



CSP 670 of 2011

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 670 OF 2011

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 598 OF 2011

AVM Capital Services Private Limited.....Petitioner / First Transferor Company

AND

COMPANY SCHEME PETITION NO. 671 OF 2011

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 599 OF 2011

Chevy Capital Services Private Limited.....Petitioner / Second Transferor Company

AND

COMPANY SCHEME PETITION NO. 672 OF 2011

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 600 OF 2011

PM Capital Services Private Limited.....Petitioner / Third Transferor Company

AND

COMPANY SCHEME PETITION NO. 673 OF 2011

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 601 OF 2011

Pranit Trading Private Limited.....Petitioner / Fourth Transferor Company

AND

COMPANY SCHEME PETITION NO. 674 OF 2011

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 602 OF 2011

Viramrut Trading Private Limited.....Petitioner / Fifth Transferor Company

WITH

COMPANY SCHEME PETITION NO. 675 OF 2011

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 603 OF 2011

Unichem Laboratories Limited.....Petitioner/ Transferee Company

In the matter of Companies Act, 1956 (1 of 1956);

AND

In the matter of Sections 391 to 394, read with Sections 80, 100 to 103 of the Companies Act, 1956;

AND

In the matter of the Scheme of Arrangement between AVM Capital Services Private Limited (**“ACSPL” or “ the First Transferor Company”**);

AND

Chevy Capital Services Private Limited (**“CCSPL” or “the Second Transferor Company”**);

AND

**PM Capital Services Private Limited
("PCSPL" or "the Third Transferor
Company");**

AND

**Pranit Trading Private Limited
("PTPL" or "the Forth Transferor Company");**

AND

**Viramrut Trading Private Limited ("VTPL" or
"the Fifth Transferor Company");**

AND

**Unichem Laboratories Limited ("ULL" or "the
Transferee Company");**

Mr. Shyam Mehta, Senior Advocate with Mr. Hemant Sethi i/b M/s. Hemant Sethi & Co., Advocates for the Petitioner Company.

Mrs. R. N. Sutar, Asst., Official Liquidator present in Company Scheme Petition No. 670 of 2011, 671 of 2011, 672 of 2011, 673 of 2011 and 674 of 2011

Mr. M. S. Bharadwaj i/b Mr. T C Kaushik for Regional Director.

Mr. Shailesh Mehta, Shareholder of the Transferee Company and Objector present in person.

CORAM: S.J.KATHAWALLA, J.

JUDGMENT RESERVED ON : 22ND JUNE 2012

JUDGMENT PRONOUNCED ON : 12th JULY 2012

JUDGMENT :-

1. By the above Company Scheme Petitions, sanction of this Court is sought under Sections 391 to 394 read with Sections 80, 100 to 103 of the Companies Act, 1956, to the scheme of arrangement whereunder the five Companies 'AVM Capital Services Private Limited (ACPL); Chevy Capital Services Private Limited (CCSPL); PM Capital Services Private Limited (PCSPL); Pranit Trading Private Limited (PTPL); and Viramrut Trading Private Limited (VTPL) (the Transferor Companies) are sought to be merged with Unichem Laboratories Limited (ULL) (the Transferee Company). Pursuant to the Scheme, the entire undertaking of the Transferor Companies would stand vested with the Transferee Company.

2. The shareholders of the Transferor Companies and the Transferee Company have approved the Scheme. A meeting of the share holders of the Transferee Company was held on November 3, 2011. At this meeting, all the share holders present at the meeting, voted in favour of the Scheme, except Mr.Shailesh Mehta – the Objector, who holds 750 shares of the Transferee

Company, constituting 0.001% of the total share capital of the Transferee Company. Out of the total 158 ballots received, one ballot was invalid. Out of the 157 valid ballots, 156 share holders representing 98.74% in number and 99.99% in value, voted in favour of the Scheme and only the Objector, representing 0.63% in number and 0.001% in value, voted against the Scheme. Further, the share holders voting in favour of the Scheme, comprised of 46 individual share holders, 31 financial institutional investors ('FII's') and 3 Insurance Companies. Thus, the Scheme was approved by an overwhelming majority of 99.99% in value of the shareholders present and voted. The Objector was the only share holder who opposed the Scheme.

The objections raised by the Objector are set out and dealt with hereunder :

3. The first, and the main objection of the Objector is that the Scheme is propounded to avoid capital gains tax that would have arisen if the Transferor Companies would have directly transferred their shares to the Promoters. It is alleged that the object of the Scheme is not to help the Transferee Company, but to transfer these shares to the Promoter Dr.Prakash Modi. According to the Objector, it is not shown how long term stability would be achieved if the shares are transferred in the name of Dr.Mody. According to the Objector, the Scheme

is a colourable device to evade tax, since such a transfer could well have been effected through the stock market. The Scheme in question involves pure transfer of shares without any benefit to the Transferee Company. The Objector has submitted that the decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited V/s. Commercial Tax Officer¹ squarely applies to the present case. He has relied upon the separate, but concurring Judgment of Justice Chinnappa Reddy, J., delivered in the aforesaid case, in which it is held that *"avoidance of tax was unethical and if a transaction is a device to avoid tax, it should not be permitted"*. The Objector has pointed out that the learned Judge in this context, also referred to the decision of the Gujarat High

Court in the case of Wood Polymer Limited² in which case, the learned Single Judge of the Gujarat High Court refused to sanction a scheme which was found to be a device to evade tax. The Objector has also submitted that the decision of the Hon'ble Supreme Court in the case of Union of India and Anr., V/s. Azadi Bachao

1 [1977] (154 ITR 148) (SC)

2 [1977] 47 Comp. cases 597 (Guj)

Andolan and Anr.³ is *per in curium* as it is contrary to the decision of the Constitutional Bench in McDowell's case (supra).

4. The Objector has relied on the decision of the Authority for Advance Ruling (AAR) in the case of Groupe Industrial Marcel Dassault (AAR No.846 and 847 of 2009) which according to him, should be followed since it correctly lays down the law on tax avoidance. The AAR appears to have held that the decision of the Supreme Court in the case of Azadi Bachao Andolan (supra) is not good law and the correct law is as laid down in McDowell's case (supra).

5. On the issue of Tax avoidance, the Objector has also submitted that this Court should direct the Transferee Company to implead the income tax authority as a necessary party. He has further submitted that the shares of the Transferee Company held by the Transferor Companies which are freely tradable and transferrable without any restriction cannot be transferred through a scheme of arrangement as is sought to be done in this case.

6. The learned Senior Advocate appearing for the Petitioners has submitted that the aforestated submissions/allegations/contentions of the Objector are untenable and baseless. It is submitted that the correct legal

3 [2004] 10 SCC 1 (SC)

position with regard to tax avoidance/evasion is laid down in the decisions of the Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra) and more recently in the case of Vodaphone International Holdings V/s. Union of India and Ors.⁴ He submitted that in the case of Azadi Bachao Andolan (Supra), the Hon'ble Supreme Court has in paragraphs 137 to 166 explained the rule in McDowell's case with particular reference to the Judgment of Chinnappa Reddy, J. It is submitted that the Objector has relied upon a sentence in the Judgment of Justice Ranganath Mishra in McDowell's case to the effect that "*on this aspect one of us, Chinnappa Reddy, J., has proposed a separate and detailed opinion with which we agree*". According to the Objector, by virtue of this sentence, the majority also approved the view of Justice Chinnappa Reddy, J. It is submitted that this very argument was considered by the Hon'ble Supreme Court in the case of Vodaphone International Holdings (Supra). The Supreme Court also considered the interpretation of McDowell's case in Azadi Bachao Andolan (supra) and categorically came to the conclusion that Azadi Bachao Andolan (Supra) was correctly decided and that the majority in McDowell's case had not approved the observations of Justice Chinnappa Reddy, J. It is submitted that the decision of the Gujarat High Court in Wood Polymer Limited (Supra) is no longer good law,

4 [2012] 341 ITR 1 (SC)

in view of the decisions of the Hon'ble Supreme Court in Aazadi Bachao Andolan and Vodaphone International Holdings (Supra). It is submitted that as far as the decision of the AAR is concerned, the AAR has no jurisdiction to disagree with the decision of the Hon'ble Supreme Court or to hold that any decision of the Hon'ble Supreme Court is not correct law. It is also submitted that the decision of the AAR is not binding on this Court.

7. As regards the submission of the Objector that this Court should direct the Transferee Company to implead the Income Tax Authority as a necessary party, it is submitted on behalf of the Transferee Company that it is not at all necessary to implead the Income Tax Authority in the present proceedings and infact, it is held by this Court in Jindal Iron & Steel Company Limited (JISCO) V/s. ACIT (Company Application No.123 of 2004 connected with Company Petition No.76 of 2004) that the income tax department has no *locus* to intervene in the proceedings under Section 391 -394 of the Companies Act, 1956. The learned Senior Advocate appearing for the Petitioner has submitted that the primary assets of the Transferor Companies, comprise of equity shares in the Transferee Company and the cash balance to meet the expenses in relation to the Scheme. The merger of Transferor Companies with the Transferee Company would help in consolidating and streamlining the Promoter holding in the Transferee Company.

Therefore, the purpose of this Scheme is to provide long term stability and transparency in the Transferee Company. The Transferor Companies are in existence since 1975. It was felt that it would be in the interest of the Transferee Company to merge the five Transferor Companies with the Transferee Company to enable the Promoter thereof to hold shares directly in the Transferee Company rather than indirectly. The object of the Scheme is not to avoid any tax. It is submitted that there is nothing illegal, unlawful or dubious or colourful in the Scheme and the same is a perfectly legitimate scheme, permissible by law.

8. It is submitted on behalf of the Petitioners that the real motive of the Objector in opposing the Scheme is to prevent the Promoter Dr.Prakash Modi from holding or controlling any shares in the Transferee Company. According to the Petitioners, this is clear from para 12 of the written submissions handed over by the Objector, in which the Objector has contended that once the shares held by the Transferor Companies in the Transferee Company are cancelled and the capital of the Transferee Company is reduced, no new shares should be issued to Dr.Prakash Modi, who is the Promoter of the Transferee Company. This would mean that Dr.Prakash Modi, who presently owns and controls the shares of the Transferee Company through the Transferor Companies should be divested of his share holding. It is submitted that it is well settled that in an amalgamation

scheme, share holders of the Transferor Companies are always entitled to the shares of the Transferee Company. Any scheme to the contrary would be unfair and illegal. Consequently, it is clear that the objection of the Objector is clearly contrary to the law and aimed at denying the Promoter of the Transferor Companies of his legitimate shareholding and entitlement in the Transferee Company.

9. As far as adoption of the Scheme is concerned, it is submitted that the Promoters are not aiming for the exit of the Transferee Company through divestment, and have adopted one of the available methods for reorganizing their share holding. In support of this contention, the Petitioners have relied on the decision in the case of Scheme of Arrangement between Tata Services Limited and Tatanet services Limited (Company Petition No.758 of 2005 connected with Company Application No.540 of 2005) (Bom.) and in the Scheme of Arrangement between Balkrishna Industries Limited and Balkrishna Paper Mills Limited and Balkrishna Synthetics Limited (Company Petition No.713 of 2007 connected with Company Application No.771 of 2007) (Bom.). It is therefore, submitted on behalf of the Petitioners that the submissions advanced by the Objector, that the Scheme be rejected on the ground that it is a colourable device to evade tax, be rejected.

10. I have considered the main charge of the Objector that the Scheme is a device for avoidance of tax, and have also considered the submissions advanced on behalf of the Petitioners in response to this charge. In the case of Azadi Bachao Andolan (supra), the Supreme Court has explained the scheme in McDowell's case. Paragraphs 147 to 149 of the said judgment are relevant and are reproduced hereunder : -

"147. We may in this connection usefully refer to the judgment of the Madras High Court in M.V.Valliappan V. ITO which has rightly concluded that the decision in McDowell cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavor. Though, the Madras High Court had occasion to refer to the judgment of the Privy Council in IRC v. Challenge Corpn. Ltd. and did not have the benefit of the House of Lord's pronouncement in Craven the view taken by the Madras High Court appears to be correct and we are inclined to agree with it.

148. WE may also refer to the judgment of the Gujarat High Court in Banyan and Berry v. CIT where referring to McDowell, the Court observed : (ITR p.850 E-H)

"The Court nowhere said that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the Act; an inference which unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in McDowell case. The ratio of any decision has to be understood in the context it has been made. The facts and

circumstances which lead to McDowell decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity.

149. This accords with our own view of the matter”

11. It is clear from the aforesaid paragraphs that according to the Hon’ble Supreme Court, the decision in McDowell’s case cannot be read as laying down that every attempt at tax planning is illegitimate, or that every transaction or arrangement which is perfectly permissible under the law, but has the effect of reducing the tax burden of the assessee must be looked upon with disfavour.

12. In the case of Commissioners of Inland Revenue v. His Grace the Duke of Westminster⁵, on the issue of tax avoidance/evasion, the principle laid down was that “given that a document or transaction is genuine, the Court cannot go behind it to some supposed underlying substance”.

5 1935 ALL E.R. 259

13. In the case of McDowell (supra), Justice Chinnappa Reddy, J., dismissed the observations of J.C.Shah, J., in CIT v. Raman & Co.⁶ based on the Westminster principle by saying “*we think that the time has come for us to depart from the Westminster principle as emphatically as the British courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere*”.

14. In paragraph 46 of the decision in McDowell’s case, Ranganath Mishra, J., speaking for the majority has observed “*on this aspect, one of us, Chinnappa Reddy, J., has proposed a separate and detailed opinion with which we agree*”. In the case of Azadi Bachao Andolan (supra), the respondents therein, therefore strenuously argued that the decision in McDowell has changed the concept of fiscal jurisprudence in this country and any tax planning which is intended to and results in avoidance of tax must be struck down by the Court. It was urged that McDowell has taken a new look at fiscal jurisprudence and the ghost of Fisher (1926 AC) 395 at P.412 and Westminster (supra) have been exorcised in the country of its origin. The Hon'ble Supreme Court declined to read or comprehend the majority Judgment in McDowell as having endorsed the

6 AIR 1948 SC 49

extreme view of Chinappa Reddy, J., as is clear from Paragraphs 141 and 142 of its Judgment, which are reproduced hereunder : -

“141. As we shall show presently, far from being exorcised in its country of origin, Duke of Westminster⁷ continues to be alive and kicking in England. Interestingly, even in McDowell, though Chinnappa Reddy, J., dismissed the observations of J.C.Shah, J., in CIT v/ A.Raman and Co.⁸ based on Westminster and Fisher's Executors⁹ by saying (SCC p.242 para 17)

“We think that time has come for us to depart from the Westminster principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere.”

it does not appear that the rest of the learned Judges of the Constitutional Bench contributed to this radical thinking. Speaking, for the majority Ranganath Mishra, J. (as he then was) says in McDowell (SCC PP254-55 para 45)

“45. Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.”

142. This opinion of the majority is a far cry from the view of Chinappa Reddy, J. : (SCC p. 243, para 17)

“In our view, the proper way to construe a tax statute, while considering a device to avoid tax, is not to ask whether the

7 1936 AC 1 : 19 TC 490

8 (1968) 67 ITR 11: AIR 1968 SC 49

9 1926 AC 395 at p.412

provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax and whether the transaction is such that the judicial process may accord its approval to it”.

We are afraid that we are unable to read or comprehend the majority judgment in McDowell as having endorsed this extreme view of Chinnappa Reddy, J., which in our considered opinion, actually militates against the observations of the majority of the Judges which we have just extracted from the leading judgment of Ranganath Mishra, J. (as he then was)”.

15. Further, in Azadi Bachao the Supreme Court also referred to the decision of the Constitution Bench of the Supreme Court in the case of Mathuram Agarwal Vs. the State of Madhya Pradesh [1999] (8 SCC 667) wherein the Constitution Bench reiterated the observations in Bank of Chettinad Ltd. Vs. CIT [1940] (8 ITR 522) (PC) quoting with approval the observations of Lord Russel of Killowen in IRC Vs. Duke of Westminster and the observations of Lord Simonds in Russell Vs. Scoot. At Para 154 of the Azadi Bachao case, the Supreme Court has stated that *“it thus appears to us that not only is the principle in Duke of Westminster alive and kicking in England but it also seems to have acquired the judicial benediction of the Constitutional Bench in India, notwithstanding the temporary turbulence created in the wake of McDowell”.*

16. The Hon'ble Supreme Court in paragraph 166 of its decision in Azadi Bachao Andolan, therefore, held as follows: -

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

17. In the case of Vodaphone International Holdings (supra), the Advocates appearing for the Revenue, contended that the decision in Azadi Bachao Andolan (supra) needs to be overruled in so far as it departs from the decision in McDowell's case (supra) on the following grounds set out in Paragraph 57 of the Judgment :

“(i) Para 46 of McDowell and Co. Ltd. (supra) judgment has been missed which reads as under “on this aspect Chinnappa Reddy, J., has proposed a separate opinion with which we agree”. [i.e. Westminster principle is dead].

(ii) That, Azadi Bachao Andolan case (supra) failed to read paras 41-45 and 46 of McDowell & Co. Ltd. (supra) in entirety. If so read, the only conclusion one could draw is that four learned judges speaking through Misra, J. agreed with the observations of Chinnappa Reddy, J. as to how in certain circumstances tax avoidance should be brought within the tax net.

(iii) That, subsequent to McDowell & Co. Ltd. (supra), another matter came before the Constitution Bench of five Judges in

Mathuram Agarwal V State of Madhya Pradesh⁷ in which Westminster principle was quoted which has not been noticed by Azadi Bachao Andolan case (supra)".

18. The Hon'ble Supreme Court in its analysis, held in paragraph 64 of its decision that there is no conflict between McDowell & Co. Ltd. and Azadi Bachao Andolan or between McDowell & Co. Ltd. and Mathuram Agarwal. Paragraph 64 of the said decision is reproduced hereunder :

"64. The majority judgment in McDowell & Co. Ltd. (supra) held that "tax planning may be legitimate provided it is within the framework of law" (para 45). In the latter part of para 45, it held that "colourable device cannot be a part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods". It is the obligation of every citizen to pay the taxes without resorting to subterfuges. The above observations should be read with para 46 where the majority holds "on this aspect one of us, Chinnappa Reddy, J. has proposed a separate opinion with which we agree". The words "this aspect" express the majority's agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colourable devices and by resorting to dubious methods and subterfuges. Thus, it cannot be said that all tax planning is illegal/illegitimate/impermissible. Moreover, Reddy, J. himself says that he agrees with the majority. In the judgment of Reddy, J. there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of tax liability" (paras 7-10, 17 and 18). In our view, although Chinnappa Reddy, J. makes a number of observations regarding the need to depart from

7 [1999] 8 SCC 667

the “Westminster” and tax avoidance – these are clearly only in the context of artificial and colourable devices. Reading McDowell, in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between McDowell and Azadi Bachao or between McDowell and Mathuram Agrawal”.

19. In view of the above observations of the Hon'ble Supreme Court in the Vodaphone decision, the submission of the Objector herein that he is fortified by the decision in McDowell's case, and that the decision in Azadi Bachao Andolan is *per in curium* or is contrary to the decision in McDowell's case is rejected. The decision of the Gujarat High Court in the case of Wood Polymer Limited (supra) is no longer good law, in view of the decision of the Supreme Court in the case of Azadi Bachao Andolan and Vodaphone International Holdings (supra). In any event, as submitted on behalf of the Petitioners, that was a case where the Transferor Company was specially incorporated for the purpose of effecting transfer of immovable property to the Transferee Company without payment of tax. This transfer was part of the scheme. The Court thus concluded that this was a clear device to avoid tax and consequently rejected the scheme. The Wood Polymer Limited (supra) case is therefore clearly distinguishable on facts. Infact, in a later case in Ambalal Sarabhai Enterprises⁸ the Division Bench of the Gujarat

8 [1984] 147 ITR 294 (Guj)

High Court approved the scheme despite the fact that tax was avoided by the scheme and held that the Wood Polymer Limited (supra) was decided on the basis of the peculiar facts of the case. The Gujarat High Court reiterated the principle that a tax payer can always arrange his affairs to avoid tax.

20. The decision of AAR, wherein according to the Objector, it is suggested that the law laid down in Azadi Bachao Andolan is not good law, and the correct law is laid down in McDowell's case, is of no assistance to the Objector, since the decision in the case of Vodaphone International Holdings (supra) has now settled the controversy once and for all.

21. As regards the submission of the Objector that this Court should direct the Transferee Company to implead the income tax authority as a necessary party, in my view, the income tax authority is not required to be heard while sanctioning the Scheme under Section 391-394 of the Companies Act, 1956. Infact, this Court in the case of Jindal Iron and Steel (supra), wherein the income tax department had objected to the scheme has observed as under:

"I am afraid I fail to find support for the submissions made by the Ld. Counsel for the Intervener. The Judgment of the Division Bench of this High Court in the case of Sterlite Industries (India) Ltd. (113 Comp Cases 273) is amply clear that in the proceedings under Section 391-394 of the Companies Act, 1956, only the Regional Director and Official Liquidator (in case company is being wound-up) apart from

the shareholders and creditors, have locus standi to support or oppose the scheme. Hence, I am of the firm view that the income tax Department has no locus standi to intervene in the proceedings under Section 391-394 of the Companies Act, 1956 (emphasis supplied)”.

22. The Objector has also raised a grievance that the shares of the Transferee Company held by the Transferor Companies which are purely tradable and transferable without any restrictions cannot be transferred through the present Scheme of Arrangement. As submitted on behalf of the Petitioners, the Promoters are not looking for an exit from the Transferee Company through divestment and have adopted one of the available methods for reorganizing their shareholding. In the case of scheme of arrangement between Tata Services Limited and Tatanet services Limited, wherein a commercial division of Tata Services Limited was proposed to be transferred, the Regional Director had objected that the transfer could be achieved through compliance of the provisions of Section 293(1)(a) of the Companies Act, 1956. This Court dealing with the said objection has held that if the Petitioners have adopted an elaborate route to achieve the objective, they cannot be faulted for the same. A similar view was taken by this Court in the Scheme of Arrangement between Balkrishna Industries Limited (supra).

23. In the present case, as submitted by the Transferee Company, the scheme involves –

(i) The merger of Transferor Companies with Transferee Company;

(ii) The consequent cancellation of the shares held by the Transferor Companies in the Transferee Company;

(iii) The consequent reduction in share capital of the Transferee Company;

(iv) issuance of shares of the Transferee Company to the shareholders of the Transferor Companies.

The purpose of the Scheme is to provide long term stability and transparency in the Transferee Company. The Transferor Companies are in existence since 1975. It was felt that it would be in the interest of the Transferee Company to merge the five Transferor Companies with the Transferee Company, and to enable the Promoter thereof to hold shares directly in the Transferee Company rather than indirectly. The object of the Scheme is not to avoid any tax. Even today the shares are owned/controlled by the same Promoter albeit through the Transferor Companies. Under the Scheme the only difference is that the Promoter will now hold shares directly in the Transferee Company. It is correctly submitted by the Transferee Company that there is nothing illegal or unlawful or dubious or colourful in the Scheme and the same is a perfectly

legitimate scheme and permissible by law. Therefore, the objection of the Objector that the Scheme is a tax avoidance device and ought not to be approved, stands rejected.

24. It is next contended by the Objector that since the Scheme was not sanctioned on or before 31st March, 2012 and since there is no announcement by the Transferee Company that the time has been extended, the Scheme has become null and void.

25. It is true that Clause 21.1 *interalia* provides that the Scheme shall become null and void and be of no effect if the same is not sanctioned by this Court by March 31, 2012 or within such further period or periods as may be agreed between the Boards of the Transferor Companies and the Transferee Company. As pointed out by the learned Advocate appearing for the Transferee Company, the Transferor Companies and the Transferee Company have passed resolutions on 01st May, 2012 and 9th May, 2012 respectively, extending the time for securing the sanction of this Court in respect of the Scheme to May 31, 2012. The Transferor Companies and the Transferee Company have on 11th May, 2012 and 12th May, 2012 respectively, passed further resolutions extending the cut off date from May 31, 2012 till the time the Scheme is sanctioned by appropriate

Court and filing the Court order with the Registrar of Companies for the Scheme to become otherwise effective. Therefore, the submission of the Objector that the Scheme has become null and void, cannot be accepted.

26. The Objector has further contended that the Company Secretary of the Transferee Company Mr.K.Subharaman, was not authorized to file the Affidavit in Rejoinder. In response, my attention is drawn to Exhibit N, page 535 of the Company Scheme Petition No.675 of 2011, wherein a certified true copy of the resolutions passed at the Board Meeting of the Transferee Company held on 14th May, 2011 is annexed. By one of the said resolutions, the Company Secretary Mr.K.Subharaman is *interalia* authorized to file Affidavits in this Court in connection with the Scheme. In view thereof, this objection also stands rejected.

27. The Objector has further submitted that the Transferee Company in its Affidavit filed before the Regional Director, has failed to disclose certain proceeding where prosecution was launched against the Transferee Company and its Chairman and Managing Director. In this regard, the Transferee Company has filed an Affidavit dated 26th March 2012 of its abovenamed Company Secretary, explaining in paragraphs 4 to 9 therein, why some of the proceedings were not

mentioned in the Affidavit filed before the Regional Director. The explanation is accepted. In view thereof, the said objection is rejected.

28. The Objector has further submitted that Mr.Jayendra Natwarlal Shah who is a joint shareholder with Dr.Prakash Modi, holding one share in four of the five Transferor Companies is a Partner of the Valuer – N.A.Shah Associates, which fact was not disclosed to the shareholders. In response, it is pointed out on behalf of the Transferee Company that the Valuation Report was prepared and signed by Mr.Milan Modi, Partner of N.A.Shah Associates and not by Mr.Jayendra Shah. As such, the Report is clearly an independent one. Further, Mr.Jayendra Shah is the second holder of the said shares and as such did not have any pecuniary interest in the Transferor Companies. Again Valuation Report has been obtained to comply with the provisions of the Listing Agreement and there is no change in the shareholding pattern of the Transferee Company, as it will issue equivalent number of shares to the Promoters as already held by the Transferor Companies. The pre and post shareholding pattern of the Transferee Company, including Promoters and Mr.Shailesh Mehta will remain unchanged as disclosed in the Notice and Explanatory Statement. In view thereof, I see no substance in this objection and the same is rejected.

29. The Objector has next contended that the valuation of the shares of the Transferor Companies which are unlisted was not done as per the rules prescribed under the Wealth Tax Act, but was wrongly done on the basis of value of the shares of the Transferee Company. As pointed out on behalf of the Transferee Company, the provisions of the Wealth Tax Act, does not apply in the instant case. Again, the only assets (apart from cash and bank balance) of the Transferor Companies were the shares held by them in the Transferee Company. As such, it was reasonable and proper to value the Transferor Companies on the basis of the value of their shareholdings in the Transferee Company. Moreover, the Transferee Company has secured a Fairness Opinion of Fedex Securities Ltd, a Category I Merchant Banker on the Valuation Report of N.A.Shah Associates, which Fairness Opinion was secured in terms of Clause 24 of the Listing Agreement. In view thereof, the submission of the Objector that the share valuation is not proper, lacks merit and is rejected.

30. The Objector has further submitted that the Transferee Company has hidden the civil proceeding for damages and breach of Trademark against it and not provided for any contingent liability in its balance sheet. It is pointed out on behalf of the Transferee Company that there are no pending cases for

infringement of Trademark or Patent filed against the Transferee Company and as such there is no question of providing any contingent liability.

31. It is lastly contended by the Objector that since there is reduction in the capital of the Transferee Company to an extent of over 15%, the Securities and Exchange Board of India (Substantial Acquisitions and Takeover) Regulations, 1997 (“SEBI Takeover Regulations 1997”) is triggered. It is correctly submitted on behalf of the Transferee Company that by virtue of Regulation 3(1)(i) of the (“SEBI Takeover Regulations 1997”) and Regulation 10(1)(d) of the Securities and Exchange Board of India (Substantial Acquisitions and Takeover) Regulations, 2011, the provisions thereof do not apply to the acquisition of shares under a scheme of arrangement or merger. Further, the National Stock Exchange and the Bombay Stock Exchange have granted their approvals to the Scheme which are annexed to the Company Scheme Petition as Exhibit S1 and S2 at page 595 and 596. This objection raised by the Objector is therefore, also rejected.

32. As stated hereinabove, the shareholders of the Transferor Companies and the Transferee Company have approved the Scheme and the Objector who is holding 0.001% of the total share capital of the Transferee Company is the only shareholder who has opposed the Scheme. The Official

Liquidator has filed his Report dated January 18, 2012 stating that the affairs of the Transferor Companies have been conducted in an appropriate manner and the Transferor Companies may be ordered to be dissolved. Neither the Official Liquidator, nor the Auditors appointed by him, have made any adverse remarks with regard to the Scheme, nor have they objected to the same. The Regional Director has also filed an Affidavit dated 17th February 2012 stating that the Scheme is not prejudicial to the interest of the shareholders and public. Even the Regional Director has not made any adverse remark with regard to the scheme nor objected to the scheme being sanctioned.

33. As already held hereinabove, there is nothing illegal, unlawful, dubious or colourful in the Scheme and the same is a perfectly legitimate Scheme, which is permissible in law.

34. Since all the requisite statutory compliances have been fulfilled, all aforesaid Company Scheme Petitions are made absolute in terms of prayer Clauses (a) to (d) of the respective Petitions.

35. The Petitioner Companies to lodge a copy of this order and the Scheme duly authenticated by the Company Registrar, High Court (O.S.), Bombay,

with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of this order.

36. The Petitioner Companies are directed to file copy of this order along with a copy of the Composite Scheme of Arrangement and Amalgamation with the concerned Registrar of Companies, electronically, along with E-Form 21 and also file physical copy thereof, within 30 days from the date of issuance of the order.

37. The Petitioner Companies in the above Company Scheme Petitions to pay costs of `10,000/- each, to the Regional Director. The Petitioner in Company Scheme Petition Nos.670 of 2011, 671 of 2011, 672 of 2011, 673 of 2011 and 674 of 2011 shall also pay cost of `10,000/- to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from the date of the order.

38. Filing and issuance of the drawn up order is dispensed with.

39. All authorities concerned to act on a copy of this order along with Scheme attached thereof, duly authenticated by the Company Registrar, High Court (O.S.) Bombay.

(S.J.KATHAWALLA, J.)