* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CO. APPLS. 578-579/2011 & 611/2011 IN CO.PET. 403/2009

IN THE MATTER OF
M/S. SPICE COMMUNICATIONS
LIMITED & ANR. ..... Petitioners

Through Dr. A.M. Singhvi, Mr. Neeraj Kishan Kaul and Mr. C. Vaidyanathan, Senior Advocates with Mr. Sandeep Singhvi, Mr. Gopal Jain, Mr. Manjul Bajpai, Mr. Rishi Agarwala, Mr. Ankit Shah, Mr. Aneesh Patnayak and Mr. Rajiv Kumar, Advocates for IDEA Cellular Limited.

Mr. A.S. Chandhiok, ASG with Ms. Maneesha Dhir, Mr. Ritesh Kumar, K.P.S. Kohli, Mr. Simranjeet Singh and Mr. N. Bhavi, Advocates for DOT.

Mr. Rajiv Bahl, Advocate for Official Liquidator.

% Reserved on : 2nd June, 2011
Date of Decision : 4th July, 2011

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J

1. Company Applications No. 578-579/2011 have been filed by the Department of Telecommunication (in short 'DOT') under Rules 6 and 9 of the Companies (Court) Rules, 1959 for recall and stay of this Court's

order dated 5th February, 2010 by virtue of which amalgamation of Spice Communication Limited (for short 'Spice') with Idea Cellular Limited (for short 'Idea') was allowed.

2. Upon the present applications being mentioned before the Division Bench, the matter was directed to be listed before this Court on 30th March, 2011. On the said date, this Court passed the following order:-

> *"Co. Appl. 578/2011 in Co. Pet. 403/2009*
>
> *Mr. A.S. Chandhiok, learned ASG has drawn my attention to the fact that the Ministry of Telecommunication vide its letters dated 07th January, 2010 (page 60) and 18th January, 2010 (page 63) of the present application, had rejected the application of Amalgamation of M/s. Spice Communication Limited with M/s. Idea Cellular Limited.*
>
> *Mr. Chandhiok further submits that these facts were not brought to the notice of the Court on 28th January, 2010 when this Court had reserved the judgment in the present case.*
>
> *Issue notice to non-applicants by all modes including dasti, returnable for 25th April, 2011.*
>
> *Co. Appl. 579/2011 in Co. Pet. 403/2009*
>
> *Issue notice to non-applicants by all modes including dasti, returnable for 25th April, 2011.*
>
> *Keeping in view the aforesaid, the operation of order dated 05th February, 2010 is stayed till the disposal of the present application."*

3. Thereafter Company Application No. 611/2011 was filed by the petitioner-companies namely, Spice and Idea seeking vacation of the

aforesaid order dated 30th March, 2011. Keeping in view the urgency in the matter, this Court, with consent of parties, decided to finally hear all the aforesaid applications.

4. Briefly stated the relevant facts of the present case are that both the petitioner-companies are telecommunication companies which have been granted various Unified Access Services Licence Agreements (for short 'licences') for different areas on terms and conditions mentioned therein. The said licences have been issued under Section 4 of the Telegraph Act, 1885. The relevant clauses of a sample Licence are reproduced hereinbelow:-

> *"1. Ownership of the LICENSEE Company……*
>
> *1.3 The merger of Indian companies may be permitted as long as competition is not compromised as defined in condition 1.4 (ii).*
>
> *1.4 The LICENSEE shall also ensure that:*
>
> *(i) Any change in share holding shall be subject to all applicable statutory permissions.*
>
> *(ii) No single company/legal person, either directly or through its associates, shall have substantial equity holding in more than one Licensee Company in the same service area for the Access Services namely; Basic, Cellular and Unified Access Service. 'Substantial equity' herein will mean equity of 10% or more'. A promoter company/Legal person cannot have stakes in more than one Licensee Company for the same service area……*
>
> *xxx xxx xxx xxx*

6. Restrictions on 'Transfer of Licence'

6.1 The LICENSEE shall not, without the prior written consent as described below of the LICENSOR, either directly or indirectly, assign or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub-Licence and/or partnership relating to any subject matter of the LICENCE to any third party either in whole or in part i.e. no sub-leasing/partnership/third party interest shall be created. Provided that the LICENSEE can always employ or appoint agents and employees for provision of the service.

6.2 Intra service area mergers and acquisitions as well as transfer of licences may be allowed subject to there being not less than three operators providing Access Services in a Service Area to ensure healthy competition as per the guidelines issued on the subject from time to time.

6.3 Further, the Licensee may transfer or assign the License Agreement with prior written approval of the Licensor to be granted on fulfillment of the following conditions and if otherwise, no compromise in competition occurs in the provisions of Telecom Services:-

(i) When transfer or assignment is requested in accordance with the terms and conditions on fulfillment of procedures of Tripartite Agreement if already executed amongst the Licensor, Licensee and Lenders; or

(ii) Whenever amalgamation or restructuring i.e. merger or de-merger is sanctioned and approved by the High Court or Tribunal as per the law in force; in accordance with the provisions; more particularly Section 391 to 394 of the Companies Act, 1956; and

(iii) The transferee/assignee is fully eligible in accordance with eligibility criteria contained in tender conditions or in any other document for grant of fresh license in that area and show its willingness in writing to comply with the terms and conditions of the license agreement including past and future roll out obligations; and

(iv) All the past dues are fully paid till the date of transfer/assignment by the transferor company and its associate(s)/ sister concern(s)/ promoter(s) and thereafter the transferee company undertakes to pay all future dues inclusive of anything remained unpaid of the past period by the outgoing company.

xxx xxx xxx xxx

16. General

16.1 The LICENSEE shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions/ regulations of TRAI as per provisions of the TRAI Act, 1997as amended from time to time and instructions as are issued by the Licensor/TRAI.……..”

(emphasis supplied)

5. Admittedly, the merger of aforesaid licences is subject to guidelines issued from time to time by the Government of India. For the present case, the Guidelines dated 22nd April, 2008 for intra service area Merger are relevant. The relevant extract of Merger Guidelines, 2008 is reproduced hereinbelow:-

No. 20-100/2007-AS-I
Government of India
Ministry of Communications and Information Technology
Department of Telecommunications
Sanchar Bhawan, 20, Ashok Road, New Delhi

22nd April, 2008

Subject : Guidelines for intra service area Merger of Cellular Mobile Telephone Service (CMTS)/Unified Access Services (UAS) Licences

The intra service area Merger of CMTS/UAS Licences shall be permitted as per the guidelines mentioned below for proper conduct of Telegraphs and Telecommunication services, thereby serving the public interest in general and consumer interest in particular:

1. Prior approval of the Department of Telecommunications shall be necessary for merger of the licence……..

xxx xxx xxx xxx

17. "Any permission for merger shall be accorded only after completion of 3 years from the effective date of the licences……."

(emphasis supplied)

6. It is pertinent to mention that Spice had licences for six different areas which were overlapping with Idea. While four out of the six overlapping licences were non-operative, two licences namely for Punjab and Karnataka areas were operative.

7. On 25th June, 2008 Idea through its letter informs DOT that there is a proposal to merge Spice with Idea in accordance with Sections 391 to 394 of the Companies Act, 1956 (hereinafter referred to as 'Act') on receipt of all necessary approvals. In this letter, Idea admits that merger of companies will result in vesting of Spice licences with Idea.

8. Idea vide its letter dated 15th July, 2008 seeks DOT's opinion as to whether overlapping licences can be merged in view of Clause 17 of the

Merger Guidelines, 2008 dated 22nd April, 2008. Idea also seeks DOT's guidance as to whether it would be appropriate for Idea to demerge the overlapping licences prior to merger of companies and/or whether it would be better for Idea to surrender the non-operative overlapping licences.

9. On 1st August, 2008, Idea reiterates that it would seek DOT's prior written approval as well as approval of the High Court for transferring the overlapping Spice licences.

10. On 7th August, 2008 a meeting is held between officials of petitioner-companies and DOT in which DOT opines that overlapping licences should be surrendered and clarifies that in the event of surrender, the entry fee for obtaining such licences would be non-refundable and the spectrum allocated for such licences would have to be surrendered. From the Minutes of Meeting on record it is apparent that the demerger proposal is not discussed in the said meeting.

11. On 1st December, 2008 Idea seeks DOT's approval for demerger of two overlapping licences for Punjab and Karnataka areas along with already granted spectrum for the said areas.

12. On 17th October, 2008, without getting any prior permission, Idea acquires 41.09% equity in Spice. It is pertinent to mention that this fact is intimated for the first time to DOT vide six monthly FDI compliance letter of Spice dated 28th January, 2009. Thereafter, Spice and Idea repeatedly write letters to DOT claiming that acquisition of 41.09% equity in Spice is not violative of Clause 1.4(ii) of Licences which deals with substantial equity crossholding.

13. On 12th May, 2009, Idea intimates to DOT that it has on 11th May, 2009 filed a restructuring scheme for demerger between Idea and Vitesse Telecom Private Limited in the High Court of Gujarat. However, filing of amalgamation scheme of Spice with Idea is not disclosed to DOT. The said scheme is disclosed to DOT for the first time on 23rd June, 2009.

14. In fact, from the documents on record it is apparent that in May, 2009 petitioner-companies had filed four 'mirror schemes' in the High Courts of Gujarat and Delhi. While two schemes are filed seeking sanction of scheme of amalgamation of Spice with Idea, the other two demerger schemes are filed with a view to transfer the overlapping six licences to independent third parties namely, Vitesse Telecom Private Limited and Claridges Communications Private Limited. The intent

behind filing the four schemes is to ensure that the merged company does not hold more than one operative licence for any particular area.

15. However, neither in the merger application being CA(M) 99/2009 nor in the demerger application being CA(M) 98/2009 filed in this Court copies of licences or Merger Guidelines, 2008 or correspondence exchanged between the parties are placed on record.

16. On 18th May, 2009, this Court allows the first motion demerger application being CA(M) 98/2009 by directing convening of meetings of equity shareholders, secured and unsecured creditors of Spice. The said meetings are directed to be convened on 11th September, 2009.

17. However, during the summer vacation, upon an application being filed by petitioner in CA(M) 98/2009 holding of meetings is deferred as the applicant states that fresh guidelines from Ministry of Communication and Information Technology are awaited with regard to allocation of spectrum to telecom operators and transfer of the same.

18. On 26th November, 2009, the Gujarat High Court approves the merger scheme between Idea and Spice.

19. On 7th January, 2010 and 18th January, 2010, DOT communicates to Idea that merger as well as demerger as proposed by the petitioner-

companies is impermissible as some of the overlapping licences are less than three years old. DOT in the said letters relies upon Clause 17 of the intra service area merger guidelines dated 22nd April, 2008.

20. Idea in its reply dated 25th January, 2010 states that merger of licences was different from merger of companies and that Clause 17 of the Merger Guidelines, 2008 is not attracted to the present case.

21. On 28th January, 2010, this Court reserves its judgment in the second motion petition for amalgamation being CP 403/2009. It is an admitted position that DOT's letters dated 7th January, 2010 and 18th January, 2010 are not brought to the notice of this Court when it reserves its judgment.

22. On 5th February, 2010, this Court allows the aforesaid merger petition and sanctions the scheme of amalgamation. One of the conditions precedent for the scheme of amalgamation is that overlapping licences would have to be transferred in accordance with the scheme of demerger. The relevant portion of the Clause 17 of the Scheme sanctioned by this Court is reproduced hereinbelow:-

*"**17. Scheme Conditional on approvals/sanctions***

The Scheme is conditional upon and subject to:

xxxx xxxx xxxx xxxx

17.3 the sanction of the Scheme of Demerger-Spice and the sanction of the Scheme of Demerger-Idea by the Courts and the same being made effective in terms of the Scheme of Demerger-Spice and the Scheme of Demerger-Idea, respectively, or such other arrangement being made by Idea and Spice with respect to Overlapping Idea UASLs and Overlapping Spice UASLs, respectively, in accordance with the prevailing UASL conditions and applicable regulations in the event the Scheme of Demerger-Spice and the Scheme of Demerger-Idea is not pursued or that the said Scheme of Demerger – Spice and the Scheme of Demerger-Idea do not become effective for any reason whatsoever."

(emphasis supplied)

23. It is pertinent to mention that during the course of hearing of merger petition, the Regional Director (Northern Region) relies upon DOT's letter dated 9th June, 2003 pertaining to internet service and thereafter, this Court observes that written approval of licensor should be obtained after scheme is sanctioned by this Court. The relevant portion of this Court's order dated 5th February, 2010 is reproduced hereinbelow:-

"21. The Regional Director, while referring to Para 5.2 of the Scheme regarding transfer of licences of the transferor company to the transferee company, has submitted that the transferee company may be directed to obtain the necessary approvals from the Ministry of Telecommunications for transfer of licences after the sanction of the Scheme by this Court, since the Ministry of Telecommunications vide letter No. 820-1/2003-LR dated 9.06.2003 has clarified that the licencee may transfer the licence with prior written approval of the licensor, even in the case of Scheme of Amalgamation under Section 391/394 of the Companies Act, 1956.

> *22. In response to the above objection, the petitioner/ transferor company in the affidavit dated 11th December, 2009 of Sh. Sumit Arya, authorised signatory of the transferor company, has submitted that the letter dated 9.06.2003 issued by the Ministry of Telecommunications pertains to licences of internet service and not for Telecom licences and that approval of Department of Telecommunication is required to be taken only after approval of the Scheme of Amalgamation by the High Court under Section 391-394 of the Companies Act, 1956. A copy of the said letter is placed on record at pages 167-168 of the paper book. A perusal of the same shows that the said letter applies to the transfer of licences in respect of internet services and the written approval of the licencor will be granted only after the Scheme is sanctioned by the High Court. In view thereof, the objection raised by the Regional Director is overruled."*

24. On 11th May, 2010, petitioner-companies withdraw the demerger scheme being CA(M) 98/2009.

25. Thereafter various petitions are filed by Idea challenging penalty and termination orders passed by DOT in Telecom Disputes Settlement and Appellate Tribunal (for short 'TDSAT'). Further, Idea has also challenged before the TDSAT the validity and legality of the letters dated 7th January, 2010 and 18th January, 2010 issued by DOT rejecting their merger proposal. Subsequent to this Court's order dated 05th February, 2010, the petitioner-companies took the stand in correspondence and legal proceedings that upon the merger scheme being sanctioned by this Court, overlapping licences stand vested in Idea and

that DOT has no other option but to grant its formal approval for transfer of licences.

26. In March, 2011 the present applications for recall and stay of this Court's order dated 5th February, 2011 are filed.

27. Mr. A.S. Chandhiok, learned Additional Solicitor General of India submits that DOT's letters dated 7th January, 2010 and 18th January, 2010, by which amalgamation of petitioner-companies is rejected, has been suppressed from this Court. In the letter dated 7th January, 2010, DOT states "*This has reference to M/s. Idea Cellular Limited (ICL) and M/s. Spice Communications Limited intimated to DoT vide their letter dated 25 June 2008, July 15, 2008 and ICL letter dated July 17, 2008, August 1, 2008, regarding proposed merger of Spice Communications Limited with Idea Cellular Limited. Also letter dated December 1, 2008, May 12, 2009 & June 23, 2009 from IGL regarding de-merger of 2 over lapping licences. M/s. Spice Communications Limited having UAS Licence in Punjab and Karnataka, M/s Idea Cellular Limited also hold UAS licences with effective date of 25 January 2008, which is less than 3 years and M/s ICL holds CMTS Licences in Andhra Pradesh, Maharashtra, Haryana and Delhi where M/s. Spice Communications Ltd. (SCL) also holds UAS licence with effective date 29.02.2008 and 03.03.2008, which is less than 3*

years. Therefore, as per licence condition 17 of intra circle merger guideline dated 22.04.2008 merger of companies cannot be permitted." According to him, the suppression of aforesaid letters is deliberate, with an intent to obtain transfer of licences and merger of petitioner-companies.

28. Mr. Chandhiok further submits that both the petitioner-companies have not only suppressed the aforesaid letters but also the Licence Agreements and Merger Guidelines, 2008, under which prior permission of DOT for merger of companies is mandatory. He places on record various letters exchanged between the parties to show that petitioner-companies have suppressed that they were in the midst of discussion of various options with DOT including simultaneous demerger and merger of petitioner-companies and/or surrender of overlapping licences. He points out that petitioner-companies have also not brought to the notice of this Court that a 'prior issue' had already arisen between the parties as to whether the substantial equity clause in the Licence Agreements had been violated.

29. In this connection, Mr. Chandhiok places reliance upon observations of the Apex Court in ***S.P. Chengalvaraya Naidu (Dead) by LRs Vs. Jagannath (Dead) & LRs & Ors., (1994) 1 SCC 1*** wherein the Supreme Court has held as under:-

"5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in

order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

30. Mr. Chandhiok further submits that without prior permission of DOT, the petition for merger of petitioner-companies could not have been filed before this Court. In this connection, he draws the attention of this Court to Clauses 1.3, 1.4 and 6 of Licence which, according to him, entail that prior to merger of companies, permission is required to be taken from DOT. According to him, Clauses 6.1 and 6.2 of Licence, while dealing with transfer of licences, prohibit transfer of licences without prior permission of DOT/Licensor. He clarifies that after approval of merger under Sections 391-394 of the Act, Clause 6.3 provides for transfer or assignment of agreement. He submits that under the scheme of the licence, prior permission having been obtained under Clauses 6.1 and 6.2, the scope of 6.3 is restricted to assignment of licence agreement pursuant to approval of merger scheme by this Court under Sections 391-394 of the Act. Mr. Chandhiok lays emphasis on the petitioner's own letter dated 1st August, 2009 to show that petitioner's own understanding is that prior permission of DOT is required under Clause 6.

31. Without prejudice to his interpretation of Clauses 6.1, 6.2 and 6.3, Mr. Chandhiok submits that after the Merger Guidelines, 2008 have come into force, prior permission is required for merger of companies.

32. Mr. Chandhiok submits that this Court's order approving scheme of amalgamation has caused grave prejudice to DOT. He submits that in accordance with Clause 17 of the merger guidelines, transfer of licences and/or merger of petitioner companies is not permissible prior to 25th January, 2011. He points out that this Court's order granting merger of petitioner-companies is being used by petitioner-companies to contend that once merger has been approved by the Company Court, all violations prior to that date of various clauses of licences and of guidelines have ceased to exist.

33. He also submits that delay in filing the application for recall does not disentitle DOT from claiming the reliefs sought for in the present application. He points out that the Gujarat High Court in ***Central Bank of India Vs. Ambalal Sarabhai Enterprises Ltd., (1999) 3 Comp. LJ 98 (Guj)*** had not only entertained an application filed after four years for recall of the amalgamation scheme but had also set aside the amalgamation order ten years after the scheme had been sanctioned. In

this connection, he refers to and relies upon the following observations of the Gujarat High Court:-

> *"24. The main contention raised on behalf of the respondent is that the appellants are contending that the order in question is obtained by playing fraud and that claim of the appellants could not be entertained in the appeal and that they will have to go for a separate proceeding by way of filing a suit to challenge the order. We would like to mention here that when the appeal is admitted under the law, appeal amounts to the continuation of the original proceeding. Therefore, when the appeal is the continuation of the original proceeding, it is open for a party to show that the party which has obtained an order or seeking an order has played or playing fraud on the court. When there is an allegation of fraud, it must be always remembered that there could not be a direct proof of fraud. The fraud will have to be inferred from the various circumstances which have to be brought on record by a party. Each circumstance may not be sufficient to prove a fraud, but all the circumstances taken together may indicate the fraud. It is always open to a party to show to the court that the party which is seeking an order in his favour is playing fraud on the court. Similarly, it must be also mentioned that the provisions of sections 391 and 392 confer wide powers on the courts and those powers are exercisable not at the time of making order under section 391 but also at any time thereafter, because the courts have wider statutory powers and responsibility in order to see as to whether the working of arrangement scheme is in the best interest of the persons who are to be principally effected, i.e., the shareholders and the creditors, and, therefore, subsequent conduct of the respondent No.1 ASE after passing of the order by the learned Company Judge on 24 December, 1987, could be taken into consideration by this Court while considering these appeals. We have quoted above the correspondence between ASE and the banks. The same clearly shows that the banks had laid a condition that ASE to continue as guarantor even after the approval of the arrangement/ amalgamation scheme till some arrangement to the satisfaction of the banks is made. When ASE had showed in the affidavits in support of the petition as well as in the petition that they have obtained consent of the secured creditors—the banks, it is obvious that the consent is on account of ASE accepting to be a guarantor even after the approval of the scheme. But when ASE*

refuses that position after the approval, it is clear case of ASE playing fraud on the court as well as the banks.

25. It was vehemently urged before us that the appellant will have to go before a regular court to establish its claim of fraud and that claim could not be considered in these appeals. At the cost of repetition, it must be stated that the appeal is continuation of the original proceeding, it is always open for a party to show that the opposite party is playing fraud on the court and is misleading the court and trying to obtain order in his favour. For that purpose, it is not necessary for him to take a separate proceeding. Therefore, we are unable to accept that contention of the respondent. In our opinion, by not producing the latest audited accounts and balance sheet of the company and by not putting on record the actual agreement which took place between ASE and the banks – secured creditors and by making a false statement that secured and unsecured creditors have approved the scheme, the respondent had played fraud on the court. We, therefore, hold that the order passed by the learned Company Judge was obtained by the respondent by playing fraud.

26. At the time of arguing these appeals, the learned advocate for the respondent had made it clear that it was not at all possible for the respondent to have rethinking on the said scheme and to get reapproval for the said scheme. Therefore, in the circumstances, there is no alternative other than rejecting the scheme of arrangement and amalgamation. Thus, we hold that the present appeals will have to be allowed and the schemes put forth by the petitioner in Company Petitions Nos. 90/86 and 91/86 will have to be rejected."

34. On the other hand, Dr. A.M. Singhvi, learned senior counsel for petitioner-companies submits that DOT has no *locus standi* to file the present applications as it is neither a shareholder nor a creditor of erstwhile Spice. He further submits that the case set out by learned ASG during the course of arguments that DOT is a creditor of Idea is an afterthought inasmuch as this fact has not been averred in the applications

filed by DOT. He also points out that DOT has never claimed to be a creditor and it never approached this Court at the initial stage even though it was well aware of the merger process since its inception. According to him, mere condition for payment of periodic licence fee and/or spectrum charges does not make DOT a creditor of Idea/Spice. He further submits that even assuming that the DOT is a creditor, it has to show that it was affected by the Scheme in its capacity as an alleged creditor of erstwhile Spice. In this connection, Dr. Singhvi relies upon the judgments of different High Courts namely, In Re: ***Hindalco Industries Limited,*** **Company Petition No. 293 of 2009 (Bom.)** decided on ***22nd June, 2009***, In Re: ***SIEL Limited, (2004) 122 Comp Cas. 536 (Del.)*** and ***Sequent Scientific Ltd., (2009) 151 Comp Cas. 1 (Bom.)***.

35. Dr. Singhvi further submits that every non-disclosure does not amount to suppression. According to him, the omission to place on record letters dated 7th January, 2010 and 18th January, 2010 is an innocent act without effect since DOT has no jurisdiction or authority to reject the merger of companies. Dr. Singhvi vehemently submits that merger of licences and merger of companies are separate, distinct, mutually exclusive and non-overlapping. According to him, Clause 6.3 of the Licence Agreement makes it clear beyond doubt that DOT has no say in

the merger of companies and can only adjudicate on the merger of licences.

36. Dr. Singhvi submits that licence agreement and merger guidelines are public documents that constitute 'law' which are incapable of being suppressed. According to him, suppression can only be of facts and not of documents.

37. Dr. Singhvi refers to the correspondence exchanged between the parties to contend that on 25th June, 2008 itself Idea had informed DOT about the proposed merger and thereafter Spice/Idea addressed various letters intimating DOT about different options including surrender of non-operative overlapping licences as well as simultaneous merger and demerger of companies. He also states that a meeting was held with high ranking officers of DOT and Idea on 7th August, 2008 wherein all points regarding the merger guidelines and licence conditions were exhaustively discussed and considered. According to him, in the said meeting, DOT raised no objection to the merger or the proposed course of action suggested by Spice/Idea and accordingly, petitioner-companies proceeded with the merger process on the understanding that DOT had no objections whatsoever. Dr. Singhvi clarifies that it is not the claim of petitioner-companies that there is an automatic merger of licences in view of

sanction of merger of companies by the Court. He relies upon the observations of this Court in order dated 05th February, 2010 as reproduced in para 23 hereinabove and states that, if required, this Court may issue necessary clarifications protecting the interest of both petitioner-companies as well as DOT.

38. Dr. Singhvi also submits that DOT has suppressed material facts and has approached this Court with unclean hands while filing the present proceedings. He contends that DOT has suppressed the petitioners' letter dated 25th January, 2010 sent in reply to the DOT's letter dated 7th January, 2010 wherein the petitioner-companies have clarified that the DOT has no jurisdiction in respect of merger of companies. He emphasises that DOT has suppressed from this Court the factum of meeting held on 7th August, 2008 between senior officers of DOT and petitioner-companies wherein all points regarding merger guidelines and licence conditions were exhaustively considered. Since considerable emphasis is laid by Dr. Singhvi on the Minutes of Meeting dated 7th August, 2008, this Court had asked learned Additional Solicitor General to produce the DOT's file. The Minutes of Meeting dated 7th August, 2008 are reproduced hereinbelow:-

"Reference note from pre-page.

2. A meeting was held on 7th August, 2008 under the chairmanship of Secretary (T) attending by Member(T), DDG(AS-I) and DDG(AS-II) with Managing Director of Idea, Mr. Sanjeev Aga, representative of Idea, Shri Rajat Mukherjee and Shri Rahul Vats.

3. Provisions of Guidelines for intra service area Merger of Cellular Mobile Telephone Service (CMTS)/Unified Access Services (UAS) Licences were noted.

4. It was observed that clause 17 states that any permission for merger shall be accorded after three years from effective date of licence. The opinion of Legal Adviser is based on Clause 17. However, clause 18 states that during all licences of the merged entity in the respective service area will be equal to the remaining duration of the all merging licences whichever is less on the date of merger. The merger, in fact, is not of the licenses but of the companies in pursuance of Section 391 and 239(4) of the Companies Act. Reading the clause 17 with clause 18, it can be inferred that the intent is not to bar transfer of licences consequent upon merger of companies which are otherwise more than three years old, but the duration of the licences of the merged entity will be equal to the remaining duration of the licences of the two merging licences whichever is less on the date of merger. Therefore, it will not be appropriate to impose a self-restriction in the instant case.

5. Further, the same objective can be achieved by surrendering one of the licences, transferring the subscribers to the other entity. In case of surrender of licence, the spectrum returns to the Government and can be allocated to the licence to which subscribers have migrated based upon the subscriber criteria. In the event of merger also, the excess spectrum held by the merged entity has to be returned to the Government within a stipulated period of three months. Therefore, in both the cases, any excess spectrum is being returned to the Government and it does not remain an issue.

6. As regards entry fee paid for obtaining such licences, it was clarified that entry fee is non-refundable.

7. Shri Ajay Chakraborty, Hon'ble M.P.(LS) has addressed Hon'ble MOC&IT on the subject vide PUC-I and PUC-II. It has been stated that as per para 17 of the guidelines dated 22nd April,

2008 clearly specifies that any permission for merger shall be accorded only after completion of 3 years from the effective date of the license. Since both Spice Communications and Idea Communications do not meet this requirement, hence, the merger violates Intra-Circle Merger Guidelines. Further, the case for surrender of license or refund of entry fee should not be considered.

8. In the second letter dated 21st July, 2008, it has been stated that the merger and acquisition should not take place in blatant violation of existing policy norms and a proper investigation be initiated and policy compliance made mandatory at all costs.

9. The issue regarding merger of licences was discussed as indicated in para 4 and 5 above. Further, surrender of licence is permitted and there is no bar. However, the entry fee is not refundable in any case. A draft reply to the Hon'ble MP on the above lines is placed below 20/C.

Submitted for kind consideration and approval of proposal in para 9 please.

Sd/- 20/8/08
(P.K. Mittal)
DDG(AS-II)

DDG(AS-I)	*Sd/- 20/8/08*
Member(T)	*Sd/- 20/8*
Secretary	*Sd/- 22/8/2008*
Hon'ble MOC&IT	*Sd/- 28/8/2008"*

39. In fact, Dr. Singhvi points out that DOT has suppressed from this Court that the same Department had permitted Idea to participate in the 3G Spectrum bid subsequent to sanction of merger Scheme.

40. Dr. Singhvi also submits that DOT is not entitled to seek adjudication of disputes by this Court under Sections 391 to 394 of the Act

in respect of issues which are already pending adjudication before TDSAT. He submits that by virtue of Section 14 of the Telecom Regulatory Authority of India Act, 1997 (in short 'TRAI Act'), all issues relating to licences as well as merger guidelines can be adjudicated only by TDSAT and this Court should not hold any enquiry or go into the questions which are pending before TDSAT.

41. Dr. Singhvi further submits that the petitioner companies have not violated any licence conditions/guidelines. According to him, in the present case as the overlapping licences are non-operational, the purport of Clause 1.3 of the licence is not attracted and the *raison d'etre* for Clause 1.4 (ii) does not exist. He further submits that Clause 17 of the merger guidelines is violative of Section 11(a) of the TRAI Act. Without prejudice to the aforesaid, he submits that as the three years' bar in respect of new licences is today over, DOT is obliged to merge the licence.

42. According to him Clause 6.3 clearly stipulates that approval of DOT for merger of licences is to be obtained only on sanction of the scheme of merger of companies by the High Court. He submits that if Clause 6 of the licence condition read with Clause 1 of the guidelines dated 22nd April, 2008 is read as sought by DOT, then Clause 6.3 of the licence will become otiose.

43. Dr. Singhvi points out that DOT while approaching this Court on 30th March, 2011 has failed to comply with the mandatory provisions of Rule 19 of Companies (Court) Rules, 1959, inasmuch as it has not served an advance copy of the applications on the petitioner-companies.

44. Dr. Singhvi further states that DOT has not made even a single averment in its applications or disclosed any fact about the urgency for passing of ex-parte order more particularly when it has approached this Court after a gap of more than 12 months from the date of sanctioning of the Scheme. Dr. Singhvi also submits that the judgment of Division Bench in ***Central Bank of India Vs. Ambalal Sarabhai Enterprises Ltd.*** (supra) has been set aside by the Supreme Court vide its judgment and order dated 20th November, 2003. The passages of said judgment and order relied upon by Dr. Singhvi are reproduced hereinbelow:-

> *"The question then arises whether the Scheme is to be maintained. In deciding this question, we have to keep in mind the fact that the Scheme was sanctioned as far back on 24th December, 1987. The banks were well aware that the Scheme has been so sanctioned. They did not immediately move to have the Scheme set aside. After the Scheme was sanctioned, the lead bank carried on corresponding with ASE. A meeting of the consortium of banks was held where, except for Citi Bank and New Bank of India no other bank objected to the Scheme having been sanctioned. Thereafter two banks, namely, Bank of Baroda and Central Bank participated in the proceedings before the BIFR. After almost a year these two banks asked for a guarantee from ASE. This came to be refused by a letter dated 16th January, 1989. It is only thereafter that these two banks filed the*

suit on 29th June, 1989. They filed their appeal on 9th March, 1990. They took out an application for condonation of delay three years thereafter. Undoubtedly delay has been condoned, but the facts still remain that in the meantime, third party rights have been created to the knowledge of the bank.

In our view, it would not be equitable at this stage to set aside the Scheme. At the same time the interest of these two banks must be protected. Before reorganisation they had security of all assets of ASE. By and under the Scheme their security is confined to assets of SSL. Central Bank was thus right in insisting on a guarantee by ASE. We are quite sure that had the Company fairly pointed out to the learned Single Judge that the consent was a conditional consent, in the Scheme itself a condition regarding giving of a guarantee by ASE for all dues of the Swastik Household and Industrial Products Limited would have been incorporated. In our view it would be equitable, under these circumstances, to set aside the impugned judgment and maintain the order sanctioning the Scheme with an additional condition of the Scheme that ASE shall execute within one month from today a guarantee as required by Central Bank. We are unable to accept submission that the Central Bank was only asking for a guarantee for its dues. A plain reading of the letter of Central Bank shows that it was asking for a guarantee to cover of the Swastik Division and for losses of the new company i.e. SSL. It is now admitted that the suit filed by these two Banks is for recovery of losses of the Swastik Division. Therefore, in our view, ASE must execute a guarantee guaranteeing the dues in Suit No. 2520/1989 filed by these two banks and which is pending before the Debts Recovery Tribunal, Mumbai. We so direct. The guarantee shall be executed within one month from today. On such guarantee being executed the impugned judgment will stand set aside and the order sanctioning Scheme with the additional condition set out hereinabove shall stand approved. In the event of a guarantee not being executed within time aforesaid, these Appeals shall stand dismissed without any further orders. With these directions, these Appeals stand disposed of. There will be no order as to costs."

45. Dr. Singhvi lastly submits that balance of convenience is entirely in favour of petitioner-companies and against DOT. He states that even

though the dispute between the parties is only in respect of six over lapping licences (four belonging to erstwhile Spice and two belonging to Idea), the DOT is virtually seeking stay of business of merged entity by seeking stay of order dated 5th February, 2010 passed by this Court.

46. Having heard the parties at length, this Court would first like to examine the extreme stand taken by both the parties, namely, DOT's submission that the present petition for merger could not have been filed before this Court and petitioner-companies' submission that that this Court cannot make the sanction for merger of companies conditional upon any statutory or regulatory permission.

47. On an analysis of Sections 391 to 394 of the Act, this Court is of the view that it alone has the exclusive jurisdiction to decide the issue of arrangement of companies. In fact, it has been repeatedly held by various courts that sanction under Sections 391 to 394 of the Act is a 'single window clearance' for the purposes of the Act and there is no need for filing applications under the Act for instance for change of name of company or alteration of memorandum/articles of association except for reduction of capital in certain circumstances which requires a special procedure. This is because the procedure under Sections 391 to 394 is so elaborate that if separate independent applications under the Act are

insisted upon, it would result in unnecessary duplication of applications and would be cumbersome. The law on this aspect has been succinctly stated by the Bombay High Court in ***Vasant Investment Corporation Ltd. v. Official Liquidator, Colaba Land and Mill Co. Ltd. (1981) 51 Comp. Cas. 20*** which following ***In re: Maneckchowk and Ahmedabad Manufacturing Co. Ltd., (1970) 40 Comp. Cas. 819 (Guj.)*** held as under:-

> *"Basically, the court is given wide powers under section 391 of the Companies Act to frame a scheme for the revival of the company. Section 391 of the Companies Act is a complete code under which the court can sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out the scheme, except reduction of share capital which requires a special procedure……..The whole purpose of section 391 is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme….."*

48. But, in the opinion of this Court, this does not mean that if some permission is required under any separate statute or licence, then the same would not be obtained. This Court while sanctioning the scheme can always stipulate that the scheme will come into effect only when other statutory and contractual permissions have been obtained. Also, if there is a prohibition of a particular time period on transfer of an asset, then the Court can even adjourn the amalgamation proceedings till the 'eclipse period' is over. To hold otherwise would amount to not only conferring

supremacy on the Act vis-à-vis other statues/contracts, but would also amount to rendering nugatory other statutory and contractual provisions – which the Act does not provide.

49. The scope and ambit of Clauses 6.1 and 6.2 are totally distinct and separate from Clause 6.3. Prior permission in Clauses 6.1 and 6.2 gets attracted as and when transfer of licence is to occur like in the present case of merger of two independent telecommunication companies.

50. This Court is also of the view that Clauses 6.1 and 6.2 relate to transfer of licences, whereas Clause 6.3 provides for transfer of assignment of the licence agreement. Clause 6.3 is attracted for instance when formal transfer or arrangement of licence agreement is sought – which will naturally happen after scheme of merger/amalgamation is sanctioned by this Court. The requirement of prior permission of DOT for transfer of licences (under Clause 6.1) is of utmost importance when licences of overlapping areas are to be transferred like in present case and that too, when some of the licences are not three years old. In fact, Idea's own understanding was that merger of companies would mean transfer of licences as would be apparent from Idea's own letters dated 25th June, 2008, 15th July, 2008 and also the application filed in the Demerger Scheme.

51. Consequently, this Court is of the opinion that permission of DOT is required prior to scheme of amalgamation coming into force since the effect of the said scheme is that licences of Transferor/Spice will stand transferred to Transferee/Idea. This Court is of the view that merger of companies does not result in merger of licences but all merger/amalgamation of companies necessarily results in transfer of licences—for which prior permission is required under Clause 6.1 of the Licence. Accordingly, the submission of petitioner-companies that the issue of merger of companies is separate, distinct and extraneous to the terms of the licence and merger guidelines, is untenable in law.

52. Dr. Singhvi's submission that petitioner-companies have not used overlapping licences is contrary to facts as it is an admitted position that after the merger order dated 05th February, 2010, it is Transferee/Idea who is using the Transferor/Spice's licences for Karnataka and Punjab circles.

53. Moreover, the submissions that petitioner-companies have simultaneously not used two overlapping licences, does not impress this Court inasmuch as non roll-out of licence obligations within a particular time frame itself makes the licencee liable to pay compensation and penalties. Also holding of two licences simultaneously by a company, even if one of the licences is non-operative, prevents competition.

Consequently, in the opinion of this Court, a breach of licence condition cannot be accepted as a 'virtue' – as is being sought to be submitted in the present case by petitioner-companies.

54. Dr. Singhvi's further submission that this Court should not interpret the provisions of the licence and merger guidelines as this jurisdiction vests with TDSAT, is both misconceived on facts and untenable in law. To arrive at a conclusion that there is no impediment to the amalgamation of companies and/or that no fraud has been played upon this Court, this Court is vested with wide powers including interpretation of other laws, interpretation of terms and conditions of licences etc.

55. As far as issue of non-service of advance copy of the application is concerned, this Court is of the view that there is no requirement for serving an advance copy in a disposed of matter. In any event, today this order is being passed after hearing both the parties at length.

56. The further contention of Dr. Singhvi that petitioner-companies proceeded with the merger process on the understanding that DOT has no objection, is contrary to record. On a careful perusal of the documents placed on record it is apparent that petitioner-companies were sitting on the fence and were giving various proposals to DOT on different dates

with regard to merger, demerger and also qua surrendering of overlapping licences.

57. From the documents on record it is apparent that petitioner-companies did not accept DOT's suggestion in the meeting held on 7th August, 2008 of surrender of overlapping licences along with return of spectrum and non-refund of licence fee. It is pertinent to mention that after the meeting dated 07th August, 2008, Transferee/Idea not only filed the Scheme for Demerger to facilitate transfer of overlapping licences to third parties namely, Vitesee Telecom Private Limited and Claridges Communications Private Limited but also accepted spectrum in the year 2008 and 2009 in licences it proposed to surrender. In fact, on 1st December, 2008, much after the alleged consensual meeting dated 7th August, 2008, Idea had sought prior permission of DOT for demerger of two overlapping licences. If permission had been granted by DOT on 7th August, 2008 as claimed by the petitioner-companies, then it is not understood as to why Idea sought prior permission for demerger in 2008. Even the demerger plan was given up by petitioner-companies after they obtained sanction for merger of Spice with Idea!

58. It is also not understood as to how DOT's consent in August, 2008 could be claimed for transfer of overlapping licences to Idea when the

Scheme itself proposed by Idea and sanctioned by this Court on 5th February, 2010 states in para 17.3 that the said Scheme is conditional on approval/sanction of demerger of overlapping licences of Spice and Idea to third companies namely, Vitesse Telecom Private Limited and Claridges Communications Private Limited. In fact, in the opinion of this Court, the petitioner-companies are today in violation of their own scheme!

59. It may also be noted that Mr. Chandhiok has pointed out that Idea has not been allocated 3G Spectrum licences in Punjab Service areas in view of the alleged violation. It was also stated at the bar that Idea has challenged the non-allocation of 3G Spectrum in Punjab before TDSAT.

60. Before this Court decides the heart of the controversy, namely, as to whether there is suppression and/or fraud played upon the Court, this Court is of the view that it is essential to clearly outline what the aforesaid concepts mean and whether every non-disclosure of a document constitutes suppression.

61. In fact, the Supreme Court in its various judgments has dealt with the aforesaid concepts at length. In ***Hamza Haji Vs. State of Kerala and Anr., (2006) 7 SCC 416***, the Supreme Court has held as under:-

"10. It is true, as observed by De Grey, C.J., in R. v. Duchess of Kingston that:

"'Fraud' is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal."

11. In Kerr on Fraud and Mistake, it is stated that:

"In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud".

xxxx xxxx xxxx xxxx

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a court to consider and decide the question whether a prior adjudication is vitiated by fraud. In Paranjpe v. Kanade it was held that: (ILR p. 148)

"It is always competent to any court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud;"

xxxx xxxx xxxx xxxx

21. In Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education this Court after quoting the relevant passage from Lazarus Estates Ltd. v. Beasley and after referring to S.P. Chengalvaraya Naidu v. Jagannath reiterated that fraud avoids all judicial acts. In State of A.P. v. T. Suryachandra Rao this Court after referring to the earlier decisions held that <u>suppression of a material document could also amount to a fraud on the Court.</u> It also quoted (at SCC p. 155, para 16) the observations of Lord Denning in Lazarus Estates Ltd. v. Beasley that: (All ER p. 345 C)

"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels

everything."

22. According to Story's Equity Jurisprudence, 14th Edn., Vol. 1, para 263:

"Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

23. In Patch v. Ward Sir John Rolt, L.J. held that:

"Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."

24. This Court in Bhaurao Dagdu Paralkar v. State of Maharashtra held that: (SCC p. 607)

"Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud but it can be evidence on fraud."

(emphasis supplied)

62. The Supreme Court in ***Meghmala & Ors. Vs. G. Narasimha Reddy & Ors., JT 2010 (8) SC 658*** has also held as under:-

"20. It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law."

xxxx xxxx xxxx xxxx

23. In United India Insurance Co. Ltd. v. Rajendra Singh & Ors. [JT 2000 (3) SC 151: AIR 2000 SC 1165], this Court observed that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

24. The ratio laid down by this Court in various cases is that

dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud……

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26. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court.

28……Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."

(emphasis supplied)

63. In the opinion of this Court, suppression of a material fact or a material document by a litigant disqualifies such a litigant from obtaining any relief. This rule has evolved out of the role of the Court to deter a litigant from abusing the process of Court by deceiving it.

64. But the suppressed fact/document cannot be an irrelevant one. It must be a material one in the sense that had it not been suppressed, it would have had effect on the merits of the case. It must be a matter which

is material for the consideration of the Court, whatsoever decision the Court may ultimately take.

65. Consequently, one in turn has to examine the scope and ambit of the jurisdiction of the Company Court under Sections 391 to 394 of the Act. Proviso to Section 391(2) of the Act states *"provided that no order sanctioning any compromise or arrangement shall be made by the [Court] unless the [Court] is satisfied that the company or any other person by whom an application has been made under sub-section (1) 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 351, and the like*. In the opinion of this Court, the expressions *'all material facts'* and *'and the like'* mean all material facts relating to affairs of the company.

66. In fact the Supreme Court in ***Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., (1997) 1 SCC 579*** has outlined the parameters of the scope and ambit of the jurisdiction of this Court as under:-

"29……In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be 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.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to

promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be 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.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction."

(emphasis supplied)

67. Keeping in view the aforesaid mandate of law as well as the facts of the present case, it is apparent that non-placing of DOT's letters dated 7th January, 2010 and 18th January, 2010 was not an innocent act. Non-filing of the aforesaid letters was a part of design to misdirect and mislead this Court as would be apparent from non-filing of Licences as well as Merger Guidelines, 2008 and correspondence exchanged between the parties. It is pertinent to mention that the primary business of both the petitioner-

companies pertain to telecommunication licences which were not produced before this Court. In fact, both the petitioner-companies did not bring to the notice of this Court that unlike any other case in the past decided by this Court, the present Scheme of Arrangement would result in transfer of some overlapping licences within the prohibited period of three years. Since this Court and the Regional Director were not aware of the prior permission and temporary prohibition contained in the licence conditions and merger guidelines respectively, the petitioner-companies reliance upon this Court's observation with regard to post merger sanction/approval of DOT is irrelevant. Consequently, withholding of relevant and material documents like licences, merger guidelines and DOT's letters dated 7th January, 2010 and 18th January, 2010 was deliberate, intentional and with a view to obtain an unfair advantage.

68. In the opinion of this Court it is also not necessary that there should be direct proof of fraud, the same can be inferred from various circumstances which are brought on record. Even if individual facts are not able to prove a fraud, it would be sufficient if all the circumstances taken together indicate a fraud.

69. The 'design' of the petitioner-companies is also apparent from their subsequent conduct, i.e., after this Court had sanctioned the merger

scheme. It is pertinent to mention that before the amalgamation scheme was sanctioned by this Court, Idea in its own affidavit had confirmed that approval of DOT would be taken after approval of scheme of amalgamation by this Court, but post merger the stand of Idea has been that DOT has no further say in the matter and only a formal approval of transfer of licences is required which DOT is obliged under law to give. To illustrate, Idea vide its letter dated 31st May, 2010 addressed to DOT stated *'in this regard you may note that our Punjab Service area, as stated in our application for 2.1 GHz auction, license held by Spice Communications Limited stands amalgamated into Idea Cellular Limited through a Court process as per provisions of the license agreements, which process of amalgamation has been completed. The DoT has already been informed about the same. Hence the Letter of Intent for Punjab too may be has to be in favour of IDEA Cellular Limited.'* Further, Idea's Managing Director vide letter dated 21st December, 2010 addressed to DOT stated *'therefore we were surprised when we received a letter from the DoT dated 7th January, 2010 saying the merger of the companies cannot be permitted (18 months after our merger announcement and 16 months after our meeting with DoT – this letter came soon after we confirmed the approval of Hon'ble High Court). The same was evidently wrong and uncalled for, considering the advise for*

approval given earlier and given that merger of companies is not in the DoT's domain, and was appropriately responded by us. In fact on the contrary, upon us informing DoT about completion of the Court process of amalgamation, the DoT ought to have issued formal orders forthwith.' Also, Idea in its petition bearing No. 143/2011 filed before TDSAT stated *'once the merger is approved it mandates the DoT to give its approval as it does not leave the DoT with any discretion to refuse the same.*' Idea in its application for withdrawal of demerger application being Co. Appl.(M) 98/2009 stated *'in light of the aforesaid sanctioning of the Scheme of Amalgamation, the application filed by Spice before this Hon'ble Court for the proposed demerger of its overlapping UASLs would not be maintainable as Spice has already merged into the Applicant Company and the overlapping UASLs of Spice now vest in the Applicant Company by virtue of the Scheme of Amalgamation.'*

70. In any event, even if this Court were not to accept the plea of dishonest intent on the part of petitioner-companies, this Court cannot lose sight of the fact that as the sanctioned scheme is binding on all shareholders, creditors of petitioner-companies, the Court is obliged to examine the Scheme in its proper perspective together with its various manifestations and ramifications with a view to finding out whether the

scheme is fair, just and reasonable to the members concerned and is not contrary to any law or public policy. Though the expression 'public policy' is not defined in the Act, it connotes some matter which concerns the public good and public interest. Thus, the question that arises is whether the petitioners had disclosed sufficient information to this Court so as to enable it to arrive at an informed decision, that means, whether the information supplied was sufficient and whether the real issue was flagged before Court and whether all relevant documents were on record for the Court to arrive at a just decision. (See ***Sesa Industries Limited Vs. Krishna H. Bajaj & Ors., (2011) 3 SCC 218***).

71. Even if this Court examines the present case from this narrow and limited perspective, this Court finds that non-filing of licences as well as merger guidelines and correspondence exchanged between the parties amounts to non-production of requisite material as contemplated under the proviso to Sub-section 2 of Section 391 of the Act and further that sufficient information was not disclosed to this Court so as to enable it to arrive at an informed decision. Consequently, this Court is of the view that there has been suppression of material and relevant documents from this Court.

72. Also, just because petitioner-companies state that DOT was constantly kept informed of all developments, it cannot be said that there is no suppression from this Court.

73. Dr. Singhvi's submission that DOT has indulged in suppression is misconceived on facts. In fact, DOT has brought to surface the fraud played by the petitioner-companies upon this Court by non-filing of Licences, Merger Guidelines, 2008 and the correspondence exchanged between the parties.

74. The petitioner-companies' challenge to the locus of DOT to file the present applications is also untenable in law. DOT is an interested/necessary party as it is both a Licensor and a Regulator. It is pertinent to mention that at the second motion stage in any scheme of arrangement, the Company Court invites objections from the public at large, if any, to the proposed scheme and the petitioner-companies' are obliged in law to disclose to this Court objection if any received by them to the Scheme of Arrangement.

75. In any event, in the present case, this Court is of the opinion that Mr. Chandhiok's submission that grave prejudice has been caused to DOT by approval of sanction of amalgamation without DOT's prior approval, is well founded as sanction is in contravention of licence conditions and

merger guidelines. In fact, the Supreme Court in ***S.K. Gupta & Anr. Vs. K.P. Jain & Anr., (1979) 3 SCC 54*** has held as under:-

> *"16……..The Court has to reach an affirmative conclusion before acting under Section 392(2) that the compromise and/or arrangement cannot be worked satisfactorily with or without modification [see J.K. (Bombay) P. Ltd.) supra]. It follows as a corollary that if the compromise or arrangement can be worked as it is or by making modifications, the Court will have no power to wind up the company under Section 392(2). Now, if the arrangement or compromise can be worked with or without modification, the Court must undertake the exercise to find out what modifications are necessary to make the compromise or arrangement workable and that it can do so on its own motion or on the application of any person interested in the affairs of the company. If such be the power conferred on the Court, it is difficult to entertain the submission that an application for directions or modification cannot be entertained except when made by a member or creditor. It would whittle down the power of the Court in that it cannot do so on its own motion."*
>
> (emphasis supplied)

76. It is settled law that in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of statutory remedies or statutory bars like *res judicata* are not attracted. Suppression of any material fact/document amounts to a fraud on the Court. Every Court has an inherent power to recall its own order obtained by fraud as the order so obtained is *non est*. [See ***Meghmala and Ors. Vs. G. Narasimha Reddy and Ors., (2010) 8 SCC 383, A.V. Papayya Sastry and Ors. vs.***

Government of A.P. and Ors., (2007) 4 SCC 221]. In fact, the Supreme Court in ***S.P. Chengalvaraya Naidu*** (supra) has held as under:-

> *"1. "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree — by the first court or by the highest court — has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."*

77. However, the present applications for recall of sanction order dated 5th February, 2010 have been filed after a delay of thirteen months. There is no plausible explanation for the delay except for the submission that Government's decisions are 'proverbially slow'.

78. In fact, today, the 'situation at the ground' is that Spice has lost its entity after having been dissolved without following the process of winding up and all its employees have become employees of Idea. The assets and liabilities of Spice have got vested in Idea. The shares of erstwhile Spice have also been delisted from the relevant stock exchange. Further, some of the shareholders of erstwhile Spice, who had received the shares of Idea, would have also transferred the same to third parties. Consequently, today it is not possible for this Court to '*unscramble the*

eggs' by recalling in its entirety the order dated 5th February, 2010 sanctioning the Scheme of Amalgamation.

79. It is also pertinent to mention that Section 392 of the Act vests power with this Court to modify the scheme even after it has been sanctioned and the said modification can be done either *suo* moto by the Court or at the instance of any person who is interested in the affairs of the company.

80. Even, the Supreme Court in ***Central Bank of India Vs. Ambalal Sarabhai Enterprises Ltd.*** (supra) observed that due to passage of time it would not be equitable at a belated stage to set aside the scheme in its entirety. The Supreme Court in the said case decided to maintain the order sanctioning the scheme with some additional conditions.

81. Consequently, to bring the sanctioned scheme, in the present case, in conformity with the Licence and Merger Guidelines, 2008 as well as in view of the fact that simultaneous demerger scheme has been withdrawn, it is directed that notwithstanding anything stated in the sanctioned scheme (in particular paras 5.2 as well as 10.2) and/or in the order dated 5th February, 2010, the six overlapping licences of the Transferor Company/Spice would not stand transferred or vested with Transferee Company/Idea till prior permission of DOT is obtained. In fact, till

permission of DOT is granted, the overlapping licences of Spice shall forthwith stand transferred/vested with the Licensor, i.e., DOT. The spectrum allocated for such overlapping licences shall also forthwith revert back to DOT. In the event DOT refuses or grants conditional approval to transfer of licences, Idea would be entitled to challenge the same before TDSAT who would decide the same in accordance with law after hearing both the parties. Since the Transferee Company has used the overlapping licences without any prior permission of DOT from 5th February, 2010 till date in contravention of the Licence and Merger Guidelines, it is directed that it shall be open to DOT to pass any order for such breach. Needless to say, any order passed by DOT can be challenged by Idea before any competent court or tribunal. To avoid inconvenience to public at large, DOT is directed to ensure that cell phone customers of the two overlapping licence areas namely, Punjab and Karnataka are provided regular and uninterrupted services like in the past.

82. Moreover, as simultaneous demerger scheme has been withdrawn, paragraphs 2.4, 2.13, 2.14, 2.19, 17.3 as well as the last two sentences in para 1.7 of the sanctioned scheme are deleted.

83. To meet the ends of justice, this Court is also of the view that costs should be imposed on Idea for not bringing to the notice of this Court the

rejection letters dated 7th January, 2010 and 18th January, 2010 issued by DOT and for not placing on record relevant and material documents like Licence, Merger Guidelines and correspondence exchanged between the parties. In the opinion of this Court, the suppression of aforesaid documents was not an innocent act especially in view of petitioners' own understanding of licences and merger guidelines as reflected in the contemporaneous correspondences. Accordingly, this Court, keeping in view the nature of petitioners' business, imposes costs of Rupees One Crore to be paid by Idea to DOT within six weeks. It is further directed that the Ministry of Corporate Affairs shall conduct a study with regard to special statutes, guidelines and licences applicable to super specialised companies like the petitioners and suggest remedial measures to ensure that no party can obtain sanction of a scheme of arrangement without placing on record material and relevant documents before the Court. In fact, both the Ministry and DOT must suggest remedial measures by which suppression of facts and documents can be detected at the earliest stage in a scheme filed under Sections 391 to 394 of the Act including appointment of more professionals like Chartered Accountants, Company Secretaries and Cost Accountants in the offices of Regional Director and Official Liquidator.

84. With the aforesaid observations, the present applications stand disposed of.

MANMOHAN, J.

July 04, 2011
rn/js