

IN THE HIGH COURT OF DELHI AT NEW DELHI

CO. PET. No. 14 of 2012

Reserved on: April 1, 2013

Decision on: April 18, 2013

IN THE MATTER OF:

VODAFONE INFRASTRUCTURE LTD. & ORS. Petitioners

Through: Mr. Rajiv Nayar, Senior Advocate,
Mr. Mihir Joshi, Senior Advocate
with Ms. Niti Dixit, Mr. Sandeep
Singhi, Mr. Vidur P. Bhatia,
Ms. Raunaq B. Mathur &
Ms. Samiksha Godiyal, Advocates
for Petitioner No.1
Mr. Gopal Jain & Mr. Kunal Kaul,
Advocates for Petitioner No.2.
Mr. Rajiv Nayar, Senior Advocate,
Mr. Mihir Joshi, Senior Advocate
with Mr. Sandeep Singhi,
Mr. Rishi Agrawala & Mr. Rajeev
Kumar, Advocates for Petitioner
No.3.
Mr. Rajiv Nayar, Senior Advocate,
Mr. Mihir Joshi, Senior Advocate
with Mr. Milanka Chaudhury,
Mr. Sarojanand Jha, Mr. Siddharth
Mehra & Mr. Abhishek Sharma,
Advocates for Petitioner No.4.
Mr. A.S. Chandhiok, Additional
Solicitor General of India with Mr.
Abhishek Maratha, Senior Standing
Counsel, Mr. Nitin Mehta and
Mr. Vidit Gupta, Advocates for
Income Tax Department.
Mr. Rajiv Bahl and Mr. Manish K.
Bishnoi, Advocates for Official
Liquidator.

Mr. K.S. Pradhan, Deputy ROC for
Regional Director, Northern
Region.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
18.04.2013

1. Vodafone Infrastructure Limited ('VIL'), Bharti Infratel Ventures Limited ('BIVL'), Idea Cellular Towers Infrastructure Limited ('ICTIL'), Petitioner Nos. 1, 2 and 3 ('Transferor companies') respectively along with Indus Towers Limited ('Indus'), Petitioner No. 4 ('Transferee company') have jointly filed this petition under Sections 391 to 394 of the Companies Act, 1956 ('Act') seeking sanction of the Scheme of Arrangement ('Scheme') among them and their respective shareholders and creditors. A copy of the Scheme is enclosed with the petition as Annexure 'A'.

2. The background to the present petition is that in October 2006 a report was prepared by the Working Group on the Telecom Sector for the Eleventh Five Year Plan (2007-2012). In para 5.5, among the recommendations to achieve Vision 2012 there was one recommendation that sharing of infrastructure of telecom companies must be promoted "so that costs can be kept down." It was also recommended that such share should be incentivized. This was considered essential for rural penetration. In the same report, in Chapter 10 (Recommendations and Suggestions) it was stated under the Sub Head 'Mobile Towers' that "there is an urgent need to bring an appropriate legislation so that the towers are shared by mobile operators resulting in reduction in cost." Under the Sub Head 'Rural

Telecom Development’ it was recommended that sharing of infrastructure should be promoted to keep the costs low for the provision of rural telephony.

3. On 19th January 2007 VIL was incorporated under the Act with the Registrar of Companies (‘ROC’), Maharashtra under the name of Perfect Tribute Impex Private Limited (‘PTIPL’). Later the name was changed to Vodafone Essar Infrastructure Private Limited (‘Vodafone Essar’) on 18th October 2007. On 20th November 2007 Indus was incorporated with the ROC, Delhi and Haryana. ICTIL was incorporated with the ROC, Delhi and Haryana on 3rd December 2007 and BIVL was incorporated with the ROC, Delhi and Haryana on 31st December 2007.

4. As part of the requirements, Indus, [formerly known as Indus Infratel Limited (‘IIL’)] was registered with the Department of Telecommunications (‘DoT’) on 10th January 2008 as Infrastructure Provider Category-I (‘IP-I’). On 17th January 2008 Vodafone Essar was converted into a public limited company and the word “Private” was deleted from its name. The name of IIL was changed to Indus on 28th March 2008. On 23rd April 2008 ICTIL came to be registered as IP-I with DoT. On 17th June 2008 VIL was likewise registered as IP-I with the DoT.

5. The Scheme was entered into by VIL, BIVL, ICTIL with Indus in terms of which the effective date of the Scheme was 1st April 2009. The Scheme was to promote infrastructure sharing among telecommunications service providers as envisaged in the report of the Working Group on the Telecom

Sector referred to above. The Scheme noted that the transfer and vesting of the undertakings of the Transferor companies to the Transferee company “reflects the global trend of segregating telecommunications services and the telecommunications infrastructure business, with a view to adopt good management practices, establish high operational standards, provide a good value proposition to other wireless service providers and enable stakeholders to differentiate between the passive infrastructure assets business and the telecommunications services business.” As a result it was proposed in Clause 1.5.4 of the Scheme that “the undertakings of the Transferor companies will be vested and consolidated in the Transferee company, the main objects of which are to provide telecommunications network infrastructure support services on a non-discriminatory basis to all telecommunications operators in India.” It was stated that the Scheme would benefit the companies, their respective stakeholders as well as the telecommunications industry since it would lower the cost of operations for telecommunications service providers; improved quality of services being rendered, increase in the speed of roll-out, efficiency and “administrative convenience through the centralization of infrastructure sharing and planning.” It was further expected to improve the network quality and greater coverage, especially in rural areas and contributing to the economic development of India. It was stated that the Scheme was in the interests of the parties as well as their respective shareholders and creditors.

6. Clause 2.2.1 provided that upon the Scheme becoming effective on the ‘record date’ Indus would issue and allot to the equity shareholders of each of the Transferor companies, whose names were registered in the register of

members of those Transferor companies on the record date, an aggregate of 1,200 equity shares of Indus of the face value of Re. 1 each credited as fully paid-up in a manner that the shareholding ratio among the shareholders of the first, second and third Transferor companies in Indus, i.e., Transferee company would remain at 42:42:16 ('share ratio'). It was mentioned in Clause 2.2.3 that the share ratio was based *inter alia* upon the proportion in which Passive Infrastructure Assets ('PIA') were proposed to be contributed by each of the Transferor companies. It has been agreed among the shareholders of both the Transferor and Transferee companies that the PIA proposed to be contributed by them would be evaluated in accordance with a points-based system. It was further stated that the PIA proposed to be contributed by each of the Transferor companies to the Transferee company had been verified by an independent technical agency appointed by the Transferee company. It was further stated in Clause 2.2.4 that the shareholders of each of the Transferor companies and the respective subsidiaries and/or affiliates of such shareholders have consolidated, or "are in the process of consolidating, the agreed Passive Infrastructure Assets in the Transferor companies by way of Court approved schemes of arrangement under Section 391 to 394 of the Act or in any other appropriate manner (such consolidation, the "Pre-Merger Reorganization")." In Clause 2.2.5 it was discussed in some detail that in the event that the pre-merger reorganization in respect of one or more of the Transferor companies could not be completed as a result of which any of the three Transferor companies was unable to contribute the agreed PIA to Indus (Transferee company), then the Scheme may be modified "such that it may be effectively implemented in respect of the Transferor company(ies) which is/are able to

contribute some or all of its/their Passive Infrastructure Assets to the Transferee Company pursuant to this Scheme. The share ratio may be suitably modified by the Board of Directors of the Transferor companies and the Transferee company.” The accounting treatment to be given in the books of the Transferee company was set out in Clause 3.2 of the Scheme.

7. ICTIL is a wholly owned subsidiary of Aditya Birla Telecom Limited (‘ABTL’) which, in turn, was a wholly owned subsidiary of Idea Cellular Limited (‘Idea’). ICTIL was registered with DoT as an IP-I. Idea and ICTIL filed petitions in the Gujarat High Court and this Court for approval of the Scheme of Arrangement to demerge the PIA of some of the circles owned by Idea into ICTIL. By orders dated 3rd August 2009 and 31st August 2009 this Court and the Gujarat High Court granted sanction to the Scheme pursuant to which some of the circles of Idea had been transferred to and vested in ICTIL. BIVL is a wholly owned subsidiary of Bharti Infratel Limited (‘BIL’).

8. VIL is a wholly owned subsidiary of Vodafone India Limited, formerly known as Vodafone Essar Limited, a leading mobile telecommunications service provider across India. Vodafone Essar Limited and certain of its subsidiaries hold Unified Access Service (‘UAS’) licences issued by the DoT for providing mobile telephony services in 23 telecom circles in India. Vodafone Essar Limited along with its sister concerns (‘Vodafone Entities’) and VIL as well as their respective shareholders filed petitions before the Bombay High Court, Calcutta High Court, Madras High Court and this Court for approval of the Scheme of Arrangement to demerge certain PIA

owned by Vodafone Entities (hereinafter referred to as ‘Vodafone Demerger Scheme’) into VIL. The Calcutta High Court approved the Vodafone Demerger Scheme on 28th October 2009 in respect of Vodafone East Limited. On 17th November 2009 the Madras High Court approved the Vodafone Demerger Scheme in respect of Vodafone Cellular Limited. On 17th December 2009 the Bombay High Court approved the Vodafone Demerger Scheme in respect of Vodafone Essar Limited.

9. On 9th December 2010 a learned Single Judge of the Gujarat High Court accepted the objections filed by the Income Tax Department (‘ITD’), Ahmedabad and rejected the petition filed by Vodafone West Limited (formerly known as Vodafone Essar Gujarat Ltd.) seeking sanction of the Vodafone Demerger Scheme. Aggrieved by the aforementioned order dated 9th December 2010 Vodafone West Limited filed an appeal before the Division Bench (‘DB’) of the Gujarat High Court. The DB of the Gujarat High Court by its judgment dated 27th August 2012 in ***Vodafone Essar Gujarat Ltd. v. Department of Income Tax (2013) 2 Comp LJ 155 (Guj)*** reversed the judgment of the learned Single Judge and approved the Scheme filed by Vodafone Essar Gujarat Limited.

10. By judgment dated 29th March 2011 in Co. Petition No. 334 of 2009 [***In re: Vodafone Essar Limited and Vodafone Essar Infrastructure Ltd. (2011) 2 Comp LJ 317 (Del)***], the learned Company Judge of this Court approved the Vodafone Demerger Scheme in respect of Vodafone Mobile Services Limited, Vodafone South Limited, Vodafone Digilink Limited and VIL. While passing the above judgment, this Court heard and negatived the

objections of the ITD. By a separate judgment on the same day, i.e., 29th March 2011 in Co. Petition No. 324 of 2009 [*In re: Bharti Infratel Ltd. and Bharti Inratel Ventures Ltd. (2011) 2 Comp LJ 400 (Del)*], this Court also approved the Bharti Demerger Scheme.

11. On 10th May 2011 Vodafone South Limited, Vodafone Digilink Limited, Vodafone Mobile Services Limited and VIL filed certified copies of the judgment dated 29th March 2011 of this Court approving the Vodafone Demerger Scheme. The said Scheme became effective *vis-à-vis* six Transferor companies as well as the Transferee company upon such filing.

12. On 23rd May 2011 and 30th May 2011 the Scheme, forming the subject matter of the present petition, was approved by the Board of Directors ('BoD') of BIVL and ICTIL respectively. On 30th May 2011 the BoD of Indus also approved the Scheme. On 31st May 2011 the BoD of VIL have also approved the Scheme. On the same date, i.e., 31st May 2011 ICTIL filed Co. Appl. (M) No. 142 of 2011 seeking *inter alia* directions for dispensation of the requirement of convening the meetings of the equity shareholders and the secured creditors and for directions for convening the meeting of the unsecured creditors of ICTIL. BIVL filed Co. Appl. (M) No. 140 of 2011 seeking directions for dispensation of the requirement of convening the meetings of the shareholders, secured and unsecured creditors. Indus filed Co. Appl. (M) No. 143 of 2011 seeking same directions. On 23rd August 2011 BIVL was registered as IP-I with the DoT. VIL filed Co. Appl. (M) No. 141 of 2011 in this Court on 31st October 2011

for dispensation of the requirement of convening the meetings of the equity shareholders, secured and unsecured creditors.

13. On 9th November 2011 a common order was passed by the learned Company Judge allowing the applications filed by the Transferor companies and the Transferee company. It was directed that a meeting of the unsecured creditors of ICTIL be held. A Chairperson and Alternate Chairperson of the meeting were appointed. Likewise, Indus was directed to hold a meeting of its unsecured creditors and for that purpose the Chairperson and Alternate Chairperson were appointed. Liberty was granted to the Petitioner companies to file a joint petition after the conclusion of the meetings. Pursuant to the above directions, meetings were convened of the unsecured creditors of ICTIL and Indus and the reports of the Chairpersons of the meetings have been placed on record.

14. Thereafter the present petition was filed seeking the reliefs as noted hereinbefore. Pursuant to the notices issued in this petition on 9th January 2012, the Regional Director ('RD'), Northern Region filed an affidavit dated 27th March 2012 stating as under:

(i) The Scheme does not mention whether the Petitioner companies have complied with the Accounting Standard ('AS')-14 issued by the Institute of Chartered Accountants of India ('ICAI').

(ii) The Transferee company has not submitted a valuation report.

(iii) The Transferee company may be directed to obtain the necessary approvals from the Ministry of Telecommunications.

(iv) Prointeractive Services (India) Pvt. Ltd. ('PSIPL') is an unsecured creditor of Indus and has opposed the Scheme and registered its objections.

(v) ROC has received a complaint dated 14th December 2011 from Karnataka Engineering Pvt. Ltd., Mumbai ('KEPL').

15. Pursuant to the notice issued, the Official Liquidator ('OL') filed a report in the Court stating *inter alia* that:

(i) Valuation of all the shares of all the Petitioner companies should have been done to ascertain the exact exchange ratio.

(ii) By issuing just 1200 equity shares against the net assets of Rs. 2,174.43 crores of the Transferor companies, huge general reserves will be created in the books of the Transferee company. The purpose of issuing shares of Rs. 1200 against assets of Rs. 2,174.43 crores is not clear.

(iii) If this Court deems fit, the comments of the DoT may be called for.

(iv) The affairs of the Transferor companies appear not to have been conducted in a manner prejudicial to the interests of its members or to public interest.

16. On 2nd July 2012 an additional affidavit was filed on behalf of the RD bringing on record the letter dated 29th June 2012 issued by the

Commissioner of Income Tax, Mumbai. On 3rd July 2012 the Court took note of the above development and the contention of the Petitioners that the ITD had no *locus standi* to object to the Scheme.

17. Aggrieved by the rejection of its contentions by the learned Company Judge by the judgment dated 29th March 2011, the ITD filed Company Appeal No. 63 of 2012. The said appeal was admitted by the DB. Subsequently, on 11th September 2012, in an application filed by the Respondents in the appeal, the DB passed the following order:

“CM No.15491/2012

In this application filed by the respondents, modification is sought of order dated 28.8.2012 whereby this Court had observed that the learned Company Court would adjourn the matters coming before it on 4th September, 2012. It is pointed out that the matters which were listed before the Company Judge on 4.9.2012 are totally independent. It is also argued that even this appeal is time barred and delay has not been condoned as yet; that even if the appeal is ultimately allowed, that will have no bearing on the matters which are listed before the Company Judge.

The matter before the learned Company Judge is now coming up for hearing on 5th October, 2012. It will be for the parties to make their submissions on the aforesaid aspect before the learned Company Judge.

The Company Judge, if convinced that two matters are independent, would be free to go ahead with the matter. The application stands disposed of.”

18. This Court has heard the submissions of Mr. Rajiv Nayar and Mr. Mihir Joshi, learned Senior counsel for Petitioner Nos.1, 3 and 4, Mr. Gopal Jain, learned counsel for Petitioner No.2, Mr. A.S. Chandhiok, learned Additional

Solicitor General of India ('ASG'), Mr. Abhishek Maratha, learned Senior Standing counsel and Mr. Nitin Mehta, learned counsel for the ITD, Mr. Rajiv Bahl and Mr. Manish K. Bishnoi, learned counsel for the OL and Mr. K.S. Pradhan, Deputy ROC.

19. In the first instance, the objections raised by the RD are dealt with. In the affidavit dated 26th March 2012 it is stated by the RD that as per Clause 4.4.1 of the Scheme, all the permanent employees of the Transferor companies would become the employees of the Transferee company without any break or interruption in their services upon sanctioning of the Scheme. In para 4 it is stated that there is no mention whether the Transferor companies have complied with the AS-14 issued by ICAI. It is next pointed out in para 5 that despite a letter being written to Indus by the RD on 16th January 2012, Indus has not submitted any valuation report.

20. The third objection of the RD in para 6 of the affidavit is that Indus should be asked to obtain approvals of the DoT for transfer of licences from the Transferor companies to it after sanction of the Scheme by this Court. A reference is made to a letter dated 9th June 2003 issued by the DoT which clarifies that the licensee may transfer the licence with prior written approval of the licensor, even in the cases of a scheme under Section 391 or 394 of the Act. The fourth objection is that one of the unsecured creditors of Indus, PSIPL had, in the meeting of unsecured creditors held on 24th December 2011, opposed the Scheme. Lastly, it is pointed out in para 8 of the affidavit of the RD that the ROC, Delhi had informed that a complaint dated 14th December 2011 against Indus had been made by KEPL seeking

certain outstanding payment and interest thereon and objecting to the Scheme. In response to the above affidavit of the RD, the Petitioners filed an affidavit dated 11th April 2012.

21. As regards AS-14, in para 5 of the affidavit dated 11th April 2012 the Petitioner companies have undertaken that to the extent that the Scheme deviates from AS-14, the Transferee company will make proper disclosures of such deviation in its profit and loss account and balance sheet in terms of Section 211 (3B) of the Act read with AS-14. Further it would be placed before the shareholders of Indus for adoption. In ***Hindalco Industries Limited (2009) 151 Comp Cas 446 (Bom)***, the Bombay High Court has, while approving a scheme, *inter alia* held that deviation from the AS *per se* could not be a ground to reject the scheme. This Court is satisfied with the undertaking given by the Petitioners to the above extent. Consequently, this objection of the RD does not survive.

22. The second objection concerns the shareholding of the Transferor companies in Indus. Indus has, by its letter dated 12th March 2012, stated that it was a closely held public limited company and that shares were held in it by the three Transferor companies. The aggregate number of equity shares held by them were to be issued in the same proportion as contribution of PIA by a ratio of 42:42:16 and therefore, in terms of Clauses 2.2.2 and 2.2.3 of the Scheme there was no requirement for the submission of a valuation report. A perusal of the said clauses substantiates the contentions

of the Petitioners that there is no requirement of a valuation report. Clauses 2.2.2 and 2.2.3 of the Scheme read as under:

“2.2.2 The aggregate number of equity shares of the Transferee company to be issued pursuant to Clause 2.2.1 above to the shareholders of the Transferor companies has been mutually agreed by the shareholders of the Transferor companies with the Transferee company.

2.2.3 The share ratio is based, *inter alia*, upon the proportion in which Passive Infrastructure Assets are proposed to be contributed by the First Transferor company, the Second Transferor company and the Third Transferor company, to the Transferee company, namely 42:42:16. It has been agreed among the shareholders of the Transferor companies that the Passive Infrastructure Assets proposed to be contributed by each of the Transferor companies to the Transferee company would be evaluated in accordance with a points-based system. The shareholders of the Transferor companies have agreed to certain weighting factors based upon (i) the telecommunications circle in which the relevant Passive Infrastructure Asset is located and (ii) the type of the relevant Passive Infrastructure Asset, that is, whether the Passive Infrastructure Asset is classified as a Ground Based Tower, a Roof Top Tower, a Roof Top Pole or a micro site. The Passive Infrastructure Assets proposed to be contributed by each of the Transferor companies to the Transferee company have been verified by an independent technical agency appointed by the Transferee company. The points attributable to such Passive Infrastructure Assets have been calculated in the manner set out above by the Transferor companies and the Transferee company.”

23. It seems that there is no change in the overall position of the assets in any of the shares in the Transferee company being issued to the Transferor companies in the same ratio as their contribution of the PIA. Further the PIA proposed to be contributed has been verified by an independent technical agency appointed by it. The explanation offered by the Petitioner

companies that no valuation report is required is accepted and this objection of the RD is negated.

24. As regards the third objection concerning the transfer of licences from the Transferor companies to the Transferee company, i.e., Indus, it is already noted that each of the three Transferor companies as well as Indus are separately registered with the DoT as IP-I. In fact, none of the Petitioner companies holds any telecom licence issued by the DoT. The question of therefore, any of the Petitioner companies transferring any telecom licences to Indus pursuant to the Scheme does not arise. Consequently, the letter dated 9th June 2003 issued by the DoT is of no consequence. It may be noted that while approving the Vodafone Demerger Scheme for merger of Vodafone Entities with VIL by a judgment dated 29th March 2011 this Court negated a similar objection raised by the RD. Although the appeal against the said judgment had been admitted there has been no stay of the said judgment.

25. It may also be noted that Indus itself has registration as IP-I. Therefore, the question of transfer of registration of certificates from the Transferor companies to Indus does not arise. Further a perusal of the registration certificates shows that this is a complete compliance under the requirements of the Indian Telegraph Act, 1885. The change of name of the companies has also been duly recorded by the authority issuing the certificates.

26. In a decision dated 6th July 2009 in Co. Petition No. 160 of 2009 [*In re: Keane International (India) Private Limited*] this Court in similar

circumstances noted that there was no third party interest involved in the scheme of merger. The shareholders, secured and unsecured creditors had also given their written consents to the scheme and the share exchange ratio proposed therein. The following passage in the decision of the Bombay High Court in *Advance Plastics (P) Ltd. & Dynamic Plastics (P) Ltd.* 138 *Com Cas 1006* was quoted with approval:

“The shares are the properties of the shareholders and they are the ultimate and the best judge of the value they would put on their charges. There is no requirement in the Companies Act, 1956 that in such a case the ratio of exchange has to be determined on a valuation made by a chartered accountant and the auditor. In the present case, no shareholder has challenged the amalgamation. In the circumstances, valuation report is not necessary.”

27. Reference may also made to the decision in *re: Bharti Infratel Limited* where the objection to the same effect had been rejected. In view of the above, the objection of the RD does not survive.

28. As regards the last objection of the RD concerning the stand of PSIPL, it requires to be noted that majority of the unsecured creditors approved the Scheme at a meeting convened for that purpose on 24th December 2011. The report of the Chairperson of the said meeting was perused by this Court and has been enclosed with the affidavit filed by the Petitioners. Indeed, when the requisite majority had approved the Scheme, the fact that one unsecured creditor had objected to it will not make a difference. It has been clarified by the Petitioners in the affidavit dated 11th April 2012 that Indus has no creditor by the name of KEPL however, it has a creditor by the name of Karamtara Engineering Private Limited (‘Karamtara Engineering’) which

served notice under the Act. The reply sent by Indus to Karamtara Engineering denying its claim has been enclosed with the affidavit and no further correspondence resulted from the said exchange. It is further submitted that Indus has a sound financial position and the Scheme has been approved by 99.892% in value of the unsecured creditors. In the circumstances, the above objection of the RD is negated.

29. The objections of the ITD are considered next. By a separate affidavit dated 29th June 2012 the RD has placed on record a copy of the letter dated 29th June 2012 received from the ITD, Mumbai. It is the said objection of the ITD which has been reiterated in the objections dated 24th August 2012. These objections are which the Court now proceeds to deal with.

30. On behalf of the ITD, this Court was addressed arguments by Mr. A.S. Chandhiok, learned ASG, on some of the dates. On some other dates the arguments were addressed for the ITD by Mr. Nitin Mehta, learned counsel and on the final date of arguments by Mr. Abhishek Maratha, learned Senior Standing counsel for the ITD.

31. The first contention of the ITD is that the Court should not proceed with the present matter unless it comes to a determination that the present petition and the appeal pending before the DB against the decision dated 29th March 2011 of the Company Court in Co. Petition No. 334 of 2009 pertain to independent issues. The attention in this regard is drawn to the order passed by the DB of this Court on 11th September 2012 in Company Appeal No. 63 of 2012.

32. It is seen that the said order was passed in an application filed by the Petitioners herein before the DB contending that the present petition is independent of the appeal. In that context, the DB clarified that the said submission should be made before this Court and that “the Company Judge, if convinced that two matters are independent, would be free to go ahead with the matter.”

33. The arguments concerning the issue whether both the matters are independent have necessitated the Court having to hear extensive arguments on the merits of the present petition itself. As a result, the Court proposes to deal with the said issue as part of the present judgment, which, it is clarified, is subject to the decision in the appeal pending before the DB.

34. The first substantive objection of the ITD is that no separate notice was issued in the petition to the Central Government as contemplated under Section 394A of the Act which reads as under:

“394A Notice to be given to Central Government for applications under Sections 491 and 394: The Tribunal shall give notice of every application made to it under Section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these Sections.”

35. At the first hearing of the present petition, notice was directed to issue to the RD, Northern Region, Ministry of Corporate Affairs (‘MCA’) as well as the OL. The authority of the RD, Northern Region having his office in Noida in Uttar Pradesh, to accept notice not just on behalf of the MCA but also on behalf of the Central Government is traceable to a notification dated

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17th March 2011 issued by the MCA under Section 637 (1) of the Act delegating to the RDs at Mumbai, Kolkata, Chennai, Noida and Ahmedabad the powers and functions of the Central Government under several provisions of the Act including Section 394A. The precursor to the said notification was another one dated 31st May 1991 whereby again the Central Government had in exercise of its power under Section 637 (1) of the Act delegated to the RDs at Mumbai, Kolkata, Chennai, Kanpur the power and functions of the Central Government under several provisions of the Act including Section 394A. Therefore, for many years now the practice of the RD accepting notices in petitions under Sections 394A of the Act on behalf of both the MCA and the Central Government has had the statutory backing by way of the notifications issued under the Act. The very purport of the notification under Section 637 (1) of the Act is to obviate multiple notices having to be issued to different departments and Ministries of the Central Government. It is expected that the RD would seek instructions from the concerned departments and Ministries as regards the Scheme submitted for approval. Consequently, this Court rejects the contention of the ITD that the present petition cannot proceed for want of separate notice to the Central Government.

36. The ITD has apart from filing its objections on 24th August 2012 filed additional documents as well as an affidavit on 9th January 2013. Further, in the Court learned counsel for the ITD has handed over a note titled 'Assuming that M/s. Bharti Infratel Ltd. gives its assets to M/s. Indus Towers Ltd. without creating a vehicle namely M/s. Bharti Infratel Ventures Ltd'. The ITD has also filed its written submissions.

37. The first substantive objection to the Scheme on merits is that the Petitioner companies have suppressed the fact that the Petitioners 1 to 3 had entered into an 'Indefeasible Right to Use Agreement' ('IRU Agreement') with Indus in 2008 with an effective date of 1st January 2009. Under the said IRU Agreement, Indus acquired an exclusive, unrestricted and indefeasible right to use the passive infrastructure until such time it was transferred to Indus by way of one or more Schemes of Arrangement under Sections 391 to 394 of the Act. The ITD accordingly points out that in terms of the IRU Agreement, Indus not only had the operational and physical control but had absolute, complete, unfettered and irrevocable right over the PIA and for all practical purposes the PIA vested in Indus with effect from 1st January 2009. The stand of the ITD is that the Demerger Schemes involving VIL, BIVL and ICTIL and the present Scheme are inter-connected and inter-dependent. It is pointed out that in 2008 itself it had been contemplated that the PIA should be ultimately transferred to Indus by way of Demerger Schemes under Sections 391 to 394 of the Act as the Demerger Schemes were devised as a first step to transfer the PIA to intermediate companies for its ultimate transfer. It is accordingly, submitted that the Demerger Schemes and the present Scheme are part of a 'single transaction'.

38. The above submissions have been considered. As already noted hereinabove, even if it were to be assumed that the Schemes are inter-connected and inter-dependent, if for some reason any part of the Demerger Schemes do not go through then such eventuality has been accounted for under Clause 2.2.5 of the Scheme. To the extent that some parts of the Demerger Schemes are not ultimately approved the present Scheme would

correspondingly stand modified. Depending on the ultimate orders that may be passed concerning any part of the Demerger Schemes, applications can be filed in this Court for modification in terms of Section 392(1)(b) or Section 392(2) of the Act.

39. It is then submitted that the ITD should be permitted to proceed with recovery in respect of any existing or future tax liability of the Transferor companies or the Transferee company in respect of the assets sought to be transferred under the Scheme. It is submitted that there should be no limitation on the powers of the ITD to effect recovery of tax and penalties etc.

40. A similar contention was addressed by this Court in its judgment dated 29th March 2011 while approving the Vodafone Demerger Scheme. The submission made by learned Senior counsel for the Petitioners before the Court in para 29 of the decision dated 29th March 2011 [*re: Vodafone Essar Limited*], reads as under:

“29. At the outset, it is necessary to record that Dr. Singhvi, counsel for the Petitioners, submitted, on instructions, that notwithstanding any sanction or approval that may be granted by this Court to the proposed scheme, his clients would be bound by all obligations that may be imposed on them under the applicable provisions of the Income Tax Act, 1961. By standing this, the Petitioners clearly outlined their stand at the beginning of these proceedings, to the effect that the sanctioning of the scheme would not *ipso facto* grant any immunity to the Petitioners *qua* any liability that may be imposed on them under the relevant provisions of the Income Tax Act, in accordance with law.”

41. It was further observed in paras 69 and 70 of the said judgment as under:

“69. Further, the Petitioners have fairly admitted that any question of tax liability is within the purview of the income-tax department and that it is free to pursue either the Transferor companies or of the Transferee company, as it may be advised, notwithstanding the sanction of the scheme by this Court. Neither counsel seeks a finding by this Court with regard to the tax implications of the proposed Scheme. It is agreed that the scheme may be sanctioned whilst relegating the parties to the appropriate fora to determine the tax liability, if any, that may arise. No action which may be violative of a statute is being legitimized by approval of the scheme, and the income tax authorities are free to move against any of the parties concerned, in case they are of the belief that there has been any impermissible evasion of payment of tax by the Petitioners.

70. In my view, if the Court is indeed to sanction the scheme, the powers of the income-tax department must remain intact. The authorities relied on by the Petitioners also support this proposition, with the only exception being a situation where the scheme itself has only one purpose, which is to create a vehicle to evade the payment of tax, rather than mere avoidance of tax. It is also true that the scope of objection that may be raised by the Central Government and the Regional Director is larger, and that of the tax authorities is confined to the question of revenue. It is not open to this Court, in the exercise of company jurisdiction, to sit over the views of the shareholders and board of directors of the Petitioner companies, unless their views were against the framework of law and public policy, which, as discussed above, is not the conclusion reached here. It is purely a business decision based on commercial considerations.”

42. In the operative portion of the judgment dated 29th March 2011, sanction was granted to the Scheme of Arrangement “reserving the right of the income tax authorities to the extent stated above.” Therefore, throughout it

has been made clear that the right, if any, that the income tax authorities may have under the Income-Tax Act, 1961 ('ITA') to proceed against the Petitioner companies was not in any manner curtailed.

43. Mr. Rajiv Nayar, learned Senior counsel for Petitioner Nos.1, 3 and 4 has reiterated the undertaking made by them as noted in para 29 of the aforementioned judgment dated 29th March 2011. Towards the end of the hearing, Mr. Abhishek Maratha, learned Senior Standing counsel for the ITD produced before the Court copies of four assessment orders ('AOs') passed by the ITD Circles at Mumbai (concerning VIL) and New Delhi (concerning Indus and Idea). Mr. Mihir Joshi, learned Senior counsel appearing for some of the Petitioners submitted that their defence, if any, in the proceedings arising out of the aforementioned AOs also ought not to be curtailed by the present judgment.

44. As far as the above submissions are concerned, this Court clarifies that it does not express any opinion whatsoever on the AOs that have been passed against the Petitioner companies. Their correctness would be decided in other appropriate *fora*, when challenged, in accordance with law. All the contentions of the Petitioner companies as well as the ITD in that behalf are left open to be decided in those proceedings. Further, it is seen that the DB of the Gujarat High Court has while approving the Scheme of demerger of Vodafone Essar Gujarat Limited by its judgment dated 27th August 2012 observed in para 55 as under:

“55. In view of the approval accorded by the equity shareholders, secured and unsecured creditors of the Petitioner and the Regional Director, Western Region to the proposed Scheme of Arrangement, as well as the submissions of the Income Tax Department, there appear to be no further impediments to the grant of sanction to the Scheme of Arrangement. Consequently, sanction is hereby granted to the Scheme of Arrangement under Sections 391 and 394 of the Companies Act, 1956 while protecting the right of the Income Tax Department to recover the dues in accordance with law irrespective of the sanction of the Scheme. However, while sanctioning the Scheme it is observed that said sanction shall not defeat the right of the Income Tax Department to take appropriate recourse for recovering the existing or previous liability of the Transferor company and the Transferor company is directed not to raise any issue regarding maintainability of such proceedings in respect of assets sought to be transferred under the proposed Scheme and the same shall bind to Transferor and Transferee company. The pending proceedings against the Transferor company shall not be affected in view of the sanction given to the Scheme by this Court. In short, the right of the Income Tax Department is kept intact to take out appropriate proceedings regarding recovery of any tax from the Transferor or Transferee company as the case may be and pending cases before the Tribunal shall not be affected in view of the sanction of the Scheme.”

45. Taking a cue from the above observations, this Court further clarifies that the grant of sanction of the Scheme by way of the present judgment will not defeat the right of the ITD to take appropriate recourse for recovery of the previous liabilities of any of the Transferor companies or Transferee company. The proceedings arising out of the AOs passed against the Transferor companies or Transferee company will not be affected by the present judgment.

46. In view of the above conclusions, this Court does not consider it necessary to deal with the objection of the Petitioner companies regarding the *locus standi* of the ITD to oppose the Scheme.

47. With no other objections remaining to be dealt with, there appears to be no impediment to the grant of sanction to the Scheme. Accordingly, this Court grants sanction to the Scheme under Sections 391 to 394 of the Act. It is made clear that the grant of sanction to the Scheme is subject to the final order in Company Appeal No. 63 of 2012 pending before the DB of this Court and any other orders in any further proceedings thereafter.

48. In terms of Sections 391 to 394 of the Act and in terms of the Scheme, the whole of the undertaking, the property, rights and powers of the Transferor companies shall be transferred to and vest in the Transferee company without any further act or deed. Similarly, in terms of the Scheme, all the liabilities and duties of the Transferor companies shall be transferred to the Transferee company without any further act or deed. Upon the Scheme coming into effect, the Transferor companies shall stand dissolved without winding up. It is, however, clarified that this judgment will not be construed as granting exemption from payment of stamp duty or taxes or any other charges, if payable in accordance with any law; or permission/compliance with any other requirement which may be specifically required under any law. The Petitioner companies will comply with the statutory requirements in accordance with law. A certified copy of this judgment shall be filed with the ROC within 30 days from its receipt.

49. The petition is allowed in the above terms.

S. MURALIDHAR J.

APRIL 18, 2013

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