WWW.LEGALERAONLINE.COM

THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH

CA No. 9/2023 & CA No. 29/2023
And
CP (CAA) No.14/Chd/Hry/2022
(2nd Motion)

Under Sections 230 to 232 of the Companies Act, 2013 and Rule 11 of NCLT, 2016

IN THE MATTER OF SCHEME OF AMALGAMATION OF:

NAM Estates Private Limited
with its registered office at
1st Floor, Embassy Point
150, Infantry Road, Bangalore-560052
PAN: AAACN6881H
CIN: U85110KA1995PTC017950

…Amalgamating Company No. 1/ Transferor Company No. 1And

Embassy One Commercial Property Developments Private Limited
with its registered office at
1st Floor, Embassy Point
150, Infantry Road, Bangalore-560052
PAN: AAFCE1051R
CIN: : U70109KA2018PTC135028

…Amalgamating Company No. 2/ Transferor Company No. 2With

Indiabulls Real Estate Limited
with its registered office at
Plot No. 448-451, Udyog Vihar
Phase-V, Gurugram
PAN: AABCI5194F
CIN: L45101HR2006PLC095409

…Petitioner Company/Amalgamated Company/Transferee Company

WWW.LEGALERAONLINE.COM

Order delivered on: 09.05.2023

Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

Present : -

For the Applicant Company : Ms. Munisha Gandhi, Senior Advocate
Mr. Vaibhav Sharma, Advocate

For the Amalgamating Companies No. 1 and 2 : Mr. Anand Chibbar, Senior Advocate
Ms. Misha Kumar, Advocate
Mr. Vaibhav Sahni, Advocate

For the applicant in CA No. 9/2023 and CA No. 29/2023 : Mr. K.V. Girish, Advocate

For the Income Tax Department :Mr. Yogesh Putney, Senior Standing Counsel

PER: SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

JUDGMENT

CP (CAA) No.14/Chd/Hry/2022 & CA No. 9/2023 & CA No. 29/2023

This is a second motion company petition filed by the petitioner Companies, namely; **Indiabulls Real Estate Limited** (for short hereinafter referred to as Amalgamated Company/Petitioner Company), under Section 230-232 of CompaniesAct, 2013 (the Act) and other applicable provisions of the Act read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (the Rules) in relation to the Scheme of Amalgamation between **NAM Estate Private Limited** (for short

WWW.LEGALERAONLINE.COM

hereinafter referred to as Amalgamating Company No. 1/Non-Petitioner Company No. 1); **Embassy One Commercial Property Developments Private Limited** (for short hereinafter referred to as Amalgamating Company No. 2/Non-Petitioner Company No. 2); with **Indiabulls Real Estate Limited** (for short hereinafter referred to as Amalgamating Company/Petitioner Company).

2. The Petitioner Company has prayed for sanctioning of the Scheme of Amalgamation between the respective companies. The said Scheme is attached as Annexure A-1 of the petition.

3. The first motion application seeking directions for dispensing with the requirement for convening the meeting of the Secured and Unsecured Creditors of the Applicant Company and to convene the meetings of Equity Shareholders of Applicant Company was filed before this Tribunal by Company Application No.CA (CAA) No. 35/Chd/Hry/2021 and based on such application, necessary directions were issued on 23.12.2021. In the order dated 23.12.2021, the meeting of the Secured & Un-secured creditors of Applicant Company was dispensed with for the reasons mentioned in the aforesaid order and meetings of Equity Shareholders of Applicant Company were to be convened on 12.02.2022.

4. In compliance of the directions issued by this Tribunal, the Chairperson, Alternate Chairperson and Scrutinizer were also appointed, and they have filed their reports which are as under:

WWW.LEGALERAONLINE.COM

Sr. No.	Meetings of	Chairpersons/Alternate Chairperson/Scrutinizer	Diary No.	Date of report of Chairperson	Date of meeting
1.	Equity Shareholders of Applicant Company	Justice Mr. R.P. Nagrath (Retd.), Chairperson, Mr. Prateek Gupta, Advocate Alternate Chairperson Mr. Rohit Garg, Chartered Accountant, Scrutinizer	Dairy No. 1132 dated 17.02.2022	12.02.2022	. 12.02.2022

As per Chairperson's Reports, the Equity Shareholders of Applicant Company have passed by 99.9987% out of the total shareholders present and voting in the meeting.

5. The main objects, date of incorporation, authorized and paid-up share capital,and the rationale of the Scheme have been discussed in detail in the order dated 23.12.2021.

6. In the second motion proceedings, certain directions were issued by this Tribunalby order dated 29.04.2022, and the same were compiled by filing affidavits by Diary No. 00293/4 dated 22.07.2022. The notice of hearing was published by Petitioner Companies in "Financial Express" (English) and "Jansatta" (Hindi), both in Delhi NCR Edition on 08.05.2022 and the original copies of the newspapers are attached as Annexure A-1 and A-2 of the aforesaid affidavit. It has also stated in the affidavit that

WWW.LEGALERAONLINE.COM

copies of notices were served upon the (1) Central Government through the Regional Director (Northern Region), Ministry of Corporate Affairs; (2) The Concerned Registrarof Companies (3) The Official Liquidator attached to Punjab and Haryana High Court and (4) The jurisdictional Income Tax Authorities, (5) Securities and Exchange Board of India (6) Bombay Stock Exchange (7) National Stock Exchange by way of speed post. Original Postal Receipts along with tracking reports evidencing service of notices are attached as Annexure A-3 of the aforesaid affidavit.

7. It is deposed by the authorized signatory of the Petitioner company that till date, no objection to the scheme has been received by the petitioner-Company or the advocate on behalf of the petitioner-Company on any of the addresses as mentioned in the notice of hearing. The aforesaid affidavit has been filed by Diary No. 00293/4 dated 22.07.2022.

8. The Petitioner Companies have also attached a letter dated 24.02.2021 issued by the Competition Commission of India, wherein it has been stated that the proposed combination is not likely to have any appreciable adverse effect on competition in India in any relevant market(s) and the proposed combination is approved under Section 31(1) of the Competition Commission Act, 2002. The aforesaid letter dated 24.02.2021 is attached as Annexure A-25 of the petition.

9. The certificate of the Statutory Auditors with respect to the Scheme between respective companies to the effect that the accounting treatment proposed in the Scheme is in compliance with applicable Indian Accounting Standards (Ind AS) as specified in Section 133 of the Act, read with rules thereunder and other Generally

WWW.LEGALERAONLINE.COM

Accepted Accounting Principles are attached as Annexure A-7, A-13 and A-19 of thepetition.

10. OBJECTOR

10.1.1 An application bearing CA No. 9 of 2023 has been filed by Shri Tejo Ratna Kongara for the substitution of an intervenor in place of Sh. Dhanekula Dharanish in CA No. 192 of 2022. It is submitted that the applicant has purchased 20,100 equity shares of the petitioner company, i.e. Indiabulls Real Estate Limited, which was previously held by Sh. Dhanekula Dharanish for a consideration of Rs. 18,33,120/- i.e. Rs. 91.20 per equity share. The applicant is bound to pursue all rights and interests in respect to 20,100 equity shares. The short notes on the maintainability of CA No. 9 of 2023 have been filed by the applicant, wherein the following objections to the scheme of amalgamation have been raised:-

i. Deliberate Suppression of material information in the scheme documents to the shareholders of India Bulls Real Estate Limited.

ii. Lack of due diligence in respect of "NAM Internal Restructuring".

iii. Non-Disclosure of the assets, liabilities, and valuation of the Transferor Embassy Group Companies.

iv. Non-Disclosure of material litigation significantly impacting the valuation of specified Company No. 2 under the Scheme Embassy East Business Park Private Limited.

10.1.2 It is further submitted that the proper valuations of the amalgamating Embassy Group Companies will only result in a lesser number of equity shares of

WWW.LEGALERAONLINE.COM

IBREL exchanged as consideration under the scheme and ultimately prevent diminishing the value of all Shareholders of IBREL. The locus of minority shareholders seeking scrutiny of the valuations in the scheme continues to subsist even on the transfer of shares from Sh. Dharanish to the applicant. The SEBI, by order dated 15.12.2022, has also observed that separate disclosures were not made in respect to assets and liabilities of the entities (Including Embassy One Developers Private Limited, Embassy East Business Park Private Limited and Summits Development Private Limited) whose shareholding was transferred to NAM as a part of internal restructuring. The applicant has also raised various other objections with regard to the pendency of litigation pertaining to the lease deed and valuation of the property of Embassy East Business Park Private Limited without any project proposal, building clearance or construction approval. The contention of the petitioner that the applicant and Sh. Dharnish does not meet the threshold limit of 10% of shareholding for raising objections as stipulated under the proviso to Section 230(4) of the Companies Act, 2013 is not applicable in the present case where the proposed scheme has suppressed material information and applied distorted valuation. Reliance is placed on the decision of the Hon'ble NCLAT in the case titled ***Ankit Mittal v Ankita Pratishtan*** Ltd. Company Appeal (AT) No. 238 of 2018:

> *"33. We have considered the arguments of the learned counsel for the Respondent. As regards the filing of appeal by appellant is concerned we have decided the issue in para 31 above. As regards the objection raised by the Respondent regarding 10% shareholding or having an outstanding debt less not than 5% of the total outstanding debt is concerned we are of the opinion that the law prescribed that the objectors must have 10% limit. But when matter is before the Tribunal it is duty bound to see that all the*

WWW.LEGALERAONLINE.COM

procedures are duly followed and the scheme is conscionable. The issue raised by any body even if not eligible or even otherwise the Tribunal will have a duty to look into the issue so as to see whether the scheme as a whole is also found to be just, fair, conscionable and reasonable inter alia from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant. The Tribunal also has to see that the scheme of amalgamation if the same is prejudicial to the Company Appeal (AT) No.238 of 2018 interest of a particular class who may not be able to meet the threshold limit to see the scheme but it may be a pointer enough for the Tribunal to see that the scheme may be loaded against the interest of the objectors."

10.1.3 The petitioner company has filed a short submission by Diary No. 00293/13 dated 30.01.2023 on the maintainability of the present application. It is submitted that the previous Intervenor/Objector has ceased to be a shareholder of Indiabulls Real Estate Limited. The subsequent purchaser has sufficient knowledge of the scheme and has chosen to purchase the shares of the company. It is contended that the shares have been purchased with the sole motivation of disrupting the scheme, as it has already been passed by 99.9987% of the shareholders. The Petitioner Company is a publicly listed company andhas no control over who acquires its share. The subsequent buyer of the shares cannot attain locus by its substitution. The previous shareholder had merely 0.003% of the total shareholding of the company, which is below the prescribed threshold limit of 10% for raising an objection under Section 230(4) of the Companies Act, 2013. It is further submitted that all the allegations levelled by the previous shareholders have been dealt by the Security Board Exchange of India (SEBI), and the SEBI has made observations with regard to the non-disclosure ofthe assets and liabilities of certain group companies whose shareholding was transferred to the Amalgamating Company No. 1, as part of an internal

WWW.LEGALERAONLINE.COM

restructuring. The Petitioner Company have already made the desired disclosure of Assets and Liabilities of the aforesaid group companies and also placed the same on Company's website, and also filed the same with both the BSE Limited and the National Stock Exchange of India Limited. The sole concern and Grievances of the minority shareholder already stand addressed by the SEBI by order dated 15.12.2022.

10.1.4 As regards the allegations made by the minority shareholder, the following submissions have been made:

> *"9. That it is submitted that averments made in Para 9 of the Application are false and baseless. Neither Mr. Reddy Veeranna who is the plaintiff in the Com. O.s. 234/2022 nor Manyata Group has any interest in Concord and in any event no material or other record has been placed to substantiate such a claim. It is further submitted that Mr. Reddy Veeranna had approached the Hon'ble NCLT, Bangalore Bench as submitted above seeking similar relief and the Amalgamating Company was ordered to serve copy of the Merger petition. Subsequently, he had chosen not to make any representations on this to the Hon'ble Tribunal and the Hon'ble NCLT Bengaluru Bench has subsequently approved the Scheme of Amalgamation. The civil suit mentioned is separately being contested on merits and is sub judice. Further, it is reiterated that this is a frivolous litigation as Mr. Reddy Veeranna has not placed any document on record to substantiate his claim and allegations.*
>
> *12-14. In response to Paras 12-14, it is submitted that the contents of the said paras are denied. The litigation of companies that are not before this Hon ble Tribunal seeking sanction to a scheme is irrelevant to the lis at hand. IREL is given to understand that the Amalgamating Companies have always complied with terms of agreement dated 07.06.2007. It is submitted that whether there was violation of the terms of the lease it is for KIADB to assert and KIADB in its statement dated 19/4/2022 filed with Hon'ble NCLT Bengaluru has also reiterated the same. The Hon 'ble NCLT Bengaluru also, in Its order dated 22 April 2022, has observed that the Scheme does not take away the right of KIADB or any other authority or confer any additional right to the*

WWW.LEGALERAONLINE.COM

amalgamated company and hence there is no impediment to approving the Scheme."

10.1.5 The Applicant, i.e. Tejo Ratna Kongara, has filed another application bearing CA No. 29/2023 to permit the Applicant to obtain the reports filed by the Income Tax Department in Diary No. 259 dated 04.07.2022 and Diary No. 293/7 dated 05.05.202212, supplementary reports vide Diary No. 293/8 dated08.09.2022 and Diary No. 293/12 dated 17.11.2022.

11. As regards the objector's claim that it should be allowed to step into the shoes of the earlier applicant, i.e., Sh. Dhanekula Dharanish, from whom it has purchased the entire lot of 20,100 equity shares of the applicant company, it is noted that the original applicant did not meet the threshold limit of 10% of the shareholding for raising objections as stipulated under the proviso to Section 230(4) of the Companies Act 2013. It is also noted that the amalgamation of companies results in competing interests and rights of different stakeholders, and in the interest of pragmatism, each and every stakeholder's whole interests are stated to be affected and cannot be entertained by theTribunal. In normal circumstances, the provisions of Section 230(4) of the Companies Act lays down that the particular threshold of 10% of shareholding needs to be respected. Otherwise, small shareholders having been very minuscule stake in the company will have the potential to derail any amalgamation process and thereby affect the broader interest of the companies amalgamating. Furthermore, by just buying shares from the earlier objector, on commercial consideration, the right to object does not necessarily pass on to the buyer of the shares. In view of this, we refuse to entertain

WWW.LEGALERAONLINE.COM

the prayer of the objector and did not find it appropriate to go into the merits of the objections raised.

12. As regards the prayer of CA No. 29/2023, seeking permission to obtain the reports filed by the Income Tax Department, we are of the view that the report filed by the Department is for the consideration of the Bench alone, and the same are not to be shared with any third party.

13. We are also conscious of the directions of the Hon'ble Punjab and Haryana High Court in the case of ***Tejo Ratna Kongara VS. The National Company Law Tribunal, Chandigarh and others*** in CWP-9490-2023 dated 03.02.2023, wherein the Hon'ble High Court has noted CA No. 09/2023 and CA No. 29/2023 have already been reserved by this Bench and has observed that they do not find any ground to restrain this Tribunal from deciding the main company petition.

14. In view of the aforementioned discussion, we find no justification in allowing the prayers made by the applicant in CA No. 09/2023 and CA No. 29/2023. In the result, the objections in these applications fail.

15. In response to the notices mentioned in paragraph 7 above, the statutory authorities have furnished their responses.

15.1 Registrar of Companies (RoC)/Regional Director (RD)

15.1.1 The Regional Director (RD) has filed its reports along with the report of the Registrar of Companies (RoC), by Diary Nos. 00293/3 dated 27.07.2022 and 00293/10 dated 20.10.2022. Para 10 of the report of the Regional Director sets out certain observations based on Clause 31 of the report of RoC, NCT of Delhi and Haryana dated 01.07.2022, which states that

WWW.LEGALERAONLINE.COM

"10. As per Clause 31 of the ROC Report dated 01.07.2022, the following observation was raised:

i. Both the Transferor Companies are incorporated in the State of Karnataka and falls under jurisdiction of ROC, Bengaluru. Further, both companies have already filed the Petition before the Bengaluru Bench of NCLT and the same is pending.

ii. Refer to Clause 12 of Part III of the Scheme and Clause 21 of Part IV of the scheme, the Transferee Company may kindly be directed to comply with the provisions of Section 232(3)(i) of the Companies Act, 2013 in regard to the fee payable on its revised authorized share capital.

iii. Applicant may be directed to amend the proposed scheme to insert the 'Employee Clause' in the Scheme.

iv. Transferee Company is a Listed company. Compliances of SEBI and other regulators be made accordingly.

v. Different parts of the Scheme (Parts III and IV) are effective from different appointed dates as per Clause 1.4.8 of the Scheme. Effective date is further dependent upon a separate de-merger as per Clause 1.4.15 of the Scheme. This does not appear to be in accordance with Section 232(6) of the Companies Act, 2013.

vi. The name of Transferee Company proposed to be changed w.e.f Effective Date, as per Clause 6.1 of the Scheme.

vii. Transferee Company, in its financial statement of F.Y 2020-21 has reported pending statutory dues amounting to Rs.3273.87 lakhs on account of disputes (page no.499 of the Petition).

viii. Inspection was ordered against the Transferee company vide Ministry letter no. 7/152/2016/CL-II dated 23.07.2018. An ATR in the matter has already been sent to the RD(NR) vide letter dated 11.04.2022."

15.1.2 A reply has been furnished by the petitioner company by letter dated 29.06.2022 (Annexure-A) to the Regional Director with respect to the observations raised by the Registrar of Companies in their report dated 01.07.2022. It is further pointed out in Para 11 of the Regional Director's

WWW.LEGALERAONLINE.COM

Report that Amalgamating Company No. 2 is the wholly owned subsidiary of Amalgamating Company No. 1, and Para 5 and 17 of the Scheme states thatshares will be allotted by the Amalgamating Companies to different investorsafter the Scheme will be sanctioned by the Tribunal but before the RecordDate/Effective Date of the Scheme and the investors will become newshareholders of the Amalgamating company who will get shares from theAmalgamated Company as per their Share Swap recommendation made in Para 9 and 19 of the Scheme. As per RD's Contention, the Scheme intends togive an allotment of shares to outside investors as equity shareholders afterapproval of the Scheme, whereas they were neither shareholders nor creditorsof the AmalgamatingCompanies. In the Scheme, the AmalgamatingCompanies have also referred to certain Agreements entered with differentclasses of investors, but these agreements are neither made part of theScheme nor of the Petition. The investments made will not be entitled to anyprotection from the merger order. The Scheme contains two appointed dates which are different for Amalgamating Company No. 1 and Amalgamating Company No. 2, and also, the appointed dates are the same as of theeffective date**.** The provisions of Section 232(6) do not provide two appointeddates in the Scheme and also do not provide that Appointed Date/ EffectiveDate are the same. It is prayed by the Regional Director to suitable modify theScheme by modifying dates as Appointed Date and Effective Date in theScheme.

WWW.LEGALERAONLINE.COM

15.1.3 Subsequently, the petitioner company has submitted a response by diary No. 00293/5 dated 28.07.2022 stating that the Scheme has been approved by the Bengaluru Bench by order dated 22.04.2022 and the petitioner company undertakes to comply with the provisions of Section 232(3)(i) of the Companies Act regarding set off of the fees paid by the Amalgamating Companies against any fees payable by the Petitioner Company on increasing its Authorized Share Capital. In response to the observations made in Para 10(iii), it is clarified that Clause 3.2 (xiii) of Part III, read with Clause 15.2 (xiii) of Part IV, provides for the protection of employees, and the same has also been acknowledged by Regional Director, Northern Region under Para 6. The National Stock Exchange of India Limited (NSE) and the Bombay Stock Exchange Limited (BSE) have submitted their observation of the no objection along with the NOC to the Scheme by observation letters dated 23.02.2021 and 19.02.2021 which are attached as Annexure B of Diary No. 00293/5 dated 28.07.2022. Further, it is undertaken by the Petitioner Company to comply with all the requirements of Stock Exchanges and SEBI Regulations with respect to the Scheme and also to file necessary E-forms and comply with the applicable provisions of the Act in order to give effect to the change of name of the Petitioner Company. It is further clarified with regard to the observation made in Para 10(vii) that the Petitioner Company is regular in depositing the undisputed Statutory dues, and no disputed amounts were pending at the end of F.Y. 2020-2021. The amount of Rs. 3273.87 lakhs is pending as the majority of the same is pending

WWW.LEGALERAONLINE.COM

adjudication with High Court. It is submitted that Regional Director, New Delhi, has conducted an inspection of records and documents pertaining to the F.Y. 2015 to 2017 u/s 206 of Companies Act, 2013, and the RoC has issued 10 show cause notices, all dated 17.02.2021 to the Amalgamated Company seeking clarifications. In response to those notices, Amalgamated Company has filed compounding applications under Section 441 of the Companies Act in 8 notices and Adjudication Applications under Section 454 for the remainingtwo show cause notices. The RoC and RD have disposed of the aforesaid applications with a direction to pay compounding fees/ penalties, and the same has already been paid by the Petitioner Company. The ATR (Action Taken Report) in respect of Ministry letter no. 7/152/2016/CL-II dated 23.07.2018 has been filed by RoC with the office of the Regional Director.

15.1.4 It is further replied by the Petitioner Companies to the observations made by the Regional Director that the exchange of Securities specified under Clause 5 and 17 of the Scheme pertains to the Amalgamating Companies has been approved by the NCLT, Bangaluru Bench by order dated 22.04.2022. In response to the observation raised by the Regional Director with respect to the two appointed dates in the Scheme, the petitioner company submitted that the Scheme does not envisage two different appointed dates but rather an appointed date which is linked to the different effective dates which are attributable independently to the amalgamation of Amalgamating Company no. 1 with Petitioner Company (i.e. Effective Date 1), and Amalgamating Company No. 2 with Petitioner Company (i.e. either Effective Date 1 or 30 days from the

WWW.LEGALERAONLINE.COM

effectiveness of IPPL Demerger) as per General Circular No. 09/2019 Dated 21.08.2019 issued by the MCA. The relevant part of the circular is reproduced below:-

> *"a) The provision of section 232(6) of the Act enables the companies in question to choose and state in the scheme an 'appointed date. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfillment of any preconditions agreed upon by the parties, or meeting any other requirement as greed upon between the parties, etc., which are relevant to the scheme.*
> *b) ….*
> *c) ....*
> *d) The scheme may identify the 'appointed date based on the occurrence of a trigger event which is key to the proposed scheme and agreed upon by the parties to the scheme. This event would have to be indicated in the scheme itself upon occurrence of which the scheme would become effective. However, in case of such event based date being a date subsequent to the date of filing the order with the Registrar under Section 232(5), the company shall file an intimation of the same with the Registrar within 30 days of such scheme coming into force."*

The appointed date in the present scheme was linked to a certain 'Trigger event,' i.e. effectiveness of IPPL Demerger, which has already occurred. Hence the appointed date for Part III and Part IV of the scheme shall be deemed to be Effective Date 1.

15.1.5 The Regional Director (RD) has again filed its reports along with the report of the Registrar of Companies (RoC), by Diary Nos. 00293/8 dated 20.09.2022 stating that as the Scheme was approved by the Hon'ble NCLT Bengaluru, vide order dated 22.04.2022, thus the RD is restricting his comments with regard to the provisions of section 230 of the Companies Act,

WWW.LEGALERAONLINE.COM

2013. Further, in respect of two different Appointed Dates for TransferorCompany-1 & Transferor Company-2, It is submitted that MCA Circular does not speak that there may be more than one Appointed Date/Effective Date in one scheme. One Effective Date and one Record Date in the case of Transferee Company can be permitted.

15.1.6 In this connection, a reference is made to the general circular No. 09/2019 and which states as under:

> "*The scheme may identify the 'appointed date' based on the occurrence of a trigger event which is key to the proposed scheme and agreed upon by the parties to the scheme. This event would have to be indicated in the scheme itself upon occurrence of which the scheme would become effective. However in case of such event based date being a date subsequent to the date of filing the order with the Registrar under section 232(5), the company shall file an intimation of the same with the Registrar within 30 days of such scheme coming into force."*

Further, we also note that the petitioners have clarified that as per the relevant part of the scheme, the effective date 2 for amalgamation of the amalgamating company 2 with petitioner company would mean

- Effective Date 1; or
- 30th Calender Day from the effectiveness of the IPPL Demerger (as defined in the Scheme).

They have further clarified that as the IPPL demerger has already been approved by this Bench by order dated 26.04.2022, there will no longer be dependency in giving effect to part IV of the scheme due to IPPL-demerger and consequently, there is only 1

WWW.LEGALERAONLINE.COM

effective date, i.e. occurring later of the IPPL demerger approval date which shall be considered as the relevant date to give effect to part IV of the scheme.

In view of the aforementioned clarifications submitted by the petitioners, it is held that noadverse conclusion in this regard can be inferred.

16. Income Tax Department

16.1 The Income Tax Department by a letter dated 24.06. 2022 informed that a search and seizure action was initiated, in the Embassy group and related entities, i.e., M/s. India Bulls Real Estate Ltd (IBREL) and M/s. India Bulls Housing Finance Ltd (IBHFL) on 1 June 2022, and the Department seized various incriminating documents. The part of this letter relevant to the discussion on the present amalgamation before us is extracted below:

> *"During the search, it has come to the knowledge that the Embassy Group has acquired controlling stake in the listed company, M/s IBREL, to the extent of 42%. To the extent of 13% by way of purchase of equity directly from Sh Sameer Gehlaut and the balance 29% is being acquired by way of amalgamation of M/s NAM Estates Pvt. Limited and Embassy One Commercial Development Pvt Ltd (companies owned by the Embassy group) with IBREL, by way of share swapping.*

16.2 This was followed by a detailed report filed by the No. 0293/7 dated 17.09.2022 specifically pointing out that the Transferee Company in the present amalgamation (which is the petitioner before this Tribunal) was also covered in the Search and Seizure operation of the Embassy group. The allegations made in this report which may be relevant to the present discussion, are listed below:

WWW.LEGALERAONLINE.COM

I. Incriminating material was seized, indicating the overvaluation of the assets of the Embassy group while transferring the same to the M/s. NAM Estates Private Limited and the same over-valued assets formed the basis for the valuation of the shares of NAM Estates Private Limited, which formed the basis for the shares swapping of IBREL.

II. Extensive changes/restructuring of the amalgamating companies during the merger and post-merger preceded the scheme of amalgamation between M/s Nam Estate Private Limited (NEPL), Embassy 1 commercial property development Private Limited and M/s. India Bulls Real Estate Ltd (IB REL)

III. It was pointed out that there are several inconsistencies and incorrect assumptions made while valuing the assets at a much-inflated value. One of the projects, i.e. Embassy Cornerstone Tech Valley, has been undertaken by the Embassy group under the Joint Development Agreement (JDA) model, and the land doesn't belong to it. The value of this asset has been estimated at Rs.

581 crores. In the case of this project, the initial agreement between the Embassy Group and Cornerstone Group was for the development of 100 acres,and it was decided by the parties that 67% built-up area was for the Embassy Group and 33% belonged to Cornerstone. But Cornerstone Group failed to acquire 20 acres, and currently, the total land available for development is only 80 acres. And for developing this 80 acres of land, a JDA dated 15.11. 2021 was entered into by the parties wherein the agreement was revised to 74% built-up area to the embassy and 26% to Cornerstone. It was further stated thatas per the Embassy group, this information and the reduction of the

measurements of the asset (land) has not been conveyed to IBREL and its shareholders. Embassy Group has entered the JDA and given advance in the form of a non-refundable deposit of the amount of Rs. 105 Crores approximately. It was further pointed out that Cornerstone group has, in fact, not registered land parcels in their name. As per the Embassy group, approximately 8 acres of land still need to be acquired by the Cornerstone group out of the 80 acres. The Embassy Group has valued the land (valuation report of the land attached as an Annexure-2 to the affidavit) on the basis of a joint development agreement for 80 acres.

IV. At page No. 6, under the head 'valuation certificate', the purpose of a valuation is for 'secured lending purposes', meaning thereby the valuation report is made for the purpose of giving the same to financial institutions for borrowing purposes and not for any amalgamation or merger purposes.

V. In-Page 6, under the head 'town planning', it is given clearly that 'based on a review of revised masterplan (our MP) 2015 BDA, the subject property is zoned for " residential (main)" use. This means only residential development can take place on the subject property; however, the valuation is made assuming that there will be commercial development and property will be leased for office purposes, which is both erroneous and incorrect. The valuer has also highlighted the fact in his report with a caveat 'that client has in his first commercial development, and the same has been considered for the purpose of this present report, CBRE has not made any inquiries with the relevant legal/statutory authorities to validate the legality of the same."

WWW.LEGALERAONLINE.COM

VI. The valuer did not certify the property as having a clear and marketable title, no legal advice regarding this title and ownership of the subject property has been obtained for the purpose of the appraisal exercise.

VII. Identical observations have been made with regard to the other group companies like Concord India Private Limited and Embassy Knowledge Park. References have been made to the major title litigations pending in respect of the land of these companies.

VIII. It was also pointed out that the Embassy group has utilised the assets whichare part of the scheme of amalgamation as collaterals for raising loans for other projects and purposes which are not part of this process of amalgamation. It is submitted that in the event of a default in servicing the loan of any non-amalgamating company, there is a possibility of an adverse impact on the finances of the amalgamating company.

IX. In response to the allegations filed by the Income Tax Department, the petitioner filed its reply by diary No. 293/6 dated 05.09.2022. Subsequently, this Bench issued further directions to rebut the specific allegations of overvaluation of properties made in the report filed by the Deputy Director of Income Tax (inv.) Unit 3(3), Bengaluru, dated 24.06.2022.

17. In response, an affidavit was filed by Diary No. 0293/14 dated 27/02/23, and the submissions by the petitioners therein are summarised below:

A. The valuer's report was specifically prepared for the purpose ofdetermination of the Fair Equity Share Exchange Ratio for the schemeand for the consideration of the Board of Directors of both companies.

WWW.LEGALERAONLINE.COM

B. The valuation exercise of NAM Estates has been carried out on a post-restructuring base as provided in the scheme. The valuer has assumed that NAM Estates is being valued after having acquired the assets and liabilities post-completion of the internal restructuring exercise, which was still going on at the time of valuation.

C. All the assets/liabilities mentioned in the report were disclosed to the valuer by the management, and the same has been considered for the purpose of determining the swap ratio.

D. At the time of determining the fair equity share swap ratio, the valuers had considered 100 acres as the total area of the said project, wherein the Embassy's share is 67%. After going through the Income Tax report and holding a discussion with the company, the valuers understood that though the original JDA was for 100 acres as the total project area, in reality, the Cornerstone Group failed to acquire 20 acres, and hence the sharing ratio has been revised to 74% for the Embassy and 26% for Cornerstone, now on 80 acres, so as not to affect the overall value agreedbetween the parties.

E. The draft CBRE report has no relevance to the valuer's exercise of theFair Equity Swap Ratio.

F. The DCF Method under the income approach has been considered for the evaluation of the amalgamating companies, and this is a widely accepted methodology.

WWW.LEGALERAONLINE.COM

G. The valuers have not evaluated the legal aspects with respect to the ownership and zoning encumbrances but have received clarification from the company that the said land project can be developed as a commercial project upon meeting certain criteria and clearing certain hurdles, which sometimes come up in large land transactions

H. Reliance is placed on ICAI valuation standards 102, which states that 'valuation shall not be constituted as an audit or review in accordance with the auditing standards applicable in India, accounting/financial/commercial/legal/tax/environmental due diligence or forensic/investigation services and shall not include verification or validation work". The same is also mentioned in Section 3 of the valuers' report.

17.1 Subsequently, vide our order dated 01.03.2023, the deponent Mr. Mandar Vikas Gadkari, was specifically asked whether the valuation done by him was after the independent verification of the assets reflected in the books of the amalgamating companies. Reference was made to para 14, page 8 of his affidavit, wherein he had stated that while determining the fair equity swap ratio, he considered 100 acres as a total area of the project for the valuation on the basis of which the fair equity swap ratio was valued. To a pointed question by this Bench as to whether the total area of the Embassy Cornerstone Tech Valley project was independently verified with the relevant records, Shri Gadkari clarified that the valuation report has been furnished on the basis of information submitted by the

WWW.LEGALERAONLINE.COM

management. As recorded in our order sheet, this was confirmed by the second valuer Shri Niranjan Kumar.

17.2 Another affidavit of compliance of our order dated 01.03.2023 by diary No. 0293/19 dated 10.03.2023 was filed, attaching therein an Architect Certificate stating that 80 acres were intended to be developed first and the balance 20 acres shall be acquired and developed subsequently in the Embassay Cornerstone Tech Valley Project.

17.2.1 It was stated that the project is developable with 80 acres. The Architect certificate demonstrates that the 80 acres can be developed without any dependence on the balance 20 acres acquisition, and hence the development is not impacted

17.2.2 Accordingly, it is clarified that the Valuers had not valued the land or extent but had valued the development rights of the Embassy group in the same. Hence, if there is a subsequent variance in the extent of lands which are being developed, as long as the Developer is able to commercially adjust the JD ratio to compensate for any potential shortfall due to such variance, the economic interest of the Developer shall not be adversely impacted.

17.2.3 It was clarified that there was no factual inaccuracy on the part of the valuers when they had initially valued the development rights of the Embassy (amounting to the 67% on a 100 acres development). Accordingly, since the total area of project land was reduced from 100 to 80 acres, the sharing ratio to the Embassy Group correspondingly increased

WWW.LEGALERAONLINE.COM

from 67% to 74%. It has been determined after commercial deliberations that 67% share of Embassy Group in 100 acres would generate the same cashflow as 71% share in 80 acres, whereas the actual sharing agreed between Embassy Group and Cornerstone is 74: 26, respectively, which has significantly benefitted the share swap ratio in favor of the shareholders of Indiabulls A Real Estate Limited the Petitioner Company.

17.3 As regards the allegation of the Income Tax Department regarding the alleged residential status of the land under the revised master plan, it is stated that the same is based on the CBRE Report, which has not been considered for the valuation reports considered in the amalgamation petition. Furthermore, it is stated that under the amended zoning regulations, the project can be developed under either the residential or commercial head as certified in the certificate from the Architect annexed to the reply.

17.4 It has been argued that the allegations of the Income Tax Department regarding the valuations considered for internal restructuring and internal transfers have no relevance to the valuation exercise carried out for the merger as the assets of NAM Estates and its subsidiaries are being valued on the basis of Income Approach and the acquisition of cost of NAM Estates is not relevant for the valuation exercise.

17.5. It was also pointed out that 99% of secured creditors of the Amalgamating Companies, comprising of leading banks and financial institutions and amounting to INR 3300 Crores gave their consent to the

WWW.LEGALERAONLINE.COM

Scheme of Amalgamation filed with the Bangalore NCLT. Similarly, the public shareholders of the Petitioner company have approved the scheme with an overwhelming majority. It is further stated that the Scheme has been thoroughly examined by all critical stakeholders and regulatory bodies and, pursuant to the objections raised by the minority shareholder, has been additionally vetted and cleared by the SEBI and Stock Exchanges also.

18. The valuer Mr. Mander Vikas Gadkari, also filed an affidavit in compliance of our order dated 01.03.2023 by diary No. 0293/18 dated 14/03/23 stating as under:

> *"It is submitted that as per industry practices, evaluation exercise can be carried out on the basis of the documents/information furnished to the valuer by the company concerned, both verbally and in writing. The valuer evaluates the information provided by the Company through broad inquiry, analysis and review but does not carry out due diligence or audit of the information provided for the purpose of the assignment. The valuation conclusions are based on the assumptions, forecasts and other information provided by the Company.*
>
> *All the assets and liabilities of the Companies forming part of the Scheme have been provided to the Valuer by the respective managements and have been considered accordingly for determining the fair equity share swap ratio."*
>
> (Emphasis Supplied)

18.1 With reference to the Embassy Cornerstone Tech Valley project, Mr. Mandar has stated as under:

> *"The valuation is necessarily based on financial, economic, monetary, market and other conditions as in effect and, and the information made available to the value are used by the value are up to, the date hereof. Subsequent developments in the aforementioned conditions may affect this report and the assumptions made in preparing this report and the*

WWW.LEGALERAONLINE.COM

value shall not be obliged to revise or reaffirm this report if the information provided to the value changes."

(Emphasis supplied)

18.2 It is further stated that the joint development agreement (JDA) of 480 acres with the revised sharing ratio (74:26) was executed between the parties and 15 November 2021 (which is after the date of the valuation report being 18 August 2020) with the provision for reverting to the original ratio of 67:33 upon completion of the acquisition of the balance lands by the landowner

18.3 Assuming all other factors considered in the valuation report remains same if the area to be developed is reduced from 100 acres to 80 acres (and the same reduction is reflected in the last phase of development), then the revision in JDA ratio from 67% to 74% adequately compensates Embassy group for the loss in value due to such reduction in the area of the land to be developed.

19. Furthermore, in response to our order dated 01.03.2023, the second appointed valuer Mr. Niranjan Kumar has filed his affidavit vide diary No. 0293/20 dated 14/03/23 stating inter alia

"*Assets (and liabilities) that have been agreed to form part of the Transaction were mutually agreed between the Management of the Transacting Companies and was Informed to us. Prior to finalising the list of assets and liabilities that would form part of the transaction both the Companies engaged Independent Third Parties to undertake a detailed Financial, Tax and Legal Diligence on the counter party. Relevant copies of Diligence reports including key findings were provided to us by the Management of the Transacting Companies."*

(Emphasis Supplied)

WWW.LEGALERAONLINE.COM

20. In the subsequent paragraph, we have analysed the valuation reports filed alongwith the Application and have focussed specifically on the parts of the valuation reports submitted by the three valuers relevant to this discussion.

20.1 Valuation Report by NS Kumar and Company

20.1.1 Under the head background, the report mentions the three petitioners amalgamating in the proposal before this Bench, i.e. Indiabulls Real Estate Limited (IBREL) or Amalgamated Company, NAM Estates Private Limited (NEPL) or 'Amalgamating Company 1' and Embassy One Commercial Property Development Private Limited (EOCDPL) or 'Amalgamating Company 2'. It is also mentioned that EOCDPL was incorporated on 03.07.2018 and is a subsidiary of Embassy Property Developers Private Limited, which, pursuant to internal re-organisation, would become a wholly owned subsidiary of NEPL. It further clarifies:

> *Prior to the Proposed Amalgamation of NEPL and EOCDPL with IBREL, NEPL is in the process of undertaking an internal restructuring exercise which includes demerger of certain identified completed and under-development residential and commercial undertakings; shares/ securities purchase agreement; business transfer of certain residential units; slump sale of residential undertaking and swap of its equity shares for securities held by third party investors of specified entities which house certain identified projects. EOCDPL is also in the process of entering into definitive share swap agreements with these specified third party investors prior to the scheme being made effective (all these steps together have been referred to as 'Internal Restructuring').*
>
> (Emphasis Supplied)

WWW.LEGALERAONLINE.COM

20.1.2 It is also clarified that "the management had informed "there wouldbe no significant variation between the draft scheme management and the final scheme approved and submitted with the relevant authorities. A detailed step-wise outline of the Internal Restructuring of NEPL is also mentioned."

20.1.3 Under the head Scope Limitations, Assumptions, Cope Limitations, Assumptions, Qualifications, Exclusions and Disclaimers, it is mentioned that the valuation report and its contents are specific subject to certain conditions some of which are extracted below:

- realization of cashflow projections and other estimates as provided by the Management;
- successful implementation of internal restructuring with respect to NEPL including obtaining necessary approval for demerger scheme, slump sale and share swap arrangements and entering into definitive agreement with respective investors as defined in the scheme;
- successful implementation of demerger scheme with respect to demerger of commercial undertaking of IPPL;
- successful execution of definitive share swap agreements by EOCDPL with IPPL shareholders as defined in the scheme;
- realisation of the immovable properties held by Transacting Companies at their estimated fair values;
- realisation of assets at the values considered in the financial statement and no additional outflow other than liabilities recorded in the financials and represented to us by the Management;
- market price reflecting the fair value of the underlying equity shares.

20.1.4 Regarding the utilization of information in their valuation report, it is mentioned as under*:*

WWW.LEGALERAONLINE.COM

In accordance with the terms of our engagement, we have assumed and relied upon, without independent verification of

- *the accuracy of information made available to us by the Management which formed a substantial basis for the report; and*
- *the accuracy of information that was publicly available.*

We have not carried out a due diligence or audit, or review of the Companies for the purpose of this engagement, nor have we Independently investigated or otherwise verified the data provided.

20.1.5 The following clarifications regarding the assumptions made in the valuation report are extracted below for further discussion:

Our conclusions are based on these assumptions and information given by/ on behalf of the Management. The Management has indicated to us that they have understood any omissions, inaccuracies or misstatements may materially affect our recommendation. Accordingly, we assume no responsibility for any errors in the information furnished by the Companies and their impact on the report.

xxxx

We would like to emphasize that prior to the implementation of the proposed amalgamation, NEPL is in the process of undertaking internal restructuring exercise including execution of definitive agreements with respective institutional investor as detailed in the Scheme. Similarly, EOCDPL would also execute definitive share swap agreements as detailed in the Scheme. Our value analysis is subject to the successful completion of the internal restructuring exercise, obtaining necessary approvals and execution of definitive agreement as mentioned above and defined in the scheme and issue of shares by NEPL and EOCDPL pursuant to the arrangement as represented to us by the Management upon the completion of all the above mentioned steps and no other consideration being issued / paid for the restructuring.

xxxx

Realization of foreacasted free cash flow forecast or the realizability of the assets at the values considered in our analysis will be dependent on the continuing validity of assumptions on which they are based.

WWW.LEGALERAONLINE.COM

20.2 Valuation Report by Mr. Niranjan Kumar

In the report of Mr. Niranjan Kumar, the facts mentioned in the previous valuation report have been repeated. It is also clarified as under:

"In accordance with the terms of our engagement, we have assumed and relied upon, without independent verification of

- *the accuracy of information made available to us by the Management which formed a substantial basis for the report; and*
- *the accuracy of information that was publicly available.*

We have not carried out a due diligence or audit or review of the Companies for the purpose of this engagement, nor have we independently investigated or otherwise verified the data provided.

We are not legal or regulatory advisors with respect to legal and regulatory matters for the proposed transaction. We do not express any form of assurance that the financial information or other information as prepared and provided by the Companies is accurate. Also, with respect to explanations and information sought from the advisors, we have been given to understand by the Companies that they have not omitted any relevant and material factors and that they have checked the relevance or materiality of any specific information to the present exercise with us in case of any doubt. Accordingly, we do not express any opinion or offer any form of assurance regarding its accuracy and completeness.

Our conclusions are based on these assumptions and information given by/ on behalf of the Management. The Management has indicated to us that they have understood any omissions, inaccuracies or misstatements may materially affect our recommendation. Accordingly, we assume no responsibility for any errors in the information furnished by the Companies and their impact on the report".

20.2.1 In the said report, the following Exclusions and Limitations are mentioned:

WWW.LEGALERAONLINE.COM

" Exclusions and Limitations:

3.1. Our report is subject to the limitations detailed hereinafter. This report is to be read in totality, y and not in parts, in conjunction with the relevant documents referred to therein.

3.2. This report, its contents, and the analysis herein are specific to (i) the purpose of valuation agreed as per the terms of our engagement, (ji) the report date and (iii) are based on the audited / provisional financial statements of the Companies as at March 31, 2020. The management of the Companies have represented that the business activities of the Companies have been carried out in the normal course between April 1, 2020 and the Report date and that no material changes have occurred in their respective operations and financial position between April 1, 2020 and the Report date.

xxxx

3.6. The scope of our assignment did not involve us performing audit tests for the purpose of expressing an opinion on the fairness or accuracy of any financial or analytical information that was provided ~ and used by us during the course of our work. The assignment did not involve us to conduct the financial or technical feasibility study. We have not done any independent technical valuation or appraisal or due diligence or legal title search of the assets or liabilities of the Companies or any of its subsidiaries or associated companies and have considered them at the value as disclosed by the Companies in their regulatory filings or in submissions, oral or written, made to us.

xxxx

3.9. Any matters related to legal title and ownership are outside the purview and scope of this valuation exercise. Further, no legal advice regarding the title and ownership of the asset has been obtained while conducting this valuation exercise. Valuation may be significantly influenced by adverse legal, title or ownership, encumbrance issues.

3.10. For land and project details such as location, land areas, utility, development status and others we have relied upon the information shared by the Companies. We have not verified accuracy of the same by any means. We have to the extent

WWW.LEGALERAONLINE.COM

possible tried to physical visit certain surplus land parcels of IBREL and had discussions with the brokers for the purpose of valuation.
xxxx

3.12. We have assumed and relied upon the truth, accuracy and completeness of the information, data and financial terms provided to us or used by us,we have assumed that the same are not misleading-and do not assume or accept any liability or responsibility for any independent verification of such information or any independent technical valuation or appraisal of any of the assets, operations or liabilities of the companies. Nothing has come to our knowledge to indicate that the material provided to us was mis-stated or incorrect or would not afford reasonable grounds upon which to base our report.

3.13. During the course of our work, we have relied upon the information and documents made available by the management and representatives of the Companies. Though we have reviewed it, we have not independently verified the same.
xxxx

3.18. Our scope is limited to the purposes stated hereinabove. The Report should not be construed as, our opinion or certifying the compliance of the Amalgamation 1, Amalgamation 2 or the As isHelloScheme with the provisions of any law including the Companies Act 2013, taxation related laws, capital market related laws, any accounting, taxation or legal implications or issues arising from them."
xxxx

20.3 Valuation Report by IBDO

20.3.1 In the Fair Equity Share Swap Ratio Report for the scheme of amalgamation dated 18.08.2020, the valuer IBDO has furnished the brief background of the scheme of amalgamation, purpose of valuation, exclusion and limitations, and procedure adopted with different valuation approaches.

WWW.LEGALERAONLINE.COM

20.3.2 Under the head 'Souces of Information', he has mentioned the following sources under the sub-head 'Land related documents'

• Title Search reports/ land ownership documents and the location co-ordinates for planned projects of EPDPL.
• Joint Development Agreement dated July 30, 2013 between EPDPL and the landowners for land admeasuring 3 acres 30 gunthas at village- Hoodi, Krishnarajapura, Bangalore.
• Joint Development Agreement dated February 12, 2020 between EPDPL and the landowners for land admeasuring 51 acres and 25 gunthas at village- Varthur, Sorahunse, Kanekandaya & Amani Bellandur Khane, Varthur Hobli, Bangalore.
• Memorandum of Understanding ("MoU") dated November 6, 2015 and Supplemental MoU dated March 6, 2019 between EPDPL and landowners for development for 100 acres of land parcel for Cornerstone project;
• Certified Area statement confirming the total saleable area for EPDPL projects- Cornerstone, Knowledge Park, Concord & Prism
• The land area summary with the location co-ordinates of the land bank of IBREL in North, West and South Zone;

BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

21. The Fairness opinion attached to the application has also clearly stated that no independent evaluation or appraisal of the assets of the company has been done, It is further clarified that no analysis of any potential or actual litigation, or possible unasserted claims have been made. For the sake of clarity, the relevant parts of the fairness opinion are extracted below:

6. We have not made any independent evaluation or appraisal of the assets and liabilities of the Company and its subsidiaries, the Amalgamating Company - 1 or the Amalgamating Company - 2 and we have not been furnished with any such evaluation or appraisal, nor have we evaluated the solvency or fair value of the Company, the Amalgamating Company - 1 or the Amalgamating Company - 2 under any laws relating to the bankruptcy, insolvency or similar matters;

WWW.LEGALERAONLINE.COM

8. We have not undertaken independent analysis of any potential or actual litigation, regulatory action, possible un-asserted claims, or other contingent liabilities to which the Company, the Amalgamating Company - 1 or the Amalgamating Company - 2 is or may be a party or is or may be subject, or of any government investigation of any possible un-asserted claims or other contingent liabilities to which the Company, the Amalgamating Company - 1 or the Amalgamating Company - 2 is or may be a party or is or may be subject, and relied on the information provided by the management of the companies;

9. We have not conducted any physical inspection of the properties or facilities of the Company, the Amalgamating Company - 1 or the Amalgamating Company - 2;

22. The main issue under discussion here is whether a Fair equity swap ratio determined solely on the basis of information furnished by the management without the valuer making any independent verification of the same be accepted as a basis of a credible amalgamation process. The importance of a valuation report in an Amalgamation process is succinctly underlined in the following extract from the IBBI's notification dated 01.09.2020:

"2. In the recent past there has been public concern on valuation and its impact on a company's shareholders, creditors and other stakeholders. Fund providers, both equity and debt, have been active in asking for enquiries into valuations submitted by companies for mobilizing funds and restructuring".

23. To appreciate the criticality of the Valuation reports in considering the approval of an amalgamation proposal, a reference is made to the following provisions of the Companies Act and the Rules

23.1 Section 230 of the Companies Act*:*

"230: Power to compromise or make arrangements with creditors and members.

xxxx

(3) Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed:"

xxxx

23.2 Section 232: xxxx

"(2) Where an order has been made by the Tribunal under sub-section (1), merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—

xxxx

(d) the report of the expert with regard to valuation, if any;"

xxxx

23.3 Section 247: Valuation by Registered Valuers:

(1) xxxx

(2) The valuer appointed under sub-section (1) shall,—

(a) make an impartial, true and fair valuation of any assets which may be required to be valued;

(b) exercise due diligence while performing the functions as valuer;

(c) make the valuation in accordance with such rules as may be prescribed; and

(d) xxxx

23.4 Further, directives regarding the documents to be circulated for meetings directed by this Tribunal are given in the Companies *(Compromises,*

Arrangements and Amalgamations) Rules, 2016 in this regard, the relevant part of Rule 6 is extracted below*:*

"Rule 6

6. ***Notice of meeting****.-xxxx*
(v) explanatory statement disclosing details of the scheme of compromise or arrangement including:?
xxxx
(c) summary of valuation report (if applicable) including basis of valuation and fairness opinion of the registered valuer, if any, and the declaration that the valuation report is available for inspection at the registered office of the company;"
xxxx

Explanation – For the purposes of these rules it is clarified that:

(a) xxxx
(b) the valuation report shall be made by a registered valuer, and till the registration of persons as valuers is prescribed under section 247 of the Act, the valuation report shall be made by an independent merchant banker who is registered with the Securities and Exchange Board or an independent chartered accountant in practice having a minimum experience of ten years.
xxxx

Explanation- For the purposes of this rule, disclosure required to be made by a company shall be made in respect of all the companies, which are part of the compromise or arrangement."

24. Considering the importance attached to the valuation under the statute, the ICAI and IBBI have come up with valuation standards and specific notifications, respectively. A reference to the same is made as under:

24.1 "10.1 The ICAI Valuation Standards

VI. Compliance with the Valuation Standards

22. The Valuation Standards will be mandatory from the respective date(s) mentioned in the Valuation Standard(s). The mandatory status of Valuation Standard implies that while preparing the valuation report, it will be the responsibility of the valuer to comply with the Valuation Standard.

23. Valuation Report cannot be described as complying with the Valuation Standards unless they comply with all the requirements of each relevant Valuation Standard, to the extent applicable.

10.2 ICAI Valuation Standards 2018

Framework for the Preparation of Valuation Report in accordance with the ICAI Valuation Standards

In the absence of any definition, or lack of guidance, for a specific term or expression in the Valuation Standards, the valuer shall use its judgement while performing the valuation assignment in such a manner so that the information is:
(a) relevant to the economic decision-making needs of intended users; and
(b) reliable, in the valuation reports
(i) represent faithfully the information contained therein;
(ii) reflect the economic substance and not merely the legal form of an item;
(iii) are neutral, i.e., free from bias;
(iv) are prudent; and
(v) are complete in all material respects.

6. In making the judgement described in paragraph 5, the valuer shall refer to, and consider the applicability of, the following sources in descending order:

(a) the prescriptions laid down in Companies (Registered Valuers and Valuation) Rules, 2017, as amended from time to time;
(b) the requirements in this Framework;
(c) the requirements in the applicable accounting standards as may be notified by the Ministry of Corporate Affairs and where applicable the accounting standards issued by the Institute of Chartered Accountants of India; and
(d) in the absence thereof, those of the other standard-setting bodies that use a similar framework to develop valuation standards, other authoritative literature relating to valuation and accepted industry practices, to the extent that these do not conflict with any of the requirements of ICAI Valuation Standards.

Qualitative characteristics of valuation report

Relevance

13. To be useful, the underlying information in a valuation report must be relevant to the decision-making needs of the intended users. Information provided in the valuation report has the quality of relevance when it influences the economic and other decisions of Users.

Materiality

14. The relevance of the underlying information in valuation report is affected by its nature and materiality.

15. The underlying information in valuation report is material if its omission or misstatement could influence the economic decisions taken by intended-users on the basis of the valuation report. Materiality depends on the size of the item or error judged in the particular circumstances of its omission or misstatement. Thus, materiality provides a threshold or cut-off point rather than being a primary qualitative characteristic, which information must have if it is to be useful.

Reliability

16. To be useful, the underlying information in a valuation report must be reliable. Information has the quality of reliability when it is free from material error and bias and can be relied upon by users to represent faithfully that which it either purports to represent or could reasonably be expected to represent.

Faithful representation

17. To be reliable, the information presented in a valuation report must represent faithfully what it purports to represent. Faithful representation has three characteristics, namely, error-free, neutrality and completeness.

18. Sometimes, the information in the valuation report is subject to some risk of being less than a faithful representation of that which it purports to portray. This is not due to bias, but may arise due to inherent difficulties either in identifying the appropriate method, approaches or techniques to be applied in valuation.

Substance over form

19. If the underlying information of valuation report represent faithfully the value, that it purports to represent, it is necessary that they are evaluated in valuation assignment in accordance with their substance and economic reality and not merely by their legal form. The substance of transactions such as acquisition or disposal of assets is not necessarily consistent with that which is apparent from their legal or contrived form. For example, an entity may dispose of an asset to another party in such a way that the documentation purports to pass legal ownership to that party; nevertheless, the entity continues to enjoy the future economic benefits embodied in the asset. In such circumstances, the reporting of a sale would not be free from error, and such a transaction may affect the result of valuation.

Professional Skepticism

33. The valuer plans and performs a valuation assignment with an attitude of professional skepticism recognising that circumstances may exist that cause the information used or contained in the valuation report to be materially misstated. An attitude of professional skepticism means the valuer makes a critical assessment, with a questioning mind, of the validity of information obtained and is alert to information that contradicts or brings into question the reliability of documents or representations by the responsible party. For example, an attitude of professional skepticism is necessary throughout the assignment process for the valuer to reduce the risk of overlooking suspicious circumstances, of over generalising when drawing conclusions from observations, and of using faulty assumptions in determining the nature, timing and extent of evidence-gathering procedures and evaluating the ….

10.3 ICAI Valuation Standard 102

Valuation Bases

A valuer shall gather, analyse and where appropriate adjust the relevant information in a manner that the methodology and approaches are in line with the nature or type of the engagement. For example, for valuation of business, in accordance with ICAI Valuation Standard 301 Business Valuation, the information shall include but not limited to the following:
(a) non-financial information;
(b) ownership details;

(c) financial information; and
(d) general information.

10.4 ICAI Valuation Standard-103
Valuation Approaches and Methods

Discounted Cash Flow ('DCF') Method

54. The DCF method values the asset by discounting the cash flows expected to be generated by the asset for the explicit forecast period and also the perpetuity value (or terminal value) in case of assets with indefinite life.
55. The DCF method is one of the most common methods for valuing various assets such as shares, businesses, real estate projects, debt instruments, etc.
56. This method involves discounting of future cash flows expected to be generated by an asset over its life using an appropriate discount rate to arrive at the present value.
57. The following are the major steps in deriving a value using the DCF method:
(a) Consider the projections to determine the future cash flows expected to be generated by the asset;
(b) analyse the projections and its underlying assumptions to assess the reasonableness of the cash flows;
(c) choose the most appropriate type of cash flows for the asset, viz., pre-tax or post-tax cash flows, free cash flows to equity or free cash flows to firm;
(d) determine the discount rate and growth rate beyond explicit forecast period; and
(e) apply the discount rate to arrive at the present value of the explicit period cash flows and for arriving at the terminal value.

65. A valuer shall by employing procedures such as ratio analysis, trend analysis to determine historical trends, gather necessary information to assess risks inherent in the achievability of the projections.

10.5 ICAI Valuation Standard 201
Scope of Work, Analyses and Evaluation

Ownership Information

32. A valuer shall obtain ownership information regarding the asset to be valued to enable him to:

(a) determine the type of ownership interest being valued and ascertain whether that interest exhibits control characteristics;
(b) analyse the different ownership interests of other owners and assess the potential effect on the value of the asset;
(c) understand the classes of equity ownership interests and rights attached thereto;
(d) understand other matters that may affect the value of the subject interest, such as:

(i) for a business, business ownership interest: shareholder agreements, partnership agreements, operating agreements, voting trust agreements, buy-sell agreements, loan covenants, restrictions, and other contractual obligations or restrictions affecting the owners and the asset to be valued;
(ii) for an intangible asset: legal rights, licensing agreements, sublicense agreements, nondisclosure agreements, development rights, commercialization or exploitation rights, and other contractual obligations.

35. A valuer shall gather and analyse the relevant general information which may affect the business directly or indirectly and/or which is deemed relevant by the valuer. Subsequent Events

36. The valuation date is the specific date at which a valuer estimates the value of the asset.

37. An event that occurs subsequent to the valuation date could affect the value; such an occurrence is referred to as a subsequent event.

38. Subsequent events are indicative of the conditions that were not known or knowable at the valuation date, including conditions that arose subsequent to the valuation date.

39. Generally, a valuer would consider only circumstances existing at the valuation date and events occurring up to the valuation date. However, events and circumstances occurring subsequent to the valuation date, may be relevant to the valuation depending upon, inter alia, the basis, premise and purpose of valuation. Hence the valuer should apply its professional judgement, to consider any of such circumstances/events which are relevant for the valuation. Such circumstances / events could be relating to, but not limited to, the asset being valued, comparables and valuation parameters used. In the event such circumstances / events are considered by the valuer ***the same should be explicitly disclosed in the valuation report****.*

ICAI Valuation Standard 202

11. A valuer shall at a minimum include the following in the valuation report:

(a) background information of the asset being valued;
(b) purpose of the valuation and appointing authority;
(c) the identity of the valuer and any other experts involved in the valuation;
(d) disclosure of the valuer's interest or conflict, if any;
(e) date of appointment, valuation date and date of the valuation report;
(f) inspections and/or investigations undertaken;
(g) nature and sources of the information used or relied upon;
(h) procedures adopted in carrying out valuation and valuation standards followed;
(i) valuation methodology used;
(j) restrictions on use of the valuation report, if any;
(k) major factors that were taken into account during the valuation;
(l) conclusion; and
(m) caveats, limitation and disclaimers to the extent they explain or elucidate the limitations faced by valuer, which shall not be for the purpose of limiting his responsibility for the valuation report.

Management Representations

36. A valuer may obtain written representations from the management/client regarding information for performing the valuation assignment. The decision to obtain a representation letter is a matter of judgment by the valuer. A written representation obtained from the management or those charged with governance becomes part of the evidence obtained by the valuer which forms a basis for his valuation report.

37. Wherever a valuer obtains written representations from the management/client regarding information which is the base for the valuation assignment, the valuer shall mention the fact of such representation and the reliance placed on the same.

38. The existence of a management representation letter shall not preclude the valuer from exercising reasonable skill and care with respect to the information obtained regarding the valuation. The valuer shall carry required procedures in the performance of his valuation assignment in respect of the information included in the management representation letter.

(Emphasis Supplied)

WWW.LEGALERAONLINE.COM

24.2. As in the present case there was an extensive internal restructuring going on in respect of one of the amalgamating groups, and as on the date of valuation there were several ongoing issues relating to incomplete contracts, acquisition of land etc pending, the role of "subsequent event" adversely affecting the completion of the amalgamating process assumes special importance. In this context, the following extract from the ICAI Valuation standards provides the apt clarification:

"9. Subsequent events-As per ICAI Valuation Standard 201- Scope of Work, Analysis & Evaluation

Para no. 37. An event that occurs subsequent to the valuation date could affect the value: such an occurrence is referred to as a subsequent event.
Para no.38 Subsequent events are indicative of the conditions that were not known or knowable at the valuation date, including conditions that arose subsequent to the valuation date.
Para no. 39-Generally, a valuer would consider only circumstances existing at the valuation date and events occurring up to the valuation date, may be relevant to the valuation depending upon, inter alia, the basis, premise and purpose of valuation. Hence, the valuer should apply its professional judgment to consider any of such circumstances/events could be relating to, but not limited to, the assets being values, comparables and valuation parameters used. In the event such circumstances/events are considered by the valuer the same should be explicitly disclosed in the valuation report.
xxxxx

25. The Insolvency & Bankruptcy Board of India vide Guidelines on use of Caveats, Limitations & Disclaimers by the Registered Values in Valuation Reports dated 01-09-2020 lays down as under:

I. *In the preparation of a valuation report, the RV shall not disclaim liability for his expertise or deny his duty of "due care". However, it is recognized that a RV, shall prepare the valuation report of the*

company based on information and records concerned as provided by the management. The management? remains liable for the correctness and veracity thereof. However, significant inputs provided to the RV by the management/owners should be considered investigated and /or corroborated. In cases where credibility of information supplied cannot be supported, consideration should be given as to whether or how such information is used.

II. *The RV does not make or calibrate the projections but factors his response and the valuation assessment on the reliability and credibility of the information. The various projections of business growth, profitability, and cash flows etc, which are used in the valuation report are the company's estimates. The RV should consider the reliability and credibility of projections after testing the assumptions made by the management / owners / company in given market conditions and after sufficient inspection, enquiry, computation and analysis. The extent of evidence requires professional judgements and RV has to ensure that it is adequate for the purpose of valuation. The RV may disagree with the projections if they are conjectural or bordering on the unreal and accordingly make necessary modifications.*

III. *A RV has the right to demand relevant information and basis of the projections before commenting thereon. It is the duty of the entity being valued to be fair and to provide accurate information about the subject asset.*

IV. *In a valuation report, the RV can state that the assumptions are statements of fact provided by the company and not generated by the RV. This warning statement is necessary as data provided by the company is often construed be a part of the valuation report. Notwithstanding this, the RV has to carry out sufficient inspection, enquiry, computations and analysis to ensure that valuation is properly supported.*

V. *All valuations are to be carried out in sufficient detail to comply with the requirements of "due care". However, it can be reasonably expected that circumstances may place certain limitations regarding access to information or the time available. Hence, one has to recognize limitations of time and context in valuations, as it cannot constrain business need and flexibility.*

VI. *Keeping in view business needs and circumstances and, in the interest of transparency, any significant concerns regarding the*

WWW.LEGALERAONLINE.COM

justification, the information or the time available to complete the valuation be stated in the valuation report, together with appropriate explanation and implications.

VII. The effort, diligence and level of expertise applied by the relevant Registered Valuer, need to be stated in the valuation report.

Xxxxxx

ii. The RV should also include in his report.

• an affirmative statement that information provided and assumptions used by management/others in developing projections have been appropriately reviewed, enquiries made regarding basis of key assumptions in context of business being valued and the industry/economy; and

• an affirmative statement on adequacy of information and time for carrying out the valuations;

iii. The RV should mention any key factors which have a material impact on the valuation, including inter alia the size or number of the assets or shares of the company, its/their materiality or significance, minority or majority holding and changes on account of the transaction, any impacts on controlling interest, diminution or augmentation therein and marketability or lack thereof; prevailing market conditions and government policy in the specified industry as a disclaimer depending upon the factor.

iv. In case of valuation of tangible assets, there may be impact on the value due to faulty structural design or contamination. Based on the individual circumstances, the RV may decide on how to use such information in the valuation report.

25.1 We also note that the IBBI, by its Notification dated 01.09.2020, has further laid down guidelines on the use of caveats, limitations and disclaimers by the Registered valuers in the valuation reports. The stated objective of these guidelines is that these guidelines provide guidance to the Registered Valuers in the use of Caveats, Limitations and Disclaimers in the interest of the credibility of the valuation reports. These also provide an

illustrative list of the Caveats, Limitations, and Disclaimers, which shall not be used in a valuation report.

"12.1

4. A valuation report should not carry a disclaimer, which has potential to dilute the responsibility of the RV or makes the valuation unsuitable for the purpose for which the valuation was conducted. The valuation reports should be capable of being tested through the crucible of legal evidence in judicial proceedings. The following points may be considered while providing disclaimers in a valuation report. An RV may:

(a) identify the rights he/she wants to protect;

(b) identify the areas where he/she might be subject to liability;

(c) clarify that the contents of the valuation report pertain to specific use by the company; and

(d) caution the reader of the potential risks.

However, a disclaimer will not, by itself, be able to exclude an RV's liability in respect of negligence in performance of his duties."

25.2 It is very relevant to note that the aforementioned IBBI notification lays down the following illustrative Caveats etc., which are not to be used ina valuation report.The same is extracted below for the sake of clarity:

"3.6 Illustrative Caveats, Limitations, and Disclaimers in a Valuation Report not to be used.

i. ***Business Plan/forecasts received from client:*** *RV giving a disclaimer for the business plan/forecasts received from client without applying test of reasonability and due diligence.*

ii. ***Physical Verification:*** *RV giving a disclaimer that he has not physically verified the tangible assets in case where engagement is for providing liquidation value.*

iii. ***Market related data:*** *RV giving disclaimer for the market related data employed in his reports e.g. beta, discounting factor, comparable companies, comparable transactions, valuation metrices without testing appropriateness of the same.*

iv. ***Historical analysis:*** *RV giving disclaimer that he has not done any historical analysis while conducting valuation exercise of listed/unlisted*

WWW.LEGALERAONLINE.COM

entities although the historical data could have been arranged with reasonable effort.

v. ***One approach:*** *RV giving valuation conclusion based on only one approach without giving any reasoning as to why the other two approaches were not considered in his valuation.*

vi. ***Another expert:*** *RV giving disclaimer for work done by any other expert and the findings of the same does not form part of report of RV*

25.3 The guidelines clearly lays down the procedure to be adopted by the Registered Valuers while reporting on Tenancy Details. The same is extracted below

vi. Tenancy Details: Extent of Investigation of Lease Details- In reporting the specific lease details of a property it is important to advise the extent of the investigation of lease documents and other supporting documentation undertaken by the RV. When the lease negotiations or preparation of documentation may not have been concluded, it is necessary to specify in the report that the valuation is subject to satisfactory conclusion of those lease negotiations and the taking on record of a stamped lease agreement by the parties. For example: This assessment of Market Value is based on the assumption that the proposed lease agreements outlined earlier in this report are all executed, signed and stamped. Upon being stamped those documents should be referred to the RV to confirm that the particulars of the document concur with those set out in this report

26. We have heard the learned Senior Counsels and other counsels for the parties and in the subsequent para, we will discuss the validity of the arguments made during the present proceedings in support of the prayer that the scheme should be approvedby this Tribunal.

26.1 As regards considering the merits of the CBRE report referred to in the report of the Income Tax, it is accepted that the same was not taken into account. It is, however, noted that some of the facts mentioned in the said report, like the adjustment in sharing ratio in Embassy Cornerstone JDA, have been

corroborated subsequently by the valuers in their affidavits filed in the course of the present proceedings. To that extent, this report can't be dismissed as irrelevant.

26.2 It has been vehemently argued that the valuations shall not be construed to be an audit or a review as per Audit Standards as mentioned in the ICAI valuation standards 102. This argument is not persuasive enough as the issue at hand is whether there is adequate disclosure of relevant information in the valuation reports along with a critical analysis of the same to make the stakeholders aware of the potential risks in the amalgamation before obtaining their consents and not to ascertain whether audit standards have been applied in the Valuations or not.

26.3 The argument that the valuations considered for internal restructuring and internal transfer has no relevance, as the acquisition cost of the NAM Estate was valued on the basis of the Income Approach, is not acceptable as, for achieving a correct valuation of any asset, the integrity of the factual matrix on the basis of which these different approaches are used for computation of cost cannot be compromised. As laid down in ICAI valuation Standards 103, the Registered valuer is to analyse the projections and its underlying assumptions to assess the reasonableness of the cash flows, and he is expected to gather the necessary information to assess risks inherent in the achievability of the projections. We note that the Valuation Reports do not comply with the guidelines in the ICAI standards in this aspect.

WWW.LEGALERAONLINE.COM

26.4 It is also argued that the present scheme has been vetted and cleared by the SEBI and Stock Exchanges, and the same should be accepted by this Tribunal also. In this connection, a reference is made to the submissions made in CA No. 5/2023 extracted as under :

Subsequently, SEBI vide its email dated December 07, 2022, directed BSE

> *"you are advised to intervene in NCLT with the observation that disclosure may be made of the assets & liabilities of the entities (including Einbassy One Developers Put. Ltd., Embassy East Business Park Put. Ltd. (formerly known as Concord India Pvt. Ltd.) and Summit Developments Pvt. Ltd.) whose shareholding was transferred to NAM as part of the internal restructuring". A copy of SEBI's email dated December 07, 2022, is annexed as ANNEXURE A-4.*

Considering the direction issued by SEBI and Observation Letter as referred to above, it is respectfully submitted that assets & liabilities of the entities (including Embassy One Developers Pvt. Ltd., Embassy East Business Park Pvt. Ltd. (formerly known as Concord India Pvt. Ltd.) and Summit Developments Pvt. Ltd (sic) disclosed to the public. This is imperative considering the fact that valuation report, which forms the basis for swap ratio, merely mentions that the value of unlisted entity upon internal restructuring is considered while it does not disclose the assets and liabilities of aforesaid entities.

That disclosure of the aforesaid information is although more relevant and utmost necessary considering the fact that public shareholders of Indiabulls -Real Estate Limited (who are holding 99.89 % of entire shareholding) are accurately and adequately informed about all the vital information such as assets and liabilities of the aforesaid entities otherwise their interest may be severely impacted. Furthermore, a listed company is duty bound to comply with direction issued by SEBI/BSE.
In view of the above email/ direction of SEBI dated December 07,2022, BSE is to be considered a necessary party and the Company is duty bound to comply with directions issued by BSE and SEBI in the interest of public."

(Emphasis Supplied)

WWW.LEGALERAONLINE.COM

The aforementioned CA before us, however, was withdrawn by BSE Limited on 03.02.2023. We, however, note, that CA No. 05/2023 unequivocally states that the valuation reports merely mentions that the value of a listed entity upon internal restructuring is considered while it does not disclose the assets and liabilities of the aforesaid entities, thus, putting a serious question mark on the level of transparency of the scheme.

26.5 In the course of the present proceedings, it has been pointed out that the allegations mostly pertain to the amalgamating companies, which are not parties to the present application before this tribunal. And that the NCLT, Bengaluru Bench, has already approved the scheme in respect of two transferor Companies by its order dated 22.04.2022. One of the major issues In the present application before this tribunal is to decide whether the valuation reports forming the basis of the Fair Equity Share Swap Ratio Report are complete in all material respects and whether the underlying information in the valuation reports is reliable and can be relied upon by the stakeholders while deciding on their consents to the proposed amalgamation. In a scheme of amalgamation, the values of the assets of all the amalgamating companies in the Scheme are critical for deciding the swap ratio of the shares of the amalgamating companies. Hence, the necessity to analyse the information regarding all companies in the scheme by both the stakeholders and this Tribunal. In this connection, a reference is made to the Second Explanation to Rule 6 Companies *(Compromises, Arrangements and Amalgamations) Rules 2016,* which lays down

WWW.LEGALERAONLINE.COM

that for the purposes of the said rules, disclosures (including a declaration that the valuation report is available for inspection by the stakeholders at the registered office of the companies), are required to be made by a company in respect of all the companies which are a part of the Compromise or Arrangement. As the valuations of the companies are to be considered parallelly both by the stakeholders as well as this Tribunal, all the evidence relating to the same need to be considered by the Tribunal. We, therefore, find no substance in the argument that this Tribunal should restrict itself to considering the evidence relating to the applicant transferee company before it.

27. The petitioner, as well as the Income Tax Department, have placed reliance on various judicial decisions in support of their contentions:

27.1 The petitioner company has filed a short note in compliance of order dated 01.03.2023 vide Diary No. 00293/21 dated 14.03.2023, wherein it has been stated that the Court cannot scrutinize a scheme already approved by the stakeholders. The commercial wisdom of the shareholders and other stakeholders allows them to approve or reject a scheme. The shareholders have approved the scheme based on the valuations carried out on a cut-off date. The valuation may fluctuate on a day-to-day basis, and if the valuations are to be reconsidered, it would be impossible for the companies to enter into any scheme of amalgamation. Reliance is placed on the judgment of Hon'ble NCLAT in the case of the ***Hon'ble NCLAT in RHI India Private Limited and Vs Union of India;*** Company Appeal (AT) No.128 of 2020, wherein it has been held that the

WWW.LEGALERAONLINE.COM

Tribunal has limited power to overrule the commercial wisdom of the shareholders. The petitioner company has also relied upon the following judgments:-

i. Hon'ble Supreme in the ***Miheer H. Mafatlal vs Mafatlal Industries Ltd*** *[(1996) 10 SCL 70]**;***

ii. Hon'ble Supreme in the ***Hindustan Lever Employees' Union Vs. Hindustan Lever Limited*** *[(1994) 2 SCL 157 (SC)];*

iii. Hon'ble Delhi High Court in the case of ***M/s. Vodafone Essar Limited and others and M/s Vodafone Essar Infrastructure Limited,*** *C.P. No.334 of 2009 dated 29.03.2011*

It is further contended that the scheme cannot be declined only on the ground the income tax liabilities will be reduced after the approval of the scheme. In support of their contention a judgment of Hon'ble NCLAT in case of ***Joint Commissionerof Income Tax Vs. Reliance Jio Infocomm Limited & Others*** *[Company Appeal (AT) Nos.113 & 114 of 2019]* wherein it has been held that even if the scheme results in tax avoidance or is not in accordance with the provisions of the Income Tax Act, 1961, even then the revenue authorities are at liberty to initiate appropriate course of action as per the law.

27.2 The Income Tax Department, in its affidavit filed by diary No. 0293/17 dated 07.03.2023, has placed reliance on the following judicial decisions:

i. The decision of the Hon'ble Supreme Court in the case of ***M/s. Integrated Finance Co. Limited vs. Reserve Bank of India***, Civil Appeal No. 5505-5508 of 2013, dated 16.07.2013, holding that:

> *"It (Company Court)cannot shut its eyes to blatant non-disclosure of material information, which could have a major influence/ impact on the decision as to whether the scheme has to be approved or not."*

ii. It also placed reliance on the decision of the Hon'ble NCLAT, Chennai, in the case of ***Hotel City Plaza Private Limited and Another vs. Union of***

WWW.LEGALERAONLINE.COM

India, Company Appeal (AT) (CH) No. 28 of 2021, dated 16.01.2023dated, holding that

> *66. The Tribunal, is to see that the scheme is not a camouflage, for a purpose, other than ostensible reason(s). Also, the Tribunal, is to find out, whether a particular scheme, is opposed to public policy or otherwise, by applying its judical mind."*

iii. Reliance is placed on the decision of the Hon'ble NCLAT in the case of ***Wiki Kids Limited & Another vs Regional Director and others***, Company Appeal (AT) No. 285 of 2017, upholding the order of the 'Hon'ble NCLAT refusing to approve the scheme being against the public interest and held that the scheme should be fair and in the interest of all shareholders and not only for a few among them'.

27.3 For an appropriate appreciation of the judicial decisions on the issue of the powers of this Tribunal to scrutinize the amalgamation scheme and arrive at an independent decision, a reference is made to the following extracts from the judicial decisions:

27.3.1 In the case of ***Hotel City Plaza Pvt. Ltd. Vs. Union of India;*** in Company Appeal (AT) (CH) No. 28 of 2021 dated 16.01.2023, the Hon'ble NCLAT ChennaiBench has held:

> *"Compromises, Arrangements and Amalgamations, under the Companies Act, 2013'*:
>
> *"57. Section 230 of the Companies Act, 2013, deals with `Power to Compromise' or make `Arrangements' with the `Creditors' and the `Members', and the said Section is wide enough to include any reasonable `Compromise' or `Arrangement'. The word `Arrangement' has wider meaning, than the term `Compromise'.*

58. At this juncture, this `Tribunal', worth recalls and recollects the decision in Travancore National v. Quilon Bank, in Re., reported in (1939) 9 CompCas 14 Mad., wherein it is observed that the use of word `may', in the Section denotes, that the Court' (now `Tribunal'), has to exercise its `Discretion', in making an `Order', when the `Scheme, before it for `Sanction', after its `Approval', by the `majority of the Creditors'.

59. If the `Scheme', is `unjust', `unfair', `unconscionable' or an `illegal' one, the `Court' (now `Tribunal'), is justified in declining to `Sanction' the `Scheme', in the considered opinion of this `Tribunal'. No wonder, a `Tribunal' / a `Court of Law', is to bear in mind that the `fairness' and `viability' of the `Scheme', qua the `right' of `minority shareholders', before according an `Approval'."

(Emphasis Supplied)

27.4 The Hon'ble Supreme Court in ***Integrated Finance Company Ltd. vs. Reserve Bank of India and Ors***; Civil Appeal Nos. 5505-5508 of 2013 (Arising out of SLP (C) Nos. 12737-12740 of 2008) dated 16.07.2013 has, mentioned, the following analysis of the High Court :

36. Whilst examining the scope of Sections 391 to 393 of the Companies Act, the High Court relied on the analysis of the aforesaid sections as rendered by this Court in the case of Miheer H. Mafatlal v. Mafatlal Industries Ltd. MANU/SC/2143/1996 : (1997) 1 SCC 579. The analysis given in the aforesaid judgment is as under:

"28-A. 1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391(2).

3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 Sub-section (1).

5. That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied

on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

(Emphasis Supplied)

Further, the Hon'ble Supreme Court has clarified as under:

"43. We are unable to accept the submission of the learned Counsel that Section 45QA of the RBI Act is not a bar to a scheme Under Sections

WWW.LEGALERAONLINE.COM

391-394 of the Companies Act. Under Section 391 of the Companies Act, whilst approving the scheme, the Company Court does not act as a rubber stamp. The Companies Act has to be satisfied that the concerned meetings of the creditors have been duly held. It has to be satisfied that in the concerned meetings, the creditors or members of any class have been provided with relevant material to enable them to take an informed decision as to whether the scheme is just and fair. The Court is also required to conclude that the proposed scheme of compromise or arrangement is not violative of any provision of law and is not contrary to public policy. Furthermore, the Court has to be satisfied that members or class of members or creditors who may be in majority are acting bonafide and have not coerced the minority into agreement. Above all, the Court has to be satisfied that the scheme is fair and reasonable from the point of view of a prudent man of business taking commercial decisions, which are beneficial to the class represented by them. [See Miheer H. Mafatlal (supra)] It is true that whilst sanctioning the scheme, the Company Court is not required to act as a Super-Auditor. No doubt whilst considering the proposal for approval, the Company Judge is not required to examine the scheme in the way of a carping critic, a hairsplitting expert, a meticulous accountant or a fastidious Counsel. However at the same time, the Court is not bound to superficially add its seal of approval to the scheme merely because it received the approval of the requisite majority at the meeting held for that purpose. The Court is required to see that all legal requirements have been complied with. At the same time, the Court has to ensure that the scheme of arrangement is not a camouflage for a purpose other than the ostensible reasons. [See Administrator of the Specified Undertaking of the Unit Trust of India (supra), Para 32]. If any of the aforesaid requirements appear to be found wanting in the scheme, the Court can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same. (See Miheer H. Mafatlal (supra).

(Emphasis Supplied)

27.5 With reference to the judicial decisions relied upon by the petitioners, it is argued that in both ***Miheer H. Mafatlal (supra) and Vodafone Essar Limited (Supra)***, it is held by the Hon'ble Apex Court that the judicial authorities cannot challenge the commercial wisdom of the shareholders and other stakeholders either to approve or reject a scheme. However, as evident from the summary of

WWW.LEGALERAONLINE.COM

the decision of the Hon'ble Supreme Court in the case of ***Miheer H. Mafatlal,*** quoted in para 27.4 above, the Hon'ble Apex Court has recognised the fact that concerned meetings of the creditors or members or any class of them should have the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. In the case of ***Hindustan Lever Employees' Union (supra),*** the Hon'ble Apex Court dismissed the appeal against the amalgamation as no material was placed before the Court to prove the infringement of interest of the employee. In the case of ***Reliance Jio Infocomm Limited & Others (supra),*** the contention that the scheme of amalgamation cannot be rejected solely on the basis of tax considerations was upheld. The present case, however, is clearly distinguishable from the abovementioned cases relied upon by the petitioners as here the issue under discussion is whether a Fair Equity Share Swap Ratio determined by the valuers in the valuation report, solely on the basis of information furnished by the management without the valuer making independent verification of the same andsubsequently challenged as being materially incomplete and unreliable, is acceptable as correct in an amalgamation proceeding and whether, under the DCF method under the Income Approach, which is stated to have been adopted for the valuation of the assets of the amalgamating companies by the valuers, any factual inaccuracy in the material assumptions regarding the assets for the purpose of valuation, as alleged by the Income Tax Department in the present case, will adversely affect the final values of these assets considered for determing the Fair Equity Swap Ratio of the amalgamating companies.

WWW.LEGALERAONLINE.COM

27.6 In this connection, reference is also made to the decision of the Hon'ble NCLAT in the case of ***Ankit Mittal vs. Ankita Pratishtan Ltd. and Ors;*** Company Appeal (AT) No. 238 of 2018 dated 29.11.2019, wherein the Hon'ble Appellate Tribunal critically analysed the valuation report and held as under:

> "*We find that the valuer made a valuation disregarding the methodology, methods or share entitlement ratio even as stated by him in his valuation report. No valuation of each share of every company has been done to arrive at the exchange ratio and we are convinced that only the guess work has been done to arrive at share exchange ratio. We are unable to convince ourselves that on the basis of this valuation report and for other reasons recorded above the amalgamation can be termed as fair to all stakeholders. Such Scheme could not have been approved."*
>
> *27.5 Thus, after critically analysing the judicial decisions placed before us, we are of the view that this tribunal cannot ignore the blatant non-disclosure of material information which has an impact on the decision as to whether the scheme has to be approved or not.*

28. Considering the complicated issues of valuation involved in the proposal of amalgamation at hand, this Tribunal appointed CA(Dr.) Debashis Mitra as Amicus Curiae by order dated 23.03.2023 and made available to him the replies filed by the respondents on the issue of valuation with a direction to assist us on the following issues.

1. *Whether a fair Equity swap ratio determined solely on the basis of information furnished by the management without the valuer making independent verification of the same and subsequently questioned by the Income Tax Department after a search and seizure operation be accepted as a basis of a credible amalgamation process.*
2. *Whether under the DCF method under the Income Approach, which is stated to have been adopted for the valuation of the assets of the amalgamating companies by the valuers, any factual inaccuracy in the material assumptions regarding the assets for the purpose of valuation will affect the final values of these assets considered for deciding the fair equity swap ratio of the amalgamating companies."*

WWW.LEGALERAONLINE.COM

29. In the present case, as per the direction of this Tribunal dated 23.12.2021, meetings of the shareholders was held on 12.02.2022, and the Chairperson's report dated 12.02.2022 was also filed. The valuation reports attached to the present application were available to the shareholders to enable them to form an opinion about and decide on their consent to the amalgamation proposal before them.

30. As outlined in para 24 above, ICAI valuation standards clearly lay down that the information furnished in the valuation report should be relevant to the decision-making needs of the intended users(in this case, the creditors and the shareholders of the amalgamating company), and should reflect the economic substance and not merely the legal form of an asset. Furthermore, it is to be complete in all material respects. It also lays down that Caveats, limitations, and disclaimers be included in the report to the extent they explain and elucidate the limitations faced by the valuer and shall not be for the purpose of limiting his responsibility of the valuers for the valuation report.

30.1 As narrated in the foregoing paragraphs, the affidavits of the registered valuers state that at the time of Valuation, EOCDPL was a subsidiary of Embassy Property Developers Private Limited, which, pursuant to an internal reorganisation, would become a fully owned subsidiary of NEPL. The scale of this internal re-organisation, as outlined in the valuation reports, is quite extensive and, therefore, subject to various uncertainties and attendant risks.

30.2 In the present case, the Registered Valuers have given disclaimers for work done by other experts, and the findings of the same do not form part of the report of the Registered Valuers as required under the IBBI Regulations.

Furthermore, they have given a disclaimer for the business plan/forecast received from the client, i.e. the amalgamating companies, without applying the test of reasonability and due diligence. Apparently, there were several incomplete negotiations which were ongoing at the time of the valuations, especially In the cases of the entities of the Embassy group, and as laid down in the IBBI's notification, it was necessary for the Registered Valuers to specify in their reports the extent of investigation of these documents and furnish details of other supporting documentation undertaken by the registered valuers. The RVs are also required to take on record the standard lease agreement by the parties. The IBBI notification clearly states under the head "illustrative caveats, limitations, and disclaimers in a valuation report not to be used", that if the assessment of market value is based on the assumption that the proposed lease agreements outlined earlier in the report are all executed, signed and stamped, upon being stamped, those documents are to be referred to the Registered Valuer to confirm that the particulars of the document concur with those set out in their reports. In the present case, this has not been complied with, and the Registered Valuers have stated that their conclusions are based on these assumptions and information given by/on behalf of the management, and they do not assume or accept any liability or responsibility for any independent verification of such information or any independent technical evaluation or appraisal of any of the assets. They have just presumed that the so-called extensive internal reorganisation would be executed as per the scheme and as promised by the management, without critically analysing the

WWW.LEGALERAONLINE.COM

same on merits with reference to records and independent information/analysisdone by them. For example, as pointed out in the report of the Income Tax Department and subsequently admitted by the petitioners, there were alterations made to the original sharing ratio during the internal reorganisation of one of the entities, i.e., Embassy Cornerstone Tech Valley Project triggered due to the inability of the Cornerstone Group to acquire the entire 100 acres of land as envisaged originally in the proposal.

30.3 As stated by the valuers in their affidavits, they came to know subsequently that a revised JDA was entered with reference to Embassy Cornerstone Tech Valley Project on 15.11.2021, altering the original sharing ratio. Even accepting for the sake of the argument the contention of the petitioners that the revision in the sharing ratio was made to protect the original rights of the amalgamating company, in the interest of transparency, the same should have been disclosed to the stakeholders and also before the Bengaluru Bench of the NCLT, during the proceedings for the approval of the Resolution Plan of the concerned amalgamating company. The same has not been done. The Registered Valuers have taken shelter behind a general statement that the valuers have relied on the information supplied by the management- which was subsequently repeated by the Registered Valuers during the proceedings and also recorded in our order dated 01.03.2023. There is no mention of any general information gathered and analysed by the Registered Valuer on the "subsequent events" which would affect the business directly or indirectly except for a caveat generally stating that they have not done any independent

technical evaluation or appraisal order due diligence or legal title search of the assets and liabilities of the company or any of its subsidiaries or associated companies and have considered them at the value as disclosed by the companies in their regulatory filings and in the submission made to the Registered Valuers.

30.4 On the basis of the facts placed before us, we note that the assets and liabilities positions of the amalgamating companies were not placed on the websites of the amalgamating companies. Subsequently, the Income Tax Department, during its Search and Seizure operations on the petitioner companies in this application, has pointed out several instances where the amalgamating companies have deviated from the original proposal for amalgamation. This also includes the aforementioned revised JDA in the Embassy Cornerstone of Tech Velly Project. The valuers alleged dependence on the diligence reports prepared by the independent third parties does not exonerate them from making a critical assessment independently with a questioning mind of the validity of information obtained from the management as laid down in the valuation standards. The valuation reports also do not include details of the inspection or any investigation undertaken by the valuerto validate the commercial projections made by the management. In short, the Registered Valuers have disclaimed liability for his expertise and denied their “duty of due care” as specified in the guidelines issued by the IBBI. If thevaluers reasoned that the credibility of the information supplied could not be supported, they are mandated under the standards and IBBI notification to

consider whether or how much information is to be used in preparing the valuation report. We note that in the present case, the asset and liability positions of the amalgamating companies had not crystallised to the desired level at the time of the preparation of the valuation report. The credibility of the claim of the Embassy group to carry out the extensive internal reorganisation needed to be properly appraised by the Registered Valuers and the possible risks should have been clearly mentioned in the valuation reports to make it relevant and reliable for the stakeholders of the present amalgamation.

30.5 We refer to the provisions in the IBBI notification that the Registered Valuers should include in reports an affirmative statement that the information provided and assumptions used by the management/others in developing projections have been appropriately reviewed, enquiries made regarding the basis of key assumptions in the context of the business being valued and the industry/economy and an affirmative statement and adequacy of information in time for carrying out the valuation. We also refer to the ICAI valuation standard 201, stating that events and circumstances occurring subsequent to the valuation date may be relevant to the valuation depending upon, inter alia, the basis, premise and purpose of valuation and the valuer should apply his professional judgement to consider any of such circumstances/ events whichare relevant for the valuation. Such circumstances/ events could be relating to, but not limited to, the assets being valued, comparables and valuation parameters used. In the event such circumstances/ events are considered by the valuer, the same should be explicitly disclosed in the valuation report.

WWW.LEGALERAONLINE.COM

Needless to say, the valuation reports, which have been considered by the stakeholders to give their consents to the scheme for amalgamation, do not have any explicit disclosure of the extent of the impact of events and circumstances occurring subsequent to the valuation date. In view of the aforementioned discussion, we are of the view that the contents of the valuation reports are in the teeth of the relevant ICAI valuation standards and the IBBI notification dated 01.09.2 020, and the same cannot form the basis for a correctequity swap ratio among the amalgamating companies.

30.6 It is worthwhile to note that the approval of the scheme by the Bengaluru bench was accorded vide order dated 22.04.2022. Subsequent to the same, a search was conducted by the Income Tax Department on 01.06.2022, and serious allegations, including that of overvaluation of assets by the companies, were levelled on the basis of incriminating material seized during the search and seizure operations. We also note that the allegations by the Income tax department regarding the deviation from the original scheme in respect of one of the entities involved in the internal restructuring, i.e, Embassy Cornerstone Tech Valley Project, have been accepted by the valuers as factually correct during the present proceedings. The fact of such a deviation from the original scheme was not placed before the Bengaluru bench by the petitioner companies though we are of the view that such information was material for the Tribunal for approving the scheme for amalgamation. We also note that the Income Tax Report does point towards critical gaps in the information provided in the valuation reports, and the Income Tax investigation is still under progress.

WWW.LEGALERAONLINE.COM

31. Now, correlating the IBBI guidelines, and ICAI Valuation standards, the opinionof the Ld. Amicus Curiae to the factual material of the case at hand, we draw the following conclusions

a) These valuation reports cannot be considered relevant and reliable material to enable the stakeholders to arrive at an informed decision for approving the scheme in question as laid down in the decision of the Hon'ble Supreme Court in the case of ***Miheer Mafatlal (supra);***

b) The valuation reports failed to comply with the mandatory provisions of the relevant ICAI valuation standards, the guidelines of the IBBI dated 01.09.2020, and the strict provisions in this regard in the Companies Act, 2013 and The Rules 2016;

c) Based on the evidence with regard to the adjustment of sharing ratio, post the date of valuation, in the case of Embassy Cornerstone Tech Valley Project in the initial report of the Income Tax Department, we hold that the registered valuers failed to appropriately review, and make enquiries regarding the basis of key assumptions in the context of business being valued and the industry/economy as laid down in the IBBI notification;

d) The valuation reports lay down caveats, limitations, and disclaimers, only for limiting the responsibility of the valuers, and do not mention many key factors which have a material impact on the valuations;

e) The valuation reports placed before this Bench seeking sanction of the scheme and also made available to the shareholders at the time of the meetings ordered by this Bench, contain information which is not free

WWW.LEGALERAONLINE.COM

from material error, and do not represent faithfully that which it either purports to represent or could reasonably be expected to represent.

32. As a sequel to the above discussion and reasons recorded herein before, this Tribunal is of the considered opinion that it is not a fit case to sanction the scheme of amalgamation. Hence, the CP(CAA) No. 14/Chd/Hry/2022 stands dismissed. As discussed above, CA No. 9/2023 & CA No. 29/2023 are also dismissed.

Sd/- Sd/-

(Subrata Kumar Dash)
Member (Technical)

(Harnam Singh Thakur)
Member (Judicial)

May 09 , 2023
PB/SA

LEGAL MEDIA GROUP
LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE