S i s t e m a S h y a m T e l e s e r v i c e s L t d v s ========== on 30 September, 2016

Author: Alok Sharma

Bench: Alok Sharma

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH
ORDER

S.B. Company Petition No.13/2016

M/s. Sistema Shyam Teleservices Limited, a company incorporated under the Companies Act, 1956 and having its registered officer at MTS Tower, Amrapali Circle, Vaishali Nagar, Jaipur Rajasthan 302021

--- Petitioner- Transferor Company

M/s. Reliance Communication Limited, a company incorporated under the Companies Act, 1956 and having its registered office at H Block, First Floor Dhirubhai Ambani Knowledge City Navi Mumbai-400710

--- Transferee Company

In the matter of Sections 391 to 394 of
the Companies Act, 1956
for Sanction of the Scheme of Arrangement
ALONG WITH

1. S.B. Company Miscellaneous Application No.76/2016
by Manisha Tele Sanchar Private Limited

2. S.B. Company Miscellaneous Application No.124/2016
by Srinivasraghvan Seshadri

3. Miscellaneous Application No.17415/2016 (Inward)
by Aman Finvest Private Limited

4. Miscellaneous Application No.16886/2016 (Inward)
by M/s. Jindal Securities Private Limited

5. Miscellaneous Application No.16978/2016 (Inward)
by Regional Director, North Western Region
Ministry of Corporate Affairs

Date of Order: September 30, 2016.

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PRESENT

HON'BLE MR. JUSTICE ALOK SHARMA

Mr. P. Chidambram, Senior Advocate and
Mr. Parag Tripathi, Senior Advocate
Mr. Abhinav Vashistha, Senior Advocate with
Mr. Anirudh Das]
Mr. Anuroop Singhi] for the petitioner companies.
Mr. Manu Krishnan]
Mr. Saurabh Jain]
Mr. Hemant Sharma]
Mr. Kushagra Sharma]
Mr. O.P. Pareek]

Mr. R.D. Rastogi, Addl.SG with
Mr. Anand Sharma,
Mr. Ashish Kumar, Mr. Satyam Khandelwal
Mr. Gujnjan Pathak, Ms. Nivedita R. Sarda,
Mr. Madhav Mitra, Mr. Anant Kasliwal for respondents.
Mr. Mohit Kumar Sharma, for applicant.
Mr. Sanjay Kumar Gupta, Official Liquidator.
BY THE COURT:

REPORTABLE This matter comes up on the second motion under Sections 391 to 394 of the Companies Act, 1956 (hereinafter `the Act of 1956') read with Rule 57 of the Company (Court) Rules 1959 (hereinafter `the Rules of 1959') seeking sanction of the scheme of arrangement between M/s. Sistema Shyam Teleservies Limited (hereinafter `the Transferor Company') and M/s. Reliance Communication Limited (hereinafter `the Transferee Company') and their respective shareholders and creditors for transfer of the telecom business undertaking of the Transferor Company to the transferee company on an ongoing business basis concern consisting of assets/ liabilities set out in the scheme.

The facts of the case are that the Transferor Company whose registered office is situate at MTS Tower Anmrapali Circle, Vaishali Nagar, Jaipur within the jurisdiction of this court moved the first motion under Sections 391-393 of the Act of 1956 Act for holding meetings of its shareholders and unsecured creditors for considering and approving the scheme of arrangement in issue. Vide order dated 29-1-2016 it was directed by this court that the meetings of shareholders and unsecured creditors be convened and held at its registered office on 18-3-2016 under the respective chairmen appointed therefor by the court. Meeting of the sole preference shareholders was dispensed with by the court on the basis of consent in writing filed before the court. Consequently the meetings as directed were held, the scheme of arrangement was approved and adopted. Reports of the respective Chair persons of the two meetings have been submitted before this court on 21-3-2016. Hence this application for second motion for sanction the scheme by the court.

Notices were issued by the court on 1-4-2016 to the Regional Director (North western Region), Ministry of Corporate Affairs and the Registrar of Companies, Ministry of Corporate Affairs, at its Jaipur office. Notices were also directed to be published in two daily news papers Financial Express (English) Delhi Edition and Dainik Bhaskar (Hindi) Jaipur and Delhi Edition. Copies of notices published in news papers on 26-4-2016 have been placed before this court.

The Transferor company was incorporated under the Act of 1956 on 20-4-1995 in the name of Telelink Network (India) Limited. The name was thereafter changed to Shyam Telelink Limited and amended certificate of Incorporation dated 3-4-1998 was issued by the Registrar of Company Delhi and Haryana. On 26- 8-2002 the registered office of the Transferor Company was from shifted Delhi to Rajasthan and a certificate of Registration issued afresh by the Registrar of Companies, Jaipur Rajasthan. The name of the Transferor Company was thereafter changed to M/s. Sistema Shyam Teleservices Limited on 22-1-2009. A fresh certificate of incorporation by the Registrar of Companies, Jaipur followed.

The Transferor Company is inter alia engaged in the business of telecom services and is one of the telecom service provider in the country. The scheme of arrangement approved by the shareholders and unsecured creditors of which sanction is sought provides for transfer and vesting of the "Transferred undertaking" defined therein (hereinafter `the telecom business') from the Transferor Company to the Transferee Company on an ongoing concern basis subject to regulatory approvals. The consideration lies in the issue of 27.65 crors equity shares by the Transferee company to the Transferor Company and payment of upto US $300 Million in Indian rupees equivalent as per the terms of the Earn Out Deed executed on 2-11-2015 between the Transferor Company, the Transferee Company and STA Capital LLC, Moscow Russian Federation. The scheme in issue provides that following the transfer and of "vesting of the Transferred undertaking" (telecom business) the Transferor Company will continue to pursue its interests in the "remaining business" which is also being presently carried out by it with greater focus to encash the available opportunities in the said business areas. The rationale for the proposed scheme has been stated to be that the transfer of the telecom businesses will result in multiple benefits to the Transferor Company such as deleveraging its balance-sheet, reduction of debt and interest outgo thereon, creation of value for its shareholders aside of facilitating the telecom and wireless business of the Transferee Company in which the Transferee Company would have acquired substantial percentage of equity interest. It has been contended that the scheme of arrangement in issue is compliant with all applicable laws and an undertaking to comply with mandatory laws following the sanction of the scheme by this court also be recorded by the court. Stating that this court only exercises supervisory jurisdiction in matters of scheme of arrangement etc. under Sections 391-394 of the Act of 1956 to ensuring that the scheme is fair, just reasonable from a prudent businessman point of view and not contrary to law (as the scheme is) it has been submitted that the scheme be sanctioned as prayed for.

On notice, the Regional Director, North Western Region Ministry of corporate Affairs has filed two affidavits in opposition of the substance of the objections, the first on 17-5-2016 and the second on 14-7-2016 objecting to the sanction of the scheme. Interestingly the second affidavit in opposition has been filed subsequent to the reply filed by the Transferor Company on 24-5- 2016 to the first affidavit in opposition. Two more affidavits have been filed by the Assistant Regional Director on

9-8-2016 and by the Regional Director on 17-8-2016 on the issue of belatedly filing an opinion of a chartered accountant.

Objections of the Regional Director to the sanction of the scheme have been set out in a more focused manner by Mr. R.D. Rastogi in his arguments as also submitted by way of written submissions.

Mr. R.D. Rastogi, ASG submitted that the scheme of arrangement is incomplete and should not be sanctioned for not having a fixed "appointed date" and instead providing that it would be the effective date. It was submitted that the effective date itself has been defined to mean opening of business hours of 7 th business day from the last date on which the pre- conditions specified in clause 18 of the scheme of arrangement are complied with. And resultantly with a fluid appointed date valuation of the telecom business of the transferor company is inherently adhoc since it is not at all possible to ascertain the assets and liability of the telecom business which is to be transferred under the scheme at a future date particularly when it is to be transferred as a ongoing concern. It was submitted that a fixed appointed date in the scheme was essential and relevant for the purpose of valuation of the telecom business and determination of the consideration for the transaction constituted, inter alia of issue of allotment of equity by the Transferee Company to the Transferor Company. It would also have relevance to the share swap ratio for the equity shareholders of the transferor company who have an option under the scheme proferred to seek exit from the transferor company by opting for shares of transferee company, a listed entity. Mr. Rastogi further submitted that aside of the aforesaid, as the proposed swap ratio of the equity shares in the transferred company for the equity shares in the transferee company as per clause 9 of the scheme is 11.5:1, resultant fractional shares in the hands of the shareholders who opt for swap of shares is an inevitability, yet the scheme is silent about the treatment of such shares in the hands of the "swap shareholders" of the transferor company as no arrangement in respect thereof has been provided either in the scheme, in the petition or in the affidavits. It was also submitted that valuation report relevant to the scheme for the transfer and vesting of the telecom assets is without requisite details of calculation on which valuation of telecom business assets of transferred company was made and therefore the entire scheme approved by the equity shareholders in the absence of the above "material facts" deserves to be rejected.

Mr. Rastogi further submitted that the rights shares issued by the transferor company in the year 2011 were in contravention of the provisions of Section 67(3) of the Act of 1956. It was submitted that the office of Regional Director, North Western Region has also received fresh complaint against the transferor company from the Registrar of Companies-cum-Official Liquidator (hereinafter `the ROC') vide letter dated 8-7-2016 stating that the aforesaid provision of law had been contravened in allotment of rights shares to 2834 persons in the year 2011 which was also without compliance with SEBI (ICDR) Regulations 2009. It was submitted that in the opinion of the ROC the transferor company "prima facie appears to have not complied with SEBI Regulations 2009" and hence the scheme ought to be examined by the SEBI and not be sanctioned prior thereto. Mr. Rastogi also emphatically pointed out that in clause 19.2 of the scheme it has been provided that in the event the scheme were not to be approved on or before 30-6-2016 it would become null and void, albeit subject to further Extension by the Board of Directors or their authorized representatives. In that

context he submitted that the letter of agreement dated 23-6-2016 signed by authorized representatives of the two companies (namely Mr. Sergey Savechanko and Mr. Amit Mathur) which have been placed on record on 29-7-2016 cannot be termed as a resolution for reason of non compliance with Section 117 of the Act of 1956 as well as clause 22(16)(i) read with rule 24 of the Company's (Management and Administration) Rules, 2014. The submission therefore is that the agreed duration for approval of the scheme having come to an end and no valid steps required in law for extension of the term having taken, sanction of the scheme of arrangement ought not be granted by this court.

Mr. Rastogi further submitted that the scheme of arrangement is also deserving of rejection for reason of suppression of material facts and documents as mandated under the proviso to Section 391(2) of the Act of 1956. It was submitted that "Earn Out Deed"

> (hereinafter `the EOD') referred to in the scheme as the deed entered into between transferor company, the transferee company and STA Capital LLC on 2-11-2015 providing for payment of Indian Rupees equivalent of US $300 Million has not been placed either before the shareholders or before this court nor in fact supplied to Regional Director, despite an application No.IA 16978/2016 therefor having been filed before this court in the petition on the second motion. It was submitted that EOD is part of consideration for transfer and vesting of telecom assets of the transferor company with the transferee company and its contents are thus material facts mandatorily required to be disclosed. It was pointed out that the importance of EOD is manifest from the fact that the Indian Rupees equivalent of upto approximately Rs.1950 crores receivable thereunder constitutes the major portion of the consideration as the valuation of 276,5553,305 shares also to be allotted to the transferor company by the transferee company as other part of consideration at the face value of Rs.5 works out to a far lesser amount of Rs.138,27,66,525/- (Rupees One Billion thirty eight crore twenty seven lacs sixty six thousands five hundred and twenty five only). It was submitted that terms and conditions of the EOD are thus an indispensable and integral part of the scheme which was required to be placed before the rights shareholders and creditors of the transferor company at the court convened statutory meetings under section 391 of the Act of 1956 to facilitate proper understanding of the nature of the transfer of the telecom assets and position the aforesaid stake holders in the transferor company to negotiate a better share swap ratio of 11.5:1 than as offered in the scheme. The transferor company has therefore not approached the court with clean hands not having disclosed a material fact and hence the petition for sanction of the scheme be dismissed and as mandated by law--notwithstanding the fig leaf defence of the transferor company for the non disclosure of the EOD rooted in the alleged commercial confidentiality of the EOD. Mr. Rastogi emphatically submitted that "no deed or document which is affects the interest of minority shareholders and facilitates avoidance of tax liability can be termed a private document with a right to confidentiality in regard thereto. Argument in the same vein was raised with regard to the merger agreement as defined in the scheme also allegedly a material fact mandatorily requiring disclosure in the absence

of which the statutory prohibition of the sanction of the scheme obtains. It was submitted that the merger agreement "appears" to be a "relevant document" absence of which raises reasonable doubts over the bonafides of the Transferor Company.

Mr. R.D. Rastogi, ASG relied on the judgment in case of Spice Communication Limited [(2011)165 Company Cases 334 (Delhi)] wherein the Delhi High court held that the words "material facts" in the proviso to Section 391(2) of the Act of 1956 include all material facts relating to the affairs of the company.

Reliance was placed by Mr. R.D. Rastogi on the judgment in case of M/s. Integrated finance company Limited Vs. Reserve bank of India [2013(179) Company Cases 390] and in the case of Mihir H. Mafatlal (supra) to submit that the court is not a mere rubber stamp for sanctioning the scheme approved by the statutory majority of shareholders and creditors at the court convened meeting and it is for the court to satisfy itself that all terms of the arrangement were conveyed to the shareholders and creditors of the company explaining this effect enable them to arrive at a proper decision for approving or rejecting the scheme. It was submitted that non furnishing of the terms of the EOD and MA to the shareholders and unsecured creditors of the transferor company vitiates the scheme, hence the scheme be rejected this petition on second motion be dismissed.

Mr. R.D. Rastogi further submitted that in fact the approving resolution on 30-10-2015 passed by the Board of Directors of the Transferor company in respect of the scheme of which sanction is sought, oddly states to have considered the EOD and merger agreement, both dated 2-11-2015 i.e. signed two days subsequent to the meeting of the Board of Directors. The fraud on which the scheme is based is thus evident, Mr. Rastogi submitted, as the Board of Directors in its meeting of 30-10-2015 would not have had access to documents not then in existence.

Mr. Rastogi further submitted that the scheme of agreement provides for receipt of Indian Rupees equivalent of upto US $300 Million under the EOD directly to the General Reserve account of the transferor company, whereas as per generally accepted accounting principles such amount of profit accruing from the sale/ transfer of the telecom assets of the transferor company should go and reflect in the "profit and loss account" of transferor company. It was submitted that clause 11.1.2 of the scheme provides that excess of the value of the net assets (i.e. value of assets as reduced by value of liabilities which have been transferred pursuant to the scheme) over the value of consideration received by the transferor company shall be appropriated first to securities premium account, then the General Reserve account and if thereafter any balance remains, it is be adjusted against the statement of profit and loss account of the transferor company, or the treatment be given as per applicable law in force on the effective date of the scheme. Mr. R.D. Rastogi submitted that the question of securities premium account does not arise in the instant case as no part of the scheme talks about issuance of shares at a premium. He submitted that as the income accruing to the transferor company under the scheme of arrangement from the transfer of its telecom business undertaking is surplus, it has to be credited in the profit and loss account of General Reserve Account, as per standard 26 of the Accounting Standard 2010, which mandatorily stipulates that profit or loss arising out of profit and loss on disposal of fixed assets shall be entered into the profit and loss account. It was submitted that the accounting sleight at hand sought to be resorted to by

the transferor company under clause 11.1.2 of the scheme of arrangement dealing with accounting treatment of the monies received in the books of account of the transferor company, is blatant financial jugglery deliberately resorted to in order to escape/ circumvent tax liability under cover of the court's sanction as would otherwise accrue to the Transferor Company in the event of excess of funds received by the transferor company pursuant to payments under the terms of the EOD were to be credited to its profit and loss account. It was submitted that as monies under the EOD to be received by the transferor company can be upto Indian Rupees equivalent of US $300 Million (1950 crores) in the ordinary course, on appropriation being lawfully made to the profit and loss account, it would be liable to income tax on the transaction to an extent of 30% thereof i.e. approximately Rs.690 crores. This accounting jugglery/ fraud should not be permitted under the aegis of the court by granting sanction of the scheme of arrangement as sought, Mr. R.D. Rastogi emphatically submitted. In support of the contention an affidavit of the Additional Regional Director Mr. R.L. Meena was filed on 7-8-2016 to place on record a brief opinion of a Chartered Accountant S.R. Goyal & Company, Ahmadabad buttressing the contention raised in the objection of the Regisional Director filed on 17-5-2016 and 14-7-2016. A further affidavit was then also filed, as directed by the court, by the Regional Director, North Western Region to justify the need of the opinion of the Chartered Accountant being filed at the stage of final hearing. Mr. Rastogi submitted that in the circumstances and reasons of objections set up the sanction of scheme as sought by the transferor company is in the eye of the proviso to Section 391(2) of the Act of 1956, plainly contrary to public interest being a device to defraud revenue and avoid tax and hence the scheme be rejected. Reliance was placed on the judgment of this court in the case of Uma Enterprises Ltd., S.B. Company Petition No.14/2012 decided on 12- 2-2016 to submit that where this court found that the scheme was designed to defraud the revenue and evade tax it is rejected as being contrary to public interest. He submitted that this scheme should be rejected.

Mr. P. Chidambram, and Mr. Parag Tripathi, Senior counsel appeared for the transferor company through the hearing of the petition, on different dates. Mr. P. Chidambram submitted that the objection to the sanction of the scheme for reason of a fixed appointed date not having been provided is misconceived and devoid of merit, inasmuch as no law so mandates. It was submitted that the scheme in issue in its definition clause states that the appointed date means the effective date and this for the reason that the telecom business undertaking of the transferor company is to be transferred on an ongoing concern basis on the effective date which itself is subject to satisfaction of multiple regulatory approval in view of the nature of business. Only on satisfaction of such preconditions set out in clause 18 of the scheme which the telecom business is to stand transferred and vested with the transferee company. It was emphasised that there is nothing sacrosanct about a fixed appointed date or any legal necessity therefore for it to be spelt out definitively at a pre-condition for a valid scheme. An appointed date is only a date for identification of assets and liabilities that would be transferred and it can be any date--even an uncertain one in the future. The Sections 391 to 394 of the Act of 1956 which give to the company court is not limited except on the issue of statutory compliances, public interest and the justness, fairness and reasonable of the scheme as a corporate/ commercial document on the test of a prudent businessman. Mr. P. Chidambram submitted that the filing of annual accounts on 31-3-2015 by the transferor company with the first motion for convening the meeting of the equity shareholders and unsecured creditors of the Transferor Company has no corelation with the appointed date under the scheme.

Mr. P. Chidambram further submitted that the reference to the earlier Company Petition No.23/2005 is quite irrelevant as all matters in respect thereto have came to a rest with the passing of the order dated 7-8-2015 in DB Special Appeal (Civil) No.9/2015 by the Division Bench of this court which has attained finality. A set of shareholders different from the appellants in DB Special (Civil) Appeal No.9/2015 did indeed file proceedings under Section 397- 398 of the Act of 1956 before the Company Law Board, New Delhi, but the said petition was withdrawn on 6-2-2016. In any event non listing of shares of the transferor company is not relevant to this petition for sanction of the scheme of arrangement which has been approved by an overwhelming majority of the equity shareholders (99.88%) and unsecured creditors (99.61%) in court convened meetings. Mr. P. Chidambram further submitted that no provision of law mandatorily requires the shares of the Transferee company to be issued to shareholders of a transferor company when it transfers its assets to a transferee company in a scheme of arrangement or otherwise. The Transferor is the transferor company in its corporate capacity not its shareholders. It has been submitted that in any event upon the sanction of the scheme and upon the listing of new equity shares (defined in the scheme) allotted to the Transferor company by the Transferee company the "swap shareholders" will have the option to exchange their equity shares in the transferor company for shares of the transferee company in accordance with the approved share swap ratio of 11.5:1 following a notification in regard thereto by the transferor company to its shareholders within the time frame already specified. Clause 9.7 of the scheme clearly provides for a process for notification for swap/ exchange of shares by the transferor company to its shareholders.

Mr. P. Chidambram then submitted that concerns raised by the Regional Director with regard to fractional shares of the shareholders in the transferor company who opt for swaping their shares according to ratio is unwarranted as it is a situation can arise only subsequent to sanction of the scheme and the exercise of options by the shareholders of the transferor company. It is only then the number of fractional entitlement would be available. The issue would then be addressed by the sub committee formed by the Board of Directors of the transferor company, which shall consolidate all fractional entitlements and distribute the proceeds thereof amongst the shareholders on a proportionate basis.

Mr. P. Chidambram submitted that in respect of potential payments of upto Indian Rupee equivalent of US $300 Million to be received by the transferor company under the Earn Out Deed (EOD) as defined in the scheme, the provisions of FEMA, DoT, TRAI and RBI Guidelines would not attract the transaction being in Indian currency. And the observations of the Regional Director in that respect are mechanical if not biased on a clear misunderstanding. It was submitted that the transferor company in any event undertakes before this court that any payments to the extent received under the EOD shall be in accordance with law and subject to all extant laws and compliant with all regulations. It was then submitted that the concerns of the Regional Director for the only preference equity shareholder is patronising as on the preference shareholders' own consent in writing, the scheme does not provide for any consideration to him. On the Regional Director's concerns with regard to those existing shareholders of the Transferor Company, who do not exercise the option of swapping their shares for that of the transferee company. Mr. P. Chidambram submitted that such shareholders would obviously continue with the Transferor company with all rights of dividends in its remainder businesses and the benefits of Indian Rupee equivalent of upto

US $300 Million receivable from the Transferee company in terms of the EOD.

Mr. Chidambram addressing the allegations of multiple contraventions of the provisions of the Act of 1956 submitted that the scheme does not seek to annul any alleged non compliance with the provisions of the Act of 1956 and as the transferor company, post sanction of the scheme, would be continuing in its corporate existence it and its directors if found responsible for the alleged contravention would accordingly be subject to any proceeding, if initiated in accordance with law by the ROC or any other statutory authority. It was also pointed out that the objection of the Registrar of Companies with regard to the alleged lack approval of the Central Government to the remuneration paid to Directors/ employees of the Transferor Company, was in any event, completely misconceived and devoid of merit. The remuneration in issue pertains to financial year 2014-15 for which no approval of the central government was required with reference to the notification dated 14-7-2011 issued by the Ministry of Corporate Affairs in exercise of powers conferred under Section 6(1) of the Act of 1956, as also the notification dated 31-3-2014 issued by the Central Government in exercise of powers conferred under Section 4(1) of the Act of 1956.

On the issue of the provisional balance sheet as on 31-3-2016 not being filed, it was submitted that company application No.13/2016 on the first motion was filed in January, 2016 for convening the meetings of the equity shareholders and unsecured creditors of the transferor company to approve with or without modification the scheme. At the relevant time the audited account of the transferred company as on 31-3-2015 was the latest financial account which was required to be filed before the court in accordance with Section 391 of the Act of 1956. Law does not require submission of the provisional balance-sheet for the following financial year and hence nothing can be made of the aforesaid objection. With regard to the objections of the Registrar of Companies in respect of detailing of assets transferred and excluded therefrom in the scheme Mr. Chidambram submitted that the scheme of arrangement clearly provides for the transfer of the telecom business undertaking of the Transferor company which includes the assets set out in Part-I of Schedule-I of the scheme. The excluded assets have clearly been defined in the scheme in Part-3 of Schedule-I of the scheme. The undertaking being the "transferred undertaking" (telecom business) shall be transferred and vested in the transferee company along with intellectual property rights as has been clearly defined in the scheme. With regard to third party consents in respect of the transferor company's contracts and agreements, the objections of the Registrar of Companies have been stated to be again misconceived. It was submitted that the issue of third party consent and of transfer/ assignment/ novation of contracts would be dealt with in terms of clause 6 of the scheme after the sanction thereof by this court. In response to the objections of the Registrar of Companies with regard to reduction of share capital, Mr. Chidambram submitted that the objections are wholly unwarranted, as subsequent to exercise of the swap options by the equity shareholders of the Transferor Company as provided in clause 9.7 of the scheme the paid up equity share capital of the transferor company would be reduced by number of shares which stand exchanged for the equity shares of the transferor company. The resultant reduction in capital of the transferor company is an integral part of the scheme which has been duly approved by the Equity shareholders at the court convened meeting. It was submitted that such cancellation of the paid up capital of the transferor company does not entail either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of paid up share capital. On the Registrar's concern about the

subsistence of the transferor company's telecom business, it was submitted that all subscribers of the transferor company shall continue in accordance with their existing plans, subject to any change or revision of such plans subsequent to the scheme becoming effective. All changes would be compliant with law and requisite statutory reportage would be done by the transferee company to the Telecommunication Regulatory Authority of India.

Mr. P. Chidambram emphatically submitted that the share exchange ratio of eleven and half shares of the Transferor Company for one share of the Trasnferee company provided for in the scheme is clearly beneficial to the equity shareholders of the transferor company as the independent experts, the Chartered Accountant S.R. Batliboi & Co. LLP have found in their valuation report that the shares of the transferor company were of nil value as the said company has negative net worth. Mr. Chidambram submitted that therefore the option of the share swap ratio 11.5:1 in respect of shares of the transferor company vis-a-vis the transferee company given to the shareholders of the Transferor company is unquestionably reasonable, just and fair. Further the said share swap ratio has been arrived at by an independent expert Chartered Accountant company and duly approved by an overwhelming majority of 99.88% of equity shareholders who and are in any event deemed to be vigilant businessmen will informed and capable of protecting their rights and interests. It was submitted that 99.88% equity shareholders were present with 99.99% in value at the court convened meeting of equity shareholders who approved the scheme in all its manifestation. Further there is no contrary competing opinion vis-a-vis the share swap ratio determined by the SR Batliboi & Co. LLP. The decision of the Directors of the Transferor company on the share exchange/ swap ratio of 11.5:1 for the Transferor and transferee company based on expert opinion is thus an outcome of their commercial wisdom and having accepted by an overwhelming majority of equity shareholders which warrants no interference by this court in the exercise of its supervisory powers under Section 391-394 of the Act of 1956.

Mr. P. Chidambram further submitted that the Income Tax Department pursuant to communication of the scheme to it by the Regional Director has not furnished any comment on the scheme and thus in terms of Circular No.1/2014 dated 15-1-2014 under the hand of Deputy Director, Ministry of Corporate Affairs, Government of India, there is a presumption that the Income Tax Department has no objection to the scheme. Mr. P. Chidambram emphatically submitted that the objections of the Regional Director based on a speculative assertion of the scheme being an instrument of tax avoidance is in excess of his authority and in the cross hairs of the directions of his administrative authority but in any event the scheme does not seek any determination or conferment of any right vis-a-vis Income Tax Department. The Income Tax Department would be free to scrutinise the effect of the scheme sanctioned and take proceedings qua any income tax liability arising therefrom, vis-a-vis the Transferor company which in turn would be free to respond as advised. It was submitted that this aspect should not therefore engage the court's attention while sanctioning the scheme. Besides, it was submitted that the objection of the Regional Director on this court is much do about nothing as clause 9.7 of the scheme categorically records that "such swap or exchange is not mandatory, but can be exercised at the option of each of the swap shareholders at any time within three months of the issuance, allotment and listing of the new equity shares on the Stock Exchange in accordance with the process as notified by the Transferor company to the swap shareholders. The Transferee Company shall, as per applicable law, record in the register of its members the transfer of

shares pursuant to the aforesaid swap or exchange".

On the objections of the minority shareholders (number undefined) whose concerns have been articulated by the Regional Director, it was submitted that the scheme in issue is in fact beneficial specially to minority shareholders of the Transferor Company who could earlier not exit the Transferor company for lack of an exit option for reason of the shares of the Transferor Company not being listed on the Stock Exchange but can now do so opting for the swap of their shares in the transferor company, a listed company, with that of the transferee company in accordance with the approved share swap ratio 11.5:1.

Mr. Tripathi, Senior Counsel also appearing for the Transferor Company submitted that the objection of the Regional Director with regard to the non disclosure of the EOD referred to in the scheme being suppression of a relevant fact is completely misconceived and without merit. It was submitted that the Regional Director has no locus to seek production and disclosure of the EOD as has been sought under the application filed in the course of hearing. It was submitted that the telecom business undertaking is an asset of transferor company, for the transfer and vesting thereof in the Transferee company by way of a scheme of arrangement it is entitled to seek sanction of this court on fulfilling the statutorily prescribed procedure and conditions and satisfying the court that the scheme is fair, just and reasonable from the point of view of a prudent businessman. Material facts set out in the proviso to Section 391(2) of the Act of 1956 have been disclosed. All facts required to be disclosed to the equity shareholders under Section 393(1) of the Act of 1956 were disclosed to enable them to take a considered and educated view of the scheme of arrangement. The EOD is not a material fact within Section 391(2) of the Act of 1956. The Transferor company is not seeking sanction of EOD which is a commercial document between the parties entitled to confidentiality from this court. So too the merger agreement. Both these documents are matters of pure contract inter-parties of Section 391(2) does not require nor can require disclosure of. The shareholders were aware both fo the EOD and the Merger Agreement which could well detailed in the explanatory statement to the notice under Section 391(b) but did not require disclosure thereof. It was understood that the EOD was a part of consideration for transfer of the telecom assets of the Transferor Company with contingent future, payments of Indian Rupees equivalent of US $300 Million. The value of telecom business undertaking of the transferor company has been determined at Rs.21,156 Million by a well reputed accounting company i.e. M/s. S.R. Batliboy & Co. LLP and in view of liabilities of transferor company, It was then submitted that valuation of the telecom business undertaking of the transferor company has been neither questioned nor any objection filed by any shareholder thereto. Nor it has been alleged that consideration under the scheme, being 27.65 crore shares with the face value of Rs.5 in the transferee company and Indian Rupees equivalent of upto US $300 Million subject to the terms of EOD to be received by the transferor company, is inadequate. The share swap ratio for the swap of equity shares of Transferor company for transferee company shares could not be mathematically determined since the equity value of shares of the transferor company was estimated to be nil. The receipt of Indian Rupees equivalent of US $300 Million has been considered by the valuer while arriving at the equity share value of transferor company. It was submitted that in fact there was no obligation on the transferor company to offer a share swap to its existing shareholders following the transfer of its telecom business for consideration agreed, yet the Board of Directors of the transferor company has negotiated and

provided shareholders of the Transferor Company an exit option under the scheme. The minority shareholders of the transferor company, long seeking to exit it, if now desirous, can convert their shareholding in the transferor company to that of the transferee company a listed company on BSE/ NSE on the share exchange ratio of 11.5:1.

Mr. Tripathi further submitted that bonafides of transferor company are also apparent from the fact that while it could have implemented transaction embodied in the scheme in issue under Section 180 of the Companies Act, 2013 without the resort to the provision of sections 391-394 of the Act of 1956 requiring sanction of the scheme by this court, yet for reason of good corporate governance the transferor company proposed the transfer of the assets of its telecom business defined in the scheme through a scheme of arrangement under Section 391(1) of the Act of 1956, which transaction is being implemented by obtaining the view and observations of the shareholders, creditors, statutory authorities (Regional Director, Registrar of Companies and the Income Tax Department) and scrutiny of the court. It was submitted that the payment of Indian Rupees equivalent of upto US $300 Million under the EOD is subject to approval of DoT for contiguity and combined use of spectrum. This fact has been clearly set out in the valuation report prepared by S.R. Batliboi & Co. LLP part of the explanatory statement with the notice for the court convened meeting of the equity shareholders and unsecured creditors. The EOD and Merger Agreement (MA) have been disclosed in the scheme of arrangement. The EOD is an agreement between three parties while the MA is between eleven parties for the transfer, vesting of the telecom business undertaking with the Transferee Company. The said documents are commercial in nature, fully confidential and the parties thereto are bound by the confidentiality clauses therein, consequent to which aside of not "being relevant facts" within the meaning of the words in the proviso to Section 391(2) of the Act of 1956, the necessarily required to be kept confidential for commercial reasons. It was submitted that in any event payment of Indian Rupees equivalent of upto US $300 Million in terms of the EOD if at all affects only the shareholders of the transferee company who in fact have approved the scheme which would come for sanction before the Mumbai High Court, within whose jurisdiction the transferee company is situate. It was submitted that no question of diversion of Indian Rupees equivalent upto US $300 Million under the EOD can even remotely arises in view of the fact that the payment is to be received by the transferor company for its benefit and be utilised for the remaining business of the Transferor company. On the receipt of amounts in terms of EOD, they would be dealt with and treated by the transferor company in its accounts in accordance with law as clause 11 of the scheme itself categorically records and the said amount would be open to examination and scrutiny by the MCA and the Income Tax Authorities. It was submitted that there is thus no failure to disclose any relevant fact as required under the proviso to Section 391(2) of the Act of 1956. All statutorily mandated documents have been placed on record with the notices for the court convened meetings before the Regional Director, the ROC and the court by way of explanatory statement as required both under in accordance with Section 393(1)(a) and the proviso to Section 391(2) of the Act of 1956.

With regard to the objection of the Regional Director to the sanction of the scheme for reason of the proposed accounting treatment of the Indian Rupees equivalent of upto US $300 Million under the EOD, it was pointed out that clause 11.1.3 of the scheme clearly states that the amounts received under the EOD shall be credited to the general reserve as required by law in force. Accordingly the

amounts received by the Transferor company will be subject to obtaining laws and open to scrutiny by tax authorities and any liability towards tax thereon is then finally made out, it would be adequately discharged by the Transferor company.

As regards the objection of the Regional Director with regard to amount of CENVAT credit set out in the scheme not being reflected in the financial statements of the transferor company, it was submitted that CENVAT has been defined in the clause 1.1 of the scheme. This amount has also been set out as "balance with customs, excise and other authorities" in the annual account of the transferred company for the year ending 31-3-2015 under the heading of "Short Term Loans and Advances" and "Long Term Loans and Advances". It was submitted that clause 18 of the scheme is conditional upon the approvals by the department of telecommunication (DoT) subsequent to the sanction of the scheme by the court. It was submitted that in the aforesaid circumstances the telecom undertaking of the Transferor company as a going concern on such effective date also the appointed date shall stand transferred and vested in the transferee company. Only after such approvals the scheme shall become effective on filing the orders of the High Court, before the jurisdictional Registrar of Companies.

With regard to allegation of the Regional Director that the transferor company has violated the provisions of Section 67(3) of the Act of 1956 with respect to rights issue made in the year 2011, it was submitted that the rights issue was pursuant to the letter of offer dated 3-2-2011 and allotment thereon was made on 25-3-2011; Return of allotment following the rights issue was filed with the Ministry of Corporate Affairs on 25-3-2011 without any objection thereto till date. Yet the objection has now oddly been raised on a second wind. It was submitted that albeit Section 56 of the Act of 1956 details matters to be stated and reports to be set out in a prospectus. However, Section 56(5) of the Act of 1956 provides that Section 56 shall not apply to the issue to existing members, of a company of a prospectus or form of application relating to shares in the company whether the existing shareholders will or will not have the right to renounce in favour of other persons. Referring to Section 64 of the Act of 1956 it was submitted that the aforesaid provision inter alia provides that where a company allots or agrees to allot any shares in the company, with a view to all or any of those shares being offered for sale to the public, any document by which the offer is made, shall, for all purposes, be deemed to be a prospectus issued by the company. It was submitted that assuming, without admitting, that under the provisions of Section 67(3) of the Act of 1956 the Transferor company would have been required to issue a prospectus, for allotment of rights shares to its members the transferor company in fact did issue a letter of offer to its shareholders qua the issue of rights shares which was a deemed prospectus in terms of Section 64 of the Act of 1956, since the provisions of Section 56 were not applicable to the rights issue. It was submitted that in this view of the matter there is no violation of any provision of the Act of 1956 as alleged by the Regional Director. Without prejudice to the above contention, it was submitted that in the event of a violation of a provision of the Act of 1956, the Regional Director could have inovked and still can, law permitting, proceed thereunder against the Transferor Company and its directors subject to their all possible defences thereagainst. Yet this cannot entail rejection of scheme of arrangement which is otherwise fair, just and reasonable as also statutorily prescribed procedure and criteria and enjoys the support of 99.88% of equity shareholders and over 99% of unsecured creditors for reason of plainly being to the benefit of the business of the Transferor company and by extension to its equity

shareholders.

The objection to the sanction of the scheme at the instance of the Regional Director, North Western Region, as encapsulated in the arguments urged by Mr. R.D. Rastogi, ASG can be categorised in three parts. Part-I is broadly with regard to (i) no specific appointed date being given out, (ii) alleged incomplete valuation report, (iii) failure of the scheme to provide for treatment of fractional shares,

(iv) alleged illegality in the issue of rights shares by the Transferor Company in the year 2011, (v) the Board of Directors at its meeting of 30-10-2015 could not have considered the EOD and the Merger Agreement dated 2-11-2015 at it purported to do evidencing the very initiation of the scheme being fraudulent. and (vi) that the scheme is now infructuous in view of it not being sanctioned by this court prior to 30-6-2016 till when in terms of clause 19.2 of the scheme, it was operational. Part-II of the objections can be said to be with regard to the alleged failure of the Transferor company to disclose the alleged material facts such as EOD and Merger Agreement both dated 2-11-2015 purportedly entailing a statutorily mandated rejection of the scheme in terms of proviso to Section 391(2) of the Act of 1956, and Part-III of the objections to the scheme pertains to the alleged evasion of tax and public detriment in view of the provisions in the scheme with regard to the treatment of the amount upto Indian Rupees equivalent of US $300 Million receivable under the EOD being lodged in the general reserve account of the Transferor company when as per the alleged extant generally accepted accounting principles it ought to have been booked in the profit and loss account of the Transferor company entailing a tax liability of approximately Rs.690 crores.

As far as the issue of a fixed appointed date not being specifically provided for but being made equivalent to the effective date in the scheme, nothing turns on it as such a provision is not voided by any legal impediment, more so in view of the nature of the arrangement under the scheme between the Transferor and Transferee company which in fact necessitates it. The Madras High Court in the case of Equitas Finance Limited [Company Petition No.119/2016] decided on 6-6-2016 has held that where, in the nature of arrangement encapsulated in the scheme approved by the statutory majority of equity shareholders and creditors of the company, it is not feasible to provide for a fixed appointed date, but equate it with the effective date itself dependent on requisite regulatory approvals mandated in law for the business of the post sanction entity, the company court can sanction such an arrangement in the scheme. In the aforesaid case before the Madras High court, the factual background was that the commencement of the Small Finances Bank (SFB) business of the merged entity, following the sanction of the scheme, was dependent on regulatory clearances for the requisite banking licence being issued by the Reserve Bank of India. A similar situation obtains in the present scheme under consideration, where the telecom business of the Transferor company would be only transferred and vested in the Transferee company as an ongoing concern subsequent to the sanction by the court followed by multiple regulatory approvals which have been set out in clause 18 of the scheme. In the circumstances, it is quite obvious that the scheme has not provided for a fixed appointed date but for one equated to the effective date as defined in the scheme. Hence, the objection of the Regional Director to the sanction of the scheme on this count is liable to be rejected.

As far as the submission of Mr. Rastogi with regard to scheme providing for treatment of fractional shares which will inevitably be generated with a share swap ratio 11.5:1 share of the transferor company to one share, of the transferee company on the shareholders option, Mr. P. Chidambram, Senior Advocate has rightly submitted that the point of time where the quantum of fractional shares would be ascertainable would be only subsequent to the shareholders of the Transferor company choosing if at all to exercise their option after being duly notified within the time set out the scheme by the transferor company subsequent to allotment of 27.65 crore new equity shares being issued by the transferee company as part of the consideration for transfer of the telecom business to it. Mr. P. Chidambram further submitted on instructions that his statement may also be recorded that at that the Board of Directors of the Transferor company will constitute a Committee which would consolidate all the fractional share entitlements and distribute the proceed thereof to the entitled shareholders on proportionate basis. Hence in view of the statement, which is hereunder made a part of the sanction of the scheme it is directed that within 90 days of the last date of allotment of shares in the transferee company to the "swap shareholders" all fractional share entitlements be consolidated and proceeds thereof be distributed to the entitled shareholders on proportionate basis.

I am also of the considered view that the belated objections qua that valuation report relating to the transfer allegedly being incomplete and hence in the teeth of Section 393(1)(a) of the Act of 1956 is without merit. The scheme of arrangement as approved by the shareholders and unsecured creditors is supported by a detailed valuation report prepared by a reputed Chartered Accountant firm S.R. Batliboi & Co. LLP valuing the transferred undertaking/ telecom business of the Transferor company at about Rs.21,156 Million. No specific objection thereto was laid in the two affidavits in opposition filed by the Regional Director, North Western Region, on 17-5-2016 and 14-7-2016. The bald objection without any specifics has however been agitated in written submissions, apparently as an afterthought. The value of the telecom business has not been put to question by the Regional Director. It was not so by the Shareholders and unsecured creditors at the court convened meetings. The valuation report on which the consideration for the transfer of the telecom business has been arrived at has been approved by 99.88 % shareholders and 99.618% unsecured creditors at the court convened meetings. There is thus no force in the aforesaid objection. It is rejected.

As far as the objection to sanction of the scheme for reason it having expired by afflux of time under clause 19.2 thereto, (on 30- 6-2016), I am of the considered view that the objection is vacuous, overlooking the clear language of the clause 19.2 itself, whereunder the scheme is not closed ended as of 30-6-2016 but it is to remain effective even subsequent thereto in the event of it so being agreed between the Transferor and Transferee companies through their Board of Directors or authorised representatives. Letter of agreement dated 23-6-2016 has been filed by the transferor company before this court signed by Sergey Savchenko authorised signatory of the Transferor company and Amit Mathur authorised signatory of the transferee company, whereunder with reference to clause 19.2 of the scheme the validity of the scheme has been extended upto 30-9- 2016. Besides, I am of the considered view that clause 19.2 of the scheme between two corporate entities duly approved by their shareholders is purely contractual. Thereunder the contracting parties to the scheme of arrangement have an inexhaustible mutual right to extend the currency/ validity of the date of the scheme before the expiry of the date of validity or even post facto, when and if warranted

by resort to the doctrine of ratification of contract. The sanction of the scheme can thus always be subject to its validity being extended by the Transferor and transferee company in terms of clause 19.2 thereof. The objection of the Regional Director on this count is also thus liable to be rejected.

The objection with regard to the merger agreement and the EOD not being before the Board of Directors of the Transferor company at the meeting on 30-10-2015 is absolutely misplaced and based on an apparent misreading of the said resolution. The Board resolution dated 30-10-2015 does not state that a signed copy of the EOD and the Merger Agreement was before it. It merely approved the merger agreement and EOD amongst other documents/ deeds and authorised Mr. Sergey Savchenko, whole time director (designated as CEO of the Transferor company) to inter alia sign the documents referred to in the resolution including the EOD and the Merger agreement. It was in pursuance to the authority conferred by the Board on Sergey Savchenko that he subsequently signed the EOD and merger agreement dated 2-11-2015. The aforesaid objection is therefore without merit and rejected.

As far as the objection of the Regional Director and contention based thereon by Mr. Rastogi, ASG that rights shares allotted by the Transferor company in the year 2011 was contrary to Section 67 (3) of the Act of 1956 and SEBI (issue of capital and disclosure requirement) Regulations, 2009 (hereinafter 'the Regulations 2009'). I am of the considered view that contention is of little relevance for the consideration of sanction of the scheme by this Court. For one, the transferor company would continue in its corporate existence in the event of sanction of the scheme and if a purported violation of statute obtains against it open to action by the statutory authority, the said authority is always free to take legally permissible proceeding against it. It is however evident that no such proceeding has yet been taken against the Transferor company for the last five years. Sadly, the objection of the Regional Director and the ROC in the historical background of past litigation between the Transferor Company and its minority shareholders and the context of its timing appears to be actuated by the prodding of minority shareholders in a last ditch effort to armtwist the Transferor company into offering to the minority shareholders an exit option which they fancying to be "fair" (the two minority shareholders have also filed objections to the sanction of the scheme which would be addressed later in this judgment). It has been stated as a fact by Mr. P. Chidambram without being contradicted, that the rights issue of Transferor company was pursuant to letter of offer dated 3-2-2011 and allotment made on 25-3-2011 on which date itself reports of allotment report was filed with the the Ministry of Corporate Affairs on 25-3-2011 without any demur. On the merits of the objection attention of the court was drawn to Part III of the Act of 1956 which deals with prospectus and allotment and other matters relating inter alia to issue of shares. Section 56 of the Act of 1956 provides for matters to be stated and reports to be set out in the prospectus. But Sub section 5 of Section 56 of the Act of 1956 is an exception and provides that Section 56 itself shall not apply inter alia to the issue to existing members of a prospectus or a form of application relating to shares in the company, whether an applicant for shares will or will not have the right to renounce in favour of any person. Section 64 of the Act of 1956 provides that where a company inter alia allots or agrees to allot any shares of the company with a view to all or any of those shares being offered for sale to the public, any document by which the offer for sale is made shall, for all purposes, be deemed to be a prospectus issued by the company. Thus Mr. P. Chidambram is prima facie right in his contention that assuming that to the rights issue of 2011 at the instance of the Transferor

company attracted the Act of 1956 and it was required to issue prospectus; the letter of offer which was issued by the company to its members qua the rights share issued would be a deemed prospectus in terms of Section 64 of the Act of 1956. Thus Section 56 thereof in turn was not applicable to the rights issue of the Transferor company. Be as it may, I am of the considered view that in any event for considering the sanction of the scheme of arrangement within the supervisory jurisdiction of this Court, it is not required that the objection with regard to alleged non-compliance with Section 67(3) of the Act of 1956 in 2011 needs to be adjudicated for the reason that the ROC would be free to pursue the Transferor company on this count if so advised with the transferee company having all rights to set up its defences thereto.

Objections Part II With regard to the submission of Mr. R.D. Rastogi that the petition for sanctioning the scheme of arrangement should be rejected for non disclosure of material facts i.e. the EOD and Merger agreement both dated 2-11-2015 to the shareholders, as also to this court and the Regional Director despite application No.16978/2016 therefor, it would be appropriate to first reproduce the proviso to Section 391(2) of the Act of 1956 on which the argument is fundamental premises and also Section 393(1)(a) of the Act of 1956 to which an attempt was also made to relate. The two sections reads as under:-

> SECTION 391(2)-PROVISO "Provided that no order sanctioning any compromise or arrangement shall be made by the Tribunal unless the Tribunal is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Tribunal by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251 and the like."

SECTION 393(1)(a):-

> Information as to compromises or arrangements with creditors and members-(1) where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 391-
>
> (a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular, stating any material interests of the Directors, Managing Director, or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons; and What would constitute material facts for the purpose of the proviso to Section 391(2) of the Act of 1956 quoted hereinabove is a matter which does not appear to have been directly and exhaustively in issue and focus in any judgment placed before this Court. The words "all material facts" about the affairs of the company of which disclosure is

mandatorily required under the proviso to Section 391(2) of the Act of 1956 are not stand alone. They are followed by the words "such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Section 235 to 251. "And thereafter" the said words are again immediately followed by the words "and the like". No doubt the words "such as" have been interpreted by the Apex Court in several decided cases as being illustrative in nature and so does the legal position obtain. However a situation where the words "and the like"

have immediately followed the words "such as" indeed illustrative words is required to be considered in the present case. The words "and the like", in my view opinion are words of limitation on the immediately preceding illustrations and this would confine the disclosure of "material facts" about the affair of the company only to matters akin (like) to disclosing of the latest financial position of the company, the latest auditor's report of the accounts of the company and the pendency of any investigation proceedings under Section 235 to 251 of the Act of 1956. I am of the considered view that the immutable obligation to disclose the material facts relating to the affairs of the company is not at large, being limited to issue of the integrity of the Transferor company as would reflect from its finances and accounts being statutorily compliant and the absence of any investigations actual, incipient or even possible in regard thereto existing. Any other interpretation of the proviso to Section 391(2) of the Act of 1956 making the objection to disclose "material facts" of the affairs of the company open ended and without limits including that of confidential nature relating to the company's commercial operations and manner of doing business, would make both the illustrations and the words immediately following "and the like" redundant. That would be against the well settled principle of interpretation of statutes.

In the case of Royal Hatcheries (P) Limited Vs. State of A.P. [(1994) Supp. (1) SCC 429] the Apex Court has construed the words "livestock, that is to say all domestic animals such oxen, buffaloes, goats, sheeps, horses etc." in clause (xvi) of the Rule 5(2) of the Andhrapradesh General Sales Tax Rules. It was held equating words "that is to say" to "such as" that such words were meant to be illustrative and not exhaustive, yet when followed by the letters "etc."

they could not be construed to be open ended but limiting and in the context of rule 5(2)(xvi) of the Andhrapradesh General Tax Rules confined to domestic animals such as (like) oxen, buffaloes, goats, sheeps horses by resort to the rule of ejusdem generis and therefore did not take into their sweep a wholly different word of domestic animal such as chicks. The abbreviation etc. at the end of rule 5(2) (xvi) of the Andhrapradesh Sales Tax Rule was, despite the rule referrring illustratively to domestic animals construed as a term of limitation as warranted by the context. In coming to the aforesaid conclusion the Apex Court also invoked the rule of construction that no construction of a provision of law should be adopted which would render some words therein nugatory and superfluous.

The consideration of the proviso to Section 391 (2) of the Act of 1956 did in some measure come up before the Apex Court in the case of Sesa Industries Ltd. Vs. Kirshna Bajaj [(2011) 3 SCC 218] where the issue was whether an inspection under Section 209A of the Act of 1956 against the company seeking sanction of the court for its scheme was a material fact within the language of proviso to Section 391(2) of the Act of 1956 and was required to be disclosed. The Court held it was so is as much as if in the course of inspection under Section 209A of the act of 1956 against the company if anything objectionable or fraudulent about the conduct of its affairs was found it would have been the foundation for an investigation under Section 235 and 231 of the Act of 1956. Two aspects are thus apparent from the Court's holding i.e. (i) Statutory proceedings, such as an inspection, underway with potential to entail investigation under Section 235 to 251 of the Act of 1956 should be disclosed when a scheme of arrangement under Section 391 to 394 of the Act of 1956 is entered into between the concerned stake holders of the company in question and the sanction of the court thereto sought and (ii) such alleged "material facts" in issue not disclosed should having a direct bearing on the scheme of arrangements of which sanction from the court is sought. Importantly the Apex Court did not hold that even unrelated to situations illustratively described and limited by the words "and the like" there was an obligation to disclose all material facts related to the affairs of the company even if they be of voyeuristic interest. Such a view apparently was not taken for the unarticulated reason of the words "and the like"

> bearing connotation of limitation as also for the potential of all manner of objections otherwise being maintainable to oppose sanction of scheme of arrangement etc. commercial decisions approved by the statutory majority of stake holders in the company at the court convened meetings. I am of the considered view that the prohibition on the sanctioning of the scheme of arrangement, etc. by the court would arise only in the event of the latest financial position of the company, latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251 "and the like" relating to the affairs of the company in its essential statutory compliances having a bearing on situations illustratively set out in the proviso to 391(2) of the Act of 1956 not being disclosed to the court. Non disclosure of other facts regarding the affairs of the company particularly commercial matters with multiplicity of parties unrelated to the scheme and confidentiality issues cannot entail the rejection of the scheme.
>
> The question that remains is whether in the instant case the Transferor company is in contravention of its obligation to disclose the material facts, as has been alleged. To answer the question what is required to be ascertained is whether the non disclosure of the contents of the EOD and Merger agreement both dated 2-11-2015 is non disclosure of "material facts". The EOD and Merger agreement dated 2-11-2015 has been referred to in the scheme and the explanatory statements with it conveyed to the shareholders and unsecured creditors of the Transferor company. None of the shareholders or unsecured creditors demanded copies thereof and approved the scheme with an overwhelming majority of over 99%.

In the case of Hindustan Lever Employees Union (supra) it was held by the Apex Court where consideration by an overwhelming majaority of equity shareholders and creditors and debenture holders of the financial institution have supported the scheme and had not complained of any lack of notice of the scheme it would not be right to hold that the explanatory statement was not proper or that the resolutions at the court convened meetings not legally passed.

Indeed either the EOD and MA were not put before the shareholders and unsecured creditors, this court and even the Regional Director, despite his application therefor. The EOD is admittedly a part consideration for transfer of telecom business of the Transferor company besides allotment of 27.65 crore shares at face value of Rs.5 by the Transferee company to Transferor Company. The EOD is not a bipartite agreement between the Tranferor company and the Transferee company alone, but also includes a third party i.e. STA Capital LLC. The merger agreement is an agreement between eleven entities including the Transferor and Transferee companies. Defence of confidentiality of the two agreements has been set up by the Transferor company as the reason for non disclosure, aside of contending that contents of the two agreements do not constitute "material facts" within the words as occurring in the proviso to Section 391(2) of the Act of 1956 for the reason that they do not relate either to financial position of the company, to the latest auditor's report of its accounts or have even a remote bearing on the issue of pendency/ potentiality of any investigation against the Transferor Company under Sections 235 to

251. The EOD and MA do not relate to the statutory compliances mandated in law with any component of public interest or policy and operate purely in the private law field of contractual law. The EOD is in the nature of a contingent contract detailing the obligations of the parties thereto and manner/ method/ time of discharge of such obligations and contingent payment thereon post the actual transfer of telecom business of Transferor company to Transferee company. The said agreements are stated to include commercial aspects relating to the intricacies of the manner of doing telecom business by the Transferor company and the Transferee company post the vesting and transfer of the telecom business visualised under the scheme. Aside of the aforesaid, there is substance in the submission of Mr. P. Chidambram that the Transferor company has not filed the petition for sanction of the EOD/ Merger agreement. Further in any event there is nothing on record to even remotely establish that there was any serious effort at the instance of the Regional Director or any other objector to impugn the valuation of the telecom business of the Transferor company to be transferred and vested in the Transferee company at Rs.21,156 Million. Nor was it questioned at any stage by any shareholder as to its inadequacy or with respect to the share exchange ratio proposed. I am of the considered view that for the above reasons disclosure of the EOD and Merger agreement both dated 2-11-2015 was not "material facts" within the scope of the proviso to Section 391(2) of the Act of 1956. The objections of the Regional Director in this regard as emphatically advanced by Mr. Rastogi ASG are therefore liable to be rejected. They are so. Part-III- Objections

of Regional Director With regard to the allegation of the Regional Director that the scheme is a misuse of the process of the company court under section 391 to 394 of the Act of 1956 and only a mechanism for defrauding the revenue and evading tax, I am of the considered view that the allegation is unfounded and without merit. This situation does not arise in the instant case and the argument of Mr. Rastogi ASG is premised on a partial and incomplete reading of clause 11.1.2 of the scheme. The said clause does indeed in the first instance propose that excess of the value of net assets (i.e. value of assets as reduced by value of liabilities which have been transferred pursuant to the scheme) over the value of consideration received by transferor company would be appropriated, to begin with the securities premium account and then the general reserves and only subsequent to appropriations aforesaid it would be further adjusted against the statement of profit and loss of the transferor company. But immediately following the proposed treatment of money received as consideration for the transfer of the telecom business, clause 11.1.2 itself categorically provides in the alternative that the treatment in respect of monies received under the EOD will be given as per the applicable law in force on the effective date of the scheme. It is thus quite clear that the scheme does not necessarily warrant an immutable lodgement of monies received under the EOD in the general reserve account but leaves it overridingly to the then extant law applicable to the transaction and obligation arising thereon. Important to note is, as argued by Mr. P. Chidambram that the sanction of the scheme by the court does not visualise any determination on the manner of appropriation of the amounts to be received by the transferor company to the extent of Indian Rupees equivalent upto US $300 Million. Mr. P. Chidambram categorically submitted that the amounts received by the transferor company under the EOD would be subject to the provisions of the Income Tax Act then obtaining and the Company would be liable to pay due tax determined/ assessed by the Income Tax Authorities in accordance with law on the aforesaid amounts received.

Further on the alleged evasion of tax by the Transferor Company in treating the amount to be received under the EOD as a part of "general reserve" and not in the profit and loss account of the transferor company, what is noticeable is that the objection has been taken by the Regional Director despite the Circular No.1/2014 dated 15-1-2014 issued by the Central Government, where it has been provided that while responding, to the notice on the second motion under sections 391 to 394 of the Act of 1956 for sanction of the scheme, on behalf of the Central Government, the Regional Director concerned shall invite specific comments from the Income Tax Department before filing his response to the court and in the event of no response emanating from the Income Tax Department it may be presumed that the Income Tax Department has no objection to the sanction of the scheme proposed under sections 391 to 394 of the Act of 1956. The Circular aforesaid records that it was not for the Regional Director to decide the correctness or otherwise of the views of the Income Tax Department and if there are compelling reasons for doubting the correctness of the view of the Income Tax Department, the Regional Director must

make a reference to the Ministry of Corporate Affairs for taking up the matter with the Ministry concerned before filing response under Section 394 A of the Act of 1956. It is not in dispute in the instant case that despite information of the petition on the second motion having been sent to the Income Tax Department, no response was forthcoming therefrom and this should have in the ordinary course led to the presumption that the Income Tax Department had no objection to the scheme of arrangement of which sanction is sought. Yet oddly the Regional Director has vociferously pressed the objection to the scheme being sanctioned alleging that evasion of tax of upto Rs.690 crores would result by the Transferor company if the scheme were sanctioned. Mr. R.D. Rastogi has also relied on the judgment of this court in the case of Uma Enterprises (supra) to submit that the scheme in the instant case being a mechanism for evading tax by providing for lodgement of the amount to be received under the EOD in general reserve and not the profit and loss account of the Transferor company where it would be taxable at the corporate income tax at the rate of 30% contrary to the generally accepted accounting principles, be rejected.

That objection based on alleged evasion of tax in the manner alleged however is a non sequitur in view of clause 9.7 of the scheme itself providing that in the alternative moneys received from the Transfer of the telecom business to the Transferee company would be subject to all extant laws at the relevant time. And inevitably that would also include extant Income Tax Laws. Mr. P. Chidambram, Senior Advocate, appearing for the Transferor Company has also conceded that this court can direct that the sanction of the scheme would not foreclose the jurisdiction of Income Tax Department to deal in accordance with law with the consideration received by the Transferor compnay through the EOD or otherwise for the transfer of its telecom business to the transferee company.

The Delhi High Court in the case of Vodafone Digilink Limited and others in company petition No.488/2012 decided on 1-4-2014 has held that no clause/ provision of the scheme sanctioned by the court could affect the income tax liabilities of the company on any income generated from the transaction under the scheme sanctioned by the court. It was held that the jurisdiction of all statutory authorities remains operable in respect of transaction under a sanctioned scheme. For clarification in the facts of the case at hand I would thus direct that in respect of all consideration including under the EOD or otherwise in the hands of the transferor company against the transfer of telecom business to the transferee company, the Income tax department shall be free to exercise its jurisdiction at all times in respect thereto to access income, and levy tax as applicable, subject to all just defences of the Transferor company. And it goes without saying that upon sanction of the scheme in issue the Transferor company should file its accounts for the financial year 2016-17, and they would be open for inquiry and investigation as warranted in law by the income tax authorities under the Income Tax Act, 1961.

Consequently, I am of the view that the objection in issue raised by the Regional Director is liable to be rejected with the caveat that the scheme sanctioned by the court would not foreclose the jurisdiction of the Income Tax Authorities qua the money received by the Transferor company under the EOD or otherwise and the Income Tax Department at the relevant time would be free to invoke its jurisdiction and take steps permissible in law to assess due tax and recover it, no doubt subject to all just defences by the transferor company in regard thereto.

Of the judgments relied upon by Mr. R.D. Rastogi, as far as that of the Delhi High Court in the case of Spice Communication (supra) is concerned, I am in respectful disagreement therewith for reason of having held that an unhinged and expansive interpretation of the words "material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251 and the like" in the proviso to Section 391(2) of the Act of 1956 would entail redundancy to the words "and the like". Beside of the above, it is indeed true that in terms of the judgments in the case of Integrated finance Company Ltd. (supra) and Mihir H. Mafatlal (supra) relied upon by Mr. R.D. Rastogi the court does not act as a rubber stamp while granting sanction to the scheme approved by the requisite statutory majorities at the court convened meeting and has to reckon for statutory compliances, upholding of the law and ensure that the scheme is not contrary to public interest. But those are questions of fact in each case before the court. For the reasons set out earlier in this judgment or neither on the aforesaid tests, the scheme under consideration is liable to be rejected. This court has evaluated the scheme from a 360* perspective and found it to be fully compliant with the mandatory requirements of law and the enunctiations of Apex Court, on the subject as also founded on the best interests of the shareholders and unsecured creditors acting a la prudent businessmen who have approved the scheme. In respect of the reliance placed by Mr. R.D. Rastogi on the case of Uma Enterprises (supra) it would suffice to state that the rejection of the scheme in the said case was based on a finding of fact from the record of the case that the scheme was activated solely by the desire to evade tax. The present case presents a wholly differentiated fact situation. Repetition thereof would be, a merely duplication as the circumstances and factual background of the scheme has been detailed earlier in the judgment. In the instant case the only ground for the allegation of the scheme under consideration being an exercise in tax evasion was based on the treatment proposed in the scheme to monies received in Indian Rupee Equivalent of upto US $ 300 Million under the EOD being provided for being lodged in the general reserve fund of the company and not the profit and loss account. The ground agitated on the basis of clause 11.1.2 overlooks the later part thereof which provides that the "the treatment will be given as per the applicable law in force on the Effective Date of the Scheme". That would indisputably include the Income Tax Laws.

Further this order has made the monies to the extent received under the EOD subject to the Income Tax Laws, as has also been stated by Mr. P. Chidambram, Senior Counsel appearing for the Transferor Company. No other aspect of the scheme were focused upon in support of the argument of the scheme being a mechanism for tax avoidance. Hence the reliance on the case of Uma Enterprises Limited is inapposite.

Objections have also been filed by two shareholders in the transferor company i.e. M/s. Jindal Securities Private Limited and M/s. Aman Finvest Private Limited having commonality of directors i.e. Anil Jindal and Monika Jindal. The fundamental grouse of the aforesaid shareholders against the scheme lies in the transferor company having allegedly failed to adhere to the directions of this court under its order dated 8-5-2006 in SB Company Petition No.23/2005 that an exit option be provided to the minority shareholders in terms of clause 3.7 of the scheme of merger between Shyam Telecom Limited and the Transferor company as approved by the court. It is alleged that the Transferor company was under an obligation in terms of the aforesaid order dated 8-5-2006 as also the subsequent order dated 7-8-2008 to complete the process of listing of its shares within 18 months of the court's subsequent order and further that in the event of the shares not being listed, provide an acceptable, just and fair exit option to the minority shareholders. That has not been done and the transferor company has yet again approached this court to further shortchange its minority shareholders by offering an abysmally poor share swap ratio for the shares in the transferee company. The objectors aforesaid pray that the transferor company therefore be directed to acquire the shareholding of applicant minority shareholders in terms of Section 395 of the Act of 1956 on a "fair price" in the context of the valuations of the shares of the transferor company at the time the exit option ought to have been granted and appropriate directions be issued that the shares of minority shareholders be acquired by the transferor company at the 49.31 per shares as of the year 2009 with interest thereon as a condition for the sanction of the scheme by this court.

Mr. Parag Tripathi appearing for the transferor company has submitted that the two companies agitating the objections hold a total of 0.01% equity shares of the Transferor Company, the objectors are completely misconceived and in fact an abuse of the process of this court. 99.88% of those present at the court convened meeting of equity shareholders with a value of 99.99% of the shareholding have approved the scheme. It was submitted that vide order dated 8-5-2006 in SB company petition No.23/2005 a scheme of arrangement inter alia between the transferor company and one Shyam Telecom company was sanctioned with a provision relating to the listing of the shares of the transferor company. The condition was not in mandatory form nor it could be as listing of shares is subject to regulatory provisions and fulfillment of preconditions set by SEBI. And despite the best efforts of the Transferor company it could not be done. In the circumstances, SB Company Application No.45/2012 in Company Petition No.23/2005 was filed seeking directions from the court with regard to providing an exit option as sought for the minority shareholders or taking requisite steps for listing of shares of the transferor company on the Stock Exchanges. The said application was dismissed vide order dated 9-1-2015 which in appeal was affirmed by the Division Bench of this Court in DB Special Appeal (civil) No.9/2015 vide order dated 7-8-2015. The entire dispute relating to the listing of shares of the transferor company and for otherwise giving an exit option to minority shareholders at the price of their choosing stood concluded and the same cannot be resuscitated in the present petition by a sleight of hand. It was submitted that the scheme

in issue, for transfer of the telecom business of the transferor company having been approved by its equity shareholders by an overwhelming majority of over

99.% equity shareholders, in terms of corporate democracy and Section 391 of the Act of 1956 the said decision is binding on the minority shareholders, particularly when there is no oppression or expropriation of the minority shareholders vis-a-vis majority shareholders as all shareholders are being similarly treated. It was submitted that the share swap ratio in the scheme for the shareholders of the Transferor Company provides the very exit option the minority shareholders such as the applicants before this court seek, only that removed from the nil value of the equity shares in the Transferor Company, its shareholders are being offered shares of the Transferee Company listed on various Stock Exchanges. The disappointment, with the share swap ratio, removed from the reality of the condition of the Transferor Company reflected in the valuation report of the expert Chartered Accountant S.R. Batliboi & Co. LLP cannot be a cause to obstruct the scheme very apparently in the best interest of all stakeholders. The current value of the shares of the Transferor company has to be determined by a well reputed CA and can not be on the ipse dixit of the objectors with reference to a wholly different fact situation and time. It was submitted that in any event the application of M/s. Jindal Securities Private Limited deserves to be dismissed at the threshold for concealment of material facts as it has been falsely stated that the Company's representatives attended the court convened meeting and objected to the scheme or to the share swap ratio. Further the judgment of this court on 9-1- 2015 in SB Company Application No.45/2012 and 7-8-2015 in DB Special Appeal (civil) No.9/2015 were concealed evidencing that the application has not been moved bonafide and with clean hands. With regard to the objections of M/s. Aman Finvest Private Limited, it was pointed out that in fact its directors Anil Jindal and Monika Jindal are common to the directors of M/s. Jindal Securities Private Limited and the juristic personality of M/s. Aman Finvest Private Limited is thus being misused for agitating the same interest as that of M/s. Jindal Securities Private Limited on the obvious apprehension that the objections of M/s. Jindal Securities Limited would to be dismissed by the court for suppression of facts. From the submission made it thus appears that the objections of these two companies Jindal Securities Private Limited and Aman Finvest Private Limited are not bonafide but only searching and seeking to arm twist the transferor company after having failed in the earlier round of litigation on the same issue as agitated herein by the minority shareholders ending with the judgment of the Division Bench of this Court on 7-8-2015 in DB Special Appeal (civil) No.9/2015. I am of the considered view that the purported right of the minority shareholders to be offered an exit option at a price of their choice de hors the current value of their equity holding in the trasferor company is misdirected, and deserves rejection. The objections under consideration are thus rejected.

Objections have also been filed by one Srinivasraghavan Seshadri an ex-employee of the transferor company through his Power of Attorney Debranjan Bhattacharya. Appearing on his behalf Mr. Gunjan Pathak asserted that the scheme in issue requires to be modified to record the interest of and provide for the debt of the applicant therein to an extent of Rs.1,84,65,459/- with interest @ 6% p.a. under the judgment and decree dated 10-2-2016 in Suit (No.44/2013 passed by Civil Judge (Junior Division) Gurgaon district court Haryana) for damages and recovery against the transferor company for the applicant's unlawful removal from service, Mr. Gunjan Pathak submitted that as a decree holder the applicant was a creditor of the transferor company within the meaning of Section

390(c) of the Act of 1956 yet the applicant's name was not included in the list of unsecured creditors and he was not served any notice of the meeting of unsecured creditor as directed by this court on 29-1-2016. The infraction, it was argued tantamounts to fraud not only on the applicant but also on this court. Mr. Parag Tripathi in reply has submitted that an appeal against the judgment and decree dated 10-2-2016 (No.174/2016) has been filed before the District Judge Gurgaon, Haryana. It was further submitted that SB Company Petition No.13/2016 was filed on the first motion by the Transferor company on 20-1-2016 and list of unsecured creditor as of 31-12-2015 annexed thereto, if time antecedent to the judgment and decree dated 10-2-2016. And in any event the applicant claiming to be an unsecured creditor could have attended the court convened meeting of the unsecured creditors pursuant to the court directed public notice dated 18-2- 2016. That was not done. Further even if the decreetal amount of Rs.1.84 crore is reckoned for, it is inconsequential in moving the needle even by a fraction for the purpose of ascertaining the price of the majority of unsecured creditors in the context of passing of the resolution by the attending unsecured creditors at the court convened meeting approving the scheme of arrangement by 99.618% in number and 99.952% in value of a unsecured debt of Rs.1425,8726884/-. It was further submitted that in any event the claim is disputed, and the applicant cannot seek adjudication of his claim in the present proceedings.

In the case of Vikrant Tyres Limited [ILR 2003 Karnataka 3885] the Karnataka High court has held that even non issue of notice to a creditor whose debt is disputed for one or the other reason would not vitiate the creditors meeting convened by the court particularly where the omission would be of no consequence in the context of the overall extent of the debt of the company in proportion to the debt of such creditor and where the requisite majority of 75% creditors supporting the scheme of which sanction is sought not be jeopardised on the equation.

In Re Shyam telecom Limited [(2007)135 Company Cases 387] this court has held that it is well settled that an objector must prove before the court that the debt due to him was admitted by the company, the court prima facie comes to a conclusion that debt due would be adversely affected by the sanction of the scheme or that scheme is unjust to the creditor objecting to the scheme. It was held in the aforesaid judgment, relying on the judgment of Bombay High Court in the case of Mayfair Limited, in re and Zodiac clothing Co. Ltd. [(2004)122 Company Cases 748] that objections in a petition for sanction of scheme under Sections 391 to 394 of the Act of 1956 cannot be used as a tool in the hands of creditor to recover the debt disputed by the company or coerce it into paying the said amount.

It was further submitted by Mr. Tripathi that even with the scheme being sanctioned, the Transferor company with substantial "remaining businesses" retains its corporate existence and the applicant would be free to recover any money due and owing to him therefrom, if finally so determined in accordance with law. It was further submitted that the judgment and decree dated 10-2-2016 and sums recoverable thereunder subject to appeal would be reflected in an accounting book of the transferor company upon the finalisation of amount for Financial year 2016-17. I am of the considered view that on arguments advanced by counsel for the parties on the objection to the sanction of the scheme, the objections of Shrinivasraghvan Seshadri are liable to be rejected. They are so rejected.

Similarly another set of objections has been filed by Manisha Tele Sanchar Private Limited seeking to bring to the notice of the court the alleged false declaration made by the petitioner transferor company as to pendency of legal proceedings. It was submitted that under clause 8.1 of the scheme of arrangement between the Transferor Company and the Transferee Company disclosure of legal proceedings have been provided. Yet a false declaration was made that no legal proceedings are pending in relation to the Transferor Company's business, operation, affairs or conduct. It was submitted that the factum of the suit [CS (OS) No.3029/2014] filed by the Transferor company itself against the applicant objector before the Delhi High Court for permanent injunction seeking restraint on infringement of its purported trade mark, passing off, damages and rendition of account and a counter claim thereagainst by the applicant objector for grant of permanent injunction and restraining the transferor company from directly or indirectly dealing in any manner with look alike telecommunication products of the applicant objector has been suppressed and not disclosed. It was submitted that the applicant objector has also written to the Government of India, Ministry of Communication and IT department of telecom requesting for registration of complaint against the transferor company for causing threat to national security on account of violation of notifications published in the Gazette of India, for selling of MTS brand duplicate handset/ data card with false IMEI/ MEID numbers to the public. The applicant objector has also requested the Joint Secretary, Ministry of Corporate Affairs under letters dated 10-10-2015 to register a complaint against transferor company for causing threat to national security. Similar complaint has been made to the Ministry of Home Affairs, Internal Security Division-I under letter dated 24-8-2015 and 23- 2-2016. It was submitted that in the context of the false declaration qua clause 8 of the scheme of arrangement and complaints against the transferor company, the scheme not be sanctioned but be rejected.

Replying to the objections aforesaid, Mr. Parag Tripathi, submitted that the application is wholly misconceived, based on a blatant and mischievous, reading of clause 8.1 of the scheme with the sole object of seeking to misuse the forum of this court to cause harassment to the transferor company and thereby arm twist it into satisfying the applicant objector in monetary terms through payment of amounts not at all legally due and recoverable. It was submitted that clause 8.1 of the scheme in respect of which mis declaration is alleged only adverts to legal proceedings with regard to "transferred undertaking" as defined in the scheme. The said clause does not provide for disclosure of any legal proceeding against the transferor company with reference to which the entire objection has been premised. Clause 8.1 of the scheme does not state in any manner or form that there are no legal proceedings pending against the transferor company. No false declaration with reference to clause 8 of the scheme has thus been made. It was submitted that the applicant/ objector has all of a Rs.25 lacs claim for damages in the alternative against the Transferor Company in its counter claim. And as the Transferor company continues in its corporate existence under the scheme with substantial business assets remaining with it even after the transfer of its telecom business, in the unlikely event of the applicant objector succeeding in its counter claim, the Transferor company would be in a position to satisfy the judgment and decree.

Having considered the respective submissions of counsel, I am of the considered view that the objections filed by Manisha Tele Sanchar Limited are untenable as they are on a patent misreading of clause 8.1 of the scheme on which they are premised. It is not the case of the applicant objector

that any legal proceedings are pending with regard to the telecom business of the Transferor company which is to be transferred and vested in the Transferee company under the scheme. Legal proceeding for whatever their worth against the Transferor company in a matter other than telecom business to be transferred, cannot and are not relevant to the scheme, as the Transferor company is to continue in its corporate existence even after the scheme of arrangement in issue is sanctioned.

Mr. Gunjan Pathak apparently realising the baselessness of the objections laid, tried to expand the scope of the objections filed beyond the pleadings, arguing that the objector/ applicant Manisha Tele Sanchar Limited by the mere fact of laying a counter claim, in law equals an unsecured creditor entitled to notice of the court convened meeting of unsecured creditors but was deliberately left out, entailing a vitiation of the direction of this court to convene a meeting of all secured creditors and vitiating the approval of the scheme by the unsecured creditors at the court convened meeting. For his far fetched contention, Mr. Gunjan Pathak invoked section 390(c) of the Act of 1956, which only provides that filing of a suit for recovery of money by an unsecured creditor leading to a decree in his favour would not confer on him a status higher than of other secured creditors, but maintain him in the same class decree notwithstanding. A "creditor" is defined by the Black's Law Dictionary (Fifth Edition) as one to whom a debt is owing by another and albeit the word "creditor" is susceptible of a latitudinous construction and in its broad sense may include one claiming money due on contract or under tort, in its narrower sense the word "creditor" would relate to one who holds a demand which is certain and liquidated. In the context of Sections 391 of the Act of 1956, I am inclined to ascribe to the restricted meaning to the word creditor and exclude therefrom claims disputed, unadjudicated and uncertain or unliquidated. Such a construction of the word "creditor" in Section 391 of the Act of 1956 is necessary to advance the object of Sections 391 to 394 to promote business through restructuring and arrangements dictated by dynamic market forces. Besides the claim of the objector Manisha Tele Sanchar Limited in its counter claim, filed as a counter blast to the Transferor company's suit for injunction etc., is for damages of Rs.25 lacs. No matter how speculatively enormous the final decree thereon could be, as was submitted, the Transferor company in its post scheme sanction avtar will be able to discharge its liability if it comes to that in accordance with law. Further a disputed claim against a company seeking sanction of a scheme cannot be an impediment by itself to the sanction.

For the multiple reasons aforesaid each of which suffices for the rejection of the objections of Manisha Tele Sanchar Limited, its objections are dismissed.

This court in the case of Uma Enterprises Limited, SB Company Petition No.14/2012 and other connected matters, vide order dated 12-2-2016 held as under:-

> "The jurisdiction of a company court in sanctioning a scheme of arrangement by way of amalgamation or de- merger is well delineated under Sections 391 to 394 of the Act of 1956 and profusely expounded in a catena of judgments of the Apex Court and this Court. It is well settled that the scheme of arrangement under Sections 391-394 of the Act of 1956 is fundamentally a commercial document based on the commercial wisdom of the shareholders and creditors of the company. The company court cannot sit in judgment thereof on merits as if in appeal and seek to evaluate the scheme

> meticulously prior to grant of sanction. That however is not the end of the matter or the complete statement of law. For it is equally well settled that the sanction of the court under sections 391(2) 394 of the Act of 1956 is not to be mechanically granted on the mere askance as if the court were a mere rubber stamp. The company court has to wisely exercise its discretionary jurisdiction vested in it to sanction the scheme, having regard to various aspects such as considering the background and material facts of the case, determining the good faith and foundation of scheme under consideration, ascertaining the purpose of scheme, ensuring that it is not prejudicial to the public interest, that it does not violate any provision of law rendering it contrary to public policy and is not a mere device to evade tax. The scheme should be bonafide to advance business efficacies and shareholders interest without compromising public interest. It should not be a ruse to indirectly achieve what is prohibited in law. It is within these parameters that the objections to the sanction of scheme by the Regional Director have to be considered."

In the case of Hindustan Lever Employees Union Vs. Hindustan Lever Limited [(1995)S SCC 499], a three judge bench of the Apex court held that a company court does not exercise appellate jurisdiction over a scheme, and its jurisdiction is limited to ascertaining fairness, justness and reasonableness of the scheme and to ensuring that neither any law has been violated or public interest compromised in the process. It was held that where a majority of shareholders (in the aforesaid case 99.64% as against 99.88% in the present case) approved the valuation in respect of the transaction under the scheme as best judges of their interest fully conversant with market trends, their judgment should not be interfered with by the court for the reason that it is not a part of judicial function to examine entrepreneurial activities and ferret out flaws.

It is well settled that the court evaluating the scheme, of which sanction is sought under sections 391 to 394 of the Act of 1956 will not ordinarily interfere with the corporate decision of a company approved by its shareholders and creditors in court convened meetings unless it can be shown that the scheme is not fair, just and reasonable or that it is in contravention of statutory provisions and/ or public interest.

From the facts on record it is evident that the scheme of transfer of which sanction is sought entails transfer and vesting of the telecom business of the Transferor company to the Transferee company. This could also have been lawfully done by the transferor company under section 180 of the Companies Act, 2013. Section 180(1)A of the Act of 2013 provides that the Board of Directors of the company with the consent of the company, by a special resolution can inter alia sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one of such undertaking, of the whole or substantially the whole of any such undertaking. Yet that was not done in the instant case and instead the scheme of arrangement was prepared and proceedings taken under Sections 391 to 394 of the Act of 1956 for the transfer and vesting of the telecom business undertaking of the Transferor Company, whereunder the views and observations of the equity shareholders, unsecured creditors and statutory authorities i.e. Regional Director, ROC and Income Tax Department as also the scrutiny of the court at the time of sanction of the scheme has been invited. Bonafides of the scheme therefore

cannot be at all therefore be doubted. The value of telecom business undertaking of the Transferor Company, has been determined at Rs.21,156 million as per the report dated 30-10- 2015 prepared by SR Batliboi & Co. LLP, wherein also the recommendations of share exchange ratio for the swap of equity shares of Transferor Company for the Transferee company was made. The recommendations of SR Batliboi & Co. LLP records that the share exchange ratio for the proposed equity share swap of Transferor company for the equity shares of the Transferee company could not be mathematically determined since the equity value of the Trasnferor company was NIL. Neither the valuation of the assets under transfer nor the share swap ratio was doubted by the shareholders and unsecured creditors or any question raised inter alia about the EOD and MA both disclosed in the scheme as also the explanatory statement accompanying it nor has it been put to any serious challenge on any plausible ground even in the course of proceedings before this court. In fact the scheme has been supported by about 99.99% of the equity shareholder value and 99.952% of unsecured creditors. The option to the equity shareholder of the transferor company to swap their shares for the shares of the Tranferor Company--a listed one--opens an exit to the minority shareholder of the Transferor Company who have been seeking an exit for about a decade.

There is also no allegation of the inadequacy of consideration for the transfer of the telecom assets of the transferor company constituted of each of Rs.5/- face value being Rs.27.65 crores shares and Indian Rupees equivalent of upto US $300 Million under the EOD subject to its terms. The payment of Indian Rupees equivalent of upto US $300 Million under the EOD is subject to approval of DoT for contiguity and combined use of spectrum and these facts have been set put in report dated 30-10-2015 prepared by SR Batliboi & Co. LLP. It is evident from the scheme in issue that both EOD and the Merger agreement have been referred in the scheme itself. The first being between three parties and the second being between eleven parties, to provide for the overall frame work for transfer of business undertaking of the transferor company to the transferee company. The multiparty documents are confidential recording the rights and obligations of others alongwith the Transferor and Transferee companies. As such the transferor company is bound by the confidentiality obligations in the said agreements and they are even otherwise not required to be disclosed as part of the statutorily required disclosure of material facts under the proviso to Section 391(2) of the Act of 1956 as held hereinabove.

It is important to note that the bonafides of the scheme of arrangement in issue have not at all been questioned and it has not been denied that the scheme would help the Transferor company in deleveraging its balancesheet including reduction of debts and outgo and help creation of value for shareholders who do not exercise the option of swapping of their shares and migrating to the Transferee company. It has also not been denied that the scheme of arrangement would consolidate the telecom wireless business of transferee company and with the transferor company as its shareholder to the extent it turns out after the Transferor Company's shareholders exercise their option to swap their shares in the transferor company for that of the transferee company, it would be to its benefits too.

The upshot of the aforesaid discussion is that the company petition for sanctioning the scheme of arrangement between the Transferor company and the Transferee Company is just, fair and reasonable, fully compliant with prescribed statutory provisions for its approval, not opposed in any

manner to law or public policy and is therefore allowed in the following terms:

i) The objections filed by the Regional Director and the Registrar of Companies are rejected;

ii) The objections filed by Manisha Tele Sanchar Private Limited and Mr. Srinivasraghvan Seshadri are also rejected.

iii) The objections filed by M/s. Jindal Securities Private Limited and M/s. Aman Finvest Private Limited are rejected with costs of Rs.1 lac payable to the Common Pool fund of the Official Liquidator within three months from today.

iv) The petition filed by the petitioner transferor company for sanctioning the scheme of arrangement being Exhibit-A is allowed and the scheme of arrangement is sanctioned.

The scheme of arrangement shall be binding creditors and equity shareholders of both the Transferor and Transferee companies.

v) The petitioner transferor company is allowed to file the sanction order of this court with the Registrar of Companies within a period of thirty days from the date of approval from the Department of Telecommunications for transfer/ merger of licenses/ authorizations as set out in the scheme Annexure-A.

vi) The order in prescribed Form No.42 be issued separately by the Registrar as per Rule 84 of the companies (court) Rules, 1959 after the approval by the Department of Telecommunication for transfer/ merger of licenses.

vii) The Official Liquidator shall be entitled to Rs.50,000/- from the Transferor company towards miscellaneous expenses.

(Alok Sharma), J.

arn/ All corrections made in the order have been incorporated in the order being emailed.

Arun Kumar Sharma, Private Secretary.