2009 (0) GLHEL-HC 221448

GUJARAT HIGH COURT

Hon'ble Judges:K.A.Puj, J.

R.H.Patel Versus Reliance Industries Limited

COMPANY APPLICATION No. 115 of 2009 ;
COMPANY PETITION No. 93 of 2007 ;
COMPANY APPLICATION No. 126 of 2007 ;
COMPANY APPLICATION No. 157 of 2009 ; *J.Date :- APRIL 27, 2009

- COMPANIES ACT, 1956 Section - 10 , 391 , 392 , 393 , 394

Companies Act, 1956 - S. 10, 391, 392, 393, 394 - interim relief - restraining RIL from operating or implementing office memorandum dated 8-3-2007 issued for Indian Petrochemicals Corporation Limited reducing superannuation age for all supervisory employees of IPCL - contended that office memorandum was in violation of Scheme of Amalgamation as well as order sanctioning Scheme of Amalgamation - held, on facts and circumstances, Court is of the view that there is no prima facie case, nor there is any balance of convenience in favour of applicants - it cannot be said that if interim relief were not granted any irreparable loss or injury would cause to applicant which could not be compensated in terms of Company - neither effective the date nor provisions in scheme were altered by the Court - applications disposed of.

Imp.Para: [23]

Cases Referred to :

1. Colgate Palmolive (India) Limited V/s. Hindustan Lever Limited, 1999 7 SCC 1
2. G. M. Bharat Coking Coal Limited, West Bengal V/s. Shib Kumar Dushad And Others, 2000 8 SCC 696
3. Gujarat Bottling Company Limited And Others V/s. Coca Cola Company And others, 1995 5 SCC 545 : 1995 (2) GLH 594 : 1996 (2) GCD 41 : 1995 (4) Scale 635 : JT 1995 (6) 3
4. Mansukhlal Son Of Late Chhotalal Devchand Shah V/s. M.V. Shah, Hathising Manufacturing Company Limited, 1976 17 GLR 592 : 1976 (46) CC 279 : 1975 (1) CompLJ 347 : 1975 GLHEL_HC 207534
5. Marshall Sons And Company (India) Limited V/s. Income Tax Officer, 1997 2 SCC 302
6. National Organic Chemical Industries Limited And Another V/s. State Of Maharashtra And Others, 2004 118 CC 556
7. Public Services Tribunal Bar Association V/s. State Of U.P. And Another, 2003 4 SCC 104
8. S.K. Gupta And Another V/s. K. P. Jain And Another, AIR 1979 SC 734
9. State Bank Of India And Others V/s. S.N.Goyal, 2008 8 SCC 92 : 2008 (3) GLH 512 : 2008 (7) Scale 415 : 2008 (3) LLJ 567 : JT 2008 (6) 398

Shri K. S. Nanavati
Sr. Advocate

10. State Of U.P. & Others V/s. Modern Transport Company, Ludhiana And Another, 2002 9 SCC 514
11. State Of U.P. And Other V/s. Ram Sukhi Devi, 2005 9 SCC 733
12. Union Of India And Other V/s. Kishorilal Bablani, 1999 1 SCC 729
13. Union Of India And Others V/s. Air Commodore S. K. Mishra, 1999 0 SCC(L&S) 949

Equivalent Citation(s):

2009 JX(Guj) 368 : 2009 GLHEL_HC 221448
JUDGMENT :-

1 Having heard Mr.Girish Patel, learned Senior Counsel appearing with Mr.Shalin Mehta, for the applicant and Mr.K.S.Nanavati, learned Senior Counsel appearing for the respondent and having considered submissions as well as documents produced before the Court both these applications are admitted. However, interim relief is refused. Reasons to follow.

FURTHER ORDER

2 Company Application No.115 of 2009 is filed by in all 42 persons whereas Company Application No.157 of 2009 is filed by in all 21 persons. In both the applications, similar prayers are made and both the applications are heard together.

3 The applicants of both the applications have prayed that the respondent " Reliance Industries Limited ('RIL' for short) should be restrained from operating or implementing in any manner whatsoever, the office memorandum dated 08.03.2007 issued by Mr. A. P. Singh for Indian Petrochemicals Corporation Limited ('IPCL' for short) which reduces the superannuation age for all supervisory employees of IPCL belonging to Baroda complex, Nagothane Complex and Gandhar Complex from 60 years to 58 years. The applicants have also prayed for quashing and setting aside the said office memorandum dated 08.03.2007. The applicants have further prayed for the declaration that the office memorandum dated 08.03.2007 is violative of the Scheme of Amalgamation between the IPCL (Transferor Company) and the respondent " RIL (Transferee Company) as sanctioned by the learned Company Judge of this Court vide his judgment and order dated 16.08.2007 passed in Company Petition No.93 of 2007. The applicants have also prayed for an interim relief for stay restraining the respondent " RIL from operating or implementing, in any manner, the said office memorandum dated 08.03.2007.

4 An affidavit is filed by Mr. R.H. Patel in support of Judge's Summons taken out in Company Application No.115 of 2009 whereas another affidavit is filed by Mr. Indrasinh A. Rana in support of the Judge's Summons taken out in Company Application No.157 of 2009. Mr. Girish Patel, learned Senior Counsel appears with Mr. Shalin Mehta, learned advocate for the applicants in both the applications whereas Mr. K.S. Nanavati, learned Senior Counsel of Nanavati Associates appears for the respondent in both the applications.

5 This Court has issued notice on 25.03.2009 making it returnable on 30.03.2009. On 31.03.2009, a statement was made by Mr. Nanavati before the Court that without prejudice to the rights and contentions, the respondent Company would maintain status-quo in respect of the applicants only till 02.04.2009. The said statement continued till the matters are heard by this Court on 27.04.2009. Both these applications were initially heard by Brother Justice Mr.

K.M. Thaker and on change of roster on 15.04.2009 and after obtaining the order from the Hon ble Chief Justice, both the applications were placed before this Court as per the present roster.

6 Mr. Girish Patel, learned Senior Counsel appearing for the applicants has submitted that on 18.04.2007, Company Petition No.93 of 2007 was filed by IPCL, seeking sanction of the Scheme of Amalgamation between it and the present respondent RIL. The three registered trade Unions, namely, IPCL Employees Association, IPCL Employees Union and Petrochemicals Employees Union had objected to the Scheme of amalgamation on various grounds. After hearing the erstwhile IPCL, the Central Government and the objectors, the learned Company Judge sanctioned the Scheme of Amalgamation between IPCL (Transferor Company) and the present respondent " RIL (Transferee Company) vide judgment and order dated 16.08.2007 by issuing certain directions.

7 The Scheme of Amalgamation was sanctioned so as to operative and binding with effect from 01.04.2006 (appointed date). The employees of the erstwhile IPCL who would join the present respondent " RIL were directed to be paid the same salary and other perquisites as well as other benefits as they were being paid and given by the erstwhile IPCL before amalgamation. It is, therefore, the say of the applicants that as per the final directions issued by the learned Company Judge in Company Petition No.93 of 2007, the service conditions of all employees of the erstwhile IPCL as on the date before the amalgamation i.e. 31.03.2006 as the Scheme of Amalgamation is sanctioned so as to be operative and binding with effect from 01.04.2006 were to remain unaltered after they transferred to the present respondent " RIL. The appointed date mentioned in the Scheme of amalgamation was stated to be 01.04.2006. This is the date, the Transferor Company and the Transferee Company had fixed for the Scheme of amalgamation to be operative and binding. The learned Company Judge accepted the prayer made in Company Petition No.93 of 2007 by the erstwhile IPCL that the Scheme of amalgamation be sanctioned so as to be binding with effect from 01.04.2006.

8 The proposed Scheme of Amalgamation between the erstwhile IPCL and the present respondent " RIL was filed before the learned Company Judge of this Court for the first time on 16.03.2007. The same was in the proceedings of Company Application No.126 of 2007. The Board of Directors of the erstwhile IPCL approved the proposed Scheme of Amalgamation by a Resolution dated 10.03.2007. Just two days before the said Board Resolution, the erstwhile IPCL is stated to have issued an office memorandum dated 08.03.2007, whereby the superannuation age for all supervisory employees of the erstwhile IPCL belonging to Baroda complex, Nagothane Complex and Gandhar Complex was reduced from 60 years to 58 years. The issuance of this office memorandum dated 08.03.2007 was nowhere disclosed by the erstwhile IPCL in any proceeding before the learned Company Judge leading up to the sanction of amalgamation between it and the present respondent " RIL. The same was neither disclosed in the proceedings of Company Application No.126 of 2007 nor in Company Petition No.93 of 2007. The said office memorandum would have had a very important bearing on the Scheme of Amalgamation because by way of this office memorandum, the Transferor Company had reduced its liability to the detriment of its employees and to the benefit of the present respondent " RIL.

9 Mr. Patel has further submitted that the office memorandum dated 08.03.2007 is violative of the Scheme of Amalgamation. The said office memorandum is also inconsistent and incompatible with the CAV judgment dated 16.08.2007 passed by the learned Company Judge in Company Petition No.93 of 2007. One of the final directions issued by the learned

Company Judge while sanctioning the Scheme of Amalgamation between the erstwhile IPCL and the present respondent RIL is that the service conditions and service benefits of all employees of the erstwhile IPCL who joined the present respondent RIL are to remain the same as those prevailing before the amalgamation i.e. 31.03.2006. The office memorandum dated 08.03.2007 can never become a part of the Scheme of amalgamation between the erstwhile IPCL and the present respondent RIL which has come into effect from 01.04.2006 because the same was not disclosed in the Scheme of Amalgamation nor was the same referred to by the learned Company Judge while sanctioning the scheme of amalgamation vide CAV judgment dated 16.08.2007. Para 3 of the scheme of amalgamation provides that the Scheme shall come into operation from the appointed date, but the same shall become effective on and from the effective date. Para 4.1 of the Scheme provides for transfer of undertaking. Paragraph 1.12 defines undertaking which shall mean the whole of the undertaking and entire business of the Transferor Company as a going concern including, inter alia, all employees engaged in or relating to the Transferor Company's business activities and operations. On the basis of these provisions of the Scheme, it is contended that upon coming into effect of the scheme of amalgamation and with effect from the appointed date, the undertaking of the Transferor Company shall, pursuant to the sanction of the Scheme by the High Court and pursuant to the provisions of Sections 391 to 394 of the Companies Act, 1956 , be and stands transferred to and vested in the Transferee Company, as a going concern. Since the undertaking has been defined to include all the employees engaged in or relating to the Transferor Company's business activities and operations, it would mean that as on the appointed date i.e. 01.04.2006, all the employees of the undertaking will also stand transferred to the Transferee Company along with the transfer of the undertaking. He has, therefore, submitted that the office memorandum dated 08.03.2007 is not only violative of the Scheme of amalgamation but also the final order of this Court sanctioning the Scheme of Amalgamation with effect from the appointed date.

10 Mr. Patel has further submitted that as per the Scheme, after the appointed date, i.e. 01.04.2006, the Transferor Company holds and does any act in relation to the Company as a Trustee of the Transferee Company. In this view of the matter, as whole Transferor Company has no authority to change the service conditions of its employees after 01.04.2006, if the Transferor Company changes the service conditions of the employees after 01.04.2006, it would mean to change of service conditions by the Transferee Company which is not permissible under the Scheme of Amalgamation as the Scheme of Amalgamation provides that the employees are transferred to the Transferee Company on the same conditions of service as prevalent when they were employees of the Transferor Company. He has, therefore, submitted that change of service conditions of the supervisory employees by office memorandum dated 08.03.2007 is contrary to the Scheme of Amalgamation as sanctioned by this Court.

11 Mr. Patel has further submitted that as per the provisions contained in Sections 391 to 394 of the Companies Act, 1956 , the Company Court has the jurisdiction to pass necessary orders, subsequent to the sanction of the Scheme of Amalgamation, to ensure that the amalgamation is fully and effectively carried out. In the present case, the office memorandum dated 08.03.2007 neither finds any mention in the Scheme of Amalgamation nor in the order passed by the learned Company Judge in Company Petition No.93 of 2007 by which the Scheme of Amalgamation was sanctioned. If the said office memorandum is allowed to operate, the same would result in violation of the Scheme of Amalgamation as well as the order sanctioning the Scheme of Amalgamation. He has, therefore, submitted that the present

respondent " RIL formed out of the amalgamation, is required to be restrained from implementing the office memorandum dated 08.03.2007.

12 Mr. Patel has, therefore, submitted that the present Company Applications filed by the applicants raise the following substantial questions of law :-

A. Whether the office memorandum dated 08.03.2007 (Annexure 5) issued by IPCL (Transferor Company) can have any binding effect when the Scheme of Amalgamation between the IPCL and the respondent " RIL (Transferee Company) is operative and binding from 01.04.2006 whereby, IPCL stands merged with RIL w.e.f. 01.04.2006 ?

B. Whether the office memorandum dated 08.03.2007 issued by IPCL which seeks to reduce the superannuation age of all supervisory employees of IPCL from 60 years to 58 years is not in consonance with the Company Court's directives in the CAV judgment dated 16.08.2007 which states that the terms and conditions of all employees of IPCL would remain the same as those prevailing before amalgamation ?

C. Whether IPCL has any authority or right or power to issue office memorandum dated 08.03.2007 when under the Scheme of Amalgamation, the entire undertaking of IPCL stands transferred to the present respondent " RIL with effect from 01.04.2006 ?

D. Whether the act of non-disclosure of the office memorandum dated 08.03.2007 by IPCL in the Scheme of Amalgamation or in Company Petition No.93 of 2007 is not an act of fraud as the said office memorandum is detrimental to the employees of the IPCL and advantageous to the present respondent " RIL.

E. Whether in sanctioning the Scheme of Amalgamation between IPCL and RIL, there is a breach of Section 394 of the Companies Act, 1956 and the principle of full and fair disclosure by suppression of the office memorandum dated 08.03.2007 ?

13 In view of the above substantial questions of law, Mr. Patel has submitted that the applications deserve to be admitted.

14 While arguing on interim relief prayed for by the applicants, Mr. Patel has submitted that the applicants have prayed for the relief against operating or implementing in any manner whatsoever the office memorandum dated 08.03.2007 issued by IPCL reducing the superannuation age for all supervisory employees of IPCL of Baroda complex, Nagothane Complex and Gandhar Complex from 60 years to 58 years. He has submitted that in a series of judgments, the Hon ble Supreme Court has laid down the basic principles of considering the question of granting or not granting interim relief. These principles are as under :-

i. The basic consideration is that no opinion as to the merits of the matter should be expressed by the Court since the issue of grant of injunction, is usually, at the earliest possible stage so far as the time frame is concerned.

ii. Extent of damages being an adequate remedy.

iii. Protect the plaintiff's interest for his rights. Though, however, having regard to the injury that may be suffered by the defendants by reasons.

iv. The Court while dealing with the matter should not ignore the factum of strength of one parties case being stronger than the others.

v. No fixed rules or opinions ought to be held in the form of grant of injunction but on the facts and circumstances of each case, the relief be kept flexible.

vi. The issue is to be looked at from the point of view as to whether on refusal of the injunction, the plaintiff would suffer irreparable loss or injury keeping in view the strength of the parties case.

vii. Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the ground.

viii. Whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.

15 Mr. Patel has further submitted that the applicants have established convincingly a strong prima facie case in favour of the applicants. In support of this submission, he has raised the following contentions:-

i. The application raises very substantial question regarding the interpretation of Clause 8 of the Scheme of amalgamation as sanctioned by the learned Company Judge and the construction of the Company Court's direction.

ii. The very substantial question regarding the power of the IPCL to act to the prejudice of its own employees between the appointed date and effective date even though between two dates, the IPCL is required to act only on account of and for the benefit of and in trust for the opponent.

iii. The very important question regarding the date of amalgamation for the purpose of determining the nature of protection of the terms and conditions and employment of the employees of IPCL after their transfer to RIL.

iv. The applicants have clearly established that the date of amalgamation is the appointed date i.e. 1.04.2006 on which, as per the Scheme, the entire undertaking of IPCL is transferred and vested in RIL and becomes the undertaking of the RIL.

v. The applicants have clearly established that the Office Memorandum dated 08.03.2007 is ex-facie inconsistent with contrary to and in clear violation of the scheme sanctioned by the Court and its directions.

vi. The applicants have clearly established that if the office memorandum dated 08.03.2007 is allowed to be operated and implemented, it would clearly frustrate the very purpose of the protection given to IPCL employees under Clause 8 of the Scheme and render that protection a nullity. The applicants have also clearly established that the interpretation advanced by the applicants on the question of relevant date is the only just, reasonable and rational interpretation of Clause 8 of the Scheme and the Court's direction.

vii. The applicants have also clearly established that under Sections 391 to 394 of the Companies Act, 1956 and particularly, under Section 392, a solemn duty has been cast upon the Company Court to ensure the proper, efficient and satisfactory working of the Scheme sanctioned by it and to give directions including modification necessary for that purpose and not to allow any person or authority to create impediment or obstacles or complications in the carrying out of the Scheme.

viii. The Companies Act, 1956 also imposes a duty upon the Company Court to exercise its power under Section 392 either suo motu or on application of any person interested in the affairs of the Company, without waiting for and even raising objection for approaching the Court for this purpose.

ix. Under Sections 391 to 394 of the Companies Act, 1956 , the Company Court is concerned not only with the wishes and desire of the members and creditors of the Company under the Scheme but is also concerned with the wider question whether the Scheme is just, fair and reasonable to all persons and whether it is opposed to any public interest.

x. IPCL has not come out with any explanation whatsoever for the sudden issue of Office Memorandum dated 08.03.2007 reducing the age of superannuation for all supervisory employees from 60 years to 58 years when the age of 60 years as superannuation age has been in operation from 1998 onwards, i.e. for 9 years. The only motive behind this office memorandum dated 08.03.2007 is to benefit the RIL to the tune of Rs.70 to 80 Crores and much more benefit in future.

xi. It appears that the purpose of office memorandum dated 08.03.2007 is to establish parity between the supervisory employees of IPCL and the supervisory employees of RIL, in respect of the age of superannuation. This object is clearly in violation of Clause 8 of the Scheme which clearly provides that the employees of IPCL cannot, after transfer, claim parity with the employees of RIL.

16 Mr. Patel has further submitted that the office memorandum dated 08.03.2007 reducing the age of superannuation from 60 years to 58 years has not been so far implemented upto the date of this Company Application i.e. for a period of two years. In fact, according to the terms of the office memorandum, the effect will be given to the reduction of age only with effect from 01.04.2009. Thus, between 08.03.2007 and 01.04.2009, no supervisory employee has been compulsorily retired or superannuated. Not only that but all supervisory employees upto 01.04.2009 have been allowed to reach the age of 60 years. Thus, if the office memorandum dated 08.03.2007 is stayed, the Company is not going to be prejudiced at all. It shows that superannuating people at the age of 58 under the office memorandum dated 08.03.2007 is not so indispensable or essential that it must be immediately implemented.

17 Mr. Patel has further submitted that it is not the case of respondent RIL that the supervisory employees who are to be affected by the office memorandum dated 08.03.2007 are deadwood or not efficient or subject to any disciplinary proceedings or their continuance will be harmful to the interest of the Company or that their services are not required. Thus, the sole purpose of the Company is merely to reduce the age of superannuation and send home the supervisory employees of IPCL only for the benefit of RIL.

18 Mr. Patel has further submitted that if the office memorandum dated 08.03.2007 is not stayed and allowed to operate, it would really cause irreversible and irrepairable damage to the very career and means of livelihood of the affected employees inasmuch as instead of retiring at the age of 60 years, they would be rendered unemployed and jobless at the age of 58 years. The damage to the affected employees in terms of the loss of service cannot be and should not be calculated only in terms of the salary and other remuneration or purely monetary benefit though it is definitely very important in the present days of economic crisis and increasing cost of living. To bring to an end suddenly and immediately, the services of the useful supervisory employees results in the sudden deprivation of the substantial salary which they get and which they will get for two years till the age of 60 years. This loss of substantial amount at this time of financial crisis and increasing cost of everything would cause an irrepairable loss to the affected employees. This immediate loss and harm to the employees and their families cannot be compensated even if upon the final disposal they succeed and get the salaries. Substantial amount of money available to the employees at present cannot be equated with the said amount to be given after 2 years or 3 years.

19 Apart from and in addition to the loss of salary and other benefits, the very deprivation of job at the good age of 58 is a severe blow to the personality and status of the employees. To have a job at hand has a much higher and deeper meaning than merely having the benefit of salary. The person in job feels that he is useful and can render services to the Company which he has served for so many years and also render services to the Society. A retired person suffers a serious psychological setback and makes him feel that he is a burden to be borne by the children or wife and by the Society also. What a loss of job really means in a life of a person has become so obvious and clear in the United States of America where lacs of people are losing jobs. Losing job means disruption of entire family including the health and education of the members of the family.

20 Mr. Patel has further submitted that the Company, on the other hand, will not suffer any irrepairable damage if the office memorandum dated 08.03.2007 is stayed. It would only mean that further supervisory employees whose services are needed and appreciated would continue to serve the Company for a further period of two years or till the matter is finally decided. The Company would not be required to give salaries without any return. The affected employees will continue to work and give their services to the Company and in return, they will continue to get salary. This is much more important particularly when it is not the case of the Company that these people are redundant and required to be retrenched because of any financial problem. In fact, IPCL was a going concern, it is merged with the RIL which is itself a super power. The business of RIL is expanding and it requires the services of people. Moreover, RIL in its letter dated 01.04.2009 clearly recognized the valuable services rendered by these employees and the Company wanted to felicitate these employees. All these factors show that the opponent Company is not going to suffer any damage whatsoever.

21 Mr. Patel has further submitted that so far as balance of convenience is concerned, it is clearly in favour of the applicants and not in favour of the opponent. If the office memorandum dated 08.03.2007 is implemented, it will immediately cause great inconvenience, in fact, great hardship, to the affected employees because it would mean the loss of job and to become jobless. The inconvenience is a mild word for the damage done to the affected employees at this period because inconvenience or hardship will be caused not only to the affected employees but to the entire families. On the other hand, no inconvenience

will be caused to the opponent Company if the office memorandum dated 08.03.2007 is stayed.

22 Mr. Patel has further submitted that granting of interim relief against implementation of office memorandum dated 08.03.2007 would not amount to granting of final relief because the final relief prayed for is that the office memorandum dated 08.03.2007 is illegal, invalid, inconsistent with and in clear violation of the Scheme of Amalgamation as sanctioned by the Court and the Court's directions in its judgment and for quashing and setting aside the said memorandum while interim relief prayed for is only for staying the operation of office memorandum dated 08.03.2007. There is a vast difference between the two. He has, therefore, submitted that this Company Application is within the jurisdiction of this Court and it cannot lie before any other High Court. Once the main question is decided, the question of continuance of services of the supervisory employees affected by the office memorandum will only be an incidental and consequential question. He has, therefore, submitted that interim relief is required to be granted in the matter.

23 Mr. Girish Patel, in support of his various submissions made before the Court, relied on the following judgments of the Court :-

i. In Mansukhlal son of late Chhotalal Devchand Shah V/s. M.V. Shah, Hathising Manufacturing Company Limited, 1976 (17) GLR 592, it is held that the framers of the Company Law in India have conferred statutory powers on the High Court to make such modifications in the compromise or arrangement as the Court may consider necessary for the proper working of the compromise and arrangement. The power of the widest amplitude has been conferred on the Court under Section 392 (1) (b) and the width and the magnitude of the power can be gauged from the language employed in Section 392 (1) (a) which confers a sort of a supervisory role on the Court during the period the scheme of compromise or arrangement is being implemented. Reading Clauses (1) and (b) of sub-section (1) of Section 392, it appears that the Parliament did not want the Court to be functus officio as soon as the scheme of compromise and arrangement is sanctioned by it. The Court has a continuing supervision over the implementation of compromise and arrangement. Unenvisaged, unanticipated, unforeseen or even unimaginable hitches, obstruction and impediments may arise in the course of implementation of a scheme of compromise and arrangement and if on every such occasion, sponsors have to go back to the parties concerned for seeking their approval for a modifications and then seek the approval of the Court, it would be a long-drawn out, protracted, time consuming process with no guarantee of result and the whole scheme of compromise and arrangement may be mutilated in the process. The Parliament has, therefore, thought it fit to trust the wisdom of the Court rather than go back to the interested parties.

ii. In S.K. Gupta and another V/s. K. P. Jain and another, AIR 1979 SC 734, it is held that 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 Section 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, there is 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).

iii. In Sarawati Industrial Syndicate Limited V/s. Commissioner of Income-tax, 1990 (Suppl.) SCC 675, it is held that the true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But undoubtedly when two companies amalgamate and merge into one the corporate entity of the transferor Company loses its entity from the date of amalgamation as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation.

iv. In Marshall Sons and Company (India) Limited V/s. Income Tax Officer, (1997) 2 SCC 302, it is held that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation / transfer shall take place. The scheme concerned herein does so provide. It is true, that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation / transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/ date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it- it should follow that the date of amalgamation / date of transfer is the date specified in the scheme as "the transfer date." It cannot be otherwise. Essentially, before applying to the Court under Section 391 (1), a Scheme has to be framed and such scheme has to contain a date of amalgamation / transfer. The proceedings before the Court may take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period, the proceedings are pending before the Court, both the amalgamating units i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in the present case but normally provision is made for this aspect also in the Scheme of Amalgamation.

v. In National Organic Chemical Industries Limited and another V/s. State of Maharashtra and others, 2004 (118) Company Cases 556, it is held that once the Court has declared that the corporate personality of a Company shall come to an end from a particular date, that status can be altered only by the Court. The status cannot be altered by the State even in exercise of its legislative powers as it would amount to directly interfering with the order passed by the Court and to overruling the orders of the Court or declaring that the judicial decisions are not binding. Moreover, there cannot be different dates of amalgamation for different authorities. In law, the Transferor Company carrying on business as Agent or Trustees of a Transferee Company cannot be said to be carrying on business as a separate entity. The State, by eviction, has sought to declare that the Transferor Company carrying on business as Trustee or Agent or a Transferee Company is a separate entity for the purposes of the sales tax. It is further held that although amalgamation is the voluntary act of the parties in deciding to amalgamate from the appointed date, that voluntary act acquires legal status and in law, the Transferor Company ceases to exist from the appointed date declared by the Court. Such a legal status which flows from the High Court order cannot be altered by the State Government.

Mr. K.S. Nanavati, learned Senior Counsel appearing for the respondent, on the other hand, has strongly opposed to grant of interim relief. He has submitted that interim relief as prayed for, if granted, would amount to grant of final relief at the admission stage itself. The Hon ble Supreme Court has time and again ordered that interim relief amounting to final relief ought not to be granted at the interim / admission stage. He relied on the decisions of the Hon ble Supreme Court in the case of State of U.P. & Others V/s. Modern Transport Company, Ludhiana and another, 2002 (9) SCC 514, wherein it is held that, it is expected that when interim orders are passed which, in effect, result in the writ petition itself being allowed, the High Court must give reasons in support thereof. In State of U.P. And other V/s. Ram Sukhi Devi, 2005 (9) SCC 733 it is held that, this Court has on numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable government order has to be ignored. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case having been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations.

1. Mr. Nanavati has further submitted that where the issue of retirement or age of retirement is involved, no interim relief be granted, which would amount to continuing the employees after the date of the retirement as stipulated by the Management, pending the adjudication as to the correct date of retirement or the age of retirement of the employees. He relied on the following decisions in support of this submission;

(i) In Union of India and others V/s. AIR Commodore S. K. Mishra, 1999 SCC (L & S) 949, it is held that the respondent would have retired from service in November 1997 but by virtue of the direction of the Division Bench dated 08.12.1997, he has been permitted to continue in service. It was not proper. A direction like the impugned one in the present case is not normally to be granted at the interim stage because in the event the employee succeeds in his case, he can always be granted relief even for the period during which he was out of service.

(ii) In G. M. Bharat Coking Coal Limited, West Bengal V/s. Shib Kumar Dushad and others, (2000) 8 SCC 696, it is held that where the date of birth as entered in service record is questioned before the Court or by an employee, shortly before his retirement, burden lies heavily on him to establish his stand by producing acceptable evidence of clinching nature. The Court should not pass interim order in continuance of such employee beyond the date of superannuation as per his service record.

(iii) In Public Services Tribunal Bar Association V/s. State of U.P. and another, (2003) 4 SCC 104, it is held that the dismissal, removal, termination and compulsory retirement puts an end to the relationship of employer and employee. In case of suspension, reduction in rank or reversion the relationship of employer and employee continues. Interference at the interim stage with an order of dismissal, removal, termination and compulsory retirement would be giving the final relief to an employee at an interim stage. The Legislature in its wisdom thought it proper not to confer the power to grant interim relief on the Tribunal, State Legislature had the legislative competence to constitute a service Tribunal and it was for it to define the

parameters of the jurisdiction of the Tribunal. During the suspension period the employee is entitled for the suspension allowance. If the suspension continues for indefinite period or order of suspension is passed mala fide then it would be open to the employee to challenge the same by approaching the High Court under Art. 226 of the Constitution of India.

2. Mr. Nanavati has further submitted that considering the principle / maxim of "delay defeats equity", no interim relief should be granted particularly when the supervisory employees concerned in the present matter were admittedly aware of the impugned Office Memorandum dated 08.03.2007 and never took any steps to challenge the said Office Memorandum, neither during the proceedings leading to sanctioning Scheme of Amalgamation of IPCL with RIL as sanctioned by this Court in Company Petition No.93 of 2007 nor before any other forum at the relevant time. For the first time on 24.03.2009, the challenge is made through the present application when w.e.f. 31.03.2009, many of the applicants were to retire. In support of this submission, he relied on the decision of Union of India and other V/s. Kishorilal Bablani, (1999) (1) SCC 729, wherein it is held that, delay defeats equity is a well known principle of jurisprudence. Delays of 15 and 20 years cannot be overlooked when an applicant before the Court seeks equity. It is quite clear that the applicants for all these years had no legal right to any particular post. After more than 10 years, the process of selection and notification of vacancies cannot be and ought not to be reopened in the interest of the proper functioning and morale of the concerned services. It would also jeopardise the existing positions of a very large number of members of that service. It would however, not be fair to the respondent to take away the benefit which he has secured on the basis of the contentions which are accepted as justified. The relief already granted to him is, therefore, maintainable, but it cannot be granted to anybody else.

3. Mr. Nanavati has further submitted that when the party can be compensated in terms of money, no injunction should be granted. This principle is statutorily recognized under Section 14 (1) (a) read with Section 41 of Specific Relief Act. In the instant case, even if the applicants succeed, then they can always be compensated in terms of money by way of wages / salaries and other remunerations as would be paid to them as if they are superannuated at the age of 60 years and not 58 years. He placed reliance on the decision of the Hon ble Supreme Court in the case of State Bank of India and others V/s. S.N.Goyal (2008) 8 SCC 92, wherein it is held that, it is held that the contract of personal service is not specifically enforceable, having regard to bar contained in Section 14 of the Specific Relief Act, 1963. Even if termination of contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of an employee is only to seek damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. Three well-recognised exceptions to this rule are :- (i) where a civil servant is removed from service in contravention of the provisions of Article 311 of the Constitution of India (or any law made under Article 309); (ii) where a workman having the protection of the Industrial Disputes Act, 1947 is wrongly terminated from service; and (iii) where an employee of a statutory body is terminated from service in breach or violation of any mandatory provision of a statute or statutory rules. There is clear distinction between public employment governed by statutory rules and private employment governed purely by contract. The test for deciding nature of relief "

damages or reinstatement with consequential reliefs " is whether employment is governed purely by contract or by a statute or statutory rules. Even where employer is a statutory body, but relationship is purely governed by contract with no element of statutory governance, contract of personal service will not be specifically enforceable. Conversely, where employer is a non-statutory body but employment is governed by a statute or statutory rules, a declaration that termination is null and void and that employee should be reinstated can be granted by Courts.

4. Mr. Nanavati has further submitted that for grant of interim injunction, the principles of prima facie case, balance of convenience and irreparable injury are to be seen. For this purpose, he relied on the following decisions.

(i) In Colgate Palmolive (India) Limited V/s. Hindustan Lever Limited, (1999) 7 SCC 1, it is held that the object of interlocutory injunction is to protect the plaintiff against the notification by reason of violation of his right and relief by way of interlocutory injunction is granted to mitigate the risk of the injustice to the plaintiff during the period before the uncertainty could be resolved. Generally, the interlocutory remedy by way of a grant of an order of injunction is intended to preserve and maintain in status quo the rights of the parties and to protect the plaintiff, being the initiator, of the action against incursion of his rights and for which there is no appropriate compensation being quantified in terms of damages. The basic principle of the grant of an order of injunction is to assess the right and need of the plaintiff as against that of the defendant and it is a duty incumbent on to the law Courts to determine as to where the balance lies. Another redeeming feature in the matter of grant of interlocutory injunction is that in the event of a grant of injunction in regard to a party defendant where the latter's enterprise has commenced, and in that event the consideration may be somewhat different from that where the defendant is yet to commence its enterprise.

(ii) In Gujarat Bottling Company Limited and others V/s. Coca Cola Company and others, (1995) 5 SCC 545, it is held that the grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests-(i) whether the plaintiff has a prima facie ease; (ii) whether the balance of convenience is in favour of the plaintiff; and

(iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need to the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where

the balance of convenience lies. In order to protect the defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.

Granting interim relief would result in an irreversible situation and, therefore, cause irreparable injury to the respondent Company. The applicants, who opted to join RIL, knowing about reduction in age of retirement cannot now complain of any irreparable loss or injury to them pending final hearing of the application.

5. Mr. Nanavati has further submitted that this Court does not have any jurisdiction to decide and adjudicate the present application inasmuch as the registered office of RIL against whom the present application is filed is not within the State of Gujarat, but is situated in Mumbai within the territorial jurisdiction of Bombay High Court. So far as IPCL is concerned, the said Company already stands dissolved w.e.f. 05.09.2007 and is no more in existence. Reference in this regard is made to Section 2 (11) read with Section 10 and Section 392 of the Companies Act, 1956 .

6. So far as the merits of the matter is concerned, Mr. Nanavati has submitted that the applicants have failed to make out any prima facie case; to justify departure from normal rule of not granting virtually final relief at the interim stage. In any case, issuance, operation and implementation of the impugned Office Memorandum dated 08.03.2007 does not amount to breach of Clause 8.1 or 8.2 of the Scheme of Amalgamation. It is also not in breach of direction / clarification issued by the learned Company Judge in paragraph 3 (b) of the main paragraph 49 of the judgment and order dated 16.08.2007 passed in Company Petition No.93 of 2007 read with Clause 8 of the Scheme. In this context, he has submitted that the Scheme under Section 391 " 394 is a Scheme for Amalgamation of two companies i.e. IPCL with RIL. The amalgamation results into merger of Transferor Company with the Transferee Company and on such merger taking place, the Transferor Company ceases to exist. Under the Scheme, this event occurs only on the effective date as referred to in Clause 3 read with Clause 1.3 and 18.1 of the Scheme.

7. Mr. Nanavati has further submitted that there is a distinction between merger of Company and transfer of undertaking. Scheme provides for merger or transfer of Company on effective date and transfer of part of undertaking on appointed date and part on effective date. Company as corporate entity, therefore, gets amalgamated only on effective date which is the relevant date. Under the directions given by the learned Company Judge, what is protected is the salary and other perquisites as well as other benefits as paid by the Transferor Company before Amalgamation. The amalgamation occurs on effective date, which is the relevant date to determine the terms and conditions of employment which are sought to be protected.

8. Based on the above submissions, Mr. Nanavati has submitted that there are no grounds which warrant grant of interim relief as prayed for pending final hearing and adjudication of the present application.

9. Having heard the learned counsels appearing for the parties and having considered their rival submissions in light of scheme of amalgamation between IPCL and RIL as sanctioned by this Court vide its order dated 16.8.2007, statutory provisions and

decided case law on the subject, this Court is of the view that looking to the issue raised by the applicant in the present applications, the matter requires consideration and hence both the applications are admitted. However, interim relief which was seriously pressed by the applicant and it was equally strongly objected to by the opponent RIL and while considering all these submissions for the purpose of deciding the question of interim relief, the Court is of the view that no case was made by the applicants out for granting interim relief and hence interim relief was refused.

10. The main challenge raised by the applicants in both these applications is against the office Memorandum dated 8.3.2007 issued by IPCL which reduced the superannuation age for all supervisory employees of IPCL, from 60 years to 58 years, on the ground that it is violative of scheme of amalgamation between IPCL and RIL as sanctioned by this Court vide its judgment and order dated 16.8.2008. The scheme of amalgamation as proposed and sanctioned by the Court contained the appointed date as 1.4.2006 and on its being sanctioned by the Court it would be operative and binding with effect from such operative date i.e. 1.4.2006. As per the direction of this Court, the service conditions of all employees of erstwhile IPCL as on the date before the amalgamation, which according to the applicant is 31.3.2006, were to remain unaltered after they were transferred to RIL. It is, therefore, contended that after 1.4.2006 it is not open for IPCL to reduce the date of superannuation age of the supervisory employees from 60 to 58 years on 8.3.2007. Thus, the real controversy between the parties centres round to the date of amalgamation for the purpose of considering the issue raised before the Court. There is no dispute about the fact that appointed date mentioned in the scheme of amalgamation is 1.4.2006 and the effective date as defined in the scheme is the last of the date on which the conditions referred to in Clause 18.1 of the scheme have been fulfilled and the orders of the High Court sanctioning the scheme are filed with the respective Registrar of the Companies by the transferor company and the transferee company. It is true that Clause 4.1 of the Scheme provides for transfer of undertaking which says that upon coming into effect of this scheme and with effect from the Appointed Date, the Undertaking of the transferor company shall, pursuant to the sanction of this scheme by the High Courts and pursuant to the provisions of Section 391 to 394 and other applicable provisions, if any, of the Act, be and stand transferred to and vested in or be deemed to have been transferred to and vested in the transferee company, as a going concern without any further act, instrument, deed, matter or thing so as to become, as and from the Appointed Date, the undertaking of the transferee company by virtue of and in the matter provided in the scheme. It is also true that Clause 1.12 defines undertaking, which shall mean the whole of the undertaking and entire business of the transferor company as a going concern, including;

(a) to (d) ... ...

(e) All employees engaged in or relating to the transferor company's business activities and operations.

On the basis of provisions of the scheme, the main argument of Mr.Patel is that upon coming into effect of the scheme of amalgamation and with effect from appointed date, the undertaking of the transferor company shall, pursuant to the sanction of the scheme by the High Court and pursuant to the provisions of Section 391 to 394 of the

Companies Act, 1956 stands transferred to and vested in the transferee company as a one concern.

1. However, Clause (8) of the scheme cannot be lost sight of, which specifically deals with employees and in unequivocal terms says that, upon coming into effect of this scheme, all the permanent employees of the transferor who are in employment as on the effective date shall become the employees of the transferee company with effect from the effective date without any break or interruption in service and on terms and conditions as to employment and remuneration not less favourable than those on which they are engaged or employed by the transferor company. This Court is, therefore, of the prima facie view that after issuing the office Memorandum dated 8.3.2007 reducing the superannuation age of the supervisory staff from 60 years to 58 years it cannot be said that those employees who have completed the age of 58 years on or before the effective date can be said to be the permanent employees of the transferor company.

2. Apart from the above submissions on merits, the other issues raised by Mr.Nanavati while opposing the present application, more particularly to grant an interim relief in favour of the applicants, are also worth considered. The first and foremost issue is regarding jurisdiction. Before considering this aspect of jurisdiction certain relevant provisions of the Companies Act, 1956 are required to be considered. Section 2 (11) defines "the Court" which means, with respect to any matter relating to a Company (other than any offence against this Act), the Court having jurisdiction under this Act with respect to that matter relating to that company, as provided in Section 10. Section 10 deals with jurisdiction of Courts. It says that (1) "The Court having jurisdiction under the Act shall be -

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2)." Section 392 deals with power of Court to enforce compromise and arrangement. It says that, "whether the 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 an 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."

Keeping the above provisions in mind, the IPCL rightly filed petition for the sanction to the scheme of amalgamation before this Court. Since the registered office of the company namely IPCL was situated at Baroda, which falls within the territorial jurisdiction of this Court. But for the scheme of amalgamation, by virtue of which the Company, namely, IPCL stood dissolved without being wound up. This Court would have entertained the present applications as per the provisions under Section 392(1)(d) of the Act. However, once the company stands dissolved this Company seizes to have any jurisdiction over such company and any modification which is not sought to be made in the scheme of amalgamation pertaining to the dissolved

company is required to be made before the Court which has jurisdiction over the transferee company and which the transferor company was amalgamated under the scheme. This Court is, therefore, of the prima facie view that it has no jurisdiction to decide the present applications.

1. The question of delay and latches was also raised by Mr.Nanavati as the Memorandum in question was passed on 8.3.2007 whereas the applications were moved on or about 22.3.2009. It is rightly said that delay will defeat equity. The Company has made this office Memorandum effective from 1.4.2009. Enough time was given to the applicants to challenge the said office Memorandum before this Court if they were really aggrieved. If they would have challenged the said office Memorandum immediately after 8.3.2007 possibly the question of jurisdiction would not have arisen as the scheme proceedings were pending before the Court and the objections would have been certainly considered by the Court. The Court also finds force in the submission of Mr.Nanavati that if interim relief as prayed for is granted it virtually amounts to granting of final relief and allowing the applications at an admission stage, which the Court should not normally do. It is also settled position in law that the Court should not pass any interim order in continuance of an employee beyond the date of termination and/or superannuation as in the event, the employees succeed in this case, they can always be granted relief even for the period during which they were out of service. One more issue which appeals to this Court while refusing the interim relief is that the grant of interim relief at this stage would now amount to specific performance of contract for personnel service, which is determinable and not specifically enforceable in view of the provisions contained in Section 14 read with Section 41 of the Specific Relief Act.

2. The submissions made by Mr.Patel and authorities cited in support of such submissions have not impressed the Court for the purpose of granting interim relief in these two applications.

3. There is no dispute about the supervisory powers of the Court under Section 392 (1)(b) of the Act for proper implementation of the scheme and there is no need for the sponsor of the scheme to go back to the interested parties for modification of the scheme, as discussed above. The question, however, remains as to which Court has to exercise this power, more particularly when transferor company got wound up without the dissolution once the scheme is sanctioned and the High Court sanctioning the scheme qua the transferee company is different from the Court sanctioning the scheme qua the transferor company. In such an eventuality the aggrieved parties will have to approach the High Court having jurisdiction over the transferee company. The judgment in the case of Mansukhlal (Supra) and S.K.Gupta & Anr. (Supra) do not render much assistance to the applicant. Similarly, Sarawati Industrial Syndicate Ltd., (Supra) reiterates the proposition of law, respective rights or liabilities of the parties are determined under the Scheme of amalgamation.

4. Clause (8) of the Scheme gives different treatment to the employees. This clause starts with the opening words "upon coming into effect of this Scheme, all the permanent employees of the transferor who are in employment as on the effective date shall become the employees of the transferee company with effect from the effective date without any break or interruption in service and on terms and conditions as to employment and remuneration not less favourable than those on which they are

engaged or employed by the transferor company. This decision could not he helpful to the applicant. Marshall Sons and Company (India) Limited's case (Supra) lays down the proposition that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation / transfer shall take place. Here in the present case, under the scheme itself, for transfer of undertaking, the relevant date is appointed date and, for transfer of employees the relevant date is effective date. The Court while sanctioning the scheme has not changed any of these two dates. National Organic Chemical Industries's case (Supra) simply lays down the principle that the status cannot be altered by the State even in exercise of its legislative powers as it would amount to directly interfering with the order passed by the Court and to overruling the orders of the Court or declaring that the judicial decisions are not biding. Here in the present case the Court itself sanctioned the scheme which contains the effective date being the date of transfer of employees. Neither the effective date nor the provisions in the scheme were altered by the Court.

5. Considering the entire facts and circumstances of the case and taking overall view of the matter, the Court is of the view that there is no prima facie case, nor there is any balance of convenience in favour of the applicants. It also cannot be said that if interim relief were not granted any irreparable loss or injury would cause to the applicant which could not be compensated in terms of Company. The Court, therefore, while admitting these two applications refused the interim relief as prayed for.

6. It is made clear that since the parties have argued the matter at length before the Court the above discussion is made and some findings are given. However, all these findings and/or observations are prima facie in nature and the same shall not be treated as final or conclusive.

Shri K. S. Nanavati
Sr. Advocate