

(2007) 05 BOM CK 0021

In the Bombay High Court

Case No : Company Application No. 1123 of 2006 in Company Application No. 1122 of 2006 in Company Petition No. 731 of 2005

Reliance Natural Resources Limited, (Formerly Global Fuel Management Services Limited)

APPELLANT

Vs

Reliance Industries Limited

RESPONDENT

Date of Decision : 03-05-2007

Acts Referred:

Companies Act, 1956 — Section 392

Citation : (2008) 142 CompCas 139

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Mukul Rohatgi, V.R. Dhond, S.B. Kirpal and Manali Singhal, Mulla and instructed by Mulla and Craigie Blunt and Caroe, for the Appellant; Harish N. Salve and Milind Sathe, Sr. Counsels, Firdosh Pooniwala and Meenakshi Grover Advs., Junnarkar, instructed by and Associates, for the Respondent

Judgement

A.M. Khanwilkar, J.—This Order will dispose of prayer for ad-interim relief pressed by the Applicant.

2. Present Application has been taken out in the Application filed by the Applicant purported to be u/s 392 of the Companies Act, 1956 (hereinafter referred to as the Act). That Application arises out of the order passed by the Company Judge on 19th December 2005 sanctioning Scheme of Arrangement/De-merger of Reliance Industries Limited (RIL). The Scheme sanctioned by this Court became effective on 21st December 2005. The present proceedings are essentially confined to the issues arising from the Scheme sanctioned by the Court in relation to the business and undertaking of gas based power generation, distribution and transmission of the gas based energy undertaking.

3. The controversy in the present proceedings is in relation to the Gas Sale Master Agreement (GSMA) and Gas Sale Purchase Agreement (GSPA) executed between the Applicant and Respondent Companies on 12th January 2006 as

amended on 27th January 2006. According to the Applicant, the said Agreements have neither been executed in accord with the Scheme sanctioned by this Hon''ble Court nor the stipulations therein are consistent with the spirit of demerger scheme sanctioned by Court. In fact, the same if given effect to, would frustrate the Scheme sanctioned by Court. Whereas, according to the Respondent Company, the said Agreements were executed between the two Companies in furtherance of Clause 19 of the Scheme sanctioned by this Court.

4. It is relevant to note that the new Board of Directors of the Applicant Company after the Scheme became effective, came to be constituted on 7th February 2006, on which date, the management of the Applicant Company was taken over by the Anil D. Ambani Group. It is the case of the Applicant that soon thereafter the Applicant protested about the scope of the two Agreements by letter dated 28th February 2006. As the grievance of the Applicant remained unresolved, the Applicant Company has preferred application being Company Application No. 1122 of 2006 on 8th November 2006, purported to be u/s 392 of the Act, for the following reliefs:

(a) Order and Direct RIL to take all necessary steps in order to ensure actual supply of 28 MMSCMD OR 40 MMSCMD of gas to RNRL on the NTPC Contract Terms and as per the commercial aspect set out in para 8.3 hereinabove.

(b) Order and Direct RIL to execute an amendment to the Gas Supply Master Agreement dated January 12, 2006 and to the Form of Gas Sale and Purchase Agreement attached in Schedule 3.2 thereto, to bring them in line with the Gas Supply Master Agreement and Form of Gas Sale and Purchase Agreement as set out in Exhibit-"J" to this Application. (c) restrain RIL from creating any third party interests or rights in respect of i) 28 MMSCMD of Gas to be supplied to the Applicant; ii) 12 MMSCMD to be supplied to the Applicant on firm basis in case NTPC Contract does not materialize; and/or entering into any contract(s) and/or use or supply to any third party the said gas (28 MMSCMD or 40 MMSCMD, as the case may be) which is required to be supplied to the Applicant under the Scheme.

(d) pending the hearing and final disposal of the Application, direct RIL to supply the said 28 MMSCMD or 40 MMSCMD gas, as the case may be to the Applicant on the same terms as per NTPC contract.

(e) ad-interim reliefs in terms of prayer (c) and (d) above.

(f) such further orders be passed and/or directions be given as this Hon''ble Court may deem fit and proper.

5. In the said Application, the Applicant Company has filed further application, which is presently under consideration for grant of interim relief, on 10th November 2006, being Company Application No. 1123 of 2006. The relief claimed in the Application under consideration reads thus:

a) RIL be restrained from creating any third party interests or rights in respect of

i) 28 MMSCMD of Gas to be supplied to the Applicant, ii) 12 MMSCMD to be supplied to the Applicant on firm basis in case NTPS Contract does not materialize; and/or entering into any contract(s) and/or use or supply to any third party the said gas (28 MMSCMD or 40 MMSCMD, as the case may be) which is required to be supplied to the Applicant under the Scheme.

b) ad-interim relief in terms of prayer (a) above.

c) For such other and further reliefs, as this Hon'ble Court may deem fit and proper.

6. It appears that the hearing of the Applications filed by the Applicant was deferred from time to time. In the meantime, the parties have exchanged pleadings contesting the rival claim. The Applications were in fact listed for hearing and final disposal on 29th March 2007 before another Judge of this Court, but were removed from the Board with direction not to be placed before that Judge. The Applications are now assigned for hearing as per the directions of the Chief Justice, to me. On 13th April 2007, matter was mentioned by the Counsel for the parties for fixing date of hearing. As the Counsel indicated that hearing of the Applications may take some time, on account of heavy board of Notice of Motions for ad-interim reliefs, Counsel for the parties were told that the matter can be finally heard only after the Summer Vacation. However, Counsel for the Applicant insisted that the Court may give some tentative date on which date, it may consider prayer for grant of ad-interim relief. Counsel for the Applicant pointed that although the proceedings have been filed in November 2006 and as the same were already scheduled to be heard finally, the Applicant did not press for ad-interim relief; however, in view of the recent developments noticed by the Applicant as reported in several Press release in February and April, lastly dated 26th April 2007, there was need to consider prayer for ad-interim relief as the final hearing of the main Application cannot proceed before Summer Vacation of the Court. Accordingly, Application was directed to be placed for hearing on 30th April 2007 for consideration of ad-interim relief. I have heard Counsel for both sides fully on the point of ad-interim relief.

7. After having gone through the pleadings and the documents on record and considering the rival submissions advanced across the Bar, the first question that needs to be addressed is: whether the Company Application No. 1122 of 2006 for the reliefs claimed therein by the Applicant, is maintainable within the purport of Section 392 of the Act. The sweep of Section 392 of the Act and the power of the Court is no more res integra. On the plain language of that Section, it is obvious that the Court has power to supervise the carrying out of the compromise or an arrangement ordered by it. It is also open to the Court to issue such directions in regard to any matter or make such modifications into compromise or arrangement as it may consider necessary for the proper working of the compromise or the arrangement. At this stage of the proceedings, suffice it to observe that notwithstanding the reliefs claimed in the main Application, the Court can always mould the reliefs in such manner so as to bring it within the

parameters of Section 392 of the Act.

8. The moot question is: whether the GSMA dated January 12, 2006 is the integral part of the Scheme sanctioned by the Court. There can be no doubt that an Agreement, though executed purportedly in furtherance of Clause 19 of the Scheme sanctioned by the Court; nevertheless, it cannot be treated as integral part of the Scheme. However, the Applicant has raised fundamental issue that there is no suitable arrangement/agreement entered into between the new management of the Applicant Company who took over the reigns of the Applicant Company under the leadership of Anil D. Ambani, after the Scheme sanctioned by Court became effective. In other words, the purported Agreements are not Agreements within the meaning of Clause 19 and other enabling provisions of the Scheme sanctioned by the Court as such. The purported Agreements, however, are entered into by the erstwhile management of the Applicant Company the alter ego of the demerged Company/Respondent and not the new Management under the leadership of Anil D.Ambani as per the Scheme sanctioned by the Court. Under the Scheme sanctioned, Anil D.Ambani is expected to take responsibility for providing focussed management attention and leadership to the segregated and demerged business. In absence of suitable arrangement arrived at between the new regime of the Applicant Company with the Respondent Company, after the new management took over the reigns of the Applicant Company on 7th February 2006, there can be no proper working of the compromise or arrangement. Indubitably, on and after the date when the Scheme sanctioned by the Court became effective on 21st December 2005, the erstwhile management of the Applicant Company (the alter ego of the demerged Company/Respondent) could not have taken decisions on policy matters till the new management of the Applicant Company in terms of the Scheme sanctioned by Court took over the management of the Applicant Company, which happened only on and from 7th February 2006. Resultantly, there is no suitable arrangement still arrived at between the Applicant Company after the new Board of Directors under the leadership of Anil D.Ambani was constituted and took over the reigns of the Applicant Company on 7th February 2006, as is required by Clause 19 and other enabling clauses of the Scheme sanctioned by Court. These and such other related issues nevertheless will have to be considered by this Court in exercise of powers u/s 392 of the Act.

9. According to the Applicant, the Scheme sanctioned by the Court was and is indisputably in relation to the power business of the demerged company (transferor company). The demerged company (Respondent) had expanded its activities in the Gas Based Energy business where gas could be used as a primary fuel. That allowed integration of the gas to power value chain and enabled exploiting of the synergies therein. The Preamble of the Scheme sanctioned, leaves no manner of doubt that demerged company had decided to make a strategic investment in REL (formerly B.S.E.S. Limited) which was engaged in generation of coal based power in Dahanu, Maharashtra and also in the business of transmission and distribution of powers to Mumbai, Delhi, Orissa,

Goa, etc. It is common ground that the demerged company had acquired equity share holding and management control of REL. With a view to further the business objective, REL had announced setting up of gas based projects in India. The demerged company (Respondent) then committed itself to use part of its gas discoveries for the generation of power. Obviously, such commitment was to enure till the generation of power was carried on by the concerned gas based projects already established or the prospective ones to be the affiliates or the undertakings of the demerged company. In furtherance of that commitment, the demerged company also committed itself to work out the appropriate gas supply arrangement between RIL and Global Fuel Management Services (now RNRL - Applicant), pursuant to which, gas was to be supplied to REL for their power projects including Reliance Patal Ganga Power Limited, for the generation of power. Sub-clause (ii) of Clause (A)(f) of the Preamble makes it plainly clear that the above mentioned business of supply of gas to REL for their power projects including Reliance Patal Ganga Power Limited for generation of power as an integrated whole, constituted the gas based energy undertaking of RIL. It is this defined business carried on by the undertaking of RIL was to be segregated and demerged to be vested in the Applicant Company under the leadership of Shri Anil D.Ambani who was to take responsibility for providing focussed management attention and leadership to the segregated and demerged business. Sub-clause (b) of Clause (B) of the Preamble unmistakably spells out this position. The spirit of the Scheme approved by the shareholders and eventually sanctioned by the Court was to provide new management and leadership to the Applicant Company of Anil D.Ambani in relation to the segregated and demerged business. Indubitably, the gas based energy resulting company was incorporated with one of its main objective as "to carry on, manage, supervise and control the business of transmitting, manufacturing, supplying, generating, distributing and dealing in electricity and all forms of energy and power generated by any source whether nuclear, steam, hydro or tidal, water, wind, solar, hydrocarbon fuel, natural gas or any other form, kind or description." The Scheme sanctioned by the Court, however, is specific to the commitment of the demerged Company to use part of its gas discoveries for the generation of power by the Applicant Company and its Affiliates and to supply such quantity of gas to the Applicant for their power projects including Reliance Patal Ganga Power Limited, for the generation of power. The business of supply of gas to Applicant for their power projects including Reliance Patal Ganga Power Limited, the generation of power as an integrated whole, constitute the segregated and demerged business to vest in the Applicant. Therefore, it is only the Management under the leadership of Anil D.Ambani who had taken over the reigns of the Applicant Company after the effective date, would have arrived at any suitable arrangement with the Respondent demerged company for the proper working of the compromise or arrangement. This view is reinforced by Clause 4.2 of the Scheme sanctioned by the Court, which deals with the contracts, deeds, etc. The erstwhile management of the demerged undertaking was incompetent to enter into contracts, agreements or arrangements including the arrangement required to be evolved

by the demerged undertaking and the demerged company in terms of Clause 19 of the Scheme sanctioned by the Court "after the effective date". For, Clause 4.2(a) would bind the Applicant Company (demerged undertaking) only of all contracts, deeds, bonds, agreements, schemes, arrangements and other instruments of whatsoever nature in relation to the demerged undertakings to which the demerged company (Respondent) is a party or to the benefit of which the demerged company may be eligible, and which are subsisting or have effect immediately "before the effective date". Clause 4.2 (b) makes the position still clearer. It provides that notwithstanding the fact that vesting of the demerged undertaking occurs by virtue of the Scheme itself, each of the resulting Companies may, at any time after "the coming into effect of this Scheme" in accordance with the provisions of the Scheme, if so required in any law or otherwise, take such actions and execute such deeds (including deeds of adherence) confirmations or other writings or tripartite arrangements with any party to any contract or arrangement to which the demerged company is a party or any writing as may be necessary in order to give formal effect to the provisions of this Scheme. Provision regarding conduct of business in terms of Clause (6) of the Scheme sanctioned by the Court also would indicate that the activities relating to each of the demerged undertakings which are carried on by the demerged company between appointed date and including the effective date for and on account of and in trust for the respective resulting companies. There is no provision authorising the erstwhile management of the demerged undertaking to carry on activities or permit them to take decisions on policy matters pertaining to the business of the demerged undertaking even after the "effective date". As per the Scheme sanctioned, that was expected to be done by the new Board of Directors of the Applicant Company under the leadership of Anil D.Ambani.

10. Thus understood, the suitable arrangements in relation to the supply of gas for power projects of Reliance Patal Ganga Power Limited and REL with the gas based resulting company (Applicant) was required to be entered into between the Applicant and Respondent albeit after the new Board of Directors under the leadership of Anil D.Ambani had taken over the reigns of the Applicant Company on 7th February 2006. The purported agreements dated 12th January 2006 and as amended on 27th January 2006 being prior to such date, cannot be said to have been executed in furtherance of the Scheme sanctioned or for carrying out the compromise or an arrangement or for the proper working of the same as such. In other words, in law, there is no suitable arrangement still entered into between demerged undertaking (Applicant) and the demerged Company (Respondent) as required by Clause 19 and other enabling clauses of the Scheme sanctioned. Advisedly, the Applicant is claiming relief in this Application for a direction against the Respondent to execute an amendment so that a suitable arrangement can be worked out relating to the subject matter on the stated terms. Whether the reliefs asked by the Applicant can be granted in toto or moulded, is a matter for consideration. The abovesaid and other related issues

pertain to the carrying out of the compromise or an arrangement and of issuing necessary directions for the proper working of the compromise and arrangement, falling within the sweep of Section 392 of the Act.

11. The other fundamental issue raised on behalf of the Applicant is that the purported agreements dated 12th January 2006 as amended on 27th January 2007 if acted upon, will be ruinous to the Scheme sanctioned by the Court. In that, the Applicant Company will be just left holding paper documents and a shell company without any actual business. It is asserted that the business of supply of gas is the entire substratum of the business of the Applicant which has vested in the Applicant Company in terms of the Scheme sanctioned by the Court; whereas, as per the scope of the purported agreements, the Applicant Company has been tied down to execute or cause the execution of one or more GSPAs with regard to the quantities of gas available for contracting for the subject blocks. Whereunder, seller would be Respondent or its Affiliates and the buyer "shall" be the Affiliate of RNRL" which owns the power plant and would consume the gas itself. That means the gas would not be supplied by the Respondent demerged company to the Applicant Company, but directly to the Affiliates of the Applicant Company. Resultantly, the entire substratum of the business of the Applicant Company will disappear. That, however, was not the spirit of the Scheme approved by the shareholders and also sanctioned by the Court. As a consequence, the Applicant Company will only remain as a shell company without any actual business.

12. Prima facie, there is substance even in this submission. Going by the Scheme sanctioned by the Court as is noted earlier, the spirit of the Scheme was to bind the Respondent (demerged Company) of its commitment of setting up of gas based power generation projects in India already announced by it in anterior to the scheme and also its further commitment to use part of its gas discoveries for the generation of power for which purpose, an appropriate gas supply arrangement was to be entered between the demerged company and Global Fuel Management Services Limited (now RNRL Applicant) pursuant to which gas was to be supplied to REL for their power projects including Reliance Patal Ganga Power Limited for generation of power. The Scheme is in relation to demerger of business of supply of gas to REL for their power projects including Reliance Patal Ganga Power Limited for generation of power as an integrated whole.

13. Thus understood, the purported Agreements not being in accord with the Scheme sanctioned by Court, are not ascribable to suitable arrangement envisaged by Clause 19 and other enabling clauses of the Scheme sanctioned by Court. The concomitant is that no suitable arrangement has still been worked out between the Resulting Company (Applicant) and the demerged company in relation to the supply of gas for power projects of Reliance Patal Ganga Power Limited and REL Gas Based Resulting Company as such. In that case, the need to supervise the carrying out of the compromise or arrangement and to issue direction for the proper working thereof, does arise. Viewed thus, the Company

Court will have power to supervise such and related aspects. That enquiry will also include whether the suitable arrangement, if given effect to, will or will not further the proper working of compromise or arrangement of segregation or demerger of business of supply of gas to the Applicant Company now under the leadership of Anil D.Ambani who has been entrusted with the task of providing focussed management attention and leadership to the segregated and demerged business.

14. The Respondent would, however, argue that the Government policy obligates that the contractor (demerged company) although has freedom to sell gas within India, has to do so firstly by transparent open competitive bidding process to discover the gas price and in any case, on the basis of arms length transaction between non-affiliates. In other words, as per the extant Government policy, the gas at the highest will have to be supplied directly to the power projects-affiliates of the applicant company. Therefore, the agreements purport to sell the gas to the affiliates of the applicant company for utilisation thereof for the generation of power. The argument though attractive, does not commend to me. The Government policy is founded on the report of the committee submitted sometime in November, 2006. The Committee at more than one place has clarified that the deliberation was only for the valuation of natural gas and the committee was not going into the principle of natural gas pricing as such. The Committee has noted that ideally, the price ought to be determined through transparent open competitive bidding process to discover gas price. However, where no such competitive bidding route has been followed, the alternatives to discover gas prices will have to be resorted to. The fact that the Government has rejected the pricing pattern agreed between the two companies, as stated in the reply affidavit, also will be of no avail. Rejection of pricing pattern agreed between the parties by the government does not, in any manner, prohibit the parties from entering into appropriate suitable arrangement regarding supply of gas to the applicant company as per the scheme sanctioned by the Court, which indeed, should be consistent with the extant regulations. It is, however, seen that the Contractor has freedom to sell natural gas within India. The valuation of the natural gas is only for the purpose of determining royalty and other calculations required under Production Share Contracts (PSC) and royalty and PLT under CBM contracts. As it was the commitment of demerged company (Respondent) to supply gas to the demerged undertakings (Applicant) and that being the basis of approval by the shareholders and Scheme sanctioned by the Court, the demerged company (Respondent) is under obligation to discharge that commitment of supply of gas to applicant for their power projects including Reliance Patal Ganga Power Limited for generation of power as integrated whole.

15. On the above finding there can be no doubt that this Court will have to consider the issues raised in the main application filed by the applicant company purported to be u/s 392 of the Act calling upon this Court to supervise, the carrying out of the compromise or an arrangement and to issue such direction, as it may consider necessary for proper working of the compromise or an

arrangement. The nature of relief that should be granted is a matter, which will have to be considered at the end of hearing.

16. Suffice it to observe that the purported agreements dated 12th January, 2006 as amended on 27th January, 2006, will be of no avail. Those agreements, in the eye of law, are not suitable arrangements under Clause 19 or other enabling clauses of the Scheme sanctioned by Court as such. It necessarily follows that there is no suitable arrangement still entered into between demerged company (Respondent) and the applicant in relation to the supply of gas for power project of Reliance Patal Ganga Power Limited and REL gas basis energy resulting company. I am presently not addressing other issues, as I am of the view that the Company Court will have to make in-depth scrutiny of all the issues and at the end of the hearing of the main application may consider it necessary to issue such direction, as may be warranted for proper working of compromise or an arrangement.

17. The next question is what is the nature of ad-interim relief that needs to be granted. In the present case, ad-interim relief as prayed on behalf of the applicant company is limited to securing its interest or rights in respect of the specified quantity of gas, which the respondent company is obliged to supply. According to the Applicant, the quantity has been specified and agreed upon in the past. That family arrangement was the basis of the demerger Scheme. Be that as it may, it is not the case of the applicant that the applicant company has interest or rights in respect of the entire quantity of gas explored and produced by the respondent company. From the recent press release, it does appear that the respondent company has planned to auction K.G.Bhasin gas. As per the press release it appears that the respondent has already initiated process of selling gas through auction and which process is likely to complete by June 2007, after which the gas sale agreement would be signed with the various customers. Indeed, having regard to the limited interest or rights of the applicant company in relation to the specified quantity, there is no question of stalling the entire auction process, in particular, with regard to the remaining quantity. In other words, it will be open to the respondent company to continue with the process of selling the remainder quantity of gas after setting apart the specified quantity of gas which the respondent has committed to supply to the applicant company as per the scheme sanctioned by the Court.

18. Counsel for the Respondent would, however, fervently argue that the Applicant Company is not entitled for any ad-interim relief on account of delay and laches. It is submitted that the purported agreements have been executed in January 2006 and the new Board of Directors of the applicant Company was constituted and took over charge on 7th February 2006, whereas the subject Applications have been filed in this Court only in November 2006 and prayer for ad-interim relief is pressed only recently. Indeed, this argument is attractive. However, in the fact situation of the present case, at this stage of the proceeding, I am inclined to take the view that the same cannot be the basis to

deny the relief claimed by the Applicant of calling upon this Court to supervise the carrying out of compromise or arrangement and to issue such direction as may be considered necessary for the proper working thereof. Although both the companies are limited companies but there are large number of stakeholders. In so far as applicant company is concerned, there are more than 20 Lakhs shareholders, having concern and interest in the affairs of the applicant company. It would have been a different matter if the new Board of Directors after taking over the management had entered into some agreement with the Respondent Company. However, as noted earlier there is no agreement entered into between the applicant company and the demerged company (respondent) after new Board of Directors took over the management under the leadership of Anil D.Ambani. The fact that one representative of the group of Anil D.Ambani was party to the deliberation before execution of the purported Agreements, will be of no avail. The Agreements after the effective dates could be executed only by the new Board of Directors, which was the spirit of the Scheme sanctioned by the Court.

19. Indeed, the Counsel for the Respondent had also argued that the Applicant cannot succeed in getting any interim relief, as the case of the Applicant was that the purported Agreements were fraudulent documents. The party who claims the documents to be creature of fraud, cannot rely on the self-same document for grant of ad-interim relief. The Applicant, however, has disputed that it has termed the purported Agreements as creature of fraud as such. Whereas, according to the Applicant, the said documents -purported Agreements are not as per the spirit of the Scheme sanctioned by the Court and of no avail.

20. Be that as it may, the question is what is the ad-interim relief that needs to be granted in the fact situation of the present case? Although the Applicant Company has specified the quantum of gas which it is entitled to receive from the Respondent Company by way of supply for their power projects for generation of power, however, has not disclosed the immediate actual consumption of gas by the existing power projects and future requirements of the concerned power projects. Even so, the Applicant Company, for the present, will be bound by the scope of relief claimed by way of ad-interim relief in the Application under consideration. In the circumstances, Respondent Company will have to be directed to ensure that no third party interest or right is created in respect of specified quantity of gas to be supplied to the Applicant under the Scheme on firm basis. In other words, the Respondent Company may proceed with the process of sale of the gas through auction, but of the remainder quantity of the gas explored and produced by it. Respondent Company will take all precautions to ensure that specified quantity of gas to be supplied to the Applicant is set-apart and made available if and when directed. This direction is only ad-interim arrangement till the Application is heard.

21. Having regard to the nature of controversy and sizeable number of stakeholders in both the companies, the affairs of the Company being in public

domain, it is appropriate that the main Application is heard expeditiously. The main Application being Company Application No. 1122 of 2006 be listed for hearing immediately on re-opening of the Court after Summer Vacation. The said Application be peremptorily listed on 7th June 2007 for hearing. If there is any other controversy, all those aspects can be considered and addressed in the main Application, which may be decided prior to the completion of the auction process which is reported to have been initiated by the Respondent Company. The above direction will meet the ends of justice.

22. Accordingly, ad-interim relief in terms of prayer Clause (a) of the Application under consideration is granted. It is made clear that the view expressed in this decision is only a tentative view for consideration of prayer for ad-interim relief. Pending proceedings will be decided uninfluenced by any of these observations. All questions therein are left open.