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M/S. Northgate Technologies Limited

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Court : Andhra Pradesh

Decided On : Mar-28-2012

Judge : Ramesh Ranganathan

Appeal No. : COMPANY PETITION Nos.191 to 193 OF 2011

Advocate for Pet/Ap. : Sri. V.S. Raju

Judgement :

COMMON ORDER:

C.P.No.191 of 2011 is filed by M/s.Northgate Technologies Limited (hereinafter referred to as 'demerged -transferee company') to sanction the composite scheme of arrangement and amalgamation under Sections 391 and 394 read with Sections 100 to 103 of the Companies Act, 1956 (the Act).

The demerged - transferee company was originally incorporated under the name and style of Garden Cements Private Limited in Rajasthan on 11.06.1991. On becoming a public limited company, with effect from 01.06.1992, the said company changed its name to Sigma Comp Soft Technologies Limited, and shifted its registered office from Rajasthan to Andhra Pradesh. The change of its registered office was confirmed by the Company Law Board, New Delhi on 22.03.2002, and a fresh certificate of registration was issued on 12.06.2002. The Company again changed its name to M/s.Northgate BPO Services Limited, and a fresh certificate of incorporation was issued by the Registrar of Companies, Andhra Pradesh on

02.12.2002. The Company once again changed its name to M/s.Northgate Technologies Limited, and a fresh certificate of incorporation was issued by the Registrar of Companies, Andhra Pradesh on 28.09.2005.

The registered office of the demerged - transferee company is situated at Hyderabad. Its authorised share capital is Rs.50,00,00,000/- divided into 5,00,00,000/- equity shares of Rs.10/- each. Its issued, subscribed and paid up capital is Rs.49,14,71,008/- divided into 4,90,18,590 equity shares of Rs.10/- each, and its forfeited share capital is Rs.12,85,108/-. The main objects of the demerged - transferee company is to design, develop, acquire, assemble, manufacture, distribute, transit, maintain, mortgage, transfer, purchase, sell, hire, lease, import, export, act as a dealer, franchiser, provide management and marking services in the field of data transmission, software development, e-commerce business solutions, hardware, peripherals, consumables, network computers, related activities globally and indigenously, and to run software training institutions. The objects also include providing hi-tech consulting and services on management of informatics and technology for enterprise excellence ((MINT-EX) by project management, internet service provider, web applications development, corporate training, business automation analysis, internet advertisements, to set up and run electronic data processing centres, to carry on business of data/word processors, development of management information system, computerisation feasibility study etc. For the financial year ending 31.03.2011, the demerged - transferee company suffered a loss of Rs.24,99,92,168/-.

C.P.No.192 of 2011 is filed by M/s. Northgate Com Tech Limited (hereinafter referred to as ‘the resulting company’) for sanction of a composite scheme of arrangement and amalgamation under Sections 391 and 394 of the Act. The resulting company was incorporated as a private limited company in Andhra Pradesh on 28.05.2010. It became a public limited company, and a fresh certificate of incorporation was issued by the Registrar of Companies, Andhra Pradesh on 01.08.2011. The registered office of the resulting company is situated at Hyderabad. Its authorised share capital is Rs.5,00,000/- divided into 50,000 equity shares of Rs.10/- each. The main objects of the resulting company is to design, develop, carry on business of development of software tools and platforms

providing fast, flexible and reliable commodities trading tools, to provide order management and risk management software tools for global commodity markets using quantitative derivative and neuro models, carry on business and become a member of multi-commodity exchanges and spot exchanges, engage in trading and clearing activities including derivative contracts and options contracts, participate in ready delivery and forward contracts, specific delivery contracts, future contracts etc. For the financial year ending 31.03.2011, the resulting company did not start its operations.

C.P.No.193 of 2011 is filed by M/s.Green Fire Agri Commodities Private Limited (hereinafter referred to as 'the transferor company). The said company was originally incorporated as a private limited company under the name and style of PNM Commodities Private Limited in Andhra Pradesh on 13.12.2005. The Company changed its name to M/s.Green Fire Agri Commodities Private Limited, and a fresh certificate of incorporation was issued by the Registrar of Companies, Andhra Pradesh on 20.04.2010. The registered office of the transferor company is situated at Hyderabad. Its authorised share capital is Rs.6,00,00,000/- divided into 60,00,000 equity shares of Rs.10/- each. Its issued, subscribed and paid up share capital is Rs.60,82,420/- divided into 6,08,242 equity shares of Rs.10/- each. The transferor company has also received share application money of Rs.5,10,20,590/-. Its main objects are to carry on the business of, and become a member of, multi-commodities exchanges; engage in trading and clearing activities including all kinds of contracts subject to the rules, regulations and bye-laws of commodity exchanges as prescribed and amended from time to time by the Forward Contract (Regulation) Act, 1952; to carry on business and engage in all kinds of derivative contracts and options contracts, participate in ready delivery and forward contracts, specific delivery contracts, future contracts etc. For the financial year ending 31.03.2011 the transferor company made a profit after tax of Rs.58,61,435/- and, after adjustment of the previous years losses, Rs.37,91,641/- was reflected as Reserves and Surplus in its balance sheet.

Before sanctioning a scheme of arrangement, the Court must be satisfied that the statutory provisions are complied with; in case a meeting, of the members or a class of members or of the creditors or a class of creditors, is called for, the class

is fairly well represented; and the scheme of arrangement is such as a man of business would reasonably approve. It is the commercial wisdom of the parties to the scheme, who have taken an informed decision about the usefulness and propriety of the scheme supporting it by the requisite majority vote, that has to be kept in view by the Court. The Court would not act as a court of appeal and sit in judgment over the informed view of the parties to the compromise as it has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. The Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The supervisor cannot ever be treated as the author or the policy-maker. The propriety and the merits of the compromise or arrangement has to be judged by the parties who, as sui juris with their eyes open, and fully informed about the pros and cons of the scheme, arrive at their own reasoned judgment and agree to be bound by such a compromise or arrangement. The Court cannot scrutinise the scheme to find out whether a better scheme could have been adopted by the parties. (Miheer H. Mafatlal v. Mafatlal Industries Ltd 1997(1) SCC 579).

Under Section 391 of the Act, where a compromise or arrangement is proposed between a Company and its members, the Court may, on the application of the company or of any creditor or member of the company, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs. Sub-section (2) provides that, if a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the said compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors and all the members of the Company.

When a scheme of amalgamation/merger of a company is placed before the Court for its sanction, the Court should, in the first instance, direct holding of the meetings in the manner stipulated in Section 391 of the Act. Thereafter, even if the proposed scheme is approved by a majority of the concerned members or

creditors, the Court should, before sanctioning such a scheme, satisfy itself that the company, or any other person moving an application for sanction under sub-section (2) of Section 391, has disclosed all the relevant matters mentioned in the proviso to the said sub-section. The first proviso to Section 394 of the Act stipulates that no scheme of amalgamation of a company, which is being wound up, with any other company, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Similarly the second proviso to the said Section provides that no order for the dissolution of any transferor company under clause (iv) of sub-section (1) of Section 394 of the Act shall be made unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Thus, Section 394 of the Act casts an obligation on the Court to be satisfied that the scheme of amalgamation or merger is not prejudicial to the interest of its members or to public interest. (Sesa Industries Limited v. Krishna H. Bajaj (2011) 3 SCC 218).

This Court, by order in Company Application No.1103 of 2011 dated 30.08.011, directed that the meeting of the shareholders of the demerged - transferee company be convened, held and conducted on 30.09.2011. A Chairman was appointed to preside over the said meeting. A perusal of the Chairperson’s report would reveal that 52 members, holding shares of Rs.4,39,38,860/- divided into 43,93,886 equity shares of Rs.10/- each attended the meeting in person; and 36 members, holding shares valued at Rs.10,43,70,230/- divided into 1,04,37,023 equity shares of Rs.10/- each, by proxies aggregating Rs.14,83,09,090/- divided into 1,48,30,909 equity shares of Rs.10/- each out of the issued, subscribed and paid up capital of Rs.49,14,71,008/- divided into 4,90,18,590 equity shares of Rs.10/- each. Except for the invalid vote of one member holding 300 shares, all the other shareholders, who either attended in person or through proxies, unanimously resolved to approve the scheme of arrangement and amalgamation; to authorise the Board of Directors to do all such acts, deeds and things required for giving effect to the composite scheme of arrangement and amalgamation; and

to assent to such modifications and conditions as may be imposed by the High Court in sanctioning the said composite scheme of arrangement and amalgamation.

By order in C.A.No.1104 of 2011 dated 30.08.2011, this Court dispensed with the holding of the meeting of the shareholders of the resulting company as all the seven shareholders had given notarised affidavits conveying their consent to the composite scheme of arrangement and amalgamation. Likewise in the case of the transferor company this Court, by its order in C.A.No.1105 of 2011 dated 30.08.2011, dispensed with the holding of the meeting of the shareholders as both the shareholders of the transferor company had given notarised affidavits conveying their consent to the composite scheme of arrangement and amalgamation.

On the question whether, in a scheme of arrangement between the company and its members, a meeting of the creditors or a class of creditors must be held, it is necessary to note that Section 391(1) enables the Court, on the application of a company or a creditor or a member of the company, to order a meeting of the creditors/or the members "as the case may be" to be held and conducted in such manner as the Court directs. Under Section 391(2), if a majority representing 3/4th in value of the creditors or members agree, in the meeting, to approve the compromise or arrangement, the scheme, on its sanction by the court, would be binding on all the creditors/members "as the case may be" and also on the company. The expression "as the case may be" finds place both in sub-sections (1) and (2) of Section 391. If the words "as the case may be" in Section 391(1) is construed as requiring the Court to order the meeting of only the members, in a Scheme of arrangement between the Company and its members, and only a meeting of the Creditors in a Scheme of arrangement between the Company and its Creditors, then should the expression "as the case may be" in Section 391(2) not be read as to bind only the members where a meeting of the members is held and the creditors where a meeting of the creditors is held? The safeguard in the provision, of the members or creditors in value voting in the meeting to approve the scheme, is that the wishes of a majority of the class should prevail, and the dissenting minority of 1/4th or less of the class should not be permitted to derail the

scheme of arrangement unless, of course, the Court, on examining the scheme, finds that the objection of the minority is justified. If no meeting of the creditors is required to be held, in a Scheme of arrangement between the Company and its members, then, in the absence of ascertaining whether $3/4^{th}$ in value of the creditors approve the scheme or not, would the Court be justified in statutorily imposing such a Scheme of arrangement on the creditors, even though their consent has not been obtained or their wishes ascertained? If it were held that not holding the meeting, and ascertaining the wishes of the creditors, would result in the Scheme of arrangement not to bind them, would the very purpose of sanctioning the Scheme by the Court not be defeated, and approval of the Scheme not be an exercise in futility? If, on the other hand, the view, that a meeting of the creditors/members must necessarily be held in all cases irrespective of whether the Scheme of arrangement is between the Company and its members or the creditors, is accepted would that not render the words "as the case may be" in Section 391(1) mere surplusage? These are a few questions which need answers.

On this issue, one view is that the creditors are not entitled, as of right, to participate in the process of consideration of sanction of the Scheme, as the Companies Act does not contain a specific provision for notice being given to the creditors at any stage either prior to the making of the order or subsequent thereto, except in so far as the creditors may have notice of it by public advertisement, (Union of India v. Asia Udyog Pvt. Ltd (1974) Vol.44 Com. Cases 359 (Delhi)), and that the legislature has cast a duty on the Court to ascertain whether the Scheme affects the interests of the creditors to such an extent that holding of their meeting is essential and, if the Court were of the view that the interest of the creditors were adversely affected, it could refuse to sanction the scheme unless their consent has been obtained. (Ansal Properties and Industries Ltd., In re (1978) 48 Comp Cas 184 (Delhi)).

Another facet of this view is that, under Section 391 of the Act, a compromise or arrangement is either between a company and its creditors or between a company and its members. An arrangement, in the nature of amalgamation, is the result of an agreement between the amalgamating company and its members, as well as a

corresponding agreement between the transferee company and its members, and there is, therefore, no provision for the participation of persons other than the members of the two companies to vote on an arrangement of amalgamation proposed between a company and its members. (Nava Bharat Ferro Alloys In re (A.P.) Vol. 89 (1997) CC 285; Mafatlal Industries Ltd., In re (1995) 84 Comp Cas 231 (Guj); Coimbatore Cotton Mills Ltd and Lakshmi Mills Co. Ltd., In re (1980)50 Comp Cas 623 (Madras); and Telesound India Ltd., In re (1983) 53 Comp Cas 927 (Delhi)). However, a different view was taken by the Bombay High Court, In Re ICICI Bank Limited (2002) 104 Bom LR 399, and it was held that Section 391(1) gives a discretion to the Court to convene a meeting of the creditors or any class of them; the Court would exercise the discretion by convening a meeting of creditors, if the creditors are likely to be adversely affected by an arrangement between the Company and its members. attending the meeting and voting are steps of participation in the process of consideration of the Scheme; if the creditors have no right of hearing at the time of hearing of the petition under Section 391, the only way of ascertaining whether the creditors are affected or not would be through the wishes of the creditors which may be expressed by them in a meeting which the Court is entitled to convene under Sub-section (1) of Section 391; and, therefore, the Court would exercise discretion as a matter of course to convene a meeting of the creditors of the Company under sub-section (1) of Section 391 unless the Court is, prima facie, satisfied that the interests of the creditors are not likely to be adversely affected by the scheme.

While the scheme of arrangement in these three company petitions is between the Company and its members, it is also necessary to examine whether the creditors of each of these three companies had consented to the composite scheme of arrangement and amalgamation as their interests would undoubtedly be affected as a result thereof. This Court is required, in larger public interest, to safeguard their interests since, in a substantial number of cases where sanction of Court is sought to the scheme of arrangement or amalgamation, the creditors are public financial institutions.

The Balance Sheet of the demerged- transferee company as at 31.03.2011 reveals that, while it had no secured loans, its unsecured loans stood at

Rs.11,77,86,690/-. The unsecured loans, in its entirety, was extended to the demerged - transferee company by its subsidiary M/s.Social Media India Limited. By their memo dated 29.02.2012, the demerged - transferee company has placed, before this Court, the letter of consent given by M/s. Social Media India Limited confirming that a sum of Rs.11,77,86,690/- was due and payable, towards inter-corporate loan, by the demerged - transferee company, and they were giving their consent to the composite scheme of arrangement and amalgamation. Since the sole creditor representing the unsecured loan in its entirety has given its consent to the composite scheme of arrangement and amalgamation, it is wholly unnecessary for a meeting of the class of creditors, representing unsecured loans, being held.

The current liabilities, as reflected in the Balance Sheet as at 31.03.2011, was Rs.48,19,198/-, out of which, the amount due and payable to sundry creditors was Rs.31,38,100/-. In their memo dated 29.02.2012, the demerged -transferee company has furnished the break up of such sundry creditors. (viz. M/s. Social Media India Limited for Rs.9,53,210/-; audit fee payable to Globe7 Pte Limited of Rs.1,19,124/-; audit fee payable to M/s. Italia Associates of Rs.5,36,590/-; Rs.53,250/- to Sri C.Ramachandram and Co., Chartered Accountant and Rs.35,280/- to P.N.R. Personal Security Services). The said memo also contains letters of these sundry creditors giving their consent to the scheme. Also enclosed to the said memo is an email addressed by the BSR and Company, Chartered Accountants stating that from out of Rs.6,41,793/- shown as due to them towards audit fees as on 31.03.2011, Rs.4,08,735/- was paid to them vide cheque No.523038 dated 01.07.2011; Rs.1,03,122/- was paid vide cheque No.000088 dated 18.10.2011; and Rs.1,29,936/- is still due to be received as on date. M/s.BSR and Company Chartered Accountant have also given their consent, by email dated 28.02.2012, to the composite scheme of arrangement and amalgamation.

From out of the total amount of Rs.31,38,100/-, shown under the head “sundry creditors”, letters of consent, to the scheme of amalgamation, have been obtained from 85.14% of such sundry creditors including dues to the employees of the company towards leave travel allowance of Rs.3,41,150/-. Even, in a scheme of

arrangement between a company and its creditors or a class of creditors, approval of 75% of such class of creditors is required for the scheme to be taken up for scrutiny by this Court. Since, in the present case, 85.14% of the class of creditors i.e. sundry creditors have given their consent to the scheme of arrangement, it is wholly unnecessary for a meeting of such unsecured creditors to be called for. As a substantial majority of the sundry creditors, representing more than 85%, have given their consent to the composite scheme of arrangement and amalgamation, it can be safely concluded that this class of creditors are satisfied that the composite scheme does not adversely affect their interests.

A perusal of the Balance Sheet, of the resulting company as on 31.3.2011, shows that the resulting company does not have any loans either secured or unsecured. Under the head “current liabilities”, Rs.10,000/- is shown as audit fees payable. As annexure to the memo dated 29.2.2012, filed on behalf of the said company, is enclosed a certificate issued by the resulting company that the amount payable as audit fee to M/s G.P. Rao was paid to them on 18.10.2011. It is evident, therefore, that the sundry creditors for Rs.10,000/- (representing audit fees) have been paid in their entirety and, as there are no other sundry creditors as at 31.3.2011, it is wholly unnecessary for this Court to examine whether or not the interests of such a class of creditors are safeguarded under the scheme, sanction for which is being sought from this Court.

The Balance Sheet of the transferor company, as at 31.03.2011, shows that the said company has no loans either secured or unsecured. The deferred tax liability of Rs.35,532/-, as reflected in the said Balance Sheet, is the difference in the depreciation allowable under the Income Tax laws over the depreciation provided for in the books of accounts of the transferor company. Under the head “current liabilities” for Rs.26,26,207/-, sundry creditors are for Rs.17,54,740/-. Along with their memo dated 29.2.2012 the transferor company has placed before this Court letters of consent of M/s Stampede Housing Limited for Rs.7,58,746.91; M/s Green Fire Agro Tech Pvt. Ltd for Rs.3,63,638.71; Venkat Srinivas Meenavavalli for Rs.3,22,711.38; Sri M.Lakshminarayana Choudary for Rs.59,400/-; Sri A.P. Mithun Kumar for Rs.43,000/-; and Smt. A.P. Rajeswari for Rs.43,000/-. The audit fees, shown as payable, for Rs.4,50,000/- was subsequently paid to M/s BSR. and

Co. vide Cheque No.095977 dated 4.7.11 for Rs.3,56,026/-, and vide cheque No.083541 dated 12.12.2011 for Rs.1,02,069/-. By their e-mail dated 28.2.2012 M/s BSR and Company have acknowledged that no amount is due from the transferor company to them as at 31.3.2011. All the sundry creditors aforementioned have given their consent to the proposed composite scheme of arrangement and amalgamation. From out of the total sundry creditors of Rs.22,24,975/-, sundry creditors for a value of Rs.20,40,497/-, i.e., 91.69% of the class of sundry creditors, have given their consent to the composite scheme of arrangement and amalgamation. Even in a scheme of arrangement between a company, and a class of creditors, the requirement under Section 391(2) is that 3/4th in the value of such creditors should accord their consent to the scheme of arrangement. In the present case, as 91.69% of the sundry creditors have given their consent to the scheme of arrangement, it may not be necessary for a meeting of the sundry creditors to be convened.

Under the proviso to Section 391(2), no order sanctioning any compromise or arrangement shall be made unless the Court is satisfied that the company has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251, and the like.

This Company Petition was filed on 17.10.2011, and copies of the balance sheets of all the three companies as at 31.03.2011, along with a copy of the auditor’s report thereof, have been filed. It is stated in the Company Petition that no investigation or proceedings are pending under Sections 235, 237 or any other provisions of the Companies Act against the demerged - transferee company or the resulting company or the transferor company. It is also stated that the demerged - transferee company is a listed company; its shares are listed on the National Stock Exchange of India; and a letter of no objection has been received from the said stock exchange. A copy of the letter of the National Stock Exchange of India dated 24.08.2011 is filed whereby the demerged - transferee company was informed of its no-objection, with limited reference to those matters which have a bearing on listing/delisting/continuous listing, within the provisions of the

listing agreement. The ingredients of the proviso to Section 391(2) of the Act are, therefore, satisfied.

Consequent upon admission of these company petitions on 4.11.2011, paper publication was ordered. Publication was effect in Business Standards (English daily) and Andhra Bhoomi (Telugu daily), Hyderabad editions on 12.11.2011. Notice was also taken out on behalf of these three companies on the Central Government and the Official Liquidator as required under Section 394-A and the Second proviso to Section 394(1) of the Act respectively.

The expression 'company' used in Section 390 of the Act applies to all companies which can be wound up under the Companies Act and is not confined only to companies which are presently in a position to be wound-up i.e. as on the date of making of the application under Sections 391 to 394 of the Companies Act. As on the date of the making of the application for merger or amalgamation the company may be quite prosperous and a profit-making company. All that is meant to be included by the words "liable to be wound up" is that it must be a company which is subject to the laws of winding-up as provided in the Companies Act, i.e., it must be liable to be wound-up as and when the circumstances so arise. (In the matter of Rossell Industries Ltd. AIR 1996 CAL 257). Section 390 of the Companies Act is the interpretation clause and, under Clause (a) thereof, it is stipulated that, in Section 391 and 393, the expression “Company” means any company liable to be would up under the Act. The expression, "any company liable to be wound up under the Act" in Section 390(a) takes within its sweep all companies registered under the provisions of the Companies Act, 1956, as also all unregistered or other companies in respect of which winding-up orders can be made by a Court under the provisions of the Companies Act, 1956. The latter are the companies which fall within the province of the provisions of Part X of the Companies Act, 1956 which deals with winding up of unregistered companies. Sections 582 and 584 of the Act show that the expression contained in clause (a) of section 390 was used so as to enable unregistered companies or foreign companies to be in a position to invoke the provisions of Sections 391 and 393 of the Companies Act. (Khandelwal Udyog Ltd and ACME Mfg. Co. Ltd., In re (1977) 47 Comp.Cas.503).

A plain reading of sub-section

(1) of Section 394 of the Act makes it clear that, when an application is made to the court under Section 391 for sanction of a scheme of amalgamation the Court, while sanctioning the scheme or by subsequent order, should make provision for dissolution, without winding up, of the transferor-company. The provisions of Sections 391 and 394 of the Act are to be read together as Section 391 confers power on the Company Court to sanction the scheme, and Section 394 sets out the procedure to be followed. The scheme of amalgamation is bound to provide for merger of the transferor-company with the transferee-company, but such merger cannot take effect without the transferor-company being dissolved. An amalgamation is not possible without dissolution of the transferor-company. Where the two companies are proposed to be amalgamated into a new company, though the scheme may not involve the winding up of the respective companies, it does involve the dissolution and, consequently, a report by the official liquidator, as contemplated by the second proviso to sub-section

(1) of Section 394 of the Act, would be necessary. (Webbs Farm Mechanization v. Official Liquidator (1996) Vol. 85 CC 146 (Karnataka High Court FB)). When a company is wound up, or liquidated, the first proviso to Section 394

(1) requires a report on the affairs of the company prior to amalgamation. In such cases, no order, transferring wholly or in part the undertaking of the transferor-company, can be made by the Court without reference to the official liquidator. The second proviso refers only to dissolution, and not to amalgamation. The report of the official liquidator is required only for the purpose of passing an order of dissolution, and not an order according sanction to a scheme of amalgamation. The distinction between the two provisos can easily be discerned. While the first proviso requires a report on the affairs of the company, before the scheme of amalgamation is sanctioned, if the company is to be wound up and not otherwise, the second proviso would require a report of the official liquidator before passing an order of dissolution. While the first proviso talks of amalgamation, the second proviso talks of dissolution. The difference in the language is significant. (Sakthi Sugars Assocaition v. Sakthi Sugars (1998) Vol. 93 CC 646). The second proviso

to Section 394(1) applies to a case where "dissolution without winding up" takes place. Does "dissolution" take place in all cases of amalgamation? "Amalgamation" means mixing up or uniting together. The resultant position of amalgamation is not annihilation although the identity of the amalgamated unit would stand integrated with another. It is the organic unification of two entities or undertakings or the fusion of one with the other. In Halsbury's Laws of England, volume 7, paragraph 1539 of the 4th edition, "amalgamation" is described as "a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company or by the transfer of one or more undertakings to an existing company. Section 481 of the Companies Act explains what is "dissolution of a company". Three contingencies are provided therein for dissolution of a company.

(1) When the affairs of a company have been completely wound up;

(2) when the court is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds and assets;

(3) when the court is of the opinion that the liquidator cannot proceed with the winding up for any other reason whatsoever. In all such contingencies the court can order dissolution of the company if the court is of the further opinion that it is just and reasonable in the circumstances of the case. The effect of such an order is that "the company shall be dissolved". Sections 450 and 481 of the Companies Act deals with situations when dissolution can be ordered after winding up as well as before winding up. In a case where dissolution is ordered before winding up either the liquidator or the shareholders may succeed in averting the complete winding up of the company and, at the same time, the company could be dissolved as per some arrangement. The first proviso to Section 394 envisages a situation where, even without dissolution, an amalgamation is made possible. The legal process of dissolution can take place after commencement of the steps for winding up. Dissolution without winding up only means dissolution without completely winding up the company. What is envisaged in Clause (iv) of Section 394 as

"dissolution without winding up" need not be the consequence of amalgamation of two companies. (Mathew Philip v. Malayalam Plantations (India) Ltd (1994) Vol. 81 CC 38). On an analysis of the two provisos to Section 394(1), it is evident that they deal with different situations. While the first proviso relates to the sanction of a compromise or arrangement involving a scheme of amalgamation of a company 'which is being wound up', the second relates only to an order for dissolution of the transferor-company without winding up. (Regional Director, Company Law Board v. Mysore Galvanising Co. [1976] 46 CC 639; Webbs Farm Mechanization v. Official Liquidator (1996) Vol. 85 CC 146 (Karnataka High Court FB)). The word "further" is employed in the second proviso not for the purpose of denoting that an additional provision is made in a situation covered by the first proviso. The purpose is to indicate that it is yet another proviso. It may be an additional one or it could be entirely separate from the other. The word further has no special significance. It is the usual mode of drafting when two provisos are incorporated even though the two provisos may not be inter-connected. It is usual draftsmanship to start the second proviso with the expression 'provided further'. If there is a third proviso, it is usual to start the third proviso with the expression 'provided also'. The word further occurring in the second proviso is often used to indicate that it is the beginning of a new clause. It has almost the same meaning as the word 'also'. The word "further" need not necessarily mean that the proviso is intended to be in conformity with the preceding proviso. (Mathew Philip; Bush Product Ltd [1973] 86 LW 243 (Madras High Court)). The Legislature, in its wisdom, has thought it fit to make a special provision in the case of an order for dissolution without winding up of any transferor-company, and it is fallacious to suggest that the second proviso to sub-section

(1) of Section 394 of the Act has no application if the transferor-company is not in the process of being wound up. A company, which is a going concern, may choose for various reasons to amalgamate itself with another company and, in such a case, an order for dissolution without winding up of the company is required to be made. (Regional Director, Company Law Board, Calcutta v. R. K. Investments [1978] Tax LR 1885 (Cal H.C); Mysore Galvanising Co.; Sumani Pvt. Ltd's In re [1979] 49 CC 547 (Bombay High Court)).

A combined reading of the first and second provisos of Section 394(1), with Section 394A of the Act, shows that the scheme of amalgamation would not be sanctioned unless the court has considered the report of the Official Liquidator or the representation of the Central Government, as the case may be. Section 448 of the Act provides for the appointment of an official liquidator for each High Court. The principal function of the official liquidator is, undoubtedly, in relation to the winding up of the company, but that does not mean that the official liquidator has not been entrusted any other functions under the Act. Section 448 merely prescribes the manner and mode of appointment of the official liquidator and, once such an appointment is made by the Central Government, it is for the Legislature to clothe the official liquidator with any other duty which is considers expedient and necessary. The second proviso to sub-section (1) of Section 394 of the Act demands submission of the report from the official liquidator in cases of dissolution of the company without winding up. (Sumani Pvt. Ltd., In re).

An Official Liquidator acts as a watchdog of the Company Court, reposed with the duty of satisfying the Court that the affairs of the company, being dissolved, have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large. In essence, the Official Liquidator assists the Court in appreciating the other side of the picture before it, and it is only upon consideration of the amalgamation scheme, together with the report of the Official Liquidator, that the Court can arrive at a final conclusion that the scheme is in keeping with the mandate of the Act, and that of public interest in general. For examining the questions as to why the transferor-company came into existence; for what purpose it was set up; who were its promoters; who were controlling it; what object was sought to be achieved by dissolving it and merging with another company, by way of a scheme of amalgamation, the report of an official liquidator is of seminal importance and, in fact, facilitates the Company Judge to record his satisfaction as to whether or not the affairs of the transferor company had been carried on in a manner prejudicial to the interest of the minority and to the public interest. (Sesa Industries Limited).

In his report dated 22.12.2011, the official liquidator would state that he had called for information and the statutory books from the transferor company, and the same

were furnished; and, on examination of the information, it does not appear as if the affairs of the transferor company has been conducted in a manner prejudicial to the interest of its members, or to the public interest.

In his report filed on behalf of the Central Government, under Section 394-A of the Act, the Regional Director (South Eastern Region), would submit that the composite scheme of arrangement and amalgamation was approved by the Board of Directors of the demerged - transferee company on 19.5.2011, and by the resulting and the transferor companies in their respective meetings held on 2.8.2011; the demerged - transferee company is listed on the National Stock Exchange of India Limited, and the requisite no objection certificate has been obtained and submitted; under clause 15.1 of Part III, upon the scheme becoming effective and in consideration of the transfer of and vesting of the whole of the business of transferor company, the transferee company shall, without any further application or deed, issue and allot to every member of the transferor company, holding fully paid up equity shares in the transferor company and whose names appear in the Register of members of the transferor company on the record date; one equity share of the face value of Rs.10 of the transferee company credited as fully paid up in respect of 158 equity shares of the face value of Rs.10/- each fully paid up held by such a member in the transferor company. The Regional Director submits that the resulting and the transferee companies are required to pay stamp duty under the provisions of the Stamp Act upon the scheme of amalgamation being sanctioned by this Court. Sri V.S. Raju, Learned Counsel for the petitioner, would submit that the requirement of payment of stamp duty can be made a condition for sanction of the scheme, and stamp duty would be paid as stipulated in Article 20 of Schedule 1A of the Stamp Act, before a certified copy of the sanction order is filed with the Registrar of Companies. Clause 19 in part III of the scheme, relates to combination of authorised capital and change in the Memorandum and Articles of Association. Under Clause 19.1, upon sanction of the scheme, the authorized share capital of the demerged - transferee company shall stand automatically increased by the authorized capital of the transferee company as on the effective date.

On the question whether the authorized or nominal capital of the transferor company can be transferred to the transferee, Section 394(4)(a) defines “property” to include property, rights, powers of every description and “liabilities” to include duties of every description. The authorized capital, a liability of the transferor company, also stands transferred to the transferee on the scheme of amalgamation being sanctioned by the Court under Section 391 read with Section 394(1) and (4) (a) of the Companies Act. Section 94(1)(a) enables a limited company having a share capital, if so authorized by its Articles, to alter the conditions of its Memorandum, to increase its share capital by such amount as it thinks expedient. Under Section 97(1), where a company has increased its authorized capital, it shall file with the Registrar a notice of the increase of the capital within 30 days after passing of the resolution authorizing the increase, and the Registrar shall record the increase and make any alterations which may be necessary in the Company’s Memorandum or Articles or both.

The expression "property" and "liabilities", which can be transferred on amalgamation, under S. 394(1) have been defined in very wide terms by Sub-S. (4)(a) of that Section, so as to include "rights and powers of every description" and "duties of every description" respectively. The expression "property" would, therefore, be wide enough to include rights under a contract. The rights, property and the liabilities of the transferor-company become the rights, property and liabilities of the transferee-company by virtue of the order of vesting made by the Court consequent on amalgamation. The company, in its essence, means the members who compose it, the assets, property and rights that it had, its liabilities, its undertaking, business or other activity. On amalgamation and consequential dissolution all these attributes continue to live as part of a larger entity. The only part that dies is the shell and the name. (Telesound India Ltd., In re). As Section 394(4a) of the Companies Act defines “property” to include property rights and powers of every description, the right of the transferor company to issue further share capital, on the date of the amalgamation, is a legal right which the transferor company can transfer under Sections 394(2) and (4a) of the Companies Act. (M/s. Magnaquest Solutions Pvt. Ltd 2007 CLC 1889; Saparna Infotech Ltd. v. Relinfo Limited Judgment in C.P. No. 149 and 150 of 2001 dated 04.01.2002). The transferor-company, having paid the requisite fee for its authorized capital, has the

right to utilize and exhaust it. This right of transfer of the authorized capital of the transferor-company to the transferee-company, is by operation of law, and can also be transferred as it would constitute “property”, (Areva T and D India Ltd. v. Union of India (2008) 144 Comp Cas 311 (Cal)).

On the scheme of amalgamation being sanctioned by the Court, the rights, property and liabilities of the transferor become the rights, property and liability of the transferee company and, as a consequence thereof, the right which the transferor has to issue share capital up to the limits stipulated as its authorised capital, and the existing liability in the form of its authorized capital, stand transferred to and are vested in the transferee company.

While the Court, called upon to sanction a scheme of amalgamation, would not act as a Court of appeal and sit in judgment over the informed view of the concerned parties to the scheme, as the same is best left to the corporate and commercial wisdom of the parties concerned, it is clear that the Court, before whom the scheme is placed, is not expected to put its seal of approval on the Scheme merely because the majority of the shareholders have voted in favour of the scheme. Since the Scheme, which gets sanctioned by the Court would be binding on the dissenting minority shareholders or creditors, the Court is obliged to examine the scheme in its proper perspective together with its various manifestations and ramifications to find out whether the scheme is fair, just and reasonable to the concerned members, and is not contrary to any law or public policy. The expression “public policy”, though incapable of precise definition, connotes some matter which concerns the public good and the public interest. (Sesa Industries Limited[2]; Hindustan Lever Employees' Union v Hindustan Lever Ltd., (1995) 83 Comp Cas 30 (SC); Central Inland Water Transport Corporation Limited. Vs. Brojo Nath Ganguly (1986) 3 SCC 156). Before according its sanction to a scheme of amalgamation, the Court has to see that the provisions of the Act have been duly complied with; the statutory majority has acted bonafide and in good faith and are not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purport to represent; and the scheme, as a whole, is just, fair and reasonable from the point of view of a prudent and reasonable businessman taking a commercial decision.

(Sesa Industries Limited)

The only question which remains to be examined is whether the scheme of amalgamation is in public interest. The Court cannot abdicate its duty simply because the statutory majority has approved it and there is no opposition to the scheme of amalgamation in Court. It must scrutinize the scheme to find out whether it is an arrangement which can, by reasonable people conversant with the subject, be regarded as beneficial to those who are likely to be affected by it. In pursuit of such an enquiry the Court is not tied down by any rigid principles or strait-jacket formulae. No enumeration contained in judicial decisions of the factors which can be taken into account, howsoever precise, can be treated as exhaustive so as to limit the scope of the inquiry which, having regard to varying circumstances, might differ from case to case. The burden lies on the petitioner-company to show that the scheme of amalgamation is fair, reasonable, workable and is such that a man of business would reasonably approve. The Court would, of course, take into account the fact that it has been approved by a big majority vote, but it would not shirk its duty to scrutinize the scheme. (Bank of Baroda Ltd. Vs. Mahindra Ugine Steel Co. Ltd. (1976) 46 Com Cas 227). When it exercises the power, conferred on it by Section 391(2), to sanction the scheme of compromise or arrangement, the Court, by its act, is imposing the scheme on the dissenting members of that class. Before taking such an action, it would be open to the Court to examine the scheme before imposing it on the unwilling/dissenting members of the class. Even if all the statutory formalities are duly carried out, the Court has still the discretion either to sanction or refuse to sanction the scheme. (Mahindra Ugine Steel Co. Ltd.and Bengal Hotels P. Ltd. In re (1977) 47 comp Cas 597 (Guj)).

The amalgamation must fulfil some felt need, some purpose, some object and that must have some co-relation with public interest. The Court is charged with a duty to ascertain whether the affairs, of both the transferor and the transferee, have been carried on not only in a manner not prejudicial to its members but also that it is not against public interest. The expression “public interest” must take its colour and content from the context in which it is used. (Union of India v. Ambalal Sarabhai Enterprises Ltd (1984)55 Com.Cas.623). The Indian law, a departure from the English law, enjoins a duty on the Court to examine objectively whether

the merger is, or is not, violative of public interest. What would be in public interest cannot be put in a strait-jacket. It is a dynamic concept which keeps on changing. It has been explained in Black's Law Dictionary as:-

"Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular locality which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national Government."

It is an expression of wide amplitude. A scheme, valid and good, may yet be bad if it is against public interest. The basic principle of the satisfaction, that the scheme is not contrary to public interest, is none other than the broad and general principles inherent in any compromise or settlement entered into between the parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, Courts have evolved the principle of "prudent business management test" or that the scheme should not be a device to evade the law. (Hindustan Lever Employees' Union). No court of law would ever countenance any scheme of compromise or arrangement if it finds that it is an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. The fairness of the scheme, qua the disputing minority shareholders or creditors, also has to be kept in view by the High Court while putting its seal of approval on the scheme.

The High Court should examine whether the proposed scheme of compromise and arrangement is violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same. The High Court has also to satisfy itself that the members or class of members or the creditors or class of creditors, as the case may be, were acting bonafide and in good faith and were not coercing the minority in order to promote any interest adverse to them. It must also ensure that the scheme as a whole is also just, fair and reasonable from the point of view of prudent men of business taking a

commercial decision beneficial to the class represented by them for whom the scheme is meant. (Miheer H. Mafatlal). Unless the scheme is shown to be contrary to any law or is such as to shock the conscience of the court or is patently unfair to the members or creditors or any class of them, or is against public interest or against public policy, the Court should not come in the way of business by rejecting a bonafide scheme under Section 391. (Zee Interactive Multimedia Ltd., In rein (2002) 3 Com.Cas 733 (Bomb)).

The composite scheme of arrangement and amalgamation gives details of the rationale of the scheme. It is stated therein that the demerged - transferee company is an internet technology company, and is engaged in the business of online advertising, aggregation and multipurpose Vo IP services; it owns valuable global properties; the company has recently forayed into the commodities business by acquiring a controlling stake in the transferor company which was basically created for high end electronic communication network (ECN) for global commodities by connecting to multiple future, spot exchanges, e-auction platforms, trade bots, processors and retailers across the globe in real time using Global Grid Matrix (GGM), high frequency trading (HFT) algorithms; segregation of the internet and commodity trading operations would result in (a) efficient and focussed management on each business segment; (b) unlocking value for the shareholders of Northgate; and (c) operating and administrative efficiencies. Clause 2 of the scheme stipulates that the scheme would be effective from the respective appointed date, but shall be operative only from the effective date. The scheme provides for the internet business undertaking of the demerged - transferee company to be vested in the resulting company as a going concern, in accordance with Section 2(19AA) of the Income Tax Act, 1961; with effect from the appointed date the whole of the undertaking and assets and properties of the internet business undertaking to be transferred to and vested in the resulting company so as to vest in them all rights, title and interest pertaining to the internet business undertaking; with effect from the appointed date all debts, liabilities, contingent liabilities, duties and obligations of every kind of the demerged - transferee company relatable to the internet business undertaking shall, without any further act or deed be, and stand transferred to the resulting company so as to become the debts, liabilities, obligations of the resulting company without the

consent of third parties; and, from the effective date, the resulting company would undertake to meet, discharge and satisfy the said liabilities to the exclusion of the demerged - transferee company, and to keep the demerged - transferee company indemnified at all times from and against all such liabilities. The scheme also envisages that all licences, permissions or approvals held by the demerged - transferee company, which are required to carry on operations in the internet business undertaking, shall be transferred to and be vested in the resulting company without any further act or deed; the transfer and vesting of the internet business undertaking shall be subject to the existing securities, charges, mortgages and other encumbrances, if any, subsisting over or in respect of the property and assets or any part thereof relating to the internet business undertaking to the extent such securities, mortgages, encumbrances are created to secure the liabilities forming part of the internet business undertaking. Clause 6.1 stipulates that, on the scheme becoming effective and upon issuing of shares in accordance with clause 5, the existing equity shares of the resulting company, held by the existing share holders of the demerged - transferee company as on the effective date, shall, without any application or deed, stand cancelled without any payment; the cancellation of the equity shares would be made without following the process under Section 100 to 103 of the Act; reduction in capital would not involve either a diminution of liability in respect of unpaid share capital or payment of paid-up share capital, and the provisions of Section 101 would not apply; the resulting company shall not be required to add the words “and reduced” as a suffix to its name consequent upon such reduction; the objects clause of the Memorandum of Association of the resulting company would stand altered, modified and amended without any further act, instrument or deed, and with effect from the appointed date, and upto and including the effective date, the demerged-transferee company would be deemed to have been carrying on, and to carry on the internet business undertaking on account of, and in trust for, the resulting company. Clause 10 of the scheme relates to employees and, under Clause 10.1 thereof, on the scheme becoming operative all staff, workmen and employees of the demerged- transferee company, pertaining to the internet business undertaking who are in service as on the effective date shall become the staff, workmen and employees of the resulting company without any break in their

service; and the provident fund, gratuity fund, superannuation fund or such other special fund, if any, created for the benefit of the staff, workmen and employees of the internet business undertaking of the demerged - transferee company would become the funds of the resulting company or shall be transferred or merged with other similar funds of the transferee company for all purposes.

Part III of the scheme relates to amalgamation of the transferor company with the demerged - transferee company, and thereunder the whole of the business, assets, properties and liabilities of the transferor company, without any further act or deed, shall stand transferred to and be vested in the demerged transferee company with all rights, title and interest pertaining to the transferor company; all debts, liabilities, contingent liabilities, duties and obligation of every kind of the transferor company are also to be transferred to the demerged - transferee company so as to become, from the appointed date, the debts, liabilities, contingent liabilities, duties and obligations of the demerged -transferee company; such transfer is without obtaining the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, liabilities, contingent liabilities, duties and obligations have arisen; all statutory licences, permissions or approvals or consents held by the transferor company, required to carry on business, would stand vested in, or be transferred to, the demerged - transferee company without any further act or deed; and all existing securities, mortgages, charges, encumbrances or liens, if any, as on the appointed date and those created by the transferor company after the appointed date over its assets are also to be transferred to the demerged - transferee company after the effective date. Clause 15 of the scheme relates to issue of shares by the demerged - transferee company and, under Clause 15.1, pursuant to the scheme coming into effect, and upon the entire business and the whole of the undertaking of the transferor company being transferred and vested in the transferee company , the transferee shall issue and allot to the share holders of the transferor, other than itself, 158 equity share of Rs.10/- each for every one fully paid equity share of Rs.10/- each held in the transferor company. Clause 15.3 provides that the equity shares to be issued to the members of the transferor company shall rank pari-passu with the existing equity shares of the demerged - transferee company in all respects including dividends. Clause 16 relates to accounting treatment on the

scheme becoming effective in the books of the demerged - transferee company. Clause 17 relates to reorganization and reduction of capital of the demerged - transferee company. Under Clause 18, with effect from the effective date, the name of the demerged - transferee company shall stand changed to “Green Fire Agri Commodities Limited” or such other name as may be approved by the concerned Registrar of Companies. Clause 21 relates to employees and, under sub-clause (1), on the scheme becoming operative, all staff, workmen and employees of the transferor company, who are in service as on the effective date, shall become the staff, workmen and employees of the demerged - transferee company without any break in their service and, on the basis of continuity of service, the terms and conditions of their employment with the demerged - transferee company shall not be less favourable than those applicable to them with reference to their employment with the transferor company. Sub-clause (2) provides that the provident fund, gratuity fund, superannuation fund etc., created for the benefit of the staff, workmen and employees of the transferor company shall become the funds of the demerged - transferee company. Clause 25 provides that, on the amalgamation scheme becoming effective, the transferor company shall be automatically dissolved without being wound up. Part IV of the Scheme contains the general terms and conditions, and Clause 28 relates to the conditionality of the scheme. The Scheme is to be conditional upon, and subject to, the requisite consent, approval or permission of the Central Government or any other statutory or regulatory authority which, by law, may be necessary for the implementation of the scheme; the sanction of the High Court under Sections 391 to 394 read with Sections 100 to 103 of the Act, and necessary orders under Section 394 being obtained; and a certified or authenticated copy of the order of the High Court sanctioning the scheme being filed with the Registrar of Companies, Andhra Pradesh, Hyderabad by all the three companies as may be applicable. Under Clause 28.5 the scheme shall be effective upon Sanction of the High Court of Andhra Pradesh.

The scheme as filed in the Court reveals that segregation of the internet and commodity trading operations of the transferor company would result in efficient and focussed management on each business segment, and unlock the value of the shareholders of Northgate to easy operating administrative efficiencies. The

scheme provides for the internet business undertaking of the demerged - transferee company to be vested in the resulting company as a going concern and for the workmen and employees of the internet business undertaking of the demerged - transferee company to become the workmen and employees of the resulting company. Likewise Part III of the scheme relates to amalgamation of the transferor company and the demerged- transferee company and for all employees, workers and staff of the transferor company to become the staff and workmen of the demerged-transferee company without break in service. The objects sought to be achieved by the proposed scheme is for segregation of internet and commodity trading operations which would result in efficient and focussed management on each business segment, and would unlock the value of the share-holders in the demerged company; it would also result in operating and administrative efficiencies and to demerge the internet business undertaking of Northgate and merging the division with the resulting company ie., Northgate Com. The merger of the transferor company with the demerged- company would be beneficial to its share holders and that of its employees. It cannot, therefore, be said that the scheme, if approved, would be against public interest.

I consider it appropriate, therefore, to sanction the scheme of amalgamation on condition that the stamp duty would be paid as stipulated under Article 20(d) of Schedule 1-A of the Indian Stamp Act, and proof of payment is enclosed along with the certified copy of the sanctioned order to be filed with the Registrar of Companies. As required under Section 394(3) of the Companies Act, read with Rule 81 of the Companies (Court) Rules, 1959, the petitioner shall file a certified copy, of the Order of this Court, with the Registrar of Companies for its registration within thirty days from the date of the order.

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