In the High Court of Judicature for
Rajasthan at Jaipur Bench, Jaipur

JUDGMENT

SB Company Appl. No.45/2012
in
SB Company Petition No. 23/2005
M/s. Jindal Securities Pvt. Ltd. & Ors v.
Sistema Shyam Teleservices Ltd. & Ors

Date of Judgment :: January 9th, 2015

HON'BLE MR. JUSTICE ALOK SHARMA

Mr.Anant Kasliwal with Mr. Vaibhav Kasliwal for the applicants

Mr.Sooli Copper, Sr.Advocate with

Mr. Rohan Batra & Mr. Nitin Jain for respondent No.1

Mr. R.D Rastogi, Add. Sollicitor Genral with
Mr. Ashish Kumar for respondent No.3

Mr. R.N Mathur, Sr. Advocate with

Mr. Sanjay Manchada, Mr. Gunjan Pathak,

Mr. Sandeep Pathak & Mr. Vinay Kothari for respondent

Ms. Anita Agarwal for the respondent

Mr.S.B Katewa on behalf of Mr. Govind Singh for respondent

Reportable

This order disposes of the application under Rule 9 of the l.Companies (Court) Rules, 1959 (hereinafter 'the Rules of 1959') filed by M/s. Jindal Securities Pvt. Ltd and 3 others (hereinafter 'the applicants') inter-alia with the prayer that the respondent company Sistema Shyam Teleservices Limited (formerly known as Shyam Telelink Limited) (hereinafter 'the SSTL/ Company') be directed to get its

shares listed in the stock exchange/s within a reasonable time frame. And further that the company aforesaid be directed to give “a continuous open exit option to the minority share-holders” at a value deemed fit by this Court from amongst the value of Rs. 220/- as per the valuation of Uninor, Rs.156/- as per the purported agreement between the promoters and the financial strategic investor or Rs.49.31- the price at which the Russian Federal Agency was allotted shares of the respondent company. Other misc. reliefs such as appointment of a representative of minority shareholders on the Board of Directors of the respondent company for the protection of their interests and compensation to the minority shareholders for the unnecessary delay since 2008 in the “buy back” of the applicants' shares resulting in a purported loss to them have also been sought.

The facts relevant to this application under Rule 9 of the Rules of 1959 and reiterated by counsel in his submissions are that the four applicants presently jointly hold approximately 21 lacs

shares in the respondent company. Pursuant to a Scheme of Arrangement/ amalgmation in accordance with the provisions of Section 391 (2) and 394 of the Companies Act, 1956 (hereinafter 'the Act of 1956'), on statutory compliances having been made, this Court sanctioned the scheme vide its order dated 8.5.2006. Part III of the sanctioned scheme deals with general terms and conditions applicable thereto. Clause 3.7 of the sanctioned scheme at the foundation of this application provided as under:

"All the equity shares of the STLL as on the Transfer Date, including any further shares issued by STLL, shall be listed and /or admitted to trading on National Stock Exchange (NSE) and / or Bombay Stock Exchange (BSE). NSE and BSE shall list the shares of STLL and listing of said shares on NSE and BSE shall be considered as due compliance of the provisions of the SEBI (Disclosure & Investor Protection) Guidelines, 2000 and other applicable provisions of law."

Subsequent to the sanction of the Scheme by the Company Court under its order

dated 8.5.2006, the respondent company applied to the Bombay Stock Exchange (hereinafter ‘the BSE’) on 10.8.2006 for listing of its shares but without success for the reason that it was found that the company was dis-entitled for relaxation of Rule 19(2)(b) of the Securities Contract (Regulations) Rules, 1957 (hereinafter ‘the Rules of 1957’). It has been submitted that the minority shareholders including the applicants continued to enquire about the status of listing of shares of the respondent company on BSE and NSE and in-fact some of the minority shareholders, in the alternative requested the respondent company in the absence of listing of the Company's shares to buy back its shares and allow them to exit the company.

The respondent company in the context of listing difficulties, however in the Annual General Meeting (hereinafter ‘the AGM’) of the shareholders held on 12.12.2007 placed the issue relating to deletion of Clause 3.7 of Part-III of the sanctioned scheme relating to listing of shares of the respondent company for reconsideration. In

the AGM, an open offer is alleged to have been made for purchase of the shareholding of the minority shareholders at a meager Rs.10/- per share in view of the fact that Company's listing at the BSE as earlier envisaged premised on in principle approval “of BSE and relaxation of regulation 19(2)(h) of the Regulations of 1957 was not readily forthcoming. Simultaneously deletion of clause 3.7 of the sanctioned scheme under the Company Court order dated 8.5.2006 was sought in view of the uncertainty of listing of respondent company’s shares on the BSE and NSE. The applicants allege that in view of the promoters holding about 82% of the equity of the respondent company the shareholders with the requisite statutory majority passed a resolution for modification of the scheme of arrangement sanctioned by the Company Court on 8.5.2006 despite stiff opposition of minority shareholders and approved deletion of Clause 3.7 aforesaid. Subsequently on 28.12.2007 SEBI, finally and formally informed the respondent company that it was not eligible for relaxation of Rule 19(2)(b) of the Rules

of 1957 on account of non-fulfilling of certain conditions.

Thereupon the respondent company filed an application under section 392 of the Act of 1956 before the Company Court seeking a modification of the original scheme sanctioned on 8.5.2006 and sought deletion of clause 3.7 Part-III of the aforesaid scheme according to which the equity shares of the STLL as on the Transfer Date including any further shares issued by STLL were to be listed and / or admitted to trading on NSE and BSE. The Company Court after hearing the respondent company and the objectors, however, vide order dated 7.8.2008 found no reason for deletion of clause 3.7 of the scheme detailed above and further ordered that the company, STLL, within a maximum period of 18 months from the date of the order initiate the process of listing the shares representing the issued capital of the company by adopting such route as may be permissible in law (underlining mine) and make such compliances as may be required in law including that of offering a specified percentage of the

shares to the public, for subscribing thereto, through the book building process, in the manner provided for under SEBI (DIP) Guidelines 2000 and upon such steps being taken, BSE may issue such orders (underlining mine) that may be required in law and as may be necessary for securing the said listing. The shareholders in the event of STLL not being listed were directed to not be at the mercy of the promoters and were held to continue to have an "exit option".

It has been submitted that thereafter the applicants have been trying to persuade the statutory authorities for having the share of the respondent company listed in terms of Clause 3.7 of the sanctioned scheme dated 8.5.2006. But the respondent company instead of having its shares listed as required by the sanctioned scheme dated 8.5.2006 had only sought to give the applicants and minority shareholders an option for the purchase of their shares at Rs.10/- per share which according to the applicants was wholly inadequate. It has been submitted that the

promoters of the respondent company have been utilizing their dominant position by transferring their shares to third parties at a very high premium but had offered the minority shareholders only a meager “exit option” at Rs.10/- per share when the actual price of the shares of the respondent company should reasonably have been around to Rs.220/- per share with reference to the average of industry valuations at the relevant time where-under the price of a competitor company, one Uninor, was at Rs. 220/- per share or Rs. 156/- per share and at-least Rs.49.31 per share. Malafides have been attributed to the respondent company in denying the rights of the minority shareholders and causing them loss by not having the shares of STLL listed in terms of Clause 3.7 of the sanctioned scheme dated 8.5.2006. It has been submitted that in the event of compliance with clause 3.7 of the sanctioned scheme dated 8.5.2006 and listing of shares of the respondent company, the market price of the shares would have been discovered to be much higher and minority shareholders would had then exercised their

right to continue as members of the company or exit it. It has further been submitted that the shares of the respondent company have not been listed owing to the mechanizations of the promoters- majority shareholders to bring in foreign investors without the obligation of making an open offer as other were mandated in law for a listed company.

It has been submitted that even though more than 46 months have elapsed since the order dated 7.8.2008 passed by the Company Court refusing to delete clause 3.7 in the sanctioned scheme dated 8.5.2006 yet no compliance with such directions has been made. It has also been pointed out that in absence of listing of its shares by the respondent company an exit offer was specifically required to be given to the minority shareholders by the respondent company on a continuous basis but this has also been wanting. The assertion is that it was not for the shareholders to exercise their exit option on their own but a fair reasonable exit option offering a just and reasonable price for the shares held by the

applicants and other minority shareholders was to come forth from the company and /or its promoters as per the directions of the Company Court in its order dated 7.8.2008. Allegations of lack of cooperation and failure to discharge statutory duties have also been made against the SEBI, Registrar of Companies and Ministry of Company Affairs who according to the applicants have been non-responsive to the plight of the minority shareholders in-spite of the repeated entreaties. In the circumstances it has been submitted that resort to Rule 9 of the Rules of 1959 was the only option for the applicants seeking justice as minority shareholders in accordance with the sanctioned scheme dated 8.5.2006 and further order thereon passed by the Company Court on 7.8.2008. It has been finally submitted that in the event the respondent company had intended to seek relaxation of Rule 19(2)(b) of the Rules of 1957, then such intendment ought to have been clearly reflected in the original scheme of arrangements in Part III of the scheme such that the sanctioned scheme dated 8.5.2006 passed by the Company

Court could have included such a direction to the statutory authorities. It has been submitted that in-stead of implementing the scheme as sanctioned by the Company Court, promoters of the respondent company in its effective control have sold their controlling stocks to a Russian Company i.e. SISTEMA, altered the shareholding pattern and made the company ineligible for relaxation of the Rule 19(2)(b) of the Rules of 1957. In the circumstances, reliefs as detailed earlier in the introductory part of this order have been sought.

Reply to the application has been filed by the respondent company and submissions also made in reiteration thereof. A preliminary objection to the very maintainability of the application under consideration has been raised. It has been submitted that the application and the reliefs claimed are predicated on a purported non-compliance with Clause 3.7 of the Scheme of Arrangement sanctioned vide order dated 8.5.2006 on proceedings under section 391(2) and 394 of the Act of 1956 which even though envisaged listing of

equity shares of the respondent company on the Stock Exchange/s, was conditioned on the “in -principle approval” received from the BSE and NSE vide letters dated 2.8.2005 and 12.8.2005 under clause 24(f) of Equity Listing Agreement with the stock exchanges. The said “in-principle approval” was granted subject to SEBI granting relaxation under Rule 19(2)(b) of the Rules of 1957 and compliance with the clause 8.3.5 of SEBI (DIP) Guidelines and rules, bye-laws and regulations of exchange/s. The aforesaid communication addressed by BSE and NSE were annexed to the explanatory statement dated 1.9.2005 under section 393 of the Act of 1956 and circulated to the members of Shyam Telecom Ltd (hereinafter ‘the STL’) who were thus fully aware of the conditionalities that were to control the prospect of listing of the respondent company’s equity shares on BSE and NSE. The consent of the equity shareholders of the company to the propagated scheme had been given fully conscious of these conditionalities on which relaxation under Rule 19(2)(b) of the Rules of 1957 was to be made and the shares

listed. It has been submitted that, subsequent to the sanction of the scheme under Company Court's order dated 8.5.2006 all possible measures and steps to facilitate listing of the equity shares of the respondent company were taken. However SEBI appeared not in favour of granting relaxation to the respondent company under rule 19(2)(b) of the Rules of 1957. Hence the respondent company's AGM was held on 12.12.2007 and in the obtaining circumstances it was resolved to seek modification of the sanctioned scheme by deleting Clause 3.7 thereof. The Company Court was then approached by the respondent company under section 392 of the Act of 1956. It has been submitted that during the pendency of the application before the Company Court, SEBI vide its letter dated 28.12.2007 indeed refused to grant relaxation under Rule 19(2)(b) of the Rules of 1957 and Clause 8.3.5 of SEBI (DIP) Guidelines. It has been submitted that albeit this Court under its order dated 7.8.2008 found no good reason to delete Clause 3.7 of the Scheme but recognized the

limitations of the respondent company in ensuring listing of its shares and inter-alia only directed the respondent company to "initiate" the process of listing by adopting possible routes for the purpose. The Court however also hastened to recognize the potential of the shares of the respondent company not being listed in the foreseeable future and therefore further directed that in the event of the respondent company not having its shares listed on the Stock Exchange/s in terms of Clause 3.7 of the sanctioned scheme, the shareholders of the respondent company would continue to have an 'exit option'. It has been submitted that the Company Court while passing the order dated 7.8.2008 was thus conscious of the fact that listing of the shares of the respondent company could be derailed or delayed interminably and therefore visualized the possibility of non-listing. Minority shareholders if aggrieved of such non-listing for reason of unforeseen circumstances were free to exercise their 'exit option". The respondent company in its annual reports for the year 2008-09, 2009-

2010, 2010-11, 2011-12 and 2012-13 continually updated its shareholders on the status, prospect and feasibility of the initial listing of its equity shares and made known to all shareholders- majority / minority- that subsequent to the order dated 7.8.2008 passed by the Company Court, there has been a radical and complete change in market conditions in the telecom sector. The respondent company was initially allotted start up spectrum for 19 circles after having been issued licenses. Pursuant to the grant of pan India licenses, the respondent company expanded rapidly and grew considerably. However grant of licenses by the Department of Telecommunication in 2008 came under severe judicial and regulatory scrutiny, the most prominent being the Public Interest Litigations in regard thereto before the Hon’ble Apex Court starting 2010 questioning the very proprietary of the issue of licenses by the Department of Telecommunication. Thereupon the Hon’ble Apex Court vide its judgment dated 2.2.2012 quashed all 122 licenses granted to various telecom operators on or

after 10.1.2008 including the 21 telecom licenses allotted to the respondent company in 2008. This was a severe blow to the business of the respondent company resultant to which it was forced to close down operations in 13 circles out of 21 where it has been awarded UAS licenses. Presently the respondent company is serving 8 telecom circles apart from the Rajasthan telecom circle and has had to re-structure its entire business operation in the wake of developments not of its making and in the process suffered massive losses. The accumulated loss per share starting 2008-09 was Rs.2.85 but climbed to Rs.9.02 in the year 2012-13. The accumulated losses of the respondent company in the year 2008-08 started from Rs. 1212.3 crores but climbed to Rs.11080.8 crores in the year 2012-13. Due to such poor market and financial conditions, listing of equity shares of the respondent company as on date or in near future is completely unviable and in-fact as of now a virtual impossibility.

It has been submitted that while the respondent company’s application for

relaxation under Rule 19(2)(b) of the Rules of 1957 has been rejected, it cannot also seek listing by way of an initial public offering in terms of Regulation 26(1) of the SEBI's Issue of (Capital Disclosure Requirements) Regulation, 2009 (hereinafter 'the ICDR') because it does not have any distributable profits under section 205 of the Act of 1956 for any of the three years of the immediately preceding five years. The respondent company subsequent to the order dated 7.8.2008 passed by this Court in the circumstances did initiate listing through the book building process. However, due to severely debilitating factors such as excessive accumulated losses, serious erosion of value per share, cancellation of the company's 21 spectrum licenses under order of the Hon'ble Apex Court and general market conditions, even this option is not presently feasible. Consequently the respondent company has not been able to proceed with its IPO plans and this fact was disclosed to all shareholders. It has been submitted that in the circumstances as obtaining, the applicants constituting a

mere 0.066% of the total issued, subscribed and paid up share capital of the respondent company have no legal, contractual or even a common law right to press for compulsory listing to the detriment of the other over 99.33% shareholders. Such a listing would be counter-productive for all shareholders and fatal for the respondent company itself. It has been alleged that the overall facts of the case are conclusively indicative of the applicants only seeking by way of this Rule 9 application to derive illegitimate gains by browbeating the respondent company/ promoters. The applicants are evidently not so much aggrieved of the non-listing of the shares of the respondent company visualized in terms of clause 3.7 of the sanctioned scheme dated 8.5.2006 (as that would reflect over 90% dilution of the subscription price) but are desirous of extracting unjust profits by a direction from this Court as sought apparently in the alternative but in fact the main relief that they be allowed an exit at a share price hundreds of times higher than the current value of their shares. Aside of the above, it has been

submitted that since listing of shares is subject to varied statutory regimes and dependent upon statutory approvals such as of SEBI and concerned stock exchanges, which conditions the respondent company is not suited to fulfill at the present stage, a direction for compulsory listing in the nature of a writ of mandamus through the vehicle of rule 9 of the Rules of 1959 application would be legally impermissible, wholly unjust and unrelated to the main object of the sanctioned scheme. It has been pointed out that the concerned statutory authorities cannot be mandated, overlooking their discretion, to require listing of shares of respondent company. Statutory discretion is to be exercised in the **larger** investor interest. It has been further submitted that in a dynamic market, the correct timing for making a public offer is crucial for its success and is best left to the prudence of the company, its independent consultants and merchant bankers.

In this regard attention of this Court has been drawn to the affidavit of one

Mr. Alok Jain in DB Special Appeal No. 15/2009 before this Court, who as the Director of the applicant no.2 stated therein stated that "…in an .... changing market scenario, determination of the correct timing for the opening of IPO and all its terms are best left for the determination of the company". The same gentleman has now taken a contra stand in this application, it is argued and is a window to his mind. It has also been pointed out that while passing the order dated 7.8.2008 this Court quite evidently took into consideration the fact that no outer time limit for listing of shares could be prescribed as it was within another statutory domain and as such it only set out a time limit for initiating the process of listing within 18 months of the passing of the order. In the circumstances it has been submitted that the relief sought by the applicants as regard compulsory listing of the equity shares of the respondent company cannot be granted. The respondent company has however hastened to state that it is committed to take all requisite actions in

the best interest of the respondent company and all its shareholders. And would afresh address the question of bringing out the initial public offering under improved market conditions, macro economic outlook and when the company’s own business prospects in an altered economic environment so warrant.

With regard to the exit option and pricing thereof it has been submitted that subsequent to the passing of the order dated 8.5.2006 and 7.8.2008 the applicants No.1 to 3 had themselves quite clearly negated the “exit option” by having subscribed to and allotted additional equity shares of the respondent company in pursuance of a rights issue in March 2011 at Rs.10/- per share. The applicant No.1 was allotted 374282 shares, the applicant No.2, 3300 and the applicant No.19056, aggregating to 396638 shares. It has been submitted that by their own conduct the applicants had de jure rendered themselves ineligible to press for an exit option as on date. The applicants thus in-fact have no cause of action for any alleged breach of the order dated 7.8.2008

passed by this Court with regard to the provision of an exit option. It has been further submitted that at any rate an exit mechanism cannot be resorted to for de-subscribing the additional equity acquired by the applicants in the rights issue. The motives and reason of the applicants for seeking an exit option at violently varying price of Rs.220/-, 156/- and 49.31/- per equity share when the right issues were availed by them at Rs.10/- per share as recently in March 2011 have been emphasized to submit that the mechanism of this Court is sought to be utilized for rank profiteering and not ex debito justitiae. Further the malafide intent of the applicants has been pointed out by stating that the factum of obtaining substantial number of shares in the right issue of March 2011 was suppressed from this Court by the applicants who are thus guilty of suppressio veri and a brazen attempt to mislead this Court. It has been submitted that the inherent powers of this Court under Rule 9 of the Rules of 1959 are equitable in nature, and applicants, seeking to invoke

such powers, who approach this Court suppressing relevant facts ought to be thrown out at the threshold and the application ought to be dismissed on this count alone.

It has been submitted that the order dated 7.8.2008 passed by this Court only reaffirmed the ‘option’ of public shareholders to exit by exercising their rights in law and no special relief was carved out for the applicants. The “exit option” referred to in the order dated 7.8.2008 was to be exercised by the shareholders themselves and no special exit / offer or mechanism was required to be initiated by the respondent company on its own accord. Consequently the allegation of non-compliance with the orders passed by this Court on this count is ill-founded. It has been submitted that the respondent company is a public limited company and its shares are freely transferable under the Act of 1956 and the applicants are therefore free to dispose of their share in accordance with law. No violation of the order passed by this Court on 7.8.2008 can in the

circumstances be attributable to the respondent company in its purported failure to offer an unreal price, far-removed from the current market value of the shares to the applicants to facilitate their exit from the company. It has been submitted that under Indian laws, no minimum price is prescribed at which shares are to be purchased from any Indian shareholder by any Indian entity / promoter / majority shareholders. And no law mandates that such price should in any event not be less than the price at which the company had historically valued its shares for transfer / fresh issue in different contexts and situations.

With reference to the price at which the shares of the respondent company were allotted to non-resident investors namely; SISTEMA and Rosimushchestvo, it has been submitted that a substantial acquisition by strategic or a financial investor bears no one to one co-relation to the actual market price of the security at a relevant point of time. The price in such situations is an amalgam of varied factors such as the

business of the company, its future prospects, market conditions, control of the company, etc. The strategic/ financial investors also get special management and shareholders rights, and accordingly purchase their shares at a premium (when compared to actual market value of the company's shares). This consideration does not apply in case of valuation of the company's shares at subsequent contextually different point of time. Even otherwise differential statutory regimes apply to the two sets of investors. Further the acquisition by SISTEMA and Rosimushchestvo had taken place on the basis of the valuation of the equity shares of the respondent company much before the quashing of its UAS licenses by the Hon'ble Apex Court, post which the respondent company's financial condition has deteriorated substantially. It has been submitted in the alternative that if this Court were inclined to hold that the respondent company was to provide the applicants an 'exit option' it be made clear that the price of such an exit offer would necessarily bear nexus to the

current market value of the equity shares of the respondent company at the relevant time. It has been submitted that the order dated 7.8.2008 passed by this Court cannot be susceptible to any interpretation / construction which would give the applicants unfettered right to seek an exit option of their liking on a price far removed from the extant commercial and market factors determining the real / current value of the respondent company's shares. It has been submitted that therefore none of the three violently varying prices of Rs.220/-, 156/- and 49.31/- for their shares by the applicants have any relevance to the exit sought as shareholders of the respondent company. It has been pointed out that SISTEMA purchased additional 10% stake in the respondent company at a price of Rs.9.20/- per share and even otherwise the allegations of the shares having been transacted at 156 per share is absolutely false.

It has been also pointed out that at the time of hearing of CA No. 69/2007 culminating in the order dated 7.8.2008

passed by this Court, objections had been raised that the exit option offered by the respondent company was at Rs.10/- per share while SISTEMA on the other hand allegedly purchased equity shares of the respondent company at Rs.156/- per share. Yet the Company Court was then apparently not satisfied and thus had not issued any direction for offering the applicants exit option at any particular price much less the price of Rs.156/- urged by the objectors. It has been further submitted that in-fact Mr. Alok Jain, Director of the applicant No.2 now before this Court, challenged the order dated 7.8.2008 passed by this Court under DB Appeal No. 15/2009 urging that the Company Court had erred in passing a direction as to an exit route option without assessing the fair price of shares at which the applicants had the right to exit. That appeal however was not pursued and came to be dismissed as withdrawn vide order dated 4.10.2010. The relief prayed for was denied (impliedly) and can now not be countenanced by this Court. Rule 9 of the Rules of 1959 cannot be invoked for obtaining relief earlier denied

(at-least impliedly) with the withdrawal of the appeal without any caveat.

It has been further submitted that the relief sought for appointment of a representative of the minority shareholders on the Board of Directors of the respondent company cannot be granted as it is completely outside the scope of Rule 9 of the Company (Court) Rules, 1959. And similarly the prayer for grant of compensation for the purported delay in the listing of the shares of the respondent company is also completely untenable as no provision exists therefor either under the Companies Act or any other operative legislation or can even be deducted on logic. It has been empathetically denied that the applicants have suffered any loss as they had not been offered a fair ‘exit option’. Further such a claim for compensation is inconsistent with the further acquisition of the respondent company’s shares by the applicants in the March 2011 rights issue. It has also been emphasized that neither the sale of the shares of the promoters to SISTEMA nor the

question with regard to the induction of financial / strategic long term investors in the respondent company can be the subject matter of a Rule 9 of the Rules of 1959 application purportedly seeking enforcement of the sanctioned scheme dated 8.5.2006 as further clarified vide order dated 7.8.2008. It has been however submitted that the promoters' stake sale to SISTEMA was at the time when there was complete uncertainty regarding listing of company shares since SEBI was not responding to the application for relaxation on the one hand and the respondent company was required to urgently find funds to operate its business on the other. It has been submitted that the funds obtained from the sale of promoters' stake and subsequent dilution of the company's equity were essential for running the businesses of the respondent company and it was only for that reason that the respondent company was able to apply for and procure 21 new licenses to have an all India imprint. It has been pointed out that in-fact the induction of financial / strategic long term investors for expansion and success of the

respondent company's business was indeed one of the objectives of the sanctioned scheme and thus far from acting contrary to the scheme or stalling its implementation the respondent company has acted in accordance with the basic structure and object of the sanctioned scheme and towards its implementation by seeking infusion of fresh funds from new found investors in the capital intensive enterprise of the respondent company. In fact reference to these aspects is not germane to the current market value of the shares of the respondent company at which the applicants always have the right to exit-as provided in law and as actually reiterated in the Company Court's order dated 7.8.2008. It has been empathetically submitted that the application under Rule 9 of the Rules of 1959 is wholly without merit, misdirected, baseless and only an attempt to pressurize the respondent company under pain of legal obstructions by resorting to meritless proceedings and to pay to the applicants as share-holders a price hundred times or more over the current market value of the shares.

Counsel therefore submitted that the application under Rule 9 of the Companies (Court) Rules, 1959 thus be dismissed.

Considered.

When a scheme is sanctioned by the Court under section 391(2) read with section 394 of the Act of 1956, it is the Court’s imprimatur on a commercial decision taken by the shareholders / creditors in compliance with statutory conditions for restructuring and more profitable management of the Company/ Companies involved. The commercial wisdom exercised by the members of the company/ies involved in the scheme who had ratified the scheme by requisite majority is to be well-regarded by the Company Court acting in a purely supervisory capacity but ensuring that the scheme is not violative of any provision of law, unconscionable or contrary to public policy. When the Court sanctions the scheme it is binding on all the parties concerned and the Court is to ensure that it works satisfactorily.

Any scheme sanctioned by the Court has a basic structure, its object and

purpose and may include incidental or peripheral matters. The Company Court has been empowered to supervise the carrying out of the compromise or arrangement and also has been conferred the power to issue directions as may be necessary for the working of the scheme. And for the purpose may even modify the scheme where necessary for its proper working. Under sub-section 2 of section 392 of the Act of 1956 where the Court is satisfied that the sanctioned scheme cannot work satisfactorily with or without modification thereof it can on an application made or suo moto order winding up of the company and such order would then relate to the powers of the Court under section 433 of the Act of 1956. It is thus evident that when a scheme of arrangement or compromise is sanctioned by the Court, it continues to have jurisdiction and is empowered to enforce such a scheme even by modifying it where warranted as to secure its object and purpose thus ensuring that the scheme is not rendered unworkable. However, it would be well to remember that every clause / condition of the sanctioned

scheme cannot be conferred equal weightage as the satisfactory workability of the scheme is the underlying test for its enforceability.

The issue which therefore requires consideration in the case at hand is as to whether Clause 3.7 of the sanctioned scheme dated 8.5.2006 was a mandatory part of the scheme- a part of its “basic structure” essential to its object and purpose and its satisfactory workability. In my considered view for an answer to this question one need not go further than the order dated 7.8.2008 passed by this Court with regard to the sanctioned scheme in issue. Therein the Court itself clearly visualized the possibility of non-listing of the shares of the respondent company in the near future for reasons of listing being in the domain of statutory authorities. And therefore in the alternative provided that the minority shareholders in such an eventuality when desirous be allowed an exit option by the company if its shares were not listed. It is on record that in-spite of DB Appeal No. 15/2009 having been filed against the

order dated 7.8.2008 (by one of the applicants) aggrieved of the non-determination of the share price for the exercise of exist option, the said appeal was not pursued but dismissed as withdrawn. It is thus apparent that a given pre-determined share price for the exercise of an exit option was not an integral part of the sanctioned scheme and its non-determination would not make the scheme unworkable. It is noteworthy that the applicants have themselves not resorted to section 392 of the Act of 1956 to contend that without a share price being determined for their exit the sanctioned scheme would be unworkable. Instead they have invoked Rule 9 of the Rules of 1959.

Rule 9 of the Rules of 1959 only recognizes the inherent powers of Courts to prevent the abuse of the process of the Court and their power to act in the interest of justice. It is however, well settled that the inherent powers of the Company Court under Rule 9 of the Rules of 1959 a la section 151 CPC (pari materia) is a power relating to the practice and procedure of

the Court and does not confer any power on the Court to determine substantive rights. Further inherent powers of the Court cannot be resorted to where there is an alternative remedy to the applicants. The Hon'ble Apex Court in the case of **K.K Veluswami and Pallanisony, 2011 (11) SCC 275** held that the inherent power which inheres in every Court by way of a statutory provision or otherwise is to do right and undo a wrong. Such powers only deal with procedural situations and are to be exercised in the Court's discretion with circumspection and care only when absolutely necessary. It has been further held that inherent powers of the Court are not a carte blanche for grant of relief and where the application invoking such inherent powers is mischievous, frivolous or to cover up negligence or lacunae, such application should be rejected with heavy costs.

In the case of **State of Haryana v. Babu Singh, 2008(2) SCC 85** the Hon'ble Apex Court has observed that even though the

inherent powers of the Court are very wide their exercise must emanate logically from the underlying legal findings and the "judicial result must be seen to be principled and supportable on those findings" **(underlining mine)**. The Hon'ble Apex Court in the case of **State of West Bengal v. Karan Singh, 2002(4) SCC 188** has held that the inherent powers of the Court cannot be invoked for reopening settled matters as the Court cannot act as an appellate or revising authority.

In the context of the scope of the inherent powers of the Courts detailed above, the substance of the application under Rule 9 of the Rules of 1959 under consideration reveals that the applicants inter-alia require the Court to determine the share price for them exercising the "exit option" in terms of the order dated 7.8.2008 passed by this Court. However, the determination of share price is not a matter of procedure but of a substantive right dependent upon the evidence of the parties with regard to the price of shares of a

company at a given point of time. Share prices are not static but dynamic in nature changing from time to time inter-alia with reference to the internal management of the Company, its business, the market conditions and the several external macro-economic factors. Hence reference to the share prices of the respondent company historically from time to time in different fact situations and contexts on the basis of which determination is sought by this Court is of no avail. It would also be well to recall that a DB appeal by applicant No.2 against the order dated 7.8.2008 inter-alia fundamentally premised on the failure of the Company Court to determine the share price for the exercise of “exit option” i.e was dismissed as withdrawn on 4.10.2010. And this fact was unfortunately not even disclosed in the application under Rule 9 of the Rules of 1959 seeking the exercise of the equitable jurisdiction of this Court under its inherent powers for the same relief. Determination of the share price claimed by the applicants for their exit is thus a vexed issue of fact relating to

substantive rights and cannot be addressed in a Rule 9 Company (Court) Rules, 1959 application.

In the case of **Mrs. Madhu Ashok Kapur & Ors. v. Mr. Rana Kapoor and others, (2014) 183 Company Cases 339 (Bombay)** it has been held by the Bombay High Court that where no remedy under the Act of 1956 can be resorted to for redressal of grievance/s of a share holder of a company, the Civil Courts would have the jurisdiction to address such an issue. Referring to the Judgment of the Hon'ble Apex Court in the case of **Dwarka Prasad Aggarwal v. Ramesh Chandra Agarwal, AIR 2003 SC 2696** it has been held that the Civil Court's jurisdiction is not generally ousted under the Act of 1956 but only in cases where the Act of 1956 specifies the Company Court as the Forum for complaint in respect of a particular matter then alone the jurisdiction of the Civil Court would stand ousted to that extent as unlike some of the statutes, the Act of 1956 does not contain any express provision barring the

jurisdiction of ordinary Civil Courts in matters covered by the Act of 1956. Consequently where there is no provision which bars the jurisdiction of the Civil Court either expressly or by implication, a dispute based on contractual or common law rights between a share-holder and a company would be triable in a suit.

In the instant case the issue in the application under consideration is with regard to the applicants being allowed “exit option” with the price of the shares to be sold in the exercise of such “exit option” to be determined as per the claim of the applicants either at Rs.220/-, 156/- or 49.31. There is evidently no remedy provided under the Act of 1956 for the relief claimed by the applicants by resort to a particular Court or Forum by invoking any particular machinery. In the circumstances I am of the considered opinion that the applicants would be well within their rights to approach the jurisdictional Civil Court for ventilating their grievance with regard to the share price for their exit, if so advised.

As far as compulsory listing of the

shares of the respondent company is concerned, in the context of the order dated 7.8.2008 passed by the Company Court, it is evident that the Court visualized the possibility of non-listing of the shares of the respondent company for the obvious reason that the jurisdiction of a company Court is limited under section 391(2) read with section 394 of the Act of 1956 to ensuring statutory compliance in the decision making process relating to a scheme ensuring that the scheme is not contrary to public interest. It does not extend to directing autonomous authorities such as SEBI and the Stock Exchanges to exercise their discretion in a particular way / manner. It has been held in the case of **Pentamedia Graphics Limited, ment and "Softowers" rep. by Dr. V Chandrasekaran, Chairman and CEO and Pentamedia Graphics Limited. "Softowers" rep. by Dr. V. Chandrasekaran, Chariman and CEO vs. the Bombay Stock Exchange, (2008) 145 Company Case 327 (Madras)** that both SEBI and Stock Exchanges have the exclusive jurisdiction to

allow or disallow listing of a company’s shares based on their lawful conclusions as to whether the statutory requisites mandated for listing have been satisfied/ fulfilled or not. A direction as to listing in the exercise of powers under section 391(2) and section 394 of the Act of 1956 or otherwise under Rule 9 of the Rules of 1959 as sought would be excess of the jurisdiction of the Company Court. Aside of the above, listing of the respondent company's shares on the Stock Exchange/s within a specified time cannot be to my mind held to the raison d’ ^etre of the sanctioned scheme dated 8.5.2006. And it has not been even so argued. A scheme sanctioned by the Company Court has its main object / purpose and “basic structure” (if one may borrow the expression from another context) on the one hand and ancillary / peripheral matters on the other in respect of which delayed implementation or even non-implementation would not make the sanctioned scheme incapable of “working satisfactorily”. The respondent company is however on record with the averment that the shares would be listed

on the Stock Exchanges no sooner it would be appropriate and in the interest of all its shareholders with better business, profits, improved market condition and favourable macro-economic environment. The Hon'ble Madras High Court in **Pentamedia Graphics Limited (supra)** has held that merely because the shares of the company are not listed as provided for in the sanctioned scheme, it would not render it bad or entail the violation of the Court's order. The enunciation of the Madras High Court is premised on the unquestionable legal position that sanctioning of a scheme under section 391(2) read with 394 of the Act of 1956 is a jurisdiction wholly distinct, separate and unrelated to the powers of the Stock Exchanges /SEBI to demand statutory compliances before granting listing permission.

In my considered opinion no direction for listing of shares of the Company with reference to Clause 3.7 of the sanctioned scheme dated 5.8.2006 within a given time frame can therefore be issued by

this Court.

The other reliefs claimed i.e of appointing a Director from amongst the minority shareholders and for compensation for delayed listing of shares of the company are ex-facie beyond the scope of the sanctioned scheme. They are thus liable to be noted only to be rejected.

I therefore find no force in the application. Accordingly dismissed. The applicants are free to take steps / their remedies as otherwise available in law.

(Alok Sharma) J

Sharma NK

"All corrections made in the judgment/order have been incorporated in the judgment/order being emailed."

NK Sharma, Sr.P.A