

(2005) 05 DEL CK 0132

In the Delhi High Court

Case No : IA. No. 3420/05 in CS (OS) 1394 of 1996 and IA. No. 3419/05 in CS (OS) 434/98 and Suit No's. 1394/96 and 434, 2712 and 2694/98

K.K. Modi and Others

APPELLANT

Vs

K.N. Modi and Others
 M.K. Modi Vs K.K. Modi and Others

RESPONDENT

Date of Decision : 11-05-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Companies Act, 1956 — Section 391, 392, 393, 394
Income Tax Act, 1961 — Section 2(19AA), 72A(4)

Citation : (2005) 05 DEL CK 0132

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : S.Ganesh, Pravin Bahadur and Meghalee and Dyshyant Dave, Manmohan and Bharti, for the Appellant; Dushyant Dave, Manmohan, Bharti, for D-2, Maneesha Dhir Alok Dhir, Jayashree Shukla for D-1 to 15 and Girish Kaul, for D-15 and Maneesha Dhir, Alok Dhir, Jayashree Shukla for D-3, S. Ganesh Pravin Bahadur and Meghalee for D-1, for the Respondent

Judgement

Pradeep Nandrajog, J.—Present order disposes of IA. No. 3420/05 filed in Suit No. 1394/96 and IA. No. 3419/05 filed in Suit No. 434/98. Both applications have been filed by Shri K.K. Modi, who is plaintiff in Suit No. 1394/96 and defendant No. 1 in Suit No. 434/98.

2. There are two other connected suits being Suit No. 2712/98 and 2694/98. Parties to the 4 suits and relief's prayed for are as follows :-

Sl.

Suit

Parties

Relied claimed

1.

Suit No. 1394/96

1. K.K. Modi

2. S.K. Modi

Versus

1. K.N. Modi

2. M.K. Modi

3. CMD-IFCI

4. Chairman, Modipon Ltd.

5. Modipon Ltd.

6. Quick Investment(India) Ltd.

7. Good Investment (I) Ltd.

8. Modi Rubber Ltd.

9. Godfrey Phillips Ltd.

10. V.K. Modi

12. B.K. Modi

13. U.K. Modi

14. Y.K. Modi

15. D.K.Modi

Suit for permanent/mandatory declaration praying for :

a. Declaration that MOU dated 24.1.1989 is binding on all parties.

b. Declaration that CMD-IFCI and Chairman-Modipon Ltd. has no power to alter, amend or modify the MOU.

c. Declaration that decision of CMD-IFCI dated 8.12.1995 is illegal, bad in law and null and void.

d. Declaration that Directions and actions taken by Chairman-Modipon Ltd. in his letters and scheme of arrangement of M/s S.S. Kothari Illegal, are bad in law and null and void.

e. Perpetual injunction restraining defendants from taking action in pursuance of decisions of CMD-IFCI and Chairman-Modipon Ltd. and scheme of S.S. Kothari.

f. Perpetual injunction restraining def. 5 from passing any resolution in terms of agenda item 8 and 9 of notice dated 30.4.1996 in Board meeting of MPL.

g. Perpetual injunction restraining defs. 6 and 7 from selling/ disposing of shares of GPI.

h. Decree, order and direction of court setting aside decisions of CMD-IFCI and Chairman-Modipon Ltd. and scheme of S.S. Kothari.

i. Perpetual injunction restraining defendant from altering, amending or modifying BSM scheme .

j. Decree ordering and directing Def.5 to be split as per BSM scheme.

k. Decree ordering and directing implementation of MOU.

k1. Declaration that Aide Memoire dtd. 22.3.2003 read with authority jointly conferred on mediators vide letter dated 7.5.2003 and decisions of mediators dated 13.5.2003, 6.12.2003, 29.12.2003, 16.1.2003 and 30.1.2004 are binding on parties.

k2. Present suit to be declared in terms of the Aide Memoire and decisions of mediators.

k3. Decree, order and direction of court that def. 5 be split in accordance with Scheme of demerger of mediators dated 30.1.2004

k4. Order of court to implement Aide Memoire and decisions of mediators

l. Cost of present suit.

m. Further costs.

2.

Suit No. 434/98

M.K. Modi

Versus

K.K. Modi

Suit for permanent and mandatory injunction praying for :

a. Permanent injunction restraining defendant from taking any steps that would destabilize the management, ownership and control Modipon Ltd. and/or Modipon Fibre Division and also permanently restrain defendant from acquiring, directly or indirectly, any further shares of MPL.

b. Permanent mandatory injunction directing defendant to sell into market all shares of MPL acquired by him, directly or indirectly, after 18.5.1996 and mandatory injunction requiring defendant not to exercise any voting right in respect of such shares till the same are disposed in the market.

c. Ex-parte ad-interim order in terms of above.

d. Any other orders.

3.

Suit No. 2712/98

U.K. Modi

Versus

1. K.N. Modi

2. M.K. Modi

3. Y.K. Modi

4. D.K.Modi

5. K.Modi

6. V.K. Modi

7. S.K. Modi

8. B.K.Modi

9. CMD-IFCI

10.Godfrey Phillips Ltd.

11. Chairman-Modipon Ltd.

12. Modipon Ltd.

13. Quick Investment (I) Ltd.

14. Good Investment (I) Ltd.

15. Modi Rubber Ltd.

16. Modi Inds. Ltd.

17. Modi Spinning and Weaving Mills Company Ltd.

Suit for declaration and permanent/ mandatory injunction praying for :

a. Declaration that decision of CMD-IFCI dated 8.12.1995 is illegal, bad in law and null and void.

b. Declaration that MOU dated 24.1.1989 is binding on all parties.

c. Declaration that CMD-IFCI and Chairman-Modipon Ltd. has no power to alter the BSM Scheme.

d. Declaration that in terms of MOU all three companies viz. MPL, MIL and MSWM are liable to be split up simultaneously in terms of BSM Scheme.

e. Perpetual injunction restraining the defendants from altering, amending or

modifying the BSM Scheme for separation of the three companies.

f. Decree ordering or directing MIL to be split up and separated as per BSM Scheme.

g. Perpetual injunction restraining members of Modi family who are parties to this suit from buying/transferring any shares of MIL, making any change in the Board of Directors of the company or passing any resolution for changing the Managing Directorship and their role in the company till final splitting of the company as per BSM Scheme.

h. Interim injunction restraining the defendants from splitting Modipon Ltd. alone till final disposal of present suit.

i. Temporary injunction restraining defendants from disposing of any assets and properties including shares, guest houses etc. of Modi Group till final disposal of the suit.

j. Declaration that in terms of the MOU, valuation taken by CMD-IFCI in respect of Bihar Sponge Iron Ltd. is erroneous.

k. Declaration that in terms of MOU, S.B. Billimoria and Co. erred in taking the value of the entire assets of Modi Group Companies in place of share holdings held by Modi Family in the company.

l. Cost of the suit.

m. Any other relief.

4.

Suit No. 2694/98

V.K. Modi

Versus

1. K.N. Modi

2. M.K. Modi

3. Y.K. Modi

4. D.K.Modi

5. CMD-IFCI

6. Modi Inds. Ltd.

7. Modipon Ltd.

8. Modi Alkalies and Chemicals Ltd.

9. Modi Champion Ltd.

10. Ambuja Cement Eastern
11. Haryana Distillery
12. Modern Spinners Ltd.
13. Vishal Syntex
14. Modi Spinning and Weaving Mills Co. Ltd.
15. Modi Xerox Ltd.
16. Godfrey Phillips
17. Cloth and Abhor Ltd.
18. Bihar Sponge Iron Ltd.
19. Modi Olivetti
20. Modi Business Machines Ltd.
21. Modi Rubber
22. Modi Carpets
23. Modi Threads
24. BTI Ltd.
25. Indo Euro Inds. Ltd.
26. Modi Export Processors Ltd.
27. K.K. Modi
28. S.K. Modi
29. B.K. Modi
30. U.K. Modi

Suit for declaration and injunction and recovery of Rs. 10,00,000 together with pendentelite and future interest @ 18% p.a. till realization praying for :

- a. Declaration that the MOU dated 24.1.1989 is binding on all parties, IFCI and other FIs and the Govt. of India.
- b. Declaration that decisions and direction of CMD-IFCI are null and void.
- c. Declaration that the MOU does not envisage or provide for sale or purchase of shares or payment of any consideration for shares listed in clause 1 and 2 thereof.
- d. Declaration that valuation under Clause 3 of MOU only in respect of non-productive assets of Modi Group including public limited companies or deemed public companies other than companies covered by clause 1 and 2 of MOU.

e. Declaration that plaintiff and defendants 27 to 30 are entitled to continue to own, manage and control the companies/units listed in clause 2 of MOU presently under their management and direct all shares of these companies in clause 2 held by companies under clause 1 be transferred by defendants 1-26 to the plaintiff and defendants 27-30.

f. Injunction restraining defendants 1-4 from disturbing or interfering with the ownership, management or control of companies/units falling to the plaintiff's group under Clause 2 and 3 of MOU, particularly, def. 21, MRL, which is under management and control of plaintiff.

g. Decree for Rs. 10 lacs in favor of plaintiff and defs.27-30 in settlement of Group Differential.

Note : prayers k1 to k4 in Suit No. 1394/96 were added post amendments to the plaint in the year 1995.

3. Applications contain identical prayers as under :

"a)Declare that the said Aide-Memoire dated 22.3.2003 read with the authority jointly conferred by the plaintiff No. 1 and defendant No. 2 to the mediators appointed under the Aide Memoire vide letter dated 7.5.2003 and the decisions of the mediators dated 13.5.2003, 6.12.2003, 29.12.2003, 16.1.2004 and 30.1.2004 are binding as between the parties to the Aide Memoire.

b) Decree the present suit in terms of the Aide Memoire dated 22.3.2003 read with the decisions of the mediators dated 13.5.2003, 6.12.2003, 29.12.2003, 16.1.2004 and 30.1.2004

c) Pass all necessary and consequential orders required to implement the Aide Memoire dated 22.3.2003, read with the decisions of the mediators dated 13.5.2003, 6.12.2003, 29.12.2003, 16.1.2004 and 30.1.2004"

4. Applications are opposed by Shri M.K. Modi and Shri K.N. Modi.

5. Litigation has its roots in a memorandum of understanding dated 24.1.1989.

6. Late Seth Gujjar Mal Modi had five sons : (i) K.K. Modi, (ii) V.K. Modi, (iii) S.K. Modi, (iv) B.K. Modi and (v) U.K. Modi. He had a younger brother named Kedar Nath Modi (K.N. Modi). K.N. Modi has three sons : (i) M.K. Modi, (ii) Y.K. Modi and (iii) D.K. Modi. The Modi family prospered. It controlled a large number of public limited companies. It owned various assets. Disputes and differences surfaced. Two groups were formed. Group "A" was K.N. Modi and his three sons. Group "B" were the five sons of of Gujjar Mal Modi. Since financial institutions had lent money to the Modi groups of companies and substantial public money had been invested in the companies, with the help of financial institutions, the two groups arrived at a settlement recorded in the memorandum dated 24.1.1989.

7. Settlement lists the companies, management and control of which will vest in Group "A" and Group "B" respectively. It records that three companies, namely,

(i) Modi Industries Ltd. , (ii) Modipon Ltd. and (iii) Modi Spinning and Weaving Mills Ltd. would be split.

8. Inter alia, settlement records :

"3. All non-productive assets including shares, properties, guest houses, etc. held by Modi Group Companies shall be valued and divided in the ratio of 40:60 i.e. KNM (Group A) 40 and KKM (Group B) 60. The shares of the above companies will be transferred to the respective groups after such valuation is done. Valuation will be done by M/s S.B. Billimoria and Co., Bombay.

5. The companies, which are to be split will be done by a scheme of arrangement in the manner as described in paras 1 and 2 above by M/s Bansi Mehta and Company, Bombay after taking into consideration valuation done by M/s S.B. Billimoria and Company, Bombay. Units to be given to each group KKM Group and KNM Group would be given along with assets and liabilities.

7. Management of various companies will change on change of Chairman/Vice-Chairman and managing Directors/ Directors as specified above. The three companies to be split namely Modi Spinning and Weaving Mills Co. Ltd. , Modi industries Ltd. and Modipon Ltd. the management of units will be shifted/ restored as per clauses 1 and 2 to respective managements of each group simultaneously with the appointment of independent Chairman as per clause 6. The common activities of the company relating to boards of the three companies will be coordinated by the Independent Chairman, assisted by Managing Directors. All matters, which are to be dealt with by the company not related to individual unit on day to day basis shall be dealt by the Chairman assisted by Managing Directors. The date for carrying out valuation shall be fixed by Chairman, IFCI as the 31st January, 1989. All other Public Ltd. or deemed Public Ltd. Company of Modi Group will continue to be managed by the respective group. Valuation of these companies will be done by M/s S.B. Billimoria and Co., Bombay. Such valuation shall be included in total valuation of Modi Group Assets and Liabilities and shall be shared by KKM Group and KNM Group in the ratio of 60:40 respectively. Difference arrived at on the above basis shall be paid by one Group to other within 30 days of the completion of valuation. Valuation shall be completed within 90 days on signing of Memorandum and Understanding or such extended time with prior approval of Chairman. IFCI or in the event of delay in actual split/ separation of the three companies the amount payable by one group to another group shall be deposited within stipulated time either in banks/ Institutions as decided by Chairman, IFCI.

The profit and loss of the various units of three companies being split/separated shall be accrued to the respective units from the cut-off date to be decided by the Chairman, IFCI, which shall not be later than 31st January, 1989. The transfer of management shall take place simultaneously with the resignation of the existing Chairman and appointment of an independent Chairman by the Institutions. Group "A" belonging to KNM shall manage the units as per para 1

above and Group "B" belonging to KKM shall manage units as per para 2. The new independent Chairman shall be appointed in consultation with the Chairman, IFCI on the Boards of the three companies viz. Modipon Ltd. , Modi Spg. and Wvg. Mills Co. Ltd. And Modi Industries Ltd. , not with standing the Articles of Association of the said three companies.

9. Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decision will be final and binding on both the Groups."

9. Pursuant to the Memorandum of Understanding, M/s S.B. Billimoria and Company gave reports between January and March,1991. M/s Bansi S. Mehta and Company who were required to provide a scheme for splitting of the three companies by taking into account the valuation fixed by M/s S.B. Billimoria and Company, also sent various reports between November,1989 and December,1994. The members of both the Groups were dissatisfied with these reports. They sent various representations to the Chairman and Managing Director of the Industrial Finance Corporation of India Ltd. in view of clause 9 of the Memorandum of Understanding.

10. The Chairman and Managing Director, Industrial Finance Corporation of India formed a Committee of Experts to assist him in deciding the questions that arose. The Committee of Experts and the Chairman, IFCI had discussions with both the groups. Meetings were also held with the Chairman of the concerned companies who were independent Chairman. The discussions took place from 12th March,1995 to 8th December,1995.

11. On 8th December,1995, the Chairman, IFCI gave his detailed decision/report. In his covering letter of 8th December,1995, the Chairman and Managing Director, Industrial Finance Corporation of India Ltd. has described this report as his decision on each dispute raised or clarification sought. He has quoted in his covering letter that since the memorandum of Understanding has already been implemented to a large extent during 1989 to 1995, with the decisions on the disputes/clarifications given by him now in the enclosed report, he has hoped that it would be possible to implement the remaining part of the Memorandum of Understanding. He has drawn attention to paragraph 9 of his report where he has said that it is now left to the members of Groups "A" and "B" to settle amongst themselves the family matter without any further reference to the Chairman and Managing Director of the Industrial Finance Corporation of India. In paragraph 7 of the letter, he has stated that on the basis of the total valuation of Modi Group assets and liabilities and allocation thereof between Group "A" and "B" and the decisions given by him in the report, a sum of Rs. 2135.55 lacs would be payable by Group "B" to Group "A".

The said amount should be deposited by Group "B" with IFCI at its Delhi Regional Office by 15th January,1996 failing which, Group "B" will be liable to

pay interest at the prevailing prime lending rate of the State Bank of India (which was the 16.5% p.a.).

12. Thereafter Chairman, Modipon Ltd. who was nominated by IFCI issued a series of directions to give effect to report/decision dated 8.12.1995.

13. On 20.5.1996, K.K. Modi filed Suit No. 1394/96 praying as noted in para 2 above (except prayers k1 to k4 which were incorporated post amendment in the year 2005). In the year 1998, M.K. Modi of Group "A" filed Suit No. 434/98 praying as noted in para 2 above. U.K. Modi and V.K. Modi of Group "B" filed a suit each in 1998 praying as noted in para 2 above.

14. Suit No. 1394/96 was dismissed vide judgment and order dated 6.9.1997, holding it to be an abuse of the process of law. Appeal being RFA (OS) No. 41/97 was filed. Against an interim order passed by the Division Bench, matter reached the Supreme Court.

15. Disposing of the appeal (CA. No. 613/98) vide order dated 4.2.1998, Hon'ble Supreme Court held :

"In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. The valuation is to be done by M/s S.B. Billimoria and Co. Three companies which have to be divided between the two groups are to be divided in accordance with a scheme to be prepared by Bansi S. Mehta and Co. In the implementation of the Memorandum of Understanding which is to be done in consultation with the financial institutions, any disputes or clarifications relating to implementation are to be referred to the Chairman, IFCI or his nominees whose decision will be final and binding. The purport of Clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. This clause does not contemplate any judicial determination by the Chairman of the IFCI. He is entitled to nominate another person for deciding any question. His decision has been made final and binding. Thus, Clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for a proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated. The decision of the Chairman, IFCI is to be binding on the parties. Moreover, difficulties and disputes in implementation may not be between the parties to the Memorandum of Understanding. It is possible that the valuers nominated in the Memorandum

of Understanding or the firm entrusted with the responsibility of splitting some of the companies may require some clarifications or may find difficulties in doing the work. They can also resort to clause 9. Looking to the scheme of Memorandum of Understanding and the purpose behind Clause 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so.

Undoubtedly, in the course of correspondence exchanged by various members of Group A and B with the Chairman, IFCI, some of the members have used the words "arbitration" in connection with clause 9. That by itself, however, is not conclusive. The intention of the parties was not to have any judicial determination on the basis of evidence led before the Chairman, IFCI. Nor was the Chairman, IFCI required to base his decision only on the material placed before him by the parties and their submissions. He was free to make his own inquiries. He had to apply his own mind and use his own expertise for the purpose. He was free to take the help of other experts. He was required to decide the question of valuation and the division of assets as an expert and not as an arbitrator. He has been authorised to nominate another in his place. But the contract indicates that he has to nominate an expert. The fact that submissions were made before the Chairman, IFC, would not turn the decision-making process into an arbitration."

16. Suit No. 1394/96 got revived. Three other suits, as noted above, came to be filed thereafter. On 28.9.1999, all four suits were consolidated and 30 issues were framed.

17. Order dated 28.9.1999 was challenged in appeal being FAO(OS) No. 324/99. Challenge was to the framing of as many as 30 issues. Appeal was disposed of vide order dated 11.1.2000. Issues were reframed. They were restricted to 8 issues as under:

"1. Whether suit discloses any cause of action?

2. Whether the decision of the Chairman, IFCI under Clause 9 of the Memorandum of Understanding is final? If so, whether the suits are maintainable?

3. Whether the decision of the Chairman, IFCI is bad in law, null and void inasmuch as it is :

i) Contrary to the Memorandum of Understanding;

ii) Contains patent mistakes; and

iii) Contains errors of principle.

4. Whether the plaintiffs in Suit No. 1394/96 are entitled to permanent injunction restraining defendant No. 5 (therein) from passing any resolution in terms of the

proposed item No. 8 and 9 as set out in the notes dated 30th April,1996 in the proposed Board meeting of the Modipon Limited?

5. In the event of the decision of the Chairman, IFCI being declared, either wholly or partly, to be bad in law, null and void and/or it being declared that it is not final and binding on the parties, whether the decision and directions given by the Chairman, Modipon Limited as contained in its letters dated 22nd January,1996, 5th February,1996, 17th April,1996, 23rd April,1996 and 24th April,1996 are illegal, bad in law, null and void for the reasons set out in paragraphs 56 and 56-A of Suit No. 1394/96.

6. In the event of the decision of the Chairman, IFCI, being declared, either wholly or partly, to be bad in law, null and void and/or it being declared that it is not final and binding on the parties whether the plaintiffs are entitled to perpetual injunction restraining Quick Investment India Limited and Good Investment India Limited from selling or disposing off shares held by them in Godfrey Phillips India Limited?

7. In the event of the decisions of the Chairman, IFCI being declared, either wholly or partly, to be bad in law, null and void and/or it being declared that it is not final and binding on the parties whether the plaintiffs in Suit No. 1394/96 are entitled to decree to the effect that the control and management of the Chemical Division including the shares of Modi Group Companies allotted to Group B be vested in plaintiff No. 1 (therein)?

8. In the event of the decision of the Chairman, IFCI being declared, either wholly or partly, to be bad in law, null and void and/or it being declared that it is not final and binding on the parties whether the plaintiffs were entitled to any relief"s, as prayed for, or at all?"

18. Suits remained pending for disposal. As time went by, the economy changed. Members of Group "A" and Group "B" went into control of different companies assigned to the respective groups as also the units of the three companies which had to be split. Dispute qua valuation and as a consequence the differential amount to be paid, if any, remained simmering. There were cross shareholdings by and in different companies. It was a delicate balance. The foot that wears the shoe feels the pinch. The pinch was felt. K.K. Modi and M.K. Modi sat down. Probably for the reason that within their group, the two took control of the two units of Modipon Ltd. (the Fibre Division and the Chemical Division) which had to be split.

19. The two signed on "Aide Memoire" on 22.3.2003. It was followed by a joint authority letter dated 7.5.2003 executed by the two requesting Shri D.N. Davar, Ex-Chairman, IFCI and Shri G.P. Gupta, Ex-Chairman, IDBI to act as mediators.

20. The Aide Memoire records as under :

"Aide Memoire

(To form basis/substance of consent terms)

I. The items/terms set out hereinafter are subject to the following compliance :

i. Consent terms based on substantive items incorporated in the aide memoire will require to be filed by both the parties in the appropriate court and the Court's order Therefore duly obtained.

ii. The in principle approval of the FIs and/or other secured creditors wherever necessary, shall be obtained by MK principally, for "One Time Settlement" (OTS) of MPL's liabilities top FIs as defined mutually (Appendix 1) along with "hive off" of the Chemical Division of MPL under provisions of Sections 391-394 of Companies Act and also.

iii. Withdrawals of all pending legal cases by both KK/MK and FIs from the concerned courts/ Debt Recovery Tribunal including revocation/ vacation of existing injunction (SO/ad-interim orders and termination of Receivership(s) if any (Appendix II).II

II(1) One time settlement with FIs a defined and mutually agreed (Appendix 1). KK to provide suitable guarantees as may be acceptable to the FIs for payment of the same.

(2) Hiving off of Chemical Division and transferring its assets and liabilities on as is where is basis to a KK controlled separate company under the provisions of Sections 391-394 of the Companies Act.

(3) Post hive-off KK and MK shall swap their respective holdings in MPL (Appendix III) without any consideration. Exchange/swapping of shares shall be before listing of the Chemical Company and SEBI rules and regulators shall be adhered to.

(4) Transfer of two subsidiaries viz. GIL and QIL to Chemical (New Company). However, investment of subsidiaries in MSWM and MIL will be apportioned to KK and MK on a 50:50 basis. Group "A" shares in the two subsidiaries shall be transferred to MFL/MK without consideration. Other assets/items and shareholding shall go along with the subsidiaries to Chemical Division.

(5) MK and his nominee to resign from Trusts in such manner so that control of 8 trusts (Appendix IV) vests with KK. All legal cases existing in relation to these Trusts shall be withdrawn/got disposed of suitably in a manner which is not adverse to KK/MK.

(6) The following funds shall be utilised for initial payments agreed to be paid to the FIS as per OTS :

Refund of deposit with Delhi High Court Rs. 739 lacs plus interest thereon
Amount lying in deposit with IFCI against sale of Modi Rubber Ltd. Rs. 827 lacs plus Shares. Interest thereon Refund (to be given to Chemical Division) of Rs. 191.56 plus GPI Dividend currently interest thereon lying with corporate office

Dividend received from GPI in Oct,2002 Rs. 166.30 (to be shared between KK and MK on a 50:50 basis as hitherto) Rs. 83.15 _____

Total : Rs. 1840.71 lacs plus interest.

(7) MPL shares held by MSWM and MI1 shall not be acquired by KK and MK respectively without prior approval of the concerned Courts and until FIs have cleared OTS and hive off proposal and also approved by MPL's Board, where after these shall be kept with an escrow agent without voting rights, who would, on conclusion of demerger, give respective portion of shares to KK and MK without any consideration.

(8) On de-merger, KK shall procure at his own cost MFC portion of MPL's Shares equivalent to 6,30,000 shares from the market and transfer it to MK without any consideration subject to compliance with and non-triggermen of SEBI "Take Overt Code"

(i) The following assets shall be transferred to Chemical Division without specific consideration :

Flat at Sterling Apartment, Mumbai

Dayawati Model Public School at Modi Nagar.

21,749 sq. mtrs. Of land at Modi Nagar (leased to Modi Rubber Ltd.)

(ii) The responsibility for redemption of preference shares will be of MPL. However, KK and his associates shall give letter of satisfaction relinquishing the right of redemption thereof and also fund the remaining preference shareholding, excluding the portion held/controlled by MK.

(10) The cut off date for demerger shall be the 1st April,2003. MK shall not claim any compensation for tax- savings up to the financial year ending the 31st of March,2003.

(11) The overall consideration for the aforesaid arrangement payable to FIs/MK shall be as follows :

(i) Towards meeting/honouring OTS with the FIs after adjustment of sub-items referred to in item 6 hereinafter.

(a) 75% of Rs. 74.09 crore after 90 days of effectuation of de-merger in four equal quarterly installments Rs. 55.57 crores.

Less: Utilisation of funds referred to in item 6 Rs. 18.40 crore hereinbefore. Plus interest

(b) Balance 25% after 5 years from the date of 11(a) above i.e. from Rs. 18.52 the date of payment of crores 1st Quarterly Installment

(ii) Non-complete fee to MK/companies nominated by MK.

The amount/stages/tranches for payment of 11 (ii) above shall be decided jointly by DND/GPG.

(12) MK/MPL shall agree to Chemical Co. issuing rights cum public issue of shares to the shareholders of Modipon Ltd. of the value of Rs. 28 crore to be subscribed/arranged to be subscribed by KK and his associates.

(13) There shall be no claim against each other, on swapping of the shares and set off of the foregoing amounts and conclusion of the aforesaid terms with demerger under the aegis of High Court, pursuant to Sections 391-394 of the Companies Act.

(14) Neither of the two (viz. KK/MK) shall acquire additional shares of MPL nor acquire shares of each other companies post demerger nor take management positions directly or indirectly in each other's company.

(15) All claims and counter claims relating to MOU signed on the 24th January, 1989 and report of CMD, IFCI dated 8.12.1995 pursuant thereto, including in respect of the group differential shall stand settled.

(16) KK and MK shall cooperate and carry out such steps as may be required including voting in favor of the resolutions to be passed at the meetings of the Board of Directors of Modipon Ltd. and at the meetings of the Shareholders of Modipon Ltd. , obtaining approval of FIs and such other authorities as may be required for implementing and giving effect to these terms of settlement.

(17) Pending final effectuation of demerger, voting rights of shares held by Modipon Ltd. and its subsidiaries relating to companies controlled by KK and/or having Group "B" interest viz. Godfrey Phillips India Ltd. and Modi Rubber Ltd. shall be exercised at the instance of KK and of companies controlled by MK and/or having Group "A" interest viz. ____ shall be exercised at the instance of MK. During the same period, all sales, disposals, transfers of assets or investments or creations of any encumbrances on any assets or investments of MPL or its subsidiaries shall be exercised subject to consent in writing of both KK and MK.

III.(i) On any matter arising from this Aide-Memoire, until consent terms are recorded by the concerned Courts and the arrangement is accomplished, the joint decision of Mediators, DND/GPGs shall be adhered to by KK/MK, who shall, in the event of KK/MK agreeing in writing, supervise the arrangements till conclusion.

(ii) The scheme for demerger shall be finalised under the guidance of DND/GPG."

21. Joint authority letter reads as under :

"May 7, 2003

To

Shri D.N. Davar, Shri G.D. Gupta,

New Delhi. Mumbai

Dear Sirs,

Re: Request to act as Mediators.

The Fibre Division and the Chemical Division of Modipon Limited controlled by Mr. M.K. Modi (MK) and Mr. K.K. Modi (KK) respectively are in the process of being separated and controlled through separate legal entities.

MK and KK have both consented through an Aide Memoire dated the 22nd March, 2003, to various terms for the settlement of various outstanding issues and the separation of the two Divisions to be carried out under a scheme of De-merger approved by the High Courts. Specifically, Para III of the terms agreed between KK and MK state as per said Aide Memoire as follows :

"i. On any matter arising from this Aide-Memoire, until consent terms are recorded by the concerned Courts and the arrangement is accomplished, the joint decision of mediators, DND/GPG shall be adhered to by KK/MK, who shall, in the event of KK/MK agreeing in writing, supervise the arrangements till conclusion.

ii. The scheme for de-merger shall be finalised under the guidance of DND/GPG."

Accordingly, we would be obliged if you please act as Mediators to this process of separation of MFC and ICC and specifically :

Take all steps for finalizing the scheme(s) of De-merger.

Take any other step on other matters as per the said Aide-Memoire and in particular supervise the arrangements till the agreement set out in the said Aide-Memoire is fully achieved and the restructuring as per the Scheme of De-merger is fully implemented.

We agree to unequivocally abide by any joint decision made by you on any dispute or issue or matter of difference between the parties in the course of the aforesaid supervision and implementation.

Thanking you,

Yours sincerely,

sd/- sd/-

(M.K. Modi) (K.K. Modi)"

22. Shri D.N. Davar and Shri G.D. Gupta mediated. They held meetings with K.K. Modi and M.K. Modi. Certain decisions were arrived at with consent. These were minuted on 6.12.2003. Decisions minuted are as under :

"MINUTES OF THE MEETING HELD ON DECEMBER 6, 2003 AT MUMBAI

The Mediators Shri D.V. Davar and Shri G.D. Gupta met with Mr. K.K. Modi and

Mr. M.K. Modi at Hotel Taj Mahal, Mumbai.

Item No. 1

In the course of the meeting, issues relating to Clause 7 of the Aide Memoire dated March 22, 2003, forming basis/ substance of consent terms to be filed in appropriate court relating amongst others, to "One Time Settlement" of MPL's liabilities to lbs. along with "hive-off" of the Chemical Division of the MPL u/s 391-394 of the Companies Act, 1956, were discussed. After deliberations and consultation, in respect of Clause 7 of the said Aide Memoire, the following clarifications were provided by the Mediators and accepted by Shri K.K. Modi and Shri M.K. Modi.

1. The transfer of 700,000 Equity shares of MPL held by MSWM to Rajputana Fertiliser Limited (RFL) under the Rehabilitation Scheme of MSWM, if permitted by BIFR, shall be effected after approval of the Delhi High Court for which application will be made to Delhi High Court and KKM and MKM will support and cooperate for getting the High Court approval for the same. In consideration of the guarantee being given by KKM for the liabilities of RFL, RFL will also be a party to the application before the High Court and will, Therefore, be bound by the order of the High Court. The application to the High Court will be on the basis that on receipt of the said MPL shares by RFL, the same shall be purchased concurrently by KKM and MKM on a 0:50 basis and deposited by them with escrow agents, i.e. DND and GPG jointly and the voting rights in respect of such MPL shares shall be exercised only by the said escrow agents jointly.

2. Similarly, in respect of the 700,000 Equity Shares of MPL held by MIL will be transferred to a Special Purpose Vehicle (SPV) sponsored by MKM under the Rehabilitation Scheme to be finalised for MIL and if permitted by BIFR, shall be effected after approval of the Delhi High Court for which application will be made to Delhi High Court and KKM and MKM will support and cooperate for getting the High Court approval for the same. SPV will also be a party to the application before the High Court and will, Therefore, be bound by the order of the High Court. The application to the High Court will be on the basis that on receipt of the said MPL shares by SPV, the same shall be purchased concurrently by KKM and MKM on a 50:50 basis and deposited by them with escrow agents i.e. DND and GPG jointly and the voting rights in respect of such MPL shares be exercised only by the said escrow agents jointly.

3. On completion of hive-off as contemplated in the Aide Memoire, the Escrow agents shall be legally authorised to release the shares deposited with them and shall swap the shares of Chemical Company and Fibre Company as contemplated in the said aide Memoire dated March 22, 2003 without any further cash consideration to be paid by either party to each other.

4. The existing shares of MPL held by KKM and MKM as specified in Annexure to the Aide Memoire dated March 2, 2003 shall also be deposited immediately with the escrow agents, DND and GPG jointly. The same will remain with the escrow

agents DND and GPG jointly up to completion of the hive-off contemplated by the Aide Memoire dated March 22, 2003.

5. In the event that the Aide Memoire cannot be implemented, the escrow agents will return the MPL shares acquired from RFL and MIL and belonging to KKM and MKM to the parties to whom the shares belong.

6. Following the aforesaid clarifications, MKM will now have suits is No. 11047 of 2003 in Suit No. 1394 of 1996 and IA. No. 11046 of 2003 in Suit No. 434 of 1998 with the Delhi High Court disposed of accordingly, so that, directions are sought in accordance with this minutes.

Item No. 2

7. On the request of the Mediators, KKM agreed to use his good offices to resolve the complaint of MKM in respect of the issue of duplicate shares for 8350 equity shares of GPI held by RBGM by GPI.

Item No. 3

8. The dividend received from GPI in respect of financial year ended March 31, 2003 would be shared between MFC and ICC on a 50:50 basis as per the past practice. This is in line with par 10 of Aide Memoire dated March 22, 2003 which provides that the cut off date for the de-merger shall be April 1, 2003.

Similarly, on the same basis any refund of income tax received after April 1, 2003 but in respect of financial years ending prior to April 1, 2003 the same shall be shared between MFC and ICC as per the past practice.

As per the request of Mr. M.K. Modi, it was clarified that, 50% of the share of ICC in the dividend received from GPI would be utilised along with ICC's share in the refund of tax for the financial years prior to April 1, 2003 which is to be received shortly as an "on-account payment" to be adjusted against the overall obligation of payment of OTS amount to the financial institutions which would have to be discharged by the Company (to which ICC be vested) post hive-off.

The minutes hereof are signed by Shri K.K. Modi and Shri M.K. Modi in confirmation of their acceptance of the above clarifications in connection with the Aide Memoire dated March 22, 2003.

(G.P. Gupta) (D.N. Davar)

Place: Mumbai

Date: December 6, 2003

Accepted and Accepted and confirmed by:

M.K. Modi K.K. Modi

Place: Mumbai

Date: December 6, 2003"

23. Pursuant thereto, on 15.12.2003, Chemical Division of Modipon Ltd. paid Rs. 85.3 lacs to the Fibre Division. Further meetings were held by the mediators on 8.12.2003, 16.12.2003, 25.12.2003 and 29.12.2003. M.K. Modi and K.K. Modi did not agree on the pending issues. On 29.12.2003, the mediators expressed their unanimous opinion. Inter alia, they declared as under :

i) Sharing of losses on proportionate basis for income tax purposes under the proposed demerger scheme envisaging spinning off of Indo Chemical Division from Modipon Limited.

MK has taken the position that irrespective of the legal situation with reference to the provisions of Section 2(19AA) and 72 A(4)(b) of the Income Tax Act and notwithstanding the provision in para II (10) if the said Aide Memoire stating "The cut-off date for demerger shall be the 1st April,2003. MK shall not claim any compensation for tax-savings up to the financial year ending the 31st of March,2003" also para II (11) defining "the overall consideration for the aforesaid arrangement payable to FI/MK" which does not envisage any compensation for sharing of such losses, MK is not agreeable to share the company's losses on a proportionate basis, without proper compensation being preferred to the transferor company (MPL), KK, on the other hand, is insisting on the point that sharing of losses in question has been inherent in the background of the understanding reached with MK.

We have given very careful consideration to the matter. In the context of contradictory position under the relevant provisions of the Income Tax Act as also the spirit of paras II(10) and II(11) of the said Aide Memoire, we feel that the business understanding, in the overall sense, does point to the conclusion that the said losses are apportionable/allocable between Chemicals and fibre Division in proportion to the transfer of assets without any specific compensation therefore.

ii) Claim for Rs. 74.09 crores irrespective of the amounts settled with FIs under OT's MK has been insisting that as Fibre Division would be responsible for garnering its own resources for paying off the OTS's with FIs, should the aggregate amount exceed Rs. 74.09 crores, that Division (Fibre Division-MPL), contrary-wise, be entitled to retain any amount, which is saved from and out of all such OTS's reached and met by MPL below Rs. 74.09 crores.

The Mediators have again carefully addressed themselves to this issue. They have relied on the understanding recorded in para II (1) of the aforesaid Aide Memoire stating as "One Time Settlement with FIs as defined and mutually agreed (Appendix I) --- which read with Appendix I where the figure given is Rs. 74.09 crores as per MK, without any due diligence having been made and the OTSs" approvals from FIs then remaining to be received. Along with it, para 2 of Appendix i reads as under:

"MFC is not in a position to meet payment under One Time Settlement (OTS) with Fls. KK and MK between themselves have reached an agreement that on conclusion of demerger of Chemical Division from MPL and issue of fresh capital of Rs. 28 crores by way of right cum public issue to be underwritten by KK, the latter shall after utilization of funds aggregating Rs. 18.40 crores plus interest thereon referred to in item 6 of this Aide Memoire, extend support to fulfill the obligations under OTS which shall not be more onerous than as follows:

"75% of the principal amounting to Rs. 55.57 crores shall be payable on effectuation of demerger in 4 quarterly Installments commencing from 90 days from the date of such approval and the balance 25% after 5 years from the date of payment of first quarterly Installment."

The overall position, as it emerges, we hold, is self explanatory in as much as KK has to extend support to fulfill the obligations under OTS with a cap of Rs. 74.09 crores and not extend surplus or profit to MK.

iii) Preserving status of Balance Sheet of MPL, consequent on demerger MK has raised an apprehension about the Balance Sheet of MPL going away, creating problems in its rating and credit worthiness status with leading bankers, should be liability covering OTSs" with Fls continue appearing there, consequent on proposed demerger of Chemicals Division. It is desired that this liability might be taken over by the Chemicals Division per se: alternatively, unsecured/KK guaranteed debentures be issued by the Chemicals company to MPL for onward assignment to Fls as per OTS's schedule.

KK has turned down any suggestion for take-over of the liability directly on the books and/or issue unsecured debentures to MPL as suggested. Attention has been drawn by KK repeatedly to portion in para II (1) in Aide Memoire reading as "One time settlement with Fls as defined and mutually agreed (Appendix I). KK to provide suitable guarantees as may be acceptable to the Fls for payment of the same."

Though technically KK's position as stated is correct, to alleviate the deadlock, the Mediators have suggested, which is reluctantly acceptable to KK that a portion of OTS, not exceeding Rs. 18.52 crores, which has longer tenure and payable after one year, might be taken over by the resulting (demerged) Chemicals company, while Rs. 55.57 crores amortizable in the first year might be retained by the MFC.

iv) Valuation of MPL's shares held by MSWM and MIL to be acquired by KK and MKI on a 50:50 basis.

As per the understanding as recorded in para II(7) of the Aide Memoire of March 22, 2003, and subsequently clarified by the unanimously accepted and confirmed Minutes of the meeting held on December 6, 2003, MPL shares held by MSWM and MIL are to be acquired by KK and MK on a 50:50 basis. As regards valuation of such shares acquired by KK and MK be pooled and the average of the pooled

cost be apportioned between KK and MK on a 50:50 basis. If one set of such shares is purchased first, the price or cost paid be taken as "on account of payment" adjustable or subject to final adjustment on the conclusion of the second and final transaction.

vi) Signing of IFCI's letter dated September 11, 2003 conveying approval for one time settlement to MPL.

Continued delay, it is apprehended, might result in "break down" of the assiduously reached OTS arrangement with IFCI. We hold the view that KK might take a practical view to cut procrastination and sign the duplicate of IFCI's letter with the remarks:

Subject to demerger of Chemicals Division being accomplished as envisaged."

On the other hand, it is incumbent on MK to reach and procure OTS, on desire lines, from IDBI Along with, in-principle, approval for demerger of Chemicals Division, at the earliest.

Similarly, in-principle, approval, for the aforesaid merger be as well secured urgently by MK from the ICICI Bank Ltd. who has conveyed its approval for OTS part already.

vii) Amount of Rs. 74.09 crores payable by KK pursuant to guarantee(s) in the discharge of obligations of OTSs" of Fls and also non-compete fee payable to MK/ MK nominated companies " Payment mechanism and security therefore.

The payment under OTSs" obligation by KK/resulting company, we hold, will be made directly to Fls, on behalf of MPL, pursuant to the non-recourse guarantee(s) by KK/resulting company, consequent on demerger for which Fls would be expected to issue simultaneous notices to MPL/guarantors. They will also expectedly be as per consent terms filed with the concerned Courts/DRT and appropriate orders obtained therefore. This obviates the need for issuing separate guarantee by KK to MPL/MK. However, for orderly implementation of the accord covered by the Aide Memoire in its essential two parts; meeting obligations of OTSs" to Fls by KK/resulting company in terms of non-recourse guarantee(s) and the hive off of Chemical Division from MPL, both KK and MK shall keep in Escrow their entire shareholdings in MPL, present and future, with Escrow Agents: DND and GPG with voting rights as well as right to get such shares transferred in the event of default by either party, which shall provide effective security cover Along with appropriate Court Orders as per consent terms filed there both by KK/MK for non-compete fee as well to be paid by "KK to MK as per terms encompassing both the amount as well as the phasing of payment therefore.

The defaults under guarantee(s) by KK/resulting company, should that happen could render the assets of the Chemicals Division (resulting company) and those of KK personally liable to attachment and sale by the institutions, an eventuality which is a sufficient deterrent.

The requirement of MK for retention of GPI shares as well with Escrow Agents with authority to sell in the event of default has been dismissed by KK as unacceptable, stating being against business understanding under joint venture arrangement with Phillips Morris not permitting alienation of such shares.

viii) Payment of non-compete fee: Payee(s), Form/ manner and its phasing and additional security therefore.

The Aide Memoire dated March 22, 2003 enjoining on KK to make payment of non-compete fee to the extent and as per phasing to be decided by DND/GPG to MK/MK nominated companies was an ingredient deliberated upon prior to concluding the said Aide Memoire. KK is wholly averse to changing the mode of payment for reasons of tax efficiency, while the reasonableness of the amount and phasing are left to the Mediators: DND/GPG to decide. The suggestion of MK at this stage for appropriate fixing of price to be aid for swapping of shares of resulting company with those of MPL consequent on demerger as a part of family settlement is not acceptable to KK, stating being tax inefficient.

The Mediators hold, in the circumstances that MK need to adhere to the concept of allowable expense to KK/ resulting company and deal with the aspect of transparency and tax efficiency with appropriate choice of payee(s) and legally acceptable set-off mechanism on his own.

As for the additional security, apart from the one of Escrow arrangement and vesting rights of MPL shareholdings both by KK and MK as dealt with under item (vii), the cheque covering the first Installment on agreed basis shall, in any case, be kept in escrow with the Mediators and other Installments would expectedly be met in agreed due time, with shareholding being in escrow as stated under item (vii), providing the continuing security cover.

25. M.K. Modi resolved. On 6.1.2004, describing Shri D.N.Davar and Shri G.D.Gupta as facilitators, M.K. Modi terminated their mandate. On 16.1.2004, Shri D.N.Davar and Shri G.D. Gupta gave decisions on the pending issues. On 30.1.2004, they forwarded the scheme of demerger of the Chemical Division of Modipon Ltd. agreement for payment of non-complete fee compensation, escrow agreement and power of attorney in favor of the mediators.

26. Since Shri M.K. Modi did not agree, there was a deadlock. Suit No. 1394/96 was amended in April, 2005. Pleadings pertaining to the Aide Memoire and subsequent decisions of Shri D.N.Davar and Shri G.D.Gupta were brought on record by way of the amendment. Written statement in Suit No. 434/98 was also amended.

27. In a nut-shell, amendment to the plaint stated that K.K. Modi and M.K. Modi are in control of the two divisions of Modipon Limited i.e. Indofil Chemicals Division and Modipon Fibres Division respectively and it is said to persons who are being affected by the on-going dispute pertaining to the division of Modipon Limited. To resolve the inter se disputes, the two entered into an aide memoire

on 22.3.2003 with the object of resolving all disputes between the two. It is further pleaded that the aide memoire addressed the problem of pending defaults of the fibre division and M.K. Modi agreed to arrange for one time settlement with all financial institutions. In return K.K. Modi agreed to provide suitable guarantees and fulfilled obligations under the O.S not exceeding Rs. 74.09 crores. Sh. D.N.Davar and Sh. G.B.Gupta were assigned the task of implementation of the aide memoire as mediators. The two were to finalise the scheme for the merger. On 7.5.2003, M.K. Modi and K.K. Modi authorised the mediators to take steps for finalising the scheme of the merger. The two agreed to abide by the decisions of the mediators. Reference has been made in the amended plaint to the various meeting held by the mediators and the decision of the mediators (noted in para 22 to 24 above). Alleging back tracking by M.K. Modi, further prayers being K-1 to K-4 (noted in para 2 above) were added.

28. Response to the amended plaint by M.K. Modi is that aide memoire was an attempt to settle the disputes between K.K. Modi and M.K. Modi and the document was not a conclusive settlement on which a decree could be passed. Till all issues were resolved and a joint application brought before the Court, aide memoire had no legal consequences. Status of D.N.Davar and G.D.Gupta was stated to be that of facilitators. Reference was made in the written statement to the amended plaint to certain admissions of (sic).K.Modi in his pleadings to show that even K.K. Modi did not understand the status of D.N.Davar and G.D.Gupta to be that of mediators. It was further averred in the written statement to the amended plaint that one Sh. Kashin Memani was subsequently appointed as a Conciliator. He attempted a conciliation, but unfortunately failed. From this subsequent event, M.K. Modi pleads that it shows that the aide memoire was not intended to be a final settlement, in that, till everything was not sorted out, aide memoire remained a contingent document.

29. D.K.Modi, in his written statement to the amended plaint took a stand that the memorandum of understanding between the parties which was signed in the year 1989 was between the two groups with each member of the respective group signing the same. The aide memoire was signed between K.K. Modi and M.K. Modi alone and was not binding on any other member. It was pleaded that since the original dispute was between the two groups, till all members of the respective groups agreed to vary the original settlement, any limited settlement between two individuals was irrelevant.

30. By consent of parties, in view of the amended pleadings, following order was passed :

19.04.2005

Present: Mr. S.Ganesh Sr.Adv. with Mr. Pravin Bahadur and Ms. Meghalee for plaintiff.

Mr. Dushyant Dave Sr. Adv. with Mr. Manmohan Sr. Adv. with Ms. Bharti for defendant No. 2. Ms. Maneesha Dhir, Ms. Jayashree Shukla and Ms. Preeti Dalal

for defendant Nos. 1 and 15.

CS(OS) 1394/96

Learned counsel for the parties agree that evidence need not be recorded and matter could proceed straight away for arguments in harmony with the orders passed in CS(OS) No. 1394/1996 and 434/1998.

Parties agreed that in addition to the issues framed by the Division Bench vide orders dated 11.1.2000 in FAO(OS) NO. 324/1999 following issues be also framed:-

9. Whether the Aide Memoire is an accord incorporating a settlement between the parties and all pending issues stand resolved under the Aide Memoire?

10. If issue No. 9 is held in favor of the plaintiff of Suit No. 1394/1996, what is the effect thereof in respect of issues 1 to 8?

11. Whether decisions taken by mediators subsequent to the Aide Memoire are final and binding on the parties?

12. To what relief are the parties entitled in to light of Aide Memoire and the decisions taken by the mediators?

Parties agree that the effect and validity and adenoids and the decisions taken by the mediators, their validity and effect would be covered by the issues afore-framed.

List on 20.4.2005.

April 19, 2005 PRADEEP NANDRAJOG, J."

31. Issues 9 to 12 were framed in Addition to the existing 8 issues. Arguments commenced.

32. Arguments commenced in terms of the consent order dated 19.4.2005. During arguments, Sh. S.Ganesh, learned senior counsel for Sh. K.K. Modi urged that issues No. 9 to 12 be decided at the first instance for the reason, if decision thereon was in favor of Sh. K.K. Modi, issues 1 to 8 would be redundant. Sh. Dushyant Dave, learned senior counsel for Sh. M.K. Modi and Sh. Alok Dhir, learned counsel for Sh. D.K.Modi argued that all issues be decided so that the suit as a whole could be disposed of.

33. When arguments were on, Sh. K.K. Modi filed the two applications being disposed of by the present order. Order 23 Rule 3 of the CPC has been relied upon. In the two applications, identical prayers have been made as noted in para 3 above.

34. Order 23 Rule 3 of the CPC reads as under:-

3. Compromise of suit- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise

[in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.]

[Explanation: - An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]

35. Shri S.Ganesh, learned Senior Advocate for the applicants urged that if there is a written settlement between the parties or between some of the parties to a suit and said settlement is brought before the Court, the Court has no option but to record such settlement and pass a decree in accordance therewith. Per contra, Sh. Dushyant Dave, learned senior counsel for Sh. M.K. Modi and Sh. Alok Dhir argued that a contingent settlement cannot form the basis of a consent decree till the contingency under the settlement is not accomplished, further, no consequential directions can be passed where consent decree is prayed for. It was further urged that the issue of the status of Sh. D.N.Davar and Sh. G.D.Gupta under the aide memoire needed adjudication and further the issue as to what was the effect of only two parties being signatories to the aide memoire had to be decided on the substratum of the dispute as originally laid where members of Group A were pitted against members of Group B. In rebuttal, Sh. S. Ganesh, learned senior counsel for K.K. Modi urged that the suits could be disposed of by passing a decree binding M.K. Modi alone.

36. At the outset I may record that Sh. Dushyant Dave, learned senior counsel for M.K. Modi urged that since issues pertaining to aide memoire and the decisions taken by Sh. D.N.Davar and Sh. G.D.Gupta were already framed, it would be advisable to decide all the issues for in such eventuality the Court could better appreciate the settlement recorded in the aide memoire and its impact on the original dispute. Counsel urged that this procedure of complete decision on all issues was all the more necessary for the reason, prayers in the application as well as the amended plaint sought consequential orders for implementation of the aide memoire.

37. For the reason I am inclined to agree with the submissions of Sh. Dushyant Dave, learned senior counsel appearing for Sh. M.K. Modi, I am not dealing with the submissions urged by the parties as to what is the legal status of the aide memoire and what is the impact of only K.K. Modi and M.K. Modi, being

signatories thereto. I am also not dealing with the pleadings of Sh. K.K. Modi before the Debt Recovery Tribunal and before the Hon"ble Supreme Court relied upon by Sh. Dushyant Dave to show that K.K. Modi did not treat Sh. D.M.Davar and Sh. G.P. Gupta as mediators. I am also not dealing with the submissions raised by the parties as to what would be the impact of Sh. Kashi N.Menmani intervening thereafter at the request of K.K. Modi and M.K. Modi. I am also not dealing with the issue as to what was the role of Kashi N.Menmani.

38. My reasons for adopting the said course of deferring all these issues is that admittedly, original dispute arose out of the working and implementation of the M.O.U dated 24.1.1989 which was signed by 5 sons of late Seth Gujar Mal Modi as Group-B and Sh. K.N. Modi and his 3 sons as Group-A. The settlement effected under the M.O.U. Divided the management and control of Modi Group of Companies amongst Group A and Group B as also division of other assets. How Group A and Group B further effected settlements within the respective groups was not a subject matter of the M.O.U. Further, three companies, namely, Modi Industry Limited, Modi Pon Limited and Modi Spinning and Weaving Mills Limited had to be split. The M.O.U left the following to be worked upon and settled between the parties:-

- a. Valuation of the various companies to be done by M/s. S.B. Billimoria and Company.
- b. Scheme of arrangement to be framed by M/s. Bansi Mehta and Company on the basis of the valuation aforesaid for the split of the three companies.
- c. Since assets and liabilities of the Modi Group Assets were divided in the ratio 60: 40 between Group B and Group A, differential to be worked out and paid by one group to the other as the case may be.

39. Aide memoire deals only with the division of Modipon Limited. It deals incidentally with the share holding of other companies in Modipon Limited. It deals with payment of non-compete fee and payment of amount under one time settlement with the financial institutions pertaining to the hive of unit of Modipon Limited falling to the share of Group "A".

40. It would, Therefore, require to be considered as to what would happen to the split of Modi Industries Limited and Modi Spinning and Weaving Mills Limited for the reason the original M.O.U of 1989 requires even said two companies to be split. It has also to be noted that the aide memoire does not have the consent of all members of Group "A" and Group "B". It has further to be noted that clause 17 of the aide memoire stipulates that pending final demerger, voting rights of shares held by Modipon Limited and its subsidiaries relating to companies controlled by Group "B" shall be exercised at the instance of K.K. Modi and of the companies controlled by Group "A", it shall be exercised at the instance of M.K. Modi. Sh. Alok Dhir, learned counsel for D.K. Modi had serious objection as to from where K.K. Modi and M.K. Modi appropriated to themselves this power.

41. Ramchandra Bhikchand Nahar and another Vs. Narhar Maruti Udavant and others, was relied upon by Sh. S.Ganesh, learned senior counsel appearing for Sh. K.K. Modi to urge that a consent decree could be passed under Order 23 Rule 3 of the CPC notwithstanding that all parties to the suit were not signatories to the settlement.

42. Decision relied upon (refer para 7) that non-consenting parties were deleted from the array of defendants with the prior leave of the Court and thereafter decree passed by consent of the surviving litigating parties. In the instant case, there is not prayer to delete defendants other than M.K. Modi. Consent decree prayed for, if granted, would Therefore bind only M.K. Modi. The said consent decree would include clause 17 of the aide memoire. As noted above, said clause affects all members of group and group B. It is trite that by consent no decree can be passed which affects the rights of third parties. In the decision reported as Chand Kaur Vs. Raj Kaur (died) and others, , it was observed as under:

"12. Finality of decisions is an underlying principle of all adjudicating forums. Thus creation of further litigation should never be the basis of a compromise between the parties. Rule 3(a) of Order 23 of the Code further provides that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. The scheme of Order 23, Rule 3 of the Code is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and a voluntary act on the part of the parties. The Court can be instrumental in having an agreed compromise effected and finality attached to the same. The Court should never be party to imposition of a compromise upon an unwilling party."

43. Prayer made in the two applications seeks directions from this Court. It is evident that the applicants pray for a decree more than a decree on consent.

44. I refrain from opining any further lest any observation causes prejudice to either party for the reason I have gone by the submission of Sh. Dushyant Dave, learned senior counsel appearing for Sh. M.K. Modi that in view of issues 9 to 12 framed, suit in its entirety should be decided and at that stage, impact of aide memoire, its legal status, how parties understood, authority of Sh. D.N.Davar and Sh. G.P. Gupta and allied issues could be decided.

45. For the reasons aforesaid, I.A.3420/05 in Suit No. 1394/96 and I.A.3419/05 in Suit No. 434/98 are dismissed. It is clarified that nothing contained in this order shall be read as an expression on the merits of the controversy between the parties as per their respective pleadings post amendment of the plaint in Suit No. 1394/96 and amendment of the written statement in Suit No. 434/98. Further, nothing stated herein would be read as an expression the merits of the disputes required to be determined as per issues 9 to 12.

46. No costs.