

# DICTUM

## “Summary of Judicial Pronouncements”

### Rejection of Scheme of Amalgamation countering approval from Regulatory Authorities

– *Wiki Kids Limited and another v. Regional Director and Others*

[National Company Law Appellate Tribunal, New Delhi, Company Appeal No. 285/2017]

[December 21, 2017]

#### Background

Section 232 of the Companies Act, 2013 (‘the Act’) provides the mechanism for application to Tribunal for sanctioning of a compromise or an arrangement proposed between a company and its creditors /members/ any class of them. Section 231 of the Act governing the powers of Tribunal provides that the Tribunal shall have power to supervise the implementation of the compromise or arrangement; and may at any time, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for its proper implementation. Hence, the jurisdiction of the Tribunal in this regard was comprehensive in nature being limited to supervision of scheme.

However, a recent judgement by the National Company Law Appellate Tribunal (NCLAT) depart significantly from the existing regulatory provisions and judicial position, and expands the scope of review that the National Company Law Appellate Tribunal (NCLT) may exercise. NCLT is obligated to protect the public interest at large and may refuse to approve a scheme of arrangement, if the benefit of the impugned scheme is limited to only a certain class of persons and no public interest is being served even though such scheme receives a green signal from Regulatory Authorities such as Securities and Exchange Board of India (SEBI), Stock Exchanges (SEs), Regional Director (RD), Official Liquidator (OL) and Registrar Of Companies (ROC).

In the case *Wiki Kids Limited and another v. Regional Director and Others*, the NCLAT upheld the decision of NCLT, and ruled that the Tribunal has enough expertise to look into the Scheme of Amalgamation and can also see whether it is just and fair to all shareholders or not. It has a duty to act in public interest and look so that unfair advantage does not flow to one of the group of shareholders or the other.

#### Issues of the Case

1. Whether the Tribunal has jurisdiction like an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion?
2. What are the essential parameters to establish that sufficient assurance has been conveyed to shareholders?

#### Tribunal’s Ruling

**NCLT in *Wiki Kids Limited and another v. Regional Director and Other* (‘Case’) held that:**

1. Circulation of scheme of amalgamation to shareholders and creditors in absence of vital information such as; list of names of shareholders, names of Directors of both Companies, disclosure that shares of transferee company would be allotted to common promoters of transferor company, make the stakeholders incapable to take a well informed decision as to whether to approve/reject the scheme.
2. Entire scheme of amalgamation conceived/ designed to financially benefit only major common promoters of both the companies and where no/negligible public interest is involved, shall be rejected.

#### Appellate Tribunal’s Ruling

**Upholding the decision of NCLT in the case, NCLAT held that:**

1. *The constitution of the NCLT comprises of both judicial and technical members.* Thus, it has enough expertise to examine a scheme and to ensure that it is fair and just to all shareholders. Where from a broad review of the scheme, it appears to be unfairly beneficial to a particular class of persons, then NCLT should exercise expertise available to it and refuse to approve a

scheme if, according to its opinion, it fails to uphold the public interest.

2. Disclaimer in valuation report issued by independent chartered accountant, stating that entire valuation was based on documents provided by management of Appellants and Valuer had disclaimed the accuracy and reliability of such information. *Thus, shareholders could not be said to have been conveyed sufficient assurance.*

#### Our Views

1. Approval of the shareholders and creditors and no objection from the concerned regulatory authorities, does not repress the power of NCLT to testify the scheme on the set grounds and confirm that the scheme is in general public interest.
2. NCLAT distinguished the existing Supreme Court rulings in *Miheer H Mafatlal*, where the defined scope of judicial review in such matters is highly limited, and not appealable in nature. Whereas, this ruling by NCLAT has widened the scope of Tribunal and empowered it to exercise its judicial power.
3. This ruling is of particular importance in businesses restructuring decisions, as the parties involved would have to ensure that scheme of arrangement proposed under the Act has a rationale that benefits of such a scheme ensues to all shareholders.

#### Let’s Talk

For a deeper discussion on how this issue might affect your business, please contact:

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