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**(2004) 122 CompCas 854 : (2004) 2 CompLJ 105**

**Allahabad High Court**

**Case No:** C.P. No"s. 25 and 26 of 2003

In Re: Jaypee Cement  
Limited<BR>In Re:  
Jaiprakash Industries  
Limited

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** March 10, 2004

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) â€” Section 9#Companies Act, 1956 â€” Section 101(2),  
103(2), 189, 21, 391#Securities and Exchange Board of India (Substantial Acquisition of Shares  
and Takeovers) Regulations, 1997 â€” Regulation 11, 42, 44

**Citation:** (2004) 122 CompCas 854 : (2004) 2 CompLJ 105

**Hon'ble Judges:** Sushil Harkauli, J

**Bench:** Single Bench

**Advocate:** S.N. Verma, R.P. Agarwal, representing JPC and JPI, Navin Sinha, S.K. Mehrotra,  
representing HSBL, Pankaj Bhatia and M.C. Tewari, representing shareholders and Sanjay  
Goswami, representing SEBI, for the Appellant;

**Final Decision:** Disposed Of

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**Judgement**

Sushil Harkauli, J.

Company Petition No. 26 of 2003 has been filed jointly by the transferee company,  
namely, Jaypee Cement Ltd.

(hereinafter referred to as JPC for short) and the transferor company, namely, Jaiprakash  
Industries Ltd. (hereinafter referred to as JPI for short)

seeking sanction of the Court to a scheme of arrangement for amalgamation of the two  
companies by which JPI is to merge into JPC.

2. JPC is a wholly owned subsidiary of JPI, that is to say, that 100% paid up shares of JPC are held by JPI. Thus, the holding company is

proposed to be merged into the subsidiary company. JPI has a paid up share capital of Rs. 176,21,69,810 consisting of 17,62,16,981 fully paid

up equity shares of Rs. 10 each. JPC has a paid up share capital of Rs. 418,00,00,000 comprising 41,80,00,000 fully paid up equity shares of

Rs. 10 each.

3. Company Petition No. 25 of 2003 seeks confirmation by the Court to the reduction of the paid up share capital of JPC from Rs.

418,00,00,000 comprising 41,80,00,000 fully paid up equity, shares of Rs. 10 each to Rs. 176,21,69,810 consisting of 17,62,16,981 fully paid

up equity shares of Rs. 10 each. This reduction is sought consequent upon the sanction of the scheme of amalgamation by Company Petition No.

26 of 2003 under which the shareholders of JPI are to get one share of the amalgamated company in lieu of each share of JPI. An affidavit of the

Company Secretary of JPI has been filed as paper No. A-15 testifying compliance of the court's order dated 9.4.2003 by service of this petition

upon the Official Liquidator and the Central Government, i.e., the Regional Director, Northern Region, Department of Company Affairs, and

advertisement in the newspapers Pioneer (English) and Dainik Jagaran (Hindi) both published from Lucknow ; and Economic Times and Hindustan

Times both published in English from Delhi. The procedural requirements have been completed and there is no objection.

4. However, because the occasion to consider the prayer in Company Petition No. 25 of 2003 can arise only after the Company Petition No. 26

of 2003 is disposed of, therefore, the Company Petition No. 26 is being considered first.

Company Petition No. 26 of 2003

5. JPC and JPI had jointly moved Company Application No. 9 of 2003 seeking the amalgamation referred [to] above.

6. In that ex parte motion, separate meetings of the creditors and shareholders of JPI and another meeting of creditors of JPC were directed by the

order, dated 18.2.2003. Because in paragraph No. 7 of the Company Application No. 9 of 2003, it was mentioned that a special appeal by a

shareholder against an order dated 27.2.2001 sanctioning an earlier scheme of arrangement was pending. Therefore, the said order dated

18.2.2003 directed as follows:

That whereas it has been mentioned in para 7 of this application that a special appeal by a shareholder against the sanction of an earlier scheme of

arrangement is pending, therefore, the learned counsel for the applicant companies will ensure that within one week, a copy of this application and

this order is served upon the learned counsel representing the appellant in the said special appeal, to submit his objections within the legally

permissible limits, if any, in this matter.

7. The meetings were scheduled for 29.3.2003.

8. The said shareholder/appellant, namely, H.B. Stockholdings Ltd. (hereinafter referred to as the HBSL for short) filed an objection, dated

21.3.2003, in the Company Application No. 9 of 2003, with an interim prayer that the three meetings of creditors and shareholders scheduled for

29.3.2003 should be deferred.

9. The matter came up before the court on 24.3.2004. Because by that belated stage, with the meetings scheduled just after 5 days, all

arrangements had already been made for holding of the meetings ; therefore, it was not considered desirable, in the larger interest of shareholders

and creditors who planned to attend the meetings, to adjourn the meetings. Since no interest of HBSL was likely to be prejudiced by mere holding

of the meetings, therefore, the order quoted below was passed on 24.3.2003:

I have heard Sri S.K. Mehrotra and Sri R.P. Agarwal in respect of this application.

This application prays for stay of the effect and operation of the order dated 18.2.2003 by which meetings of the shareholders of the transferor

company, and the creditors of both the companies was directed to be held on 29.3.2003. Sri S.K. Mehrotra has raised the objection that a special

appeal filed by the applicant is still pending. This fact has been taken into consideration in the 2nd paragraph of the order, dated 18.2.2003.

The purpose of holding these meetings is to ascertain the views of the shareholders and creditors in respect of the proposed scheme of

arrangement. There is no other purpose of these meetings.

If the scheme is not approved, the applicant, i.e., H.B. Stockholding Ltd. would have no grievance left.

If, however, the scheme is approved by both the shareholders and creditors, the question would arise whether the court should accord the sanction

to the scheme in the confirmation petition. At that stage, the objections of H.B. Stockholdings Limited can also be examined along with any other

objection received against the proposed scheme. Therefore, I see no urgency in taking up this application. It may be listed with the record.

10. The meetings were held, as scheduled on 29.3.2003, at Hotel Taj Residency, Lucknow. The creditors of both the companies present and

voting, representing more than 68% of the credit value, have unanimously supported the scheme, and there is no objection to the report of the

Chairman of the meetings of creditors.

11. So far as the meeting of the equity shareholders of JPI is concerned, the report of the Chairman of the said meeting, Sri Yashwant Varma,

Advocate, is on record as Paper No. A-8 in Company Application No. 9 of 2003. No objection has been pressed that the report of the Chairman

is not accurate and correct so far as the voting results are concerned. The members present and voting represented 51.13% of the voting power.

Out of these -- 96% have supported the amalgamation. Only 4% of the members present and voting dissented. A chart containing the complete

summary of the voting result at the three meetings is given at page No. 41 of this order and the analysis of the voting is given in the chart titled

"voting pattern..." at page No. 42 of this order.

12. After the meeting, the Company Petition No. 26 of 2003 was filed for sanction of the Court to the scheme. On 19.5.2003, Hon"ble S.P.

Mehrotra, J., who was then the Company judge, was pleased to direct that the case should be listed before "another Bench". On 1.7.2003, the

Hon"ble Chief Justice was pleased to nominate this Bench to hear the matter.

13. When the matter came up for hearing on 16.9.2003, the learned counsel for HBSL raised an oral objection that the matter was cognizable by

the Lucknow Bench of this court and was not cognizable at Allahabad.

14. This objection had not been raised by HBSL when it filed the written objection, dated 21.3.2003, or on 24.3.2003 when the said objection

dated 21.3.2003 was pressed. The objection was also not raised when HBSL participated in the shareholders meeting dated 29.3.2003, although

other objections were given in writing by HBSL to the Chairman of the meeting. Subsequently, pursuant to the notice issued on 19.5.2003 HBSL

moved an application (Paper No. A-37) raising several objections and seeking to summon certain records, but even at that stage, no objection as

to territorial jurisdiction was taken. Again, on 29.8.2003, HBSL filed additional objections, but again no objection as to territorial jurisdiction was

taken. Rejoinder affidavits were also filed by the HBSL without objecting to the court's jurisdiction. Thus the objection as to territorial jurisdiction

was raised by HBSL, orally, for the first time at the hearing on 16.9.2003,

15. Similarly, two other objectors namely, Bhavan Jain and Devendra Kumar Bansal, who claim to be shareholders of JPI, represented in these

proceedings by Sri Pankaj Bhatia, Advocate, had also filed written objections on 17.5.2003 and 19.5.2003 without including therein any

objections as to territorial jurisdiction. They also raised this objection for the first time in writing on 16.9.2003.

16. The objection in a nutshell was that because both the JPC and JPI have their registered office, at Lucknow, therefore, in view of Section 10 of

the Companies Act, 1956, the Lucknow Bench of this Court alone would have territorial jurisdiction in the matter. After hearing the parties at great

length on this preliminary objection about the jurisdiction, and considering the fact that no prejudice could be shown to result to any of the

objectors if the matter was heard at Allahabad, a detailed order was passed saying that in view of the facts mentioned in the said detailed order

and summarised above, the Hon"ble Chief Justice may be pleased to consider whether a formal order under the second proviso to Clause 14 of

the United Provinces High Court's Amalgamation Order, 1948, should be passed directing that this case should be heard at Allahabad for

preventing the wastage of time and money of the parties, and the time and money spent by the creditors and shareholders in attending the meetings,

as well as time of the Court which had been spent in this litigant till that stage, and to avoid de novo proceedings before the Lucknow Bench.

17. Under the said Clause 14, Chief Justice has the power to direct any particular case within the domain of Lucknow Bench, but presented at

Allahabad, to be heard at Allahabad. In the case of Sri Nasiruddin Vs. State Transport Appellate Tribunal, the Supreme Court had said (in para

39 of that law report) that the answers given by the High Court (in the Full Bench decision reported in Nirmal Dass Khaturia and Others Vs. The

State Transport (Appellate) Tribunal, U.P., Lucknow and Others, to the first three questions are correct. The Full Bench (in Nirmal Dass Khaturia

and Others Vs. The State Transport (Appellate) Tribunal, U.P., Lucknow and Others, had answered the third question as follows:

3. A case pertaining to the jurisdiction of Judges at Lucknow and presented before the Judges at Allahabad cannot be decided by the Judges at

Allahabad in absence of an order contemplated by second proviso to article 14 of the Amalgamation Order, 1948.

18. On 2.11.2003, the Hon"ble Chief Justice was pleased to pass an order under the said Clause 14 of the Amalgamation Order, 1948, that the

matter should heard at Allahabad by the Bench which was hearing the matter earlier, that is to say, this Bench which had been nominated by the

order of the Chief Justice dated 1.7.2003.

19. This is how the matter came up before this Bench, and has been heard at great length extending over several days. The initial very detailed

arguments were advanced by Sri Navin Sinha, Senior Advocate, assisted by Sri S.K. Mehrotra, Advocate, representing HSBL. The objections

raised by him were replied in greater detail by Sri S.N. Varma, Senior Advocate, and his Assisting Advocate, Sri R.P. Agarwal, representing JPC

and JPI. When the arguments on behalf of JPI and JPC concluded on Friday the 13 February, 2004, Sri Navin Sinha, Senior Advocate, had

stated that he would take about two days time by way of rejoinder arguments. When the matter came up on the next reopening day, i.e., Monday,

the 16 February, 2003, Sri Sinha stated in a somewhat embarrassed manner that he had been instructed by HBSL not to argue the matter further.

This was very unusual. But what was more unusual was that in reply to the court's query as to whether the HBSL was withdrawing its objections,

Sri Sinha said that the objections were not being withdrawn, but he had been instructed not to argue further. He also stated that this instruction was

given to him by HBSL at 10 a.m. on that very day, after he had wasted the whole weekend in preparing the case.

20. Sri Sanjay Goswami, Advocate, representing the SEBI, did not appear at all on that date for his rejoinder arguments.

21. Sri Pankaj Bhatia, Advocate, representing two alleged shareholders, namely, Bhavan Jain and Devendra Kumar Bansal, who had raised a

preliminary objection only, also said that he had nothing to add by way of rejoinder.

22. Sri M.C. Tiwari, Advocate, who had filed several photo identical objections on behalf of some petty shareholders, but had not raised any

argument initially, also did not advance any arguments.

23. In these unusual circumstances, judgment was reserved on 16.2.2004. The objections of SEBI

24. To revert back in time, at the hearing date on 7.11.2003, Sri Sanjay Goswami, Advocate, had appeared and submitted that he had received

telephonic instructions from the Securities and Exchange Board of India (popularly known as SEBI) that the SEBI intended to intervene in these

proceedings and raise certain objections. Sri S.N. Verma, Senior Advocate, assisted by Sri R.P. Agarwal, representing JPC and JPI, submitted

that SEBI had no right to be heard in amalgamation proceedings. After a brief hearing, the following order was passed on 7.11.2003 in these

proceedings, which is recorded on the order sheet of Company Petition No. 26 of 2003:

Sri Sanjay Goswami, Advocate, has appeared today when the case has been called old and has submitted that he has received telephonic

instructions from SEBI about certain objections that SEBI intends to raise in these proceedings. It has been stated by him that objections are

regarding acquisition of more than the permissible number of shares of one of the companies without the proper permission or offer to other

shareholders.

Learned counsel for the applicant company submits that SEBI has no right to be heard in amalgamation proceedings.

In my opinion, even this question whether SEBI has the right to be heard or not, should be decided after hearing SEBI also. At present, Sri Sanjay

Goswami does not have either the power to appear, nor has SEBI moved any application for being impleaded or being heard in these

proceedings. Therefore, I am not inclined to hear the matter today.

As the amalgamation proceedings were widely advertised, Sri Goswami prays for and is granted ten days, and no more time to enable him to file a

proper application along with objections that he want to raise, in writing and incomplete details in order to avoid any further delay in the matter.

It has been stated on behalf of Sri Naveen Sinha, Advocate, that he has some difficulty in appearing on 18th ; therefore, this matter will be listed on

19 November, 2003. Learned counsel for the parties are granted liberty to make mention in the matter on that day.

25. Thereafter, an intervention application, dated 22.11.2003 was filed on behalf of SEBI by Sri Sanjay Goswami being Miscellaneous

Application No. 214001 of 2003 (marked as Paper No. A-10 in Company Application No. 9 of 2003). In the intervention application, it was

stated that an inquiry by SEBI into alleged violation of regulation 11 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation,

1997, by the main promoter, Sri Jaiprakash Gaur and 3 other persons acting in concert with him, namely, Shivajay Enterprises Ltd. (formerly,

known as Kamran Consultants (P) Ltd.), Jaypee Ventures Ltd. (formerly, known as International Design Engineers Associates Ltd.) and Jaypee

Hotels Ltd., is pending. It was mentioned by SEBI in the application that the intervention application had been moved for a "very limited purpose

to protect the interest of small investors" of JPI, and it was prayed that either the sanction to the amalgamation should be deferred till the

conclusion of the enquiry by the SEBI or in the alternative, the two companies be directed to inform their shareholders about the said enquiry and

the possible outcome of that enquiry so that the shareholders of both the companies may take a well-informed decision on the proposed scheme of

amalgamation. However, later, again in an unusual turn of events, SEBI changed its stand vide paragraph No. 5 of its rejoinder affidavit filed as

Paper No. A-64, and stated that it had no objection to sanction of the scheme, subject to a rider being placed or undertaking being obtained that

the ultimate order of SEBI should be complied with by the acquirers. This changed stand ignores the vital fact that since the acquirers are not party

to these proceedings, no direction can be issued (sic) as to bind them and no undertaking can be demanded from them. It would, therefore, appear

that SEBI has failed to give adequate thought to the matter. And, as will appear from the following paragraphs, the proceedings initiated by the

SEBI are also prima facie on insufficient grounds.

26. Under the said regulation 11, no person along with persons "acting in concert with him" is permitted to acquire more than 5% (now after

amendment, 15%) of the shares or voting rights in a company in any period of 12 months, unless such acquirer makes a public announcement. It

was alleged that the main promoter, Sri Jaiprakash Gaur, along with other persons aforesaid had acquired 1,16,39,958 shares representing 7.36%

of the voting rights of JPI during the period between 22.1.1999 to 16.10.1999.

27. The Jay pee Ventures and Jaypee Hotels are the companies of the same (JP or Jaypee) Group and, therefore, their acquisitions stand on a different footing and could perhaps prima facie be clubbed with the acquisition by Sri Jaiprakash Gaur. But there is no apparent connection of the fourth acquirer, namely, Shivajay Enterprises Ltd. with the other three acquirers. Admittedly, if the acquisition by Shivajay Enterprises Ltd.

(formerly, known as Kamran Consultants (P) Ltd.) is excluded, the acquisition by the other three persons is below the then prescribed limit of 5%.

In the circumstances, by order dated 5.1.2004, SEBI was required to produce before the Court the relevant material for its conclusion that the

persons aforesaid, particularly Shivajay Enterprises Ltd. (formerly, Kamran Consultants (P) Ltd.), were "acting in concert" while acquiring the shares in excess of the prescribed limit.

28. The documents produced by Sri Goswami indicate that there was an enquiry and an investigation report pursuant to some public interest

litigation filed before the Delhi High Court, which has since been disposed of. After the enquiry and investigation reports, notice was issued to the

acquirers on 27.6.2003 ; but the proceedings have not been concluded by the SEBI so far. The acquirers had applied for copies of certain

documents which were not supplied to them, because of which they were unable to submit proper replies.

29. During the hearing, Sri Sanjay Goswami was required by the Court to obtain instructions from the SEBI whether it was prepared to supply to

the acquirers copies of the documents including the enquiry report and the investigation report so that the amalgamation proceedings could be

postponed for a short period, enabling the acquirers to submit their replies and to enable the SEBI to conclude the proceedings, The enquiry report

and the investigation report had been produced and shown to the Court by Sri Goswami and nothing contained therein was found to be of a nature

so as to make it difficult or undesirable for SEBI to disclose the same to the acquirers.

30. On the next date, Sri Goswami stated on instructions that the SEBI was not prepared to supply the copies inasmuch as under its regulations

(No. 42) -- the SEBI was obliged only to communicate the findings of the enquiry/investigation and not the entire report.

31. Considering this rigid stand taken by SEBI, I have given careful thought to the various aspects of the matter. I find that if the original prayer of

SEBI for postponement of these amalgamation proceedings is accepted, it may be an unduly long or even indefinite postponement, because if

SEBI ultimately passes an adverse order, the acquirers would have a right of appeal which would also take time for disposal, and might even entail

a remand due to violation of principles of natural justice owing to non-supply of the demanded documents to the acquirers. Further, as stated

above, the SEBI itself has changed its stand and has stated in its rejoinder affidavit (Paper No. A-64) saying now that it has no objection to the

sanction of the scheme, subject to the rider suggested. The unanimous support to the scheme of amalgamation by the creditors of both the

companies and also by overwhelming majority of shareholders as also by prospective investors indicated by the undisputed fact that immediately

after the scheme was approved by the shareholders and creditors, the prices of the shares of JPI reportedly rose from Rs. 29 per share to Rs. 105

per share, and were reported to be ranging at the hearing at Rs. 110 to Rs. 115 per share, it does not appear to be desirable to postpone the

decision on the amalgamation. The avowed object of SEBI for intervention, namely, protection of interest of small investors, is belied by the rise in

stock prices immediately after the approval of the scheme which rise has apparently been sustained over the past several months.

32. Besides, the investigation by SEBI is not into the affairs of the company, but it is into the affairs of certain shareholders only. The company,

JPI, consists of a very large number, about two lakh shareholders who cannot be made to suffer on account of conduct of some other shareholders

even if the faulting shareholders belong to the promoter group.

33. The SEBI also cannot be permitted to sit tight over such matters over months together, and on that basis, seek to jeopardise the interest of the

investors who stand to gain by the rise in stock prices consequent upon prospects of amalgamation.

34. Further, even if the proceedings of SEBI are ultimately concluded against the acquirers, the 3 actions which are permissible for the SEBI to

take under the Regulation 44(a), (c) and (d) will not be defeated entirely. Only one of the actions vide Clause (c), namely, directing disinvestments

of the shares in excess of the permissible limit might not remain possible, but even that is doubtful inasmuch as for each share of JPI, the

shareholders are getting one share of JPC and it may remain possible to lift the corporate veil. The action permissible under Clause (b), namely,

restraining disposal of the disputed shares appears to be only an interim measure as a step in aid to the action under Clause (c), inasmuch as

perpetual restraint on disposal of certain shares without anything further would lead to obvious major complications. Again, it is not mandatory for

SEBI to take all the permissible actions under regulation 44.

35. More importantly, the SEBI has totally failed in its various pleadings, including the enquiry and investigation reports, to show what possible

motive the acquirers could have had, at that stage, for acquiring those shares. The promoter group, admittedly, validly held a large majority of

shares of about 45% (including the shares acquired within the permissible limit of 5%), and with those additional 2.36% shares (i.e., those in

excess of the 5% prescribed limit) the holding increases to a little above 47%. The only basis for the proceedings of the SEBI appears to be the

guarantee given by one of the JP Group of companies for the loan taken by Shivajay (formerly, Kamran) out of which the disputed shares are

alleged to have been acquired. While the source of funding is no doubt an important circumstance, but that by itself, cannot lead to the conclusion

that the persons were "acting in concert". Irrespective of the Evidence Act, it is pure common sense that circumstantial evidence, even in civil

disputes, must lead to one and only one conclusion and be inconsistent with every other conclusion. Because, if the circumstances brought out can

reasonably lead to more than one conclusion, it would be impossible and unsafe to say which of the two or more conclusions has been proved by

those circumstances. The phrase "acting in concert" in the context in which the phrase has been used and considering the scheme, and purpose of

the restriction by the regulations means a motivated conspiracy for acquiring shares clandestinely for ulterior motives. From that point of view,

motive would be a vital element. Mere guarantee by a JP Group industry for the loan, without motive, can hardly be said to lead to one and only

one conclusion about those persons "acting in concert" -- and much less can this sole circumstance of giving guarantee be said to be inconsistent

with conclusions other than the suggested conspiracy. The guarantee could have been given for a host of reasons other than the reason suggested.

As a matter of law and good public policy, SEBI should not initiate proceedings of this nature unless it is possessed of sufficient material which is

capable of sustaining a punitive order by SEBI if that material is not controverted by the defaulter.

36. Although a number of other arguments have been advanced from the side of the JPI and JPC about the failure on part of SEBI in following the

requirements of the regulations regarding the enquiry and investigation, but in view of what has been stated above and also to avoid embarrassment

to the SEBI in the proceedings pending before it, I do not consider it advisable to examine those aspects, more so because due to the absence of

Sri Goswami at the time of rejoinder argument, these questions have not been properly debated at the Bar. Whatever has been said above is only

a prima facie view for the purpose of considering whether these amalgamation proceedings should be deferred or not.

37. Thus, considering all the above facts and circumstances, the SEBI has not been able to establish its case that its intervention is necessary for

the professed "limited purpose of protecting the small investors". It has not been established that such postponement would be in the interest of the

shareholders, big or small, of JPI or the creditors of the two companies, or that it would serve any public interest. It has thus not made out any

ground for intervention in this matter or for postponement of the amalgamation proceedings.

38. The Official Liquidator in his report No. 156 of 2003 (Paper No. A-9) has raised no objection to the scheme. Against this report the HBSL

has filed frivolous objections vide Paper No. A-33. The Central Government represented by the Regional Director, Northern Region, Department

of Company Affairs, Kanpur, has vide Paper No. A-10 raised basically two objections. Even to these objections of the Regional Director, the

HBSL has filed objections, vide Paper No. A-34.

39. The first objection of the Regional Director is that the procedure has not been followed for the change of name of the amalgamated company

from Jaypee Cement to Jaiprakash Associates Ltd., which name has been undisputedly made available by a letter, dated 5.2.2003, of the

Registrar of Companies of U.P.

39.1 The objection cannot be sustained due to the following reasons. u/s 21 of the Companies Act, this change of name could be brought about

irrespective of the amalgamation, by merely passing a special resolution and the approval of the Central Government signified in writing. This

power of Central Government has been delegated to the Registrar of Companies, according to the footnote No. 93 of the Tax-man's Companies

Act, 2002 Edn., at page 1.26. Therefore, once the Registrar of Companies has, by a written letter, made available the name of Jaiprakash

Associates Ltd. to the JPC, it would amount to the approval of the Central Government signified in writing to the said change of name. There is

already a special resolution approving the scheme which in Clause 3.13 mentions that the name of JPC shall, upon the scheme taking effect, stand

changed to Jaiprakash Associates Ltd. without any further act or deed.

39.2 Secondly, in this group of JP or Jaypee companies, the main promoter, namely, Sri Jaiprakash Gaur, appears from the names of the group

companies to be the beacon light and his name still remains part of the new name, and, therefore, it cannot be said that there is any change in the image of the company.

39.3 Thus there being a special resolution for the change of name of the JPC to Jaiprakash Associates Limited and the approval of the Central

Government delegate, i.e., Registrar of Companies, in writing by making that name available, both conditions of Section 21 of the Companies Act

are fulfilled. It has not been pointed out by any of the objectors that this change of name is calculated to serve any objector's motives or purposes.

In any case, change of name, of a company does not require any approval from the court. Therefore, had the change of name been brought about

after the amalgamation by a separate subsequent resolution with the agreement of the Registrar of Companies in his capacity as delegate of the

Central Government, the Court would not come into the picture. Therefore, there is no reason why this change of name should be an impediment

to the sanction of the scheme.

40. The second objection of the Central Government is with regard to another condition mentioned in para 4.03 (ii) of the scheme which provides

that upon the merger authorised share capital of JPI shall stand combined with the authorised share capital of JPC. According to the Regional

Director, this amounts to increase of the authorised capital of JPC, which cannot be done without paying the requisite fee/ stamp duty to the

Government. In reply to this objection, it was submitted on behalf of JPC that the fee/stamp duty is nominal and has a maximum limit which the

JPC is prepared to pay. But, it was submitted that the requisite fee has already been paid on the authorised capital of JPI and merely because of its

merger with JPC, there is no reason why the same fee should be paid again by JPC on the same authorised capital.

41. The submission has force and no good reason has been shown why the two merged companies should be required to pay duty again on the

same authorised capital on which duty has already been paid by the JPI.

42. Regarding the increase of authorised share capital by merger of the authorised capitals of the two companies, an order can be passed u/s 391

of the Companies Act itself. This has been laid down by the Bombay High Court in the case of Vasant Investment Corporation Ltd. Vs. Official

Liquidator, Colaba Land and Mill Co. Ltd., The relevant part of the judgment is reproduced below :

The whole purpose of Section 391 is to reconstitute the company without the company being required to make a number of applications under the

Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted

company under the scheme (vide Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re (1970) 2 CLJ 300 (Guj) : (1970) 40 Comp Cas

819 (Guj). The company is, therefore, not required to make a separate application under the Companies Act for alteration of its memorandum of

association to show the new share capital. Such an alteration can be sanctioned under the scheme itself.

43. Similar view has been taken by the Bombay High Court in the case of In Re: Pmp Auto Industries Ltd., (at page 295, 296) and by the Gujarat

High Court in the case of Maneckchawk & Ahmedabad Manufacturing Company Limited, In re (1970) 2 Comp LJ 300 (Guj) : (1970) 40 Comp

Cas. 819 (Guj).

44. Therefore, both the objections of the Regional Director, Northern Region, Department of Company Affairs, Kanpur, are overruled.

The objection by Bhawan Jain and Devendra Kumar Bansa

45. Sri Pankaj Bhatia had at the outset of the hearing raised a preliminary objection that under the provision to Section 391(2) of the Companies

Act, the sanction of the scheme could not be considered by the court unless the latest financial position of the two companies was before the court,

According to him, the balance sheet which has been furnished in these proceedings was of the period ending 31 March, 2002, after which almost

two years have passed. In support of his preliminary objection, he relied upon a decision of the Bombay High Court in the case of KEC

International Ltd. v. Kamani Employees Union and Ors. (2000) 1 CLJ 351 (Bom). It was also argued that the two companies had not deliberately

disclosed their latest financial position to the court.

46. In reply to the above objection, it was argued that the Company Application No. 9 of 2003 was filed on 17.2.2003, the meetings of the

shareholders and creditors were held on 29.3.2003, the Company Petition No. 26 of 2003 was filed on 8.4.2003, and the date of hearing was

fixed for 19.5.2003. Sri Agarwal submitted that the companies JPI or JPC had not taken any adjournment after 19.5.2003. Till, that time, i.e.,

19.5.2003, the latest financial position of the two companies which were available was of the period ending 31 March, 2002, and not beyond that,

because it requires time to get prepared the audit report, and for the year ending 31.3.2003, the audit can begin only after 31.3.2003. Therefore, it

cannot be said that either in the company application or in the meetings or in the company petition, the latest financial position of the two companies

had not been disclosed. In any case, it was submitted that there was no averment from the side of the objections that there had been any drastic

deterioration in the financial position of any of the two companies, i.e., JPI or JPC since 31 March, 2002.

47. Reliance was placed on behalf of JPI and JPC on the decision of the Gujarat High Court in the case of Navjivan Mills Company Ltd., In re

(1972) 42 Comp Cas 265 (Guj), wherein the Gujarat High Court held as follows:

The word "latest" is always a relative term and it has to be understood in relation to the date on which the petition is filed.

48. Reliance has also been placed on the decision of the Bombay High Court in the case of Blue Star Limited, In re (2000) 2 Comp LJ 245 (Bom)

: (2001) 104 Comp Cas 371 (Bom) , in which the judgment of the Gujarat High Court in the case of Navjivan Mills Company Limited (1972) 42

Comp Cas 265 (Guj) was considered along with another judgment of the Gujarat High Court by the same Hon"ble Judge, namely, D.A. Desai, J.,

in the case of Maneckchowk & Ahmedabad Manufacturing Company Limited, In re (1970) 2 CLJ 300 (Guj) : (1970) 40 Comp Cas 809 (Guj),

and it was held as follows:

Reading of the judgment together, one can say that the relevant point of time for disclosing the latest financial position would be at the time of filing

of the petition.

49. Similar view was taken by the Delhi High Court in the case of Aradhana Beverages and Food Company Limited, In re (1998) 3 Com LJ 421

(Delhi) : [1998] 93 Comp Cas 905 (Delhi), in which it was held as follows in the context of the proviso to Sub-section (2) of Section 391 :

The latest Auditors report of the company which is required to be disclosed in the one which would be available as on the date of filing of the

application

In the case of Alembic Ltd. v. Deepak Kumar J. Shah (2002) 6 Com LJ 513 (Guj) : [2002] 112 Comp Cas 262 (Guj), the Gujarat High Court

held as follows :

The objector, however, submits that since the petition is being heard today, the petitioner company could have produced accounts as at 31

December, 2001.

The Court does not propose to go into this controversy in the facts of the instant case. Apart from the fact that it is not the case of the objector that

there is any significant change in the financial position of the demerged company (Darshak Limited) or the resulting company (Alembic Limited) in

the intervening period, i.e., in the year, 2001.

50. In the decision of a Division Bench of Bombay High Court in the case of State Bank of India v. Alstom Power Boilers Limited (2003) 5 Com

LJ 268 (Bom) : (2003) 13 SEBI & CLR 449 it has been held that while the company should produce the latest balance sheet, profit and loss

account and the Auditor's report as on the date when the matter is actually heard by the court especially when there is long gap between the date

of application and the date when the court considers the scheme for sanction, but if the said record has not been produced -- it is open to the court

to call for and look into the said records.

51. Thus, it would appear that as the law stands today, when there is a long gap between the filing of the petition and its hearing, the concerned

company should itself produce the latest financial position which may be available before the Court.

But, if the same has not been produced by the company, the Court should call for it, and give an opportunity to the company to produce the

relevant record and examine the same instead of dismissing the petition on this technical ground. It also appears that this requirement of furnishing

the latest financial position is to be examined in the light of objections about any such drastic change in the financial position as would make the

sanction to the scheme undesirable.

52. However, an affidavit of Harish K. Vaid, the President (Corporate) and Company Secretary of JPI has been filed in these proceedings,

annexing thereto a copy of the balance sheets of JPI has been filed in these proceedings, annexing thereto a copy of the balance sheets of JPI as on

31 March, 2003. It has been stated that these are the latest audited balance sheets of the two companies. The affidavit has not been disputed,

although the parties were given liberty by the Court for filing rebuttal up to the stage of delivery of judgment. Therefore, objection regarding non-

disclosure of the latest financial position loses relevance.

53. Having examined the said records regarding the latest financial position, I do not find any such drastic change in the financial position of either

of the two companies, JPC or JPI, which would dissuade this court from according sanction to the proposed scheme of amalgamation.

The objection by HBSL

54. Before examining the objections of HBSL it would be pertinent to mention that HBSL which was holding 12,73,000 shares of JPI, has more

than doubled its shareholding in JPI to 26,21,000 shares after the scheme or amalgamation was approved at the meetings of shareholders and

creditors on 29.3.2003. Normal conduct of a dissenting shareholder would be expected to be just the reverse. He/it would try to disinvest.

Indeed, Section 395 of the Companies Act itself provides for power and duty to acquire shares of shareholders dissenting from the scheme.

55. Thus, on the one hand, HBSL is objecting to the amalgamation and, on the other hand, with the brightening of the prospects of amalgamation,

it is increasing its shareholding by no small numbers. This averment by JPI was made in para 2 of paper No. A-66. In reply, an absolutely vague

denial was made by HBSL in paragraphs 4 and 5 of its reply affidavit Paper No. A-68. Sri Navin Sinha had earlier orally contended that the

additional shares had not been acquired from the open (secondary) market, but had been acquired from the associate companies of HSBL. Sri

R.P. Agarwal contended that the reply affidavit of HBSL (A-68) was deliberately vague and had not disclosed the names of the alleged

"associates" of HSBL, nor the reasons for transfer of stock between these alleged associates were disclosed. According to Sri Agarwal, this was

to avoid investigation by the Court or other authorities into charges of circular trading at rigged prices to manipulate the stock market. While I am

not inclined to probe into this aspect as HBSL has refused to argue in rejoinder, but in absence of proper explanation by HBSL, the above facts

do raise a doubt upon the bona fides of the objections of HBSL. The doubt is by no means reduced by the fact that the HBSL has not even been

able to persuade its entire 5% holding in JPI to vote against the amalgamation, and its strange and unexplained conduct in abandoning arguments in

this case mid-way. Therefore, even if what is suggested by Sri Agarwal is not correct one could reasonably doubt whether HBSL is increasing its

shareholding with the full knowledge that the scheme is beneficial to the shareholders, and is raising the objections for ulterior motives. In this very

context, a scrutiny of certain suits instituted by HBSL would be relevant and has been dealt later in this order.

56. On merits, Sri Navin Sinha, Senior Advocate representing HBSL, which according to him holds about 5% of the total paid up share capital of

JPI had raised objections of which the major ones can be broadly classified under two heads, namely, (a) oppression and mismanagement, which

are covered by Sections 397 and 398 of the Companies Act, 1956 ; and (b) the non-disclosure by the company JPI of certain legal proceedings,

namely, an enquiry by SEBI into the alleged acquisition of shares above the prescribed 5% limit, another alleged inquiry into a case of preferential

allotment of shares by JPI, and the pendency of suit Nos. 1722 of 2001 and 1531 of 2002 before the Delhi High Court and Suit No. 129 of 2003

which is said to be pending before the Civil Judge, Lucknow. All the three suits have been instituted by HBSL and are dealt with later in this

order.

57. So far as the enquiry of SEBI into acquisition of shares above the 5% limit is concerned, the matter has already been dealt with above.

Whether this non-disclosure of the SEBI inquiry is or is not a material fact -- is dealt with later in this order. However, in view of the findings

recorded on that issue of acquisition, the contention of HBSL that the present amalgamation is not bona fide, and has been initiated to scuttle the

said inquiry of SEBI -- cannot be sustained.

58. So far as the alleged inquiry by SEBI into the preferential allotment is concerned there is only one document by way of a letter, dated

31.12.2002, of SEBI sent to HBSL (Annexure V to Paper No. A-32). That refers to a letter of HBSL dated 30.9.2002 and merely says that the

matter is being examined. Prima facie, the letter of SEBI appears to be nothing more than an acknowledgement of some complaint of HBSL. It

does not even suggest any formal inquiry being launched. Moreover, there is no averment by HBSL about any further progress in the matter for the

past more than one year since 31.12.2002. Therefore, it is difficult to hold that any inquiry by SEBI is pending in respect of this preferential

allotment. However, this preferential allotment is the subject matter of one of the suits of HBSL which is dealt with later.

59. This brings [us] to the question as to whether the non-disclosure of the pending SEBI inquiry into the acquisition of more than 5% shares is the

non-disclosure of a material fact within the meaning of Section 391(2), proviso. Firstly, this investigation, for whatever it is worth, is not against the

company, but is against certain shareholders of the company. Secondly, as is clear from the chart given at page No. 43 of this Order titled

"Adjusted Voting Pattern" even if the disputed shares in excess of the 5% limit are ignored, the resolution passed at the meeting of the shareholders

is not affected. Therefore, this Investigation was not a "material" fact and its non-disclosure does not have any affect upon the present petition.

60. So far as the three suits are concerned, the cause of action, if correct, would, at best amount to oppression and/or mismanagement.

61. Suit No. 1722 of 2001 was instituted before the Delhi High Court by HBSL against JPF on 23.8.2001 seeking to restrain the JPI from holding

its annual general meeting proposed to be held just four days later on 27.8.2001, and to restrain approval in that meeting of balance-sheet and

profit and loss account, and seeking appointment of a Chartered Accountant by the court in the civil suit to conduct a fresh audit. The timing of the

suit needs to be noticed.

62. Suit No. 1531 of 2002 also by HBSL was instituted before the Delhi High Court on 23.9.2002 against JPI, seeking a declaration that the

balance sheet of JPI as on 31.3.2002 is null and void, and all injunction restraining the JPI from considering and adopting the balance sheet (in its

AGM proposed to be held just four days later on 27.9.2002) and for appointment of an Auditor by the court to carry out a special audit. Again,

the timing of the suit deserves thought.

63. Suit No. 129 of 2002 was instituted before Civil Judge, Lucknow, in March, 2002, against JPI by one Lalit Bhasin through his attorney, Dr.

Sanjeev Kumar, who is the Company Secretary of HBSL, again, shortly before the general meeting of JPI scheduled for 21.3.2002 seeking to

restrain the holding of the general meeting. Once again, the timing of the suit should provoke thought and inquiry into the question as to whether this

repeated last minute institution of suits is for good and genuine reasons or is just a device to get ex parte interim orders to the detriment of the

defendant.

64. But even apart from the above timings, the apparent justification towards maintainability of all these suits appears to be that HBSL holds only

5% shares in JPI, and it does not have the requisite 10% of the total number of members or 100 members or 10% of the issued share capital to

enable it to avail of the remedies u/s 397 or 398 of the Companies Act, 1956, having regard to the restriction imposed by Section 399 of the Act.

64.1 Prima facie, this justification does not appear to be acceptable. u/s 9 of the Code of Civil Procedure, a suit is not maintainable if its

cognizance is "impliedly barred". The law is well settled that where the right sought to be enforced by the suit is not a pre-existing common law

right, but is a right created by statute which provides the remedy for breach of that right, the suit is "impliedly barred". Reference may be made in

this connection to Raja Ram Kumar Bhargava (Dead) by Lrs. Vs. Union of India (UOI),

65. The right of members of a company against oppression and mismanagement is not a pre-existing common law right, but is a right created by

statute, i.e., the Companies Act. Indeed, the concept of company itself is not a common law concept. The Companies Act in Sections 397, 398

also provides the remedy before the Company Law Board for vindication of the said right of members. Therefore, such suits are prima facie not

maintainable.

66. Further, prima facie, such suits would also not be maintainable by individual members or members having less than 10 per cent of the

membership or voting strength for the reasons given below.

67. There appears to be fairly good reason for Section 399 restricting the access of members to the Company Law Board u/s 397 and 398 of the

Companies Act in alleged cases of oppression and mismanagement. The restriction of 10% of the number of total membership or 100 members

(whichever is less) or holders of at least 10% of the voting rights has been made to avoid the nuisance of frivolous or mala fide litigation by a

minuscule membership. Opening of such a Pandora's Box by granting more free access to members would make it impossible for any company to

function. This risk would be much more in case of companies having large share capitals or large membership. Normally, in cases of oppression of

minority membership, it can be done only by a policy of the company which is not likely to affect individual members in isolation. Any such policy

of oppression is bound to affect a particular  $\frac{1}{2}$  class or section of members, which normally would necessarily exceed the 10% of the members

either by numbers or by voting rights. Similarly, any genuine case of mismanagement is unlikely to fail to invite protest by less than such number

(10%) of members. Therefore, taking the view that if the oppression or mismanagement is affecting 10% or more members by numbers or shares

they will approach the Company Law Board u/s 397/398 read with Section 399 of the Companies Act, and if it is affecting less than that number,

they can institute suits, would be contrary to public policy and would also be contrary to the legislative intent considering the spirit and purpose of

such restriction imposed by the statute, i.e., Section 399 of the Companies Act. Besides, acceptance to the contention of law espoused by HBSL

would also mean that even where an alleged case of oppression or mismanagement is affecting more than 10% of the membership, the members

are free not to join together for their remedy u/s 397 or 398, but to individually and separately institute suits. This would again defeat the legislative

intent and very purpose of the creation of specialized remedy before the Company Law Board, which is supposed to consist of experts in the field.

Further, even if the aggrieved members are less than the minimum limit required by Section 399, they are not rendered remediless, as they can still

approach the Central Government and if the Central Government is satisfied about the genuineness of the grievance, it can refer the case to the

Company Law Board u/s 401. This scrutiny and filtering at the level of Central Government can be expected to reduce the hazards of frivolous or

vexatious litigation by unscrupulous members creating hurdles in the company's functioning.

68. However, I refrain from expressing any final view on this subject for the reason that it might embarrass the Delhi High Court or the Civil Judge

where the suits are said to be pending. What has been said above is only a prima facie conclusion for the purposes of deciding this amalgamation

petition.

69. It has been held in the case of *Modi Luft Ltd., In re* (2002) 4 Com LJ 128 (Delhi) : [2003] 47 SCL 227 (Delhi) by the Delhi High Court (in

para 16 of that law report):

Secondly, the mere filing of suits on the original side by one of the rivals to the propounder of the scheme cannot be construed to be a bar to

entertaining a scheme in absence of any interim order. If Mr. Sawhney's plea as to the existence of dispute as to management pending in this court

as bar for propounding a scheme by the existing management is accepted, then all that an objector opponent has to do is to file a suit and dub the

management as disputed, to thwart a scheme. If such a plea is accepted, even a suit without merit filed to ostensibly dispute the management's

credentials can have the effect of stalling a revival scheme for several years. Such a plea of Mr. Sawhney about the pendency of a suit about the

control of the company being a bar against the consideration of this scheme u/s 391 cannot, therefore, be accepted inter alia in the absence of an

interim order given in the civil suit.

70. Similar view has been taken by the Gujarat High Court in relation to pendency of a writ petition in the case of Reliance Petroleum Ltd. (2003)

5 Com LJ 240 (Guj) : [2003] 46 SCL 38 (Guj), and by the Madras High Court in relation to pendency of penal proceedings in the case of Cetex

Petrochemicals Ltd., In re (1992) 1 Com LJ 384 (Mad) : [1992] 73 Com Cas 298 (Mad).

71. In the present case, the only interim orders are dated 29.8.2001 and 20.9.2001 in suit No. 1722 of 2001 (at Annexures 6 and 7 of Paper No.

A-7 of Company Application No. 9 of 2003). There is no other interim order in that suit, and there are apparently no interim orders in any of the

other two suits. I have examined these interim orders carefully. None of the two interim orders referred to above can have any restraint upon the

proposed amalgamation.

72. Thus the pendency of these suits is not a "material" fact as none of these suits is likely to have any bearing on the question of amalgamation.

The alleged nondisclosure of the same is, therefore, not relevant.

73. The contention of HBSL that the disputed share capital should not have been\* allowed to participate in the shareholders meeting -- is also not

sustainable for the following reasons. Firstly, the disputed shares which are the subject matter of the suit, i.e., (a) those 2.6% which are in excess of

the 5% limit ; or (b) those involved in preferential allotment, did not have any substantial impact on the result of the meeting of the shareholders of

JPI as will be clear from the chart titled "Adjusted Voting Pattern" given on page 43 of this order. Secondly, in view of Section 87 of the

Companies Act -- "½ voting rights could not be denied to any person holding shares of the JPI. It has been stated that all the so-called disputed

shares are listed on the stock exchange and are being traded without any restriction. Shares are movable property of the recorded holder. The

SEBI cannot annul the shares or cancel the transaction of purchase, because otherwise, in case of shares purchased from the market, where will

those shares go ? They cannot go back to the seller, who is not at fault, and who has already received their price and who may be unwilling to take

back the shares by refunding the money.

74. It was next argued by Sri Sinha that in the balance sheet of JPC filed as Annexure III to the Company Petition No. 26 of 2003, the

accumulated losses of that company as on 30 September, 2000, were Rs. 172 crores against a net worth of Rs. 418 crores, i.e., erosion of 41%

in the net worth of the company. Even this net worth was increased at the last minute by infusing Rs. 265 crores capital into JPC by JPI. The net

worth of the company comprises of the share capital plus the free reserves. According to Sri Sinha, in that particular year, the company JPC

deliberately did not show in its balance sheet the depreciation of about Rs. 59 crores, so as to keep the net worth erosion below 50%. According

to him, erosion of more than 50% in the net worth of the company would attract Section 23(A)(2) and (3) of the Sick Industrial Companies

(Special Provisions) Act, 1985, (hereinafter referred to as the SICA). He also pointed out that, in the next year, the accounting period was

increased to 18 months and at the end of the accounting year, i.e., 31 March, 2002, JPC showed the depreciation of about 59 crores, which had

been carried forward and, in this particular year, the company showed a profit of about 63 crores. Thus, again, the erosion in net worth was kept

below 50%. According to Sri Sinha, this is a deliberate doctoring of the balance sheet by JPC. He further submitted that the JPI which is a profit

making company is now being merged into this apparently sick company, i.e., JPC by the promoter group to the detriment of the shareholders of

JPI.

75. In reply to these submissions, Sri R.P. Agarwal pointed out that depreciation is not necessarily required to be shown in the balance sheet

except for the limited purpose of Sections 205 and 349(4)(k) of the Companies Act. The object of Section 205 is that dividend should be paid out

of profits and not out of capital. Similarly, the object of Section 349 is to ensure that the profits and assets of the company are reflected, after

adjusting depreciation, while considering the fixation of remuneration of its managers. It has also been pointed out from the side of JPC that under

Schedule VI (Part II) of the Companies Act, the requirement as to profit and loss account have been mentioned, and at item No. 3(iv) it is not

necessary to show the depreciation. The said provision is quoted below :

(iv) The amount provided for depreciation, renewals or diminution in value of fixed assets.

If such provision is not made by means of a depreciation charge, the method adopted for making such provision.

If no provision is made for depreciation, the fact that no provision has been made shall be stated and the quantum of arrears of depreciation

computed in accordance with Section 205(2) of the Act shall be disclosed by way of a note.

75.1 On behalf of JPC, it was also shown that a note was appended to the balance sheet for the year ending 30 September, 2000, as required by

the above provision.

76. On behalf of JPC Sri Agarwal submitted that the object of SICA is to first attempt rehabilitation of sick companies. He also pointed out

Section 18(1)(c) which provides for amalgamation of the sick industrial company with any other company. He has also submitted that Section

23A(2) and (3) of the SICA cannot apply because u/s 23 of the SICA, the erosion of the net worth should be 50% of the peak net worth during

the immediately preceding four financial years. According to him, this period of four financial years has been prescribed because every newly

formed company has teething troubles in the beginning, and it normally takes time for industrial companies to become profitable. According to him,

JPC was incorporated on 15.11.1995 and the first financial year ended on 31.3.1997. The relevant financial year ending 31.3.2000 was only the

fourth financial year. Thus, four financial years had not preceded that particular year, and, therefore, Section 23A will not be attracted. There

being no argument in rejoinder, the allegation of the HBSL that the JPI or the promoters of JPI are trying to bail out JPC by the present scheme of

amalgamation to the detriment of the members of JPI cannot be sustained. This conclusion is reinforced by the fact that all the losses of JPC are in

effect, the losses of JPI, which is the holding company of JPC. Sri Agarwal argued that the present scheme would be in the interest of shareholders

of JPI inasmuch as the JPI is; paying the corporate taxes on its profit due to its inability to set-off the losses of JPC against the profits of JPI, the

two companies being separate entities. According to Sri Agarwal, the present situation amounts to this, that practically thinking, while the members

of the holding company, i.e., JPI, are absorbing the losses of JPC, yet the JPI is being made to pay the taxes on profits which are actually not being

earned, in the sense of being reduced from the practical point of view by the loss of its subsidiary, namely, JPC. According to Sri Agarwal, all the

creditors of JPI and JPC and all the sensible shareholders of JPI, who have approved the amalgamation, including the informed prospective

investors are fully aware of these consequences, because of which immediately after the approval of the scheme of amalgamation at the meetings,

the share prices of JPI have registered sharp rise. In this context, Sri Agarwal relied upon a decision of the Bombay High Court in the case of State

Bank of India v Alstom Power Boilers (2003) 5 Com LJ 268 (Bom) : (2003) 13 SEBI & CLR 449 (Bom), supra, which on page 476 of the law

reports indicates that such amalgamations are based on commercial wisdom. He also relied upon the decision of the Gujarat High Court in the case

of Navjivan Mills Company Limited [1972] 42 Com Cas 265 (Guj), supra, particularly, the passages at page 273 and 274 of the law reports.

77. Sri Agarwal submitted that assuming without conceding the contention of HBSL to be correct, it cannot be lost sight of that the assets of JPC

belong to JPI, and if that company (JPC) becomes sick and is wound up on account of erosion of net worth, the JPI and consequently its

shareholders would suffer inasmuch as the net worth of JPC even after accounting for the erosion is still not zero or in the negative, The argument

has force ; and there is no plausible reply. Therefore, even if it is a case of bail out of JPC, the decision cannot be said to be commercially unsound

or detrimental to the shareholders or creditors of JPI or JPC.

78. Sri Agarwal lucidly narrated a host of other seemingly good reasons for the merger or the holding company JPI into its subsidiary JPC. The

submissions were not controverted by way of rejoinder arguments. I do not consider it desirable to pen down all those reasons here as it might not

be desirable in the interest of the two companies. In fact, while reserving judgment, I had asked Mr. Navin Sinha, who had heard those

submissions, as to whether those commercial details should be omitted from this order and he agreed that mentioning those details was not

necessary, and the same would not be in the interest of the companies of which his client was also a major shareholder. Therefore, suffice it to say

that there are more than adequate good reasons to hold that the decision on merger is a commercially sound decision.

79. Considering the above submissions, it would appear that the decision for amalgamation is in the interest of the shareholders of JPI as well as

the creditors of two companies and the objection by HBSL is not sustainable.

80. There was an objection from the side of HBSL to the scheme on the ground that it involves merger of the holding company JPI into the

subsidiary company JPC. The following decisions are precedents for such mergers: (a) A.W. Figgis & Co., In re [1980] 50 Com Cas 95 (Cal) :

(b) New Vision Laser Centres (Rajkot) (P) Ltd., In re (2002) 5 Com LJ 38 (Guj) : [2002] 111 Comp Cas 756 (Guj) ; (c) In Re: Asian

Investments Ltd. and others, ; (d) McLeod Russel (India) Ltd. (1997) 4 Com LJ 60 (Cal).

81. The next objection of HBSL is that the court's order of 40% voting strength/50 members quorum for the meeting of the shareholders was

obtained by the JPI without disclosing to the court, at that stage, that the promoter group itself held 47% of the paid-up share capital.

82. This objection does not appear to be relevant at this stage, inasmuch as it has been shown in the Chairman's report that 739 members were

present at the meeting as against the quorum of 50 fixed by the court, and besides 51.13% of the paid-up capital was represented at the meeting

which was not only in excess of the quorum of 40% fixed by the Court, but was also in excess of the 47% shareholding of the promoter group.

Further, it is not disputed that the meeting was widely advertised in three leading newspapers namely, The Pioneer (English) Lucknow Edition,

Dainik Jagran (Hindi), Lucknow Edition and The Economic Times (English), Delhi Edition. It is also not seriously disputed during arguments that

notices of the meeting were sent individually to all members under the supervision of the Chairman of the meeting, although there is such objection

by some petty shareholders. But I find it difficult to accept the objection because all the written objections of these petty shareholders are virtually

carbon copies of each other and there is no explanation why all these petty shareholders, having no connection with each other and belonging to

different places, should converge upon the same Advocate, namely, Sri M.C. Tiwari, for filing of the objections. Thus, these petty objectors

appear to have merely lent their names by way of proxy for the sake of opposition. Indeed, Sri M.C. Tiwari, Advocate, who has filed these

identical objections did not even argue the matter to press the objections although he remained present. Thus, it has not been proved that individual

notices were not sent or that any member was precluded from attending the meeting. It has also not been proved that any member was restrained

from entry to the meeting which, as stated above, was well-publicised in leading newspapers and informed to the members by individual notices.

As is clear from the charts given at pages 41 and 42 of this order, 49.004% of the members by value voted in favour of amalgamation and only

2.127% of the members by value voted against the scheme. Thus, even the 5% members by value who belonged to HBSL and its associates did

not as a whole oppose the amalgamation. This is also a very important circumstance to be considered along with the fact about rise of share price

of JPI consequent upon the approval of the amalgamation at the meeting.

83. The contention of Sri Sinha about 8.8% (by value) of the shares being disputed in the investigation by SEBI is also not sustainable. These

"disputed" shares can be divided into two categories. First, the shares in respect of which SEBI inquiry is pending under the SEBI (Substantial

Acquisition of Shares and Takeovers) Regulations, 1997. Second, the 1,39,34,300 shares which are the subject matter of the preferential

allotment in respect of which the SEBI has said that it is looking into the matter. In respect of the first category, the argument of Sri Sinha does not

take into account the factor that even if the worst is assumed and the SEBI investigation is concluded against the acquirers only those shares can be

said to be disputed which are in excess of the permissible limit of 5%. The argument of Sri Sinha also does not take into account the provisions of

Section 87 which confirms voting right of every shareholder and Sections 181 and 182 of the Act which alone provides for restriction on the voting

rights. Thus, merely because some enquiry is pending by SEBI, cannot be a ground for disallowing voting rights. Regarding the second category,

the issue has already been dealt with in the earlier part of this order, and in absence of anything further, allottees of this preferential allotment cannot

be denied voting rights. Besides, the "adjusted voting pattern" chart at page 43 of this Order indicates that even this does not have any substantial

affect on the result of the shareholders meeting.

84. It was argued by HBSL that the decision for amalgamation is not a decision which a prudent businessman would take. Apart from what has

already been mentioned above, about the reasons for amalgamation, the creditors of these two big companies, being big financial institutions

dealing with functioning of several big companies, are expected to have much more awareness than small investors. In view of the fact that the

creditors of both the companies, who have much higher stakes than the dissenting shareholders, have unanimously approved the scheme of

amalgamation, it appears to be safe for the court to assume, unless something striking is shown to the contrary, that the scheme is commercially

sound and beneficial to both the companies. The contention of HBSL that the proposed amalgamation is not a decision which a prudent

businessman Would take in the circumstances is not capable of being sustained.

85. It has also been argued from the side of HBSL that earlier, the cement unit of JPI was hived off to JPC under an earlier scheme sanctioned by

the Court on 27.2.2001 against which the special appeal is pending. According to HBSL, the object of the earlier scheme for the said hive off was

to bring the cement business under one roof and the present scheme for amalgamation is diametrically opposed to the said object. This argument

loses sight of the vital fact which can be read between the lines clearly that in the objects of the earlier scheme, it was mentioned that the hive off

was being done with the object of procuring a strategic partner to the cement business. In the objects of the present scheme of amalgamation, it is

mentioned that the said partner could not be procured. While considering such matters, the courts cannot lose sight of the goings on of the present

day. Large number of companies of the country have collaborated with multinational or foreign companies. Therefore, the object of the earlier

scheme for transferring the cement unit to JPC thereby making it a bigger cement producer could normally be expected to improve the chances of

getting a foreign or even domestic collaborator. Due to strategic reasons of business, it cannot be expected from companies to disclose details of

the negotiations which have taken place with prospective collaborators or their names. Again, regarding the present scheme of amalgamation, it

cannot be lost sight of that the present times are of amalgamation of companies to make them larger to enable them to compete with the

multinationals, Several mergers which have taken place in the recent past (names of those big companies need not be mentioned as they are

common knowledge)-bear ample testimony to the present day situation, Therefore, if the object of procuring a strategic partner in the cement

business of JPC could not materialise and the two companies, JPC and JPI, are sought to be amalgamated to create a bigger company, no

exception can be taken to it.

86. It was pointed out by Sri Sinha that in the objects of the present scheme, it has been stated that the cement industry is going through a bad

phase resulting in low profits. Sri Sinha then referred to a report of the Chairman of another big cement producer, namely, ACC in which the said

Chairman has opined that the future of cement industry is bright.

87. The criteria to be examined by a Company Court while considering a scheme of amalgamation for sanction have been spelt out lucidly by the

Supreme Court in the case of *Miheer H. Mafatlal v Mafatlal Industries* (1996) 4 Com LJ 124 (SC) : (1997) 1 SCC 597. Considering those

guidelines, the Court normally, should not sit in appeal over the decisions of shareholders and creditors and should not indulge in hair splitting or

pedantic fault finding.

88. In the case of *Reliance Petroleum Limited, In re* (2003) 5 Com LJ 240 (Guj) : [2003] 46 SCL 38 (Guj), the Gujarat High Court has held as

follows :

The decision in law is well settled that while exercising the jurisdiction and power to sanction a scheme, the court is required to ensure that

statutory provisions have been complied with, that the class of persons who attended (the) meeting was fairly represented and that the statutory

majority was acting bona fide and, lastly, that the arrangement, i.e., scheme was such which an intelligent and honest man acting in respect of his

interest, might reasonably approve. The Court at the same time is not required to defer from the decision of the majority arrived at the meeting,

unless any of the factors is found to be wanting. A share exchange valuation will have to be approved, unless it shocks the conscience of the Court.

In the same judgment, it was held that it is commercial wisdom of the parties to the scheme who have taken an individual position about the

usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court has

neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority.

89. Another objection by HBSL was that the JPI is a company, shares of which are listed on the stock exchange, whereas the shares of JPI are

not listed and, thus, the promoter group, by the present scheme, is trying to merge a listed company into an unlisted company. This objection

appears to have been taken without reference to para 3.20 of the scheme which contemplates clearly that upon the [coming] into effect of the

scheme, the equity shares of JPC issued and allotted in terms of the scheme, shall be listed on all such stock exchanges in India where the equity

shares of JPI are listed.

90. Sri Sinha also made an attempt to resist the proposed amalgamation by submitting that the company has a history of mergers and demergers.

In reply, Sri Agarwal submitted two charts to show that there has been continuous growth of the company in respect of its assets. However, it is

not necessary to go into this aspect as there is no limit placed by any law upon the number of mergers. Therefore, without anything more, earlier

mergers or demergers cannot be a bar to the present merger.

91. It was next contended by Sri Sinha that the attendance at the meeting of shareholders was not truly representative of the shareholders,

specially, the small investors, and the promoter group has utilised its; large shareholding to push the approval of the scheme. He relied upon a

passage from the Treatise on Company Law by Palmer. The said passage is reproduced below:

The court must be satisfied that those who attended the meeting are fairly representative of the class and that the statutory majority did not coerce

the minority in order to promote the interest adverse to those of the class who they purport to represent.

92. The argument fails to consider that Section 391(2) takes good care of the interest of the small shareholders by providing that the arrangement

should be approved not only by 3/4th of the members present and voting by vote value, but must also be approved by a majority (by numbers) of

the members present and voting. Therefore, even the small investors can defeat the scheme by their sheer numbers irrespective of their small

shareholding. On facts, it is clear from para 9 of the rejoinder affidavit of HBSL itself (Paper No. A-32) that out of the total presence of 739

members, 714 valid votes (by number) were polled at the meeting. The scheme was approved by an overwhelming 698 members although the

promoters' own persons/ entities were only 156 by number.

93. In the case of *Miheer H Mafatlal v Mafatlal Industries Ltd.* (1996) 4 Com LJ 124 (SC) : (1997) 1 SCC 597, the Supreme Court held as

follows (para 38 at page 154 of Comp LJ) :

On the express language of Section 391(1), it becomes clear that where a compromise or arrangement is proposed between a company and its

members or any class of them, a meeting of such members or class of them has to be convened. This clearly presupposes that if the scheme of

arrangement or compromise is offered to the members as a class, and no separate scheme is offered to any sub-class of members which has a

separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive.

94. The Delhi High Court in the case of *Modiluft Ltd.* (2002) 4 Com LJ 128 (Delhi), *supra*, has defined as to what constitute a class ? In a

nutshell, the law appears to be that where some shareholders are to be treated differently from others pursuant to the proposed scheme, such

members or creditors would constitute a different class or sub-class. But where under the proposed scheme of arrangement ; all members are

being offered exactly the same terms, it cannot be said merely because some members do not agree to the scheme that they constitute a separate

class.

95. In the present case, there is only one class of shareholders, namely, equity shareholders, and it cannot be said that the interest of the class of

equity shares held by the promoter group, if it can be dubbed as a class, is adverse to any other equity shareholder. The scheme is universal in its

application to all equity shareholders who get similar treatment. Thus, it cannot be said that there was any class or sub-class of members who

required separate representation or separate meeting. Further, even the objector HBSL has not been able to persuade its entire 5% voting support

by value to vote against the motion. Also, even the associate of HBSL namely, Hari Sai Investments, who is alleged to have voted against the

motion along with HBSL has not come to the court to file objections (see voting analysis chart at page 42 of this order). As already stated above,

the meeting was widely publicised and no shareholder is said to have been stopped from attending the meeting and, therefore, also it cannot be

said that the persons present at the meeting did not fairly represent the shareholders. This objection of HBSL is thus overruled.

96. The following chart indicates the result of the meeting of members and creditors of JPI and JPC as reported by the Chairman of the respective

meetings :

#### SUMMARY STATEMENT SHOWING RESULTS OF THE MEETING OF MEMBERS AND CREDITORS OF JAIPRAKASH

INDUSTRIES LTD. AND JAYPEE CEMENT LTD.

Jaiprakash Industries Ltd. Jaypee Cement Ltd.

Member Creditors Creditors

No. of Voting No. of Voting power No. of Voting power

persons powers persons (value of debt) persons (value of debt)

/ ballots (No. of / ballots / ballots

shares)

Total 176216981 20509527245.17 3184099057.91

voting

strength

Total 739 90107674 143 14069066977.94 59 2112456153.95

presence

Quorum 50 40% 5 40% 5 40%

fixed by

the

Court

Total 718 90102918 143 140690669977.94 59 21124156153.95

votes

cast

Invalid 4 681 0

votes

Votes 698 86353547 143 14069066977.94 59 2112456153.95

cast in

favour

% of 96% 100% 100%

total

valid

votes

Votes 16 3748690 0 0 0 0

case

against

% of 4%. 0 0 0 0

total

valid

votes

Not 21 4756 0 0 0 0

voted

96.1 Analysis of the said voting, which would indicate the fact that the members who disapproved the scheme and their percentage and the

persons who despite such disagreement at the meeting, did not approach the Court to file objections, is shown by the following chart:

#### VOTING PATTERN AT THE MEETING OF SHAREHOLDERS OF JAIPRAKASH INDUSTRIES

LTD -- TRANSFEROR COMPANY

Nos. Shares held %

Total votes polled (valid) 714 9,01,02,237 100%

Votes cast in favour 698 8,63,53,547 95.84%

Votes cast against (dissenters) 16 37,48,690 4.16%

Analysis of dissenters

Dissenters who have come before

this Court and filed objections 5 12,73,0251 1.41%

Dissenters who have not filed

any objections 11 24,75,665 2.75%

96.2 Thus, only 1/3rd of the dissenters have filed objections. Rest 2/3rd have not filed any objections.

Analysis of objectors who have filed objections in the Court

Persons who have filed objections 8 12,73,225 1.41%

Shares held by HB Stock Holdings

Limited 1 12,72,675 1.41%

Other objectors who attended

the meeting and dissented 4 350 -

Objectors who did not attend

the meeting 3 200 -

96.3 Adjusting the disputed shares in the above voting at the meeting, the position which emerges is shown in the following chart:

#### ADJUSTED VOTING PATTERN

##### A. Disputed shares No. of shares

1. Shares allegedly acquired in violation of takeover

code 1,56,40,000

Less : 5% permissible limit of the then capital

i.e. 15,892,38,711 shares (-) 79,11,935

2. Shares allotted on preferential basis 1,39,34,300

3. Total disputed shares (1) + (2) 2,16,62,365

##### B. Adjusted voting strength

Total voting strength on 29.3.2003 17,62,17,981

Less : Shares allotted on preferential basis (-) 1,39,34,300

Total adjusted voting strength 16,22,82,681

##### C. Adjusted presence

Total presence on 29.3.2003, as per Chairman"s

Report 9,01,07,674

Less : Disputed shares as at "A-3" above (-) 2,16,62,365

Adjusted presence 6,84,45,309

Percentage of adjusted presence to adjusted voting

strength 42.18%

D. Adjusted valid votes

Total votes cast, as per Chairman's Report 9,01,02,918

Less : Disputed shares as at "A-3" (-) 2,16,62,365

Adjusted votes cast 6,84,40,553

Invalid votes 681

Adjusted valid votes 6,84,39,872

E. Adjusted votes cast in favour

Votes cast in favour, as per Chairman's Report 8,63,53,547

Less : Disputed votes as at "A-3" (-) 2,16,62,365

Adjusted votes cast in favour 6,46,91,182

Percentage of adjusted votes cast in favour to ad-

justed valid votes 94.52%

F. Votes cast against

Votes cast against, as per Chairman's Report 37,48,690

Percentage of votes cast against to adjusted valid

votes 5.48%

97. It is rare to find unanimity in respect of decisions. People differ [differ?] in their knowledge, views, approach and consequently, in their

decisions. The scheme of the Companies Act suggests that the majority decision should prevail unless that decision is oppressive to the minorities

or unfair to the minority dissenters or for some reasons is not in public interest. This would imply that where there is a dissent in respect of the

scheme at the meeting where the decision is taken by vote without reasons, the dissenters can approach the Court with their reasons for the

dissent, and they have the right to attempt to convince the court that their reasons for dissent are such which the court can uphold within the legally

permissible limits of the jurisdiction of the court. By and large, this procedure under the Companies Act is sufficient safeguard for the interest of the

dissenters. Dissenters still not willing to go along are to be bought out u/s 395 of the Act.

98. In view of what has been said above, the scheme annexed as Annexure I to the Company Petition No. 26 of 2003 as approved in the meeting,

dated 29.3.2003 -- is hereby sanctioned without any modification. A certified copy of this will be issued to the parties on payment of requisite

charges within a week. The applicant will file a copy of this order before the Registrar of Companies, U.P., Kanpur, within 30 days. The applicant

will also file a copy of the formal order issued by the Registrar of this Court in the prescribed form before the said Registrar of Companies within

30 days of its issue.

99. Any party will be at liberty to apply to this Court u/s 392 for directions which may be considered necessary in case of any doubt or dispute

regarding the carrying out of the scheme hereby sanctioned.

Company Petition No. 25 of 2003

100. So far as reduction of paid up share capital of the amalgamated company is concerned, it is apparent that as a result of the reduction, there is

no outgo of funds or change of assets. Thus, there is no effect on creditors. There is no extinguishments or reduction of liability of any of the shares

in respect of share capital not paid up, or cancellation of any paid up capital which is lost or is unrepresented by available assets, or refund of any

part of the share capital to its shareholders. A special resolution duly passed in accordance with Section 189 on 29.3.2003 is on record. As

already stated despite notice and publication in newspapers, there is no objection on this score. In view of the above, there does not appear to be

any reason to invoke Sub-section (2) of Section 101. As a consequence, the Company Petition No. 25 of 2003 for reduction of share capital is

also allowed in the terms prayed as per special resolution quoted in para 12 of the said petition. The reduction is confirmed and will take effect in

accordance with Section 103(2). The minutes set out in para 16 proposed to be registered u/s 103(1)(b) are approved.