

**THE ICSI 6<sup>th</sup> ALL INDIA MOOT COURT COMPETITION 2008 - PROBLEM**

**IN THE HIGH COURT OF DELHI**

**C.P.No: 36 of 2007**

Paolo Luscini & Co. (PL)

..... Petitioners

Vs

RELIVE CO. LTD

..... Respondent

1. RELIVE CO.LTD was incorporated in the year 1971 in the State of Maharashtra with the object of carrying on the business of media and telecommunications. The paid-up share capital of the company was 130 million comprising of 13 million shares of Rs. 10 each. The Company initially made a foray into radio and later into the television segment in India. In the 1990s, there was an unprecedented growth in television viewership, which led RELIVE CO.LTD to invest heavily in its TV division.
2. With the focus shifting to television, the radio business was largely neglected and contributed a very insignificant share to total revenues. At times, the Board of directors even considered discontinuing the radio business. However, the proposal was always thwarted by a few senior members of the management popularly known as the Phalke group, being headed by the one of the promoters, Natesh Phalke. This group did not subscribe to the new-age philosophy of television and internet but believed that radio, as a form of communication, still had the widest possible reach in the country and therefore, the business had to be nurtured and revived.
3. At that time, one of the biggest problems faced by the industry in general, and RELIVE CO. LTD in particular, was the rate of attrition amongst employees. The difficulty in retaining employees was more pronounced in the radio business and this led the Phalke group to moot the proposal of engaging Human Resource Consultants to address the problem of attrition in the company. When the matter was brought up in the Board Meeting held in October 2000, the directors responsible for managing the TV business opposed the suggestion contending that it would involve heavy investment with no commensurate tangible/perceivable benefits. After heated discussions, it was finally resolved that Consultants would be engaged for the entire company (not just the radio business) on an experimental basis for a period of 2 years initially, with an option for renewals every two years. It was further resolved that the entire amount of consultancy fees would be paid out of the annual budgetary allocation made to the Radio Division and would constitute expenses of the Radio business. Accordingly, a consultancy contract was entered into in December 2000 with a renowned Italian company Paolo Luscini & Co. (PL) which specialized in recruitment consultancy and employee retention programmes.
4. Some relevant clauses of the consultancy contract are reproduced below:

Reorganization Clause:

“(a) ....

(b) The Company agrees that no reorganization of business shall take place without notice to the Consultant. Provided that the consent of the Consultant shall not be required where no payments under the Contract are outstanding/due to the Consultant as on the date of sanction of the scheme for reorganization.”

Payment Clause- “While the services may be delivered to different divisions separately and the Consultant’s fees and bills would be raised as a lump sum (giving a break-up of fees for each division), the payment would be made as a lump-sum without any demarcation of the amounts attributable to each division”.

Dispute Resolution Clause: “Any dispute arising out of or in connection with this contract shall be referred to arbitration by a panel of three arbitrators with one arbitrator appointed by each party, who will in turn agree upon the third arbitrator. The place of arbitration shall be Singapore and the language of arbitration shall be English.”

5. In the year 2004, it was finally decided to hive off the radio business into a separate company under the Phalke group and a demerger proposal was accordingly drafted. With a revival in the radio audience, it was believed that a demerger of the business to a separate company with a focused strategy would have a positive impact on revenues and also enhance shareholder value.
6. The salient features of the Demerger Scheme were as follows:
  - (a) All assets, debts, duties, liabilities and obligations of the RELIVE Co. LTD (demerging company), appertaining and relatable to the Radio Business as on the date of demerger (Effective Date), whether provided for or not in the Books of Accounts of the demerging company, whether disclosed or undisclosed in the Balance Sheet, shall be the assets, debts, duties, liabilities and obligations of RELAY CO. LTD (Resulting company) and the Resulting Company undertakes to meet, discharge and satisfy the same.
  - (b) All legal or other proceedings by or against the demerging company under any statute, whether pending on the Effective Date or which may be instituted in future in respect of any matter arising before the Effective Date and relating to Radio Business (including those relating to any property, right, power, liability, obligation or duties of the demerging company shall be continued and enforced by or against the Resulting Company only after the Effective Date.
  - (c) All contracts, deeds, bonds agreements and other instruments of whatsoever nature, relating to the Radio Business to which the demerging company is a party or to the benefit of which the demerging company may be eligible and which are subsisting or having effect immediately before the Arrangement shall remain in full force and effect against or in favour of the resulting company and may either be enforced as fully and effectually as if instead of the demerging company, the resulting company had been a party thereto or replaced by fresh contracts/deeds etc. executed by the resulting company with the third party concerned.
  - (d) Any statutory licenses, permissions or approvals or consents held by the demerging company required to carry on operations of Radio Business shall stand vested in or

- transferred to the resulting company without any further act or deed, and shall be appropriately mutated by the statutory authorities concerned therewith in favour of the resulting company.
- (e) Consequent to the demerger, for every 3 equity shares held in the demerging company, the shareholder will receive 1 equity share in the resulting company.
7. After the Scheme was approved by 90% of the shareholders and 80% of the creditors of the Company, the Bombay High Court passed an order on 22.02.2005 sanctioning the Scheme without any modifications and a certified copy of the said order was filed with the Registrar of Companies on 15.03.2005. Following the demerger, RELIVE Co. LTD also shifted its Registered Office from Nagpur to Delhi as most of the directors of the demerged company were based in the capital.
  8. While there were positive effects on shareholder value as a whole, the flip side of the demerger was that the television business initially took a hit due to the sudden absence of senior personnel in the management of the company (RELIVE CO. LTD). This situation worsened with the loss of a few critical contracts for the telecast of major sporting and entertainment events. For the first time since inception, the company reported losses for the FY 2005-06.
  9. On September 12, 2006, RELIVE CO.LTD terminated the Consultancy Agreement with Paolo Luscini & Co. (PL). In December 2006, PL. sent a legal notice to RELIVE CO. LTD. demanding the settlement of outstanding consultancy dues to the tune of Rs.150.26 million, being fees payable for the years, 2003-2004 and 2004-05 along with damages to the extent of 75 million for premature termination of contract [current tenure of the contract – 20.1.2005 to 20.1.2007]. According to PL., Mr. Divyanand Bhakshi, a member of the Phalke group had engaged the Consultant to conduct market research in the television and radio segments. PL. produced written acknowledgements of Mr. Bhakshi, which evidenced the commissioning of the said services as well as an undertaking on behalf of the company to pay for the same. PL. contended that the amounts were admitted debts and PL. was entitled to payment of the same. Incidentally, for the years 2005 and 2006 till the demerger took effect, Mr. Bhakshi had been heading the television division. However, with the demerger taking effect, he resigned from his directorship in RELIVE CO. LTD and took over as a director on the Board of RELAY Co. Ltd.
  10. By reply dated March 21, 2007, RELIVE merely responded to the demand for damages and stated that the same was not payable as the termination was for cause and the Consultant had not provided any services in the past 1 year. Subsequently, in April 2007, PL. sent a demand notice under Section 434(1) (a) of the Companies Act, 1956 for its outstanding dues.
  11. To this, RELIVE sent a response stating that all liabilities/obligations pertaining to the contract had been taken over by RELAY CO. LTD and a copy of the earlier legal notice had already been forwarded to RELAY for necessary action. Further, RELIVE contended that the sums claimed by the Consultant were for additional services allegedly rendered by the Consultant and were in excess of the contractual fees already paid to the consultant. The director, who had allegedly given the acknowledgment was no longer with the company and had no authority to act without the Board's consent in such matters. No

entries were made in the books of accounts, which would amount to an admission of liability. In any case, the liability, if any, had to be borne by RELAY.

12. On August 15, 2007, PL. received a response from RELAY Co. LTD stating that only liabilities relatable to the Radio Business were taken over and therefore, the company could be held liable, if at all, only to that extent. Further, RELAY disputed the said liability stating that the excess payment claimed was not a contractual liability and therefore not payable unless admitted by the Company. As far as damages were concerned, RELAY disclaimed all responsibility for the same as it was an action taken by RELIVE and RELIVE alone could be held responsible for its consequences.
13. On December 5, 2007, PL. filed a company petition before the High Court of Delhi for winding up of RELIVE CO. LTD under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956 on the ground that the Company was unable to pay its debts. The petitioners also filed an application for modification of the Scheme for winding up and fixation of exact amount of liabilities of the respective companies towards the petitioners, by virtue of its powers under Section 394 of the Companies Act, 1956.
14. RELIVE Co. LTD countered the petition on the following grounds, among others:
  - (1) RELIVE was under no obligation to pay the alleged debt, if any, as all obligations pertaining to the said contract had been transferred to RELAY Co. LTD by virtue of the demerger.
  - (2) Further, the alleged debt was one in respect of which, a bonafide dispute had been raised by RELIVE CO.LTD.
  - (3) The machinery of winding up was being used by PL. to coerce the company into making payment of the alleged debt, which RELIVE is under no obligation to pay.
15. PL.'s contentions, among others, were as follows:
  - (1) By terminating the contract, RELIVE had confirmed that it was the relevant party to the contract and therefore, all remedies for PL. lay against RELIVE.
  - (2) There was no bonafide dispute, as the liability remained undisputed till the date of demand under Section 434(1) (a). This dispute was merely raised for the purpose of covering up the Company's inability to meet its payment obligations.
  - (3) The Company was unreasonably refusing to pay the debt without just cause and with malafide intentions and therefore, the Court could order winding up in such instances.
16. You are required to substantiate the allegations/contentions of the parties with applicable case laws and statutory provisions. You may add to/vary the contentions above without deviating from/being inconsistent with the facts of the problem (till Para 13).