

(2009) 07 BOM CK 0226

In the Bombay High Court

Case No : Company Petition No. 487 of 2009 and Company Application No's. 438 and 757 of 2009 in Company Petition No. 487 of 2009 in Company Application No. 438 of 2009, Company Petition No. 488 of 2009 and Company Application No's. 439 and 761 of 2009 in Company

**In Re: Reliance Communications Limited
 Reliance Communications Limited**

Date of Decision : 18-07-2009

Acts Referred:

Companies Act, 1956 — Section 187, 211, 211(3C), 21A(1), 235
Income Tax Act, 1961 — Section 43(1), 43A

Citation : (2009) 111 BOMLR 3340 : (2009) 94 SCL 219

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Iqbal Chagla and Janak Dwarkadas, s, instructed by Rajesh Shah and Co, for the Appellant; Mohammed Shafiq and Satendra Kumar for Creditors in CAs/757 and 758/2009, N. Venkataraman, instructed by Madekar and Co. for share holders in CAs/759, 760, 761 and 762/2009 and C.J. Joy and P. Khosla, instructed by S.K. Mohapatra, for Regional Director, for the Respondent

Judgement

A.M. Khanwilkar, J.—These Petitions are filed by the Petitioners to obtain sanction of this Hon"ble Court to the Scheme of Arrangement between Reliance Communications Ltd. (Petitioner in Company Petition No. 487/2009 ? hereinafter referred to as the "Demerged Company") and Reliance Infratel Ltd. (Petitioner in Company Petition No. 488/2009 ? hereinafter referred to as "the Resulting Company") and their respective shareholders and creditors where under the Optic Fiber Undertaking of the Demerged Company shall stand transferred to and vested in the Resulting Company with effect from the appointed date in terms of the Scheme without any further act or deed pursuant to Section 394 of the Companies Act, 1956.

2. The Demerged Company was incorporated under the provisions of the Indian Companies Act, 1956 in Mumbai on 15th July 2004 under the name "Reliance Infrastructure Developers Private Limited.". Subsequently, the said name has

undergone change and the present name of the Demerged Company is "Reliance Communications Limited" with effect from June 7, 2006. On the other hand, Resulting Company was incorporated on 16th April 2001 in the name and style of "Reliance Communications Rajasthan Private Limited". Subsequently, that name has been changed and the present name of the resulting Company is "Reliance Infratel Limited". The Resulting Company is a subsidiary of the Demerged Company. Originally, the Demerged Company held 100% shares in the Resulting Company. However, at present, it has been reduced to 95%, and 5% shares in the Resulting Company are held by institutions and Banks.

3. The authorised share capital of the Demerged Company is 300,00,00,000 equity shares of Rs. 5/- each, valuing Rs. 1500 Crores. The issued, subscribed and paid-up capital of the Demerged Company is 2,06,40,26,881 equity shares of Rs. 5/- each fully paid-up valuing Rs. 1032.01 crores. It is stated that the capital structure of the Demerged Company post the balance sheet as on March 31, 2008 has not undergone any change. Insofar as the Resulting Company is concerned, the authorised share capital of the said Company as on March 31, 2008 is 300 crores equity shares of Rs. 5/- each valuing Rs. 1500 Crores. The issued, subscribed and paid up capital of the Resulting Company is 79,80,40,534 equity shares of Rs. 5/- each valuing Rs. 399.02 Crores. It is stated that the capital structure of the Resulting Company post the balance sheet as on March 31, 2009 has not undergone any change. The objects of the respective companies are set out in their Memorandum of Association. The Demerged Company is presently engaged in the business of providing telecommunication services, whereas, the Resulting Company is engaged in the business of providing telecom infrastructure services. The Board of Directors of the Resulting Company vide Resolution dated January 19, 2009, approved the Scheme of Arrangement between the Demerged Company and the Resulting Company and the respective shareholders and creditors. Similar approval was accorded by the Board of Directors of the Demerged Company vide Resolution dated January 31, 2009. The rationale for the proposed scheme of arrangement is stated as under:

- (a) Reduced set-up and operating costs resulting in cost efficiency coupled with a greater financial flexibility;
- (b) Segregation of the business of providing telecommunication services and the business of providing Infrastructure on a consolidated basis, thereby enabling each of the companies to concentrate on its core business activities;
- (c) Promote high valued standalone business by conversion of cost-centric assets to revenue-centric ones by sharing of the Infrastructure of the Resulting Company with other wireless service providers operating in the same field.

4. Insofar as the material provisions of the proposed Scheme are concerned, I shall advert to the same while dealing with the objections of the intervenors. Suffice it to observe that the arrangement is of transfer and vesting of Optic Fiber Undertaking of the Demerged Company into Resulting Company for

consideration subject to non-exclusive right of the Demerged Company to use the Optic Fiber. The fair value of consideration for such transfer and vesting was done by M/s. R.B. Shah and Associates and certificated by M/s. Chaturvedi and Shah, Chartered Accountants.

5. To effectuate the decision of the Board of Directors, both the Companies filed separate Company Applications being Company Application Nos. 438/2009 and 439/2009 respectively before the Company Judge for directions. On 23rd April 2009, the respective companies were directed to convene meeting of the equity shareholders at the specified place, date and time for the purpose of considering and if thought fit, approving with or without modification the arrangement embodied in the Scheme of Arrangement. The said order further nominated persons who were to act as Chairman of the meeting or any adjourned meeting and to report the result of the meeting to the Company Judge. It was further ordered that the convening and holding of the meeting of the sole secured creditor of the Demerged Company to consider and approve the proposed Scheme of Arrangement was dispensed with in view of the averment in Paragraph 18 of the affidavit that the Scheme would not affect the sole secured creditor. The Court was also pleased to dispense with convening and holding of the meeting of unsecured creditors of both Companies in view of the averment in Paragraph 19 of the affidavit-that the unsecured creditors will not be affected by the proposed Scheme of Arrangement as the value of the assets of the Applicant Company post Scheme will be same as they were before the implementation of the Scheme. The Court, however, directed both the Companies to serve individual notices of the hearing of the Petition by registered post acknowledgment due to the unsecured creditors having an outstanding balance of Rs. 20 lakhs or more and also publish the notices in one issue each of Free Press Journal in English language and Maharashtra Times in Marathi language, both having circulation in Mumbai. Accordingly, notice of the meetings were sent individually to all the equity shareholders of all the respective companies under Certificate of Posting as required by order, together with copies of the Scheme, statement required to be sent u/s 393 of the Companies Act, prescribed form of proxy and attendance slip therewith. Besides, the notice convening the meetings was also advertised as per the order of the Court in the specified newspapers.

6. As per the said notice, the meeting of equity share holders of both the Companies was convened and held at the nominated place, time and date which was presided over by Justice M.H. Kania (Retired Chief Justice of India) as Chairman of the meeting of the equity shareholders. The Chairman has submitted two separate reports with regard to the meetings of the equity shareholders of the respective Companies. Insofar as the Demerged Company is concerned, the report records that proxies and representations u/s 187 of the Act representing 144,40,36,096 equity shares were submitted. In all, 2218 ballots representing 143,98,25,310 equity shares of the face value of Rs. 5/- each were present either in-person or by proxy or by authorised representatives. The proposed Scheme of Arrangement was taken as received, read and understood

with the permission of the members who attended the meeting. The members were invited to express their views on the Scheme. It is noted that the members appreciated the Scheme and no objections were raised. It also records that certain clarifications were asked for by the shareholders; answers to which were provided to their satisfaction. Paragraph 10 of the Report gives the details of the fact as to how the Resolution was approved by the shareholders with overwhelming majority as high as constituting 99.32% in number and representing 99.9999% in value, present and voting in -person or by proxy or by authorised representative voted in favour of the Scheme. Only 15 equity shareholders holding 2038 shares of Rs. 5/- each fully paid-up representing in value the sum of Rs. 10,190/- constituting 0.6784% in number and representing 0.0001% in value, present and voting in-person or by proxy or by authorised representative voted against the Scheme. The report mentions that the Scheme was approved by the shareholders with requisite majority.

7. Insofar as Chairman's report submitted by Justice M.H. Kania (Retired Chief Justice of India) of the meeting of the equity shareholders of the Resulting Company, it is stated that the meeting was held on the appointed place, time and date after issuance of notices in terms of the order of the Court. In the said meeting, the shareholders requested for more time to study the Scheme and with the unanimous approval of the shareholders present, the Chairman adjourned the meeting to Friday, June 5, 2009 at the same time and same venue. On that date, in all 20 members representing 70,93,69,361 equity shares of the face value of Rs. 5/- each were present either in person, through proxy or authorised representatives. Since the quorum fixed for the said meeting was five members present in person, the adjourned meeting proceeded. In the said meeting, with the permission of the Chair, the proposed Scheme of Arrangement was taken as received, read and understood. The members present were invited to express their views on the Scheme. The members present appreciated the Scheme and no objections were raised. The Scheme was then put to vote for approval with or without modification, the arrangement embodied in the Scheme of Arrangement between the Demerged Company and the Resulting Company and their respective shareholders and creditors. The Report records that the Resolution was unanimously approved by the shareholders as no shareholder voted against the Scheme.

8. As aforesaid, both these reports have been submitted before this Court as per the directions given on the earlier occasion. Since the shares of the Demerged Company are listed on Bombay Stock Exchange Limited and National Stock Exchange Ltd., approval of the respective Stock Exchanges has also been obtained. The said Stock Exchanges have favoured the proposed arrangement. According to the respective Companies, the sanctioning of the arrangement embodied in the Scheme will be for the benefit of the Company. It is stated that no winding up Petitions have been admitted against any of these Companies nor any investigation proceedings are pending against the Companies under Sections 235 - 251 of the Companies Act or the like. Besides, it is stated that the Scheme

does not value or overwrite or circumscribe any of the provisions of Regulation or Guidelines made under the said Act. In this backdrop, present Petitions have been filed on 5th June 2009.

9. Pursuant to the notice issued by this Court, the Registrar of Companies and the Regional Director have appeared before this Court. The Regional Director has filed affidavit dated 15th July 2009 in which has plainly opined that the Scheme is not prejudicial to the interest of shareholders and the public, save and except two points raised in Paragraph 7 of the Affidavit. The Regional Director in his affidavit, has adverted to the fact that complaints were received to oppose the proposed Scheme and on scrutiny of each of these complaints referred to in the affidavit, it was found that the Scheme was not prejudicial to the interest of the shareholders and the public. Insofar as the points raised by the Regional Director for consideration of the Scheme, the same read thus:

7. The Deponent further submits that:

(a) As per the explanatory statement u/s 393 of the Companies Act, 1956 circulated to the members of R Com and RITL, the net consideration payable by RITL to R Com is Rs. 6718.87 crores after adjustment of the liabilities attributable to Optic Fiber Undertaking. In this connection the deponent further submits that Clause 2.2 of the scheme dealing with the consideration does not quantify the net consideration payable by RITL on transfer of Optic Fiber Undertaking from R Com. Hence the petitioners may be directed to file an undertaking before this Hon''ble High Court on the net consideration involved in the scheme.

(b) Clause 2.4.3 of the scheme is not in conformity with mandatory Accounting Standard ? 11 prescribed by the Institute of Chartered Accountants of India. Hence Resulting Company may be directed to comply with Accounting Standard -11 as applicable to it in respect of losses on account of changes in exchange rates relating to foreign currency loans.

10. Significantly, consequent to the directions issued by this Court, the Petitioner Companies not only issued notices to concerned creditors but also published advertisement in the Free Press Journal (English) and in Maharashtra Times (Marathi) clearly indicating that the hearing of the present Petition would proceed on 17th July 2009 before the Company Judge at 11 O''Clock in the forenoon or so soon thereafter. As a result of the said publication, six Company Applications have been filed before this Court. Two Company Applications being Company Application Nos. 759/2009 and 762/2009 are filed by one Shri S. Anantharaman on 14th July 2009 supported by affidavit sworn at Coimbatore on 11th July 2009 in respective Company Petitions, praying for the following reliefs:

(a) That this Hon''ble High Court may be pleased to dismiss and set-aside order passed in Company Applications in Company Petition No. 487 filed by Reliance Communications Ltd. i.e. The Petitioner Company and Company Petition No. 488 filed by Reliance Infratel Ltd. i.e. The Resulting Company namely Reliance

Infratel Limited u/s 391 and 394 of the Companies Act 1956 as not maintainable;
or

(b) In the alternative the Hon''ble High Court may be pleased to order and direct
(i) the Petitioner Company to amend the scheme to disclose all material facts that are relevant for the proper appreciation of the scheme by the shareholders;
(ii) the Petitioner Company to table the Valuation Report)iii) the office of the Regional Director to ascertain whether the scheme is in the interest of the shareholders and (iv) the National Advisory Committee on Accounting Standards (NACAS) to confirm whether the accounting treatment appearing in Clauses 2.3 and 2.4 of the scheme are not contrary to Companies (Accounting Standards) Rules, 2006 and are not extraneous to the scheme.

(b-I) That this Hon''ble Court be pleased to allow to intervene application.

(c) pass such other order or orders as deemed fit and proper and thus render justice.

(e) That the cost of this Application be provided for.

(f) For such further and other relief''s as this Hon''ble Court may deem fit and proper in the nature and circumstances of the case.

11. Significantly, this Applicant though claims to be a shareholder of the Demerged Company, did not personally attend the meeting of the equity shareholders convened pursuant to the direction issued by this Court, but had opposed the Scheme of Arrangement by voting (through proxy) against the Scheme. He has, however, stated that he had sent his objection to Registrar of Companies and Regional Director dated 9th July 2009, which reads thus:

9th July 2009

The Registrar of Companies, Everest Building, 100, Marine Drive Mumbai-400002.

The Regional Director, Ministry of Corporate Affairs Everest Building, 100, Marine Drive, Mumbai-400002.

Sir,

Sub: Scheme of arrangement between Reliance Communications Limited ("Company") and Reliance Infratel Limited (RITL).

I am a shareholder of the Company and holding 55 shares under the DP Id-Client Ids IN30017510197978 and 250 shares under the DP Id ? Client Ids 1302340000196414.

The Company has filed a petition before the Hon''ble Court of Judicature at Bombay for approving the scheme of arrangement to de-merge the Optic Fiber Undertaking of the Company to RITL.

I had opposed the scheme of arrangement as it was not possible to ascertain

another the scheme of arrangement was in the interest of the shareholders and hence I had voted (by proxy) against the resolution in the meeting of the shareholders held on 26th May 2009 at Mumbai for the following reasons:

1. The Company has carried out in the recent past restructuring exercise through "schemes of arrangement" and "purchase of assets" relating to the passive infrastructure consisting of optic fibers and associated assets as explained below:

i. In the year 2005-06, Reliance Communications Infrastructure Limited (RCIL) de-merged lit optic fiber to the Company through a scheme of arrangement.

ii. In the year 2006-07, the Company, with the intention to consolidate and hold passive infrastructure assets in Reliance Communications Infrastructure Limited (RCIL) and its subsidiary RITL, de-merged towers and lit optic fiber owned by the Company to RITL through another scheme of arrangement.

iii. In the year 2007-08, the Company purchased unlit passive optic fiber assets from RCIL worth Rs. 1,930 crores for a token consideration of Rs. 80 crores.

iv. Now, in the year 2008-09, through the subject scheme of arrangement the passive optic fiber assets are being de-merged from the Company to RITL.

From the above, it is not clear which parts of the optic fiber is lying with the Company and with RCIL and RITL.

2. The disclosures made in the scheme with respect to the value of the Optic Fiber Undertaking are vague and are not transparent. The Company has not disclosed the book value of the assets which are transferred to RITL through the subject scheme of arrangement.

3. The basis and methodology of valuation for the Optic Fiber Undertaking which is proposed to be de-merged from the Company to RITL through the subject scheme of arrangement is also not known. I had already written to the Company for a copy of the Detailed Valuation Report on 7th July 2009.

4. It has also not been disclosed whether the Company proposes to pay any user charges (lase rentals) for use of the passive optic fiber to RITL. Unless this is known, a shareholder cannot evaluate the merits or demerits of the Scheme.

5. Also, it is not known when the Company will receive the consideration of Rs. 7,206 crore from RITL upon de-merger of the Optic Fiber Undertaking under the subject scheme of arrangement. If the consideration is not received upon de-merger, whether RITL will pay interest to the Company since the appreciation in value of the assets demerged will only accrue to RITL.

6. Accounting treatment proposed to be followed by the Company as mentioned in para 2.3.3 of the Scheme of Arrangement for accounting the difference between the consideration and the net book value is not in line with the Accounting Standards prescribed by the Companies (Accounting Standards) Rules, 2006.

7. Similarly, the Company's proposal as mentioned in para 2.3.4 of the Scheme of Arrangement to utilize the above surplus amount for meeting the future foreign exchange losses is not relevant to the demerger.

Since all the critical information required to form an opinion about the benefits that will accrue to the Company and the shareholders are not available in the subject scheme of arrangement, I oppose the subject scheme of arrangement and will be filing necessary petitions before the Hon''ble High Court of Judicature at Bombay.

I request you to seek all the above information from the Company before affirming to the Hon''ble Court that the subject scheme is not prejudicial to the interest of the shareholders.

Thanking you,

Yours faithfully,

Sd/-.

12. According to this Applicant, he has not received any response to the abovesaid representation. He has further stated that on 11th July 2009, one Mr. Ramjibhai Mavani, founder President of Rajkot Saher/Jilla Grahak Suraksha Mandal contacted him, having found from the Company Petition and its Annexures that the said Applicant had voted against the Scheme of Arrangement. This Applicant has further stated in Para 4 of his affidavit-in-support of the Application that the said Mr. Mavani informed him that the Scheme of Arrangement was engineered with a clear objective of defrauding creditors, affecting the interest of shareholders besides clear evasion of taxes due to the Income Tax Department. The said Mr. Mavani further informed that he was in the process of moving an Intervention Application as the Scheme of Arrangement is contrary to public interest and does not meet the statutory requirements of Sections 391 - 394 of the Companies Act, 1956. It is the case of this Applicant that after detailed discussion, he was convinced that in the capacity as a shareholder, he should take up the matter before this Court and for which reason, has filed the two Intervention Applications on 11th July 2009 itself.

13. In addition, two other Applications have been filed on 14th July 2009 by M/s. Webduniya. Com (India) Pvt. Ltd. being Company Application Nos. 757/2009 and 758/2009 respectively, praying for the following reliefs:

(a) That this Hon''ble High Court may be pleased to set-aside and dismiss the order passed in Company Petition No. 487 of 2009 and Company Petition No. 488 of 2009; or

(b) In the alternative to prayer Clause (a) above, this Hon''ble High Court be pleased to: (i) modify its earlier order passed in company application 438 and company application 439 dated 23rd April 2009 in dispensing the meeting of the creditors and (ii) direct the Petitioner Company to hold the meeting of its

Creditors and also to submit full fledged and complete report to be placed before this Hon''ble Court by giving the facts, figures and details as to the number of creditors including Public Sector Banks and Financial Institutions who had sought information of this scheme of arrangement and had not objected to the same.

(b1) That this Hon''ble Court be pleased to allow to intervene application.

(c) pass such other order or orders as deemed fit and proper and thus render justice.

(d) That the cost of this Application be provided for.

(e) For such further and other reliefs as this Hon''ble Court may deem fit and proper in the nature and circumstances of the case.

14. This Applicant asserts that they are one of the Creditor of the Demerged Company as the Company owes a sum of Rs. 74,51,125/-. According to this Applicant, even though an unsecured creditor, no notice of the Petition has been served, nor any intimation with regard to the proposed Scheme was received. Whereas, incorrect statement is made by the Company of such compliance. On this basis, the Applicant contends that the order passed by this Court of dispensation of convening of meeting of the unsecured creditors, deserves to be set-aside. According to this Applicant, no meeting was held. As per his information, as of 31st December 2008, the Demerged Company has an unsecured loan of about Rs. 27000 Crores and current liabilities of Rs. 31000 Crores.

15. There are two other Applications filed on 13th July 2009 being Company Application No. 760/2009 and 761/2009 by Rajkot Saher/Jilla Grahak Suraksha Mandal praying for following reliefs:

(a) That this Hon''ble High Court may be pleased to dismiss and set-aside the order passed in Company Applications in Company Petition No. 487 Company Petition No. 488 as not maintainable being the same is against public interest and in violation of Section 391 and 394 of the Companies Act 1956 as not maintainable; or

(b) In the alternative the Hon''ble High Court may be pleased to exclude or delete or modify that portion of the Scheme as appearing in Clauses 2.3 and 2.4 as the same is contrary to public interest resulting in loss of hundreds of crore to the exchequer;

(c) to issue notice to the Income Tax Department and the Secretary Ministry of Finance to place on record its report, so as to facilitate this Hon''ble High Court to pass appropriate order in Company Law Petition No. 487 and 488 of 2009; or

(d) to order the Petitioner Company to hold meeting of the creditors considering the huge amount of borrowings from Public Section Banks and other Banks and Financial Institutions;

(d-I) That this Hon"ble Court be pleased to allow to intervene application.

(e) pass such other order or orders as deemed fit and proper and thus render justice.

(e) That the cost of this Application be provided for.

(f) For such further and other relief"s as this Hon"ble Court may deem fit and proper in the nature and circumstances of the case.

16. Significantly, this Applicant is neither a shareholder nor a creditor of the Demerged Company or the Resulting Company. But being a public spirited person, has taken up the cause to protect the interest of the Creditors and shareholders of the public in general.

17. As per the order passed on the earlier occasion, Petitions were notified for hearing on 17th July 2009. At the outset, Counsel appearing for Mr. S. Anantharaman raised an issue that unless the valuation report is furnished by the Company, it may not be appropriate to proceed with the hearing of the Petitions. According to him, if the valuation report is furnished, the said Applicant may be in a position to point out several irregularities and illegalities in the proposed scheme. According to him, therefore, the Company be directed to first furnish the valuation report before proceeding with the hearing of the Petitions. Insofar as this objection is concerned, I find merit in the stand taken by the Petitioner Companies that this is a subtle attempt to prolong the hearing of the Petitions with ulterior design. More over, from the material on record, it can be inferred that this Applicant has been set up by Rajkot Saher/Jilla Grahak Suraksha Mandal, who in turn, have no locus to oppose the proposed Scheme. There is substance in this grievance. Indeed, the said Applicant is a shareholder and had opposed the Scheme of Arrangement by voting, albeit through proxy. However, he did not think it necessary to remain personally present in the meeting so as to educate the other shareholders about the shortcomings, drawbacks or irregularities and illegalities in the proposed Scheme. As observed by the Apex Court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., , the objections now raised by such Applicant either before the Registrar of Companies/ Regional Director or for that matter, before this Court, at the time of opposing the Scheme which was put for the sanction of the Court are clearly afterthought and for the sake of it. It is too late in the day for such objector to contend that the Scheme was unfair to him or other similarly placed persons. As a matter of fact, the Applicant admits that he was inspired to file Applications before this Court and to intervene to oppose the sanction of the proposed Scheme only after being persuaded by Mr. Ramjibhai Mavani, founder President of Rajkot Saher/Jilla Grahak Suraksha Mandal. In the affidavit, he has candidly mentioned the date of such meeting on 11th July 2009. Notably, the said Applicant is resident of Coimbatore in Tamil Nadu, but is able to prepare a detailed affidavit on the same day on 11th July 2009 to be sworn at Coimbatore and forward it for filing of the present Applications in this Court, which is filed on 15th July 2009. On the same

day i.e. 15th July 2009, the Applications of Rajkot Saher/Jilla Grahak Suraksha Mandal have been filed in this Court. Indeed, there is no difficulty if the two objectors were to act in tandem. However, it is indisputable that Rajkot Saher/Jilla Grahak Suraksha Mandal is neither a shareholder nor creditor of any of the two Companies. In fact, the Applicant has not minced words in stating that he was inspired to file objection by Mr. Mavani. Since Mr. S. Ananthraman has filed his intervention Applications and objections to the proposed Scheme at the behest of person who is neither a shareholder or creditor of either Company, it will have to be considered with utmost circumspection. The bonafides of Mr. S. Ananthraman to intervene in the proceedings would become questionable.

18. Be that as it may, the grievance now made before this Court about supplying valuation report as a condition precedent for hearing of the Petitions, clearly overlooks that the notices regarding convening of the meeting of the equity shareholders of the Demerged Company were issued and published in time as directed by the Court. The same clearly mentioned that inspection of documents referred to therein were available at the registered office of the Company upto one day prior to the date of the meeting. One of the document referred to therein is valuation report issued by M/s. R.B. Shah and Associates and certificated by M/s. Chaturvedi Shah Pvt. Ltd. No reason is forthcoming as to what prevented the Applicant to take inspection of the stated documents, especially when he thought it appropriate to vote at the meeting through proxy. If the Applicant was serious about his objections to the proposed Scheme, was expected to personally remain present in the meeting so as to educate other shareholders who were likely to vote at the meeting about the illegalities or irregularities in the proposed Scheme. As is noted earlier, the Scheme has been approved with overwhelming majority of shareholders of the Demerged Company and unanimously by the shareholders of the Resulting Company. The opposition constituted only a miniscule fraction of 0.6784% in number and representing 0.0001% in value of the Demerged Company. In that, only 15 equity shareholders holding 2038 equity shares of Rs. 5/-each fully paid up representing in value sum of Rs. 10,190/- voted against the Scheme. Whereas, the overwhelming majority of the shareholders consciously voted in favour of the Scheme. Accordingly, I am convinced that there was no reason to adjourn the matter for the reason stated by the said intervenor. If at all, the Applicant was so keen, he ought to have approached this Court well in advance to seek appropriate directions and not make such grievance for the first time on the date of hearing of the Petition. The only purpose whereof would be to protract the hearing of the Petition for reasons best known to him. The fact that the hearing could be rescheduled to a short date, in my opinion, cannot be the basis to entertain the request of such Applicant. Taking overall view of the matter, I am more than convinced that adjournment of the hearing of the Petitions was not only avoidable but unwarranted.

19. I shall straightway deal with the two Applications filed by Rajkot Saher/Jilla Grahak Suraksha Mandal. As aforesaid, this Applicant is neither a Creditor nor a

Shareholder of any of the Company. By now, it is well established that a person who is neither a Shareholder nor a Creditor of the Company would have no locus. Very recently, I had occasion to deal with similar grievance in the case of Hindalco Industries Limited decided on June 22m 2009 in Company Petition No. 293 of 2009 (See Paragraph 9).

20. Reverting to the objection filed by Shri S. Ananthraman, while dealing with the issue of request for adjournment of hearing of the Petitions, I have already noted that the two Applications filed are clearly at the behest of a person who had no causal connection with the proposed Scheme. More over, this Applicant though a shareholder, did not think it necessary to remain personally present in the meeting of the shareholders which considered the proposed Scheme for approval. On this count alone, the Applications filed by Mr. S. Ananthraman will have to be rejected. However, to reassure myself that the grievance made by the objector is not significant one, I would proceed to consider the issues that have been raised at the time of arguments.

21. In the first place, Counsel appearing for the Objectors took me through the history of earlier Schemes of Arrangement between the Demerged Company, the Resulting Company and another wholly owned subsidiary M/s. Reliance Company Infrastructure Company Limited interse. In my opinion, however, it may not be necessary to delve upon matters which may be relevant to those Schemes. It may be noticed that as per the earlier Schemes, the transfer of assets were made at book value of Rs. 2,755 Crores from the above named Reliance Communication Infrastructure Limited to the Demerged Company. Later on, the Towers and Associated Assets of the Demerged Company were transferred to the Resulting Company. It is the case of the Applicant that Reliance Communication Infrastructure Limited sold to Demerged Company, Passive Telecom Structure-Unlit Optic Fibers and other Associated Assets lying on 31st December 2007. The book value of the Assets was Rs. 1932 Crores, but sold only at Rs. 80 Crores. As a result, Reliance Communication Infrastructure Limited declared a loss of Rs. 1,852 Crores in its books. As aforesaid, all issues raised with regard to the said transfers, in my opinion, are of no avail. I would, however, confine the inquiry to matters related to the present Scheme.

22. Insofar as the present Scheme is concerned, the grievance is that, the purpose of the Scheme is to transfer unknown, unidentified and unclear assets from the Demerged Company to the Resulting Company. The valuation of the assets is shown as Rs. 7,206 Crores. It is argued that it is not clear as to which parts of the Optic Fiber are lying with the Demerged Company and the one that was to be transferred to the Resulting Company. According to the Objectors, the disclosures made in the Scheme with respect to the value of the Optic Fiber Limited was vague and not transparent. Further, the Company has not disclosed the book value of the assets which are being transferred to the Resulting Company under the Scheme of Arrangement. This argument will have to be stated to be rejected. It clearly overlooks the figures of the value of Optic Fiber

Undertaking reflected in the Books of Accounts and more so, in the valuation report. The summary of valuation of OFC network of the Demerged Company as on 1st April 2008 reveals the relevant information. By no standards, it can be said to be vague. The grievance that the valuation is not transparent or that the Company has not disclosed the book value of the assets is also without any substance. Counsel appearing for the Petitioners has justly pressed into service observation of Justice Vazifdar in order dated 21st March 2009 in Company Petition No. 63 of 2009 in the case of Ajmera Realty & Infra India Ltd. In paragraph 5 of the said decision, it is observed thus:

5. There is no provision in law which requires the balance sheet and profit and loss account or the scheme enumerating and setting out each and every asset which is the subject matter of the scheme of demerger. My attention has not been invited to any such provision.

23. In my opinion, having regard to the fact that the Petitioner Companies have produced the audited Books of Accounts till March 31, 2008 and unaudited till December 31, 2008, which discloses all the relevant information coupled with the fact that the valuer has also referred to the figures of the value of the assets of the Optic Fiber Undertaking, it is neither a case of vague nor of non-transparent disclosures made by the Companies.

24. The next issue canvassed was that the basis and methodology of valuation of the Optic Fiber Undertaking which is proposed to be transferred from the Demerged Company to the Resulting Company under the Scheme is not known and that in absence of valuation report, the Objectors were at a loss to offer any comment. Insofar as non supply of valuation report is concerned, I have already dealt with that aspect in the earlier part of this Judgment. The valuation report was available for inspection before the meeting was held. If the Applicant failed to avail of the said opportunity. Therefore, the Company cannot be blamed. The fact that the Applicant has demanded the said valuation report on 7th July 2009 or for that matter, insist before this Court to issue such direction to the Company does not take the matter any further. The valuation report is already placed on record along with the affidavit of the Regional Director. The summary of valuation of specified tangible fixed assets Optical Fiber Network of the Demerged Company, discloses the basis and methodology adopted by the valuers. The same reads thus:

Summary of Valuation of Specified Tangible Fixed Assets Optical Fiber Network of Reliance Communications Ltd.

Ref.No.:RBSA/MUM/2008-09/ADAG Date: 15th March, 2009 1.1 We have been engaged and appointed as Valuation Consultants by Reliance Anil Dhirubhai Ambai Group (Reliance ADAG) company i.e. Reliance Communications Limited (RCOM) for Valuation of Specified Tangible Fixed Assets ? Optical Fiber Network of Reliance Communications Ltd. (RCOM) as on 1st April, 2008.

1.2 The purpose of the Valuation is determining the "Market Value" of the Optical

Fiber Network of RCOM for reorganization purposes. The material date of Valuation is 1st April, 2008.

1.3 RCOM, and Reliance Infratel Ltd. (RITL) are part of Reliance Anil Dhirubhai Ambani Group; and are undergoing a major reorganization/restructuring as per a Scheme of Arrangement proposed to be filed in the High Court of Mumbai. As per the said proposed scheme the Optical Fiber Network of RCOM shall vest with RITL with effect from 1st April, 2008.

1.4 Generally, Depreciated Replacement Cost (DRC) is the Market Value of the Fixed Assets, subject to continued potential profitability of industry and enterprise, for assets that can be replicated in a short time duration/or which do not have any "entry barriers" associated with it. However, the Optical Fiber Network is a premium asset which would take a minimum time frame of 3 to 4 years to replicate or replace; and has significant "entry barriers" associated with it. Any potential acquirer would have to pay a premium price to acquire such assets in "one-go". Therefore a premium is added to the Depreciated Replacement Cost of the Network to arrive at the Market Value. For detailed calculations and analysis please refer the Detailed Valuation Report (DVR).

1.5 The Valuation Summary of the "Market Value" of Specified Fixed Assets ? Optical Fiber Network of Reliance Communications Ltd. (RCOM) can be represented in following tabulation:

Summary of Valuation of OFC Network of Rcom as on 01-04-2008 All Figures in INR

Sr.	Particulars	Gross Block	Net Block	Gross current Depreciated	No. Replacement
Cost					
-----	-----	-----	-----	-----	-----
-----	OFC Network(45%) acquired	40396156775	36022483086	56382090446	
	46559903405 from RCIL as at 31-3-2006	-----	-----	-----	
-----	-----	2	OFC Network(49%)	BAN	
	851115135 777806197 1910666629 1740855692 Project 2006-07	-----	-----	-----	
-----	-----	3	OFC		
	Network(49%) Phase: 4, 2427703785 2385365983 4954498307 4835771942	-----	-----	-----	
	WIN Project 2007-08	-----	-----	-----	
-----	-----	4	OFC Network(49%)	BAN	
	2934640786 2882143255 Project 2007-08(BAN)	-----	-----	-----	
-----	-----	5	OFC Network purchased		
	from 780000000 768218441 Incd.in Incd.in RCIL as on 31-12-2007 Sr.No.1-4	-----	-----	-----	
	Sr.No.1-4	-----	-----	-----	
-----	-----	6	OFC Network transferred from (*)	1826357677 (*)1802738862	
	Incd.in Incd.in Sr.No.3-4 Sr.No.3-4	-----	-----	-----	
-----	-----		RCIL Grand Total(excluding	CWIP)	
	47719307356 43176505711 66181896168 56018674293	-----	-----	-----	
-----	-----	7	Approximate		

Premium on the 6000000000 Value to account for the time required to replicate the Network; and the fact that any potential acquirer gains on "time and opportunity" by acquiring such a premium asset in "one go" (For details please refer the D.V.R.) -----

----- Grand Total of Market Value 62018674293 (excluding CWIP) -

----- 8 Capital Goods Inventory 5306277144 5306277144 5306277144 5306277144 -

----- 9 Capital Advance 1022707044 1022707044 1022707044 1022707044 -----

----- 10 WBS consumption relating to 2770054847 2770054847 2770054847 2770054847 CWIP -----

----- 11 Pre-Operative Expenses 945842752 945842752 945842752 945842752 -----

----- (Item 8,9,10 & 11 are not Valued but taken at cost) -----

----- Grand Total(including CWIP) 57764189144 53221387499 76226777956 72063556081 --

----- *Includes the complete OFC network of RCIL transferred from RCIL to Rcom on 1st April 2008.

1.6 The total "Market Value" of Specified Fixed Assets ? Optical Fiber Network of Reliance Communications Limited (RCL) has been assessed in the range of Rs. 6,201.86 Crores. This amounts do not include the assets under the asset head Capital Work in Progress-CWIP, amounting to Rs. 1,004.49 Crores, which has not been valued and has been adopted at cost in the aforesaid tabulation.

1.7 This Valuation Certificate is privileged, and is intended for internal use of R Com and its group companies. We understand that this Valuation Certificate will be used by RCOM for the purposes mentioned herein above.

1.8 The Basis of Valuation, Limitations, Methodologies, Conclusions etc. of this Valuation exercise would be presented in detail in the final Detailed Valuation Report which shall follow this certificate.

25. There is no tangible material produced to question the abovesaid opinion of the valuer regarding the basis and methodology adopted. No contrary opinion is forthcoming. More so, in the meeting of the equity shareholders, after due deliberations, the Resolution was approved by overwhelming majority of the shareholders of the Demerged Company and unanimously by the Resulting Company. Merely because the Applicant has voted against the said Resolution, cannot be the basis to undermine the wisdom of the stakeholders and the Board of Directors in approving the Scheme. Their commercial decision cannot be interfered with unless it is shown to be illegal, impermissible and against Public Policy. It is not the case of the Applicant that the said Scheme would be prejudicial or unfair to him alone. The stakeholders have approved the Scheme on the assumption that the same is fair and equitable to the class of

shareholders as a whole. Besides, there is nothing on record to doubt the integrity and honesty of the independent expert appointed by the Company for the purpose of valuation. The argument of the Applicant that the same valuer is regularly appointed by the Company for valuation purpose, cannot be the basis to hold that the subject report submitted by the said Valuer is dishonest or manipulated one. Such inference cannot be lightly drawn in absence of tangible material to substantiate the same. Significantly, it is noticed during the course of argument that the valuation is in excess of the net book value of the assets. Suffice it to note that the grievance made by the Objectors that the basis and methodology of valuation is not spelt out in the valuation report, is devoid of merits.

26. Another issue raised on behalf of the Objectors is that the Scheme does not disclose whether the Company proposes to pay any user charges (lease rentals) for the use of passive optic fiber to the Resulting Company. In absence of such disclosure, the shareholders cannot evaluate the merits and de-merits of the Scheme. In the first place, no such grievance or doubt was expressed by any shareholder who voted in favour of the Scheme. More over, the Scheme clearly spells out the scope of arrangement. In the definitions in Part-I of the Scheme, definition of Optic Fiber Undertaking has been articulated as follows:

1.1.6. "Optic Fiber Undertaking" means the entire business of the Demerged Company relating to Optic Fiber along with all related assets, liabilities, employees including specifically the following:

1.1.6.1. all assets wherever situated, whether movable or immovable, leasehold or freehold, tangible or intangible, including all capital work in progress, plant & machinery, equipment, trademarks, trade names, brands, investments and other IP rights, vehicles, furniture, fixtures, office equipment, computer installations, electrical appliances, accessories pertaining to the Optic Fiber Undertaking;

1.1.6.2. all liabilities present and future (including contingent liabilities pertaining to or relatable to the Optic Fiber Undertaking), as may be determined by the Board of the Demerged Company;

1.1.6.3. all rights and licenses, all assignments and grants thereof, all permits, registrations, rights (including rights under any agreement, contracts, applications, letters of intent etc.), approvals, regulatory approvals, entitlements, goodwill, cash balances, bank balances, bank accounts, receivables, loans and advances, privileges, all other claims, rights and benefits, powers and facilities of every kind, nature and description whatsoever, inventory, rights to use and avail of telephones, telexes, facsimile connections and installations, utilities, electricity, water and other services, provisions, funds, benefits of all agreements, contracts and arrangements and all other interests in connection with or relating to the Optic Fiber Undertaking;

1.1.6.4. all employees of the Demerged Company substantially engaged in the Optic Fiber Undertaking as determined by the Board of the Demerged Company;

1.1.6.5. all deposits and balances with Government, Semi-Government, local and other authorities and bodies, customers and other persons, earnest moneys and/or security deposits paid or received by the Demerged Company, directly or indirectly in connection with or in relation to the Optic Fiber Undertaking;

1.1.6.6. all books, records, files, papers, directly or indirectly relating to the Optic Fiber Undertaking; but shall not include any portion of the Remaining Business of the Demerged Company and

1.1.6.7. Any other asset/liability which is deemed to be pertaining to the Optic Fiber Undertaking by the Board of the Demerged Company.

Explanation: In case of any doubt regarding whether any particular asset or liability forms part of the Optic Fiber Undertaking or otherwise, the same shall be resolved mutually by the Board of the Demerged Company and Resulting Company.

The Scheme also mentions the appointed date to mean April 1, 2008 or such other date as may be decided by the High Court. The effective date is defined to mean date on which the certified copy of the Order of the High Court sanctioning the Scheme of Arrangement is filed with the Registrar of Companies, Maharashtra, Mumbai. Clause 1.3. stipulates the date of taking effect and operative date. Clause 2.1 provides for transfer and vesting of Optic Fiber Undertaking of the Demerged Company into Resulting Company. The manner in which the same shall be effected is provided in Clause 2.1.1. (a), (b), (c) and (d). It is an arrangement to transfer whole of the Undertaking and properties of Optic Fiber Undertaking to be vested in and/or deemed to be transferred to and vested in the Resulting Company, subject to non-exclusive right of the Demerged Company to use the optic fiber. The consideration for such transfer is provided in Clause 2.2. Clause 2.2.1. stipulates that the consideration for transfer and vesting of Optic Fiber Undertaking of the Demerged Company to the Resulting Company shall be fair value as may be determined by renowned valuers to be appointed mutually by the Demerged Company and the Resulting Company. It further provides that the Valuers shall assign values to each asset and liability of the Optic Fiber Undertaking which shall be aggregated to determine the consideration for the transfer.

27. As it is a Scheme for transfer of undertaking, non mention of provision regarding the user charges by the Demerged Company for use of optic fiber, does not militate against the Scheme. That is an arrangement post demerger Scheme to be evolved and adopted by the Board of Directors of the two Companies, as may be suited to them. Obviously, the Board of Directors would act in the best interest of the stakeholders of the respective Companies. It would be a different matter if the Objectors were to substantiate that the valuation of the assets of the Undertaking is hopelessly undervalued. That is not the case forthcoming from the Objectors. As a matter of fact, the Objectors were at pains to point out that considering the earlier arrangements, it may appear that the

assets worth Rs. 80 Crores purchased from Reliance Communication is resold to the Resulting Company for value of Rs. 7206 Crores. If it is so, it is not a case of transfer of assets of the Demerged Company by suffering loss. The Demerged Company has been commensurately paid for the value of assets. Once again, this is the commercial wisdom of the overwhelming majority of the shareholders of the Demerged Company and unanimous view of the shareholders of the Resulting Company. Suffice it to observe that the grievance under consideration cannot be the basis to disapprove the proposed Scheme.

28. The next issue is in the context of arrangement provided in Clause 2.2.2. of the Scheme. The same reads thus:

2.2.2. Till such time, the consideration for transfer of Optic Fiber Undertaking is discharged by Resulting Company, the Demerged Company shall be entitled to interest on the outstanding amount of the consideration at a rate that may from time to time be mutually decided by the Board of the Demerged Company and Resulting Company on arm's length basis.

29. The grievance is that, it is not known when the Company will receive the consideration of Rs. 7206 Crore from the Resulting Company upon demerger of the Optic Fiber Undertaking as per the Scheme of Arrangement. Besides, if the consideration is not received, what is the quantum of interest to be paid by the Company is also not spelt out, even though, the appreciation in value of the assets demerged will accrue to the Resulting Company. In the context of this objection, the Counsel appearing for the Companies were called upon to state whether it was possible to specify the quantum of interest in the Scheme itself. In response thereto, Counsel for the Company have stated on instructions that the Court may consider to specify the interest rate as not less than 1% over and above the prevailing Benchmark Primary Lending Rate (BPLR) from the effective date until the realisation of the amount in question. It was, however, later on argued by the Counsel for the Companies that the Reserve Bank of India has reviewed the Benchmark Primary Lending Rate Structure. In the opinion of the Reserve Bank of India, as can be discerned from its Annual Policy Statement 2009-10, the system of BPLR has evolved in such a manner that it has lost its relevance as a meaningful reference rate as bulk of loans are advanced below BPLR. This position can be discerned from paragraph 87 of the Report which reads thus:

(a) BPLR System: Review

87. Consequent to the Mid-Term Review of October 2005, the Indian Banks' Association (IBA) issued guidelines for determination of benchmark prime lending rate (BPLR) by banks for appropriate pricing of credit. Over time, however, the system of BPLR has evolved in such a manner that it has lost its relevance as a meaningful reference rate as bulk of loans is advanced below BPLR. Furthermore, this impedes the smooth transmission of monetary signals and makes the loan pricing system non-transparent. It has, therefore, become

necessary to review the current procedures and processes of pricing of credit. Accordingly, it is proposed:

to constitute a Working Group to review the present BPLR system and suggest changes to make credit pricing more transparent. The Working Group would consult all the stakeholders and submit its report by end - August 2009.

30. On the same lines, Press Statement of the Officials of the Reserve Bank of India have appeared in newspaper on April 22, 2009. In this backdrop, it was suggested that the Court may consider of specifying the rate of interest to be not less than 1% over and above the Benchmark Primary Lending Rate or not less than 1% over and above the Weighted average cost of debt of the Demerged Company, whichever is lower. In my opinion, it would be just and proper to accept this offer made by the Companies as it is seen that the Average Lending Interest Rate paid by the Company is far less than the Benchmark Primary Lending Rate. The Company cannot be made to pay interest at a higher rate. Accordingly, on accepting this offer of the Companies on the above terms, the Scheme will stand modified to that limited extent. Clause 2.2.2. of the Scheme will stand modified and would now read as follows:

Till such time, the consideration for transfer of Optic Fiber Undertaking is discharged by the Resulting Company, the Demerged Company shall be entitled to interest on the outstanding amount of the consideration at the rate not less than 1% over and above the prevailing Benchmark Primary Lending Rate or not less than 1% over and above the Weighted average cost of debt of the Demerged Company, whichever is lower. That may from time to time be mutually decided by the Board of the Demerged Company and Resulting Company on arm's length basis.

31. Insofar as the time within which the said payment has to be made, although the Scheme does not specify any specific time period, since that arrangement is not against any provision of law for the time being in force, the question of disapproving the Scheme on that count does not arise. For, that is the commercial wisdom of the Body of equity shareholders which would bind the stakeholders. As a matter of fact, the Creditors are in no way affected by the said arrangement. Somewhat similar issue was considered by me in the recent decision in the case of Hindalco Industries Limited (*supra*). In that case, the Regional Director had raised issue that the Scheme does not place time limit for implementation of the Scheme and to write off expenses of securities premium accounts in the Books of Accounts up to a particular day. That objection was negated on the opinion that the decision was expression of commercial wisdom of the shareholders who have approved the Scheme and also thought it appropriate to bestow complete discretion in the Board of Directors in whom they have full confidence. As aforesaid, there is no law which prohibits deferred payment by the subsidiary company in relation to the commitment under the Scheme sanctioned by the Court; nor there is any law which prescribes for outer limit for such payment. The fact that the payment will be made in deferred

manner, by itself, does not result in unfairness to the shareholders of the Demerged Company. In that, the Demerged Company will be suitably compensated by way of interest as provided in Clause 2.2.2. until the consideration is fully paid by the Resulting Company. Accordingly, the issue under consideration does not commend to me.

32. The next issue raised is about breach of accounting standard by the Demerged Company. This argument is made with reference to Clause 2.3.3. Clause 2.3.3. of the Scheme reads thus:

2.3.3. The difference between the consideration and net book value of the Optic Fiber Undertaking, shall unless otherwise determined by the Board of the Demerged Company be credited to the General Reserve Account of the Demerged Company. The General Reserve Account so credited shall constitute Free Reserves available to the Demerged Company for all purposes as it may consider proper including in particular for declaration of dividends. Such General Reserve shall be a reserve which arises pursuant to the Scheme and shall not be and shall not for any purpose be considered to be a reserve created by the Demerged Company.

33. The argument was that the accounting treatment proposed in the Scheme for accounting purpose between the consideration and the net book value is not in line with the accounting standards prescribed by the Companies Act. Assuming there is merit in this objection, as has been held in the case of Hindalco Industries Limited (supra), the possibility of violation of accounting standard, per se, cannot be the basis to straightway disapprove the Scheme. Inasmuch as, observance of accounting standard is a norm, but violation thereof is not completely impermissible. It is regulated by the provisions of Section 211 of the Act. The Companies, through Counsel assure to abide by the said regime to be followed as per Section 211 of the Act even in the present case. In other words, so long as necessary disclosures are made, the Company cannot be faulted even if there were to be deviation from the accounting standards, more so, to be made a ground to disapprove the Scheme.

34. To overcome this position, Counsel for the Objectors relied on

the recent decision of the Apex Court in the case of Commissioner of Income Tax, Delhi v. Woodward Governor India P. Ltd. in Civil Appeal No. 2206 of 2009 decided on April 8, 2009, to contend that the Apex Court has disapproved the deviation of accounting standards and has observed that the Authorities should ruthlessly proceed against the defaulting companies. The argument clearly overlooks that the said decision is in the context of provisions of Taxation Law. However, while considering a Scheme of Arrangement propounded by the Company, the same will have to be tested on the touchstone of provisions of the Companies Act which, as aforesaid, do not completely prohibit the deviation of accounting standard subject to disclosures in terms of Section 211 of the Act. This does not mean that the Authorities under the Taxation Law are precluded

from lifting the veil or to prosecute the Companies for violation of mandatory accounting standards. Those matters will have to be proceeded on its own merits in accordance with law, uninfluenced by the approval of the present Scheme. If the Scheme results in breach of any mandatory accounting standards, all questions in that behalf will have to be addressed at the appropriate stage in the concerned proceedings.

35. It may be useful to advert to unreported decision of our High Court in the case of Jindal Iron & Steel Co. Ltd. v. Assistant Commissioner of Income Tax 5(2) in Company Application No. 123 of 2004 decided on September 2, 2004. Similar apprehension expressed by the objectors in that case (incidentally Income Tax Department), was answered in the following manner:

Mr. Chatterjee then shifted to another argument. He brought to the Court's notice a judgment of the Supreme Court 229 ITR 809 in the case of Marshall & Sons. Mr. Chatterjee submitted that, as per this decision, the merger takes effect from the Appointed Date since in this case the merger is with effect from April 1, 2003. All options of the Income Tax Department would be foreclosed as regards investigation into the fact that the books of accounts of the Petitioner do not record the liability towards Balli Klockner GmbH, the Creditor objecting to the proposed merger. Therefore, Mr. Chatterjee's last submission is that the Appointed Date be changed from April 1, 2004. I fail to appreciate the possibility of such a situation. As I understand, all the assets and liabilities of the Petitioner relating to the remaining business will be transferred to the transferee company i.e., Jindal Vijayanagar Steel Limited. Therefore the Income Tax Department, if it desires, can carry out any investigation into the affairs of the transferee company even after the merger. The point that seems to be apparent is that a shift of the Appointed Date would enable the Income Tax Department to recover Income Tax to the tune of Rs. 63 crs., from the petitioner. I do not see how this can be a reason to amend the Appointed Date when the same has been approved by large body of shareholders, secured creditors, financial institutions, etc. The share exchange ratio has also been computed taking into account the Appointed Date as 1.4.2003. Changing the Appointed Date at this stage would mean reversing the decision of such a large body of stakeholders. In fact, when the Scheme was approved by the Board of Directors in November, 2003, it was a logical date, being the 1st day of the financial year. Various Courts have held that in any proceedings u/s.391-394, the courts will not interfere with the decisions of the majority provided prescribed procedure is followed and unless there is grave prejudice being caused to a Section of the public or the scheme is generally harmful to the public interest. I am afraid I cannot accede to the submissions made by Mr. Chatterjee that if the scheme is sanctioned, it will cause grave harm to the public interest.

36. Recently, while approving the Scheme of Reliance Communications Infrastructure Ltd. decided on 19th June 2009 in Company Petition No. 375 of 2009, the apprehension that on approval of the Scheme, the Company would

claim that it stood extricated from the investigation and proceedings to be resorted to by Income Tax Department, have been dealt with by recording as follows:

9. The Income Tax Department will be free to examine the aspect of any tax payable as a result of the Scheme by either of the two entities. The Petitioners undertake that they will not urge before the Income Tax authorities that the issue of taxability cannot be gone in to by reason of the order passed by this Hon"ble Court.

37. Even in the present case, the Petitioners through Counsel undertake that they would not plead that the approval of the present Scheme as a defence in the Income Tax proceedings-either pending or to be resorted to by the appropriate Authority. Accordingly, the issue under consideration needs no further elaboration.

38. The next issue is about the provision made in Clause 2.3.4, which reads thus:

2.3.4. Losses on account of changes in exchange rates, relating to loans/liabilities denominated in foreign currencies taken/incurred which have been or are debited to profit and loss account of any year upto the year ending March 31, 2011 may as determined by the Board of Directors and to the extent the balances are available, be adjusted by a corresponding withdrawal from the General Reserves of the Demerged Company.

39. According to the Objectors, this provision is not relevant to the Scheme of demerger. Insofar as this provision in the Scheme is concerned, none of the Authorities have objected to the same. According to the Companies, it is imperative to make provision regarding loss on account of changes in exchange rates. The Company has relied on the Notification issued by the Ministry of Corporate Affairs dated 31st March 2009, which supports the case of the Companies. The same reads thus:

Ministry of corporate affairs Notification New Delhi, the 31st March, 2009

G.S.R. 225(E). - In exercise of the powers conferred by Clause (a) of Sub-section (1) of Section 642 read with Sub-section (1) of Section 21A and Sub-section (3C) of Section 211 of the Companies Act, 1956 (1 of 1956), the Central Government in consultation with the National Advisory Committee on Accounting Standards, hereby makes the following rules to amend the Companies (Accounting Standards) Rules, 2006, namely:-1. (1) These rules may be called the Companies (Accounting Standards) Amendment Rules, 2009.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Companies (Accounting Standards) Rules, 2006, in the Annexure, under the heading "B. Accounting Standards", in the sub-heading "Accounting Standard (AS) 11" relating to "The Effects of Changes in Foreign Exchange Rates", after

paragraph 45, the following shall be inserted, namely:

46. In respect of accounting periods commencing on or after 7th December, 2006 and ending on or before 31st March, 2011, at the option of the enterprise (such option to be irrevocable and to be exercised retrospectively for such accounting period, from the date this transitional provision comes into force or the first date on which the concerned foreign currency monetary item is acquired, whichever is later, and applied to all such foreign currency monetary items), exchange differences arising on reporting of long-term foreign currency monetary items at rates different from those at which they were initially recorded during the period, or reported in previous financial statements, in so far as they relate to the acquisition of a depreciable capital asset, can be added to or deducted from the cost of the asset and shall be depreciated over the balance life of the asset, and in other cases, can be accumulated in a "Foreign Currency Monetary Item Translation Difference Account" in the enterprise's financial statements and amortized over the balance period of such long-term asset/liability but not beyond 31st March, 2011, by recognition as income or expense in each of such periods, with the exception of exchange differences dealt with in accordance with paragraph 15. For the purposes of exercise of this option, an asset or liability shall be designated as a long-term foreign currency monetary item, if the asset or liability is expressed in a foreign currency and has a term of 12 months or more at the date of origination of the asset or liability. Any difference pertaining to accounting periods which commenced on or after 7th December, 2006, previously recognized in the profit and loss account before the exercise of the option shall be reversed in so far as it relates to the acquisition of a depreciable capital asset by addition or deduction from the cost of the asset and in other cases by transfer to "Foreign Currency Monetary Item Translation Difference Account" in both cases, by debit or credit, as the case may be, to the general reserve. If the option stated in this paragraph is exercised, disclosure shall be made of the fact of such exercise of such option and of the amount remaining to be amortized in the financial statements of the period in which such option is exercised and in every subsequent period so long as any exchange difference remains unamortized.

[F. No. 17/33/2008/CL-V] Jitesh Khosla, Jt. Secy.

Note.- The principal notification was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 739(E), dated the 7th December, 2006 and amended vide notification number G.S.R. 212(E), dated 27th March, 2008.

40. Even in the decision of the Apex Court which was pressed into service by the objectors, in the case of Commissioner of Income Tax, Delhi v. Woodward Governor India P. Ltd. (supra), in Paragraphs 32 and 33, the Court while considering the effect of amended Section 43A of the Income Tax Act has observed thus:

32. One more aspect needs to be mentioned. Section 43(1) defines actual cost for the purpose of grant of depreciation etc. to mean "the actual cost of the assets to the assessee". Till the insertion of the unamended Section 43A there was no provision in the Income Tax Act for adjustment of the actual cost which was fixed once and for all, at the time of acquisition of the asset. Accordingly, no adjustment could be made in the actual cost of the assets for purposes of grant of depreciation for any increase/decrease of liability subsequently arising due to exchange fluctuation. Consequently, Section 43A was introduced in the Act by Finance Act, 1967 w.e.f. 1.4.1967 in the above terms to provide for adjustment in the actual cost of assets pursuant to change in the foreign currency exchange rates. As a consequence of the insertion of the said section, it became possible to adjust the increase/decrease in liability relating to acquisition of capital assets on account of exchange rate fluctuation, in the actual cost of the assets acquired in foreign currency and for, inter alia, depreciation to be allowed with reference to such increased/decreased cost. This position is also made clear by Circular No. 5-P dated 9.10.1967 issued by CBDT. One more point needs to be mentioned. Section 43A (unamended) corresponds to para 10 of AS-11 similarly providing for adjustment in the carrying cost of fixed assets acquired in foreign currency, due to foreign exchange fluctuation at each balance sheet date. The relevant para reads as follows:

10. Exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which carried in terms of historical cost, should be adjusted in the carrying amount of the respective fixed assets. The carrying amount of such fixed assets should, to the extent not already so adjusted or otherwise accounted for, also be adjusted to account for any increase or decrease in the liability of the enterprise, as expressed in the reporting currency by applying the closing rate, for making payment towards the whole or a part of the cost of the assets or for repayment of the whole or a part of the monies borrowed by the enterprise from any person, directly or indirectly, in foreign currency specifically for the purpose of acquiring those assets.

33. As stated above, what triggers the adjustment in the actual cost of the assets, in terms of unamended Section 43A of the 1961 Act is the change in the rate of exchange subsequent to the acquisition of asset in foreign currency. The Section mandates that at any time there is change in the rate of exchange, the same may be given effect to by way of adjustment of the carrying cost of the fixed assets acquired in foreign currency. But for Section 43A which corresponds to para 10 of AS-11 such adjustment in the carrying amount of the fixed assets was not possible, particularly in the light of Section 43(1). The unamended Section 43A nowhere required as condition precedent for making necessary adjustment in the carrying amount of the fixed asset that there should be actual payment of the increased/decreased liability as a consequence of the exchange variation. The words used in the unamended Section 43A were "for making payment" and not "on payment" which is now brought in by amendment to Section 43A vide Finance Act, 2002.

A priori, the issue raised by the objectors regarding irrelevance of Clause 2.3.4. is without any substance.

41. That takes me to the objection taken by the Regional Director. The Regional Director in the first place has noted that the Scheme does not quantify the net consideration payable by the Resulting Company to the Demerged Company. In response to this objection, the Petitioners have already disclosed the net consideration of Optic Fiber Undertaking is Rs. 6718.87 Crores. In this view of the matter, the said objection stands answered.

42. The second objection raised by the Regional Director is that Clause 2.4.3. of the Scheme is not in conformity with mandatory accounting standard-11 prescribed by the Institute of Chartered Accountants of India. The Regional Director insists that the Resulting Company be directed to comply with Accounting Standard-11 as applicable to it in respect of losses on account of changes in exchange rates relating to foreign currency loans. Clause 2.4.3. reads thus:

2.4.3. Losses on account of changes in exchange rates, relating to loans/liabilities denominated in foreign currencies taken/incurred which have been or are debited to profit and loss account of any year upto the year ending March 31, 2011 may as determined by the Board of Directors and to the extent the balances are available, be adjusted by a corresponding withdrawal from the General Reserves of the Resulting Company.

43. In response to this objection, the Petitioners, through Counsel, undertake that the Petitioners would not only follow the Accounting Standard-11 but also Accounting Standard-5 in its letter and spirit. Assurance so given by the Petitioners is accepted. The Regional Director has no other objection to any other Clause in the Scheme.

44. That takes me to the objection of Webduniya.com (India) Pvt. Ltd., a Creditor of the Demerged Company. The said objector has more or less reiterated the issues put forward by the Counsel for Mr. S.Ananthraman, which have already been answered hitherto. The Counsel appearing for this objector, however, additionally argued that the Company has already substantial secured loan and has huge liability and in furtherance of this Scheme would part with the assets worth Rs. 7206 Crores. That may cause prejudice to the Creditors. Except this Creditor, no other Creditor has come forward to oppose the present Scheme. The apprehension of this Creditor is completely misplaced. Notably, the Scheme does not affect the claim of unsecured Creditors at all. Besides, the Demerged Company would receive consideration from the Resulting Company in lieu of transfer of specified undertaking on the basis of valuation of the said assets already done.

45. Be that as it may, as has been rightly contended by the Petitioners, the objection of this Creditor is not bonafide. This Creditor claims outstanding amount of around Rs. 75,00,000/- (Rupees Seventy-five Lakhs), which debt is

almost over four years old. This Creditor has not resorted to any legal action for recovery of its outstanding dues for reasons best known to it. Besides, it was argued that this Applicant has made incorrect statement in affidavit on oath that he has not been served with the notice. Whereas, personal notice was dispatched to this Applicant in addition to the publication in terms of the direction given by the Court. In support of this submission, reliance is placed on the receipt issued by the Postal Authority. It is possible that the notice so dispatched has not reached the Applicant. Assuming that the Applicant has not been served, in my opinion, that alone cannot be the basis to set-aside the order passed by this Court to dispense with convening of meeting of the unsecured creditors.

46. Moreover, it is seen that notice regarding hearing of the Petition was duly published in the specified newspapers as per the order of the Court. In that sense, the grievance of this Applicant about non-service of notice on him will not vitiate the entire action. The only apprehension of the said Objector is that the interest of the Creditors will be compromised. As mentioned earlier, it is not a Scheme of Arrangement to affect the claim of the unsecured Creditors. Moreover, the transfer of assets of the Demerged Company is for consideration. The claim of the Applicant is only around Rs. 75,00,000/- (Rupees Seventy-five Lakhs), subject to proving the same. As a result, even the objection taken by the said Applicant/Creditor does not take the matter any further.

47. Taking overall view of the matter, therefore, there is no substance in the objections taken by the intervenors/Objectors. In that view of the matter, the Petitions should succeed, subject to modification of the Scheme as mentioned earlier and upon accepting the undertaking given by the Petitioners through Counsel.

48. Since all other requisite compliances have been done, Company Petition Nos. 487/2009 and 488/2009 are made absolute in terms of prayer Clauses (a) to (c) and (e) respectively, subject to the modification to the Scheme specified in this Judgment and upon acceptance of undertaking given by the Petitioners. Petitioners to pay cost of Rs. 7,500/- (Rupees Seven Thousand Five Hundred) each to the Regional Director, Western Region. Cost be paid within four weeks from today. Filing and issuance of drawn up order is dispensed with.

49. All concerned to act on an ordinary copy of this Judgment along with Scheme, duly authenticated by the Company Registrar, High Court, Mumbai."