THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

CSA NO. 719 OF 2018

In the matter of the Companies Act, 2013;

-And-

In the matter of Sections 230 to 232 of the Companies Act, 2013;

-And-

In the matter of the Scheme of Arrangement between East West Pipeline Limited and Pipeline Infrastructure Private Limited

Pipeline Infrastructure Private Limited
A company incorporated under the provisions of the Companies Act, 2013 having its registered office at Maker Maxity, 4th North Avenue, 2nd Floor, Kala Nagar, BKC, Mumbai 400 051, Maharashtra

...Applicant Company

Order Delivered on: 05.09.2018

CORAM:

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

For the Petitioner: Senior Counsel Mr. Janak Dwarkadas a/w Advocate Sidharth Samantaray a/w Advocate Ms. Dhwani Bagdai i/b M/s. Junnarkar & Associates, Advocates for the Applicant Company.

Per B.S.V. Prakash Kumar, Member

ORDER

Order Pronounced on 30.08.2018

1. The Counsel for the Applicant Company submits that the present Scheme is a Scheme of Arrangement between East West Pipeline Limited ('EWPL' or 'the Transferor Company' or 'Demerged Company') and Pipeline Infrastructure Private Limited ('PIPL' or 'the Transferee Company' or 'Resulting Company' or 'Applicant Company').

2. The counsel for the Applicant Company states that the directions of this Tribunal are sought under Section 230 of the Companies Act, 2013 with respect to the Scheme of Arrangement between East West Pipeline Limited and the Applicant Company. The Transferor Company's registered office is situated in the State of Gujarat and the Transferor Company has filed a Company Application (CA (CAA) 92 of 2018) before the Hon'ble National Company Law Tribunal Bench at Ahmedabad. The Learned Advocate for the Applicant Company states that by an Order dated 3rd August 2018, the Application filed by the Transferor Company has been allowed and the Bench at Ahmedabad has, inter-alia, dispensed with the holding of meetings of shareholders and creditors of the Transferor Company.

3. The counsel for the Applicant Company states that the Scheme provides for the transfer of Pipeline Business of the Transferor Company to the Transferee Company. The object of the Transferor Company is to carry on the business of maintaining and operating pipelines and the Transferor Company is presently engaged in transportation of natural gas through pipelines and other activities. The Transferee Company has been incorporated with the object of maintaining and operating pipelines and is empowered to undertake the Pipeline Business of the Transferor Company.

4. A meeting of the Equity Shareholders (2 in number) of the Applicant Company be convened and held at Maker Maxity, 4th North Avenue, 2nd Floor, Kala Nagar, BKC, Mumbai 400 051, Maharashtra on Monday, 8th day of October 2018 at 11:00 a.m., for the purpose of considering, and if thought fit, approving, with or without modification(s), the proposed Scheme of Arrangement between East West Pipeline Limited and Pipeline Infrastructure Private Limited.

5. At least 30 days before the said meeting of the Equity Shareholders of the Applicant Company to be held as aforesaid, a notice convening the said meeting at the place, day, date and time as aforesaid, together with a copy of the Scheme, a copy

of the Statement required to be sent under Section 230(3) of the Companies Act, 2013 and the prescribed form of proxy be sent by hand delivery to all the Equity Shareholders of the Applicant Company at their respective registered or last known addresses as per record of the Applicant Company.

6. At least 30 days before the meeting of the Equity Shareholders of the Applicant Company to be held as aforesaid, a notice convening the said meeting, at the place, day, date and time aforesaid and stating that copies of the Scheme of Amalgamation and the statement required to be furnished pursuant to Section 230(3) of the Companies Act, 2013 and form of proxy can be obtained free of charge at the registered office of the Applicant Company as aforesaid shall also be published in two newspapers namely, "Economic Times" in English and Marathi translation thereof in "Navshakti", both circulating in Mumbai.

7. Mr. M. Sundar, Director of the Applicant Company shall be the Chairperson of the said meeting of Equity Shareholders and failing him, Mr. Hariharan Mahadevan, Director of the Applicant Company and failing him, Mr. EVS Rao, Director of the Applicant Company shall be the alternate Chairperson of the said meeting of Equity Shareholders.

8. The quorum for the meeting of Equity Shareholders shall be 2 (two) members personally present.

9. Voting at the meeting shall be by way of poll and Shri GBB Babuji, Practicing Company Secretary and failing him, Shri Atmaram Dhoundiyal, Practicing Company Secretary shall be the Scrutinizer for the said meeting of Equity Shareholders.

10. Voting by proxy/authorised representative in case of a body corporate shall be permitted, provided that a proxy in the prescribed form/authorization duly signed by the person entitled to attend and vote at the meeting, is filed with the Applicant Company at its registered office at Maker Maxity, 4th North Avenue, 2nd Floor, Kala Nagar, BKC, Mumbai 400 051, not later than 48 hours before the aforesaid meeting as required under

Rule 10 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

11. The Chairperson of the meeting to file an Affidavit before the Tribunal not less than 7 (seven) days before the date fixed for the meeting to report to this Tribunal that the directions regarding the issue and service of notice have been duly complied with.

12. The Chairperson or as the case may be, the Alternate Chairperson shall prepare and submit to the Tribunal a report of the result of the meeting of Equity Shareholders within 3 (three) days after the conclusion of the meeting.

13. The question of convening and holding of the meeting of Preference Shareholders of the Applicant Company does not arise since there are no preference shareholders of the Applicant Company as stated in paragraph No. 13 of the Company Scheme Application.

14. The question of convening and holding of the meeting of Secured Creditors of the Applicant Company does not arise since there are no secured creditors of the Applicant Company as stated in paragraph No. 14 of the Company Scheme Application.

15. The counsel for the Applicant Company submits that the company has received consent by its sole unsecured creditor in writing by way of affidavit to the Company Scheme Application. The affidavit is annexed as Exhibit "K" to the Company Scheme Application.

16. As to this Applicant Company is concerned, it is an entity come into existence on 20th April 2018 with two shareholders namely Reliance Industries Holding Private Limited (RIHPL) having 49,999 shares and one Ritesh Shiyal jointly with RIHPL having one share as on 17th July, 2018.

17. This Scheme of Arrangement is between East West Pipeline Limited (EWPL – Gujarat based company) and Pipeline

Infrastructure Private Limited for the purpose of merging an undertaking of Demerged Company (EWPL) into the Resulting Company (Applicant in this application) with an arrangement of payment of ₹600crores to the Demerged Company and for issual of preference shares by the Resulting Company to the Demerged Company. Though as per law it appears on face as demerger, the Applicant has shown the Demerged Company as Transferor Company and Resulting Company as Transferee Company, which is not the situation in this case because an undertaking of EWPL is proposed to be hived and transferred to the Applicant Company (PIPL). As we all know that if an undertaking of demerged company is transferred to resulting company, it falls within the conspectus of section 232 (1) (b) of the Companies Act 2013, the same being the proposal in this scheme, this applicant company is hereafter directed to coin them as Demerged Company (EWPL) and Resulting Company (PIPL), not as Transferor Company and Transferee Company.

18. Looking at the scheme, it is evident on record as per the Scheme of Arrangement; paid up share capital of the Resulting Company as on 20th April 2018 is of ₹5 lakhs, whereas paid up share capital of the Demerged Company before demerger is around ₹2025crores as on 17th July 2018. As per this Scheme, the definition of Pipeline Business proposed to be merged with Resulting Company means the entire activities and operations of the Demerged Company with respect to transportation of natural gas through its cross-country pipeline called East West Pipeline (EWP) between Kakinada in Andhra Pradesh and Bharuch in Gujarat and related activities as going concern. Now this arrangement is for transfer of this undertaking as going concern to the Resulting Company by hiving it from Demerging Company.

19. In part-III (consideration for transfer, compliance with Tax laws and Accounting Treatment) of the Scheme, the fair value of this Pipeline Business undertaking has been valued at ₹15,200crores, and it has been further stated that the difference between enterprise value and fair value is around

₹1,850crores, and both the parties said to have agreed to be assigned to all the self-generated intangible assets including Pipeline Usage Agreement, being novated as a part of transfer of the Pipeline Business as a going concern. It is also provided that liabilities of ₹16,400crores of the Demerged Company will become part of the Pipeline Business, in addition to it, if there are any further liabilities then that shall also be transferred to this Resulting Company in the event of any additional assets come to the resulting company. The consideration for this transfer as I said earlier, is computed as fair value plus enterprise value aggregating to ₹17,050crores (15,200+1850crores) minus liabilities (₹16,400crores), out of balance ₹650crores, ₹600croes is agreed to be paid by the Applicant Company in cash to the Demerged Company and for remaining ₹50crores, the Applicant Company agreed to allot preference shares to the Demerged Company.

20. Having regard to registration of documentation is concerned, this scheme says that by virtue of this scheme whatever assets, including immovable assets, coming to the Resulting Company shall be deemed as transferred to and vested in Resulting Company, but this is not permissible under law because what all is to be transferred through scheme, the same shall take place as governed by Stamp Act and Registration Act of the respective State, likewise documentation for transfer of assets as per fiscal laws shall be complete before the copy of this scheme is placed before the Registrar of the Company.

21. As to appointed date, it is relevant to know in whose hand net income will be taxable under the Income Tax Act, 1961 and to determine the market value of assets and investments getting transferred under Stamp Act of the respective state in which immovable property is situated.

22. On having seen different interpretations and unending litigation under Companies Act 1956 in determining a date for giving effect to the scheme courts approved and ramifying single date into appointed date, effective date, at times even negating the provisions of Income Tax Act 1961, the Legislature has cleared

it with a mandate u/s 232 (6) of the Companies Act 2013 saying that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date. This has come to do away this evil of ambiguity over appointed date. Under companies Act 1956, it was nowhere said that scheme shall indicate appointed date from which it shall be effective and that it shall be a date not subsequent to the appointed date.

23. By closely reading this section, it is evident that a mandate u/s 232 (6) is that scheme filed before NCLT shall indicate appointed date. It is not said "day" has to be indicated, it is clearly indicated that "date" has to be indicated, and that it shall be present in the scheme before filing it before Tribunal. When it has been specified as "date", it has to be conceived as calendar "date", and it shall not be conceived as contingent upon approval of scheme by NCLT.

24. The logic behind asking appointed date at the time scheme presented before Tribunal is that, appointed date has to be conceived as date from which demerged company undertaking is deemed as transferred to resulting company with all financial implications. And it will come into effect if scheme is approved by NCLT as well as approved by all Regulatory and Sectoral Authorities, or else, that undertaking will continue as part of the demerged company as before.

25. To know the financials of this arrangement, the assets proposed to be transferred to the Resulting Company shall be valued, so that the consideration payable for transfer of the assets can be fixed, then if any share swapping, then to decide swap ratio, like wise to decide transferability of assets or liabilities; stamp duty liability; tax (direct and indirect) liability and loss or gain of Tax benefits by valuation of. So this cut off date taken into consideration for valuation shall be the appointed date, because all the financial implications are dependent upon the cut off date and valuation thereof.

26. A specious argument has been advanced by the applicant counsel that since the shareholders are entitled to decide appointed date, so whatever date given by the shareholders, it alone has to be appointed date. No doubt it is true to some extent that shareholders who take decision specifying a particular date as appointed date, they are at liberty to do so as long it is not against public interest, but such date shall be the date determining the value of the transfer of the asset and its implications, so that shareholders, creditors and all other stake holders will be in a position to know the permutations and combinations of that arrangement, therefore, basing on which they will make up their mind how to go about the scheme. Likewise, the tax authorities as well as stamp duty authorities will be in a position to assess the tax liability as well as stamp payable over such transfer.

27. Let us assume a converse situation that valuation of the asset has been fixed on March 31, 2017, appointed date has been fixed as September 30, 2017, in the meanwhile if any material change has come in between to the asset of the company varying financials of it, what valuation will become relevant for levying stamp duty for transfer, for assessing tax implications, will it be the valuation date or appointed date opted by the company subsequent to valuation? If this is correct, what for appointed date has come into existence? Can it be conceived that appointed date has been mentioned in the statute without any purpose and reason?

28. It is simple common sense, for any financial transaction, price fixation is the determinative for going ahead with transaction. Since appointed date is the effective date for such transfer, the valuation date shall be the appointed date, not otherwise.

29. As per accounting standards, acquisition date is taken into consideration for accounting treatment, in scheme that acquisition date becomes appointed date, because scheme will be effective from appointed date on filing NCLT approval to the scheme before RoC. This effectiveness comes with retrospective effect. For that reason, in this scheme also, like in all other

schemes, it has been mentioned that there will not be any change to the business of the company except running it in ordinary course after valuation, the reason behind it is to ensure no variation to the valuations already computed.

30. Another point for consideration is, whether two dates like appointed date and effective date are really in existence, or is it a myth created? In section 232 (6) of the Act 2013, it is nowhere said that effective date is the date when the scheme approved has been filed before RoC. It is only said that the scheme will become effective from the appointed date with retrospective effect because effectiveness to the scheme comes after the approved scheme filed before RoC. Therefore, there is no effective date, only giving effect to the scheme from the appointed date alone is present. Since scheme at the time of filing itself has to mention appointed date after valuation has been carried, effectiveness of the scheme will always relate back to the appointed date, not otherwise. In view thereof, there won't be any appointed date in future, because scheme always dependent upon the valuation and for valuation of the assets having to be done before presenting scheme, it is inconceivable to visualise appointed date in future.

31. This Demerged Company's profit and loss account and other financial statements show that this company is incurring consistent losses, by seeing its financials, and rationale of this scheme, it is an effort to salvage loss making Demerged Company with a new face by merging its substantial undertaking with this company, for that reason only, it has been said that scheme is being proposed for deleveraging the balance sheet of the Demerged Company, and to attract new investors.

32. The Applicant counsel relied upon Marshall Sons and Co. (India) Ltd. v. Income Tax Officer (1997)2SCC 302 to say that date of amalgamation could be the appointed date when appointed date has been inserted in the scheme of amalgamation. As against this argument, when I have gone through this judgement, I have noticed the ratio decided in the case is as follows:

"14. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with affect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not

only sanctioned the scheme in this case but have also not specified any other date as the date of transfer amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment or shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. The Bank of Upper India Ltd. [A.I.R.1919 P.C.9]."

33. On reading this para, even according to Companies Act 1956, as to fixing appointed date, it must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer, meaning thereby, a particular date has to be given, and it cannot be contingent upon sanctioning of the scheme. It is also said in case appointed date is not given, court is competent to decide it. In the case supra, for date has not been indicated in the scheme, it has been held that date of approval of the scheme could be the appointed date, but it has not been held that appointed date could be future date. To avoid this controversy, now there is only one date for dealing with issues under company law, tax laws and other fiscal laws that is appointed date and that date shall be the date taken as

cut-off date for valuation, so that there won't be any conflict of opinions in calculating consideration and assessing tax.

34. In view thereof, the appointed date is hereby decided as the date on which the demerged undertaking has been valued. As to the argument of the Applicant counsel, that since the NCLT, which dealt with the scheme of demerged company, has approved the scheme leaving it open to the company to decide appointed date in future cannot become ratio to toe the same line by this Bench, because it is against the mandate given in section 232 (6) of the Companies Act 2013.

35. The Applicant Company is directed to serve notice to the Central Government, concerned Income Tax Authority, Petroleum and Natural Gas Regulatory Board and Registrar of Companies alongwith a copy of the notice of meeting of equity shareholders, Statement under Section 230(3) of the Companies Act, 2013 and Scheme of Arrangement with a direction that the authorities shall submit their representations, if any, within a period of 30 days from the date of receipt of such notice to the Tribunal and copy of such representations shall simultaneously be sent to the Applicant Company and in case no representations is received within the stated period of 30 days by the Tribunal, it shall be presumed that the authorities have no representation to make on the proposed Scheme of Arrangement.

36. The Applicant Company to file in the Registry an Affidavit of service as per the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and atleast 7 days before the date of the meeting of shareholders.

SD/-
Ravikumar Duraisamy
Member (Technical)

SD/-
B.S.V. Prakash Kumar
Member (Judicial)