NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL(AT) NO.238 OF 2018

(ARISING OUT OF JUDGEMENT AND ORDER DATED 12TH APRIL, 2018 PASSED IN CP/159, 160, 161, 162, 163, 164 AND 165/CAA/2017(CA 95, 96, 97, 98, 99, 100 AND 101/CAA.2017 BY NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH CHENNAI).

IN THE MATTER OF:

Ankit Mittal
S/o Shri Raj Kumar Mittal,
117, Lohiya Building,
Railway Road,
Samalkha,
Panipat-132101 Haryana. Appellant

Vs

1. Ankita Pratisthan Ltd
   Dalmiapuram,
   Lalgudi,
   Dist. Tiruchhirappalli,
   Tamil Nadu 621651

2. Mayuka Investment Ltd.,
   Dalmiapuram
   Lalgudi,
   Distt. Tiruchhirappalli,
   Tamil Nadu 621651

3. Puneet Trading and Investment Co Pvt Ltd.
   Dalmiapuram
   Lalgudi,
   Distt. Tiruchhirappalli,
   Tamil Nadu 621651

4. Ziphead.Com Pvt Ltd,
   Dalmiapuram
   Lalgudi,
   Distt. Tiruchhirappalli,
   Tamil Nadu 621651

5. M/s Mahanadi Trading Pvt Lt,
   B-5 Tardeo Everest Premises Cooperative Society Ltd,
   156, Tardeo Main Road,
   Mumbai-400034.

6. Shreevallabh Textile Private Ltd,

B-5 Tardeo Everest Premises Cooperative Society Ltd,
156, Tardeo Main Road,
Mumbai-400034.

7. Keshav Power Ltd,
Dalmiapuram, Lalgudi,
Distt. Tiruchhirapalli,
Tamil Nadu 621651

8. Shree Nirman Ltd,
Dalmiapuram,
Lalgudi,
Distt. Tiruchhirapalli,
Tamil Nadu 621651

9. Rama Investment Company Pvt Ltd,
Dalmiapuram,
Lalgudi,
Distt Tiruchhirappalli
Tamil Nadu 621651 Respondents

For Appellant:- Mr. K. Chatterjee, Mr. Sansar Kumar, Mr. Anna Malhotra, Mr. Parish Mishra, Advocates for Appellant.

For Respondents: - Mr Jayant Mehta, Mr. Kartikeya Singh, Mr Sarvaswa Chhajer, Ms Shipra Chaudhary, Sh Raktim Gogoi, and Ms Anu Shrivastava, Advocates.
Mr. S. Dutta and Shri Abhishek Wadhwa, Advocates of Intervenor.

JUDGMENT
(29th November, 2019)

Mr. Balvinder Singh, Member (Technical)

The present appeal has been preferred by the appellant under Section 431 of the Companies Act, 2013 against the impugned order dated 12th April, 2018 passed by the National Company Law Tribunal, Chennai Bench, Chennai in Company Petitions No.CP/159/CAA/2017, CP/160/CAA/2017, CP/161/CAA/2017, CP/162/CAA/2017, CP/163/CAA/2017, CP/164/ CAA/2017 and CP/165/CAA/2017 vide which the scheme of amalgamation submitted by the respondents was approved.

2. The brief facts of the case are that in the year 2017, 7 company petitions were filed by 1st to 6th Respondents to be amalgamated with 9th Respondent under a Scheme. The Scheme further contemplated proposed transfer of identified undertakings in Keshav Power Ltd and Shree Nirman Ltd (7th and 8th Respondents) to 9th Respondent. Learned NCLT vide order dated 30th June, 2017 (Page 312 and 314) directed 1st, 2nd and 8th Respondent to convene, hold and conduct meetings of equity shareholders thereof on 17th August, 2017. Learned NCLT vide the same order also dispensed with holding of Meeting in respect of 3rd, 4th, and 7th respondent. Meetings were convened and the report was submitted. After considering the report the amalgamation scheme was approved by Learned NCLT.

3. Being aggrieved by the said scheme the appellant has preferred the instant appeal. The case of the appellant is that one Mr Laxman Das resident of Palwal held and still holds 450 equity shares in 1st respondent and 685 equity shares in 2nd Respondent. It is stated that 450 shares of 1st respondent have always been lying in the name of Ms Ganga Devi, since deceased, being the mother of Mr. Laxman Das. After the death of Ms Ganga Devi the said 450 shares of 1st respondent were transmitted to Mr. Laxman Dass. 685 shares of 2nd respondent are held by Mr. Laxman Das under Folio No.A00099.

4. The appellant is the constituted Power of Attorney holder of Mr. Laxman Das. Being Power of Attorney holder he is authorised to attend the general meetings of 1st and 2nd Respondent, make representations to the said companies pertaining to their proposed schemes of amalgamations and/or merger.

5. It is stated by the appellant that the Respondent Companies filed a batch of Company Petitions before the Learned NCLT Chennai with a view to obtain sanction of a scheme or amalgamation and arrangements inter se. It is stated that the Scheme is impermissibly promoter oriented and anti-minority/public shareholders and is illegal, unlawful, unjust and against the public policy in India.

6. It is stated that the Valuation Report of the Scheme has not been prepared by a Registered Valuer and is a completely unreasoned document. It is stated that the swap ratio of shares as contemplated under the scheme is absolutely illegal, unjust and one-sided. It is stated that while deciding the swap ratio the intrinsic/market value of the individual shares was not considered. The scheme is also illegal and against public policy of India in as much as it allows, upon approval, the participant companies to wipe out the stake of the public shareholders and misappropriate their investment by converting the same into its own capital reserve.

7. It is stated that the Scheme contemplates reduction of capital in violation of Section 66 of the Companies Act, 2013. It is stated that the appellant represents one of the shareholders of 1st and 2nd respondent. It is stated that the appellant was not served with the Notice convening EGM on 17th August, 2017 by 1st and 2nd respondent and some other companies. It is stated that the public shareholders were not aware of any such EGM being convened on 17th August, 2017, therefore, could not turn up in the said Meeting. It is stated that the promoters taking advantage of their majority stake in the companies and absence of the public shareholders went ahead

with the scheme and got the same approved behind closed doors. It is stated that the public shareholders did not get any opportunity to consider the scheme and approve and/or object to it. It is stated that the companies misrepresented before NCLT, Chennai with regard to service of EGM Notice to all the shareholders. It is stated that the said EGM is bad in law for non-service of notice thereof to all the shareholders of the participating companies. Therefore, the resolutions taken in the said EGM are also bad in law, illegal and cannot be given effect to. NCLT Chennai ought to have directed fresh valuation of shares and determine the share exchange ratio in accordance with the fair market value. It is stated that the Regional Director Southern Region, Ministry of Corporate Affairs Chennai also filed its objections against the scheme. It is stated that the NCLT approved the scheme subject to minor interventions despite the objections of the appellant and the Regional Director not being satisfactorily addressed to by the companies.

8. Lastly the appellant prayed that the impugned order dated 12th April,2018 passed by he Learned Tribunal is bad in law and the same having been passed mechanically, without application of mind and without due regard to the laws of the land, equity and the public policy of India, is not sustainable in the eyes of law and the Scheme of Arrangement and Amalgamation inter se the respondent companies is illegal and bad in law.

9. Reply on behalf of 9th Respondent has been filed. It is stated that the present appeal is not maintainable as the appellant does not have any locus standi to file the present appeal as the appeal has been filed by the appellant in his personal capacity and neither as a shareholder in any of the Respondent

companies nor as a Power of Attorney holder of any of shareholder in any of the Respondent companies. It is further stated that the appellant is not a shareholder in any of the Respondent companies. It is stated that the appellant is only an interloper who is misusing the process of law to harass the corporates for his personal gain.

10. It is stated by 9th respondent that pursuant to the order dated 30th June passed by the Learned NCLT, all members were despatched notice of the meeting individually as well as through public notice. It is stated that the publication of the notice had been done in Business Standard in English and Malai Malar in the vernacular language on 15th July, 2017, as earmarked by learned NCLT. It is further stated that the appellant was present in the Meeting dated 17th August,2017 as a proxy of some other shareholders. It is stated that the appellant represented different set of shareholders in the Meeting and is pursuing this litigation on behalf of completely different set of shareholders. It is stated that the appellant had objected to the Scheme during the said meeting and had cast his vote against the Scheme. It is stated that the appellant had filed objections to the Scheme before the NCLT as the Power of Attorney holder of one Sh Shyam Lal Sharma. It is stated that the appellant has filed the appeal on the Power of Attorney of Mr. Laxman Das. It is stated that the appellant has filed a defective Power of Attorney.

11 It is further stated by 9th Respondent that it is well settled position of law as interpreted and enshrined in Section 230(6) of the Companies Act, 2013 that once a scheme is approved by the majority and subsequently sanctioned by a Tribunal by an order, then the same shall be binding on the company, its creditors, class of creditors, members, class of members, as the

case may be. It is further stated that the Board of Directors of each individual Respondent company had approved the Scheme on 21st March, 2017 and the same was approved by majority of the shareholders in shareholders meeting on 17th August, 2017 and thereafter was approved by the Learned NCLT and it has become statutorily binding on the appellant and thus, no appeal, could lie therefrom.

12. It is stated that Mr. Laxman Dass did receive the Court Convened Meeting notice of 1st Respondent alongwith a copy of the purported scheme including the Valuation Report, which has been annexed in the appeal. It is stated that the said annexure is not the Court Convened Meeting noticed of 1st respondent but is in fact the CCM notice of 8th Respondent of whom the appellant owns no share. It is stated that the said Annexure contains the Board Resolution approving the Scheme of 1st Respondent and 2nd Respondent at Pages 563 and 564 respectively and also valuation report and share entitlement ratio of each Respondent company of the appeal paper book. It is stated that the NCLT has passed a well reasoned order after taking all the relevant provisions, material on record and arguments advanced in due consideration while adhering to the principle of natural justice and equity. It is stated that Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 posits and clarifies that the service of notice of meeting shall be deemed to have been effected in case of delivery by post, at the expiration of forty eight hours after the letter containing the same has been posted. It is further stated that the valuation in the instant case has been arrived at and determined based on the market value approach.

13. It is stated that the appellant is erroneous in arriving at the conclusion that the scheme does not provide for repayment of capital to the public shareholders of 1st Respondent and 2nd Respondent. It is stated that the scheme had provided for capital repayment for all its shareholders, however, the problem only arose with respect to a handful number of shareholders, whose share value upon re-organisation would be rounded off to zero, as their number of shares would have not met the minimum threshold. It is stated that the NCLT has rightly directed the respondent to make payment to the shareholders whose shares had been cancelled at the book value rate as on 1.4.2016.

14. It is stated that the Scheme is not a standalone capital reduction under Section 66 of the Companies Act. It is state that the question of the capital reduction being in violation of Section 66 does not arise and it is further stated that the Scheme does not violate the provisions of Section 66 of the Act and that a company is entitled to reduce its share capital in different manner from those envisioned and embedded in Section 66 of the Act.

15. It is stated that the valuation and the process adopted by an expert to arrive at a value or the swap ratio is in the wisdom of commercial experts and the valuation report alongwith the swap ratio are correct and have been arrived at keeping the due principles of equity and valuation in consideration.

16. It is stated if one shareholder might have not been in receipt of the notice, then the entire Scheme and meeting would not become nullity and cannot be deemed void ab initio. It is stated that proviso to Section 230(4) envisages that any objection to the compromise or arrangement shall be made only by persons holding not less than 10% of the shareholding or having an

outstanding debt to not less than 5% of the total outstanding debt as per the latest audited financial statement and that the appellant in the instant case is not a shareholder but a Power of Attorney of shareholder, whose shareholding is evidently less than 10%, which is the threshold limit to file objections to the Scheme and thus the objector is not entitled to oppose the Scheme and his objections are not required to be considered.

17. It is stated that the Scheme is neither promoter oriented nor affects the minority shareholders prejudicially. It is stated that the Respondent had taken complete care and given due consideration and deliberations to the interests of the minority shareholders and only upon being satisfied with the objective and the repercussions of the Scheme was the Scheme approved and the modifications directed by Ld. NCLT was accepted and acted upon by the Respondent.

Case of Maya Devi, Intervener and Mr. Ved Prakash

18. The intervenors/applicants being aggrieved by the impugned order filed an IA No.1365/2018 and IA No. 1364/2018 seeking impleadment in the matter. The applicant stated that she is the shareholder of the 2nd respondent having 685 shares. The applicant submitted that she was not a party to the Company Petition and Company applications before the Learned Tribunal. The applicant submitted that the scheme of amalgamation approved by the Learned NCLT is a fraud on its public shareholders. The applicant stated that she is being attempted to be thrown out of 2nd respondent without repayment of her investments therein. The applicant submitted that the shares of 2nd respondent have been deliberately devalued in the Scheme concerned. The applicant submitted that despite being public shareholder of the 2nd

respondent the applicant did not receive any copy of the Scheme of amalgamation whereof the 2nd respondent is party as the transferor company No.2. The applicant submitted that it did not receive any notice or agenda of the Meeting which was convened as per order of NCLT, Chennai. The applicant submitted that 2nd respondent has 246 shareholders, out of which 14 are promoters shareholders and these 14 shareholders were present in the said meeting. The applicant submitted that the meeting of 2nd respondent which was called pursuant to the order of Learned NCLT under Section 230(1) of the Companies Act, 2013 is vitiated by non-service of notices and other documents and particulars thereof on all the equity shareholders of the 2nd respondent. Therefore, any resolution taken in the said meeting is illegal and void ab initio. The applicant further submitted that only the promotors shareholders were present and voted for the scheme of amalgamation. The applicant further submitted that the exchange ratio between the 2nd respondent and 9th respondent as proposed in the said scheme is also illogical, incomprehensible and baseless. The applicant submitted that 2nd respondent is one of the promoters of Dalmia Bharat Limited having 21.82% stake therein. The net worth of Dalmia Bharat Ltd is around Rs.50 billion. The swap ratio inter se 2nd respondent and the 9th respondent as proposed in the Scheme is palpably erroneous on the face of it. The applicant further submitted that the shares of 2nd respondent have been deliberately devalued by the promoters thereof in order to defraud the public shareholders and misappropriate their investments and accruals thereon. The applicant submitted that the Regional Director, Chennai raised certain concerns over the merit of the Scheme which were not properly addressed by the

respondents but the Learned NCLT sanctioned the scheme without ensuring the objections of the Regional Director are satisfied.

19. The applicant submitted that the Scheme provides for capital reduction of the 2nd respondent and liquidation thereof without winding up. The applicant stated that it appears that a portion of the capital of the 2nd respondent is being sought to be cancelled and the same is also sought to be converted into capital reserve of the transferee company without any repayment to the shareholders. The applicant submit that such an arrangement is in blatant violation of Section 66 of the Companies Act, 2013. The applicant submitted that the scheme appears to be illegal and she reserves her rights to file further pleadings dealing with the said Scheme. The applicant further submitted that the Tribunal has modified the scheme to the extent of capital repayment to the shareholders whose shares are going to be cancelled consequent upon giving effect to the swap ratio proposed in the Scheme to the extent of only its book value and buy back of the fractional shares. The applicant submitted that such modification of the scheme is insufficient in as much as the shareholders including the applicant deserves to be repaid as per the market value of the shares. The shareholders are entitled to be paid the accruals of their respective investments in the 2nd respondent.

Case of Prem Prakash Pareek & 7 Ors

20. An IA No.1845/2018 has been filed by the applicants seeking directions to implead them in the Company Appeal, set aside the impugned order dated 12th April, 2018 and also reject the purported scheme of amalgamation and arrangement approved in the impugned order. The applicants submit that

they were shareholders of 1st Respondent and hold 1400 shares in the said company. The applicants submit that 1st, 2nd and 9th respondents are promoters of Dalmia Bharat Ltd (DBL) and the net worth of DBL is Rs.4964.87 crores as on 31st March, 2017. The applicants submit that they did not receive the notice for the meeting of 1st respondent held on 17.8.2017 as well as other companies involved in the Scheme of Amalgamation which was held in terms of the direction given by the Learned NCLT. The applicants submit that they came to know that for the purpose of consideration of scheme of amalgamation, the valuation report had been rendered by a Chartered Accountant and the share entitlement ratio vis-à-vis the purported scheme has been determined based on market value approach. The applicants submit that there is nothing to show that the purported valuation report forming a part of the purported scheme was prepared by a Registered Valuer. The applicants submit that no particulars have been provided in the purported report as to how the share entitlement ratio was arrived at. The applicants submit that the report merely records the satisfaction of the Valuer with regard to so called fairness and reasonableness of the share entitlement ratio without any basis. The applicants submit that the Valuer did not consider the market value/intrinsic value of one equity share of 1st, 2nd and 9th respondent while preparing the report and/or arriving at the share entitlement ratio as provided therein. The applicants submit that there are 23 shareholders holding less than 116 shares whereas the balance shareholders own more than 116 shares each. The applicants submit that on approval of the scheme the transferee company i.e. 9th respondent would have more than 200 shareholders in violation of the Companies Act, 2013 and

the 9th respondent did not take necessary steps to convert itself into a public limited company. The applicant submits that the scheme attempts to send out, inter alia, the majority of the public shareholders of 1st respondent without repaying their just entitlement. The applicants further submit that the said scheme does not provide for capital repayment to public shareholders of 1st respondent. The applicants submit that the manner in which the scheme has been sanctioned and allowed, the public shareholders would be left with only 47 shares of Rs.100 each in 9th respondent. The applicants further submit that majority public shareholders of 1st respondent would not get any share in 9th respondent. The applicants submit that the said scheme is a fraud upon the numerical majority public shareholders of 1st respondent. The applicants submit that the said scheme does not envisage allotment of shares of 9th respondent to the numerical majority of public shareholders of 1st respondent in which besides the appellant, the applicants herein are also concerned nor does it provide for repayment of capital in a realistic manner based on the appropriate valuation. The applicants further submit that the maximum portion of the stake of the public shareholders in 1st appellant is being clandestinely sought to be converted into capital reserves of 9th respondent. The applicants submit that the net asset value of each equity share of 1st respondent is Rs.20,677.11, however, the valuation report forming part of the scheme does not specify the basis on which the swap ratio of the shares of 1st, 2nd respondent and 9th respondent and other companies participating in the scheme is calculated. The applicants submit that the public shareholders of 1st respondent holds 1,41,331 shares the value whereof is Rs.292.23 crores(approximately). The applicants submit that only 47

shares would be held by the public shareholders in 9th respondent, a substantial part of the investments of the public shareholders in 1st respondent running into hundreds of crores of rupees are going to be misappropriated by the promoters of these companies who are going to hold more than 98% of the shares of 9th respondent post scheme.

21. The applicants submit that the Ld NCLT has accepted the fact that the holders of the cancelled shares by virtue of the purported scheme would receive nothing as there is admittedly no provision of capital repayment in the scheme. The applicants further submit that the Learned NCLT directed 9th respondent to consider repayment to holders of the cancelled shares consequent to the scheme, 9th respondent only agreed to pay them as per the book value of the shares as on 1st April, 2016 which is negligible in view of the market value of the said shares.

22. The applicants submit that the Regional Director, Southern Region, Ministry of Corporate Affairs, Chennai also objected to the scheme stating that the divesting of shares/investment from Keshav Power Ltd and Shree Nirman Ltd (cement business of Dalmia Ggroup) to 9th respondent is a transfer of shares and not transfers of business undertakings; the scheme is incomplete as the scheme does not disclose as to how the minority equity and preference shareholders would be issued with shares of 9th respondent or compensated for fractional shareholding; 9th respondent will make deemed profit at the cost of the preference shareholders in the garb of the scheme; Such deemed profit must be notified to the Income Tax Authorities for proper assessment of tax liabilities; the entire share capital of 2nd respondent is sought to be cancelled in contravention of the applicable laws and 400 shares

allotted by 2nd respondent do not form part of the scheme. The applicants stated that the Ld. NCLT merely recorded without reasons that the objections raised by the Regional Director were satisfied.

23. The applicants lastly prayed for rejection of the scheme of amalgamation and arrangement.

24. Rejoinder affidavit on behalf of the appellant has been filed. The appellant has reiterated the contents which have been stated by him in the appeal. The appellant has stated that nothing has been disclosed that the said R.K. Agarwal is conversant with the affairs of the Respondents including 9th respondent. It is reiterated that the Respondents have cleverly violated the provisions of Sections 230(3) of the Companies Act, 2013.

25. We have heard the parties and perused the record.

26. Learned counsel for the appellant argued that the Learned NCLT directed the Respondents to convene meeting and the notice may be published in the Business Standard, all India edition and another in vernacular language the Malai Malar newspapers. Learned counsel further argued that no proof of service of Court Convened Meeting notice to shareholders except purported certificates by one Ashish claiming dispatch of notice. However, no postal receipt of said post office is on record. Learned counsel for the appellant argued as there is clear violation of directions of NCLT, therefore, the resolutions taken in the CCM dated 17.8.2017 approving the Scheme impugned is bad in law. Learned counsel further argued that the Ld. NCLT failed to appreciate the same.

27. Learned counsel for the 9th Respondent argued that Learned NCLT vide order dated 30.6.2017 directed the Respondent Companies to convene a

shareholders' meeting on 17.8.2017 while issuing a notice of the meeting to the shareholders at least 30 days prior to the date fixed and also publishing a public notice in English in Business Standard and in the vernacular language in Malai Malar. Learned counsel for the 9th Respondent argued that the as per the directions of Ld.Tribunal the notice was published in the said newspapers and also argued that the postal receipts by which the notice was sent are at Page No.28 to 82 of the application filed by Respondent. Learned counsel for the 9th Respondent further argued that the notices were sent to Mr. Laxman, Ms Ganga Devi, Mr. Shyam Lal Sharma (Objector before NCLT) through speed post and the postal receipts are at Page 80, 51, 40, 60 respectively of the Application filed by the Respondent. Learned counsel for the Respondent argued that the directions of the NCLT were, therefore, complied with.

28. We have noted that the notice of the Meeting was duly published in the newspapers as directed by the Ld.Tribunal and the notices were also sent by speed post. Learned counsel for the 9th Respondent argued that the postal despatch certificate given by Aatish is duly supported by postal receipts of the post office which are available with the Respondent. These postal receipts have been brought on record vide an application filed by the Respondent dated 12.7.2019 at Page No.28-82. We have noted that the speed postal receipt include the notice sent to Mr. Laxman Dass and Ms Ganga Devi, are at Pages 80 and 51 of the application filed by the respondent. Therefore, we are convinced that the direction given by the Learned Tribunal has been duly complied with both as to publication in the newspapers as well as notices to the shareholders.

29. Learned counsel for the appellant argued that the present appellant is holding Special Power of Attorney on behalf of Mr Laxman Das, who was holding shares in 1st and 2nd Respondent. Learned counsel for the appellant argued that the appellant has filed the appeal as Special Power of Attorney holder of Mr. Laxman Das and not his personal capacity. Learned counsel for the appellant argued that as the appellant is objecting the scheme on behalf of Mr. Laxman Das, therefore, he has every right to oppose the same. Learned counsel for the appellant argued that the locus of Mr. Laxman Das and of appellant was not questioned before the NCLT and this issue cannot be taken up for the first time in appeal and may be considered to have been waived.

30. Learned counsel for the Respondent argued that the appeal has been filed by an alleged Power of Attorney holder of one Mr. Laxman Das but the appeal has been filed by the said Power of Attorney holder in his own name. Learned counsel for the Respondent argued that this is not permissible in law. Learned counsel argued that the appeal be dismissed on this ground alone.

31. We have seen the cause title of the appeal and noted that the appeal has been filed in the name of Mr. Ankit Mittal. We have noted that the appellant has purchased the shares from Mr Laxman Dass and Ms Ganga Devi and sent for transfer and these shares were not transferred. The appellant has placed an affidavit from these two individuals authorising to take appropriate action on their behalf. However, learned counsel of the appellant has categorically argued that the appellant has filed the appeal as Power of Attorney holder of Mr. Laxman Das. Further Mr. Laxman Das has not come forward to state that he has not authorised the appellant to file the appeal. The Respondent have also not raised this issue before the Learned

Tribunal. Therefore, we find that there is no force in the argument of Learned counsel for the Respondent and reject the same.

32. Learned counsel for the Respondent argued that proviso to Section 230(4) envisages that any objection to the compromise or arrangement shall be made only by persons holding not less than 10% of the shareholding or having an outstanding debt of not less than 5% of the total outstanding debt as per the latest audited financial statement and that the appellant in the instant case is not a shareholder but a Power of Attorney of shareholder, whose shareholding is evidently less than 10%, which is the threshold limit to file objections to the Scheme and thus the objector is not entitled to oppose the Scheme and his objections are not required to be considered.

33. We have considered the arguments of the learned counsel for the Respondent. As regards filing of appeal by appellant is concerned we have decided the issue in para 31 above. As regards the objection raised by the Respondent regarding 10% shareholding or having an outstanding debt less not than 5% of the total outstanding debt is concerned we are of the opinion that the law prescribed that the objectors must have 10% limit. But when matter is before the Tribunal it is duty bound to see that all the procedures are duly followed and the scheme is conscionable. The issue raised by any body even if not eligible or even otherwise the Tribunal will have a duty to look into the issue so as to see whether the scheme as a whole is also found to be just, fair, conscionable and reasonable inter alia from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant. The Tribunal also has to see that the scheme of amalgamation if the same is prejudicial to the

interest of a particular class who may not be able to meet the threshold limit to see the scheme but it may be a pointer enough for the Tribunal to see that the scheme may be loaded against the interest of the objectors.

34. Learned counsel for the appellant argued that the valuation report and the swap ratio qua 1st and 2nd respondent with 9th respondent is arrived at market value approach but the market value of 1st, 2nd and 9th respondent is neither mentioned nor discussed nor compared in the Report. Learned counsel for the appellant further argued that the valuation report also does not indicate any nexus between the market value of 1st, 2nd and 9th respondent and their inter se swap ratio. Learned counsel for the appellant further argued that the valuation report is unreasoned and the only basis for the Share Entitlement Ratio is representation made by the management which the valuer considered to be fair. Learned counsel for the appellant further argued that the valuer in their report at para 7 Page 516 of the appeal has also stated that they have relied on the representation made to them by the management including financial information, significant transactions and events occurring subsequent to the balance sheet date and they have assumed such representations to be reliable and their conclusions are dependent on such information being complete and accurate in all material respects. Learned counsel for the appellant further argued that the swap ratio is merely but solely based on speculations and assumptions admittedly based on management representations not guaranteed by the valuer to be at least genuine/truthful. Learned counsel for the appellant further argued that 9th respondent being the worst performer financially but the following swap ratio recommended by the valuer is unjustified:-

"i) 4(Four) fully paid up equity share of INR 100(Rupees Hundred) each of 9th respondent shall be issued and allotted by every 907(Nine Hundred and seven) fully paid up equity shares of INR 10 (Rupees Ten) each held in 1st respondent.

ii) 5(Five) fully paid up equity share of INR 100 (Rupees Hundred) each of 9th respondent shall be issued and allotted for every 1541(One thousand five hundred and forty one) fully paid up equity share of INR 10 (Rupees Ten) each held in 2nd Respondent."

Learned counsel for the appellant argued that the less valuable shares of 9th respondent are being given in lieu of more valuable shares of 1st and 2nd Respondent. Learned counsel for the appellant argued that 1st and 2nd Respondent held 7.20% and 21.82% shares respectively of Dalmia Bharat Ltd (DBL in short) in 2016-17 and the net worth of DBL is Rs.5578 crores and the market capital of DBL was Rs.17,488 crores. Learned counsel for the appellant further argued that 7.20% of Rs.5578 crores and 21.82% of Rs.5578 crores is Rs.401.61 crores and Rs.1217.1 crores respectively and these investments are of 1st and 2nd Respondent and the same were ignored by the Valuer while arriving at the swap ratio. Learned counsel for the appellant argued that these investments are the main assets of 1st and 2nd respondent who have no business as such. Learned counsel for the appellant further argued that as per Merchant Banker's Valuation, each share of 1st and 2nd Respondent are worth Rs.20,677.11 and Rs.14,885.22 respectively. The valuation is based on Net Asset Value method which 9th respondent admitted to be most appropriate valuation method for companies having no significant business. Learned counsel for the appellant argued that the book value of 1st

and 2nd Respondent merely Rs.173.38 and Rs.280.51 respectively. Public shareholders are being weeded out for the above value despite valuer claiming market value approach followed. Learned counsel for the appellant argued that the book value of 1st respondent is 0.83% of its market value whereas the 2nd respondent's book value is 1.8% of its market value. Learned counsel for the appellant argued that the Learned Tribunal ought not to have allowed escape of the 1st and 2nd Respondent by paying the public shareholders only 0.83% and 1.8% of their market value per share. Learned counsel further argued that no return on investment was provided for in the original Scheme, however, the same was modified by the Ld Tribunal at the instance of appellant. Learned counsel for the appellant further argued that the valuation has been got done from an unregistered/unqualified valuer in violation of Section 230(2)(c) (iv) of the Companies Act, 2013.

35. Learned counsel for the 9th respondent argued that to prepare the valuation is a function of experts. Learned counsel further argued that it involves various factors and even if the correct principles are applied, different valuers may arrive at different valuations. Learned counsel for the 9th respondent argued that each one of them may be right yet the valuations may differ. Learned counsel for the respondent argued that even the swap ratio, which is a result of the valuation exercise, is also a function of experts. Learned counsel for the 9th respondent argued that the appellant has not cited, much less contended any fundamental error in the share valuation or resultantly in the swap ratio determined. Learned counsel for the 9th respondent argued that the only ground to challenge the valuation is that it

ought to have been done on Asset Valuation Method relying on Net Asset Value. Learned counsel argued that this is a misconceived argument in as much as there is no reason offered by the appellants as to why the said method ought to have been adopted by the valuer. Learned counsel for the 9th Respondent further argued that this is not the case of the appellant that any of the Respondent company are not going concerns. Learned counsel for the Respondent further argued that even listed shares of reputed companies are trading at steep discount to NAV. Learned counsel for the 9th Respondent argued that the valuation report submitted in respect of 1st, 2nd and 9th Respondent clearly shows that terms of reference were to determine the Fair Market Value of the shares. Learned counsel for the Respondent further argued that Merchant Banker while working out Fair Market Value has broadly followed the guidelines issued by SEBI from time to time on valuation for providing exit at the time of delisting. Learned counsel for the Respondent argued that the appellant himself has sought to purchase the shares of 1st respondent in the range of Rs.25/- to Rs.120/- per share and shares of 2nd Respondent in the range of Rs.70/- per share, whereas the value as per directions of the Ld. NCLT Chennai isRs.241/- per share for 1st respondent and Rs.386/- per share of 2nd Respondent. Learned counsel for the Respondent argued that the appellant cannot blow hot and cold and claim different values purely at mater of convenience.

36. Learned counsel for the Intervenors have also argued that the valuation report is incompetent other than being unfair and unjust and the impugned scheme being promoter oriented where the respondent No.9 is appropriating the share capital of the public shareholders of the 2nd respondent as capital

reserves by throwing them out for mere book value of the shares and the resolution of the respondent No.2 is bad in law for violation of Section 230(3) of the Companies Act, 2013.

37. We have heard the parties and perused the record. We have noted that the appellant and Intervenors have mainly stressed that the valuation report is unfair and unjust and the impugned scheme is promoter oriented. We have noted that the Valuer in his Valuation Report at Page 513 has stated as under:-

"Methodology

4.1 For the purpose of valuation, it is necessary to select an appropriate basis of valuation amongst the various alternative. It is universally recognised that valuation is not an exact science and that estimating values necessarily involves selecting a method or approach that a suitable for the purpose. The application of any particular method of valuation depends upon various factors including the size of company, nature of its business and purpose of valuation. Further, the concept of of valuation is all about the price at which a transaction takes place i.e. the price of which seller is willing to sell and buyer is willing to buy. Thus, the market value of any company would be most indicative price. Accordingly, a fair and proper approach for pricing the shares of the company is to use a combination of these methods.

4.2 The methods generally used for determining the fair value of equity shares are Market Value, Profit Earning Capacity Value and Asset based valuation techniques.

Xxx

4.4 Accordingly the share entitlement ratio is determined based on the market value approach.

5. Consideration of Factors

We have been informed by the management of the companies involved in this Scheme that the consideration would be discharged by Rama to the equity and preference shareholders (wherever applicable) of Ankit, Mayuka, Puneet Trading, Zipahead, Mahanadi, Shreevallabh, Keshav Power and Shree Nirman, pursuant to the Scheme, in the form of fully paid equity shares ofRs.100/- each. However, no shares will be issued against inter company holding.

Having regards to the above factors and on the basis of the representations made by the management the same can be considered to be fair."

38. Valuer has to be an independent person assigned the important duty that his report is equitable to all stakeholders for which his report is to be relied upon.

We have noted that the importance of the valuer for the purpose of valuation is recognised under Section 247 of the Companies Act, 2013 which provides as under:-

*"**247. Valuation by registered valuers**-(1) Where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (herein referred to as the assets) or net worth of a company or its liabilities under the provision of thisAct, it shall be valued by a person having such qualifications and experience registered as a valuer and being a member of an organisation recognised, in such manner,*

on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company.

(2) The valuer appointed under sub-section (1) shall

(a) Make an impartial, true and fair valuation of any assets which may be required to be valued;

(b) Exercise due diligence while performing the functions as valuer;

(c) Make the valuation in accordance with such rules as may be prescribed; and

(d) Not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during a period of three years prior to his appointment as valuer or three years after the valuation of assets was conducted by him."

As regards the arguments of the learned counsel for the appellant that the valuation report has been got prepared from an unregistered valuer is concerned, we note that earlier there was no such section in Companies Act. We note that Section 247 of the Companies Act, 2013 was notified w.e.f. 8.10.2017. The compliance of Section 247 would arise only after this date. There has been no regulation of valuers under the Companies Act, 1956 though the practice has been well established that this valuation was being done by the Chartered Accountants or valuers. The valuation report was submitted by the Valuer in March, 2017.

But the duties of the valuer as all along is necessitated that as a professional he will do his work i.e. Make an impartial, true and fair valuation of any assets which may be required to be valued; Exercise due diligence while

performing the functions as valuer; Make the valuation in accordance with such rules as may be prescribed.

Having gone through the valuation report, we have noted that there are three to four methods to arrive at the fair price of the shares.

As stated by the valuer the share entitlement ratio is determined on the market value approach. Further we find that no valuation of each share in each of the Respondent companies have been stated in arriving at by the valuer in the valuation report. Valuer has only stated and without basis in his report at Page 514 of the appeal that the four shares of Rs.100/- each of 9th respondent will be issued to 1st respondent holding 907 shares of Rs.10/- each and similarly 5 shares of Rs.100/- each of 9th respondent will be issued to 2nd respondent holding 1541 shares of Rs.10/- each.

We find no valuation of each shares in each Respondent Companies have been done. Valuation of each share of company is a starting point to determine the exchange ratio of the shares of the transferor and transferee company. Exchange ratio of the shares of the two companies an outcome of determining the value of the share. We fail to understand how the valuer reached at a conclusion that 4 shares of Rs.100/- each of 9th respondent will be issued to a shareholder holding 907 shares of Rs.10/- each in 1st respondent without having determined the share price of the R1 and R9. Share exchange ratio has to be outcome of the share value determined for an individual company to ensure that the exchange ratio is fair. Similar exercise was supposed to be done of other companies also. We note that this a very cavalier approach adopted by the Respondents is unprofessional, devoid of due diligence expected of them.

Valuation report is circulated to all concerned so that the informed choice could be made by the person whose interest could be favourably or unfavourably impacted on the amalgamation. No such help is coming from the submitted valuation report being devoid of necessary details.

In view of the serious compromises in the process of the valuation of shares the creditability of the exchange ratio recommended could at best be termed as guess work by the valuer. The scheme based on such a valuation report losses its creditability and will impact the entitlement of the shareholders of the transferor companies. -

We have noted that the original scheme has not provided any payment to the shareholders whose shares are cancelled and the NCLT passed another order directing the transferee companies to consider to make payment to the shareholders whose shares were cancelled in terms of respective clauses of the scheme and on the intervention of the Tribunal, the Transferee companies accepted to make payment to the objector/shareholders at the book value as on 1.4.2016. If the principle of Book Value given by the Ld. Tribunal is accepted for the scheme, this will require re-working of the exchange share ratio for all the companies. This will amount to re-writing the scheme of amalgamation together again which will necessitate that the process of approval of amalgamation scheme be initiated de novo. In view of the serious consequences it would be unfair to approve the scheme the foundation of which is seriously compromised.

We have also noted that the 2nd Respondent is the promoter of Dalmia Bharat with 21.82%. Dalmia Bharat is a listed company on the Stock Exchange. The net worth of Dalmia Bharat is around Rs.50 billion. We note

that the swap ratio inter se 2nd respondent and the 9th respondent as proposed in the scheme is erroneous on the face of it and the Regional Director of Chennai has also raised certain concerns over the merit of the scheme. NCLT has also directed the transferee company to make to the objector at the book value as on 1.4.2016 whose shares were cancelled in terms of respective clauses of the scheme. We note that it will be a substantial loss to the people who will receive the payment it will be a massive gain to the people who will continue to be the shareholder in transferee company.

We also note that the Regional Director, Chennai had also filed its objection with regard to these schemes and had left the same to the Ld. Tribunal to dispose the matter on merits. The legal points/adverse observations brought out by the Regional Director in his affidavit is summed up as follows:-

a) The divesting of the shares/investment from the demerged companies (1)(2) pertaining to cement business of the Dalmia group companies is only a transfer of shares and not transfer of a business or business undertaking and hence could not be considered as a Scheme of demerger/arrangement u/s 230-232 of the Companies Act, 2013 as well under the provisions of Section 2(19AA) of the IT Act, 1961.

b) How the minority equity and pref. shareholders in the second demerged company will be issued with shares or compensated for the fractional holdings i.e. who holds less than 1636 equity shares and also the minority Pref. shareholders who are holding less than 4,44,255 has not been stated. Hence the scheme is not complete in

all respects as required under the law and may be considered for rejection.

c) By not issuing shares or issuing less than the value of the Pref. shares redeemed the transferee company is making deemed profit which has to be notified to the Income Tax authorities for assessing the tax liability.

d) The entire share capital of the 2nd transferor company is cancelled which is not permissible under the law. Further the 2nd transferor has allotted 400 shares which is not forming part of the scheme and hence could not considered in the scheme and for this purpose alone the scheme of demerger between the 2nd demerged company and the transferee/resulting company may be considered for rejection.

e) Taking into consideration the above submission it is felt that the scheme is not giving complete information in various aspects and hence may be considered for rejection.

The Regional Director further stated that the composite scheme of arrangement/merger/amalgamation filed with the applications have been examined in view of the observations/objections raised in the affidavit regarding lack of clarity/lack of furnishing of crucial information/details on many aspects of the scheme which has been pointed out in para (9) and (11) (Page 704 to 711 of appeal) and prayed that the Bench may dispose of the matter on merits and pass such order/orders as deemed fit and proper.

We find that the objections raised by the Regional Director were material. Impugned order however has given no good reasons to ignore the objections.

Conclusion

We find that the valuer made a valuation disregarding the methodology, methods or share entitlement ratio even as stated by him in his valuation report. No valuation of each share of every company has been done to arrive at the exchange ratio and we are convinced that only the guess work has been done to arrive at share exchange ratio. We are unable to convince ourselves that on the basis of this valuation report and for other reasons recorded above the amalgamation can be termed as fair to all stakeholders. Such Scheme could not have been approved.

In view of the above the following order is passed.

i) The appeal filed by the appellant is allowed.

ii) Impugned order dated 12th April, 2018 is quashed and set aside.

iii) The Scheme of Amalgamation (accepted by Impugned Order) is rejected. The Company Petitions are dismissed.

iv) A sum of Rs.10,00,000/- costs is imposed on 9th Respondent to be deposited with National Defence Fund within 15 days from the date of this order. Proof of depositing the same will be submitted to the Registrar of this Appellate Tribunal within a week thereafter.

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

(Mr. Balvinder Singh)
Membet (Technical)

New Delhi

Bm