IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT

D.B. SPECIAL APPEAL (CIVIL) NO.9/2015
IN
S.B. COMPANY APPLICATION NO.45/2012
IN
S.B. COMPANY PETITION NO.23/2005

M/s. JINDAL SECURITIES PVT. LTD. & ORS.
Vs.
SISTEMA SHYAM TELESERVICES LIMITED & ORS.

RAJASTHAN HIGH COURT

DATE:07.08.2015

HON'BLE THE CHIEF JUSTICE MR. SUNIL AMBWANI
HON'BLE MR. JUSTICE AJIT SINGH

Mr. Anant Kasliwal with
Mr. Vaibhav Kasliwal, for the appellants.

Mr. Soli Cooper, Senior Counsel assisted by
Mr. Nitin Jain &
Mr. Rohan Batra, for the respondent No.1.

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REPORTABLE

1. We have heard learned counsel appearing for the parties.

2. This Special Appeal(Civil) arises out of an order passed by learned Company Judge, dated 09.01.2015, by which he had dismissed the application filed by the appellant under Order 9 of the Companies (Court) Rules, 1959 (in short, 'the Rules of 1959'), with a prayer that the respondent-Company, Sistema Shyam Teleservices Limited, formerly known as Shyam Telelink Limited (hereinafter called as 'SSTL/Company'), be directed to get its shares listed in the stock exchanges within a reasonable time frame. Further, the SSTL be directed to give " a

continuous open exit option to the minority share-holders", at a value deemed fit by the 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. He had also prayed for 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" option of the applicants' shares resulting in a purported loss to them.

3. Clause 3.7 of the sanctioned scheme, on the basis of which the application was filed, reads as follows:-

> "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."

4. An application was filed before learned Company Judge after the scheme was sanctioned on 08.05.2006, on which he passed an order dated 07.08.2008, in which he did not find any good reason to delete Clause 3.7 of the Sanctioned Scheme, and disposed of the application with an order as under:-

> "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".

5. It is submitted that learned Company Judge had erred in law in dismissing the application on the ground that no direction for listing of the shares of the Company with reference to Clause 3.7 of the sanctioned scheme, dated 08.05.2006 under Section 391 of the Companies Act, 1956 (in short, 'the Act of 1956') can be given, with a time frame. Learned Company Judge has erred in relying on the judgment of the Madras High Court in *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),* in which it was held in para 42 as follows:-

> "42. It must be noted that SEBI acts in its own field, given the jurisdiction as a regulatory agency in the matter of dealing with stocks, shares and debentures. The intricacies on the listing of the Company is entirely with the Stock Exchange. Section 4 of the Securities Contracts Regulation Act empowers SEBI to recognise the Stock Exchanges. It also control the rule-making of the said Exchanges. Stock Exchanges are held to be regulatory authorities. Their byelaws bind not only buyers, sellers and brokers, but also third parties who are affected by the transactions in the Stock Exchange. They are entitled to regulate all matters connected with the business of the Stock Exchange. The byelaws have the

> effect of the statutory force. Hence, given the expertise in the above field, the exclusive province of the Stock Exchange to grant recognition subject to the compliance of the Securities Laws, the Regulations and the Listing Agreement, in the context of Clause 24(f) is not to be confused with the jurisdiction of this Court granting approval of the Scheme. The applicants have, no doubt, filed a copy of the Scheme and the petition proposed to be filed. However, considering Clause 24(g), even after the grant of approval to the Scheme, it is open to the Stock Exchange to reject the plea for listing, when it is satisfied that such listing would be violative of the Securities Laws, there is no disrespect to the order of approval granted by this Court. The authority who is to judge on the merits of listing is competent to arrive at a decision in terms of the laws pertaining to the listing. In this view of the matter, one has to look at Section 392 of the Companies Act."

6. It is submitted by learned counsel appearing for the appellant that by increasing the promoters shares, the applicant's shares were reduced to the extent of 0.6%. The respondents have not taken earnest steps to get the Company listed, leaving the appellant high and dry, with no equitable exit option, defeating the object of Clause 3.7 of the Sanctioned Scheme.

7. It is submitted that underlying object of Clause 3.7 of the Sanctioned Scheme, dated 08.05.2006, provide option given to the shareholders to pay only to the Stock Exchanges, and that with an intentional delay and neglect in taking steps in getting the Company listed with SEBI, and further with no exit option, Clause 3.7 has been frustrated, by which the entire Scheme requires re-look by the Court and the Resultant Company be wound up.

8. Learned counsel appearing for the respondents submitted that they had taken all steps permissible in law to get the Resultant

Company listed on the Stock Exchanges. They have explained, in detail, the steps taken by them, on which the Resultant Company could not be listed in SEBI upto now despite their best efforts.

9. By an order dated 03.07.2015, the respondents were required to file an affidavit, giving the steps taken by them, for listing of the shares of the Company. In compliance, an affidavit has been filed by the respondents, explaining as to why and under what circumstances, the respondents have not succeeded so far in getting the shares of the resultant Company listed on the Stock Exchanges. Paragraph 6 and paragraph 13 onwards of the affidavit reads as follows:-

> 6. With this understanding in mind, the answering Respondent proceeded to take the following steps for initiating the process of listing of its shares after the pronouncement of the said Order:
>
> (a) The Board of Directors ("**BoD**") of the answering Respondent in the meeting held on 01 October 2008 reviewed the said Order and decided that the future course of action for initiating listing be prepared.
>
> (b) Subsequently, the Management Committee of the answering Respondent convened a meeting on 27 January 2009 and decided that aside from preparing a detailed proposal for the steps required for listing of issued capital of the answering Respondent, a comprehensive legal opinion vis-à-vis compliances required to be made by the answering Respondent under the prevalent laws would also be obtained. It was also decided by the Committee that a detailed in-house exercise be carried out in consultation with suitable experts and Directors of the answering Respondent to assess the feasibility of listing of shares in the current market scenario.
>
> (c) This matter was once again reviewed by the Management Committee on 16.04.2009, wherein after a detailed discussion on the Commercial Report submitted by the in-house team of exerts and the Legal Opinion received, the Committee observed that

in view of the market conditions not being conducive and posing an unfavourable state of affairs, the making of public offering by IPO and listing of the shares, based thereon, would not be commercially viable. It was further decided that the management efforts must be continued to explore the possibilities of initiating process of listing through IPO as soon as possible.

(d) Thereafter, the matter was again reviewed at length at the level of the Board of Directors on 15.10.2009 wherein a special committee named as the "Directors Special Committee for Listing" was constituted for all the issues related to the listing of the issued capital. It was further resolved that the Chief Executive Officer of the answering Respondent prepare a detailed report on various aspects relating to the issue along with the proposed action plan and submit the same to the Special Committee so constituted.

(e) In pursuance of the aforesaid resolution, the Chief Executive Officer of the answering Respondent on 10.12.2009 presented the 'Report cum Action Plan' for review of the Special Committee of Directors and after detailed discussions over the same, it was unanimously concluded that the matter would necessitate further monitoring and deliberation and consideration by the Board of Directors.

(f) It is significant to mention that at the relevant time, the following routes were available by which a company could get listed:

(i) Listing of equity shares pursuant to a scheme sanctioned by a High Court: In terms of the SEBI Circular SEBI/CFD/SCRR/01/2009/03/09 dated September 3, 2009 issued under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, ("**ICDR Regulations**"), a company could apply to SEBI for relaxation from Rule 19(2) (b) of the Securities Contracts (Regulations) Rules, 1957 ("**SCRR**") and list its shares without making an initial public offer if it satisfies the conditions prescribed under Rule 19 (7) and the aforesaid circular;

(ii) Initial public offer ("**IPO**") in terms of Regulation 26(1) of ICDR Regulations: In terms of Regulation 26(1) of the ICDR Regulations, a company could make an initial public offer, if it, *inter alia*, fulfills the condition of having a track record

of having distributable profits in terms of section 205 of the Companies Act, 1956, for at least 3 out of the immediately preceding 5 years; and

(iii) IPO in terms of Regulation 26(2) of the ICDR Regulations: In terms of Regulation 26(2) of the ICDR Regulations, a company, which did not satisfy the conditions specified in Regulation 26(1) of the ICDR Regulations, could make an initial public offer through the book building process. The same was, however, subject to the mandatory requirement that the company undertook to allot at least 50 per cent. of the net offer to public to Qualified Institutional Buyers ("**QIBs**") and to refund full subscription monies if it failed to make allotment to the QIBs.

(g) In the present case, mode (i) was ruled out when SEBI *vide* letter dated 28.12.2007 rejected the answering Respondent's request for relaxation under Rule 19(2)(b) of SCRR. Even mode (ii) was rendered impermissible as the answering Respondent did not have any distributable profits under Section 205 of the Companies Act, 1956 for at least 3 out of the immediately preceding 5 years. The only remaining route was that of listing through a book building process. In complete deference to the said Order, the answering Respondent, undertook further steps stated hereinbelow to commence the process of listing of its equity shares through the book building process.

(h) The matter of the listing was once again reviewed by the BoD on 16.12.2009. After detailed discussion and keeping in view the steps already taken towards implementing the Court's directions for initiating the process for the listing of shares, the members of the Board unanimously decided that the matter be directly monitored by the Board and a detailed report be submitted to the Board from time to time appraising the Board about the developments in the matter. Further, in light of the issuance of ICDR Regulations and the resultant repeal of SEBI (Disclosure and Investor Protection) Guidelines, 2000, the BoD sought an additional legal opinion as to whether the listing exercise directed for by the Hon'ble High Court can be undertaken by the answering Respondent on its own and in accordance with the manner provided for under ICDR Regulations 2009 or whether the answering Respondent is required to approach the Hon'ble High Court for

suitable clarifications on the point. Further, it was also resolved by the BoD that tenders be invited for the appointment of National and/or International Merchant Banker(s).

(i) It is relevant to mention that pursuant to the resolutions passed in the BoD meeting dated 16.12.2009, the answering Respondent initiated the process for selection of Merchant Bankers through the tender process and carried a detailed exercise for evaluating suitability of various intermediaries that had responded to the request for participation in the selection process undertaken by the special working group.

(j) On 3.02.2010, a Board meeting was also convened, wherein the BoD reviewed the report prepared on the results of tender process for the selection of the Merchant Banker and other process in the matter of listing of the shares of the answering Respondent. Thereafter, the Board accorded its approval to conclude the process of appointing the First Merchant Banker at the earliest; and settling its scope of work and areas of its activity.

(k) In pursuance thereof, the IPO and listing committee of the directors of answering Respondent in its meeting held on 10.03.2010 reviewed and approved the Report on Tender Process Results for the selection of the First Merchant Bankers and recommended the same for the approval of the Board of Directors.

(l) Thereafter, on 11.03.2010 the BoD on the basis of the recommendations of the IPO and "Listing Committee" meeting held on 10.03.2010 resolved to appoint Bank of America, Merill Lynch and ICICI Securities as the First Merchant Bankers and to shortlist HSBC Bank, ING Bank and SBI Capital Markets for future requirement, if any, of additional/ substituted Merchant Banker.

13. However, the prospects of making a public offer of shares of the answering Respondent received a huge set back in the year 2010, when the grant of licenses by the DoT in 2008 came under severe judicial and regulatory scrutiny. Certain public interest litigations were filed before the Hon'ble Supreme Court of India questioning the proprietary of the entire process of granting licenses

on First Come First Serve basis by DoT in 2008.

14. This suddenly created highly volatile market conditions and deeply afflicted the investor sentiment in the telecom sector. Notwithstanding the same, the BoD continued to constantly review and assess the feasibility of securing listing of its shares

15. On 02 February 2012, the Hon'ble Supreme Court *vide* its judgment of even date quashed all 122 licenses granted to various telecom operators on or after 10.01.2008. The 21 telecom licenses allotted to the answering Respondent in 2008 (except the already existing Rajasthan Circle) were also canceled *vide* the said judgment. The quashing of the answering Respondent's licenses landed a severe blow to its ambitious business plans of being a Pan India Telecom Operator. Aggrieved by the same, the answering Respondent preferred a Review petition and a curative Petition against the aforesaid judgment dated 02.02.2012, but the same were rejected by the Hon'ble Supreme Court of India.

16. Compelled by such exigencies, the answering Respondent closed down operations in 13 out of 21 circles where it had been awarded the UAS licenses. For the remaining 8 circles (excluding the State of Rajasthan) which it was earlier servicing, the answering Respondent participated in the fresh auction conducted by DoT in March 2013. This move was necessitated to retain its presence in India and to prevent its operations from being closed down as was the case for other operators such as Etisalat and S Tel.

17. Thereafter, in April 2013, DoT issued a Letter of Intent dated 30 April 2013 to the answering Respondent for awarding the spectrum for 8 telecom circles bid by it. It was the award of spectrum for such circles that gave a new lease of life to the company and the answering Respondent began provisioning telecom services under the UAS license in such areas. Copy of the Letter of Intent dated 30 April 2013 is enclosed herewith as **Annexure-A**.

18 From being a Pan India operator to providing services in merely 9 circles, the entire operations of the answering Respondent underwent drastic re-structuring and remodeling.

19. Amidst such adversities, the financial health of the answering Respondent continued to suffer as it remained a loss making concern from 2008 with accumulated losses amounting to Rs. 11080 crores as on 31.03.2013. The intrinsic value of the equity shares of the answering Respondent had also been rapidly diminishing and the loss per share as per the audited balance sheet for the year ending 31.03.2013 stood at Rs. 9.02. Details of the accumulated losses and loss per share for the years 2008-09 to 2012-13 is tabulated hereinbelow.

Particulars	2008-09	2009-10	2010-11	2011-12	2012-13
Loss per share	2.85	5.95	9.05	9.89	9.02
Accumulated losses (Rs.)	1212.3 crores	2672.8 crores	5040.3 crores	8199.1 crores	11080.8 crores

20. Adding to these challenges was the poor economic growth, mainly on account of global financial woes, which had gripped the Indian economy since 2008. The economic growth rate had slipped to the decade's low of 5 per cent in 2012-13 and had worsened to 4.7% in 2013-2014, marking the worst economic slowdown in more than a quarter of a century.

21. Due to the aforesaid debilitating factors i.e. cancellation of the 21 spectrum licenses, excessive accumulated losses, erosion of value per share, other economic factors and general market conditions, listing of equity shares of the answering Respondent through the book building process became an unviable option and in fact, a virtual impossibility.

22. As a direct result of the above, the BoD of the answering Respondent was left with no option but to put its IPO plans on hold. The BoD had disclosed this fact to all its shareholders, including the Appellants, *vide* the Annual Report for the years ending 31 March 2012, 31 March 2013 and 31 March 2014. Copy of the annual reports for the years ending 2012 and 2013 are already on record as part of **Annexure-B** to the present appeal. Copy of the Annual Report for the year ending 31 March 2014 is being enclosed herewith as **Annexure-B**.

23. From the aforesaid events, it is clear that the answering Respondent has taken all possible steps, in

the given circumstances, for *initiating* the process of listing of its shares and has at all times been fully compliant of direction no. 1 of the said Order.

24. It is pertinent to clarify that merely because the answering Respondent has not been able to secure listing of its shares, cannot be construed to mean that the answering Respondent has contravened direction no. 1 of the said Order or has violated the sanction accorded to the approved Scheme. This is because the direction to list its shares is not a direction for mandatory listing, rather a direction to "initiate" the process of listing. This position stands vindicated in the findings of the Ld. Single Judge, which while passing the Impugned Order dated 09 January 2015, held as follows:

> *"The issue which therefore requires consideration in the case at hand is as to whether Clause 3.7 of the sanctioned scheme dated 08.05.2006 was a mandatory part of the scheme- a part of its "basic structure" essential to its object purpose and purpose and its satisfactorily workability. In my considered view for an answer to this question one need to go further than the order dated 07.08.2008 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….*
>
> *…Aside of the above, listing of the respondent company's shares on the Stock exchange/s <u>within a specified time</u> 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…*"

25. In ruling that listing of shares is not a mandatory part of the scheme, the Ld. Single Judge also noted the decision of the Hon'ble Madras High Court in *Pentamedia Graphics Ltd. vs. BSE, [2008] 145 Comp Cas 327 (Mad)*,, wherein it was 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.

(ii) Present status of compliance of Direction no.1 of the said Order

25. I say and submit that despite the many obstacles above, the answering Respondent has striven hard to reposition and rebuild itself in the telecom sphere as a mobile service provider. After securing the UAS licenses in 8 circles, the answering Respondent has carried out major overhauling of its processes and is presently in the process of re-structuring its business operations across India.

27. The Answering Respondent is also engaged in fulfilling its roll-out obligations under the UAS license granted to the answering Respondent in respect of the said circles. Owing to DoT's failure in ensuring contiguous availability of spectrums awarded to the answering Respondent, the answering Respondent has taken out proceedings before the Telecom Disputes Settlement and Appellate Tribunal, Delhi in this regard. As and when this issue is decided and the answering Respondent is provided contiguous availability of its spectrum, it will be able to efficiently utilize its spectrum and offer third and fourth generation network services to its customers.

28. In the year 2013-2014, the answering Respondent has also attained break even in 5 circles at an operational level. The net losses have also witnessed reduction from Rs. 3158.8 crores in the fiscal 2012 to Rs. 2881.7 crores in the fiscal 2013 to Rs. 2072.8 crores in the fiscal 2014, and to Rs. 1717.3 crores in the fiscal 2015, as per the provisional accounts. There has been, thus, a considerable reduction in the losses due to cost optimization measures undertaken by the answering Respondent. The value per share has also strengthened from (-ve) Rs. 9.02 per share in year 2012-2013 to (-ve) Rs. 6.49 in 2013-2014.

29. Though the answering Respondent has come a long way from the cancellation of its 21 licenses, there still lie significant challenges for the answering Respondent before it can publicly offer its shares. While the net losses for the answering Respondent have lessened, it has still not completely recuperated financially. The answering Respondent continues to reel under heavy losses and debt as it experiences year on year losses.

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The net worth of the answering Respondent for the last three fiscals has also been consistently eroding. It is significant to mention that the answering Respondent's accumulated losses at the end of fiscals 2014 and 2013 were more than fifty per cent of its net worth, making it a company with negative net worth.

30. At the ground level, the answering Respondent is also facing fierce competition from its adversaries. While its rivals have already shifted or are on the verge of shifting to next generation 4G/LTE technology, the answering Respondent is still grappling to capture its original market share in the existing 2G/3G network.

31. At this juncture, it is worth mentioning that in the current statutory and regulatory regime, the eligibility to make an IPO in India is prescribed at two levels as set out below:

a. Eligibility under the relevant Securities and Exchange Board of India Regulations ("SEBI Regulations")

SEBI, as a matter of practice and in order to protect the interests of the investors, particularly the retail investors, discourages loss making companies from listing their shares as this may harm the interests of retail investors particularly. It is specifically with this objective in mind that it has formulated Regulations 26(1) and 26(2) of the ICDR Regulations, 2009, as amended, which stipulate that an unlisted company must meet the following eligibility norms:

i. it has net tangible assets of at least Rs. 3 crores in each of the preceding three full years (of 12 months each), of which not over 50% is held in monetary assets. If over 50% of net tangible assets are held in monetary assets, it must have made firm commitments to utilize excess monetary assets in its business or project;

ii. it has a minimum average pre-tax operating profit of Rs. 15 crores, calculated on restated and consolidated basis during the three most profitable years, of the immediately preceding five years;

iii. the aggregate of the issue size and all previous issues made in the same financial year does not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year;

iv. it has a pre-issue net worth of Rs. 1 crore in each of the three preceding years; and

v. in the event of a change in its name within the last year, at least 50% of the revenue of the preceding full year is earned from the activity suggested by the new name.

If a company does not meet these eligibility conditions described above it may still undertake an initial public offer, however, such company has to follow the mandatory allocation of 75% of the total offer size to QIBs. It is respectfully submitted that no company which has large accumulated losses and which is continuing to make operational losses can ever go in for a successful public offering of its shares. It is respectfully submitted that no investor will subscribe, in a public offering, to shares of a company which has not made and is not making any profits.

b. Eligibility under the Stock Exchanges' rules and bye-laws

One of the key eligibility criteria for listing an initial public offer on the National Stock Exchange of India Limited (the "**NSE**") is that the company seeking listing must be able to show a financial track record of at least three years and submit annual reports of three preceding financial years to the NSE. Additionally, the company must submit and also provide a certificate to the NSE stating that the net worth of the company has not been wiped out by the accumulated losses resulting in a negative net worth.

32. In the present case, the answering Respondent neither meets the eligibility norms (i) to (iii) of SEBI nor the pre-conditions for listing before NSE since the answering Respondent has been incurring losses in the preceding five years and also because it has a negative net worth. Accordingly, even if the answering Respondent undertakes an initial public offer, it will not be able to list its shares on the NSE.

33. The answering Respondent may be eligible to list its shares only on the BSE Limited. However, as stated above, the answering Respondent has to mandatorily allocate of 75% of the total offer size to QIBs. Because of the answering Respondent's negative net worth, it is highly unlikely to attract investment from QIBs, which are sophisticated investors and this would also inevitably

result in a failure of the offer.

34. I say that such circumstances do not in any manner inspire making a public offer of shares and are in fact, factors which advise against listing of a concern. Hastening the answering Respondent into listing its shares on the bourses, when the company's valuation appears bleak, will have disastrous consequences. The public offer would not solicit the required subscription from the public or command the floor price desired by the shareholders. A failed IPO would not be in the interest of any shareholder much less the Appellants. That is why many companies in the recent past have even called off their IPOs despite having the approval of SEBI.

35. In a dynamic market, the correct timing for making an Initial Public Offer is crucial for its success and should be best left to the prudence of the company and its independent consultants and merchant bankers, which is exercised after considering the potential acceptability of the offer by the entity. In his affidavit filed in D.B. Special Appeal No. 15/2009, Mr. Alok Jain has endorsed this position by stating, "*…in an ever changing market scenario, determination of the correct timing for the opening of IPO and all its terms are best left for the determination by the Company…".* Even the Ld. Single Judge passing the order dated 07 August 2008 was fully cognizant of this commercial reality and therefore, did not fix any time for listing but only specified the period of 18 months to "*initiate*" the process of listing.

36. This position is particularly true for telecom industry, which is a highly competitive and capital intensive sector. It takes years before a company attains the stage of offering its shares to the public. For instance, Bharti launched its IPO only after becoming a market leader and carving a niche in the Telecom sector. Another clear illustration will be that of Vodafone, which has not yet moved for an IPO, despite creating a huge subscriber base in India.

37. In view of such facts and circumstances, it is prayed that no direction be passed by this Hon'ble Court in matters of listing of the answering Respondent.

38. Having said that, the answering Respondent is fully conscious of its obligation to all its shareholders and will continue to act in compliance of the said Order. It is

committed to undertake any and all action that is necessary in the best interests of the company and its shareholders. In fact, I say and submit that the answering Respondent and its BoD are making continuous efforts to reduce the vast liabilities of the answering Respondent and/or to increase its profitability.

39. The answering Respondent will continue to constantly monitor the feasibility/commercial possibility of making a public offer and would revisit the question, as and when the market conditions, macro economic outlook and the answering Respondent's own business prospects warrant it to go public. This decision will be taken under and will be subject to the expert advice of the merchant bankers and industry experts and in consultation with all stakeholders of the answering Respondent. This will be in the interest of all shareholders of the company including the Appellants. This position of the answering Respondent had found acceptance of the Ld. Single Judge, which recorded the said averment in the Impugned Order dated 09 January 2015.

40. The present affidavit is being filed without prejudice to all the contentions and statements made by the answering Respondent in its reply to the Stay Application to the present appeal and in its reply to Company Application No. 45 of 2012. The said affidavit has been filed for the limited purpose of bringing on record, for the satisfaction of this Hon'ble Court, its compliance of direction no.1 of the said Order and that it has indeed complied with the same. "

10. We have gone through the detailed reasons given in the reply of the resultant Company, affirmed by the affidavit of Shri Vinay Kumar Dadheech, and do not find any lack of bonafides in making sincere efforts for compliance of Clause 3.7 of the Sanctioned Scheme. The permission from the SEBI has not come forward on account of unavoidable reasons, which cannot be attributed to the respondents. It was not their fault, in which the shares could not be listed on the Stock Exchanges.

11. We also find that the appellant continuous to be shareholder of the resultant Company, and that he has also exercised option to subscribe to the rights shares, which goes to demonstrate that the appellant, as on date, did not have any intention to exercise the exit option, for which he had pressed the application before learned Company Judge, nor he has accepted an offer made by respondents to make a joint effort for a willing buyer on mutually acceptable price.

12. We also agree with the submission of learned counsel appearing for the respondents that the application of the kind, filed by the appellant, was not maintainable under Rule 9 of the Rules of 1959. The inherent powers of the Company Courts do not extend the power to pass order, which may recall and frustrate the Scheme of Amalgamation, on any subsequent developments after the Resultant Company has been incorporated putting the clock back.

13. We do not find any good ground to interfere. If the appellant wants to seek any relief, he may, if so advised, apply under Section 397/398 of the Act of 1956, subject to his competence, for appropriate orders.

14. The Special Appeal is dismissed.

(AJIT SINGH),J. **(SUNIL AMBWANI),C.J.**

/KKC/

Certificate:

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

KAMLESH KUMAR
P.A.

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