TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 4th July, 2011

Petition No. 93 of 2011

ETISALAT DB Telecom (P) Ltd. …. Petitioner

Vs.

Union of India & Ors. … Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

For Petitioner	:	Mr. Ramji Srinivasan, Sr. Advocate
		Mr. T. Srinivasa Murthy, Advocate
For Respondent	:	Mr. Ruchir Mishra, Advocate

O R D E R

S. B. SINHA

1. The Petitioner is a Licensee; the license having been granted in terms of Section 4 of the Indian Telegraph Act, 1885 (The Act).

One M/s. Swan Telecom Pvt. Ltd. had been granted UASL license for 13 telecom circles. It's name, however, was subsequently changed to ETISALAT DB Telecom (P) Ltd. (Company). The first respondent represents the Department of Telecommunication.

The second respondent is one of the units/wings of the DOT being responsible for handling activities relating to collection of spectrum charges, licence fee, maintenance of bank guarantees issued by the licensees etc.

The respondent no. 3 is a Nationalised bank.

2. The petitioner initially had acquired 100 % shares in one Allianz Infratek Pvt. Ltd. (Allianz). It was granted license for the circles of Madhya Pradesh and Bihar. In terms of the provisions of the said license, Allianz was required to furnish performance bank guarantees. It also furnished a financial bank guarantee dated 29.7.2008 for a sum of Rs. 25 Crores which was valid till 28.7.2009. The said bank guarantee was kept alive.

3. An amalgamation of the Allianz with the petitioner company was proposed by a letter dated 4.4.2009.

The petitioner asked for grant of a No Objection Certificate from the first respondent by a letter dated 17.4.2011 annexing therewith all relevant documents including the detailed proposal dated 4th April, 2009 for amalgamation of Allianz Infratech Pvt. Ltd. into EDBTPL, the petitioner herein.

4. By reason of a letter dated 13.5.2009, the first respondent granted the said No Objection Certificate stating:-

> "The request of the company has been examined and the undersigned is directed to convey the approval of "No Objection Certificate" for the same subject to the following:-

a) All dues relating to the license of the merging entities in that given service area will have to be cleared by either of the two parties before issue of the permission for merger of licenses.

b) The merged entity undertakes to pay all future dues inclusive of anything remained unpaid of the past period by the merging company.

c) The transfer of license to the merged entity shall be permitted after the merger is sanctioned and approved by the High court or Tribunal as per the Law inforce; in accordance with the provisions, more particularly of sections 391 to 394 of Companies Act, 1956.

d) Retention of spectrum by the merged entity and the spectrum charges payable shall be governed by the guidelines inforce at the time of merger of the licenses.

This is to intimate further that Issue of "No Objection Certificate" should not be taken as approval of proposal for merger. Proposal for merger maybe submitted afresh after the approval by High Court or Tribunal as and when obtained."

5. Relying on or on the basis of the said certificate, the petitioner and the aforementioned Allianz framed a scheme for amalgamation and the same was presented before the Learned Company Judge of the Bombay High Court in terms of Sections 391 and 394 of the Companies Act, 1956.

By reason of a judgment and order dated 26.3.2010, the said scheme of amalgamation was sanctioned by the Bombay High Court stating:-

"The Official Liquidator has filed his Report stating therein that the affairs of the Transferor Company are being conducted in a proper manner, and that the Transferor Company be ordered to be dissolved. Accordingly, it is ordered that the Transferor Company be dissolved without winding up.

From the material on record, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy. None of the parties concerned have come forward to oppose the Scheme.

There are no objections to the Scheme, save and except as stated heremabove, and since all the requisite statutory compliances have been fulfilled by the Petitioner Companies, both the Petitions are made absolute in terms of prayer clauses (a) and (b) of both Petitions.

All concerned authorities to act on a copy of this Order alongwith the Scheme, duly authenticated by the company Registrar, High court, Bombay."

6. The petitioner by a letter dated 30.4.2010 brought the same to the notice of the first respondent, stating:-

"It is also intimated that the authenticated copies of the High Court order have already been filed with Registrar of Companies (RoC), Mumbai on 22nd April 2010 as required under section 391 (3) of Companies Act. Consequent to the filing with the RoC (Copies of the Forms 21 filed and the Service Request Numbers A83413971 and A83409599 in this regard are attached as Annexure 2), the scheme of amalgamation shall be effective retrospectively from the Appointed date i.e. 1st April 2009. Once we receive intimation from the ROC that the forms have been duly approved. We shall furnish a copy of the intimation letter to DoT.

It is intimated that all assets and liabilities including the licenses issued to Allianz Infratech Pvt. Ltd. now stand transferred and vested in Etisalat DB Telecom Pvt. Ltd. & all commitments will now be the responsibility of Etisalat DB Telecom Pvt. Ltd.

You are requested to take the said matter of amalgamation on record and issue the change of name for the following UAS Licenses from Allianz Infratech Private Limited to Etisalat DB Telecom Private Limited.

(i) UASL License issued to Allianz Infratech Pvt. Ltd. vide number 20 204/2008/Allianz-AS-1 dated 07.08.2008.

(ii) USAL License issued to Allianz Infratech Pvt. Ltd. vide number 20 211/2008/Allianz-AS-1 dated 07.08.2008."

7. However, no decision was taken by the respondent no. 1 thereupon.

The petitioner thereafter by a letter dated 11.8.2010 brought it to the notice of the first respondent that it had been finding a lot of operational difficulties such as issue of payment of demand by BSNL in the LSAs of Bihar and MP. A request was, therefore, made to expedite recording of the change of the name of Allianz to the petitioner and issue the amended UAS license as requested in its letter dated 30.4.2010.

Several reminders were also issued but despite the same the respondent did not amend the license. By a letter dated 12.1.2011, the Controller of Communication Accounts sought for instructions from the Department of Telecommunication, Madhya Pradesh as to whether the bank guarantee furnished by Allianz could be permitted to be renewed in the name of Etisalat DB Telecom Private Limited, the validity whereof was upto 24.2.2011.

The petitioner furnished a renewed bank guarantee in respect of Madhya Pradesh circle on or about 21.1.2011, which was not accepted. However, the Bihar Circle of the respondent accepted the same.

The petitioner by a letter dated 7.2.2011, informed the respondent no. 1 thereabout. The Controller of Communication Accounts, Bhopal, however, enforced the bank guarantee by a letter addressed to respondent no. 3 on or about 1.2.2011. A request was made that the bank guarantee submitted to its office in view of the renewed financial bank guarantees offered to the value as it is on 24.1.2011 should not be encashed.

On the aforementioned premise the petitioner, has filed the present petition praying inter alia for the following reliefs:-.

> (i) "Declare that the inaction/failure on the part of Respondent No. 1 in approving the transfer of licenses for Madhya Pradesh and Bihar from Aliianz Infratech Private Limited to the name of the Petitioner is contrary to the UAS License Agreement and the provisions of the Indian Telegraph Act, 1885 read with the TRAI Act, 1997;
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> (ii) Direct Respondent No.1 to approve the transfer of licenses for Madhya Pradesh and Bihar telecom circles from Allianz Infratech Private Limited to the name of the Petitioner and to issue appropriate instructions to its sub-divisions /wings/field offices including TERM Cell, LF Cell, WPC etc. to accept documents/instruments as well as Bank Guarantees issued by/in the name of the Petitioner instead of Allianz Infratech Private Limited;
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> (iii) Set aside and quash the letters dated 24.12.2010, 12.1.2011, 24.1.2011, letter bearing reference number CCA/MPT/USO/LF-04/BG/10-11/1618 and 1.2.2011 issued by the Respondent No. 2 as illegal, arbitrary and contrary to UAS License Agreement and the provisions of the Indian Telegraph Act, 1885 read with the TRAI Act, 1997 as well as the terms of the FBG issued by Respondent No. 3.

(iv) Restrain the Respondents or their agents, employees, servants or any person acting for an don their behalf from in any manner whatsoever, from encashing or recovering any monies from and under the subject bank guarantee dated 25.2.2009 as extended from time to time.

(v) Pass such other and further order (s) as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case."

In our order dated 9.2.2011, the statements made by Mr. Vineet Malhotra, learned counsel appearing on behalf of the respondent has been recorded that 'the bank guarantees in question would not be encashed.'

In our order dated 15.2.2011, this Tribunal has also recorded that the matter has been referred to the Secretary of the Department concerned and the petitioner's case was likely to be considered within ten days.

The matter, however, appears to have been referred to the Law Ministry for its opinion and it in turn has referred the matter for the opinion of Learned Solicitor General.

8. The Madhya Pradesh circle, however, also accepted the bank guarantee without prejudice to the rights and contentions of the parties in this petition.

9. The respondent has filed a reply dated 13.4.2011 contending that

(i) having regard to the fact that bank guarantees were furnished by Allianz and the same was valid only upto 24.2.2011, it was required to renew and extend the bank guarantee on its own before one month of its expiry i.e. 24.1.2011.

(ii) as it failed to do so, a letter was issued on 24.12.2010 to the said Allianz and the same was to be treated as a notice for encashment of bank guarantee.

(iii) as the amalgamation or merger of M/s. Allianz with the petitioner has not been sanctioned, the petitioner can not be permitted to renew and extend the bank guarantee in terms of the provisions of the license.

(iv) the letter dated 13.5.2009 cannot be construed to be a letter of approval of merger/amalgamation.

10. Mr. T. Srinivasa Murthy, the learned counsel appearing on behalf of the petitioner, in support of the petition inter alia would submit:-

(i) Having regard to the fact that a no objection certificate was granted by the respondent pursuant whereto only it filed an application before the Bombay High Court praying for sanction of the scheme of merger and the same having been accepted, the respondent is statutorily obligated to pass an order of merger of license in respect of the M.P. and Bihar circles.

(ii) The conditions for grant of merger having been complied with and the petitioner having accepted the liabilities of Allianz, it is entitled to renew and/or extend the bank guarantees in its own name.

(iii) In view of the order of the Bombay High Court, Allianz in law has ceased to exist and in that view of the matter, it cannot in its own name procure any bank guarantee from any nationalized bank for the purpose of continuing to perform its part of the license conditions.

(iv) The effect of a judgment granting sanction to a scheme of merger being judgment in rem, all concerned should have acted on the basis thereof.

11. Mr. Ruchir Mishra, the learned counsel appearing on behalf of the respondent, on the other hand, would contend:-

1. The approval of the scheme of merger would not automatically lead to a merger of license as an appropriate order is required to be passed by the Ministry.

2. The matter having been referred to the Ministry of Law and in turn to the Solicitor General of India, it had not been possible for the DOT to take any decision in the matter one way or the other.

12. Sub Section 1 of Section 391 and Sub Section 2 of Section 394, the Companies Act read as under: -

391. Power to compromise or make arrangements with creditors and members.-

(1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the [Tribunal] may, on the application of the company or of any creditor or member of the company or, in the case of a company which is being wound up, of the liquidator, 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 [Tribunal] directs.

394. Provisions for facilitating reconstruction and amalgamation of companies.-

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order; that property shall be transferred to and vest in and those liabilities shall be transferred to and become the liabilities of the transferee company and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect."

We may consider the effect of an order sanctioning the proposal of such amalgamation/merger.

13. The Madras High Court in Sahayanidhi Virudhanagar Limited Vs. ASR Subrahmanya Nadar reported in AIR 1951 Madras 209 while considering the effect of section 153 –A of the Old Companies Act, held as under:-

"Before considering the terms and stipulations in the two deeds of transfer referred to as A-2 and A-3, we would like to refer to Section 153-A, companies Act, which has been enacted with a view to facilitate arrangements and compromises between a company and its creditors or shareholders which involve a transfer of its assets and liabilities to other companies as part of such arrangement. If any such scheme or arrangement is sanctioned by Court, the Court is empowered by the section to make provision by its order sanctioning the arrangement or any subsequent order, for the transfer of the assets and liabilities of a company in liquidation to another company, styled in the section as the transferee company. Where an order of Court made under the section provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets are, by virtue of that order, without more, transferred to and vest in the transferee company

> and the contracts while assets are assignable, liabilities under contracts or duties arising thereunder are not assignable that the effect of Section 153-A is to some extent to override the ordinary law. There is not only a vesting of assets and property but also the imposition of a liability to discharge the debts of the transferor company as a result of the order of Court passed under Section 153-A. The physical handing over of the property and assets transferred would in many cases have to be effected by the Official Liquidators who are in possession of the assets and properties of the company under liquidation and Section 153-A (1) Clause (a), Companies Act, empowers the Court to pass an order directing such transfer or delivery of assets to the transferee company. The title of the transferee company to the property and assets transferred as the result of the order of Court under Section 153-A is derived from and by the force of the order of the Court itself."

14. In Re: Tele Sound India Ltd. Vs. Unknown reported in (1983) 53 Company Cases 926, a learned Company Judge of the Delhi High Court while considering a scheme of Amalgamation vis-à-vis the right of tenancy drew a distinction between the death of a natural person and dissolution of a company without winding up terming to the same to be appropriate, stating:-

> "It is for historical reasons that the device of amalgamation was built into the company law for facilitating the merger of companies, inter alia, with a view to help restoration of sick units to health, better, more effective and economical management of the corporate sector to ensure continued production, increased employment avenues and generation of revenues. Section 72 A of the I T Act is one of the incentives for this kind of absorption of one company into another."

15. In M/s. General Radio and Appliances Company Limited Vs. M A Khader (1986) 2 SCC 656, the Supreme Court of India held:-

> "The effect of an order under Section 153(a) of the Companies Act, 1913 which corresponds to Sections 391 and 394 of the Companies Act, 1956 has been very succinctly stated in the case of Sahayanidhi Virudhunagar Ltd. v.A.S.R. Subrahmanya Nadar [AIR 1951 Mad 209 : (1950) 2 MLJ 216] . Section 153(A) of the Companies Act has been enacted with a view to facilitate arrangements and compromises between a company and its creditors or shareholders which involve a transfer of its assets and liabilities to other companies as part of such arrangement. If any such scheme or arrangement is sanctioned by court, the court is empowered by the section to make provisions by its order sanctioning the arrangement or any subsequent order, for the transfer of the assets and liabilities of a company in liquidation to another company styled in the section as transferee company. Where an order of court made under the section provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets are, by virtue of that order, without more, transferred to and vest in the transferee company and the liabilities of the former company are also cast upon the transferee company. Under the ordinary law of contract while assets are assignable, liabilities under contracts or duties arising thereunder are not assignable, but the effect of Section 153(A) is to some extent to override the ordinary law. Thus by an order sanctioning amalgamation of the rights, interest and liabilities of the transferor company are transferred and vested in the transferee company. It appears that by the order of amalgamation, the interest, rights of the transferor company in all its properties including leasehold interest and tenancy rights are transferred and vested in the transferee company."

16. In Saraswati Industrial Syndicate Limited Vs. Commissioner of Income Tax, 1990 (Supp) SCC 675, it was held:-

> “The question is whether on the amalgamation of the Indian Sugar Company with the appellant Company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Act. The amalgamation of the two companies was effected under the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate, the transferee Company was a subsidiary of the Indian Sugar Company, namely, the transferor Company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee Company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that Company incurred or it could incur, any liability, before the dissolution or not thereafter.
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> Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending Company become substantially the share holders 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. Strictly amalgamation does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsburys Laws of England 4th

Edition Vol. 7 Para 1539. Two companies may join to form a new Company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third Company or one is absorbed into one or blended with another, the amalgamating Company loses its entity.

The High Court was in error in holding that even after amalgamation of two companies, the transferor Company did not become nonexistent instead it continued its entity in a blended form with the appellant Company. The High Court's view that on amalgamation there is no complete destruction of corporate personality of the transferor Company instead there is a blending of the corporate personality of one with another corporate body and it continues as such with the other is not sustainable in law. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there can be any doubt that when two companies amalgamate and merge into one the transferor Company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation but the corporate entity of the transferor Company ceases to exist with effect from the date the amalgamation is made effective."

17. The Apex Court had the occasion to consider the question in Marshall Sons & Co. (India) Limited Vs. Income Tax Officer (1997) (2) SCC 302 wherein a question arose as to what would be the effect of amalgamation namely the date mentioned in the scheme or the date of passing of the order of the High Court, stating:-

> "Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz. 1-1-1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate

in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it — as has happened in this case — it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the Court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer/amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is necessary and the logical consequence of the Court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the Court before the Registrar of Companies, the allotment of shares etc. may have all taken place subsequent to the date

> of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be 1-1-1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. Bank of Upper India Ltd. [AIR 1919 PC 9 : 46 IA 135 : 23 CWN 697] ”

18. Before, however, we consider the stand taken by the respondent, it may be noticed that there are high authorities for the preposition that an order sanctioning the scheme of amalgamation would amount to a judgment in rem.

19. The Supreme Court of India in Singer India Limited Vs. Chander Mohan Chadha reported in (2004) 7 SCC 1 followed Saraswati Industrial Syndicate (Supra) stating:-

> “ In Saraswati Industrial Syndicate Ltd. v. CIT [1990 Supp SCC 675 : AIR 1991 SC 70] (para 6) it has been held that there can be no doubt that when two companies amalgamate and merge into one, the transferor company loses its identity as it ceases to have its business. However, their respective rights or liabilities are determined under the Scheme of Amalgamation, but the corporate identity of the transferor company ceases to exist with effect from the date the amalgamation is made effective. Therefore, in view of the settled legal position, the original lessee, namely, the American Company ceased to exist with effect from the appointed day i.e. 1-1-1982 and thereafter the Indian Company came in possession and is in occupation of the premises in dispute.”

20. We have noticed heretobefore that the Mumbai High Court had sanctioned the scheme of amalgamation of Allianz with the petitioner.

What is the legal consequence thereof? An order sanctioning the scheme of merger as contemplated under section 391 and sub section 2 of 394 of the Companies Act would be that the merging companies becomes non est in the eye of law with effect from the date from which such merger would take place as directed by the learned Company Judge. Ordinarily the date of merger would be the effective date as mentioned in the scheme itself. In terms of the said scheme the amalgamation/merger took place w.e.f. 1.4.2009, although, the order of the High Court was passed on a later date.

21. There are certain acts which may become irreversible. As a licensee, the petitioner in the capacity of a merged company will have to take steps in various directions in relation to the DOT. It may have to renew the bank guarantee or extend the same in relation to the other operators with whom it has entered into inter-connection agreements. It has to raise bills and receive the same. Payments have to be made or received in its own name. It may have to meet the roll out obligations of Allianz. It may have to perform several other duties or discharge several other liabilities

22. The respondent, however, has not recognized the same.

In this case, itself, we have noticed that the different circles of the DoT acted differently.

Whereas the Bihar circle accepted the renewed bank guarantee, the MP Circle did not. The later while invoking the bank guarantee referred the question to the DoT.

Therefore, there was no application of mind. Another aspect of the matter can not also be lost sight of.

Various Courts in India have been treating an order of sanction of merger or demerger as a judgment in rem within the meaning of the provisions of Section 41 of the Indian Evidence Act.

We may notice that recently the Bombay High Court in Europlast India Ltd. [2010] Bombay Law Reporter 281 stated the law thus:-

> "While referring to the decision in the case of J.K. (Bombay) Pvt. Ltd. V. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd. MANU/SC/0217/1968 : AIR 1970 SC 1041 the Court has observed that the effect of the sanctioned scheme is to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity. It is also observed that scheme represents a contract sanctified by court's approval between the company and the creditors and/or members of the company. It is equally well established that the rights which are enshrined in the scheme approved in the same way as the earlier one. Further, sanction of the Court operates as a judgment in rem. In the case of Smt. Pramila Devi V. Peoples Bank of Northern India Ltd. MANU/PR/0061/1938 : (1939) 9 Com Cases Page 1 : AIR 1938 PC 284, the Court held that the scheme when sanctioned acquires statutory force and has greater sanctity than a mere agreement between the parties affected. It cannot be varied by a mere agreement of the parties."

23. Yet again, a similar view has been taken by the Calcutta High Court in Shrimati Bhavita Jitendra Mehta Vs. Sudera Enterprises Pvt. Ltd. (2004) 122 Comp. Cases 361 in the following terms:-

> "Moreover, the petitioner is only a tenant and she has not right to say 'no' to the amalgamation in as much as she is entitled only to the protections under the existing rent restrictions Act. It is settled law the order of amalgamation passed by the Company court is a judgment in rem and as such the order of amalgamation is binding on the tenant."

24. The interpretation and/or application of a judgment in rem came up recently for consideration of the Supreme Court of India in Booz Allen and Hamilton Inc Vs. SBI Home Finance Ltd., Civil Appeal no. 5440 of 2002 reported on 2011(5) SCC532 in relation to an Arbitration Clause. It was stated:-

> "Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and

> (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.
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> It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself.

25. In regard to the order of a probate court the Supreme Court of India again in Syed Askari Hadi Ali Augustine Imam Vs. State, (2009) 5 SCC 528, wherein a question arose as to whether despite a will having been held to be genuine by a probate court, a criminal court could exercise its jurisdiction, the Supreme Court opined:-

> "It speaks about a judgment. Section 41 of the Evidence Act would become applicable only when a final judgment is rendered. Rendition of a final judgment which would be binding on the whole world being conclusive in nature shall take a long time. As and when a judgment is rendered in one proceeding, subject to the admissibility thereof keeping in view Section 43 of the Evidence Act, it may be produced in another proceeding.

> It is, however, beyond any cavil that a judgment rendered by a probate court is a judgment in rem. It is binding on all courts and authorities. Being a judgment in rem it will have effect over other judgments. A judgment in rem indisputably is conclusive in a criminal as well as in a civil proceeding."

26. However, an Election dispute was held not to come within the purview thereof in Satrucharla Vijaya Rama Raju Vs. Nimmaka Jaya Raju, (2006) 1 SCC 212, stating:-

> "The contention that the judgment in EP No. 13 of 1983 is a judgment in rem also cannot be accepted. Under the Evidence Act, Section 41 is said to incorporate the law on the subject. A judgment in rem is defined in English law as "an-adjuication pronounced (as its name indeed denotes) by the status, some particular subject-matter by a tribunal having competent authority for that purpose." Spencer Bower on Res Judicata defines the term as one which "declares, defines or otherwise determines the status of a person or of a thing, that is to say, the jural relation of the person or thing to the word generally." An election petition under Section 80 of the Representation of the People Act, 1951 cannot be held to lead to an adjudication of a statutory challenge on the question whether the election of the successful candidate is liable to be voided on any of the grounds available under Section 100 of the Representation of the People Act, 1951. It is not an action for establishing the status of a person. It is not an action initiated by a person to have his status established or his jural relationship to the world generally established, to borrow the language of Spencer Bower."

3. It was observed:-

> "Even if we take it that the earlier judgment is admissible in the evidence, on that, no objection was raised even at the trial, it could be brought in under Section 42 of the Evidence Act on the basis that it relates to a matter of a public nature or under section 43 of the Evidence Act. In either case, not being inter partes, the best status that can be assigned to it is to say that it is of high evidentiary value, while considering the case of the parties in the present election petition."

27. It may be, as has been contended by Mr. Mishra that DoT is not concerned with the merger of two entities but is concerned with merger of licenses granted to two different entities in terms of the provisio appended to section 4 of the Indian Telegraph Act.

It is not a case where even the question of merger of the license is involved. The petitioner never held any license in Bihar and MP circles. It is, therefore, a question of transfer or amendment in license. The petitioner prior to filing of the application for grant of sanction applied for grant of a No Objection Certificate. The said application was necessary to be filed, keeping in view the provisions contained in clause 6.3 of the License sub clause 2 whereof, refers to amalgamation or restructuring i.e. merger or demerger, sanction of merger or demerger in accordance with the provisions of law more particularly section 391 to 394 of the Companies Act.

28. The said application was a very detailed one. The respondent by its letter dated 13.5.2009 granted a No Objection Certificate subject to

principally two conditions namely past as also future dues of Allianz are to be the liability of the merged company namely the petitioner. Another condition over which the petitioner has no control was that retention of spectrum by the merged entity and the spectrum charges payable would be governed by the guidelines enforced at the time of merger of license.

29. The petitioner has undertaken and infact before us reiterate its undertaking to take upon itself the burden of liabilities of Allianz both past, present and future. Even otherwise, that would be the effect of the order of the High Court sanctioning merger.

If the conditions are fulfilled, the permission of transfer of license to the merged entity is ordinarily to be granted after the grant of sanction and approval of the High Court as per Section 391 to 394 of the Companies Act.

30. The petitioner altered its position pursuant to the said no objection certificate. Even if in terms of para 3 of the said letter, it was required to apply afresh, the same would not mean that the grant of No Objection Certificate had absolutely no value whatsoever having been acted upon. If not anything else, the petitioner's application requires a serious consideration at the hands of the DoT.

31. We have noticed hereto before that the matter is pending consideration of the Ministry of Law. The said Ministry has in turn has sought for the opinion of learned Solicitor General.

We hope and trust that the DoT, one way or the other, shall take a decision on the petitioner's application, keeping in view the factual background of this case as expeditiously as possible and preferably within a period of one month from the date of communication of this order.

32. We have noticed heretobefore that on a provisional basis the renewed bank guarantee furnished by the petitioner has been accepted both by Bihar Circle as also the MP circle. The said provisional arrangement is made absolute subject of course to any order that may be passed by the first respondent on the application filed by the petitioner herein for transfer of license in respect of the aforementioned circles.

33. This petition is allowed with the aforementioned observations and directions. In the facts and circumstances of the case, there shall be no orders as to costs.

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(S.B. Sinha)

Chairperson

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