NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No.285 of 2017

(Arising out of order dated 13.07.2017 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad in C.P.(CAA) No.14/230/HDB/2017 & C.P. (CAA) No.15/230/HDB/2017 (connected with Company Application No.1641/2016 and 1642/2016).

In the matter of:

1. **Wiki Kids Limited,**
   Having its Regd Office at
   Sy.No.141, Plot No.47/P, Apiic Industrial Park,
   Gambheeram (Village) Anandapuram,
   Vishakhapatnam District, Andhra Pradesh 531163
   Through
   Mr. Ramesh Kosaraju,
   302, Sai Krishna Residency,
   White Fields, Kondapur, Hyderabad,
   Telangana 500084 **...Appellant No.1**

2. **Avantel Ltd,**
   Having its Regd Office at
   Sy.No.141, Plot No.47/P, Apiic Industrial Park,
   Gambheeram (Village) Anandapuram,
   Vishakhapatnam District, Andhra Pradesh 531163
   Through
   Mr. Naveen Nandigam
   S/o Lakshmi Narasimharao Nandigam,
   H.No.1-3-183/40/21/E, Plot No.9,
   P&T Colony, Kavadiguda, Gandhi Nagar,
   Hyderabad, Telangana 500080 **...Appellant No.2**

Versus

1. **Regional Director,**
   South East Region,
   3rd floor, Corporate Bhawan,
   Bandlaguda Nagole, Tattiannaram Village,
   Hayat Nagar Mandal, Ranga Reddy District,
   Hyderabad 500068, Telengna,

2. **Registrar of Companies, Andhra Pradesh & Telangana,**
   2nd floor, Corporate Bhawan,
   GS1 Post, Tattiannaram Nagole, Bandlaguda
   Hyderabad 500068

3. **The Office of Official Liquidator,**
   1st floor, Corporate Bhavan, Bandlaguda,
   Nagole, Tattlannaram, Hayath Nagar Mandal,
   RR Distirct, Hyderabad 500068.

4. **The Office of the Deptt Comm. Of Income Tax,**
   Circle -1(1), Hyderabad,
   Room No.722, 7-B, 7th floor,
   Income Tax Towers, AC Guards,
   Masab Tank, Hyderabad 500004.

5. **BSE Limited,**
   PJ Towers, Dalal Street,
   Fort, Mumbai 400 001.

6. **Securities and Exchange Board of India,**
   Plot No.C4-A, 'G' Block, Bandra Kurla Complex,
   Bandra (East), Mumbai-400051.

...Respondents

Present: **For appellant: Dr. U.K.Chaudhary, Senior Advocate with Shri Naveen Dahiya, Shri Y. Suryanarayan, Shri Himanshu vij and Shri Lokesh, Advocates.**

Shri Sanjib K Mohanty, Sr. Panel Central Government Counsel for Respondent No.1/Regional Director.

Mr. Arun Devdas, Advocate for Official Liquidator.

Ms Swarupama Chaturvedi, Advocate for Respondent No.6/SEBI.

JUDGMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

1. The present appeal has been preferred under Section 421 of the Companies Act, 2013 by the appellants against the impugned order dated 13.07.2017 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad (hereinafter referred to as the 'Tribunal')

in C.P.(CAA) No.14/230/HDB/2017 & C.P.(CAA) No.15/230/HDB/2017 (connected with Company application No.1641/2016 and 1642/2016) wherein the Scheme of Amalgamation between Appellant No.1 (Wiki Kids Limited) and Appellant No.2 (Avantel Limited) and their respective shareholders and Creditors was rejected by the Tribunal.

2. The brief facts of the case are that the appellant No.1 (transferor company) is a company incorporated under the Companies Act, 1956. The transferor company is non-listed company. Appellant No.2 (transferee company) is a company incorporated under the Companies Act, 1956 and is a listed company. Both the companies are having their registered office at SY No.141, Plot No.47/P, APIIC Industrial Park, Gambheeram (Village), Anandapuram, Distt. Vishakhapatnam. The management of both the appellants proposed a Scheme of Amalgamation pursuant to which appellant No.1 was to be amalgamated into Appellant No.2. Accordingly, both the appellants moved before the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh seeking dispensation/direction with respect to the meetings of the shareholders, secured and unsecured creditors in the Scheme. Hon'ble High Court issued certain directions to the companies. As per directions of the Hon'ble High Court the appellants convened a meeting on 27.1.2017 and the Scheme was approved by 99.999% shareholders of the appellant No.2. In the meantime, in view of the notification dated

7th December, 2016 issued by the Ministry of Corporate Affairs, the case stood transferred to National Company Law Tribunal (hereinafter referred to as the Tribunal), Hyderabad Bench. The appellants filed the second motion petitions with the Tribunal, Hyderabad and also filed No objection from Bombay Stock Exchange Limited, Securities and Exchange Board of India, Registrar of Companies, Regional Director and Official Liquidator. The Tribunal sought certain clarifications from the parties regarding the rationale of the Scheme, valuation report submitted to the regulatory authorities and the comments received from them. After hearing the parties and perusing the record relating to the Scheme of Amalgamation, the Tribunal passed the impugned order dated 13.7.2017 thereby rejecting the Scheme of Amalgamation stating that this scheme is beneficial to the promoters only, relevant portion of the impugned order is as under:

"17. Upon perusal of the documents submitted the Petitioners Company, it is observed that the Transferor Company viz Wiki Kids was incorporated on 15.10.2004. But it has not yet started any commercial operations and hence no Profit and Loss Account was prepared and it has also stated that income from business operation is NIL and the Transferor Company had income from other source i.e. only on Fixed Deposit amounting to Rs.85,490 for the year ended 31.03.2016

18. As per the details provided under the Head Capital Work in progress an amount of Rs.94.67 lakhs ahd been spent out of Rs.117 lakhs Issued subscribed and Paid up Share Capital which means the Transferor Company's value is approximately Rs.22.32 lakhs. The facts of the case shows that the Transferor Company is yet to commence its commercial production/operation for almost 13 years, whereas the rationale as stated in the scheme of amalgamation is that "Amalgamation will enable Avantel to diversity into high growth and profitable areas of business ***without any gestation.*** *It enables Avantel to* ***improve steadiness of cash flows*** *and to participate* ***more vigorously and profitably*** *in an increasingly competitive and liberalized market; The amalgamation*

would result in optimizing and ever growing existing resources and infrastructure of Avantel; The combined entity would result ***in improved cash flows,*** *increased net worth, better credit rating, and thereby strengthening the value of all the stakeholders of the Company.*

19. Perusal of the documents also revealed that Cash Flow Statement was not forming part of the Transferor Company and the income earned as on 31.03.2016 is only Rs.85,490 through interest income on Fixed Deposit.

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21.As per the share exchange ratio the promoters/shareholders of the transferor company would be eligible "100 (One Hundred) equity shares in the Transferee Company of the face value of Rs.10/- (Rupees Ten only) each credited as fully paid up for every 289 (Two Hundred and Eighty Nine) equity shares of Rs.10/- (Rupees Ten only) each fully paid-up held by such member in the Transferor Company". The Audit Committee and the Amalgamation Committee of the Transferee Company has taken into account the recommendations on the Share Exchange Ratio given by M/s Nekkanti Srinivasu & Co, Chartered Accountants, acting as independent chartered accountants, and the fairness opinion provided by M/s Mark Corporate Advisors Pvt Ltd, acting as the merchant banker. On the basis of their evaluation and its own independent judgement, the Audit Committee the amalgamation Committee has recommended the Scheme, including the Share Exchange Ratio to be Board of Directors of the Transferee Company. The eligible number of shares works out to 4,04,845 shares and the same is multiplied with the market price of Rs.124.80 as on 31.03.2016 works out to Rs.5.05 crores. However, the market price of Avantel Limited i.e. transferee company closed at Rs.296.40 on 30.06.2017 and on the same date it touched the market high of Rs.306.50. If we consider the closing market price, it works out to approx. Rs.11.99 crores and if we consider highest market price on 30.06.2017 the same works out to approx.. Rs.12.40 crores. The shares to be allotted by the transferee company to the shareholders of Transferor Company are nothing but common promoters of both the transferor and transferee company (M.s Wiki Kids Limited and Avantel Ltd).

22.We have also observed that neither, BSE, SEBI, Registrar of Companies (ROC); Regional director (RD) and Official Liquidator (OL) have not scrutinized the above angle, financial benefit flowing only to the few common promoters for an amount of Rupees approx. Rs.12 crores for a net worth/value of approx.. Rs.22.32 lakhs to transferor company.

23. Further it is also observed that the Company Petition was filed under Section 230 to 232 of the Companies Act, 2013 whereas the Board Resolution dated 03.09.2016 was under Section 391 to 394 of the Companies Act, 1956. The transferor company i.e. Wiki Kids Ltd was promoted by promoters of Avantel Ltd and they hold 99.90% of the Paid up Share Capital of Wiki Kids Ltd. The Scheme of amalgamation

submitted/circulated to the Shareholders and Creditors do not have the list of names of shareholders, names of Directors of both the Companies, the disclosure that shares of the transferee company would be allotted to the common promoters of Transferor Company. In the absence of the vital information in the scheme of amalgamation, document submitted to various stake holders, they were handicapped to take a well informed decision as to whether to approve/reject the scheme. We are also of the considered view that the entire scheme of amalgamation was conceived/designed to benefit only major common promotors of both the companies and no/negligible public interest is involved in this case especially the transferee company being a listed company having more than four thousand shareholders as on 25.11.2016.

24. Therefore, we are of the considered view that the amalgamation of scheme in question is beneficial only for the common promotors of both the companies and public interest is not being served as envisaged in the scheme. Moreover the rationale, objective and purpose of scheme as stated is not justified based on the above facts/discussions. Therefore, we deem it fit not to sanction/confirm the scheme as prayed for."

3. Learned counsel appearing on behalf of the appellants submitted that the appellants have complied with all the requirements/directions and there was no objection to the Scheme from any concerned authority or stake holders or general public at large even then the Scheme of Amalgamation has been rejected by the Hon'ble National Company Law Tribunal, Hyderabad.

4. Learned counsel for the appellants submitted that management of both the appellants and their respective Board of Directors examined the relative business strengths and a Scheme of Amalgamation was proposed which provides for amalgamation of appellant No.1 into Appellant No.2 as per provisions of Companies Act, 1956/2013. Both the appellants filed company applications before the Hon'ble High Court of Judicature at Hyderabad.

5. Learned counsel appearing on behalf of the appellants stated that in view of the notification dated 7th December, 2016 issued by Ministry of Corporate Affairs, therefore, the said matters were transferred to National Company Law Tribunal, Hyderabad Bench, Hyderabad.

6. Learned counsel appearing on behalf of the appellants stated that the impugned order only corners around the figures as appearing in the balance sheet of the Transferor Company and has completely overlooked the potential business model developed by the Transferor company, which will be soon launched and the Transferee company intended to acquire by way of present Scheme. Learned counsel for the appellants further argued that the Tribunal has overlooked the well settled law that the Courts should not supplement its wisdom with the commercial wisdom of the stakeholders and that the share exchange ratio has been computed by an expert independent Chartered Accountant in accordance with the settled principle of valuation and law.

7. It is further argued that all the directions given by the Hon'ble Court were complied with and due notice was given to shareholders along with requisite explanatory statement and other relevant documents, which are already placed on record and on the scheduled day and venue, the meeting of shareholders of Appellant No.2 was held and the proposed scheme was approved by the shareholders. The Chairperson, who was appointed to convene the meeting, also filed his report before Hon'ble Tribunal stating that the Scheme has been approved by the

shareholders. Accordingly, the appellants filed the Company Petitions before the National Company Law Tribunal, Hyderabad for sanction of Scheme of Amalgamation. Learned counsel for the appellants further submitted that Registrar of Companies has not raised any objections to the Scheme as confirmed by the affidavit of Regional Director. The Income Tax Department and Bombay Stock Exchange has also not given any Adverse Observation. Learned counsel for the appellants stated that no adverse observations has been given by any of authority but the Learned NCLT vide impugned order dated 13.7.2017 rejected the Scheme by recording that the Scheme in question is beneficial only for common promoters of both the companies and public interest is not being served as envisaged in the Scheme. Learned counsel further argued that the share exchange ratio has been computed by an expert independent Chartered Accountant in accordance with the settled principles of valuation and law, which includes value of potential business model in the market, projected revenues and cash flows which is supported by the fairness opinion certificate issued by the Merchant Banker. Learned counsel for the appellants in support of his arguments referred to the cases of **M/s Miheer H. Mafatlal Vs Mafatlal Industries Ltd and M/s Hindustan Lever Employees' Union vs Hindustan Lever Limited and Others.** Relevant portion of the same is as follows:

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A.However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently, the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."

Of course this Section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy maker. Consequently, the propriety and the merits of the compromise or arrangement have to be judged by the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial economic interest by majority agree to give green signal to such a compromise or arrangement. The aforesaid statutory scheme which is clearly discernible from the relevant provisions of the Act, as seen above, has been subjected to a series of decisions of different High Courts and this Court as well as by the Courts in England which had also occasion to consider schemes under pari material English Company Law. We will briefly refer to the relevant decisions on the point. But before we do so we may also usefully refer to the observations found in the oft-quoted passage in Bucklay on the Companies Act 4th Edition. They are as under :

"In exercising its power of sanction the Court will see, first that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that he statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purposed to represent, and thirdly, that the arrangement is such as intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which is empowered to bind, or some blot is found in the Scheme."

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We may also in this connection profitably refer to the judgment of this Court in the case of Hindustan Lever Employees Union Vs Hindustan Lever Ltd 1995 Supp. (1) SCC 499 wherein a Bench of three learned judges speaking through Sen, J. on behalf of himself and Venkatachaliah, CJ., and with which decision Sahai, J., concurred Sahai, J., in his concurring judgment in the aforesaid case has made the following pertinent observations in this connection in paras 3 and 6 of the Report::

"But what was lost sight of was that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction ..... Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle "prudent business management test" or that the scheme should not be a device to evade law. But when the court is concerned with a scheme of merger with a subsidiary of foreign company then test is not only whether the scheme shall result in maximising profits of the shareholders or whether the interest of employees was protected but it has to ensure the merger shall not result in impeding promotion of industry or shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on English decisions Hoare & Co. Ltd. Re 1933 All ER Rep 105, Ch. D and Bugle Press Ltd. Re. 1961 Ch 270 that the power of the court is to be satisfied have complied with or that the classes were fully represented and the arrangement was such as man of business would reasonably approve between two private companies may be correct and may

normally be adhered to but when the merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The jurisdiction of the court in this regard is comprehensive."

Sen, J. Speaking for himself and Venkatachaliah, CJ., also towed the line indicated by Sahai, J., about the jurisdiction of the Company Court while sanctioning the Scheme and made the following pertinent observations in paragraph 84 at page 528 of the Report :

"An argument was also made that as a result of the amalgamation, a large share of the market will be captured by HLL.

But there is nothing unlawful or illegal about this. The Court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved. But that is not the case here. A company may, on its own, grow up to capture a large share of the market. But unless it is shown that there is some illegality or fraud involved in the scheme, the Court cannot decline to sanction a scheme of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO. Dr Dhavan has argued that TOMCO is not yet a sick company. That may be right, but TOMCO at this rate will become a sick Company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The shareholders, the employees the creditors will all suffer. The argument that the Company has large cotton mills and jute mills in India have become sick and are on the verge of liquidation, even though they have large assets. The Scheme has been sanctioned almost unanimously by the shareholders, unsecured creditors and preference shareholders of both the Companies. There must exist very strong reasons for withholding of sanction may turn out to be disastrous for 60,000 shareholders of TOMCO and also a large number of its employees.

8. Learned counsel appearing on behalf of 1st respondent submitted that transferor company has 10 shareholders and all of them have given their consent to the proposed scheme by way of affidavits and it has no secured and unsecured creditors. It is further submitted that the transferee company has a sole secured creditor and eight trade creditors and all of them have given their consent to the proposed scheme by way of affidavits. It is further submitted that a meeting of

shareholders of transferee company was held on 27.1.2017 and other details were provided to the shareholders of the transferee company including pre and post amalgamation shareholding pattern of the two companies. The members of transferee company approved the Scheme with requisite majority. It is stated that the share exchange ratio was arrived at on the basis of a valuation report issued by an Expert and there was no cause for the 1st respondent to disbelieve the premises on which the share exchange ratio was arrived. It is also stated that NCLT had also accepted the facts that the Transferor company had developed certain e-learning platforms but did not do any business. It is further argued that the valuer takes into consideration the future prospects and potential of entity under valuation and thus the potential value of the entity being valued is a matter of perception besides the work that was already carried out by such entity. In support of his arguments, the learned counsel for the 1st respondent has referred to two judgements namely ***M/s Miheer H Mafatlal Vs Mafatlal Industries Ltd reported in (1997) 1SCC 579*** delivered by the Hon'ble Supreme Court and ***Kamala Sugar Mills Limited 55 Company Cases p.308 NABY/TN/0005/1980*** of Hon'ble Gujarat High Court. 1st respondent in his reply also prayed that the observations of Hon'ble NCLT in para 22 of the impugned order dated 13.7.2017 be expunged with further order or orders as deemed fit.

9. Learned counsel appearing on behalf of the 6th respondent (SEBI) submitted that 6th respondent is not the authority as per law to do valuation, therefore, the observations made in the para 22 of the impugned order is unwarranted. It is further submitted that the 6th respondent has issued Circular dated 30th November, 2015 which lays down the detail requirements to be complied with by listed entities while undertaking scheme of amalgamation. 6th respondent vide their letter dated 11th November, 2016 intimated 5th respondent that the submission of documents/information in accordance with circulars, to 6th respondent should not in any way be deemed to construed that the same has been cleared or approved by it. 6th respondent does nto take any responsibilities either for the financial soundness of any scheme or for the correctness of the statements made or opinion expressed in the documents submitted. It is further argued that the valuation of the company was carried out by an independent valuer and the fairness opinion thereon was given merchant banker who is registered with 6th respondent and the price of the share of a listed company is decided by the market forces on the basis of the price sensitive information available in the public domain. It is submitted that the promoters are not allowed to participate in the voting process and the scheme was conditional upon being approved by a shareholders resolution of M/s Avantel to be passed by way of postal ballot and e-voting, provided that the scheme can be acted upon only if the votes cast by the public shareholders in favour of the proposal are more than the number of

votes cast by the public shareholders against it. It is further submitted that the 6th respondent is not expert in valuation and it relies only upon the fairness opinion of its registered merchant banker. It is stated that as on 11.11.2016 the share price of M/s Avantel Ltd was Rs.120/- and after that it went upto Rs.295.40 on June 30, 2017. It is stated that once 6th respondent has issued its observations as per SEBI guidelines, it has no means to give its observation on movement of market price of the scrip. It is further stated that since no grievance or objection has been raised, therefore, they have no objection.

10. Learned counsel appearing on behalf of the Official Liquidator submitted that on receipt of notice from the Transferor Company and subsequently the transferor company provided information and books and records. Based on the information made available by the Transferor Company, the Official Liquidator submitted its report before the Hon'ble Tribunal conveying its opinion that the affairs of the Company appear to have not been conducted in a manner prejudicial to the interest of the members or to public. It further submitted it has submitted in its report that the combined entity would result in improved cash flows, increased net worth, better credit rating, and thereby strengthening the value of all the stakeholders of the company.

11. We have heard learned counsel appearing on behalf of the parties and perused the entire record.

12. There is no dispute that the compliance under the law has been done and no objection certificate from the relevant authorities have

been obtained. So we are not commenting on this issue. The conclusion arrived by the Tribunal is on the basis of reservation expressed on the valuation report and that the valuation report will result in undue advantage to the promoter class.

13. We observe that in the Valuation Report at page No.20 of Valuation Report and Page No.801 of the Paper book the Chartered Accountant has observed as under:

"The company informed that they did not prepare any Profit and Loss Account till the financial year 2015-16 as the company was in the development phase of its E-Learning platform "Wonderwhiz Kids". The company further informed that the product is ready for commercial launch and is presently hosted on Amazon Server. Thus, the portal is poised to generate revenues."

14. Thus it is clear that the company has not generated any revenue till the financial year 2015-16.

15. The Chartered Accountant has also in Section XI-Disclaimer, Page 822 of the Paper Book has observed as under:

"In the course of forming our opinion, we have relied upon the financials and other documents which have been provided to us by the management of the respective companies. We do not assume any responsibility for the accuracy or reliability of such documents on which we have relied upon in forming our opinion.

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We specifically disclaim any and all liability arising from any of the contents of this Report of ours, including but not limited, reliance placed by any person on any content of this report."

16. We have observed that the transferor company has created assets in its books but are yet to generate any revenue. The transferor company has not sold even a single product since its inception i.e. 15.10.2004 to FY 2015-16 (almost more than 10 years). It is also observed that the Cash Flow statement was not forming part of the Transferor Company and the income earned as on 31.3.2016 is interest income on Fixed Assets. The Transferee company hopes that merger would create enough revenue in future to add value. Future projections if based on past performance would be sound basis. We further observe that the NCLT Hyderabad has rightly observed that financial benefit is flowing only to the few common promoters for an amount of Rs.12 crores approx. for a net worth/value of Rs.22.32 lakhs approx. of transferor company. One of the objective of the Scheme should be fair to the interest of all the shareholders and not only to a 'few' among them. In this Scheme of amalgamation, the interest of promoters has been kept in mind and well protected on the merger itself whereas for other shareholders it depends on the future performance. It clearly shows that the entire scheme has been designed just to give benefit to the promoters of both the companies. Further the projection given can be a guess and not a forecast. The benefit of scheme of amalgamation will immediately flow to the promoters but not to the shareholders. The other class will be contingent upon the realisation of the revenue in future. The figures have been given by the Management and has been accepted by the valuer as it is and has disclaimed accuracy and

reliability. The shareholders cannot be said to have been conveyed sufficient assurance.

17. Further the Learned counsel for the appellants have referred the case of ***Hindustan Lever Employees' Union vs Hindustan Lever Ltd and other reported in 1995 Supp(1)SCC 499*** decided by the Hon'ble Supreme Court. In this case the amalgamation of TOMCO (Tata Oil Mills Company Ltd) and HLL (Hindustan Lever Ltd) was considered. Both the companies were listed companies. The promoters of both the companies were different. One was promoted by Tata Group and the other was subsidiary of Unilever, London. The products of both the companies were available in the market. In the present case the promoters of both the companies are same and also the registered office of both the companies is the same. Product of transferor company is yet to enter into the market. This may call for a closer look into information made available. Therefore, the facts of the case are different and the present case does not fall in that category.

18. The next case referred by the Learned Counsel for the appellants is ***Miheer H Mafatlal Vs Mafatlal Industries Ltd (referred-Supra)*** decided by the Hon'ble Supreme Court on 11.9.1996. The judgement can be distinguished on facts. The principals laid down are however relevant. In this connection we may state the National Company Law Tribunal has been constituted consisting of Judicial and Technical Members as per the provision of Section 409 (3) of the Companies Act read with **judgement dated 14th May, 2015 of Supreme Court in the**

case of Madras Bar Association vs Union of India WP(C) No.1072/2013.

19. The Tribunal below has enough expertise to look into the Scheme of Amalgamation and can also see whether it is not just and fair to all shareholders. It has a duty to act in public interest. In the matter of company, it needs to see if it is in the interest of all the shareholders and the company. In the light of this it is desirable not to look into the mathematical details but a broad look at the scheme of amalgamation. If it shows that there are wide variation in the valuation as can be achieved, it will be desirable that expertise available in the Tribunal has to look so that unfair advantage does not flow to one of the group of shareholders or the other. We are noting in this case that the net worth as reported by the Tribunal below is Rs.22.32 lakhs and the valuation at Rs.5.05 crores is having a considerable variation making it imperative to have a broad look into it. The look by the Tribunal into the issue may not be looking into too much mathematics of the scheme and may be in the best interest and protection of the stakeholders. After noticing the same the Tribunal has come to the conclusion that the Scheme of amalgamation is beneficial to the promoters only. The Tribunal has justified its discretion to reject the amalgamation. We do not find mitigating factors to differ with the same.

20. In view of foregoing discussions and observations we do not find any cogent reason to interfere in the impugned order. The appeal is, therefore, rejected. No order as to cost.

(Justice A.I.S. Cheema)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

New Delhi
Dated: 21st December, 2017

BM/nn