



cyril amarchand mangaldas  
advocates & solicitors

---

# SCHEMES OF ARRANGEMENT AND GAAR

---

December 3, 2018

**Bharat Vasani**

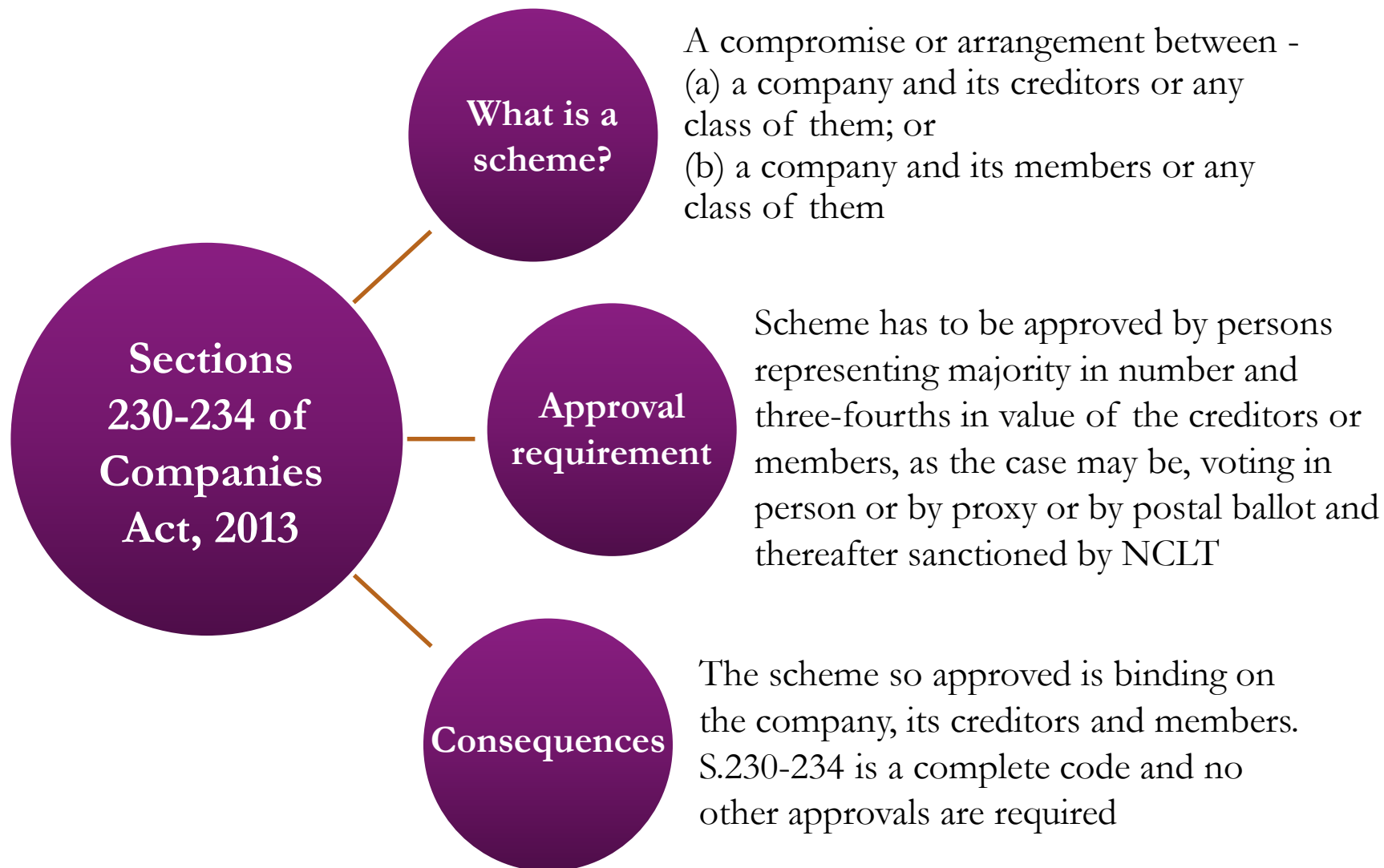
Partner

Cyril Amarchand Mangaldas



**Character, Competence & Commitment**

# Schemes of arrangement



# Schemes under CA 2013 and GAAR

## Companies Act, 2013

- Section 230(5) - notice of scheme to Central Government, income-tax authorities, RBI, SEBI, RoC, stock exchanges, Official Liquidator, CCI etc.

## GAAR provisions in Income Tax Act, 1961

- Sections 95-102 came into force w.e.f. April 1, 2018
- Section 96(1)(c) - an arrangement lacking commercial substance is impermissible avoidance arrangement

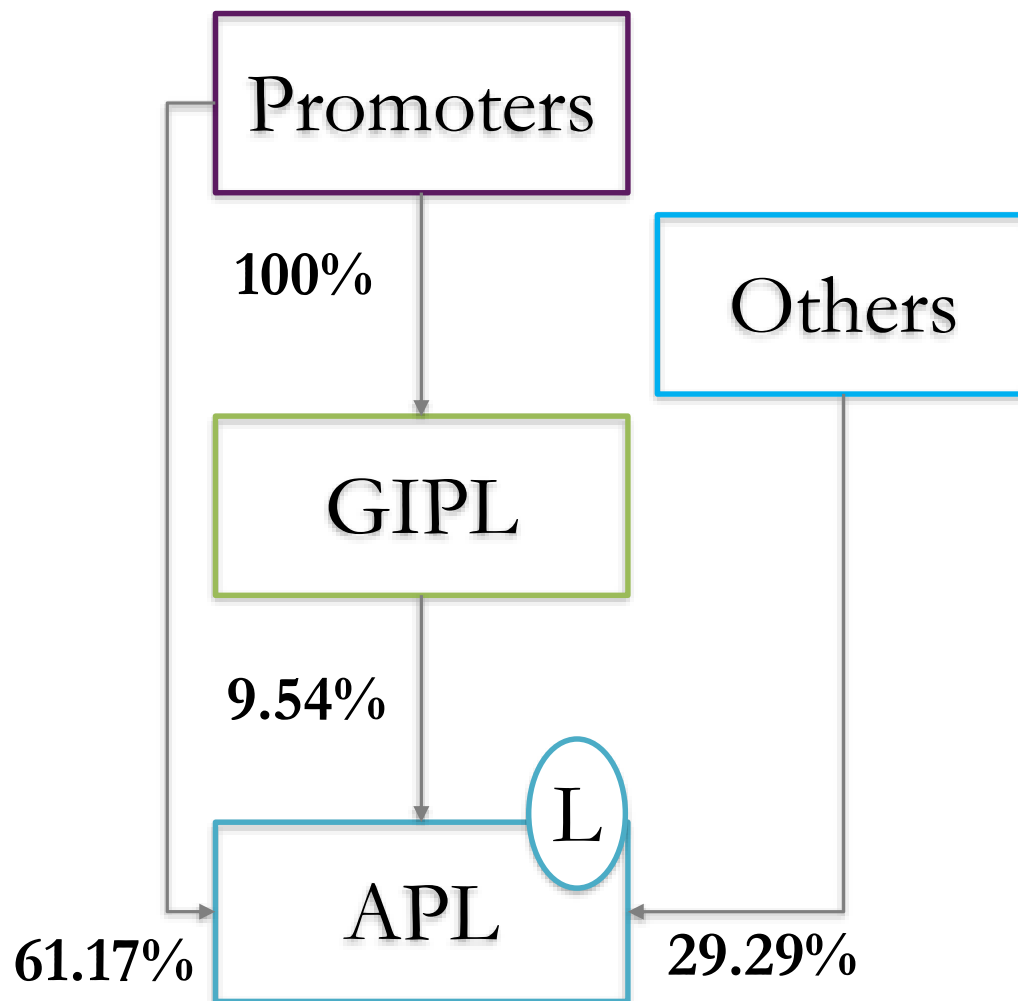
## Role of judiciary in sanctioning schemes

- High Courts earlier adopted 'non-interventionist approach' in sanctioning schemes
- *Miheer Mafatlal* case – 9 principles on sanctioning schemes laid down by SC

# Ajanta Pharma Amalgamation Case (1) – Facts

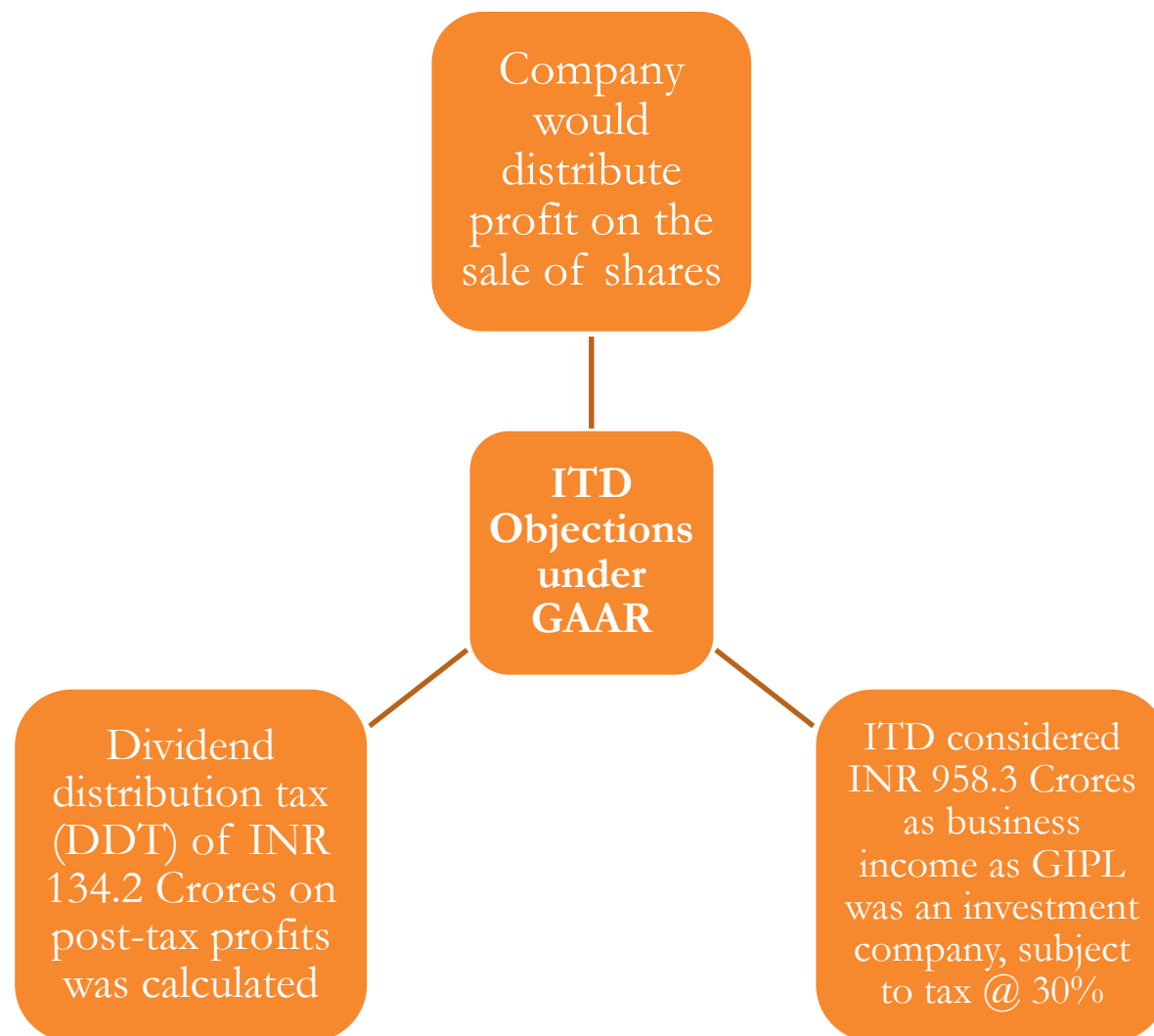
Scheme of amalgamation and arrangement filed before NCLT, Mumbai wherein two companies of Ajanta group – GIPL and APL (listed entity) were to be merged.

Scheme was approved by 99.99% of the public shareholders of APL and was also not opposed by the Regional Director, Official Liquidator, RoC, SEBI or stock exchanges.



# Ajanta Pharma Amalgamation Case (2) – ITD objections

ITD argued that the Scheme was impermissible as it was a deliberate measure to avoid taxes and that there would be revenue loss of INR 421.7 Crores



# Ajanta Pharma Amalgamation Case (3) – NCLT Ruling

Through the Scheme, GIPL and promoters were avoiding tax liability.

With investment of INR 48.7 Crores, promoters would get shares worth INR 1,477 Crores without payment of income tax.

The NCLT relied on the judgement of NCLAT in *Wiki Kids Ltd v/s Aventel Ltd* - held that if the scheme was not in public interest the same can be rejected

# Ajanta Pharma Amalgamation Case (4) – Issues of Concern

Wrong to raise GAAR objections where specific tax exemptions are provided

Shome Committee on deferment of GAAR – Purpose of GAAR to prevent tax avoidance and not tax mitigation.

In a scheme of amalgamation, no profits are realized by any party – ITD cannot tax unrealized profits

ITD will always get an opportunity to tax the transaction (covered by the scheme) at the stage of assessment – it cannot hold the entire scheme for that

Shares issued in the scheme of amalgamation are required to be fair valued under the IND AS and any profit made would be subject to MAT

## Ajanta Pharma Amalgamation Case (5) – Issues of Concern (contd.)

NCLT rejected the scheme on the ground that it was not in public interest but there is no requirement of public interest in Sections 230-232 of CA 2013

NCLT bound by the law declared by the SC in *Mibeer Mafatlal* case

Interventionist approach of the NCLT may discourage parties to do M&A transactions using the scheme route – this is not good for the economy



THANK YOU