distribution of dividend; it took the form of distribution of a right which had a monetary value. But by the form of the resolution sanctioning the distribution, the true character of the resolution could not be altered. We are therefore of the view that the High Court was right in holding that the distribution of the right to apply for and obtain two shares of the Bank of India (at half their market value) for each share held by the shareholders of the Mills amounted to distribution of dividend.” (Emphasis supplied)**

22. From the above decision of the Hon'ble Apex Court it is apparent that the Hon'ble Apex Court considered the inclusive definition of the expression "*dividend*" as contained in Section 2(6a) of the Income Tax Act, 1922 and its meaning, and clearly held that the expression "*dividend*" means dividend as ordinarily understood and includes in its connotation the other items set out in the definition. The Hon'ble Apex Court further held that when the Legislature defined the expression "*dividend*" in Section 2(6A) it added to the normal meaning of the expression several other categories of receipts which may not otherwise be included therein. In other words, the Hon'ble Apex Court held that the ordinary meaning of the expression "*dividend*" would be applicable and was not excluded by virtue of the inclusive definition of the the said expression. The Hon'ble Apex Court thereafter went on to hold that it was open to Navjivan Mills to sell the right to the shares of the Bank of India in the market and distribute the sale proceeds among its shareholders, which distribution would undoubtedly have been distribution of dividend. The Hon'ble Apex Court held that if, instead of selling the right in the market and then distributing the sale proceeds, the Navjivan Mills directly transferred the right to its shareholders, the benefit in the hands of the shareholders was still dividend. According to the Hon'ble Apex Court dividend need not be distributed only in money but may be distributed by delivery of property or a right having monetary value. The Hon'ble Apex Court further held that even though the resolution passed by the Navjivan Mills did not purport to distribute the right amongst the shareholders as dividend, it did not make any difference inasmuch as it was not the form of the resolution that mattered but the true character

thereof. In these circumstances the Hon'ble Apex Court came to the conclusion that the distribution of the right to apply for and obtain the shares of the Bank of India by Navjivan Mills to its shareholders amounted to distribution of dividend.

23. Applying the ratio of the decision of the Hon'ble Apex Court in Kantilal Manilal in the present case, there is no doubt in my mind that the gifting of the shares of TAAL by the Petitioner Company to its Shareholders constitutes and amounts to the distribution and payment of dividend. As held by the Hon'ble Apex Court the inclusive definition of "*dividend*" in the Income Tax Act did not exclude from its purview the ordinary meaning of dividend. In my view the same is the situation in the context of the 2013 Act. The definition of "*dividend*" in Section 2(35) of the 2013 Act will not exclude from its purview the meaning of dividend as ordinarily understood. The expression "*dividend*" as used in the 2013 Act will therefore include dividend in its ordinary sense. As held by the Hon'ble Apex Court in Kantilal Manilal (supra) even the distribution of properties or rights having monetary value by a company amongst its shareholders will constitute dividend. The form of resolution passed by the company is not relevant, but its substance is relevant. In Kantilal Manilal (supra) the Hon'ble Apex Court held that the distribution of the right to acquire shares constituted distribution of dividend. In the present case it is not just the right to acquire shares that is being gifted by the Petitioner Company to its Shareholders, but it is the shares themselves that are being gifted. The Petitioner Company is distributing its shares in TAAL to its Shareholders by way of a gift. In my

view this is clearly distribution of dividend by the Petitioner Company. The Company could very well have sold the shares of TAAL in the market and distributed the proceeds amongst its Shareholders. Instead the Company is directly gifting the said shares to its Shareholders. Such a gift in the hands of the Shareholders would clearly be dividend. Mr. Tulzapurkar submitted that in the case of Kantilal Manilal, the Hon'ble Apex Court was considering whether the distribution of the right to acquire shares was taxable in the hands of the shareholders and not the company, and that for the purposes of the Companies Act the distribution of dividend should be considered from the company's perspective and not the perspective of the shareholders. In my view it makes little difference that the Hon'ble Apex Court was considering the matter from the angle of taxability of dividend whether in the hands of the shareholders or the company. In my view the expression "*dividend*" in its ordinary sense must mean the same thing whether considered in the context of the Income Tax Act or the Companies Act. What constitutes dividend when declared or issued by the company will equally be dividend when received by its shareholders. In the light of the aforesaid discussion, in my view, there can be no doubt that by gifting the shares of TAAL the Petitioner Company is in fact distributing dividend amongst its Shareholders.

24. The decision in Kantilal Manilal (supra) was subsequently followed by the Hon'ble Apex Court in the case of Central India Industries (supra). In that case the assessee company received dividend partly in cash and partly in shares. Once again

the question arose as to whether the receipt of shares by the assessee company was taxable as dividend. The Hon'ble Apex Court followed its earlier decision in Kantilal Manilal and came to the conclusion that since the distribution of property or right having monetary value also constitutes distribution of dividend, and dividend need not be distributed in money only, the dividend by way of handing over of shares also constituted dividend and was taxable. The Hon'ble Apex Court further held that if it were otherwise, companies may distribute dividend in kind and facilitate evasion of tax by shareholders and this would be destructive of the very basis of taxation of dividends. Both the decisions of the Hon'ble Apex Court viz. the decisions in Kantilal Manilal (supra) and Central India Industries (supra) hold the field even today and continue to be good law. It is therefore well settled that the inclusive definition of "*dividend*" will not exclude the ordinary meaning of dividend. It is also well settled that "*dividend*" as ordinarily understood will include dividend paid in kind by distribution of properties or assets of a company or any rights having monetary value, amongst its shareholders. In the present case the Petitioner Company is seeking to distribute its shares in TAAL to its Shareholders under the Scheme. This is nothing but payment of dividend in kind.

25. The next question that arises for consideration is whether the gifting of the shares of TAAL by the Petitioner Company to its Shareholders is violative of Section 123 of the 2013 Act. Sub-section 5 of Section 123 categorically prohibits the payment of dividend by a company in any manner otherwise than by cash. I have

already held that the gift of the shares of TAAL by the Petitioner Company to its Shareholders amounts to payment of dividend. It is clear that this payment of dividend is in kind and not by way of cash. Payment of dividend in kind is expressly prohibited by Section 123(5). In my view therefore the gifting of the shares of TAAL by the Petitioner Company to its Shareholders will be in violation of Section 123(5) of the 2013 Act.

26. It is submitted by Mr. Tulzapurkar that a company can distribute its assets under the provisions of Sections 100-104 of the 1956 Act and that accordingly no fault can be found with the Scheme. I am unable to accept this submission. First and foremost, as is clear from the Clause 5 of the Scheme itself, the reduction of the SPA is merely an accounting treatment in the books of the Petitioner Company. Further this reduction is a consequence of the gifting of the shares of TAAL by the Petitioner Company to its Shareholders and this is clear from the opening words of Clause 5 viz., *“Pursuant to the gifting of equity shares in TAAL by ISEL to its shareholders, the balance lying in the Securities Premium Account shall, be reduced by the book value of investments in TAAL so gifted,”*. Even otherwise it is clear that the main purpose and object of the Scheme is the gifting of shares of TAAL by the Petitioner Company to its Shareholders. Moreover, even a reduction of capital under the Companies Act must not be in violation of the other provisions of the Companies Act. The gift of the shares of TAAL by the Petitioner Company to its Shareholders will therefore necessarily have to comply with the provisions of Section 123 of the 2013

Act, particularly in view of my finding that the said gift amounts to distribution of dividend. In the circumstances the provisions of Sections 100 to 104 of the 1956 Act and Section 52 of the 2013 Act are of no assistance to the Petitioner Company and will not save the Scheme.

27. Mr. Tulzapurkar has relied on an Order passed by this Court in the case of KEC Infrastructure Limited (*supra*) sanctioning a scheme involving the distribution of shares of KEC International Limited in KEC Infrastructure Limited to the shareholders of KEC International Limited and submitted that the case was similar to the present one and thereby submitted that this Court had already sanctioned a similar scheme in the past. In this regard Mr. Mehta has rightly pointed out that in the case of KEC Infrastructure Limited there was no objection raised by the Regional Director or any other party with regard to the violation of Section 205 of the 1956 Act. Hence this issue was not considered by this Court in that case. Consequently, the order of this Court in KEC Infrastructure Limited is not relevant in the present case and is of no assistance to the Petitioner Company. The same is the situation with regard to the order of the Calcutta High Court in the case of Bata Properties Limited (*supra*) relied upon by Mr. Tulzapurkar. That decision therefore also does not carry the case of the Petitioner Company any further.

28. The next objection of the Regional Director is based on the letter of the Dy. Commissioner of Income Tax, Central Circle-2(1), Pune dated 27th October 2014. By this letter the Income Tax Department has informed the Regional Director that the

following proceedings are pending against the Petitioner Company under the Income Tax Act :-

- i) Assessment proceedings in respect of AY 2013-14 i.e. FY 2012-13.
- ii) Outstanding demands of Rs.1,16,57,000/- and Rs.1,09,57,772/- in respect of AY 2006-07 and AY 2007-08 respectively.
- iii) Penalty proceedings in respect of AYs 2006-07 to 2012-13.

29. Relying upon Section 281 of the Income Tax Act, 1961, the Income Tax Department has contended that the gift of the shares of TAAL by the Petitioner to its Shareholders as proposed under the Scheme is void. It is pointed out that the Petitioner has not made any application to the Income Tax Department for permission to make this gift. In view of the aforesaid, the Income Tax Department has requested that the Scheme not be approved. The Regional Director has placed the aforesaid objection of the Income Tax Department before the Court in support of the same.

30. To appreciate the objection of the Income Tax Department it is necessary to consider the provisions of Section 281 of the Income Tax Act. The relevant portion of Section 281 is reproduced below :-

“281 (1) Where, during the pendency of any proceedings under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any

other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise :

Provided *that such charge or transfer shall not be void if it is made-*

(i) For adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee; or

(ii) With the previous permission of the Assessing Officer.”

31. It is clear from Section 281 of the Income Tax Act that the gift of any asset by an assessee to any person during the pendency of any proceedings under the Income Tax Act will be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of such proceedings or otherwise. In the present case it is an undisputed position that the above mentioned proceedings under the Income Tax Act are pending against the Petitioner Company. Despite the pendency of these proceedings, by the Scheme the Petitioner proposes to gift its shares in TAAL to its Shareholders. Such a gift would therefore clearly be hit by the provisions of Section 281(1) and would be void as against the claims of the Income Tax Department resulting from the proceedings mentioned above. It is pertinent to note that it is not the case of the Petitioner that the gift of the shares of TAAL would not be void on account of the proviso to Section 281(1). In the

circumstances there can be no doubt that the proposed gift of the shares of TAAL by the Petitioner to its Shareholders will defeat the provisions of Section 281(1) of the Income Tax Act.

32. The Petitioner however contends that it has more than sufficient assets to discharge the tax liability in the event that the same crystallizes upon the Petitioner, inasmuch as according to the Petitioner, it has a net worth of Rs. 52 crores as per the book value method and a net worth of Rs. 57 crores as per the market value method post distribution of the shares of TAAL to its Shareholders. In my view, even if this be true, the same does not alter the position with regard to the applicability of Section 281(1). Section 281(1) does not carve out any exception on the basis of sufficiency or otherwise of the assets of the assessee. The Petitioner therefore cannot avoid the applicability of the provisions of Section 281(1) on the ground that it may have sufficient assets to discharge the tax liability as and when the same accrues. This contention of the Petitioner is also therefore liable to be rejected.

33. As noticed above, there are assessment proceedings, outstanding demands and penalty proceedings under the Income Tax Act pending against the Petitioner Company. These proceedings may very well result in taxes or other sums being payable by the Petitioner Company to the Income Tax Department. The gift of the shares of TAAL by the Petitioner Company to its Shareholders will be void as against the claim or claims of the Income Tax Department in respect of the aforesaid taxes and sums, in view of Section 281(1). The Income Tax Department would therefore

be entitled to recover its dues by attachment and sale of the said shares of TAAL. If these shares are today permitted to be gifted under the Scheme to the Shareholders of the Petitioner Company, the same may not be available at the time when the claim of the Income Tax Department is crystallized, since there may be further sales of these shares by the Shareholders receiving the same. It must be kept in mind that TAAL is a Public Limited Listed Company whose shares can be traded on the Stock Exchange. In this manner this asset of the Petitioner Company will be lost to the Income Tax Department. In my view this will defeat the purpose and object of Section 281(1) of the Income Tax Act. Accordingly it will not be proper to permit the Petitioner Company to gift its shares in TAAL to its Shareholders as envisaged under the Scheme. The Court will not put its imprimatur on such a Scheme.

34. Mr. Tulzapurkar submitted that it is well settled by the decisions of this Court as well as the Hon'ble Apex Court that an assessee is entitled to arrange its affairs in a manner so as to save tax. Consequently the Petitioner is entitled to avoid payment of tax by propounding the present Scheme. In my view this is not an answer to Section 281 of the Income Tax Act. There is no doubt that the Petitioner can arrange its affairs in a manner so as to avoid payment of tax. However, this does not entitle the Petitioner to dispose of its assets in a manner so as to defeat the provisions of Section 281(1) of the Income Tax Act.

35. It is further argued by Mr. Tulzapurkar that by gifting its shares in TAAL to its Shareholders, the Petitioner is not seeking to avoid tax and that if any tax is payable

on the transaction or on future sales of the shares by the Shareholders, it is always open to the Income Tax Department to carry out assessment proceedings and recover the tax. In my view this submission also does not answer the objection of the Income Tax Department, and the Regional Director, based on Section 281(1) of the Income Tax Act. No doubt that if the transaction of gift of the shares or the subsequent sales of the shares are taxable, it will be open to the Income Tax Department to adopt appropriate proceedings for recovery of the same. However, even this does not mean that the Petitioner Company can dispose of its shares in TAAL in a manner so as to defeat the provisions of Section 281 of the Income Tax Act.

36. In view of my findings above it is clear that the Scheme is illegal and contrary to law and hence cannot be sanctioned by this Court. Accordingly I pass the following Order :-

ORDER

- i) Company Scheme Petition No.709 of 2014 is dismissed;
- ii) However, there shall be no order as to costs.

(S.J. KATHAWALLA, J.)

CERTIFICATE

" Certified to be true and correct copy of the original signed Judgment"