

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY APPLICATION NO.580 OF 2016**

**IN**

**COMPANY SCHEME PETITION NO.292 OF 2013**

Associated Aluminium Industries (P) Limited      ....Applicant/Petitioner

Vs.

The Registrar of Companies, Mumbai      ....Respondent

**WITH**

**COMPANY APPLICATION NO.581 OF 2016**

**IN**

**COMPANY SCHEME PETITION NO.293 OF 2013**

Associated Aluminium Products (P) Limited      ....Applicant/Petitioner

Vs.

The Registrar of Companies, Mumbai      ....Respondent

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Shri Hemant Sethi a/w. Ms. Dhanashree G. i/b. M/s. Bilawala and Co. for  
applicant/petitioner.

Shri N.D. Sharma for Regional Director.

Shri Ankit Lohia, Amicus Curiae present.

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**CORAM : K.R.SHRIRAM, J.**

**DATE : 26<sup>th</sup> FEBRUARY, 2018**

**P.C.:**

**COMPANY APPLICATION NO.580 OF 2016**

**WITH**

**COMPANY APPLICATION NO.581 OF 2016**

1            These applications are taken out by applicants, who were original petitioners, to amend clause 2(e) and clause 2(f) of the Scheme as per the Schedule annexed to the company applications. The Schedule reads as under :

1. *By deleting Sub Clause (ii) as appearing in Clause 2(e) of the Scheme.*
2. *By deleting Clause 2(f) of the Scheme.*
3. *By deleting the reference of above said clauses as appearing anywhere in the Scheme as if it were never a part of the Scheme.*

4. By deleting the reference of Windmill Business and Windmill Business Undertaking as appearing in any party of the Scheme, as if it were never a part of the Scheme.

5. All consequential amendments as required.

## 2 Clause 2(e) and 2(f) of the Scheme read as under :

e. **“Demerged Undertaking”** means and includes:

i. All the investments of the Demerged Company.

ii. Windmill business means “windmill business” comprising of all assets (whether movables or immovables, tangible or intangible, real or personal, corporeal or incorporeal or present, future or contingent) and liabilities which relate thereto or are necessary therefore including specifying the following:-

(a) Wind energy generator facility presently operating at Gut No.64/4P, Village; Akhatwade, Taluka, Nandurbar, Dist; Nandurbar, Maharashtra together with all that piece or parcel of freehold/leasehold lands, hereditaments and premises situate, lying and being thereat together with all civil structures standing thereon.

(b) All wind energy generators, movable and fixed plants and machinery equipments, installations, plants, pipes, tools, accessories, computers, furniture, fixtures, office equipments, power lines, water lines, relating to windmill business.

(c) All current assets including sundry debtors, receivables, cash, bank balances, loans and advances, claims, bills, credit notes, and all inventories, stores and machinery spare parts relating to windmill business.

(d) All agreements, contracts (including forward contracts, arrangements, understandings, bonds, engagements, deeds and instruments, lease agreements, tenancy rights, power purchase/ sanction agreements, equipment purchase agreements, agreements with the suppliers, agreements with the clients/purchasers and all rights, title, interest, claims and benefits thereunder relating to windmill business.

(e) All present and future liabilities including contingent liabilities arising out of the activities or operations relating to windmill business including insurance, loans, debts (secured or unsecured), current liabilities and provisions and duties and obligations relating to the windmill business.

iii. Office premises admeasuring 643.630 square feet (built up area) situate at 122-B, 12<sup>th</sup> Floor, Mittal Court Premises Co-op. Soc. Ltd., Nariman Point, Mumbai 400 021.

iv. Land & building at Plot No.10, MIDC Industrial Area, Taloja, District Raigad 410 208 with structure standing thereon.

*Provided that any question that may arise as to whether a specified asset or liability pertains or does not pertain to the Demerged Undertaking of the Demerged Company shall be decided by mutual agreement between the Boards of the Demerged Company and the Resulting Company.*

*f. Windmill “**Business Undertaking**” shall mean and include:*

*i. All the assets or properties operating at Gut No. 64/4P, Village; Akhatwade, Taluka, Nandurbar, Dist; Nandurbar, Maharashtra together with all that piece or parcel of freehold/leasehold lands, hereditaments and premises situate, lying and being thereat together with all civil structures standing thereon movable or immovable properties, and all other property whether tangible or intangible, whether corporeal or incorporeal, whether leasehold or freehold, all rights, titles and interests and covenants in connection with the lands, buildings, offices, lease, tenancy rights, plant and machinery, fixed assets, furniture, fixtures, computer and office equipments, software, vehicles, capital, raw material, work-in-progress, finished goods, cash-in-hand, bank accounts, sundry debtors, receivables, bills, credits, loans and advances, earnest money, deposits with any government, quasi government, local or other authority or body, or any company or other person, investments of all kinds, rights to use telephones, telexes, facsimile connections, e-mail, internet, leased line connections and installations, utilities and other services, reserves, provisions, funds, and all other interests, easements and privileges of all kinds, if any of whatsoever nature and wherever situated belonging to or in the ownership, power or possession and in the control of or vested in or granted in favour of or enjoyed by the Demerged Company which pertains to the Windmill business as on the Appointed Date.*

*ii. All the debts, liabilities (including contingent liabilities), advances, duties, loans taken, deposits accepted, facility availed, any guarantees relating to the business executed by the Demerged Company in favour of third party, undertakings or any other obligations (whether in Indian Rupees or foreign currency, whether in present or future and whether secured or unsecured) of the Demerged Company which relates to the windmill business as on the Appointed Date:*

*iii. All statutory licenses, Government approvals or otherwise, authorities, registrations, authorizations, engagements, permissions, no-objection certificates, statutory incentives, statutory exemptions from payment of income tax, statutory permits, consents, patents, trademarks, copyrights, other intellectual property rights, tenancies, offices, quotas, rights, sales tax deferrals, subsidies, concessions, grants, entitlements, privileges, powers, benefits of all contracts or agreements (including but not limited to contracts and agreements with vendors, customers, government etc.), all other rights (including but not limited to right to use and avail electricity connections, water connections, internet connections, environmental clearances, lease rights, easements, powers and facilities), of the Demerged Company which relates to the Windmill business.*

iv. All licensing arrangements including but not limited to usage of softwares, patents, trademarks, copyrights and other intellectual property rights of any nature whatsoever which relates to the Windmill business as on the Appointed Date.

v. Reserve, provisions and funds, all records, files, papers, process information, computer programs, manuals, data, catalogue, quotations, sales advertising materials, lists of present and former customers and suppliers, customer credit information, customer pricing information and other records whether in physical form or electronic form of the Demerged Company which relates to the Windmill business as on the Appointed Date.

vi. All wind energy generators, movable and fixed plants and machinery equipments, installations, plants, pipes, tools, accessories, computers, furniture, fixtures, office equipments, power lines, water lines, relating to windmill business.

vii. All current asserts including sundry debtors, receivables, cash, bank balances, loans and advances, claims, bills, credit notes, and all inventories, stores and machinery spare parts relating to windmill business.

viii. All agreements, contracts (including forward contracts, arrangements, undertakings, bonds, engagements, deeds and instruments including hire purchase agreements (if any), lease agreements, tenancy rights, power purchase/sanction agreements, equipment purchase agreements, agreements with the suppliers, agreements with the clients/purchasers and all rights, title, interest, claims and benefits thereunder relating to windmill business.

3           The Scheme of Arrangement between two applicants, viz., applicant in company application no.580 of 2016 – Associates Aluminium Industries (P) Ltd. (Transferor) and applicant in company application no.581 of 2016 – Associated Aluminium Products (P) Ltd. (Transferee) was sanctioned by this Court by an order dated 13<sup>th</sup> September, 2013. The Scheme has been made effective by Transferee filing copy of the order and Scheme alongwith Form 21 with the Registrar of Companies on 15<sup>th</sup> October, 2013.

4           In terms of clause 2(e) of the Scheme, Transferor was to demerge all its investment business, windmill business, office premises at 122-B, Mittal Court, Nariman Point, Mumbai – 400 021 and land and building at Plot No.10, MIDC Industrial Area, Talaja – 410 208, District Raigad to Transferee. The Windmill Business Undertaking has been defined in detail under clause 2(f) of the Scheme as quoted above.

5           Transferor was enjoying various tax benefits while it was carrying on the Windmill Business and was involved in generation and distribution of power and setting up of various infrastructural facilities for distribution and transmission of power so generated. Transferee, though it was incorporated on 6<sup>th</sup> January, 2012, was not carrying on any business prior to the business that was transferred to it under the Scheme. When the Income Tax Department passed an assessment order of Associated Aluminium Products (P) Ltd. (Transferee) for the assessment year 2013-2014, Transferee realised that the deduction under Section 80IA to which Transferor was eligible, was not available to Transferee. Paragraph 5.3, 5.4, 5.5, 5.9 and 5.10 of the assessment order read as under :

*5.3 During the course of assessment proceedings assessee's claim of deduction u/s-80IA has been examined in the light of provisions of Section 80IA. In this regard sub section (4) of Section 80IA has classified the undertakings or enterprises eligible for availing deduction under this Section as under.*

*(i) Enterprise carrying on the business of developing or operating and maintaining or developing, operating and maintaining infrastructure facilities.*

*(ii) Undertakings providing basic or cellular telecommunication services.*

(iii) Undertaking which develops, develop and operates or maintains and operates an Industrial Park or SEZ.

(iv) Undertakings set up for generation/generation and distribution of power or laying of network/renovation or modernization of network of transmission/Distribution lines or set up for reconstruction or revival of power generation plant.

5.4 In view of the above classification, and since the assessee falls in clause (iv) of sub section (4) of Section 80IA, the conditions which are necessary to be met for being eligible for deduction as per the provisions of sub section (3) of Section 80IA are also examined which in an unambiguous terms states that "The undertakings at (ii) and (iv) above should not, inter-alia, be formed by splitting up or reconstruction of an existing business".

5.5 This position has further been clarified in sub section (12A) of Section 80IA which provides that where the enterprise or undertaking of an Indian company entitled to the deduction under the said section is transferred on or after 01-04-2007 in scheme of amalgamation or demerger, no deduction shall be available to the amalgamated company.

In this regard Circular No.10/2014 (F. No.178/84/2012-ITA-I) dated 06-05-2014 has also been perused which clarifies the above position.

5.9 The above submission/contention of the assessee company is perused and considered carefully, however found not tenable. Since the legal position on the issue of allowability of deduction to the eligible undertaking/enterprise is clarified in the provisions of section itself.

In this regard provisions of Section 80IA (12A) clarifies that no deduction shall be available to the amalgamated company when the enterprise or undertaking of an Indian company entitled to the deduction under the said section is transferred on or after 01-04-2007 in the scheme of amalgamation or demerger. This position has further been clarified by Board's circular as cited above.

In the present case under consideration M/s. Associated Aluminium Industries (P) Ltd. being an Indian company who was entitled to the deduction u/s-80IA, transferred its Windmill running business to M/s. Associated Aluminium Products (P) Ltd.

Here M/s. Associated Aluminium Industries (P) Ltd. being the Transferor company was claiming deduction from A.Y.2010-11 which was the initial Assessment Year as per Form No.10CCB.

In assessee's case Demerger has been happened from 01-04-2012, i.e., after the date specified in sub section (12A) of Section 80IA (i.e. 01-04-2007) and hence the assessee company being resulting company is not entitled to claim deduction u/s-80IA.

5.10 In view of the above facts, the legal position and further clarification made by the Board's circular as cited above, Deduction claimed by the assessee to the tune of Rs.54,02,673/- is disallowed and added to the total income of the assessee. Penalty proceedings u/s-

*271(1)(c) are initiated separately for furnishing inaccurate particulars of income.*

6 Transferee having realised that it will not be entitled to the tax benefits has now, alongwith Transferor, approached this Court with these applications so that the Windmill Business Undertaking would be retained by Transferor whereas the remaining undertakings as mentioned in clause 2(e) of the Scheme will continue to remain with Transferee.

7 Respondent has filed an affidavit of one A.K. Chaturvedi affirmed on 7<sup>th</sup> June, 2017 opposing the applications. Since there were tax implications involved, respondent insisted that Income Tax Authorities be also given notice to remain present in Court and address the issue. Though on one occasion counsel represented the Income Tax Department, today nobody is present. At the same time, as there were tax issues also involved, this Court appointed Shri Ankit Lohia, an advocate practicing in this Court, who is also a Chartered Accountant by qualification, as Amicus Curiae. It has to be noted that the support given by Shri Ankit Lohia was immense and the Court expresses its appreciation.

8 Shri Lohia placed on record three judgments, viz., (i) ***Unique Delta Force Security P. Ltd., In re vs. Sumeet Facilities P. Ltd., In re***<sup>1</sup>, (ii) ***S.K. Gupta and another vs. K.P. Jain and another***<sup>2</sup> and (iii) ***Idea Cellular Limited vs. Union of India***<sup>3</sup>.

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1. (2012) 175 Comp Cas 318 (Bom)

2. AIR 1979 SC 734

3. (2012) 173 Comp Cas 235 (Delhi)

9           Shri Sethi, counsel for applicants after narrating the facts and the reason why these applications were taken up, submitted that indisputably position in law is that the order cannot be recalled but certainly can be modified. Shri Sethi submitted that by asking this Court to amend the Scheme, the net result is only modification and not recall and therefore, these applications should be allowed.

10           It will be useful to reproduce Section 392 of the Companies Act, 1956 (the Act) and the same reads as under :

*392. Power of High Court to enforce compromises and arrangements.*

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

*(a) shall have power to supervise the carrying out of the compromise or arrangement; and*

*(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 Court aforesaid is satisfied that a compromise or 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.*

*(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under section 153 of the Indian Companies Act, 1913, (7 of 1913) sanctioning a compromise or an arrangement.*

11           Section 392, therefore, makes it clear that after the Court sanctions a compromise or an arrangement under Section 391 of the Act, it has power to supervise the carrying out of the compromise or an arrangement. The Court may also 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 and it may make an order winding up the company if it satisfied that a compromise or an arrangement under Section 391 of the Act cannot be worked satisfactorily with or without modifications. Section 392 codifies the power of the Court to deal with the Scheme post sanction. Therefore, the Companies Act specifically prescribes the powers vested in the Court once the Scheme is sanctioned by the Court. Section 392 shows that the Act empowers the Court to give directions and allow modifications in the compromise or arrangement but has not given any powers to the Court to recall/rescind/cancel the order sanctioning the compromise or arrangement. If at all the Court is satisfied that the compromise or arrangement sanctioned under Section 391 of the Act cannot be worked satisfactorily with or without modifications, the Court can *suo motu* or on the application of any person interested in the affairs of the company, make an order winding up the company.

12           The Hon'ble Supreme Court of India in ***Meghal House P Limited vs. Shree Niwas Girni K.K. Samiti***<sup>4</sup> has held that if a company desires to modify a sanctioned scheme despite the same not being necessary for the proper working thereof, the company cannot do so under any other provisions except by following the required procedure prescribed under

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4. (2007) 7 SCC 753

Section 391 of the Companies Act. The Hon'ble Supreme Court in *S.K. Gupta* (Supra) has held that the Court cannot, under Section 392 of the Act, change the basic fabric of the scheme. This was followed by the Hon'ble Supreme Court in *Reliance Natural Resources Limited vs. Reliance Industries Limited*<sup>5</sup> and the Hon'ble Supreme Court held as under :

*The ratio of S.K. Gupta (supra) is that under Section 392 the Courts have the duty of continuous supervision to make the Scheme workable by removing the hitches, obstacles or impediments as necessary to ensure the proper functioning of the Scheme. Further, while the Court does state that the powers of the court are of the widest amplitude, including the power to modify a provision of the scheme, it also does hold that the same can only be exercised so as to ensue the proper working of the Scheme and further, that such powers may not be exercised in a manner that would alter the “basic fabric” of the scheme. The removal of obstacles, impediments or hitches cannot be held to mean wholesale changes in the scheme itself and go beyond the confines of what the shareholders, the stakeholders and the courts that sanctioned the scheme would have understood the provisions of the scheme to mean.*

*It is true that in paragraph 26 of the said decision in S.K. Gupta case it was stated that “if something can be omitted or something can be added to a scheme of compromise by the Court, on its own motion or on the application of a person interested in the affairs of the company” then there ought not to be any justification for restricting the meaning of the word of modification and whittle down the powers of the court. However, the next paragraph holds the key to the judgment that the “basic fabric” of the scheme ought not to be changed. The limit on the powers of the Court to modify by way of even additions or omissions as contemplated is that the “basic fabric” of the Scheme cannot be changed; and according to the said decision, even before a court could embark upon a mission of suggesting modifications it has to first determine what “modifications are necessary to make the compromise or arrangement workable” Any such determination first has to arrive at a conclusion that the Scheme has become unworkable in its entirety or in a portion thereof. Arrangements, by their very nature are complex processes involving many elements that may or may not work. In fact in S.K. Gupta this court recognized that to be the very reason why the legislature in India has given such a power to the courts; and such power can be exercised only to order those minimal modifications that would bring the aspect that is not working into a functional zone, with the proviso that at any rate such a modification cannot lead to a change of the “basic fabric” of the Scheme.*

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5. (2010) 7 SCC 1

*What does the expression “basic fabric” mean? “Fabric” can imply both the end result, and also equally importantly, the processes, procedures and steps that were taken to weave the “fabric” of the Scheme. During the course of weaving of the “fabric”, decisions could be taken to leave out certain aspects as unacceptable to the Board or the shareholders and stakeholders or the Court. Further, those processes necessarily involve certain steps in obtaining shareholders permissions. Such processes are the very essence of the fabric and not just some technicalities that are to be consigned to history and ignored in making modifications. Whatever changes are made can only be minor ones which would not tamper with the essence of the scheme.”*

13           Therefore, once a scheme is sanctioned and made effective, the changes allowed therein should be minor ones and not wholesale changes which would tamper with the essence of the scheme and if a company desires to modify a sanctioned scheme, though not necessary to do so for the proper working thereof, it is required to follow the procedure prescribed under Section 391 of the Act. What is modification has been dealt with by the Supreme Court in *S.K. Gupta* (Supra) in which paragraphs 25, 26, 27 and 28 read as under :

*25.The noticeable feature of this definition is that it is inclusive definition and where in a definition clause the word 'include' is used it is so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include (see *Dilworth v. Commissioner of Stamps*). Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect (see *Jobbins v. Middlesex County Council*). Where the definition of an expression in a definition clause is preceded by the words 'unless the context otherwise requires', normally the definition given in the section should be applied and given effect to but this normal rule may, however,*

be departed from if there be something in the context to show that the definition should not be applied (see *Khanna, J. in Indira Nehru Gandhi v. Raj Narain*). It would thus appear that ordinarily one has to adhere to the definition and if it is an expansive definition the same should be adhered to. The frame of any definition more often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible (see *Kalva Singh v. Genda Lal*).

26. Is there anything in the context and setting in which the word 'modification' is used in s.392 to indicate that the legislature has not used the expression assigning the meaning to the word as set out in the definition clause? At least nothing was pointed out to us. Undoubtedly, as pointed out by Lord Hershell in *Cox v. Hakes*, that for the purpose of construing any enactment it is right to look, not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation. Even with this caution we find nothing in s.392 or reading s.392 with s.391, to cut down and restrict the meaning as has been attempted by the High Court completely ignoring the definition section.

27. According to the definition 'modify' and 'modification' would include the making of additions and omissions. In the context of s.392 'modification' would mean addition to the scheme of compromise and/or arrangement or omission therefrom solely for the purpose of making it workable. Reading s.392 by substituting the definition of the word 'modification' in its place, if something can be omitted or something can be added to a scheme of compromise by the Court on its own motion or on the application of a person interested in the affairs of the company for the proper working of the compromise and/or arrangement, we see no justification for cutting down its meaning by a process of interpretation and thereby whittle down the power of the Court to deal with the scheme of a compromise and/or arrangement for the purpose of making it workable in course of its continued supervision as ordained by s.392 (1).

28. Strictly speaking, omission of the original sponsor and substituting another one would not change the 'basic fabric' of the scheme. The scheme in this case is one by which a compromise is offered to the unsecured creditors of the company and whoever comes in as sponsor would be bound by it. Undoubtedly a sponsor of the scheme enjoys an important place in the scheme of compromise and/or arrangement but basically the scheme is between the company and its creditors or any class of them, or the company and its members or any class of them, and not between the sponsor of the scheme and the creditor or member. The scheme represents a contract sanctified by Court's approval between the company and the creditors and/or members of the company. The company may as well be in charge of directors and the implementation of the scheme may come through the agency of directors but that would not lead to the conclusion that during the working of the scheme the

*directors cannot be changed. If the scheme has to be ultimately implemented by the company as part of its contract and yet its directors can be changed according to its Articles of Association, we see no difference in the situation where a sponsor is required to be changed in the facts and circumstances of a case. Therefore, it is not possible to accept the submission that as and by way of modification one sponsor of a scheme cannot be substituted for another sponsor.*

14           I also find support from the judgment of this Court in *Unique Delta Force* (Supra). In *Idea Cellular Limited* (Supra), which Shri Lohia placed for Court's consideration, the facts were entirely different. There appellant, Idea, was the holder of a cellular mobile telephone service licence granted to it by the Department of Telecommunications in the service areas of Haryana, Maharashtra, Andhra Pradesh and Delhi. Spice was a telecom service provider in the service areas of Punjab and Karnataka. The licence stipulated that the licensee may transfer or assign the licence agreement with prior written approval of the licensor to be granted on fulfillment of certain conditions. The unified access service licence provided that any change in shareholding shall be subject to all applicable statutory permissions, that no single company/legal person, either directly or through its associates, shall have substantial equity holding, i.e., 10 per cent or more in more than one licensee company in the same service area for the access services. The licence also provided that the licensee shall not, without the prior written consent of the licensor, either directly or indirectly, assign or transfer the licence to a third party or enter into any agreement for sub-licence or partnership, that the licensee may transfer or assign the licence agreement with prior written

approval of the licensor to be granted on fulfillment of the condition, *inter alia*, that amalgamation or restructuring is sanctioned and approved by the High Court or Tribunal as per the law in force. The Department of Telecommunications guidelines provided that prior approval of the Department of Telecommunications shall be necessary for merger of the licence, that consequent upon the merger of licences in a service area, the post-merger licensee entity shall be entitled to the total amount of spectrum held by the merging entities, subject to the condition that after merger, the licensee shall meet, within a period of 3 months from date of approval of merger by the licensor, the prevailing spectrum allocation criterion, that any permission for merger shall be accorded only after completion of 3 years from the effective date of licences. Neither in the merger applications nor in the demerger applications were copies of licences or the Merger Guidelines 2008, or the correspondence exchanged between the appellant and the Department of Telecommunications placed on record. The High Court sanctioned the scheme of amalgamation which provided that overlapping licences would be transferred in accordance with the scheme of demerger. Upon the merger scheme being sanctioned by the Court, overlapping licences stood vested in the appellant and that the Department of Telecommunications had no other option but to grant its formal approval for transfer of licences. The Department of Telecommunications, however, refused permission and on the ground that the amalgamation of Spice with the appellant was resorted to

without the knowledge or taking consent of or notice of the proceedings to it, moved an application for recall of the orders of sanction and demerger of the two companies. The Learned Single Judge held, by notifying that a communication from the Department of Telecommunications to appellant that merger and demerger as proposed was impermissible as some of the overlapping licences were less than 3 years old was suppressed from the Court when the matter was argued and judgment reserved, that sanction to the scheme had been obtained by fraud. The Court, however, instead of recalling the order granting sanction, modified it to bring the sanctioned scheme in conformity with the licence and Merger Guidelines, 2008 to the effect that the six overlapping licences of Spice would not stand transferred to or vested in the appellant till prior permission of the Department of Telecommunications was obtained but would stand vested with the Department of Telecommunications and that the spectrum allocated for such overlapping licences shall also forthwith revert to the Department of Telecommunications.

15           The Division Bench upheld this conclusion of the Learned Single Judge with some minor modifications. The facts in the applications being heard are totally different. At one point, Shri Sethi tried to suggest that the application dated 9<sup>th</sup> March, 2016 of Transferee to Chief Engineer, Maharashtra State Electricity Distribution Company Limited (MSEDCL) is still pending disposal and hence the windmill business has not yet been

transferred to Transferee and the Scheme is conditional upon the requisite approval being received from various authorities as mentioned in Clause 20 (a) (ii) of the scheme.

16           In my view, this submission of Shri Sethi is of no assistance to applicants because if this permission was a condition precedent for carrying on windmill business by Transferee, Transferee would not have made the Scheme effective by filing Form 21 alongwith copy of the order and Scheme with the Registrar of Companies on 15<sup>th</sup> October, 2013. The fact that Transferee has already started showing revenue from windmill business in its accounts and has started filing income tax returns also belies the submissions of Shri Sethi that the pendency of the application before the Chief Engineer, MSEDCL means the windmill business has not yet been transferred to Transferee. Shri Sethi's submissions further cannot be accepted because Transferee took almost three years to file this application dated 9<sup>th</sup> March, 2016 before the Chief Engineer, MSEDCL for sanction. If what Shri Sethi stated was correct, Transferee would have applied to MSEDCL before making the Scheme effective or soon thereafter.

17           Shri Sethi also relied upon a judgment of High Court of Punjab and Haryana in re : *Highway Cycle Industries Limited and Anr.*<sup>6</sup> to submit that the Courts have allowed even shifting of the transfer date which, according to Shri Sethi, is much more a serious issue than what

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6. (2003) 115 Comp Cas 260 (P & H)

applicants are seeking in the present two applications. I am afraid, it is like comparing apples with oranges. Each application has to be considered in its own merits and conclusion arrived at.

It should be noted that when an order sanctioning a scheme under Section 391 of the Act is passed, it operates in rem. It affects the rights of several persons including creditors, investors, etc. and also creates liabilities in favour of persons like the Income Tax Authorities. These rights and liabilities became vested once the scheme becomes effective. The windmill business was transferred to Transferee and the Scheme was made effective by Transferee by filing Form 21 with the Registrar of Companies, Transferee having started earning revenue and having filed income tax returns, undoubtedly created rights and liabilities in favour of the Income Tax Authorities.

18           It should be noted that Transferee has filed returns for 3 years before this applications were filed. Therefore, these applications are not just for a simple or minor modification of the scheme. If the Court grants the prayers as sought, the net effect would be of recalling the order sanctioning the Scheme to the extent of windmill business. Just because certain tax benefits have been lost does not mean that the Scheme is not workable. Hence no modifications are required. If the reliefs as sought are granted, would effectively amount to tampering with the essence of the scheme which is impermissible. The basic fabric of the Scheme would change and will go

beyond the confines of what the Court while sanctioning the Scheme understood in the provisions of the Scheme.

19           In the circumstances, both applications stand dismissed with no order as to costs.

**(K.R. SHRIRAM, J.)**