

IN THE HIGH COURT OF DELHI AT NEW DELHI
CO. PET. NO. 187 OF 2013
IN THE MATTER OF:

***VODAFONE SPACETEL LIMITED & ANR. PETITIONER
COMPANIES***

Through: Mr. Rajiv Nayar, Senior Advocate,
Mr. Sandeep Singhi, Mr. Anirudh Das
and Mr. Kamaljeet Singh, Advocates
for the Petitioner Companies.

Mr. Atma Sah, Assistant Registrar of
Companies appearing for the Regional
Director.

Mr. Rajeev Bahl, appearing for the
Official Liquidator.

CORAM :

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

ORDER
03.07.2014

SANJEEV SACHDEVA, J (ORAL)

1. This second motion joint petition has been filed under Sections 391 to 394 of the Companies Act, 1956 (hereinafter referred to as "the Act") by M/s Vodafone Spacetel Limited (Transferor No.1/Petitioner Company No.1), Vodafone West Limited (Transferor No.2) and Vodafone Mobile Services Limited (Transferee Company/ Petitioner Company No.2) and their

respective shareholders seeking sanction and approval of the Scheme of Amalgamation (hereinafter referred to as the Scheme). A copy of the proposed Scheme is filed alongwith the present application.

2. The Registered Offices of M/s Vodafone Spacetel Limited (Transferor No.1/ Petitioner Company No.1) and M/s Vodafone Mobile Services Limited (Transferee Company/ Petitioner Company No.2) are situated at New Delhi within the jurisdiction of this Court. The Registered Office of M/s Vodafone West Limited (Transferor No.2) is situated in the State of Gujarat and for which the said Company has filed Company Petition before the High Court of Gujarat at Ahmedabad for sanction of the Scheme.
3. The details of respective dates of incorporation of the Petitioner Companies, their authorized, issued, subscribed and paid up capital have been set out in the Petition.
4. The copies of Memorandum and Articles of Association of the Petitioner Companies have been enclosed with the Petition.
5. The copies of resolutions passed by the Board of Directors of the Petitioners Companies approving the Scheme have also been filed along with the Petition.

6. Learned counsel for the Petitioner Companies submits that no proceedings under Sections 235 to 251 of the Act are pending against the Petitioner Companies.
7. The Petitioner Companies had earlier filed Co.Appl.(M) 38/2013 seeking dispensation from convening the meetings of the Equity Shareholders, Secured Creditors and Unsecured Creditors of the Petitioners and this Court by order dated 08.04.2013 allowed the Application and dispensed with the requirement of convening the meetings of the Equity Shareholders, Secured Creditors and Unsecured Creditors of the Petitioner Companies. However it was directed that upon notice being issued on the second motion petition for sanction of the scheme, the applicant companies shall issue individual notices to all its secured and unsecured creditors seeking their objection if any to the scheme.
8. The Petitioner Companies have thereafter filed the present Petition seeking sanction of the Scheme of Amalgamation. By order dated 26.04.2013, notice in the Petition was directed to be issued to the Regional Director (Northern Region) and the Official Liquidator. Citations were also directed to be published in the “Indian Express” (English, Edition) and “Jan Satta” (Hindi, Edition).

9. An Affidavit dated 24.07.2013 has been filed on behalf of the Petitioner Companies, affirming compliance regarding the service of Notice of the Petition on the Regional Director (Northern Region), Official Liquidator and the Registrar of Companies as also regarding publication of Notice of the Petition in the Indian Express (English Edition) and Jan Satta (Hindi Edition). The Petitioner Companies have also affirmed that the order dated 26.04.2013 of this Court regarding dispatch of notice to the Secured Creditors and Unsecured Creditors of the Petitioner Companies has been complied with. The Petitioner Companies have also filed Affidavit dated 10.10.2013 affirming that the order dated 01.08.2013 of this Court regarding dispatch of notice to the un-served Unsecured Creditors of the Petitioner Companies has been complied with. Copies of the newspapers containing the citations, CD containing the tracking report regarding dispatch of notice to the Unsecured Creditors of the Petitioner Companies and the certificate from the Post Office regarding dispatch of notices to the Unsecured Creditors of the Petitioner Companies have been filed along with Affidavits dated 24.07.2013 and 10.10.2013, affirmed by the Authorized Signatory of the Petitioner Companies.

10. Pursuant to the Notice issued by the Court, the Official Liquidator has filed his Report dated 08.04.2013. The Official Liquidator has in para 15 of the Report referred to an objection filed by M/s Skipper Limited, an unsecured creditor of the Petitioner/Transferor Company 1. The Official Liquidator has further stated that no complaint has been received against the proposed Scheme from any person or party interested in the Scheme till the date of filing of the Report. The Official Liquidator has further stated that subject to the submissions made in paras 15 and 16 of the Report, the affairs of the Petitioner/Transferor Company No.1 do not appear to have been conducted in a manner prejudicial to the interests of its members or to public interest as per the 2nd proviso of Section 394 (1) of the Act.
11. In response to the Report of the Official Liquidator, the Petitioner/Transferor Company No.1 has filed Reply dated 13.02.2014. In response to para 15 of the Report of the Official Liquidator, Learned Senior Counsel for the Petitioner Companies submits that the objections of M/s Skipper Limited as referred to in the Report of the Official Liquidator are not tenable in law and the said unsecured creditor cannot be permitted to raise its purported money claim in proceeding under Section 391 of the Act which are for sanction of the Scheme.

The Petitioner/Transferor Company No.1 has also filed its Reply to the Objections of M/s Skipper limited.

12. The Regional Director (Northern Region) has filed Affidavit dated 14.03.2014 raising certain observations to the scheme.
13. The first observation raised by the Regional Director is that approval of the Department of Telecommunication (DoT) is required for transfer of licenses. Learned Senior Counsel for the Petitioner Companies has submitted that the letter dated 09.06.2003 referred to by the Regional Director refers to licenses of internet services which is not applicable to the facts of the present case since the Petitioner Companies are providing Cellular Mobile Services in terms of the licenses granted by the DoT. The Learned Senior Counsel further submits that the Scheme stipulates that it is subject to the approval of the DoT in terms of Clause 5.7.1 (b) of the Scheme and that the DoT was informed about the scheme of amalgamation and the request of the Company has been examined. He further submits that the DoT by communications dated 11.03.2014 and 13.03.2014 has conveyed its' No Objection Certificate to the Scheme. He further submits that the DoT has stated that the proposal for transfer of licenses may be submitted afresh after the

sanction/approval of the Scheme of Merger/Amalgamation by the concerned High Court/Tribunal as the case may be.

14. In view of the above, it is clarified that all approvals required either in terms of any regulation or as per the policy of DoT would be obtained by the Petitioner Companies. In this view of the matter, the observations raised by the Regional Director have been answered by the Petitioner Companies.
15. The Regional Director has at para 4.3 of the Report sought an undertaking from the Petitioner Companies that no inquiry/case is pending against the said Companies at the time of original allotment of license from any Court of law or from any investigation authority. The Petitioner Companies have in reply submitted that to the best of the knowledge of the Petitioner Companies, there is no inquiry or case pending with regard to the original allotment of license. This aspect is not controverted by the Assistant Registrar of Companies appearing for the Regional Director. Learned Senior Counsel for the Petitioners further submits that the DoT by its communications dated 11.03.2014 and 13.03.2014 has granted its 'in principle No Objection to the Scheme and in terms of the said letters, approval would be obtained from the

DoT for transfer of licenses after the sanction of the Scheme by the respective High Courts. In view of the above, the concern of the Regional Director is addressed.

16. The third observation raised by the Regional Director relates to the pendency of the Scheme of Amalgamation in Co. Pet. No.488/2012 filed before this Court. It is submitted by the Senior Counsel for the Petitioners that the Scheme subject matter of Co.Pet 488/2012 since been sanctioned by this Court on 01.04.2014 after hearing all the concerned parties viz. Regional Director, Official Liquidator and the Income Tax Department. In this view of the matter the concern of the Regional Director does not survive.
17. The fourth observation raised by the Regional Director is that the present Scheme is pre-mature since Company Petition No.488 of 2012 is pending. Learned Senior Counsel for the Petitioner submits that the Scheme being subject matter of C.P. No.488 of 2012 has since been sanctioned by the Delhi High Court on 01.04.2014, by the High Court at Calcutta on 22.03.2013 and High Court of Madras on 05.06.2013. It is further submitted on behalf of the Petitioners that the Transferee Company in CP No.488 of 2012 and the present Scheme is the same i.e. Vodafone Mobile

Services Limited which is a 100% subsidiary of Vodafone India Limited and the allegation of the RD that will be a different set of shareholders is untenable. In view of the above the concerns of the Regional Director do not survive.

18. The fifth observation of the Regional Director is with respect to a Scheme of Arrangement subject matter of Company Petition No. 334 of 2009 which Scheme was sanctioned by order dated 29.03.2011. Learned Senior Counsel submits that the Scheme being subject matter of C.P. No. 334 of 2009 was sanctioned by this Court on 29.03.2011 and Company Appeal No.63 of 2012 is pending. It is submitted that there is no stay of the sanction order dated 29.03.2011. It is further submitted that the said Scheme is also not connected to or in any manner related to the present Scheme. It is further submitted that the Scheme in C.P. No. 334 of 2009 seeks the consolidation of the Passive Infrastructure Assets of the Telecom Companies in one entity and the purpose is to segregate the telecom infrastructure business from the business of providing telecom services. It is submitted that the purpose and object of the present Scheme is the consolidation in one entity of the business of providing and marketing telecommunication services in terms of the licenses granted by the DoT. Nothing has been pointed out as to

how the same is prejudicial to the interest of the Shareholders and the secured and unsecured creditors. In view of the above, the concern of the Regional Director do not survive.

19. The Regional Director has further referred to the letter dated 25.02.2014 of the Income Tax Department wherein it has been stated that from the Scheme, no direct adverse impact on the tax position could be noticed in so far as the amalgamation of the Transferor Companies into the Transferee Company is concerned.
20. The Regional Director has further referred to four observations raised by the Income Tax Department in the aforesaid letter dated 25.02.2014 i.e. (a) Income Tax Department should be permitted to proceed against Transferee Company in the event of any liability arising out of the transaction in question irrespective of approval granted by the High Court, (b) The Scheme is question should be subject to outcome of Company Appeals filed by the Revenue Department in connection with other Scheme of de-merger and merger filed in respect of Vodafone Group Companies, (c) There should not be any writing off any liability by the Transferor Companies and (d) As per para 3.7 of the Scheme, in case any amount is created to General Reserve Account in the financial statement of the

Transferee Company, the same should not be utilized to pay any dividends under the Companies Act.

21. As regards the rights of the Income Tax Department to proceed against the Transferee Company, Learned Senior Counsel has relied on the ***ORDER DATED 01.04.2014 IN C.P. NO.488 OF 2012 M/S VODAFONE DIGILINK LTD. AND ORS*** and submits that similar protection may be granted to the Income Tax Authorities.
22. In view of the above, it is clarified that any income tax liability which is payable by the transferor companies shall be paid by the transferee company as the liabilities of the transferor companies stand transferred to the transferee companies. Therefore, any liability that falls on the Transferor Companies on account of any earlier transaction shall have to be borne by the Transferee Company. It is also clarified that any tax benefit by way of refund or any credit that may be available to the Transferor Companies shall also enure to the Transferee Company as all assets of the Transferor Companies stand vested with the Transferee Company pursuant to the Scheme. Needless to mention that the Transferee Company shall also have the right to challenge the validity of the assessments made or any demands made by the Income Tax Authorities to

the same extent as the Transferor Companies. It is also clarified that the Income Tax Authorities shall have the right to raise demands which are valid and as per law and the Transferee Company shall be entitled to benefits, refunds and credits in accordance with applicable law. It is further clarified that none of the provisions made in the scheme shall affect the income tax liability of the companies including as arising from the present scheme. The income tax authorities shall independently assess the taxability of any income arising from any transaction de hors any provision in the scheme.

23. With regard to the pending Company Appeals arising out of orders passed in C.P. No.334 of 2009 and C.P. No. 14 of 2012, are concerned, Learned Senior Counsel for the Petitioners submits that the Scheme subject matter of C.P. No.334 of 2009 and C.P. No.14 of 2012 are not related to or dependent upon or connected with the present Scheme. It is submitted that the Scheme subject matter of CP No.334 of 2009 seeks the consolidation in one entity of the telecom infrastructure business of Vodafone Group Companies. The Scheme subject matter of CP No.14 of 2012 seeks the consolidation of the Passive Infrastructure Assets of three telecom operators in one entity. It is further contended that the present Scheme seeks the

consolidation in one entity of the business of providing telecommunication services in terms of licenses granted by the DoT. Learned Senior Counsel further submits that similar objections raised in C.P. No. 488 of 2012 were not upheld by this Court. Learned Senior Counsel further submits that upon the Scheme becoming effective, the amount if any, credited to the General Reserve Account of the Transferee Company shall be dealt with in accordance with the applicable Accounting Standard 14 and the law. He further submits that the Petitioners undertake to comply with the accounting treatment as prescribed under Accounting Standard – 14 i.e. 'Accounting for Amalgamation' issued by the Institute of Chartered Accountants of India. In view of the above, the concern of the Regional Director and the Income tax authorities has been addressed.

24. The Regional Director has at para 10 of the Report observed that the Appointed Date under the Scheme be shifted to 01.04.2013. Learned Senior Counsel for the Petitioner Companies submits that Appointed Date of 01.04.2012 as specified in the Scheme has been accorded approval by the Board of Directors and the shareholders of the respective companies. It is submitted that the choice of an appointed date is the prerogative of the respective companies and approval

has been granted to the present Scheme incorporating the said Appointed Date. It is further submitted that the Board of Directors of the Petitioner Companies and the Transferor Company-2 approved the present Scheme on 21.03.2013. The equity shareholders of the Petitioner Companies and the Transferor Company-2 have also approved the present Scheme by letters dated 21.03.2013 and the Company Application (Main) No. 38 of 2013 was sworn on 22.03.2013.

25. Mr. Atma Sah, Assistant ROC has relied upon the ***JUDGMENT DATED 26.03.2014 OF THIS COURT IN CO.PET. NO. 653/2013 TITLED M/S VERTEX CUSTOMER SERVICES INDIA PRIVATE LIMITED AND ANR*** wherein this court has laid down as under:

“The petitioners are conscious that fixing 1st April 2011 as the appointed date would entail filing of revised returns with the Income Tax and other Authorities. It is clarified that the petitioner would also pay all requisite fees that may be payable in law for revising any returns. Needless to mention, the Registrar of Companies would also be at liberty to examine all returns on merits including the returns pertaining to the past periods.”

26. Learned Senior Counsel for the Petitioners submits that all matters and events with respect to the approval of the present Scheme by the Petitioner Companies and the Transferor Company No. 2 and its shareholders

took place in financial year 2012-13 and accordingly, there is no justification whatsoever for any change in the Appointed Date as sought to be contended by the Regional Director. In this regard, Learned Senior Counsel relies upon the judgments of the ***BOMBAY HIGH COURT IN M/S JINDAL IRON & STEEL DATED 02.09.2004 IN C.P. NO.76 OF 2004*** and of the ***GUJARAT HIGH COURT IN SHREE BALAJI CINEVISION DATED 23.09.2009 IN O.J. APPEAL NO.65 OF 2009.***

27. No objection to the Appointed Date has been raised by any shareholder or creditor of the Petitioner Companies. In view of the above the facts do not necessitate any change in the Appointed Date as sought for by the Regional Director. However it is clarified that in case there is any necessity of filing of any revised returns with the Income Tax and other Authorities. The petitioner would also pay all requisite fees that may be payable in law for revising any returns and the Registrar of Companies and the Income Tax Authorities would also be at liberty to examine all returns on merits including the returns pertaining to the past periods as may be permissible in accordance with statutory provisions of the Companies Act and the Income Tax Act.

28. At para 11 of the Report, the Regional Director has stated that the valuation of shares and swap ratio is to be calculated by a professional firm of Chartered Accountants. It is contended that the Petitioners have filed the certificate of M/s Ernst & Young Private Limited which is a company and not a firm of Chartered Accountants. Learned Senior Counsel for the Petitioners in this respect submits that there is no provision in law which requires a report for the share exchange ratio or that such report has to be prepared only by chartered accountants. Without prejudice to the aforesaid, it is submitted that M/s Ernst & Young Private Limited is a company providing various services like financial advisory, tax advisory, management consulting, valuation etc. Learned Senior Counsel submits that as per the instructions received from Ernst & Young Private Limited, the team in respect of the present report comprised of chartered accountants, cost accountants and experts in the field of finance. Learned Senior Counsel in support of his contention has relied upon the judgment of this Court in *M/S KEANE INTERNATIONAL DATED 06.07.2009 IN C.P. NO.160 OF 2009* and the judgment of the *PUNJAB & HARYANA HIGH COURT IN VARDHMAN TEXTILES LIMITED DATED 24.01.2008 IN C.P. NO.59 OF 2007*. It is further submitted that no objection to the swap ratio

or valuation has been raised by the Regional Director. In view of the submissions on behalf of the Petitioners and the law as laid down, the objection of the Regional Director is not sustainable.

29. As regards the observations of the Regional Director in para 12 and 13 of the Report, the Learned Senior Counsel for the Petitioners has submitted that the scheme of arrangement referred to at para 26.15 of the audited accounts of the Petitioner/Transferor Company No. 1, the said scheme was withdrawn on 06.05.2013. It is further submitted that the scheme of merger referred to at para 24.14 of the audited accounts of the Petitioner/Transferee Company, was subject matter of Company Petition No. 488 of 2012 and has been finally heard and sanctioned by this Hon'ble Court on 01.04.2014. In respect of the proceedings pending before the TDSAT, it is submitted that the said Petition has since been allowed by the TDSAT by order dated 29.04.2014. In view of the above, the concerns of the Regional Director have been addressed.
30. As regards the objections to the Scheme filed by three Unsecured Creditors namely, M/s Skipper Limited, M/s Matrix Cellular Services Private Limited and M/s Associated Towers Structure Private Limited, the concerned Petitioner Companies have filed their

replies. Learned Senior Counsel for the Petitioner Companies has submitted the amounts as claimed by the three Unsecured Creditors are disputed. It has further been submitted that the present proceeding for sanction of the Scheme under Sections 391-394 of the Act cannot be used for recovery of monies and the said Objectors are entitled under contract or in law to pursue available remedy for recovery of amounts. As regards M/s Matrix Cellular Services Private Limited, Learned Senior Counsel submits that arbitration proceedings are pending with respect to the Claims and Counter Claims of the Petitioner/Transferee Company and M/s Matrix Cellular Services Private Limited. Learned Senior Counsel in support of his submissions relies upon the judgments in *SANVIJAY ALLOYS (P) LIMITED, (2004) 122 COMPANY CASES 754*, *ZEE INTERACTIVE MULTIMEDIA, (2002) 111 COMPANY CASES 733* AND *MAYFAIR LIMITED, (2004) 112 COMPANY CASES 748* and further submits that the present proceedings cannot and ought not to be permitted to be used by the Unsecured Creditors for recovery of their monies.

31. In the present case, the claims of the three Unsecured Creditors are disputed by the concerned Petitioner Companies. As regards M/s Matrix Cellular Services Private Limited, arbitration proceedings are pending

with respect to the claim of the company and the Petitioner/Transferee Company. The other two Objectors, M/s Skipper Limited and Associated Towers Structure Private Limited have not yet initiated any proceedings for recovery of amounts purportedly due to them. This Court is of the view that the claim raised by the three Unsecured Creditors cannot be agitated in the present proceedings for sanction of the Scheme. It is however clarified that the sanction of the Scheme will not in any manner affect the Arbitration proceedings between the Transferee Company and M/s Matrix Cellular Services Private Limited and would not come in the way of the said M/s Skipper Limited and M/s Associated Towers availing legal remedies for recovery of amounts claimed to be due to them subject to objections available under law to the Transferee Company, including the plea of alternate remedy and limitation. In this view the objections raised by the three Unsecured Creditors do not survive.

32. The Petitioner Companies have placed on record communications from Unsecured Creditors to the effect that they shall be opposing the scheme. However, none of these Unsecured Creditors have appeared before this Court or filed objections to the Scheme before this Court.

33. In view of the approval accorded by the shareholders of the Petitioner Companies, the Report filed by the Official Liquidator, Affidavit filed by the Regional Director and the Replies of the Petitioner Companies to the Reports of the Official Liquidator and the Regional Director, there appears to be no impediment to the grant of sanction to the Scheme. Consequently, sanction is hereby granted to the Scheme of Amalgamation under Sections 391-394 of the Companies Act, 1956. The Petitioner Companies will comply with the statutory requirements in accordance with law.
34. Further, in view of Clause 5.7.1 of the Scheme and prayer clause (i) of the Company Petition, the certified copy of the formal order sanctioning the Scheme be filed with the Registrar of Companies, NCT of Delhi and Haryana within 30 days of the receipt of DoT approval for transfer of licenses listed in Schedule 1 to the Scheme. It is further clarified that the Petitioners will take expeditious steps to obtain the approvals from the DoT after sanction of the present Scheme by this Court and the Gujarat High Court and the DoT shall take necessary decision within 45 days of the Petitioners complying with all necessary formalities.

35. The sanction order of this Court shall be binding on the shareholders and creditors of the Petitioner Companies. The Scheme is also subject to sanction by the High Court of Gujarat. Upon the Scheme becoming effective in terms of the Scheme, the Petitioner/Transferor Company 1 shall stand dissolved without the process of winding up.
36. It is however clarified that this order will not be construed as an order granting exemption from payment of stamp duty or any other charges if payable in accordance with law. This order shall also not be construed as absolving the Petitioners from compliance with any other law.
37. Learned Counsel states that the Petitioner Companies would voluntarily deposit a sum of Rs. 2 lakh to the Common Pool fund of the Official Liquidator within one week from today. The statement is accepted.
38. This Petition is allowed in the above terms.

SANJEEV SACHDEVA, J

JULY 03, 2014
HJ