NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 113 of 2019

IN THE MATTER OF:

Joint Commissioner of Income Tax (OSD),
Circle (3)(3)-1, Mumbai ...Appellant

Vs.

Reliance Jio Infocomm Ltd. & Ors. ...Respondents

Company Appeal (AT) No. 114 of 2019

IN THE MATTER OF:

Income Tax Officer, Ward 3(3)-1, Mumbai ...Appellant

Vs.

M/s. Reliance Jio Infratel Pvt. Ltd. & Ors. ...Respondents

Present: **For Appellant: - Mr. Zoheb Hossain, Sr. Standing Counsel for Revenue and Mr. Piyush Goyal, Advocate for Income Tax Department.**
Mr. Sagar Suri, Ms. Lakshmi Gurung, Advocates.

For Respondents: - Dr. A.M. Singhvi, Mr. Ramji Srinivasan, Mr. Jehangir N. Mistry, Mr. Ritin Rai, Senior Advocates with Mr. K.R. Sasiprabhu, Mr. Biju P. Raman, Mr. Raghav Shankar, Mr. Tushar Bhardwaj, Mr. Aabhas Kshetrapal, Mr. Avishkar Singhvi and Ms. Sylona Mohapatra, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

'Reliance Jio Infocomm Limited'- Demerged/ Transferor Company (Petitioner Company No.1), 'Jio Digital Fibre Private Limited'- Resulting

Company (Petitioner Company No.2) and 'Reliance Jio Infratel Private Limited'- Transferee Company (Petitioner Company No. 3) moved joint petition under Sections 230-232 of the Companies Act, 2013, seeking sanction of the Composite Scheme of Arrangement amongst 'Reliance Jio Infocomm Limited' and 'Jio Digital Fibre Private Limited' and 'Reliance Jio Infratel Private Limited' and their respective shareholders and Creditors ("Composite Scheme of Arrangement").

2. The Petitioner Companies (Respondents herein) filed Company Application seeking dispensation of the meeting of Equity Shareholders of the Petitioner Company No.2 and the Petitioner Company No.3 by seeking directions to convene and hold meetings of Secured Creditors (including Secured Debenture Holders), Unsecured Creditors (including Unsecured Debenture Holders), Preference Shareholders and Equity Shareholders of the Petitioner Company No.1.

3. By order dated 11th January, 2019, passed in Company Application, the National Company Law Tribunal ("Tribunal" for short), Ahmedabad Bench, ordered dispensation of the meeting of the Equity Shareholders of the Petitioner Company No.2 and the Petitioner Company No.3, directing for holding and convening the meetings of the Secured Creditors (including Secured Debenture holders), Unsecured Creditors (including Unsecured Debenture holders), Preference Shareholders and Equity Shareholders of the Petitioner Company No.1.

4. Notices were directed to be issued on Regional Director, North Western Region, Registrar of Companies, concerned Income Tax Authority (in case of Petitioner Company No.1), 'Securities and Exchange Board of India', 'BSE Limited' and 'National Stock Exchange of India Limited' (in case of Petitioner Company No.1) stating that the representation, if any, to be made by them, within a period of 30 days from the date of receipt. Publication was also directed to be made and published in the Newspaper "Indian Express" in English language having all India circulation and "Divya Bhaskar" in Gujarati language having circulation in Ahmedabad. Statutory notice was issued and Affidavits were also filed.

5. The National Company Law Tribunal, Ahmedabad Bench, taking into consideration the Chairperson's Report of the meeting of the Secured Creditors; Chairperson's Report of the meeting of the Unsecured Creditors; Chairperson's Report of the meeting of the Preference Shareholders; Chairperson's Report of the meeting of the Equity Shareholders of the Petitioner Company No.1, by order dated 11th January, 2019, directed the Regional Director, North Western Region to make a representation under Section 230(5) of the Companies Act, 2013 and the Income Tax Department to file representation.

6. The Joint Commissioner of Income Tax (OSD), Circle (3)(3)-1, Mumbai and the income Tax Officer, Ward 3(3)-1, Mumbai have preferred these appeals.

7. According to the Appellants, the Tribunal has not adjudicated upon the objections raised by the Appellant- Income Tax Department at the threshold before granting any sanction to the proposed composite scheme of arrangement.

8. It was submitted that the Tribunal has not dealt with specific objection that conversion of preference shares by cancelling them and converting them into loan, it would substantially reduce the profitability of Demerged Company/ 'Reliance Jio Infocomm Limited' which would act as a tool to avoid and evade taxes.

9. It was submitted that the proposed composite scheme of arrangement amounts to reduction in profitability would also bring down the payment of dividend distribution tax which is again a way to avoid payment of taxes. The structure of proposed composite scheme adopted by the Respondents was a permissible method of tax planning or is a tool to avoid and evade payment of taxes.

10. The main thrust of the argument was that by scheme of arrangement, the transferor company has sought to convert the redeemable preference shares into loans i.e. conversion of equity into debt which is not only contrary to the well settled principles of company law as well as Section 55 of the Companies Act, 2013 but also would reduce the profitability or the net total income of the transferor company causing a huge loss of revenue to the Income Tax Department.

11. According to the Appellants, the scheme seeks to do indirectly what it cannot do directly under the law. By way of the composite scheme, there is an indirect release of assets by the demerged company to its shareholders which is used to avoid dividend distribution tax which would have otherwise been attracted in light of Section 2(22) (a) of the Income Tax Act.

12. It was further submitted that the composite scheme also does not fulfil the requirements of Section 2(19AA) which defines the meaning of 'demerger' under the Companies Act, 2013 and it could only be referred to as a purported demerger which does not fulfil the requirements of law.

13. According to counsel for the Appellant, Section 2(19AA) requires the transfer of the undertaking on a going concern basis which is not evident from the balance sheet and profit and loss account of 'M/s. Reliance Jio Infocomm Limited'.

14. Further, as per the law, dividend arising out of preference shares can only be paid by the company out of its accumulated profits. However, when preference shares are converted into loan, the shareholders turn into creditors of the company. There are two consequences of such conversion of preference shares into loan. Firstly, the shareholders who are now creditors can seek payment of the loan irrespective of whether there are accumulated profits or not and secondly, the company would be liable to pay interest on the loans to its creditors, which it otherwise

would not have had to do to its shareholders. Payment of interest on such huge amounts of loan would lead to reducing the total income of the company in an artificial manner which is not permissible in law.

15. It was also alleged that the proposed scheme does not identify the interest rate payable on the loan which will be a charge on the profits of the company i.e. 'Reliance Jio Infratel Private Limited'. Even if 10% interest rate is considered as per Section 186 of the Companies Act, 2013, this would amount to interest of Rs.782.2 Crores per annum which would reduce profitability of company as this interest would reduce Respondent's tax by Rs.258.16 Crores (approx.) each year. The reduction in the profitability is clearly resulting into tax evasion.

16. Learned counsel for the Appellant relied on the decision of the Hon'ble Supreme Court in ***"Vodafone International Holdings BV v. Union of India and Another– (2012) 6 SCC 613"*** wherein the Hon'ble Supreme Court has frowned upon such artifice which leads to tax avoidance.

17. Referring to the Scheme, learned counsel for the Appellant submitted that the Scheme envisages cancellation of preference shares and discharge by constructive payment to the holders of preference shares and a constructive receipt of an equivalent amount as loan from the holders of preference shares to the demerged company, which is not permissible under the law.

18. Overview of the Scheme has been highlighted by 1st Respondent-'Reliance Jio Infocomm Limited', as follows:

(i) Reliance Jio Infocomm Limited and Ors. previously had separate units/divisions housing its optic fiber and tower infrastructure undertakings. Each of these units had distinct assets and liabilities and were involved in separate business.

(ii) The Composite Scheme of Arrangement was entered into between 'Reliance Jio Infocomm Limited', 'Jio Digital Fibre Private Limited' and 'Reliance Jio Infratel Private Limited'. The rationale of the Scheme was that since the businesses and markets in which they operated were distinct, segregation and unbundling of these undertakings would enable enhanced focus on exploiting opportunities, attracting different sets of investors, de-leveraging RJIL's balance sheet and unlocking the value of the undertakings for the shareholders.

(iii) The scheme provided for:

a) **demerger** of the optic fiber undertakings of 'Reliance Jio Infocomm Limited' to 'Jio Digital Fibre Private Limited', i.e., all assets, properties and liabilities of the undertaking were demerged to the resulting company at the values appearing in the books of 'Reliance Jio Infocomm Limited'

b) Transfer of the tower infrastructure undertaking to 'Reliance Jio Infratel Private Limited' as a going concern, i.e., as a slump sale at book value.

c) As consideration for the demerger of the optic fiber undertaking, equity and/or preference shares of 'Jio Digital Fibre Private Limited' would be issued to the shareholders of 'Reliance Jio Infocomm Limited' on a proportionate basis; similarly, 'Reliance Jio Infocomm Limited' would receive equity and/or preference shares of 'Reliance Jio Infratel Private Limited' as consideration for the slump sale of the tower infrastructure undertaking

d) 'Reliance Jio Infocomm Limited' had issued 1,300 preference shares of Rs. 10 each at a premium of Rs. 40 each to its holding company, 'Reliance Industries Ltd.' (RIL), aggregating to Rs. 65,000 crore of subscribed share capital. These funds were *inter alia* utilized by the Answering Respondent for investment in the optic fiber and tower infrastructure undertakings.

e) Under Clause 4 of the Scheme w.e.f 31.03.2019, the preference share capital and corresponding share premium would be cancelled and converted into an equivalent amount of loans from 'Reliance Industries Ltd.' to 'Reliance Jio Infocomm Limited' (7,822 crore), 'Jio Digital Fibre Private

Limited' (45,342 crore) and 'Reliance Jio Infratel Private Limited' (11,836 crore).

19. It was submitted that the opportunities of hearing granted to the Appellants, as detailed below:

(i) Notice dated 17th November, 2019 was issued by 'Reliance Jio Infocomm Limited' to the Appellant pursuant to the NCLT's order dated 11th January, 2019. Pursuant to this, letters dated 14th February, 2019 and 6th March, 2019 were written by the Appellant to NCLT setting out their comments/ observations on the proposed Scheme.

(ii) Further Notice dated 7th March, 2019 was issued by 'Reliance Jio Infocomm Limited' to the Appellant notifying that the final hearing in the matter was fixed for 18th March, 2019. Appellant vide letter dated 15th March, 2019 informed NCLT that it was a "very busy period" for the Department, so the matter may be adjourned to some date in April 2019 (i.e., after the appointed dated under the Scheme, which was 31st March, 2019)

(iii) Final hearing was conducted on 18th March, 2019, on which date Appellant chose to remain unrepresented. The order was reserved on this date and pronounced on 20th March, 2019. The impugned order notes in detail the submissions of the IT Department and issues the directions sought in the same.

(iv) Appellant is now effectively suggesting that the matter should have been adjourned and the scheme recast solely on the basis that the NCLT should have unquestioningly acceded to its request for an adjournment, which request it did not even see fit to advance through counsel on the date of hearing. This is ex facie an absurd suggestion. The plea that that Appellant was not heard prior to passing of the impugned order is therefore contrary to the record of the case unsustainable.

20. It was submitted that in its letters dated 14th February, 2019 and 6th March, 2019 written to the Tribunal, the Appellant did not seek adjudication of the issues raised by it, but only sought issuance of appropriate directions protecting the interests of revenue, i.e., by reserving the right of the Appellant to initiate proceedings under the Income Tax Act in regard to past, present or future liability arising out of or in relation to the Scheme. The Appellant nowhere sought denial of sanction to the Scheme.

21. It was further submitted that the Tribunal in the impugned order noted the submissions of the Appellant and observed that even as per the Department, only two residual issues- valuation of assets and cancellation of preference shares. Even in respect of these issues, Appellant itself had only sought directions protecting the Revenue's right to initiate appropriate proceedings, if it ultimately found that the Scheme had resulted in tax avoidance. The directions prayed for by the Appellant

were noted by the Tribunal and granted in the very terms in which they were sought.

22. According to Respondents, 'Reliance Jio Infocomm Limited' has affirmed on Affidavit that it has no objection to being subjected to tax on the transactions under the Scheme as per law and that the sanctioning of the Scheme would not adversely impact the rights of the Appellant in this regard.

23. Further, it was submitted that no prejudice has, therefore, been occasioned to the interests of Revenue on account of the sanctioning of the Scheme. It remains open to the Department to initiate appropriate proceedings under the Income Tax Act in regard to each of the aspects mentioned in its letters dated 14th February, 2019 and 6th March, 2019.

24. It was also contended that the Appellant is approbating and reprobating in submitting before the Tribunal that it would take necessary steps to examine under the Income Tax Act the specific issues identified by it in appropriate proceedings, while it now contends that these were the threshold issues that the Tribunal should have determined as precursor to according sanction to the Scheme.

25. The main grievance of the Appellant is against clause B of the Composite Scheme of Arrangement and part of Clause C, which relates to 'preference shares' and 'cancellation of the preference shares and reduction of the Preference Share Capital', as shown below:

ANNEXURE - A

COMPOSITE SCHEME OF ARRANGEMENT
AMONGST
RELIANCE JIO INFOCOMM LIMITED
AND
JIO DIGITAL FIBRE PRIVATE LIMITED
AND
RELIANCE JIO INFRATEL PRIVATE LIMITED
AND
THEIR RESPECTIVE SHAREHOLDERS AND CREDITORS
UNDER SECTIONS 230 TO 232 READ WITH SECTION 52 AND OTHER APPLICABLE PROVISIONS OF THE COMPANIES ACT, 2013

A. BACKGROUND OF THE COMPANIES

(i) Reliance Jio Infocomm Limited is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Office - 101, Saffron, Nr. Centre Point, Panchwati 5 Rasta, Ambawadi, Ahmedabad, Gujarat 380 006 (hereinafter referred to as the "**Demerged Company**" or "**Transferor Company**" or "**Demerged/ Transferor Company**"). The Demerged/ Transferor Company *inter alia* has the following undertakings: (a) digital services undertaking; (b) optic fibre cable undertaking; and (c) tower infrastructure undertaking. The non-convertible debentures of the Demerged/ Transferor Company are listed on BSE Limited and National Stock Exchange of India Limited.

(ii) Jio Digital Fibre Private Limited is a company incorporated under the provisions of the Companies Act, 2013, having its registered office at Office - 101, Saffron, Nr. Centre Point, Panchwati 5 Rasta, Ambawadi, Ahmedabad, Gujarat 380 006 (hereinafter referred to as the "**Resulting Company**"). The Resulting Company has been incorporated to carry on the business of setting up, operating and managing the optic fibre cable undertaking.

(iii) Reliance Jio Infratel Private Limited is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Office - 101, Saffron, Nr. Centre Point, Panchwati 5 Rasta, Ambawadi, Ahmedabad, Gujarat 380 006 (hereinafter referred to as the "**Transferee Company**"). The Transferee Company shall carry on the business of setting up, operating and managing the tower infrastructure undertaking.

B. RATIONALE OF THE SCHEME

(i) The Demerged/ Transferor Company has *inter alia* the digital services undertaking, the optic fibre cable undertaking and the tower infrastructure undertaking.

(ii) Each of the above undertakings have a differentiated strategy, different industry specific risks and operate *inter alia* under different market dynamics and growth trajectory. The nature and competition involved in each of the businesses is distinct from the others and consequently each business or undertaking is capable of attracting a different set of investors, strategic partners, lenders and other stakeholders.

(iii) The transfer and vesting of the Demerged Undertaking (*as defined hereinafter*) and the Transferred Undertaking (*as defined hereinafter*) from the Demerged/ Transferor Company to the Resulting Company and the Transferee Company respectively, pursuant to this Scheme (*as defined hereinafter*) would, *inter alia*, result in the following benefits for the Demerged/ Transferor Company and the Resulting Company and the Transferee Company:

(a) segregation and unbundling of the optic fibre cable undertaking and tower infrastructure undertaking of the Demerged/ Transferor Company into the Resulting Company and the Transferee Company respectively, will enable enhanced focus by the Demerged/ Transferor Company, Resulting Company and the Transferee Company on exploiting opportunities in their respective businesses;

(b) operating as separate businesses which are capable of providing services to third parties;

(c) attracting different sets of investors, strategic partners, lenders and other stakeholders having a specific interest in the respective businesses;

(d) assisting in the de-leveraging of the balance sheet of the Demerged/ Transferor Company including reduction of debt and outflow of interest as well as creation of value for its shareholders; and

(e) unlocking the value of the optic fibre cable undertaking and tower infrastructure undertaking for the shareholders of the Demerged/ Transferor Company.

(iv) The Preference Shares (*as defined hereinafter*) issued by the Demerged/ Transferor Company are either redeemable or convertible at the option of the Demerged/ Transferor Company. The Demerged/ Transferor Company has now decided that the Preference Shares (*as defined hereinafter*), which have financed the creation of the assets of various undertakings of the Demerged/ Transferor Company, will not be converted into equity shares. In terms of the Scheme, the Preference Share Capital (*as defined hereinafter*) and the Securities Premium (*as defined hereinafter*) is proposed to be reduced such that there is a constructive receipt of an identical amount as loan from the preference shareholders to the Demerged/ Transferor Company.

The Scheme is in the best interests of the shareholders, employees and the creditors of each of the Demerged/ Transferor Company, the Resulting Company and the Transferee Company.

C. OVERVIEW AND OPERATION OF THE SCHEME

The composite scheme of arrangement ("**Scheme**") amongst the Demerged/ Transferor Company, the Resulting Company and the Transferee Company and their respective shareholders and creditors is presented under Sections 230 to 232 read with Section 52 and other applicable provisions of the Act (*as defined hereinafter*) read with Section 2(1)(AA) and other applicable provisions of the Income Tax Act (*as defined hereinafter*).

This Scheme provides for:

(i) cancellation of the Preference Shares and reduction of the Preference Share Capital and the Securities Premium such that there will be constructive payment to the holders of the Preference Shares and a constructive receipt of an identical amount as loan from the holders of the Preference Shares to the Demerged/ Transferor Company for the purpose of refinancing part of the expenditure incurred in respect of the optic fibre cable undertaking to the extent of INR 45342,00,00,000 ("**Loan 1**"), the tower infrastructure undertaking to the extent of INR 11890,00,00,000 ("**Loan 2**") and in respect of other businesses to the extent of INR 7822,00,00,000 ("**Loan 3**").

26. Section 55 of the Companies Act, 2013 relates to 'issue and redemption of preference shares', as follows:

> *"**55. Issue and redemption of preference shares**— (1) No company limited by shares shall, after the commencement of this Act, issue any preference shares which are irredeemable.*

(2) A company limited by shares may, if so authorised by its articles, issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue subject to such conditions as may be prescribed:

Provided that a company may issue preference shares for a period exceeding twenty years for infrastructure projects, subject to the redemption of such percentage of shares as may be prescribed on an annual basis at the option of such preferential shareholders:

Provided further that—

(a) no such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption;

(b) no such shares shall be redeemed unless they are fully paid;

(c) where such shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the

nominal amount of the shares to be redeemed, to a reserve, to be called the Capital Redemption Reserve Account, and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the Capital Redemption Reserve Account were paid-up share capital of the company; and

(d) (i) in case of such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133, the premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed:

Provided also that premium, if any, payable on redemption of any preference shares issued on or before the commencement of this Act by any such company shall be provided for out of the profits of the company or out of

the company's securities premium account, before such shares are redeemed.

(ii) in a case not falling under sub-clause (i) above, the premium, if any, payable on redemption shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

(3) Where a company is not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of issue (such shares hereinafter referred to as unredeemed preference shares), it may, with the consent of the holders of three-fourths in value of such preference shares and with the approval of the Tribunal on a petition made by it in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed:

Provided that the Tribunal shall, while giving approval under this sub-section, order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares.

Explanation.—For the removal of doubts, it is hereby declared that the issue of further redeemable preference shares or the redemption of preference shares under this section shall not be deemed to be an increase or, as the case may be, a reduction, in the share capital of the company.

(4) The capital redemption reserve account may, notwithstanding anything in this section, be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Explanation.—For the purposes of sub-section (2), the term ''infrastructure projects'' means the infrastructure projects specified in Schedule VI."

27. Whether clause B (iv) is against Section 55, is not a subject matter for determination by the Income Tax Department. It can be noticed and

objected by the Competent Authorities i.e., Regional Director, North Western Region and the Registrar of Companies.

28. Pursuant to order dated 11th January, 2019, the Regional Director, North Western Region, made a representation vide letter dated 13th March, 2019 making certain observations.

(i) The first observation relates to non-convertible debentures of the Applicant Company No.1.

(ii) The second observation relates to placing on record the relevant facts regarding clause 4.2 of the Composite Scheme of Arrangement.

(iii) The third observation relates to modification of the Composite Scheme of Arrangement.

(iv) The fourth observation relates to approvals to be taken from the concerned Regulatory Authorities.

(v) The fifth observation is regarding sufficiency of authorised share capital to issue and allot new equity shares of the Transferee Company to the shareholders of the Demerged/ Transferor Company upon sanction of the Composite Scheme of Arrangement.

(vi) The sixth observation relates to compliance with the provisions of Section 2(19AA) of the Income Tax Act, 1961.

(vii) The seventh observation relates to disclosure of list of assets and liabilities which are proposed to be demerged and

transferred pursuant to the Composite Scheme of Arrangement.

(viii) The eight observation relates to legal expenses to be paid to the Regional Director.

(ix) The ninth observation relates to representation received by Regional Director from the office of Registrar of Companies, Ahmedabad which contain three observations.

29. The Tribunal has noticed the stand taken by the Regional Director, North Western Region as well as taken into consideration the stand taken by the Petitioner Companies and the Composite Scheme filed by them, relevant of which reads as follows:

> "*13.1 With regard to first observation, it is submitted that the non-convertible debentures of the Petitioner Company No.1 are listed on BSE Limited and the National Stock Exchange of India Limited. Regulation 59 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 prescribe prior approval of the stock exchanges where the non-convertible debentures are listed for any material modification in the structure of the aforesaid debentures in terms of coupon, conversion, redemption, or otherwise. It is further submitted that as there is no change in the structure*

of non-convertible debentures in terms of coupon, conversion, redemption, or otherwise pursuant to the Composite Scheme of Arrangement, no prior approval is necessary.

13.2 With regard to second observation, it is submitted that the amount of Preference Share Capital and the corresponding securities premium apportioned to Loan 1, Loan 2 and Loan 3 (as defined in the Composite Scheme of Arrangement) are based on expenditure incurred in respect of the optic fibre cable undertaking, tower infrastructure undertaking and other businesses of the Petitioner Company No.1.

13.3 With regard to third observation, it is submitted that the Petitioner Companies modified the composite scheme of arrangement to the effect that the Resulting Company and the Transferee Company shall provide an option to the shareholders of the Demerged Company and to the Transferor Company, at their discretion, to receive a part of the consideration in the form of preference shares, for the demerger of Demerged Undertaking and transfer of the Transferred Undertaking respectively. It is further submitted that the aggregate consideration

envisaged under the Composite Scheme of Arrangement does not undergo any change pursuant to the aforesaid amendment. It is further submitted that a notice of this modification was published in Indian Express, all editions in English and a Gujarati translation thereof in Divya Bhaskar on 13.02.2019. The modifications were also explained by the Chairperson of the respective meetings of the Secured Creditors (including Secured Debenture holders), Unsecured Creditors (including Unsecured Debenture holders), Preference Shareholders and Equity Shareholders of the Petitioner Company No. 1 at their meetings convened and held for approving the Composite Scheme of Arrangement. In the said meetings, the Composite Scheme of Arrangement, as amended, was approved by the requisite majority of the Secured Creditors (including Secured Debenture holders), Unsecured Creditors (including Secured Debenture holders), Preference Shareholders and Equity Shareholders of the Petitioner Company No. 1.

13.4 With regard to fourth observation, it is submitted that the approvals and permissions, as may be necessary for carrying on the activities of the

Petitioner Companies shall be applied for and obtained by following necessary procedures in accordance with applicable law.

13.5 With regard to fifth observation, it is submitted that Petitioner Company No. 2 and Petitioner Company No.3, shall reclassify/ increase the authorized share capital to the extent required and also undertake to make due compliances for the said purpose.

13.6 With regard to sixth observation, it is submitted that Composite Scheme of Arrangement is a composite Scheme and that the Petitioner Companies shall comply with the provisions of Section 2 (19AA) of the Income-tax Act, 1961, to the extent applicable.

13.7 With regard to seventh observation, it is submitted that the Petitioner Company No.1 shall submit the list of assets pertaining to the Demerged Undertaking and the Transferred Undertaking with the registry to be annexed as part of the order sanctioning this Composite Scheme of Arrangement. Since the Appointed Date is a prospective date, the Petitioner Company No.1 shall identify all the liabilities of the Demerged Undertaking and the Transferred Undertaking as on the Appointed Date

and the same shall also be duly transferred along with the respective undertakings.

13.8 With regard to eighth observation, it is submitted that the Petitioner Companies shall pay the requisite legal fees/cost to the Central Government as may be directed by this Tribunal.

13.9 With regard to the ninth observation which is in relation to representation of Registrar of Companies, it is submitted that the Petitioner Company No. 1 has submitted letter dated 08.02.2019 with the office of the Regional Director and the Registrar of Companies, for reply to letter dated 17.12.2018 of Birbhum Highway Division-II, stating that the Composite Scheme of Arrangement will not impact the dues, if any, of the Birbhum Highway Division-II. A copy of the letter dated 08.02.2019 of the Petitioner Company No.1 is placed on record. As regards the second observation is concerned, the Petitioner Company No. 1 has submitted letter dated 05.03.2019 with the office of the Regional Director and the Registrar of Companies, for reply to letter dated 29.11.2018 of Municipal Commissioner, Thane Municipal Corporation, clarifying that there is no proposal of merger between the Petitioner

Company No.1 and Reliance Communications Limited. So far as the third observation is concerned, it is stated that the Petitioner Company No.1 has submitted a letter dated 07.02.2019 with the office of the Registrar of Companies clarifying the issues and that there is no further observation received from the office of Registrar of Companies.

There are no other observations made by the Regional Director and the Registrar of Companies."

30. Though no specific argument was advanced on behalf of the Income Tax Department (Appellant), however, the Tribunal dealt with the representations of the concerned Income Tax Department and observed:

"15. In response to the representations of concerned Income Tax Department, the Petitioner Companies have filed affidavit dated 15.3.2019 with this Tribunal. This Tribunal perused the representations of the Income Tax Department and the affidavit filed by the Petitioner Companies in response thereto. This Tribunal notes that though in its initial report, the IT Department had some reservations in the Scheme, later on, after receipt of clarifications from the Petitioner Companies, the IT Department, in its last

report, has raised only two issues viz. valuation of the assets under slump sale/ demerger and cancellation of preference shares. In so far as the first issue is concerned, it is understood by the Petitioner Companies that "the IT Department reserves the right to examine any aspect of any tax payable in respect of proposed slump sale and issue of shares, etc." On the second issue, IT Department has merely referred to tax implication on conversion of preference shares into loan. However, having said that, ultimately the report makes the following submissions:-

> *"9. The Income Tax Department will be free to examine the aspect of any tax payable as a result of the Scheme and in case it is found that the Scheme of Arrangement ultimately results in tax avoidance or is not in accordance to the demerger provisions of the Income Tax Act, then the Department will be at liberty to initiate appropriate course of action as per law.*
>
> *10. It is further requested that the right of the Income Tax Department should remain intact to take out appropriate proceedings regarding rising of any tax demand against the demerged company at any future date and these rights should not*

be adversely affected in view of sanction of the Scheme.

*11. It is reiterated that any sanction to the Scheme of Arrangement under Sections 230 to 232 of the Companies Act, 2013 should not adversely impact the rights of the Income Tax Department for any past, present or future proceedings. The department should be at liberty to take appropriate action as per law in case of an event of any tax-avoidance or violation of Income Tax Law or any other similar issue.***"**

In response to this, the Petitioner Companies have affirmed that the sanctioning of the Composite Scheme of Arrangement will not adversely impact the rights of the Income Tax Department for any past, present or future proceedings as per law in relation to the Petitioner Companies.

No representations have been received from any other statutory authorities.

xxx xxx xxx

21. In so far as the observations of Income Tax Department made in Para 15 are concerned, considering the response of the Petitioner companies, it is hereby made it clear that the Income Tax Department will be free to examine the aspect of any

tax payable as a result of the sanction of the Scheme and in case it is found that the Scheme of Arrangement ultimately results in tax avoidance or is not in accordance with the demerger provisions of the Income Tax Act, then the IT Department will be a liberty to initiate appropriate course of action as per law. It is further clarified that any sanction to the Scheme of Arrangement under Sections 230 to 232 of the Companies Act, 2013 shall not adversely impact the rights of the Income Tax Department for any past, present or future proceedings. The department shall be at liberty to take appropriate action as per law in case of an event of any tax-avoidance or violation of Income Tax Law or any other similar issue."

31. We have noticed the representations made by the Income Tax Department dated 14th February, 2019 wherein following comments were made in respect to issues relating to cancellation of preference shares:

"iv) ***Issue related to Cancellation of Preference Share:-***

- *As per the scheme the preference shares having face value of 13000 crores along with securities premium of 52,000 crores are cancelled and*

converted into loan as mentioned in page 8 para 7b of the scheme.

Generally, share premium cannot be cancelled or returned back. The security premium once received does not belong to the person who has paid the premium but to all the shareholders of the company irrespective of quantum of shareholding and period of shareholding. It cannot be paid to the subscriber or preference shareholders only.

- *Converting preference shares along with securities premium into loans is detrimental to the interest of shareholders and income tax department because payment to preference shareholders is made only when there is profit in the hands of company and the same is application of profit. Whereas, payment of interest on loan is charged on profit therefore the conversion will result in lesser taxable profit in the hands of company which pays interest and would be against the interests of Income Tax Department.*
- *The security premium amount can only be used for the following purpose.*

a. *When money is lying and is not used.*

b. *For issuing bonus.*

c. *For payment of dividends*

The cancellation of preference share is not related/ connected with demerger/ transfer of an undertaking. The conditions laid down in section 66(1) of Companies Act, 2013 are not satisfied while making cancellation of preference shares.

- *The conversion of securities premium into loan results into release of assets and may be taxable u/s 2(22a) of Income Tax Act, 1961. The reasons being,*

  a. *In the case of securities premium there is no liability on the company to pay to anyone whereas conversion of the same into loan creates liability on the company and ultimately company has to pay these loans along with interest. This results into release of the assets.*

- *The complete details of treatment given to preference share capital and security premium are not provided. In this circumstance, no further*

comment can be offered in respect of this at this stage.

- *In Para 4.2 of page 16 of copy of notice give, it is mentioned that the terms and conditions of document shall be mutually agreed between demerged and transferor company and holders of preference shares which is a future event whereas the details of the same should have been given in the scheme itself. Even in the case of* ***M/s. Reliance Jio Infocomm Ltd.*** *these details are missing. It is also mentioned that there will be no reduction in authorized share capital of demerged/ transferor company whereas what is relevant is reduction/ change in the paid up capital and securities premium.*
- *The names of preference shareholders are not made available. However, since M/s. Reliance Jio Infocomm Ltd. is closely held company and from plain reading of the scheme, it may be assumed that the preference shareholders would be closely related to the management or the equity shareholders.*

  This assumption can be made from the information that huge amount of securities

premium (Rs. 52,000 Cr.) is being converted into loan in favour of these shareholders. In this background, this part of scheme is apparently designed to unduly favour the preference shareholders. Further, the decision to convert Preference Share to Loans is detrimental to the Transferor Company (i.e. ***M/s. Reliance Jio Infocomm Limited)***

This would adversely affect the Income Tax Department also because interest on these converted loans would be claimed as expenditure by the concerned companies and the same would result in lesser taxable profit."

32. In the said comments, the Income Tax Department also noticed the note on the page 9 of the Scheme and made following comments:

"(vii) It is clear that all pending proceedings against the Demerged Company shall be continued against the Resulting Company. Therefore, the Scheme should be without prejudice to the rights of the Income Tax Department and the Income-tax

Department is free to proceed against the Resulting Company for all its proceedings.

(viii) Apart from the above tax aspects of the scheme, if it is discovered that this scheme or similar such schemes are in any way acting further as a device for tax-avoidance then the Department will be at liberty to initiate the appropriate course of action as per law.

(ix) The Income Tax Department will be free to examine the aspect of any tax payable as a result of the Scheme and in case it is found that the scheme of Arrangement ultimately results in tax avoidance or is not in accordance to the demerger provisions of the Income Tax Act, then the Department will be at liberty to initiate the appropriate course of action as per law.

(x) It is further requested that the rights of the Income Tax Department should remain intact to take out appropriate proceedings regarding raising of any tax demand against the demerged company at any future date and these rights should not be adversely affected in view of the sanction of the Scheme.

(xi) It is further being mentioned that, as per the scheme of demerger the valuation of the assets and

liabilities in the case of ***M/s. Reliance Jio Infocomm Limited*** *shall be done on 31/03/2019. Hence, it would be not possible to comment on the valuation of the assets and liabilities at this point of time."*

33. Comments show that liberty was sought for to allow the Income Tax Department to examine the aspect of any tax payable as a result of the Scheme and in case it is found that the scheme of arrangement ultimately results in tax avoidance or is not in accordance to the demerger provisions of the Income Tax Act, then the Department will be at liberty to initiate the appropriate course of action as per law.

34. However, in the end of comments, asking for such liberty, it was observed that the Composite Scheme of arrangement amongst 'M/s. Reliance Jio Infocomm Limited', 'M/s. Digital Fibre Pvt. Ltd.' and 'M/s. Reliance Jio Infratel Pvt. Ltd.' and their respective shareholders and creditors is giving undue favour to the shareholders of the company and also the overall scheme of arrangement results into tax avoidance.

35. The Income Tax Department in one hand asked that it is entitled to examine the aspect of any tax payable as a result of the Scheme and the Scheme of Arrangement ultimately results in tax avoidance or not, on the other hand, without any basis, it comes to a conclusion that the Composite Scheme of Arrangement amongst the Petitioner Companies

and their shareholders and creditors is giving undue favour to the shareholders of the company and also the overall scheme of arrangement results into tax avoidance.

36. Without going to the record and without placing any evidence or substantiate the allegation by appearing before the Tribunal, it was not open to the Income Tax Department to hold that the Composite Scheme of Arrangement amongst the Petitioner Companies and their respective shareholders and creditors is giving undue favour to the shareholders of the company and also the overall scheme of arrangement results into tax avoidance.

37. The Income Tax Department, which sought for liberty, while accepted by the Petitioner Companies (Respondents herein) and the Tribunal while approving the Composite Scheme of Arrangement has granted liberty. Such liberty to the Income Tax Department to enquire into the matter, if any part of the Composite Scheme of Arrangement amounts to tax avoidance or is against the provisions of the Income Tax and is to let it take appropriate steps if so required.

38. Mere fact that a Scheme may result in reduction of tax liability does not furnish a basis for challenging the validity of the same. In the Division Bench of the Hon'ble Gujarat High Court in ***"Vodafone Essar Gujarat Ltd. v. Department of Income Tax (2013) 176 Com Cas 7 (Guj)"*** while rejecting the similar objection of the Income Tax Department held:

"42. The main contention of the Income Tax Department is that the Scheme is floated with the sole object to avoid tax liability. Except the Income Tax Department no objections were raised by anyone against sanctioning the Scheme. In this connection, it is submitted by Mr Mihir Thakor, learned Counsel for the Department that the transaction in question is nothing, but a transaction of assets of passive infrastructure of the transferor company into Indus, but the said transaction is given colour by an artificial device and with a view to save income-tax liability two stages are created by the appellant group i.e. Vodafone i.e. introducing a pre-ordained devise/ conduit in the form of a new Company (the present Transferee Company) and transferring by way of Gift to this new Company and thereafter amalgamating this new Company into Indus. Both the stages are done under the guise of scheme u/s 391 to legitimise the same by obtaining the seal of the Hon'ble Court and evade payment of Income Tax, stamp duty and VAT and other taxes. In this connection, it is required to be noted that as per the Scheme the Passive Infrastructure business and the telecommunication service business was sought to be segregated in order

to achieve a commercial purpose and object inter alia being segregating the PI business and the telecommunications service business to enable further growth and maximize value in each of the business; improved quality of services to customers by establishing high service standards and delivering services in an environment friendly manner; increase in the speed of role out and efficiency through sharing of infrastructure, converting the PI assets from non-revenue generating assets; improved network quality and greater coverage etc. It is required to be noted that various telecommunication companies in this country have adopted the business policy of segregation of telecommunication services and telecommunication infrastructure business as per the global trends prevailing as on today. During the course of hearing it has been pointed out that the working group under the Planning Commission has recommended sharing of infrastructure. Keeping the said object in mind if the Scheme has been framed and is approved by the shareholders in their wisdom, in our view, it cannot be said that the Scheme itself is floated with the sole criteria of tax avoidance simply because it may have effect and result into avoidance

tax. If the Scheme is evolved by way of an arrangement and with an object of converting the PI assets from non-revenue generating assets; improved network quality and greater coverage etc. Moreover the segregation of telecommunications services and telecommunications infrastructure business reflects the global trend and has been adopted by telecommunication companies in India without objection. In fact, the Working Group under the Planning Commission has recommended sharing of infrastructure, and the present Scheme reserves flexibility to it for easing such process when required. It may be relevant to note that even the Central Government has not raised any objection to the Scheme and even the Department has not contended that the aforesaid objectives are imaginary. Therefore it cannot be said that the Scheme has no purpose or object and that it is a mere device/ subterfuge with the sole intention to evade taxes, particularly when even the incidence of tax purportedly sought to be evaded is not established on facts. Further, similar scheme of arrangement proposed by other telecommunication companies to achieve the aforesaid objectives have been sanctioned by different High Courts. In our

considered view, this Court cannot refuse the sanction on the aforesaid ground by coming to the conclusion that the only object of the Scheme is to avoid taxes.

43. It is, no doubt, true as argued by Mr Thakor that in case the Scheme is sanctioned, it may result into tax avoidance on the part of the appellant, but it is required to be noted that even if the ultimate effect of the Scheme may result into some tax benefit or even if it is framed with an object of saving tax or it may result into tax avoidance, it cannot be said that the only object of the Scheme is tax avoidance. Considering the various clauses of the Scheme it is not possible for us to come to a conclusion that the Scheme is floated with the sole object of tax avoidance. In its commercial wisdom if the Company has decided to have a particular arrangement by which there may be even benefit of saving income-tax or other taxes, that itself cannot be a ground for coming to the conclusion that the sole object of framing the Scheme is to defraud the Income Tax Department or other taxing authorities. It is also required to be noted that identical Schemes have been approved by various High Courts as pointed out

earlier. As per the Scheme, it proposed to demerge the passive infrastructure assets of seven transferor companies and transfer them to the transferee company. The transferor companies and the transferee company are wholly owned and subsidiary of transferee company viz. Vodafone Essar Mobile Services Limited. One of the objects for framing of the Scheme is segregation of passive infrastructure business and telecommunication services business is to enable further growth and maximize value in each of the businesses.

It is required to be noted that in the case of Nirmay Properties P. Ltd. reported in (2009) 150 Comp Cases 538 (Gujarat), this Court was dealing with the Scheme for amalgamation of five subsidiary companies with the holding company. In the said case also there were no secured creditors. No objection was raised to the petitions even after the publication. The Official Liquidator in his report has stated that the auditors appointed for the purpose of scrutiny and investigation of the books of account and affairs of the company had in their report pointed out violation of the provisions of the Companies Act, 1956 and Accounting Standards

and evasion of stamp duty and income-tax. The learned Company Judge held that the objections raised by the auditors would not affect the scheme and that sanction to the scheme would not absolve the companies from any liability that may arise in future on violation of any statutory provisions or that the Scheme would not affect proceedings pending either before the civil or criminal courts and the liability that may be inflicted upon the petitioners or their Directors, would not be affected simply by virtue of the Scheme of Amalgamation.

In the case of Vodafone International Holdings B.V. v. Union of India and Another, (2012) 1 Comp LJ 225 (SC), the Honourable Supreme Court has considered the provisions of Section 195 of the Income Tax Act. The aforesaid matter concerned a tax dispute involving the Vodafone group with the Indian tax authorities in relation to the acquisition by Vodafone International Holdings BV (VIH), a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd. (CGP), a company resident for tax purposes in the Cayman Islands (CI, for short), vide transaction dated 11.02.2007,

whose stated aim, according to the Revenue, was acquisition of 67% controlling interest in HEL being a company resident for tax purposes in India which is disputed by the appellant saying that VIH agreed to acquire companies which in turn controlled a 67% interest, but not controlling interest, in Hutchison Essar Limited (HEL). According to the appellant, CGP held indirectly through other companies, 52% shareholding interest in HEL as well as options to acquire a further 15% shareholding interest in HEL, subject to relaxation of FDI norms. The Revenue sought to tax the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, holds the underlying Indian assets. The High Court upheld the jurisdiction of the Indian tax authority to impose capital gains tax on VIH as a representative assesse after holding that the transaction between the parties attracted capital gains in India. Applying the 'natural character of the transaction' test, the High Court came to the conclusion that the transfer of CGP share was not adequate in itself to achieve the object of consummating the transaction between HTIL (a group holding overseas company of which

HEL was a subsidiary) and VIH. That, intrinsic to the transaction was a transfer of other 'rights and entitlements' which rights and entitlements constituted in themselves 'capital assets' within the meaning of Section 2(14) of the Income Tax Act, 1961. According to the High Court, VIH acquired the CGP share with other rights and entitlements whereas, according to the appellant, whatever VIH obtained was through the CGP share. The decision of the High Court was called in question in SLP before the Honourable Supreme Court. The Honourable Supreme Court held that the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, holds the underlying Indian assets. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the look at test to ascertain its true legal nature. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to

overcome the evidence of a device. In para 45 it has been held that the tax planning may be legitimate provided it is within the framework of law. In the latter part of para 45, it held that colourable device cannot be a part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes without resorting to subterfuges. Thus, it cannot be said that all tax planning is illegal/illegitimate/impermissible.

The following observations of the Honourable Supreme Court in the aforesaid case are relevant for our purpose:

> *"64. Shareholders can enter into any agreement in the best interest of the company, but the only thing is that the provisions in Association. The essential purpose of the SHA is to make provisions for proper and effective internal management of the company. It can visualize the best interest of the company on diverse issues and can also find different ways not only for the best interest of the shareholders, but also for the company as a*

whole. In S.P. Jain v. Kalinga Cables Ltd. : (1965) 2 SCR 720, this Court held that agreements between non-members and members of the Company will not bind the company, but there is nothing unlawful in entering into agreement for transferring of shares. of course, the manner in which such agreements are to be enforced in the case of breach is given in the general law between the company and the shareholders. A breach of SHA which does not breach the Articles of Association is a valid corporate action but, as we have already indicated, the parties aggrieved can get remedies under the general law of the land for any breach of that agreement."

In the case of Union of India & Another v. Azadi Bachao Andolan And Another, (2004) 10 SCC 1 the Supreme Court was considering the question as to whether offshore companies incorporated and operating from Mauritius and liable to tax in that country were entitled to benefits of Indo-Mauritius Double Taxation Avoidance Convention, 1983

or not. The Honourable Supreme Court has held as under:

114. The decision of the Chancery Division in Re F.G. Films Ltd. 53 (1) WLR 483 was pressed into service as an example of the mask of corporate entity being lifted and account be taken of what lies behind in order to prevent fraud. This decision only emphasises the doctrine of piercing the veil of incorporation. There is no doubt that, where necessary, the courts are empowered to lift the veil of incorporation while applying the domestic law. In the situation where the terms of the DTAC have been made applicable by reason of section 90 of the Income Tax Act, 1961, even if they derogate from the provisions of the Income Tax Act, it is not possible to say that this principle of lifting the veil of incorporation should be applied by the court. As we have already emphasised, the whole purpose of the DTAC is to ensure that the benefits thereunder are available even if they are inconsistent with the provisions of the Indian Income Tax Act. In our view,

therefore, the principle of piercing the veil of incorporation can hardly apply to a situation as the one before us.

164. If the court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal result has not been achieved, the court might be justified in overlooking the intermediate steps, but it would not be permissible for the court to treat the intervening legal steps as non-est based upon some hypothetical assessment of the real motive of the assessee. In our view, the court must deal with what is tangible in an objective manner and cannot afford to chase a will-o-the-wisp.

166. We are unable to agree with the submission that an act which is otherwise valid in law can be treated as non-est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents.

167. In the result, we are of the view that Delhi High Court erred on all counts in

quashing the impugned circular. The judgment under appeal is set aside and it is held and declared that the Circular No.789 dated 13-4-2000 is valid and efficacious.

In the case of United Bank of India Limited v. United India Credit and Development Company Limited, 1977 Company Cases 689 (Cal.), the Calcutta High Court has observed that fairness or unfairness of the scheme is not for the court's discretion in a technical sense but is a matter to be decided on evidence -- Test being whether it is for the interest of future commercial interest of the company, court cannot substitute its own views for the directors and experts. Unanimous opinion of directors is a relevant factor. He rightly submitted that predominant combined holdings of shares by directors are irrelevant consideration for the court. In paragraph 54 of the said decision, it has been held as under:

"54. Regarding the question of the scheme being unfair on merits, hypothetical, conditional, etc., I do not find any substance

in the same save and except such contentions as have been raised relying on various decisions which are entirely on different background and different facts having no relevancy whatsoever in the facts and circumstances of the case. All of the said decisions relate to taking over or amalgamation of a company with an existing company, whereas, here, a new company has been incorporated for the purpose of the said amalgamation. As such, the principles relied on by the opposing group of shareholders cannot have any application whatsoever in the facts of the case, as, admittedly, the new company has not commenced its business but has only been incorporated for the purpose of taking over the petitioner-bank. Further, the court cannot speculate at this stage as to the possibility, potentiality of the amalgamated-company in future and its working. It is true that the court is not a mere rubber-stamp but, in sound exercise of its discretionary power to sanction a scheme, must consider the scheme as a whole having regard to the general

conditions, background, and object of the scheme and the present day conditions, and atmosphere in the State where the companies are going to function. Court cannot take a pedantic and strict view of each and every clause in the scheme and speculate as to its future, feasibility and possibility at this stage. It is for the collective wisdom of the shareholders who are primarily businessmen and investors guided by the directors of a company to determine the course of business they choose. The principles are so well-known and even repeated by all the counsels appearing for both the parties that I need not discuss the same threadbare and it will be sufficient for me to hold that I accept the arguments and contentions of Mr. S. C. Sen, Mr. R. C. Nag and Mr. S. B. Mukherjee on this question which I have set out before. It is premature for the court to judge now whether the business envisaged by the scheme of amalgamation to be carried on in future would become profitable and a success. The court is only to see whether it is feasible having

potentiality in the facts and circumstances of this case. In my view, prima facie, I am satisfied that in the present set up and conditions, particularly as it appears from the Report of the Banking Commission, the relevant articles of which I have quoted before, that there is nothing wrong or objectionable in the scheme of amalgamation being put through. In fact, the State of West Bengal appearing before me through Mr. D. P. Gupta is supporting the said scheme so also the Life Insurance Corporation of India and other statutory bodies. I have no hesitation in holding that the business of the amalgamated company is highly potential and conducive to the economy and development of the State of West Bengal in the present set up, when funds are urgently needed for the growth and development of existing and new enterprises. Further, the shareholders of the petitioner-bank never complained of the management of their company by its directors so far and suddenly they cannot have any reasonable and bona fide grievances against the said

management and the scheme. It is true that names of eminent, well-known industrialists and respectable persons of integrity and honesty have been referred as prospective directors of the amalgamated company and they have not yet signified their consent of acceptance of such office but that in my view is not required at this stage, being premature. But the suggestion and intention as shown by the petitioners to appoint respectable, reliable and honest persons of high reputation as directors is enough for me at this stage to take into consideration the bona fide intention and object of the petitioner-companies." (emphasis supplied)

49. Both the learned counsel have relied upon the decision of the Supreme Court in the case of Miheer H Mafatlal v. Mafatlal Industries Limited (1996) 87 CompCas 792 (SC). In the said case it has been held by the Honourable Supreme Court that the sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held,

whether the Scheme of compromise or Arrangement is not found to be violative of any law and not contrary to the public policy. The Supreme Court has laid down the following broad contours of such jurisdiction:

> *"1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.*
>
> *2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 Sub-Section (2).*
>
> *3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.*

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391 Sub-section (1).

5. That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to

promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable 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.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory

jurisdiction. The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the courts jurisdiction."

xxx xxx xxx

55. In view of the approval accorded by the equity shareholders, secured and unsecured Creditors of the petitioner and the Regional Director, Western Region to the proposed Scheme of Arrangement, as well as the submissions of the Income Tax Department, there appear to be no further impediments to the grant of sanction to the Scheme of Arrangement. Consequently, sanction is hereby granted to the Scheme of Arrangement under Sections 391 and 394 of the Companies Act, 1956 while protecting the right of the Income Tax Department to recover the dues in accordance with law irrespective of the sanction of the Scheme. However, while sanctioning the Scheme it is observed that said sanction shall not defeat the right of the Income Tax Department to take appropriate recourse for recovering the existing or

previous liability of the transferor company and the transferor company is directed not to raise any issue regarding maintainability of such proceedings in respect of assets sought to be transferred under the proposed Scheme and the same shall bind to transferor and transferee company. The pending proceedings against the transferor company shall not be affected in view of the sanction given to the Scheme by this Court. In short, the right of the Income Tax Department is kept intact to take out appropriate proceedings regarding recovery of any tax from the transferor or transferee company as the case may be and pending cases before the Tribunal shall not be affected in view of the sanction of the Scheme."

39. The aforesaid decision of the Hon'ble Gujarat High Court in ***"Vodafone Essar Gujarat Ltd."*** (Supra) was affirmed by the Hon'ble Supreme Court in ***"Department of Income Tax v. Vodafone Essar Gujarat Limited – (2015) 16 SCC 629"*** wherein the Hon'ble Supreme Court observed:

"2. We are not inclined to entertain the special leave petitions. The special leave petitions are, accordingly, dismissed. We only state that the

Income Tax Department is entitled to take out appropriate proceedings for recovery of any tax statutorily due from the transferor or transferee company or any other person who is liable for payment of such tax due."

40. The case of the Appellant(s) is covered by the decision of the Hon'ble Supreme Court in ***"Department of Income Tax v. Vodafone Essar Gujarat Limited and Another"*** (Supra) and in view of the liberty given to the Income Tax Department, we are not inclined to interfere with the Scheme of Arrangement as approved by the Tribunal.

Both the appeals are dismissed. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Kanthi Narahari)
Member(Technical)

NEW DELHI
20th December, 2019

AR