2010 eGLR_HC 10006237,2011 CC (162)397 ,2011 (2) GLH NOC 7

Before the Hon'ble MR K A PUJ, JUSTICE

R H PATEL Vs. RELIANCE INDUSTRIES LIMITED - RESPONDENT

COMPANY APPLICATION No: 115 of 2009 , Decided On: 16/12/2010

Sunit Shah, Shalin Mehta, K.S.Nanavati, Nandish Chudgar, Nanavati Associates, pinakin M.Raval, Pooja K.Dave, Nandish Chudgar

MR.JUSTICE K.A.PUJ

1. Since common issue is involved in both these Company Applications and since they were heard together, the same are being disposed of by this common judgment and order.

2. Initially, both these Company Applications were admitted by this Court on 27.04.2009 and by detailed order, interim relief was refused. Being aggrieved by the said interim order, the applicants have approached the Apex Court by way of Special Leave Petition (Civil) Nos.16428 - 16430 of 2009 and the Apex Court vide its order dated 30.11.2009 disposed of the said SLPs observing that the petitioners have challenged the interim order and main applications are pending and since these applications affect factually good number of employees, the same should be disposed of at the earliest at least within a period of six months from the date of the said order. Accordingly, main matters are taken up for hearing.

3. The applicants took out Judges Summons praying reliefs, inter alia, that opponents - Reliance Industries Limited (RIL) be restrained from operating or implementing Office Memorandum dated 08.03.2007 issued by Mr. A. P. Singh for Indian Petrochemicals Company Ltd., (IPCL) reducing superannuation age from 60 years to 58 years for supervisory employees and same be quashed and set aside and further be declared that the Office Memorandum dated 08.03.2007 is violative of the Scheme of Amalgamation between IPCL and RIL sanctioned by the learned Company Judge of this Court vide judgment and order dated 16.08.2007 in Company Petition No.93 of 2007. The applicants by way of amendment, in the alternative, prayed for monetary compensation as if the applicants were continuing in service till 60 years of age. The applicants further amended the applications by incorporating the facts relating to disinvestment policy, shareholders agreement executed in compliance with the disinvestment policy and inter alia further contended that the clause relating to employees in the sanctioned Scheme is to be viewed in the context of disinvestment policy of the Government; shareholders agreement executed by the Reliance Industries Limited in favour of the Government assuring and committing to continue the existing employees with service conditions not inferior to what they were than currently enjoying and in case of retrenchment, offer atleast VRS and,

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therefore, the purpose of ascertaining the relevant date for considering the terms and conditions of service would be the date on which shareholders agreement was executed on 04.06.2002.

4. The brief facts giving rise to the present applications are that the age of superannuation of the supervisory employees was made 60 years from 58 years in May, 1998. Pursuant to the disinvestment policy, the majority shareholding came to be divested by IPCL to Reliance group of Industries on 04.06.2002 and hence, the management control came in the hands of Reliance group of Industries. In the meeting of the Board of Directors of IPCL, a Resolution came to be passed on 15.01.2007, whereby a decision was taken to revert back the age of superannuation of supervisory employees from 60 years to the original superannuation age of 58 years. However, the said decision was to be made applicable for those supervisory employees, who attained 58 years of age on or before 01.04.2009 and would retire on 01.04.2009 and those supervisory employees who attain 58 years of age after 01.04.2009 to retire on the date they attain such age. It was further resolved in the said meeting of the Board authorizing the whole time Director of the Company to take further action for implementing the said Resolution. Pursuant to the said resolution, impugned Office Memorandum was issued by the competent authority of Human Resources Department of IPCL on 08.03.2007 conveying the decision taken by the Board of Directors. The said Office Memorandum was forwarded to all supervisory employees who were connected to Internet computers as well as the notice board of all departments.

5. The Board of Directors of IPCL as well as of RIL took decision for amalgamation of IPCL with RIL and passed appropriate Resolution on 10.03.2007. VRS scheme for the supervisory employees was floated by the Management of IPCL on 13.03.2007. Clause 2 of the said VRS scheme with regard to compensation clearly stipulated that for the purpose of calculating the compensation, with regard to balance period of service left, the age of superannuation, shall have to be considered in accordance with the Circular dated 08.03.2007 i.e. considering the age of superannuation to be 58 years.

6. Company Application was filed by IPCL, the transferor company in this Court on 14.03.2007 under Section 391 for convening meetings of shareholders and creditors. The order was passed by this Court on 16.03.2007 directing convening of meetings of shareholders, secured creditors and unsecured creditors. Advertisements were published in newspapers on 20.03.2007 and meetings of shareholders and creditors were held and the Scheme of amalgamation was approved at the meeting on 14.04.2007. Report of the Chairman was filed in the proceedings of Company Application on 18.04.2007. On the same day, a substantive petition was filed by IPCL, the transferor company for sanction of the Scheme of amalgamation in this Court. The petition was admitted on 23.04.2007 and final hearing was fixed on 19.06.2007. 2,700 employees who had opted for VRS were relieved by IPCL in the first week of April, 2007 and were paid compensation on the basis of the age of retirement at 58 years as per the Circular dated 08.03.2007. Public advertisement inviting objection was published in the two newspapers. None of the applicants nor any other supervisory employees appeared in the Court and raised any objection with regard to the impugned office memorandum dated 08.03.2007 in this Court or otherwise. The Company Judge sanctioned scheme of amalgamation of IPCL with RIL on 16.08.2007. The certified copy of the judgment and order were filed with the Registrar of

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Companies on 05.09.2007. Similarly, on the same day, certified copy of the judgment passed by the Bombay High Court in the petition filed by RIL were filed with Registrar of Companies, Maharashtra. Thus, on filing of the certified copy, scheme of amalgamation became effective as directed by the High Court as well as in view of the provisions contained in the scheme of amalgamation. Even the OJ Appeal filed by the shareholders was dismissed by the Division Bench on 26.12.2007 and filed by the Labour Union was dismissed on 18.03.2008.

7. On the basis of the pleadings contained in the applications, affidavits, amendments and further affidavits, major submissions are made on behalf of the applicants by learned Advocate Mr. Sunit Shah. He developed his case mainly on the basis of the amendment made in the original Company Application. The disinvestment policy contemplates various modes of disinvestment. One of the modes is by way of strategic sale of the company was adopted. In mode of strategic sale, transaction has two elements (I) transfer of block of shares to the strategic partner and (II) transfer of management control to the strategic partner. Both take at a different time. In the process of disinvestment, governments one of the main concerns was protection of the employees. The disinvestment process included execution of three transaction documents. One of the documents included shareholders agreement. The shareholders agreement is divided into different sections dealing with different issues. Section 2 includes an assurance by strategic partner to continue with the existing employees with service conditions not inferior to what they currently enjoy, when in case of retrenchment, after atleast VRS. The transfer of shares take place between 3 to 5 years thereafter. The stand taken by the opponent was that service conditions were changed (i) on 08.03.2007 (ii) by IPCL and not by RIL (iii) the same were changed by competent authority of IPCL i.e. Board of Directors of IPCL and (iv) prior to sanctioning of the scheme and, therefore, there is no breach of the scheme as sanctioned by the Court. This is not a correct stand. Mr. Shah further submitted that the main argument of the opponent is that the scheme contemplates two dates one dated 01.04.2006 i.e. appointed date and another date is when certified copy of the order is filed upon sanction of the scheme by the High Court i.e. 05.09.2007 - the effective date. For the purpose of determining what were the terms and conditions of service according to the opponent, the relevant date is not 01.04.2006 but it is 05.09.2007. He submitted that this contention is misconceived for the following reasons :-

i. Taking the language as it is of clause 8.1, effective date is confined only for the purpose of identifying the employees, who were to be treated as the employees of RIL. Hence, 05.09.2007 is limited for the purpose of ascertaining the employees who were becoming employees of RIL. The said date is not relevant for the purpose of deciding the terms and conditions of the service of employees;

ii. The issue relating to employees i.e. continuity of service with same terms and conditions is not only covered by clause 8 of Scheme in isolation but is to be read in the context of clause 4 relating to transfer of "undertaking", "contract" and also the order of this Court. "Undertaking" includes employees. All legal transfer takes effect from 01.04.2006 and, therefore, obviously issues relating to transfer of employees with same conditions takes effect from 01.04.2006;

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iii.Clause 8 is to be read in context of disinvestment policy and shareholders agreement in letter and spirit. It is a larger issue, affecting others who are also not before this Court. Mr. Shah further submitted that RIL was in control and management of IPCL with effect from June 2002. Disinvestment policy does not permit strategic partner to change service terms and conditions detrimental and adversely affecting the interest of employees and, therefore, it is not open for the RIL in control of IPCL to change terms and conditions of service of employees after June 2002. RIL cannot change the terms and conditions through the process of disinvestment i.e. after 04.06.2002 and before 05.09.2007. If that be so, then strategic partner can very well defeat the assurance relating to employees of IPCL as contemplated by disinvestment policy and shareholders agreement. He further submitted that the interpretation put forward by the opponent would run counter to the letter and spirit of protection of the employees with regard to continuity of service on same terms and conditions. He further submitted that the scheme itself is a part of disinvestment process and the process commences with execution of documents and is achieved with sanction of scheme of amalgamation. He has, therefore, submitted that the scheme has to be read as implementing the disinvestment policy and shareholders agreement and cannot be read in isolation as canvassed by the opponent. In support of this contention, he relied on the decision of the Apex Court in the case of RIL V/s. RNRL, 2010 (5) SCALE 223 wherein it is held that the Court cannot interpret the scheme contrary to the Govt. policy and, therefore, Clause 8.1 should be interpreted in consonance with the terms and conditions of the disinvestment policy.

8. Mr. Shah further submitted that the Court has power under Section 392 of the Act to go into disinvestment policy and read into the Scheme and, therefore, RIL had no power or authority to alter the terms and conditions of the service of the applicants and other employees after 04.06.2002 including the superannuation age, which was 60 years. He further submitted that RIL cannot take a defense that it was done by IPCL and not by RIL. As per disinvestment policy and shareholders agreement, RIL had taken over the control from 04.06.2002 and since then, IPCL was merely a legal entity remained in existence till amalgamation was taken place. The defense of RIL is further hit by the doctrine of lifting the corporate vein. The Court is always empowered to pierce the legal entity and look into the reality and, therefore, this contention does not survive. He further submitted that it is not open for the RIL to raise a contention that the supervisory officers are not being protected by labour law / industrial law and hence, they have a right to change terms and conditions of service as an employer. The said power is already taken away by the Government by incorporating the terms and conditions in the disinvestment policy as well as shareholders agreement. An assurance was given to the employees under the disinvestment policy and if that assurance is not adhered to, there is no sanctity of such assurance. The Government has made a mandatory provision for strategic partner to agree for continuation of service of the employees on same terms and conditions and, therefore, the office memorandum issued on 08.03.2007 by IPCL is contrary to the terms of disinvestment policy as well as shareholders agreement.

9. Mr. Shah further submitted that the office memorandum dated 08.03.2007 does not assign any reason for reducing the superannuation age. Though the said office memorandum does not refer to the name of any competent authority, during the course of hearing of these applications, a copy of the Board of Directors Resolution dated 15.01.2007 is produced.

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However, the said resolution does not contain any reason. Even if it is assumed that Board of Directors did pass a resolution and had an authority to pass a resolution, in view of the disinvestment policy and shareholders agreement, the same is not in consonance with the principles laid down by the Apex Court in relation to the change in superannuation age of the employees. He further submitted that the decision to reduce superannuation age is based on irrelevant issues. For bringing uniformity, superannuation age was reduced prior to scheme of amalgamation. The contention of the uniformity is also not well convincing as the Courts have recognized two class of employees with different set of service in case of amalgamation and merger and it is to be based on intelligible differentia. He further submitted that the reason of the uniformity runs counter to the object of disinvestment policy. He has, therefore, submitted that the object of office memorandum dated 08.03.2007 is to frustrate the disinvestment policy, shareholders agreement and the scheme of amalgamation.

10.Mr. Shah further submitted that the application is not hit by doctrine of estoppel as contended by the opponents in their pleadings. He further submitted that the only contention raised is with regard to delay. However, that contention is not acceptable in view of the peculiar facts of the present case because applications are filed on or around 31.03.2009 and it was the case of the opponents that the superannuation age was not the subject matter of the scheme and hence, the question of not taking the contention at the time of passing of the scheme or at the time of sanctioning of the scheme by this Court does not arise. Even otherwise, it is a matter of legal and equitable right and same cannot be defeated. On the contrary, opponents are estopped from reducing superannuation age in view of disinvestment policy and shareholders agreement.

11.Mr. Shah further submitted that reduction of superannuation age results into discriminatory treatment because service conditions of the employees of public undertakings are governed by the Bureau of Public Enterprise (BPE) and BPE fixes terms and conditions of public enterprise. Pursuant to the direction of the Central Government, 60 years of age are prescribed for the employees of public sector enterprise. Even after privatisation, constitutional mandate continues against the private employer and, therefore, cannot be treated arbitrarily and discriminatory.

12.Mr. Shah has further submitted that the scope of Section 392 is very wide to include power to go into the issues which have an effect or impact on the scheme or relevant interpretation or understanding and making the scheme working. He has, therefore, submitted that there is no need to go before any other forum for filing a separate proceeding because Clause 8.1.G which has a statutory force.

13.Mr. Shah has further submitted that even the contention regarding territorial jurisdiction has no force. The applicants are the employees of IPCL. The scheme was proposed by IPCL and the same was sanctioned by this Court. Once the scheme is sanctioned, this Court does not become functus officio. Even if IPCL is dissolved, this Court continues to have the jurisdiction. He further submitted that the argument of one Court is wrong because there were two Courts sanctioning the scheme right from beginning. Hence, the application is

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not barred by vice or lack of jurisdiction. Lastly, Mr. Shah has submitted that by agreeing to continue employees with the same service conditions under disinvestment policy, shareholders agreement and the scheme, specific performance of service conditions is accepted by RIL. Now to permit them to argue that the service can be terminated and only compensation can be asked runs counter to scheme / disinvestment policy / shareholders agreement. Alternatively, he has submitted that if specific performance is not possible in that case, adequate compensation is required to be paid to the applicants.

14.Mr. Shah relied on the decision of the Apex Court in the case of Bholanath J. Thaker V/s. The State of Saurashtra, AIR 1954 SC 680 for the proposition that two sets of employees with two set of service conditions are permissible. In this case, it is held that the covenant could be looked at to see whether the new sovereign had waived his rights to ignore rights given under the laws of the former sovereign. The Court further held that there was no dispute arising out of the covenant and what A was doing was merely to enforce his rights under the existing laws which continued in force until they were repealed by appropriate legislation and hence, bar under Article 363 could not be invoked. The Court further held that even though the tenure of As service with the Ruler of the Wadhwan State was initially during the pleasure of the Ruler, the Ruler put a fetter upon his powers to dispense with the services of A when the Dhara No.29 of St. 2004 was enacted by him. This obligation of the Ruler passed to the Saurashtra State and the Saurashtra State also could not dispense with the services or compulsorily retire A before he attained 60 years of age. If the Saurashtra State chose to compulsorily retire A, it could only do so on payment of reasonable compensation.

15.Mr. Shah further relied on the decision of the Apex Court in the case of Mohinder Singh Gill and another V/s. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851 for the proposition that decision is to be judged as what is written therein and not to be supplemented by affidavit. The Court held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

16.Mr. Shah further relied on the decision of the Apex Court in the case of Air India V/s. Nergesh Meerza and others, AIR 1981 SC 1829 for the proposition that retirement age is to be fixed keeping in mind various factors. The Court held that the question of fixation of retirement age of an Air Hostess is to be decided by the authorities concerned after taking into consideration various factors such as the nature of the work, the prevailing conditions, the practice prevalent in other establishments and the like. The factors to be considered must be relevant and bear a close nexus to the nature of the organization and the duties of the employees. Where the authority concerned takes into account factors or circumstances which are inherently irrational or illogical or tainted, the decision fixing the age of retirement is open to serious scrutiny.

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17.Mr. Shah further relied on the decision of the Apex Court in the case of National Textile Workers Union V/s. P.R. Ramakrishnan and others, AIR 1983 SC 75 for the proposition that what should be the approach of the Court towards employees in Company matters. The Court held that it is not only the shareholders who have supplied capital who are interested in the enterprise which is being run by a company but the workers who supply labour are also equally, if not, more interested because what is produced by the enterprise is the result of labour as well as capital. While the shareholders invest only a part of their moneys, the workers invest their sweat and toil, in fact their life itself. The workers therefore have a special place in a socialist pattern of society. They are not mere vendors of toil, they are not a marketable commodity to be purchased by the owners of capital. They are producers of wealth as much as capital may, very much more. In view of the Preamble, the Directive Principles of State Policy and particularly introduction of Article 43-A, it is idle to contend that the workers should have no voice in the determination of the question whether the enterprise should continue to run or be shut down under an order of the Court.

18.Mr. Shah further relied on the decision of the Apex Court in the case of Life Insurance Corporation of India and another V/s. S. S. Srivastava and others, AIR 1987 SC 1527 wherein it is held that since the classification of the employees for the purpose of age of retirement made into two categories i.e. transferred employees and employees appointed after 01.09.1956 is reasonable and not arbitrary and that there is a reasonable nexus between the classification and the object to be attained thereby. It cannot be said that Regulation 19 (2) is violative of Articles 14 & 16 of the Constitution of India. The transferred employees who are treated favourably belong to a vanishing group and perhaps, within a period of few years none of them would be in the service of the Corporation. Thereafter, only one class of employees would be in the service of the corporation, namely, those appointed subsequent to 01.09.1956 by the corporation in respect of whom the corporation has fixed the age of retirement as 58 years which correspondence to the age of retirement in almost all the public sector establishments, central Government services and the State Government services.

19.Mr. Shah further relied on the decision of the Apex Court in the case of B. S. Yadav and another V/s. The Chief Manager, Central Bank of India and others, AIR 1987 SC 1706 wherein it is held that there was good reason to make a distinction between the employees who had entered service prior to nationalization and those who joined thereafter. At the time of nationalization, the corresponding new banks did not have their own employees to run the vast business taken over under the Act. There was, therefore, necessity to secure the services of the employees of the former banking companies without causing much dissatisfaction to them. There was also need for standardising the conditions of service of all such employees belonging to the 14 banks. The Government of India took the advice of the Pillai Committee and the Study Group of Bankers and after due deliberation evolved a uniform pattern of conditions for the transferred employees keeping in view the conditions of service of the employees prevailing in the majority of the banking companies which were nationalized. In so far as the employees recruited after nationalization were concerned the Government applied the rules generally applicable to all its employees in other spheres of Government service. In the circumstances, it could not be said that the Banks attitude was unreasonable, particularly when the age of retirement of the new entrants was quite consistent with the conditions prevailing in almost all the sectors of public employment. Therefore, the classification of the employees into two categories i.e. those falling under Rules 1 & 2 of the Rules for age of retirement and those

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falling under Rule 3 thereof satisfies the tests of a valid classification laid down under Articles 14 & 16 of the Constitution and Rule 3 could not be declared as unconstitutional.

20.Mr. Shah further relied on the decision of the Apex Court in the case of H. L. Trehan and others V/s. Union of India and others, AIR 1989 SC 568 wherein it is held that where the management of Caltex Oil Refining (India) Ltd., (CORIL) to which management of the Undertaking of Caltex (India) Ltd., had been transferred, altered the conditions of service of the staff of the Caltex (India) Ltd., to their disadvantage without giving them an opportunity of being heard, the order altering the conditions was liable to be set aside. There can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a Government servant without complying with the rules of natural justice by giving the Government servant concerned an opportunity of being heard. Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the provision of Article 14 of the Constitution. Admittedly, the employees of CORIL were not given an opportunity of hearing or representing their case before the impugned circular altering conditions of service was issued by the Board of Directors. The impugned Circular could not, therefore, be sustained as it offends against the rules of natural justice. The Court further held that the fact that after the circular was issued, an opportunity of hearing was given to the employees with regard to the alterations made in the conditions of their service by the impugned circular would be immaterial. The post-decisional opportunity of hearing does not sub-serve the rules of natural justice. The authority who embarks upon a post-decisional hearing will naturally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity. Once a decision has been taken, there is a tendency to uphold it and a representation may not yield any fruitful purpose. Thus, even if any hearing was given to the employees of CORIL after the issuance of the impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by Article 14 of the Constitution.

21.Mr. Shah further relied on the decision of the Apex Court in the case of Hindustan Lever Employees Union V/s. Hindustan Lever Limited and others, AIR 1995 SC 470 wherein the Court has taken the view that the amalgamation caused no prejudice to workers of both Companies as there were two sets of service conditions. The Court, therefore, refused to interfere in the approval of the scheme.

22.Mr. Shah further relied on the decision of the Apex Court in the case of Marshall Sons and Company (India) Limited V/s. Income-tax Officer, 1996 (88) Company Cases 528 wherein it is held that every scheme of amalgamation of companies has necessarily to provide a date with effect from which the amalgamation / transfer shall take place. It is true that while sanctioning the scheme, it is open to the company 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, 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, the date of amalgamation / date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise.

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23.Mr. Shah further relied on the decision of the Apex Court in the case of Ahmedabad Education Society V/s. Gilbert B. Shah and others, 2004 (4) GLR 374 wherein teachers were appointed in private primary school run by Ahmedabad Education Society. Contract of service contained in the Societys Leave Rules provided that teachers would retire at the age of 60 years. Since the original terms and conditions of the contract, the teachers were appointed upto a particular age i.e. upto age of 60 years, they could be considered as appointed for a definite period. The teachers were wrongly retired at the age of 50 years instead of 60 years. The Court directed the employer to pay the difference in salary and emoluments as if they had continued in service till the age of 60 years.

24.Mr. Shah further relied on the decision of the Apex Court in the case of RNRL V/S. RIL, 2010 (5) SCALE 223, wherein it is held that in the Companies Act, there is no provision except Section 391 to Section 394 which deal with procedure and power of the Company Court to sanction the scheme which fall within the ambit of the requirements as contemplated under these Sections. In absence of any other provisions except Section 392, it is difficult to accept the contention as raised that the present application under Section 392 of the Companies Act is without jurisdiction. On the other hand, Sections 391 to 394 has ample power and jurisdiction to supervise the scheme as sanctioned under the Companies Act. The exigencies, facts and circumstances, play dominant role in passing appropriate order under Sections 391 to 394 after sanctioning of the Scheme. The Company Court is not powerless and can never become functus officio. Sections 391 to 394 are interconnected and it can pass appropriate order for sanctioning of any Scheme including of arrangement, demerger, merger and amalgamation. Therefore, the application filed by RNRL under Section 392 is maintainable. Nevertheless, the power of the Court does not extend to rewriting the Scheme in any manner.

25.Mr. K. S. Nanavati, learned Senior Advocate appearing for M/s. Nanavati Associates for the opponents has raised the preliminary issue with regard to territorial jurisdiction of this Court. He has submitted that the scheme of amalgamation of IPCL with RIL has been sanctioned by this Court vide its judgment and order dated 16.08.2007 and certified copy of the said judgment has been filed with the Registrar of Companies on 05.09.2007. Thus, the amalgamation has become effective on and from 05.09.2007 as stipulated in the scheme as well as in the judgment and order dated 16.08.2007 of this Court. By virtue of the same, IPCL, the transferor Company stood dissolved without winding up w.e.f. 05.09.2007. In view of the same, it is only RIL which is now existing. The registered office of which is situated within the territorial jurisdiction of Bombay High Court and not within the territorial jurisdiction of this Court. Directions sought by the applicants are essentially against RIL for implementing Clause 8 of the Scheme sanctioned by the Bombay High Court. IPCL stands dissolved and has ceased to exist. He has, therefore, submitted that if at all the jurisdiction under Section 392 of the Companies Act is to be exercised, as is available, it would be available with Bombay High Court and not with this Court.

26.Mr. Nanavati has further submitted that so far as the proceedings relating to the sanctioning of the Scheme of amalgamation of IPCL with RIL is concerned, since the registered

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office of IPCL was within the territorial jurisdiction of this Court, while for RIL, proceedings were filed before the Bombay High Court, because the registered office of RIL is within the territory of Maharashtra. Now IPCL already stands dissolved, while it is only RIL which is in existence, whose registered office is at Mumbai and it is only the Bombay High Court, who has jurisdiction over RIL, under the provisions of the Companies Act, 1956.

27.Mr. Nanavati has further submitted that the word Court as provided in Section 2 (11) read with Section 10 of the Companies Act, 1956, with reference to the instant case, would mean Bombay High Court and not this Court. He further submitted that in view of the fact that IPCL already stands dissolved w.e.f. 05.09.2007 and the registered office of RIL admittedly being in Mumbai, the jurisdiction to entertain the present application would be only with Bombay High Court at Mumbai and not this Court at Ahmedabad. To substantiate his argument, Mr. Nanavati further invited the Courts attention to the provisions of Section 391 (2), which provide that if the Court is satisfied that the compromise or arrangement sanctioned under Section 392 cannot be worked out satisfactorily, it may make an order of winding up of the Company and such order shall be deemed to be an order under Section 433 of the Companies Act. IPCL is now no more in existence and it is only RIL which is in existence. The registered office of RIL is at Mumbai. If any winding up order is to be passed by the Court while exercising the provisions of Section 392 (2) of the Act, it will be RIL which may be required to be wound up. In such a case, it will be Bombay High Court alone which will have jurisdiction to wind up RIL and not this Court. In that view of the matter, he has submitted that assuming without admitting that the jurisdiction under Section 392 is exercisable, for the purpose of reliefs as prayed for in the present applications, then also, it will not be within the territorial jurisdiction of this Court to pass any such order.

28.Mr. Nanavati further raised an issue with regard to delay in filing the present applications. He has submitted that it is well settled proposition of law that delay defeats equity. In the instant case, the office memorandum was communicated to all the supervisory employees including the applicants on 08.03.2007 when the said office memorandum / circular was pasted on the notice board of all the department of IPCL. The applicants, therefore, knew about the provisions and the resultant effect of the said office memorandum right from 08.03.2007. The fact that the applicants knew about the office memorandum is also admitted by the applicants, categorically in the rejoinder affidavit dated 31.03.2009. Thus, if the applicants were aggrieved by resultant effect of the said office memorandum vis-a-vis the scheme and its implementation, then the applicants should have participated in the proceedings of Company Petition No.93 of 2007 which is for sanctioning of the scheme before this Court and should have objected to such a Scheme. The present applicants chose not to raise any grievance at the relevant time despite full knowledge of the office memorandum and its resultant effect at the relevant time itself. Not only that, the said office memorandum dated 08.03.2007 has already been given effect to, for the purpose of calculation of the compensation with regard to the VRS, which was floated on 13.03.2007 and 212 supervisory employees were relieved pursuant to their opting for VRS in the first week of April, 2007. Thus, the office memorandum dated 08.03.2007 has already been given effect to and implemented and is in operation since 08.03.2007. Despite implementation and operation of office memorandum dated 08.03.2007, from the even date, the applicants have only now chosen to approach this Court at the very fag end for the first time by filing the application on 24.03.2009 when the applicants are being relieved / superannuated on 31.03.2009 or later as the case may be, in terms of the office

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memorandum dated 08.03.2007. Such conduct is not bonafide and suffers from the vice of delay, laches and acquiescence. He has, therefore, submitted that delay, laches and acquiescence defeats equitable relief and hence, the applicants are not entitled to any reliefs as prayed for.

29. In support of the above submission, Mr.Nanavati relied on the decision of the Apex Court in the case of Municipal Council, Ahmedanagar and another Vs Shah Hyder Beig and others, (2000) 2 SCC 48, wherein the court held that it is now a well settled principle of law that while no period of limitation is fixed but in the normal course of events, the period during which the party is required for filing a civil proceeding ought to be the guiding factor. While it is true that this extraordinary jurisdiction is available to mitigate the sufferings of the people in general but it is not out of place to mention that this extraordinary jurisdiction has been conferred on the law courts under Article 226 of the Constitution on a very sound equitable principle. Hence, the equitable doctrine, namely, "delay defeats equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution. The discretionary relief can be had provided one has not by his act or conduct given a go-by to his rights. Equity favours a vigilant rather than an indolent litigant and this being the basic tenet of law, the question of grant of an order as has been passed in the matter as regards restoration of possession upon cancellation of the notification does not and cannot arise.

30.Mr. Nanavati further submitted that the decision of reverting the superannuation age from 60 years to 58 years for supervisory employees was taken by the Board of Directors of IPCL on 15.01.2007 and was communicated to all including supervisory employees on 08.03.2007 vide the office memorandum of even date, displayed on the notice board on the same date, as also by mass-mails addressed to all employees who were connected through intranet computers. The supervisory employees are being relieved pursuant to the said office memorandum w.e.f. 01.04.2009. The office memorandum as such become effective w.e.f. 08.03.2007 when it was displayed in the notice board and thus communicated to all the supervisory employees. The date of superannuation came to be reduced from 60 years to 58 years on 08.03.2007. thus, it is clear that as per the service condition, as prevailing on 08.03.2007, the superannuation age was 58 years.

31.Mr. Nanavati further submitted that Clause 8.1 of the Scheme envisages that when all the permanent employees of transferor company become employees of the transferee company w.e.f. the effective date, their terms and conditions as to employment and remuneration would not be less favourable than those on which they are engaged or employed by the transferor company. Clause 8.1 clearly stipulates that all the permanent employees of IPCL who are in employment with IPCL, as on the effective date (05.09.2007) shall merge with transferee company (RIL) w.e.f. 05.09.2007. Therefore, it is clear that the terms and conditions of service or conditions of employment which were prevalent prior to the effective date i.e. upto the period during which the employees were employed by the transferor company would not be altered by the transferee company so as to be less favourable. In the instant case, employees of IPCL continued to be employed by IPCL upto the effective date i.e. 05.09.2007 and therefore, what is to be seen is the terms and conditions of the service as on 04.09.2007 just before effective date, which cannot be altered so as to be less favourable than those which were prevailing

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on 04.09.2007. It is clear that as on 04.09.2007, the age of superannuation was already reduced from 60 years to 58 years for supervisory employees. Thus, the action of relieving the supervisory employees from 01.04.2009 by virtue of office memorandum dated 08.03.2007 does not amount to altering the service conditions so as to be less favourable than those which were prevailing as on 04.09.2007 inasmuch as the age of superannuation stood already reduced from 60 years to 58 years as on 04.09.2007. Therefore, the said action cannot be said to be in breach of the provisions of the Scheme of Amalgamation.

32.Mr. Nanavati has further submitted that the learned Company Judge in his judgment and order dated 16.08.2007 has observed that the employees of the transferor company who joined the transferee company shall be governed by the Scheme with modification that such employees shall be continued to be paid the same salary and other perquisites and benefits as they are being paid and given by the transferor company before amalgamation. The learned Company Judge has also directed that the payment and other benefits including the salary as well as provident fund that are to be paid and given to such employees shall be paid and given to them as at present it is paid. He further submitted that as per the said direction, on joining of the employees of the transferor company with the transferee company, such employees are to be continued to be paid the same salary and other perquisites as well as other benefits as they were being paid and given by the transferor company before amalgamation. Thus, to those employees who joined RIL, this Court directed that they shall be continued to be paid same salary, perquisites and benefits as were being paid by IPCL before amalgamation. He further submitted that these directions can be dissected into two parts. One is regarding payment of salary, perquisites and benefits while the other is regarding the salary, perquisites and benefits as being paid before Amalgamation. The condition of service with regard to age of superannuation and particularly reverting the age of superannuation from 60 years to 58 years, cannot be said to be covered within the direction with regard to payment of salary, perquisites and other benefits. Therefore, the said direction would not be covering the said condition of service with regard to age of superannuation.

33.Mr. Nanavati further submitted that without prejudice to this argument, with regard to the interpretation and meaning of the words "before Amalgamation", the undertaking of IPCL consisting of employees was transferred and amalgamated with RIL only on the effective date as per the true and correct meaning of Part-II with regard to "Transfer of Undertaking" of the Scheme and particularly by virtue of Clause 8.1 of the Scheme.

34.Mr. Nanavati further submitted that from the perusal of Clause - C with regard to Chapter - "GENERAL", it appears that the Scheme of Amalgamation is divided into five parts. The Part-II deals with transfer of undertaking of the transferor company to the transferee company. Part-II is consisting of Clause 4 to 9, which are with regard to Transfer of Undertaking. The term "Undertaking" is defined in Clause 1.12, which includes, inter alia, all assets, properties, secured and unsecured debts, agreements, contracts, permits, licences, intellectual property rights as also employees. To be precise, sub-clause (e) of Clause 1.12 provides that all the employees engaged in or relating to the transferor companys business activities and operations shall also mean part of the Undertaking of the transferor company.

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35.Mr. Nanavati has further submitted that in Part-II of the Scheme, Clause 4.2 deals with transfer of assets, which says that on coming into effect of the Scheme, the assets, properties, license, permits, etc. shall be transferred to the transferee company w.e.f. the appointed date - 01.04.2006. Clause 4.3 deals with transfer of liabilities, debts, loans and other obligations of transferor company, which shall be transferred to transferee company w.e.f. the appointed date (01.04.2006). Clause 5 deals with contract, deeds etc. and provides that the contracts, agreements, arrangements, deeds, etc., shall be taken over to the transferee company from the transferor company w.e.f. Effective date (05.09.2007). Thus, the part of undertaking of transferor company comprising of contracts, deeds, arrangements, etc. is being merged or amalgamated or transferred from transferor company to transferee company w.e.f. Effective date (05.09.2007). Clause 6 deals with legal proceedings and it contemplates that w.e.f. the Effective date, the legal proceedings which were being prosecuted or defended by the transferor company shall be continued and/or enforced by or against the transferee company on and from the Effective Date. Meaning thereby that the legal proceedings shall stand transferred from the transferor companys name to the transferee company on and from the Effective Date. Thus, the part of Undertaking comprising of legal proceedings, is being merged or amalgamated or transferred from the transferor company to the transferee company w.e.f. Effective Date (05.09.2007). Clause 7 deals with the conduct of business during the interregnum period i.e. w.e.f. the appointed date upto the effective date and the said Clause provides that w.e.f. the Appointed date 01.04.2006, the business and activities of the transferor company shall be carried on and shall be deemed to have been carried on by the transferor company for the benefit and in trust for the transferee company, upto the including the Effective date 05.09.2007, on and from the effective date, the transferor company stood dissolved and hence, business, obviously would be carried on by the transferee company alone. Thus, there is no ambiguity but it is crystal clear that the undertaking is sought to be transferred from the transferor company to the transferee company in different parts of different times. Some parts of the Undertaking of IPCL are sought to be transferred and amalgamated with RIL on the Appointed Date i.e. 01.04.2006 while the other parts of the Undertaking of IPCL are sought to be transferred and amalgamated with RIL on the Effective Date i.e. 05.09.2006.

36.Mr. Nanavati further submitted that Clause 8 deals with the employees portion of the Undertaking. Sub- clause (2) of Clause 1.12 provides that employees shall be included in the whole of the Undertaking. Thus, it is clear that employees form a separate portion of the Undertaking as a whole. Clauses 8 and particularly 8.1 provides for the said part of the Undertaking i.e. the employees part which shall be transferred from the transferor company to the transferee company with effect from the Effective Date. Thus, it is crystal clear that the employees part of the Undertaking is transferred and amalgamated from IPCL to RIL only on the Effective Date 05.09.2007 and not from the Appointed Date 01.04.2006. He has, therefore, submitted that even if the reversion of age of superannuation from 60 years to 58 years is included in the fresh salary and other perquisites and other benefits, then also, such reversion had taken place much before the amalgamation of the employees part of undertaking of IPCL with RIL and hence, giving effect to the said reversion, does not in any way, violates the direction / clarification issued by the learned Company Judge in his judgment and order dated 16.08.2007 and also in the proceedings of Company Petition No.93 of 2007. He has, therefore, submitted that the grievances made by the applicants are ill- founded, baseless and devoid of any merits not entitling them to any of the reliefs as prayed for.

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37.Mr. Nanavati further raised an issue regarding significance of the Appointed Date. As per the Scheme of Amalgamation of IPCL with RIL, the Appointed Date is 01.04.2006 as provided in Clause 1.2. While Clause 1.3 gives meaning of Effective Date to mean the last of the date on which the conditions as 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 Companies by the transferor company and by the transferee company. Admittedly, the order of this Court sanctioning the Scheme was filed with ROC, Gujarat on 05.09.2007, so also the order of the Bombay High Court sanctioning the Scheme was filed on 05.09.2007 with ROC, Maharashtra. Thus, the effective date as per Clause 1.3 would mean 05.09.2007. The transfer of Undertaking of IPCL is sought to be transferred from IPCL to RIL on different dates in different parts. The properties, assets, debts, liabilities, etc. are sought to be transferred on the Appointed Date and amalgamated with RIL on the Appointed Date while the Undertaking consisting of parts such as encumbrances (mortgages, charges, etc.), contracts, deeds, etc., legal proceedings, and employees are sought to be transferred from IPCL and amalgamated with RIL w.e.f. the Effective Date. He further submitted that the significance of the Appointed Date is only for certain purposes, such as for accounting purposes including that for identification and quantification of assets, properties, for identification of liabilities, debts, etc. While it is the effective date on which the actual amalgamation of the two companies take place.

38. In support of this submission, he relied on the following decisions :-

(i) In the case of HCL Limited, In re., (1991) 80 Company Cases 228 (Delhi), the Court held that the companies explained that the appointed date had been taken for identification and quantification of the assets and liabilities of the existing company on the basis of the audited balance-sheet of the existing company for the financial year ending June 30, 1990, for the purpose of fixation of the share valuation for the share exchange rate. The scheme nowhere sought transfer artificially of new assets in July, 1990. All the assets sought to be transferred were in fact in existence on the appointed date. The appointed date was distinct from the effective date, which was the date on which all consents and approvals required under the scheme were obtained and on which the transfer was to take effect. The Court therefore took view that the objection raised by the Central Government was not sustainable.

(ii) In the case of Bombay Gas Company Private Limited Vs Central Government and others, (1997) 89 Company Cases 195 (Bombay), the Court held that the "appointed date" was stipulated in the scheme only for the purpose of identification and quantification of assets on a particular date which were sought to be transferred to the transferee company. Clause 20 of the scheme in terms provided that the scheme shall take effect finally upon and from the date on which the necessary sanction or approval was obtained.

39.Mr. Nanavati has also canvassed an argument that scope of Section 392 of the Companies Act is very limited so far as the present case is concerned. Though the power of the Court under Section 392 (1) is of wide amplitude, it cannot be said that such power is without any

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limitation. Such power can be invoked only for the purpose of proper working of the compromise or arrangement. It cannot be invoked for the purposes of determination or adjudication of any right or interest claimed by any party flowing from the Scheme. It would not be within the ambit of Section 392 that the Company Court is called upon to adjudicate dispute or claims arising from the Scheme under the guise of supervising the Scheme. Such powers are not contemplated under Section 392 of the Companies Act. The jurisdiction under Section 392 can be invoked only for the purpose of issuance of direction with regard to matters in respect of which the direction might be necessary to complete the process of Amalgamation, merger or absorption. In the instant case, the direction / declaration as sought for by the applicants for quashing and setting aside Office Memorandum dated 08.03.2007 could not be said to be necessary to secure that the arrangement and amalgamation is fully and effectively completed. With reference to provision of Section 392 (1) of the Act, it cannot be said that declaring / directing and setting aside the office memorandum dated 08.03.2007 by the company Court of this Court would be either supervising "the carrying out of the compromise or arrangement" as contemplated by Clause A of Section 392 (1) or taking any steps "for the purpose of working of the compromise or arrangement" as envisaged by Clause B of Section 392 (1). The Company Court would not assume the role of a Civil Court or of an Industrial Tribunal / Labour Court and adjudicate upon the dispute with regard to conditions of service of the employees of the company. Such role of the Company Court is not envisaged by the Scheme of Companies Act and particularly the provision of Section 392 thereof.

40. In support of the above submission, Mr.Nanavati relied on the following decisions :-

(i) In the case of Divya Vasundhara Financiers Private Limited, In re., (1984) 56 Company Cases 487 (Gujarat), this Court held that the power of the Court under Section 392(1)(b) of the Companies Act, 1956, is of wide amplitude. But it cannot be said that it is a power without any limitation. There is an inbuilt limitation on the power of the Court in the section itself. The limitation is that it can be invoked only for purposes of proper working of the compromise or arrangement. The power is a power of superintendence which is to be exercised by issuing appropriate directions or effecting necessary modifications so as to ensure the proper working of such compromise or arrangement. This power cannot be invoked for purpose of determination or adjudication of any right or interest claimed by a company against persons who are not parties to the scheme of compromise or arrangement, and who dispute such rights or interest in fact or in law. This is because, in the first place, the power under Section 392 is a supervisory power for enforcement of a compromise or arrangement. The enforcement can be only against persons who are parties to it. Secondly, the power of issuing directions in the course of exerciser of such a power of superintendence in regard to any matter or for modification, as may be necessary, is only for the proper working of the compromise or arrangement. The rights or claims of a company carrying on a scheme of compromise or arrangement between itself and the creditors and/or members, or any class of them, can only be enforced in the manner in which such rights or claims can be enforced under the law. Merely because a scheme of compromise or arrangement has been made between a company and its creditors or members, it cannot claim that its disputed rights or claims can be adjudicated upon by a company court which may be supervising such scheme. Thirdly, if the Legislature had intended that the company court supervising the scheme of compromise or arrangement between a company and its creditors or members should have the power of an ordinary court to hold trials for adjudication or determination of disputed rights or claims of that

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company against third parties as if it is a court of ordinary civil jurisdiction, it would have appropriately provided in the section and invested the company court with the necessary powers. A mere comparison of Section 392(1) with Section 446(2) fortifies this view. In the fourth place, if the power invested in a company court under Section 392 is held to be one akin to one under Section 446(2), the company court will be required to assume jurisdiction which it does not possess of adjudicating or determining the disputed rights between a company and the persons who are not parties to the scheme of compromise and/or arrangement as if it is a court of ordinary civil jurisdiction, irrespective of the question of the court itself and/or the territorial jurisdiction in the matter.

(ii) In the case of Mysore Electro Chemical Works Limited Vs Income tax Officer Circle-1, Bangalore, (1982) 52 Company Cases 32 (Karnataka), the Court held that the jurisdiction of the company court under Section 392 of the Companies Act, 1956, after it has sanctioned a scheme for reconstructing a company in winding up does not empower the court to issue directions which do not relate to either the sanctioned scheme itself or its working in relation to the company which the scheme seeks to reconstruct, and Sections 392 and 394 have refrained from making any specific provision and left the matter to directions by the court. The court further held that the company should seek to set aside the income-tax demand under the provisions of any other law as the company court cannot assume corrective jurisdiction to set aside regular assessments under the I.T. Act.

(iii) In the case of Union of India Vs Asia Udyog P. Ltd. And others, (1974) 44 Company Cases 359 (Delhi), the Court held that the process of the transferee-company and the consequential transfer of the assets and liabilities of the transferor-company to that of the transferee-company did not depend on or could be said to be incomplete without the discharge of such liability by the transferee- company. The liability of the transferee-company to pay the creditors of the transferor-company could not be a step in aid of the amalgamation but would be a consequence of it. The direction sought by the Union of India in its application was not within the scope of Section 153A(1)(f) of the Companies Act, 1913 and the application was not maintainable. The court further held that the directions sought by the Union of India could not be granted even with reference to the provision of Section 392(1) of the Act of 1956, because it could not be said that in directing payment of the amount claimed by the petitioner the court was either supervising "the carrying out of the compromise or arrangement" as contemplated by clause (a) of the said sub-section or taking any steps "for the proper working of the compromise or arrangement" as envisaged by clause (b) of that sub-section, because the scheme of amalgamation made no provision regarding the manner in which the transferee-company would have to discharge the liability of the transferor-company and the only provision it contained was that of merger of the two companies and the consequential direction by which the liability of the transferor- company would become the responsibility of the transferee-company.

(iv) In the case of Hifco Consumer Credit Limited V/s. Miland Industries Limited, (1996) 4 Company Law Journal 402 (A.P.), the applicant claimed to be holding equity shares in the company which came to be merged with the first respondent company under a scheme of amalgamation approved by the court. However, after amalgamation, the first respondent company allegedly did not allot any shares to the applicant of which it was entitled. In the instant

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application under Section 392 of the Companies Act, 1956, the applicant sought direction for issue of share certificates in accordance with the scheme of amalgamation approved by the court. The Andhra Pradesh High Court held that the jurisdiction of the civil court can always be invoked whenever there is no provision made under any other enactments for obtaining proper relief. In the instant application, the crux of the problem is whether the applicant is holding shares. As per the applicant, it has 1,10,000 shares in the merged company, but the name of the applicant does not figure in the list of shareholders furnished by the said company. The dispute thus appears to be between the applicant and the merged company. The said dispute cannot be decided under Section 392 of the Companies Act as it cannot form part of implementation of proceedings of scheme of amalgamation. Admittedly, the parties have already approached the civil court for various reliefs and the suits are pending. The court in these proceedings cannot go into the mater as to who were the real shareholders of the merged company. The instant application, on the facts, was found to be not maintainable under Section 392 of the Companies Act and the same was ordered to be dismissed.

(v) In the case of Meghal Homes (P) Limited Vs Shreenivas Girni K. K. Samiti and others, (2007) 7 SCC 753, the Apex Court held that section 392 only gives power to the court to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. This is only a power that enables the court to provide for proper working of compromise or arrangement, it cannot be understood as a power to make substantial modifications in the scheme approved by the members in a meeting called in terms of Section 391 of the Act.

(vi) In the case of S.K. Gupta and another Vs K.P. Jain and another, (1979) 3 SCC 54, the Apex Court held that sub-section (2) of Section 392 provides the legislative exposition as to who can move the court for taking action under Section 392. Reference to Section 391 in that sub-section does not mean that all the limitations or restrictions on the right of an individual to move the court while proposing a scheme of compromise or arrangement have to be read therein. Under sub-section (2) acting on an application or any person interested in the affairs of the company,, the latter expression having a wider denotation than a member or creditor or liquidator of a company specified in Section 391 and includes even a non-member or a non-creditor. Undoubtedly, the court may decline to act at the instance of a busy body but if the action proposed to be taken is justified, valid, legal or called for, the capacity or credentials of the person who brought the situation calling for courts intervention is hardly relevant, nor would it invalidate the resultant action only on that ground. Therefore, when sub-section (2) confers power on the court to act on its own motion, the question of locus-standi hardly arises. On the same analogy, the court can exercise under sub- section (1) of Section 392 also on an application of any person interested in the affairs of the company including one who is not a member or a creditor of the company. Sub-sections (1) and (2) have to be read harmoniously.

41. Mr. Nanavati further raised an issue that contract of personal service cannot be specifically enforced. He submitted that the prayers as made if granted i.e. the office memorandum dated 08.03.2007 if quashed and set aside as prayed for, then, it would indirectly have the effect of enforcing contract of personal service of the applicants. It goes without saying that the terms and conditions of service of the applicants who admittedly are not "workmen" within the provisions of

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the I.D. Act cannot in fact and in law enforce their contract of personal service, even in case of breach of the said contract. The only remedy available to them is for claiming damages compensation and that too, in the event of breach of contract being established and so declared by a competent Court of Civil Jurisdiction. In other words, the action of RIL in not continuing the services of applicants w.e.f. 01.04.2009 may amount to termination of their contract of service, in breach of the conditions of the said contract. Even in such case, the said contract of service of the applicants cannot be specifically enforced inasmuch as the contracts are determinable in nature, and the matter would be covered within the mischief of Section 14 of the Specific Relief Act.

42. In support of the above submission, Mr.Nanavati relied on the following decisions :-

(i) In the case of State Bank of India and others Vs S.N. Goyal, (2008) 8 SCC 92, the court held that 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- recognized exceptions to this rule are: (a) 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); (b) where a workman having the protection of the Industrial Disputes Act, 1947 is wrongly terminated from service; and (c) 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.

(ii) In the case of Nandganj Sihori Sugar Co. Ltd., Rae Bareli and another Vs Badri Nath Dixit and others, (1991) 3 SCC 54 the Apex Court held that even if there was a contract in terms of which the plaintiff was entitled to seek relief, the only relief which was available in law was damages and no specific performance. Breach of contract must ordinarily sound in damages, and particularly so in the case of personal contracts. Assuming that a contractual relationship arose consequent upon the letters addressed by defendant No.3 to defendant No.1, however, the plaintiff was a total stranger to any such relationship, for, on the facts of this case, no relationship of a fiduciary character existed between the plaintiff and defendant 3 or other defendants. The court further held that the courts do not ordinarily enforce performance of contracts of a personal character, such as a contract of employment. The remedy is to sue for damages. The grant of specific performance is purely discretionary and must be refused when not warranted by the ends of justice. Such relief can be granted only on sound legal principles. In

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the absence of any statutory requirement, courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer.

(iii) In the case of Shree Vidyaram Mishra Vs Managing Committee, Shree Jaynarayan College, (1972) 1 SCC 623, the court held that (i) it is well settled that, when there is a purported termination of a contract of service, a declaration that the contract of service, still subsisted would not be made in the absence of special circumstances, because of the principle that court do not ordinarily enforce specific performance of contracts of service, (ii) if the master rightfully ends the contract, there can be no complaint. If the master wrongfully ends the contract, then the servant can pursue a claim for damages. So even if the master wrongfully dismisses the servant in breach of the contract, the employment is effectively terminated; (iii) the terms and conditions of service mentioned in Statute 151 have proprio vigaro no force of law. The become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract, they have no vitality and can confer no legal rights.

43. Mr. Nanavati further submitted that the applicants have alleged fraud at paragraph 12 of the memo of Company Application No.115 of 2009 wherein it has been contended that non-disclosure of office memorandum dated 08.03.2007 in the proceedings before the learned Company Judge leading upto the sanction of Scheme of Amalgamation amounts to an act of fraud. In this context, he has submitted that the proceedings leading upto the sanction of the Scheme of Amalgamation are governed by the provisions of Section 391 & 394 of the Companies Act and the Company Court Rules in respect of the said provisions of the Act. The transferor Company had disclosed all the information as is contemplated and required under Section 391 and 394 of the Act and the Rules governing the said provisions under the Company Court Rules. Further, it is admitted by the applicants in their rejoinder affidavit that the fact about the said office memorandum dated 08.03.2007 was within their knowledge right from the same day. Therefore, and even otherwise, since there is no requirement for disclosing the details with regard to conditions of service of the employees of transferor company as were prevailing before or during the said proceedings before the Company Court or prior to the said proceedings before the Company Court, the transferor Company was not obliged to specifically plead about the office memorandum dated 08.03.2007, in the proceedings for or proceedings leading upto the sanctioning of the Scheme of Amalgamation of IPCL with RIL in this Court. In that view of the matter, non-disclosure of the service conditions with regard to age of superannuation or to be precise of non-disclosure of office memorandum dated 08.03.2007 in the pleadings of or in the proceedings leading upto the sanctioning of the Scheme of Amalgamation cannot be said to be an act of fraud as is sought to be contended by the applicants.

44.Mr. Nanavati then raised an issue with regard to the disinvestment policy and shareholders agreement. He submitted that so far as the shareholders agreement are concerned, RIL has not committed any breach thereof. Clause 21 (vii) (g) of the Scheme is not violated. He has also denied that the provisions of the Scheme envisaged are to preserve the service conditions as was prevalent at the time of shareholders agreement. He further submitted that the applicants have filed the present applications invoking the provisions contained in Section 392 of the Act and, therefore, the scope and jurisdiction of this Court while exercising powers under Section 392 is limited to the jurisdiction provided for under the said Section. The contentions raised

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by the applicants in the amended paragraphs go beyond the scope of Section 392 of the Act. The applicants, by raising the contention, are seeking a declaration that the service conditions of the employees remained frozen as was prevalent at the time of disinvestment of IPCL. He has, therefore, submitted that all the contentions raised by way of an amendment, are baseless, devoid of merits and are beyond the scope of Section 392 of the Companies Act. He has also submitted that there is no violation of the provisions contained in the Disinvestment Policy and allegations made by the applicants in this regard are also baseless.

45.Considering all these submissions, either on law or on merits, Mr. Nanavati has submitted that both the applications should be rejected with cost.

46.Having heard learned counsels appearing for the parties and having considered their rival submissions in light of the statutory provisions, decided case law on the subject and the provisions of the Scheme of Amalgamation duly sanctioned by this Court and by now stands finalized, the Court is of the view that before dealing with the issues on merits certain preliminary issues raised by the Company will have to be decided. The first and foremost issue raising preliminary objection against maintainability of these two applications filed before this Court is with regard to territorial jurisdiction of this Court. It is true that the Scheme of Amalgamation is effected between IPCL and RIL. So far as IPCL is concerned, the petition was filed before this Court. This Court has sanctioned the scheme. So far as RIL is concerned, the petition was filed before the Bombay High Court and the scheme was sanctioned by the Bombay High Court. The applicants are originally the employees of IPCL and they have raised their grievance against reduction of their superannuation age from 60 years to 58 years. It is equally true that on scheme became effective, IPCL stood dissolved and hence the applications are rightly filed by the applicants against RIL and not IPCL. The only question which is to be decided by the Court is as to whether such applications can be entertained by this Court especially when IPCL stood dissolved and relief is claimed against RIL over which the Bombay High Court has jurisdiction.

47.To address this question, certain statutory provisions contained in the Companies Act 1956 are require to be looked into. Section 2(11) of the Act defines the word "the Court" which means, (a) 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; (b) with respect to any offence against this Act, the Court of a Magistrate of the First Class or, as the case may be, a Presidency Magistrate, having jurisdiction to try such offence. Section 10 deals with jurisdiction of Court. Sub-section (1) of Section 10 reads as under :-

"The Court having jurisdiction under this 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

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any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2); and

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district.

Admittedly, the Registered office of RIL is situated at Bombay and since the applications are filed against RIL, the said applications should have been filed before the Bombay High Court having jurisdiction over the Company. The contention raised by the applicants that since the scheme has been sanctioned by this Court, this Court is equally having the jurisdiction to entertain these applications. This contention will have to be considered in light of the provisions contained in Section 392 of the Act, which deals with the power of the Court to enforce compromise and arrangement. It reads as under:-

"Section 392 :-

(1) Where the Tribunal 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.

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

As per Sub-section (1) of Section 392, this Court being a Court sanctioning a scheme of compromise or an arrangement is having the power to supervise the carrying out of the compromise or an arrangement; and this Court can certainly make an order or give direction or make such modification in the compromise or arrangement as it considers necessary for the

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proper working of the compromise or arrangement. However, Sub-section (2) puts restriction on exercise of such powers in view of the fact that if the scheme cannot be worked satisfactorily with or without modifications, the Court shall make an order of winding up of the company, and in that case it would be treated as an order passed under Section 433 of the Act. The IPCL is already dissolved and hence there is no question of winding up of the said Company. If RIL is to be wound up it can be done only by Bombay High Court as this Court has no jurisdiction over RIL.

48.In the above view of the matter and considering the statutory provisions of Section 2(11), 10 and 392(2) of the Act, this Court is of the view that this Court has no territorial jurisdiction to entertain these applications.

49.An another issue was raised with regard to delay caused in filing these applications before this Court. What is challenged in these two applications is the office memorandum dated 8.3.2007. The said office memorandum was communicated to all the supervisory staff including the present applicants on the very same day either by pasting on the notice board of all the departments of IPCL or by sending e- mails etc., to the respective employees. The office memorandum specifically states that all those supervisory employees, who attained 58 years of age on or before 1.4.2009 would retire on 1.4.2009 and those supervisory employees who attained 58 years of age after 1.4.2009 would retire on the date they attained such age. Thereafter VRS scheme for supervisory employees was floated by the management of IPCL on 13.3.2007 and Clause (2) of the said scheme specifically stipulates compensation for the purpose of calculating the balance period of service left and the age of superannuation was to be considered in accordance with Circular dated 8.3.2007 i.e. the age of superannuation to be 58 years. The said office memorandum was also implemented in the sense that around 270 supervisory employees had opted for VRS and they were relieved in the first week of April, 2007 on payment of compensation on the basis of age of retirement at 58 years. The Company Application was filed by IPCL before this Court on 14.3.2007. The order was passed on 6.3.2007 for convening meeting of the shareholders, secured creditors and unsecured creditors. The advertisements were published in the newspapers on 20.03.2007. The petition was admitted on 23.4.2007 and it was finally sanctioned by the Court on 16.8.2007. The certified copy of the judgment and order was filed with the Registrar of Companies on 5.9.2007. Even OJ Appeal preferred by the shareholders as well as Labour Unions were dismissed on 26.12.2007 and 18.3.2008 respectively. Despite the fact that the applicants were aware about all these developments and still they have chosen to remain silent. The conduct of the applicants, therefore, leads this Court to believe that they might have accepted this office memorandum and, therefore, the applications filed belatedly raising this grievance against office memorandum dated 8.3.2007 is hit by delay, latches and acquiescence.

50.The third important aspect which is required to be dealt with is the relief sought for by the applicants for modification in the scheme by invoking the provisions contained in Section 391(2) of the Act. The real issue is as to whether such a prayer can be made while invoking the jurisdiction of the Company Court under Section 392(1) of the Act. There is no dispute or doubt about the fact that the power of this Court under Section 392(1) is of very wide amplitude. However, there are certain inherent restrictions on exercise of such powers. Such

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powers can be exercised only for the purpose of proper working of compromise or arrangement and it can never be invoked for the purpose of determination or adjudication of any right or interest claimed by any party, flowing from the scheme sanctioned by the Court. By filing the present applications the applicants require this Court to adjudicate the dispute or claims arising from the Scheme under the guise of supervising the scheme. The basic prayer in both these applications is the prayer for quashing and setting aside the office memorandum dated 8.3.2007. The same would not fall within the ambit of carrying out of compromise or arrangement as contemplated by Clause (a) of Section 392(1) nor even within the ambit of taking any step for the purpose of working out the compromise or arrangement as envisaged by Clause (b) of Section 392 (1). The Company Court cannot certainly play role of Civil Court or Industrial Tribunal or Labour Court. There are in all six judgments dealing with the scope and ambit of Section 392 of the Act relied on by the Company which clearly state that such disputed matters or where adjudication and/or trial is required, the same cannot be decided while entertaining an application under Section 392 of the Act.

51.The next contention which requires consideration by the Court is the transfer of undertaking from IPCL to RIL is either from the appointed date or from the effective date. The Scheme itself provides and which Scheme is already approved by the Court, the transfer of undertaking from IPCL to RIL in different parts at different times. Some parts of the undertaking of IPCL are transferred and amalgamated with RIL on the appointed date i.e. 01.04.2006 while the other parts of the undertaking of IPCL are transferred and amalgamated with RIL on the effective date i.e. 05.09.2007. The properties, assets, debts, liabilities, etc. are transferred on the Appointed Date and amalgamated with RIL on the Appointed Date while the Undertaking consisting of parts such as encumbrances (mortgages, charges, etc.), contracts, deeds, etc., legal proceedings, and employees are transferred from IPCL and amalgamated with RIL w.e.f. the Effective Date. It is settled position that the significance of the appointed date is only for certain purposes such as for accounting purposes including the purpose of identification and quantification of assets, properties, identification of liabilities, debts etc. For all other purposes, practically, it is the effective date on which the actual amalgamation of the two Companies take place. Clause 8.1 of the Scheme specifically provides that the employees of the IPCL shall be transferred to RIL with effect from the effective date i.e. 05.09.2007. The impugned office memorandum is dated 08.03.2007. Thus, on the effective date, the superannuation age of all Supervisors including the applicants is considered to be 58 years and not 60 years as contended by the applicants. It is true that in the said office memorandum, it is clearly stated that on or before 01.04.2009, any person who completes the age of 58 years shall be retired from the service on 01.04.2009 and after that date on attainment of the 58 years of age, such person shall retire from service. Thus, the contention raised by the applicants that they are governed by the Service Regulations which are prevalent on the appointed date i.e. 01.04.2006, according to which they will be retired at the age of 60 years, should prevail and it is not open for RIL to make any change in the said Service Regulations, has no legal force and cannot be accepted. To substantiate the plea of the applicants, Mr. Shah at the belated stage has strenuously pressed into service the ground regarding violation of the provisions of Disinvestment Policy and Shareholders Agreement. There is nothing in the Scheme which requires that the Service Conditions as were prevalent at the time of framing Disinvestment Policy or entering into Shareholders agreement are to be preserved. It cannot be accepted that RIL has committed any breach of the Disinvestment Policy or the Shareholders Agreement. Even otherwise, it is a disputed question of fact which cannot be decided in a proceedings under Section 392 of the Companies Act, 1956. As stated earlier and as found from the judicial

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pronouncements referred to hereinabove, the scope and jurisdiction of this Court while exercising powers under Section 392 is very limited. Such a contention is beyond the scope of Section 392 of the Act. The Court is not empowered to give such a declaration that under the Scheme, the service conditions of the applicants are governed as were prevalent on the date of Disinvestment Policy or execution of Shareholders Agreement. This Court does not lack only the territorial jurisdiction, but also lacks the jurisdiction under Section 392 of the Act in granting such declaration. The contention raised by the applicants in this regard, therefore, fails.

52.In view of the above finding arrived at by the Court, various contentions raised by Mr. Shah do not deserve any merit and the authorities cited by him in support of those contentions would also not bring the applicants case any further. There is no dispute about the proposition that two sets of employees with two sets of service conditions are permissible. However, before the effective date, if some changes are brought in by the Transferor Company, those changes are not considered to have been done at the behest of the transferee company despite the fact that such changes are made in the service conditions prior to the effective date. The applicants cannot rely to the original service conditions and on that basis, they cannot seek any relief from the transferee company i.e. RIL in the present case. As stated earlier, as per the provisions in Clause 8 of the Scheme, RIL has not made any changes in the service conditions of the applicants and hence, the applicants could not insist that for them, different set of service conditions must be accepted. Thus, the reliance placed by Mr. Shah on the decisions of the Apex Court in the case of Bholanath J. Thaker V/s. The State of Saurashtra (Supra), Life Insurance Corporation of India and another V/s. S. S. Srivastava and others (Supra) and B. S. Yadav and another V/s. The Chief Manager, Central Bank of India and others (Supra) is wholly uncalled for and irrelevant and these cases have no application to the facts of the present case.

53.There is also no dispute about the proposition that under Sections 391 to 394 of the Companies Act, the Court has ample power and jurisdiction to supervise the Scheme as sanctioned under the Companies Act. However, such power in jurisdiction must be exercised keeping in mind the essential perquisites of the said Sections. The Court will have to act within the parameters laid down in these Sections. Every grievance raised by the affected party cannot be raised nor can it be entertained by the Court while exercising powers thereunder. The applicants fail to satisfy the Court that the issues raised by them squarely fall within the parameters of Section 392 of the Act. Even otherwise, it is accepted for the sake of argument that it falls within such parameters, once IPCL is already dissolved, the appropriate Court is the Bombay High Court to consider and decide such issues, in view of the provisions of Section 2 (11) read with Section 10 and 392 of the Companies Act, 1956 and hence, in any case, all these issues which are raised by the applicants cannot be and should not be allowed by this Court, in their favour.

54.Considering the foregoing discussion and taking overall view of the matter and keeping in mind the statutory provisions and the judicial precedents, the Court is of the firm view that both these applications deserve to be rejected both on the ground of jurisdiction as well as on merits. Hence, both these applications are rejected without any order as to costs.

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Appeal dismissed

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