

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

**CSP No. 995 of 2017
AND
CSP No. 996 of 2017
In CSA No. 791 & 792 Of 2017**

GABS INVESTMENTS PVT. LIMITED ... Petitioner/Transferor Company

AND

AJANTA PHARMA LIMITED ...Petitioner/ Transferee Company

In the matter of the Companies Act, 2013

AND

In the matter of Scheme of Amalgamation and Arrangement between Gabs Investments Private Limited and Ajanta Pharma Limited and their respective shareholders ('Scheme')

AND

In the matter of Sections 230 to 232 read with Section 52 and Section 66 and other applicable provisions of the Companies Act, 2013

Order Delivered On: 05.09.2018
Order Pronounced On: 30.08.2018

CORAM:

Hon'ble Shri B.S.V Prakash Kumar, Member (Judicial).
Hon'ble Shri Ravikumar Duraisamy, Member (Technical).

For the Petitioner(s): Mr. Hemant Sethi, Advocate M/s Hemant Sethi & Co.,
Mr. Gaurav Joshi, Senior Adv. &
Mr. Somasekar Sundaresan, Advocate

For the Regional Director : Mr. Rakesh Tiwari, Joint Director
For the Official Liquidator : Mr. Santosh Dalvi,

Per Ravikumar Duraisamy, Member

ORDER

1. Heard the Learned Counsel for the Petitioner Companies. None appears before the Tribunal to oppose the Scheme or to contravene averments made in the Petition.
2. The sanction of the Tribunal is sought under Sections 230 to 232 read with Section 52 and Section 66 and other applicable provisions of the Companies Act, 2013 to the Scheme of Amalgamation and Arrangement between Gabs Investments Private Limited ('Transferor Company') and Ajanta Pharma Limited ('Transferee Company') and their respective shareholders.
3. The Learned Counsel for the Petitioner Companies states that the Transferor Company is the group holding company and primarily holds shares in the Transferee Company. The Transferee Company is a specialty pharmaceutical company engaged in development, production and marketing of branded and generic formulations.
4. The Learned Counsel for the Petitioner Companies further submits that the rationale for the Scheme is as under:
 - a. The merger will result in the promoter group of the Transferor Company directly holding shares in the Transferee Company, which will lead not only to simplification of the shareholding structure and reduction of shareholding tiers but also demonstrate the promoter group's direct commitment to and engagement with the Transferee Company;
 - b. The promoter group of the Transferee Company is desirous of streamlining its holding in the Transferee Company. As a step towards such rationalization, it is proposed to merge the Transferor Company into the Transferee Company;
 - c. The promoters would continue to hold the same percentage of shares in the Transferee Company, pre and post the merger. There would also be no change in the financial position of the Transferee Company. All cost, charges and expenses relating to the Scheme would be borne out of the assets (other than shares of the Transferee Company) of the Transferor

Company. Any expense, exceeding the assets of the Transferor Company would be borne by the promoters directly;

- d. Further, the Scheme also provides that the shareholders of the Transferor Company shall indemnify the Transferee Company and keep the Transferee Company indemnified for liability, claim, demand, if any, and which may devolve on the Transferee Company on account of this amalgamation.
5. The Petitioner Companies have approved the said Scheme by passing the board resolutions at their respective Board meetings held on 18th March 2017 which are annexed to the respective Company Scheme Petition.
6. The Learned Counsel further submits that the Scheme has been approved by 99.99% shareholders of the Transferee Company and unanimously consented by shareholders of the Transferor Company at their respective meetings held on 10th October, 2017.
7. The Learned Counsel further submits that, upon this Scheme becoming effective, the Transferee Company shall, without any application, act or deed, issue and allot equity shares, credited as fully paid up, to the extent indicated below, to the members of Transferor Company holding fully paid-up equity shares of Transferor Company and whose names appear in the register of members of the Transferor Company as on the Record Date, or to such of their respective heirs, executors, administrators or other legal representatives or other successors in title as may be recognized by the Board of Directors of the Transferor Company / Transferee Company in the following proportion:
- “83,92,262 fully paid up equity share of Rs 2 each of the Transferee Company shall be issued and allotted as fully paid up to the equity shareholders of the Transferor Company in proportion of their holding in the Transferor Company”*
8. The Learned Counsel for the Petitioner Companies further states that, the Petitioner Companies have complied with all the directions in orders passed in Company Scheme Application No. 791 and 792 of 2017 and that the

Company Scheme Petitions have been filed in consonance with the orders passed in the respective Company Scheme Application.

9. The Learned Counsel for the Petitioner Companies further states that the Petitioner Companies have complied with all requirements as per the directions of this Tribunal and they have filed necessary Affidavits of compliance in the Tribunal. Moreover, the Petitioner Companies through their Counsel undertakes to comply with all statutory requirements, if any, as required under the Companies Act, 2013 and the rules made there under whichever is applicable. The said undertaking is accepted.
10. The Regional Director has filed his Report dated 27th December, 2017 stating therein that save and except as stated in paragraph IV of the said Report, it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraph IV of the said Report, the Regional Director has stated as under:
 - a) *As per Clause 1.2 Definitions of the Scheme, "The Appointed Date" means the 1st April 2016 or such other date as may be approved by the National Company Law Tribunal or any other Competent Authority. In this regard, it is submitted in terms of provisions of Section 232(6) of the Companies Act, 2013, it should be 1st April 2016;*
 - b) *The tax implication, if any arising out of this Scheme is subject to final decision of Income Tax Authorities. The approval of the Scheme by this Hon'ble Tribunal may not deter the Income Tax Authority to scrutinize the tax returns filed by the Transferee Company after giving effect to the Scheme. The decision of the Income Tax Authority is binding on the Petitioner Company;*
 - c) *As regards Para No. 9 of the Scheme, the Transferee Company may be allowed in respect of fees payable by the Transferee Company on its Authorized Share Capital, subsequent to the Amalgamation for setting-off fees paid by the Transferor Company on its Authorized Share Capital in accordance with the provisions of Section 232(3)(i) of the Companies Act, 2013;*

- d) *In addition to compliance of AS -14 (IND AS – 103), the Transferee Company shall pass such accounting entries which are necessary in connection with the Scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS – 8) etc.;*
- e) *In accordance to proviso to Section 232(3) of the Companies Act, 2013, the Transferee Company may be directed to file a Certificate from the Company's Auditors to the effect that the accounting treatment as proposed in the Scheme is in conformity with the Accounting Standards as prescribed under Section 133 of the Companies Act, 2013;*
- f) *As regards Para No. 7 and 8.6 of the Scheme, in view of the provisions of proviso to Section 66(3) of the Companies Act, 2013 in respect of reduction of share capital of the Transferee Company, the Hon'ble Tribunal may kindly direct the Company to submit Certificate from Auditor of the Company that the accounting treatment proposed by the Company for such reduction is in conformity with the Accounting Standards specified in Section 133 or any other provisions of the Companies Act, 2013;*
- g) *The Petitioner ensure compliance of directions issued by Bombay Stock Exchange (BSE) and National Stock Exchange of India (NSE) in their communication vide letters dated 19-07-2017 towards the aforesaid Scheme of Amalgamation;*
- h) *As regards Para No. 8.5 of the Scheme, the difference, if any, of the value of Assets over the value of Liabilities and Reserves transferred to the Transferee Company and the face value of New Equity Shares issued by the Transferee Company, after providing for adjustments shall be adjusted in the Reserves of the Transferee Company, preferably against the Capital Reserve as per the requirements of Para No. 35 of AS-14 notified by the Central Government.*

11. In so far as observation of the Regional Director, as stated in paragraph IV (a) of the Report is concerned, the Petitioner Companies through their Counsel submits that the Appointed Date shall be 1st day of April, 2016.
12. In so far as observation of the Regional Director, as stated in paragraph IV (b) of the Report is concerned, the Petitioner Companies through their Counsel undertakes to comply with all applicable provisions of the Income Tax Act and all tax issues, if any arising out of the Scheme will be met and answered in accordance with law.
13. In so far as observation of the Regional Director, as stated in paragraph IV (c) of the Report is concerned, the Petitioner Companies through their Counsel states that the Petitioner Company shall comply with the provisions of Section 232(3)(i) of the Companies Act, 2013.
14. In so far as observation of the Regional Director, as stated in paragraph IV (d) of the Report is concerned, the Petitioner Companies through their Counsel states that it shall comply with all applicable Accounting Standards and shall pass such accounting entries as may be necessary in connection with the Scheme to comply with any other applicable Accounting Standard.
15. In so far as observation of the Regional Director, as stated in paragraph IV (e) and (f) of the Report is concerned, the Petitioner Companies through their Counsel submits that the Transferee Company has already filed the Company Auditor certificate along with Company Scheme Application of the Transferee Company, stating that the Accounting treatment for the proposed Scheme is in conformity with the Accounting Standards prescribed under Section 133 of the Companies Act, 2013 with the Hon'ble Tribunal.
16. In so far as observation of the Regional Director, as stated in paragraph IV (g) of the Report is concerned, the Petitioner Companies through their Counsel states that the Petitioner Company shall comply with the directions issued by Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange of India Ltd. (NSE) in their communication vide letters dated 19-07-2017 towards the aforesaid Scheme.

17. In so far as observation of the Regional Director, as stated in paragraph IV (h) of the Report is concerned, the Petitioner Companies through their Counsel states that as per the provisions of Section 52 read with Section 66 and as per terms of Para No. 8.6 of the Scheme the Transferee Company shall utilize its Securities Premium to adjust the difference, if any of the value of the assets over the liabilities and reserves transferred to the Transferee Company and the face value of New Equity Shares issued by the Transferee Company, after providing for such adjustments as stated in the Scheme. The utilization of Securities Premium Account, as mentioned in Clause 8.5 of the Scheme, shall be effected without having to follow the process under Section 66 of the Act separately and the order of the NCLT sanctioning the Scheme shall be deemed to be also the order under Section 66 of the Act for the purpose of confirming the reduction.
18. The observations made by the Regional Director have been explained by the Petitioner Companies in paragraphs 11 to 17 above.
19. The Official Liquidator has filed his report on 2^{0th} December, 2017 in the Company Scheme Petition No. 995 of 2017 inter-alia, stating therein that the affairs of the Transferor Company have been conducted in a proper manner and that the Transferor Company may be ordered to be dissolved without winding up by this Hon'ble Tribunal.
20. The report of the Registrar of Companies ('ROC') dated 28th November, 2017 provides that there are six complaints against the Transferee Company. In this regard, the Learned Counsel of the Transferee Company submits that the complaints against the Petitioner Company are not in connection with the Scheme and pertain to past years for which an appropriate reply has already been filed by the Petitioner Company with the ROC. Further, the Learned Counsel of the Transferee Company submits that the outcome of the above complaints shall be decided in accordance with the applicable law since these are not related to the Scheme.

21. Objections of Income Tax Department:-

Income Tax Department raised various objections vide its letter dated 05.10.2017 and the same are narrated below:-

- (I) Office of the Deputy Commissioner of Income Tax Mumbai vide reply letter dated 05.10.2017, submitted a detailed report submitting the objection against the scheme of amalgamation and arrangements between Gabs Investment Pvt. Ltd (GIPL) and Ajanta Pharma Ltd. (APL) and respective share holders. This representation has been forwarded with Prior approval of Principal Commissioner Income Tax (Central)-4. The department observed that 61.17% of shares are held by Agrawal Family Members in APL as on 31.07.2017. Share holding of GIPL is controlled by Agrawal Family Members only.
- (II) The income tax department after considering the facts, the family tree of Agrawal Family, background of the scheme, salient features of the scheme, consideration payable, accounting treatments in the books of APL as per the scheme, financials of GIPL, financial implication of the scheme, the departments has made a valid observation as under.
- (III) The department has articulated that GIPL being a private limited company has to be considered as separate entity and any “assets” of the Pvt. Ltd. company cannot be transferred and distributed directly. The company has to pay the Divided Distribution Tax (DDT) @ 20% and accordingly the DDT will be ₹ 134.16 Crores. This DDT of Rs 134.16 Crores will be loss if this amalgamation scheme is approved.
- (IV) The total cost of acquisition of shares of APL by GIPL is Rs. 48,73,20,332/- as per the submissions made by APL. Further, as per the object mentioned in the MOA of GIPL, the investment and dealing in equity/shares is the business of the company and once the equity is sold in the market the business profit will be acquired by GIPL and the amount will at ₹ 958.34 Crores (₹ 1007.07 Crore - ₹ 48.73 Crore). On this business profit, Income tax @ 30% is payable and accordingly ₹ 287.50 Crores income tax will be payable by the GIPL. Further, in case the applicability of MAT u/s 115JB @ 20% should also be kept in mind, in case the GIPL adopts another method of computation of income. This

- tax of ₹ 287.50 Crores will be lost if this amalgamation scheme is approved by the NCLT Mumbai.
- (V) In view of the above computation, total loss to the revenue will be approximately ₹ 421.66 Crores, if this amalgamation Scheme is approved.
- (VI) The department has further argued that in view of GAAR provisions, the scheme of amalgamation is a deliberate measure to avoid tax burden by using the via media of NCLT and this scheme is purely Impermissible Avoidance Agreement (IAA) and should not be allowed by the NCLT.
- (VII) The proposed scheme of arrangement is nothing but Round trip financing which includes transfer of funds among the parties to the arrangements through the series of transactions.

22. Important provisions of the Scheme:-

- (a) The transferee company shall, without any application, act or deed, issue and allot equity shares, credited as fully paid up, to the extent indicated below, to the members of Transferor Company holding fully paid up equity shares of Transferor Company and whose names appear in the register of members of the Transferor Company as on the Record Date, or to such of their respective heirs, executors, administrators or other legal representatives or other successors in title as may be recognized by the Board of Directors of the Transferor Company/Transferee Company in the following proportion: “83,92,262 fully paid up equity share of Rs 2 each of the Transferee Company shall be issued and allotted as fully paid up to the equity shareholders of the Transferor Company in proportion of their holding in the Transferor Company”.
- (b) The equity shares of the Transferee Company held by the Transferor Company shall stand cancelled in accordance with Clause 7.1 of the Scheme and as a result equivalent equity share capital of the Transferee Company and the book value of investments held by the Transferor Company in the Transferee Company recorded as per Clause 8.1 above shall stand cancelled.

- (c) The utilization of Securities Premium Account, as mentioned above in Clause 8.5 shall be effected as an integral part of the Scheme itself in accordance with the provisions of Section 52 and Section 66 of the Act without having to follow the process under Section 66 of the Act separately and the order of the Tribunal for the purpose of confirming the reduction. The reduction would not involve either a diminution of liability in respect of unpaid share capital or payment of paid-up share capital to the shareholders and the provisions of Section 66 of the Act will not be applicable.
- (d) It is proposed in the Scheme that the Transferee Company shall, without any application, act or deed, issue and allot equity shares to the share holders of Gabs. On the scheme becoming effective, the Transferor Company shall stand dissolved without being wound-up.
- (e) The transferor company holds 83,92,262 equity shares of the transferee company and pursuant to the merger, the transferee company shall issue the same number of New Equity Shares i.e. 83,92,262 to the shareholders of the Transferor Company.
- (f) The new equity shares shall rank pari-passu in all respects including dividend, with the existing equity shares of Transferee Company.
- (g) The New Equity Shares of the Transferee Company shall be listed and/ or admitted to trading on the Stock Exchanges on which the existing equity shares of the Transferee Company are listed at that time.

23. Observations of the Bench:-

Upon perusal of the documents submitted, written submissions made by the counsel on behalf of the petitioner companies, Judgments relied upon by the Counsel, Bench made the following observations.

- (a.) Gabs Investments Pvt. Ltd (Gabs) was incorporated on 04.01.1995, and Ajanta Pharma Ltd. (APL) was incorporated on 31.12.1975. The petitioner / transferor company is engaged in the business of making investments and hold shares and primarily holds shares in the Transferee Company. The main object of Gabs is to carry on the business as an Investment Company.

Gabs have been purchasing share of the APL in the secondary market at various points of time and at various prices.

- (b.) The issued, subscribed and paid up capital of Gabs as on 31/03/2016 was 18,410 equity shares of ₹ 10 each amounting to ₹ 184,100/- and as on 31/03/2017, was 19,110 equity shares of ₹ 10 each amounting to ₹ 1,91,100. The bench has also noted that Gabs has passed a board resolution on 18.03.2017 for the proposed merger of the company into APL, whereas on the same day 700 equity shares at a value of ₹ 8,00,000/- per share was allotted as right issue. The Petitioner Company annexed a copy of the Audited Statements of Account as on 31st March, 2017 and provisional financial statements as on 30th June, 2017 respectively. Upon perusal of the balance sheet for the year ended 31, March 2017, it is observed that the company had issued 700 equity shares of ₹ 10 each on 18, March 2017, whereas reserves and surplus as on 31, March 2016, was (-) ₹ 2,25,51,523 and as on 31 March, 2017 was ₹ 58,84,37,074 predominantly in view of securities premium account. Further, perusal of the Balance Sheet, it is noted that the share holders of Gabs are namely Mrs. Manisha Y. Agrawal, Mrs. Richa R. Agrawal, Mrs. Smriti R. Agrawal, Mr. Ayush M. Agrawal. It is stated in the scheme that Equity shares held by Gabs would be cancelled and new shares will be allotted to the share holders of Gabs.
25. It is also noted that Gabs has passed a board resolution on 18.03.2017 for the proposed merger of the company into APL, whereas on the same day 700 equity shares at a value of ₹ 8,00,000/- per share was allotted i.e. after the appointed date fixed as 01st April 2016. It is also noted from the cash flow statements for the year ended 31 March 2017 an amount of ₹ 56 Crores was received through rights issue, which translates into ₹ 8,00,000 per share and the breakup is ₹ 10 towards face value and ₹ 7,99,990 towards premium and ₹55,99,93,000/- was credited towards securities premium account and the securities premium amount is equal to/multiple of 273 times of EPS as on 31.03.2016.
26. Though the share capital of the Gabs was only ₹ 1,84,100 and ₹ 1,91,100 as at 31.03.2016 and 31.03.2017 respectively, the company had investment in APL amounting to ₹ 48.73 Crores, i.e. the book value.

27. However, for the 700 shares issued by the transferor company on 18.03.2017 i.e. after the cutoff date/appointed date of 01.04.2016 the treatment for the same has not been explained in the scheme/petition therefore these 700 shares will not get any shares from the transferee company and it may continue to remain with the share holders of the Transferor Company even after Winding up/dissolution of the Transferor Company which is practically not the case. It is also stated in the scheme that with effect from the appointed date, all the assets and liabilities appearing in the books of account of the transferor company shall stand transferred to and vested in the transferee company. Further it is stated that the equity shares of the transferee company held by the transferor company shall stand cancelled in accordance with clause 7.1 of the scheme. However, treatment for these 700 shares allotted by way of rights issue on 18.03.2017 and amount shown under the head securities premium account have also not been explained.
28. Gabs received divided income from Ajanta Pharma Ltd. amounting ₹ 11,74,91,668 for the year ended 31, March 2016 and ₹ 10,90,99,406 for the year ended 31, March 2017.
29. Gabs generated total revenue of ₹ 11.88 Crores as at 31.03.2016 and ₹ 11.36 Crores as at 31.03.2017 (more than 92% of dividend income from APL), and for the quarter ended 30.06.2017, total revenue generated was only ₹6,03,233/- from interest on fixed deposit.
30. Gabs is not a subsidiary of any company including APL.
31. Investments in APL is appearing in the balance sheet of Gabs since FY ended 31.03.2009, and shown as 3,98,930 shares of APL at the market value of ₹ 51.35 and total value is shown as ₹ 2,07,45,057 thus, it can be understood that Gabs investment in APL started only in the financial year 2009 and the company had been incurring loss since financial year 2010-11.
- (a.) The submissions of the petitioner company i.e. Gabs is a promoter company of APL/ group holding company with the sole object of holding investments in APL is factually incorrect in view of the facts as discussed

above. Gabs have been purchasing shares of APL in the open market since 2nd December 2008.

(b.) From the above analysis/facts it is noted that Gabs did not subscribe at the time of formation of APL or at the time of IPO of APL. Gabs started acquiring shares of APL only in the secondary market since 02.12.2008 even in small quantity of 100 shares on 01.01.2009 and 02.01.2009 at ₹ 54.69 and ₹ 54.55 per share. As on 03.09.2013, cumulative holding of Gabs in APL was 22,37,930 equity shares and because of bonus issue by APL on 19.09.2013 (for 2 share: 1 Share) Gabs was allotted 11,18,965 equity shares thereby total holding went upto 33,56,905 equity shares. Further because of shares split (share of ₹ 5 split into ₹ 2) on 23.03.2015 it was allotted another 50,35,357 equity shares thereby totaling to 83,92,262 equity shares of APL and total investment for all the shares was only ₹ 48.73 Crores approximately.

32. **Gabs is holding 83,92,262 equity shares of ₹ 2 each fully paid up in APL representing about 9.54% of the total paid up share capital of APL and as per the balance sheet, as at 31.03.2017, the book value was only ₹ 48.73 Crores and the market value was ₹ 1477.50 Crores as per the records submitted.**

33. Profit and Loss, Reserves and Surplus and Earnings per Share of Gabs since 2010 upto the appointed date are given in the Table below to understand the financial strength of Gabs.

For the year ended on 31 st March	Profit/Loss (₹)	Reserves & Surplus (₹)	Earnings Per Share (₹)
2016	5,38,08,747	(-) 225,51,523	2,923
2015	(-) 3,62,31,693	(-) 401,28,577	(-) 1968.04
2014	(-)2,57,74,824	(-) 401,28,577	(-)1,400.04
2013	(-)1,40,00,944	(-) 143,53,753	(-)760.51
2012	(-)19,80,969	(-)352,809	(-)107.60

2011	(-)16,28,160	16,28,160	76.13
2010	226,679	226,679	38.25

From the above analysis of the balance sheet and profit and loss account of Gabs, it is observed that the company has been incurring loss from the financial year 31.03.2011, its reserves and surplus is also (-) from FY 2012 upto 2015 and EPS is also (-) since then. Securities Premium account amounting to approximately ₹ 55.99 Crores. Further it is also noted that EPS of ₹ 10 each is ₹2,766 as on 31.03.2017. Gabs obtained ₹ 45 Crores as long term borrowings from Citicorp Finance India Ltd. and ₹ 15 Crores from Family Credit Ltd. as at 31.03.2016.

34. From the analysis of the annual report of APL for the year 2016-17, it is noted under the heading share holding of promoters, Gabs Investments Pvt. Ltd was holding 83,92,262 equity shares amounting to 9.54% of total shares of APL, Ganga Exports represented* by Mrs. Manisha Y Agrawal, Ayush M Agrawal and Mrs. Richa Agrawal had 51,37,500 equity shares amounting to 5.84% of shares and Mr. Aayush M. Agrawal, trustee Aayush Agrawal Trust was holding 1,26,60,000 shares amounting to 14.39%, totaling to approx. 30% of the total paid up share capital of APL. It is also noted that Mrs. Manisha Y. Agrawal had 16,78,912 shares, Mrs. Richa R. Agrawal had 16,57,500 shares and Mrs. Smriti R. Agrawal had 16,55,302 shares as at 31.03.2016, totaling to approximately 24%.

* **All these 3 share holders are also share holders of Gabs.**

35. Total number of share holders of APL as on 31.03.2017 is 38,075.
36. The rationale given in the scheme among others things are the proposed amalgamation of the transferor company into Transferee Company by the scheme, as a result of which the share holders of the transferor company viz. the promoters of the transferor company (who are also the promoters of the transferee company) shall directly hold shares in the transferee company

and the promoters would continue to hold the same percentage of shares in the Transferee company pre and post merger.

37. The above rationale presented by the petitioner company is without any Justification. Petitioner has to comply with all applicable laws. By this scheme of amalgamation and arrangement Gabs/shareholders of Gabs are avoiding full tax liability which is strenuously objected by the Income Tax Department as discussed Supra. Any transfer of property from one entity to other has to be treated as sale/transfer and the same has to comply with applicable provisions of law including applicable tax liability, stamp duty. In the instant case, the transferor is a private Ltd. company which is a separate legal entity and any transfer of shares to other entity including individuals from the legal entity would attract applicable tax liability. Therefore, we are of the considered view that the Bench can sanction/approve the scheme only if it complies with all applicable provisions of the Act, Rules and if the scheme is in the interest of public, shareholder etc. However, the petitioner companies did not provide details with regard to compliance of tax liability raised by the Income Tax Department, their undertaking to pay the huge tax liability as pointed out by the income department etc.
38. From the above analysis of the financials of Gabs, the bench noted that with an equity share capital of only ₹ 1,91,100 the promoters/share holders of Gabs who are also the common promoters of APL, by way of this proposed scheme of amalgamation and arrangement would get the shares of APL worth ₹1477.50 Crores (market value as on 31.03.2017) and that too without paying any Income Tax, Stamp Duty etc. for which the bench is of the considered view that the same is not in the public interest, thousands of shareholders of Transferee company especially retail shareholders. The market value of the same number of shares as at 31.03.2016 was ₹ 1,182.59 Crores.
39. Since Income Tax department (IT) has raised strong objections about tax benefit, tax avoidance, tax loss as discussed above, we are of the opinion that it would be advisable to settle the important/crucial issue of huge tax liability before sanctioning the scheme by the Tribunal rather than disputing the same at a later stage after the scheme is sanctioned by the Tribunal. It is

mandatory as per section 230 (5) of the Companies Act, 2013, a notice under sub section (3) along with all the documents in such form shall also be sent to central government, Income Tax Authorities, RBI, SEBI, ROC, stock exchanges, OL, CCI and other Sectoral regulators or Authorities for their representations. In response to the notice received as per above section the Income Tax Department has raised valid observation/objections as detailed above, we find merit in the objections raised by Income Tax Department and we are also inclined to agree with the objections raised.

40. As discussed *supra* the financials of Gabs are also not strong rather it had weak financials from the financial year 2011 upto 2015. Whereas by this proposed scheme of Amalgamation and Arrangement the 4 common promoters of both transferor and transferee company would get 83,92,262 equity shares of APL and the market value as on the appointed date works out to ₹1,477 Crores approx. It is quite interesting to observe that on an investment of approx ₹ 48.70 Crores the Common Promoters would get market value of ₹ 1477 Crores without paying any income tax. Considering the above facts and circumstances, analysis of balance sheet, profit and loss account for various years, we are of the considered view that the proposed scheme of Amalgamation and Arrangement would benefit only the common promoters of both transferor and transferee companies and the scheme is devised only to benefit the common promoters and it does not serve any public interest as envisaged, more so unfair advantage flows only to the common promoters therefore, the bench is not inclined to sanction the scheme as proposed.

41. **To buttress the argument the petitioner companies have relied upon various Judgments/Orders viz.**

- (i) Judgment in company petition No 215/1978 between A.W. Figgis & Co. Pvt. Ltd decided by the Hon'ble High Court of Calcutta on 31st July 1978.
- (ii) Hon'ble Supreme Court in the case of Mihir H Mafatlal V/s Mafatlal Industries Limited (AIR 1997 SC 506) had held that the court has neither the expertise nor the Jurisdiction to delve deep into the commercial wisdom.

- (iii) Azadi Bachao Andolan decided by Hon'ble Supreme Court in the year October 2003.
 - (iv) Unichem Laboratories (AVM Capital Services Pvt. Ltd) decided by the Hon'ble High Court of Judicature at Bombay in the year July 2012,
 - (v) Commissioner of Income Tax V/s Sesa Goa Ltd. in Company Application No. 17/2012, decided the Hon'ble High Court of Bombay at Goa on 06.11.2012.
 - (vi) Cairn Vedanta decided by NCLT Mumbai Bench in the Month of March 2017,
 - (vii) Trinity India Ltd with Ring Plus Aqua Ltd. in Company Scheme Petition No. 105/2014 decided by the Hon'ble High court of Judicature at Bombay on 09.05.2014.
 - (viii) Vodafone International Holdings Vs Union of India and Ors.
42. Upon perusal of the Judgment in the case of Sesa Goa Ltd., the prayer sought is to implead Income Tax Authority as necessary party and the Hon'ble High Court held that the applicants have no locus to intervene in the above company petition and dismissed.
43. In the case of Cairn India Ltd. the Income Tax Department filed objections to sanctioning the scheme since huge demands of Tax have remained outstanding against the Transferor Company and the petitioner company has defaulted in payment of taxes from the Assessment Years 1990 to 2000 to the Assessment Year 2013-14 and the transferor company and transferee should be directed to clear outstanding income tax dues before granting the scheme of amalgamation.
44. In the case of Trinity India Ltd., the issue involved / decided is relating to scrutiny of the accounts of the company which is not the issue in the instant scheme matter.
45. In the case of AVM Capital Services Private Limited, an objector has raised various issues such as the Capital Gains Tax, to implead the Income Tax Authority as a necessary party.

46. From the above it is also noted that the Judgments relied upon by the petitioner companies are not applicable in the facts and circumstances of the instant scheme.
47. At this juncture we would like to rely upon the recent Judgment of the Hon'ble NCLAT in the matter of Wiki Kids Ltd. V/s Aventel Ltd decided on 21.12.2017 in Company Appeal (AT) No. 285 of 2017, wherein the Hon'ble NCLAT held that if the scheme is not in public interest, the same can be rejected by NCLT. Accordingly, relying upon the above Judgment of Hon'ble NCLAT, as discussed *supra* we hold that the proposed scheme is devised only for the benefit of the few common promoters/ shareholders of both the petitioner companies and no larger public interest is being served (total number of share holders of APL as on 31.03.2017 is 38,075), and also huge amount of tax loss would occur to the Government's exchequer.
48. It is an admitted legal position that Gabs is holdings shares in APL and not the 4 individual share holders whose names are mentioned above. Therefore any allotment of the shares other than to the original share holders would amount to transfer/sale of shares and that would attract applicable provisions of tax. In this case, the Income tax department has rightly quoted various provisions, objections and huge loss to exchequer etc. In the instant case shares of the transferee company were not directly allotted to individual share holders of Transferor Company, or it is not a bonus shares to be allotted to the individual share holders of the transferor company, nor it is transmission of shares to the individual share holders of the transferor company. Therefore we are also inclined to agree with the objection raised by the Income Tax Department. Any scheme of amalgamation/merger has to be in compliance with the Section 2(1B) of the Income Tax 1961. However, in the instant case, IT Department has raised serious objections not to sanction the scheme and highlighted huge tax loss to the government.
49. From the records it is observed that the transferor company Gabs Investments Pvt. Ltd is holding approximately 9.54% of the equity shares of APL and its major income ranging from 92%-99% is the divided income from APL. As discussed *supra* Gabs has only 4 share holders each having 25% paid up share capital of Gabs. Further as discussed *supra*, all these 4

share holders and the Gabs itself holding shares ranging from 24% -30% shares of APL during the financial year ended 31.03.2016 & 2017 respectively. As per the proposed scheme of amalgamations and arrangement shares of transferee company will be allotted only to these 4 share holders of Gabs who are nothing but promoters of the transferee company/common promoters of both transferor and transferee company.

50. We have also taken into consideration, objections/representation of Income Tax Department and total loss of revenue to the exchequer amounting to approximately ₹421.66 Crores (₹ 287.50 Crores + ₹134.16 Crores), the proposed scheme is a deliberate measure to avoid tax burden, it results directly and indirectly, in the misuse or abuse of the provisions of IT Act etc. As discussed *supra*, no provision is also made with regard to open offer to be made by the promoters of Gabs.
51. Incidentally the bench also noted that the common Promoters of petitioner companies are prima-facie required to comply with the provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011. As per the report of the Income Tax Department, the proposed scheme would amount to transfer/sale of shares.
- 52. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011):-**
- a) As per the information available, Agrawal Family hold 61.17% shares in APL as on 31.07.2017. The same Agrawal family holds 100% shares in transferor company-Gabs. Gabs in turn hold 9.54% of equity share capital in APL. As per Regulation -3 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011(SAST Reg.), no acquirer shall acquire shares or voting rights in a target company which taken together with shares are voting rights, if any, held by him and by *persons acting in concert* with him in such target company, *entitle them to exercise 25% or more of the voting rights* in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

- b) No acquirer, who together with persons acting in concert with him, has **acquired and holds** in accordance with these regulations shares or voting rights in a target company **entitling them to exercise twenty five percent or more of the voting rights** in the target company but less than the maximum permissible non public shareholding, shall acquire within any financial year additional shares or voting rights in such target company **entitling them to exercise more than five percent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company** in accordance with these regulations.
- c) As per Regulations -7 of SAST Reg. the open offer for acquiring shares to be made by the acquirer and persons acting in concert with him under regulation 3 & 4 **shall be for at least 26% of total shares of the target company**. Further as per Regulation 8, the open offer for acquiring shares under regulations 3, 4, 5 or 6 shall be made at a **price not lower than the price determined** in accordance with sub regulation 2 or 3, as the case may be.
- d) From the available data, information as discussed above the Agrawal Family, persons acting in concert have to comply with either Regulation 3(1) or 3(2) of SAST Reg. In this scheme of Amalgamation and Arrangement, no such provision is made and if the Bench sanctions the scheme as proposed, the common promoters of the petitioners company will escape from complying with the Takeover Regulations and no financial outflow will be from these persons acting in concert.
53. Though the counsel in the written note on arguments dated Nil submitted in the month of July 2018 that the scheme would achieve greater efficiency of promoter shareholding in APL and will remove one unnecessary layer of shareholding-meeting one of the objectives of the Companies Act 2013 - namely reduction in the number of layers of companies in shareholding across companies. However, the same is not in compliance with the provisions of Income Tax Act 1961 and of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011.

54. RD, RoC, Stock Exchanges, SEBI have not offered their comments/inputs with regard to huge benefit of more than ₹ 1,400 Crores flowing only to the few common promoters of the petitioners companies as observed by this Bench.
55. Finally the Bench holds that the scheme is devised mainly to benefit the four share holders of Gabs who are also the promoters of APL (common promoters). In addition to the above, by this scheme, huge tax liability is being avoided, the scheme does not provide for complying with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011. In view of the above infirmities, no benefit is accruing to the thousands of shareholders of APL especially the retail shares holders of the transferee company, (the shareholders of APL as on 31.03.2017 was 38075) therefore, the scheme appears to be unfair, unreasonable and is not in the public interest and as such the Bench is of the considered view not to sanction the scheme as proposed.

SD/-

RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

SD/-

B.S.V. PRAKASH KUMAR
MEMBER (JUDICIAL)

Sec (PS)