In Re: Mafatlal Industries Ltd.

Court: Gujarat High Court

Date of Decision: Nov. 14, 1994

Acts Referred: Companies Act, 1956 â€" Section 153, 173, 173(1), 173(2), 186

Citation: (1995) 84 CompCas 230

Hon'ble Judges: S.D. Shah, J

Bench: Single Bench

Judgement

S.D. Shah, J.
Mafatlal Industries Limited (hereinafter referred to as ""MIL"" for brevity) is the transferee company, which has moved this

petition for sanction of this court to the scheme of amalgamation of Mafatlal Fine Spinning and Manufacturing Co. Ltd. (hereinafter referred to as

MFL"" for brevity), the transferor company u/s 391(2) of the Companies Act, 1956.

* * * *

2. The transferor company, MFL, is proposed to be amalgamated with the petitioner company under the following circumstances and for the

following reasons :

(1) The proposed amalgamation will pave the way for better, more efficient and economic control in the running of operations.

(2) Economies in administrative and management costs will improve in combined profitability.

(3) The amalgamated company will have the benefit of the combined reserves, manufacturing assets, manpower and cash flows of the two

companies. The combined technological, managerial and financial resources are expected to enhance the capability of the amalgamated company

to invest in larger and sophisticated projects to ensure rapid growth.

(4) The amalgamated company will have a strong and large resource base. With a strong resource base, the risk-bearing capacity of the

amalgamated company will be substantial. Hitherto, with limited resources and capacity, either company had to forgo business opportunities which

would otherwise have been profitable to the group.

(5) ""Exports"" have been identified as a thrust area for both companies and response in time to customers'' needs is considered to be critical in this

area of operations. An amalgamated company will be strategically better placed to reduce the response time. Customers'' confidence in dealing

with such a mega company ensures timely delivery of large orders.

(6) The amalgamated company will be able to secure and absorb new technology and spend on research and development, market surveys, etc.,

more comprehensively.

(7) More particularly in the textiles division, with five operating units at the company''s disposal the flexibility in operations will be very much

pronounced. The managers will not be inhibited by capacity constraints and will have the freedom of choosing from various options.

(8) Both the companies have been subject to the pressures of raw material price fluctuations and of adverse market conditions in their respective

product mix. Hence, the amalgamation will neutralise the adverse effects contrary business cycles. The operations of one unit will be

complementary to the other and a stable profitability will be achieved.

3. The directors of the petitioner company, MIL, and the transferor company, MFL, approved the proposal for amalgamation of the MFL with

MIL and pursuant to the respective resolutions passed by them, the detailed scheme of amalgamation was finalised. The directors of both the

companies were of the opinion that such amalgamation was in the interest of both the companies. A detailed reference to the salient provisions of

the scheme of amalgamation needs to be made at this stage.

Salient provisions of the scheme of amalgamation :

1. The undertakings and all the properties, rights, claims and powers of the Mafatlal Fine Spg. and Mfg. Co. Ltd. (hereinafter called ""MF"") be

without further act or deed transferred to and made to vest in Mafatlal Industries Ltd. (hereinafter called ""MIL"") with effect from the 1st day of

April, 1993, pursuant to the provisions of sections 391 to 394 of the Companies Act, 1956, together with all the estates and interests of MF

therein but subject nevertheless to the charges, if any, affecting the same.

2. All the liabilities, duties and obligations of MF be also without further act or deed transferred to MIL with effect from the said 1st day of April,

1993, pursuant to the provisions of the said sections 391 to 394 of the Companies Act, 1956, so as to become as from that day the liabilities,

duties and obligations of MIL.

3. All proceedings (legal and others, including any suits, appeals, revisions, petitioners, arbitration, execution proceedings), if any, pending by or

against MF at the time of such transfer be, on such transfer of MF, continued by or against MIL.

4. All the employees of MF immediately preceding the last date referred to in clause 11 hereinafter and as shall not have expressly in writing

declined to be the employees of MIL shall on amalgamation of MF with MIL become the employees of MIL on the same terms on which they are

employed by MF and their services with MF so to be amalgamated with MIL prior to such taking over will not be treated as having been broken

for the purposes of the Provident Fund Rules or for gratuity or for superannuation or for any other purposes but will be reckoned for all such

purposes from the date of their respective appointments with MF so to be amalgamated.

5. (a) The amalgamation of MF with MIL will be made on the basis that every member of MF shall in respect of every five ordinary shares in MF

of Rs. 100 each held by him on the day when this scheme becomes effective, be entitled as of right to an allotment to himself of two equity shares

in MIL of Rs. 100 each credited as fully paid up and MIL shall, without any application, allot to such member in MF shares in MIL to which such

member may become entitled.

(b) MIL holds at present 12,06,914 ordinary shares in MF. As MIL cannot make any allotment of shares to itself, the said 12,06,914 shares in

MF shall stand cancelled.

4. The transferee company, MIL, thereupon filed Company Application No. 872 of 1993, in the High Court of Gujarat u/s 391 of the Companies

Act, 1956, for convening the meeting of the equity shareholders of the petitioner company, MIL. It appears that the learned single judge of this

court, vide order dated December 22, 1993, was pleased to direct that the meeting of the equity shareholders of MIL be convened on January 22,

1994, for the purpose of considering and, if thought fit, approving with or without modification, the said scheme of amalgamation. The said order

also stipulated that Arvind N. Mafatlal, failing him Rishikesh A. Mafatlal should act as chairman of the meeting and should report the result thereof

to this court. The details of the order shall be mentioned at the appropriate stage as a serious objection is taken to the convening and holding of the

meeting of the equity shareholders of MIL without classifying the equity shareholders into the majority group and the minority group and the second

objection is to the effect that Arvind N. Mafatlal, who acted as chairman of the meeting, ought not to have been appointed and he ought not to

have worked as chairman of the said meeting.

5. It is an admitted fact that pursuant to the direction contained in the order of this court dated December 22, 1993, notice of the meeting was sent

individually to the members of MIL by post, under certificate of posting at their respective registered addresses together with a copy of the said scheme of amalgamation and of the statement required u/s 393 of the said Act and a form of proxy. The notice of the said meeting was also

advertised in the issue of the Times of India, Ahmedabad and Bombay edition, dated December 29, 1993, and in the Gujarat Samachar, dated

December 29, 1993.

6. On January 22, 1994, a meeting of the members of the petitioner company, MIL, was duly convened at Premabhai Hall, Bhadra, Ahmedabad,

and Arvind N. Mafatlal acted as chairman of the said meeting. The said meeting was attended by 5,522 members (in computed folio wise) present

either in person or by proxy, holding 20,48,513 fully paid equity shares of Rs. 100 each aggregating to Rs. 20,48,51,300. At the said meeting, a

resolution was passed without modification by the requisite majority as 5,298 members holding 19,36,964 fully paid equity shares voted in favour

of the scheme and 143 members holding 86,061 fully paid equity shares voted against the scheme. In short, the said meeting by requisite majority

approved the proposed scheme of amalgamation and the report of the chairman was submitted to this court.

7. Thereupon, the petitioner company, MIL, has filed the present petition in this court for its sanction to the proposed scheme of amalgamation. On

February 14, 1994, a learned single judge of this court admitted the petition and fixed it for hearing on March 15, 1994, and issued an

advertisement in the Gujarat Samachar and Times of India, Ahmedabad edition and Bombay edition and also issued a notice to the Regional

Director, Company Law Board, Western Region, Bombay.

8. In response to the notice issued to the Central Government u/s 394A of the said Act, Mr. Jayant Patel, learned Additional Central Government

standing counsel, has appeared and has produced on the record of this court letter dated June 10, 1994, received by him from the Registrar of

Companies, Gujarat. By the said letter, this court is informed that it has been decided by the Central Government not to make any representation in

favour of or against the proposed scheme of amalgamation and to leave the matter to this court for its decision on the merits. It is, therefore, clear

that u/s 394A of the said Act, the Central Government does not object to the proposed scheme of amalgamation being sanctioned by this court.

9. Pursuant to the public advertisement issued in the Times of India, dated February 21, 1994, Miheer H. Mafatlal, a shareholder, holding 40,567

shares in MIL has filed an affidavit opposing the scheme of amalgamation and arrangement between the petitioner company, MIL, and Mafatlal

Fine Spinning and Manufacturing Company Limited (MFL). In such affidavit, he has, inter alia, averred that the scheme of amalgamation and arrangement should not be sanctioned by this court for as many as nine objections which in his own words are as under :

Objection No. 1. - The scheme is not for the avowed purpose or objects for which it is proposed.

Objection No. 2. - Consequently, as the scheme is not for the purpose for which it is proclaimed to be, I submit it is for an ulterior motive which is

explained hereinafter in detail.

Objection No. 3. - That the scheme even otherwise is not in the interest of Mafatlal Industries Limited.

Objection No. 4. - Miheer H. Mafatlal, in his personal capacity and as karta of his Hindu undivided family and as trustee of trusts and his family

members are the shareholders of MIL holding 5 per cent. of the total share capital of MIL. He, therefore, claims that he and his family members

are of a distinct class of the shareholders having interest in the petitioner company, MIL, of a distinct nature in view of the family arrangement dated

March 1, 1979, and, therefore, they were required to be treated as a separate and distinct class of shareholders and their separate meeting was

required to be called for in approving the proposed scheme as the scheme vitally affects the rights of this class of shareholders. In the absence of

such meeting, the scheme ought not to be sanctioned.

Objection No. 4. - The scheme of amalgamation and arrangement was approved at a meeting of shareholders only held under the chairmanship of

Arvind N. Mafatlal. The said Arvind N. Mafatlal is a person who is personally interested in getting the scheme approved and sanctioned. In the

circumstances, he having a personal interest in the scheme, could not have chaired the meeting and at the same time, obtained proxies to vote in

favour of the scheme, the court in the circumstances, ought not to sanction the scheme.

Objection No. 5. - The scheme of amalgamation and arrangement along with the explanatory statement thereto, was sent to the shareholders of

MIL. The scheme and the explanatory statement do not disclose all material facts relating to MIL and MF and in the absence of all material facts

being placed before the shareholders, the shareholders are not and were not in a position to exercise an intelligent judgment as to whether they

should vote in favour of the scheme or against it. The notice, the consequential meeting and the resolution passed therein, therefore, are of no effect

and the scheme, in the circumstances, ought not to be sanctioned by this honourable court.

Objection No. 7. - The scheme of amalgamation is passed at a meeting of shareholders which, inter alia, included shareholders like NOCIL and

Sushripada Investments Pvt. Limited whose allotment is illegal and contrary to and in violation of the order of the City Civil Court at Ahmedabad.

Moreover, the rights issue of 1987 and 1992 being under a cloud, the allottees of shares under the said issue or their transferees could not have participated in the meeting of shareholders and passed the resolution favouring amalgamation and hence also the scheme cannot be sanctioned.

Objection No. 8. - The scheme of amalgamation is supported in so far as fair exchange ration is concerned by the report of C. C. Chokshi and

Co. and ICICI both of whom being interested parties could not have given any such report and in any event the scheme based on exchange ratio

fixed on the basis of such report ought not to be sanctioned by this court.

Objection No. 9. - The scheme vitally affects the secured and unsecured creditors and in view of the fact that necessary meeting of such class of

creditors has not been called, this Honourable court ought not to grant sanction to the scheme of amalgamation.

10. In support of the aforesaid nine objections raised by Miheer H. Mafatlal, in the reply affidavit, he has produced voluminous documents to

which reference shall be made at the appropriate stage while dealing with the specific objection. It may be stated that the reply affidavit is sworn on

March 9, 1994, at Bombay and is accompanied by annexure A to annexure R from pages 100 to 582.

11. It is also required to be noted that the company secretary of the petitioner company, Ramakant R. Patel, has filed an affidavit-in-rejoinder and

in support thereof some annexures are produced. Miheer H. Mafatlal has filed thereafter, after the commencement of the hearing of this petition,

affidavit-in-surrejoinder and along with such affidavit-in-surrejoinder, once again a large number of documents are produced from annexure I to

annexure VIII commencing from page 717 to page 756. The petitioner company, MIL, has filed an affidavit-in-surrejoinder, during the course of

hearing, of Ramakant R. Patel. From the aforesaid pleadings and the documentary evidence produced in support thereof, this court is called upon

to decide the question as to whether all or any of the aforesaid objections raised by Miheer H. Mafatlal are tenable at law and are required to be

upheld so as not to sanction the proposed scheme of amalgamation or whether such objections are not tenable at law and in facts and are,

therefore, required to be rejected.

Family history and emergence of two groups :

12. From the aforesaid objections raised by Miheer H. Mafatlal, it becomes clear that the paramount objection is that the proposed scheme of

amalgamation is not for the avowed purpose or objectives, but it is for an ulterior motive. According to Miheer, the whole purpose of the scheme

is to see that the family arrangement arrived at in 1979 cannot be implemented and the counter-claim filed by Miheer in Suit No. 1010 of 1987 is

rendered infructuous. The scheme is proposed with the sole object of seeing that Miheer is unable to enforce his rights under the family

arrangement.

13. The aforesaid principal objection can be better appreciated if the family history and the circumstances leading to the present division of the

family are stated in brief at the outset.

14. Mafatlal Gagalbhai had three sons. Pransukhlal, Navinchandra and Bhagubhai. The eldest son, Pransukhlal, got out of the family prior to the

death of Mafatlal Gagalbhai and he died without leaving any male issue. Mafatlal Gagalbhai expired on July 19, 1944, and was survived by his two

sons, Navinchandra and Bhagubhai. On September 30, 1944, the said Bhagubhai died leaving behind him surviving Hemant, then aged 9, as his

only male issue. On August 31, 1955, Navinchandra Mafatlal died leaving behind him surviving the three sons, Arvind Mafatlal, Yogindra Mafatlal

and Rasesh Mafatlal as his made issues. On August 16, 1971, the said Hemant expired leaving behind his only male issue, present objector,

Miheer, then aged 13. The family tree of ""Mafatlal Gagalbhai"" and his two sons is as under :

SHETH MAFATLAL GAGALBHAI (DIED ON 19-07-1944)

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| | |

Navinchandra Bhagubhai Pransukhlal

(died 31-08-1955) (died on 30-09-1944) (deceased) (no issues)

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| | |

Arvind Yogindra Rasesh Hemant (died on 16-08-1971)

| |

Atulya Pradeep Miheer

| |

Padmanabh Hrishikesh

(died on 28-07-1990)

15. The said Mafatlal Gagalbhai started different business undertakings and with passage of time, the family of the said Mafatlal consisting of

Navinchandra and Bhagubhai expanded heir business undertakings. The said family held controlling interest in different business concerns run

through public limited or private limited companies and the members of the family were also partners in partnership firms. The pattern which was maintained throughout was that the two sons, Navinchandra and Bhagubhai, and their families would respectively have an equal interest in companies or in partnership firms. At the time of the death of the said Bhagubhai the said Hemant was just nine years of age. The business of the Mafatlal group was, therefore, for all practically purposes managed by the said Navinchandra. At the time of the death of Navinchandra the shareholding of the branch of Hemant Mafatlal in the Mafatlal group of industries was equal to aggregate shareholding of Arvind Mafatlal, Yogindra Mafatlal and Rasesh Mafatlal. On the death of Navinchandra, the Mafatlal group was managed by Arvind Mafatlal, Yogindra Mafatlal, Rasesh Mafatlal and the late Hemant Mafatlal. Arvind Mafatlal, was, however, the eldest male member in the family who was always looked at by Yogindra, Rasesh and the later Hemant as an elder in the family and respected.

16. On August 16, 1971, Hemant Mafatlal died at the young age of 36 years leaving behind him his widowed mother, his wife, his son, Miheer (then aged 13), and his two daughters (then aged 11 and 6). At that time, the Mafatlal family, i.e., the families of Navinchandra and Bhagubhai, were running three apex companies (1) Mafatlal Gagalbhai and Company Private Limited, (2) Surat Cotton Spinning and Weaving Mills Private Limited, and (3) Pransukhlal and company Private Limited.

17. Of these companies, the first was an investment company and had invested in shares of different companies of the Mafatlal group and through this company, other companies were being managed and controlled. The said apex company was controlling New Shorrock Spinning and Manufacturing Company Limited, Standard Mills Company Limited, Mafatlal Fine Spinning and Manufacturing Company Limited, Indian Dyestuff Industries Limited, National Machinery Manufacturers Limited (now Mafatlal Engineering Industries Limited). National Organic Chemical Industries Limited (NOCIL), Polyolefins industries Limited (PIL), Hoechst Dyes and chemicals Limited (now Mafatlal Dyes and chemicals Limited). The second company, Surat Cotton and Weaving Mills Private Limited, was having a textile unit at Surat and two 100 per cent. foreign subsidiaries, viz., Mafatlal AG, Zurich and Mafatlal Limited, Manchester. The third company, Pransukhlal and Company Private Limited, was again a holding company having one subsidiary company controlled by it, named Mihir Textiles Limited. The shareholding pattern in the above referred to three companies of the members of the family of Mafatlal Gagalbhai would clearly indicate that about one-half of the shares was held by the family of Hemant Mafatlal, while the remaining one-half were held by the family of Navinchandra consisting of Arvind, Yogindra and Rasesh.

18. It is the case of Miheer that when his father expired, New Shorrock Spinning and Manufacturing Co. Limited was being controlled and

managed by Mafatlal Gagalbhai and Co. Limited in which his father and his family had 46.47 per cent. shares vis-a-vis 43.66 per cent. shares held

by the family of Navinchandra Mafatlal. After the death of his father, when Miheer was a minor, it was decided to amalgamate Mafatlal Gagalbhai

and Co. Pvt. Limited with the New Shorrok Spinning and Manufacturing Co. Limited on January 24, 1974, and the name of the company was

changed to its present name, i.e., MIL.

19. According to Miheer, in or around 1979, there were certain disputes and differences amongst Arvind Mafatlal, Yogindra Mafatlal and Rasesh

Mafatlal and it was felt that some arrangements should be worked out, whereby there would be a separation and division of the family business

concerns amongst the four branches, viz., the Miheer branch, known as the MHM group, the family of Arvind Mafatlal known as the ANM group.

The family of Yogindra Mafatlal known as the YNM group and the family of Rasesh Mafatlal known as the RNM group. It is his further case that

Mr. C. C. Chokshi was requested to prepare a scheme for division of the family business concerns. According to him, Mr. C. C. Chokshi,

prepared a note dated February 23, 1979, making six suggestions for the division of the Mafatlal group of industries into four groups as there were

four family groups. The said note is produced at annexure E to the reply affidavit by Miheer. It is his further case that suggestion No. 5 put forth by

Mr. C. C. Chokshi with minor modifications was accepted at the meeting held on March 1, 1979, at which the following were present : (1) Arvind

Mafatlal, (2) Yogindra Mafatlal, (3) Resesh Mafatlal, (4) Miheer Mafatlal, (5) Padmanabh Mafatlal, and (6) Hrishikesh Mafatlal. The minutes of

the said meeting dated March 1, 1979, are produced at annexure F to the reply affidavit by Miheer and entire suggestion No. 5 is reproduced by

him in his affidavit-in-reply. As per suggestion No. 5, group A which included Mafatlal Industries Limited (MIL) was to go to Miheer, i.e., the

MHM group, as the holding of the MHM group was the largest, Group B was to got to the ANM group, Group C was to go to the RNM group

and Group D was to go to the YNM group. It is his further case that to work out the aforesaid suggestion No. 5, the formation of three wholly

owned subsidiary companies by MIL was envisaged. It was further envisaged that the shareholding of MIL in Standard Mills Co. Ltd. will be

transferred to one such subsidiary company, while the holding of Mafatlal Industries Limited in Indian Dyestuffs Industries Limited and Hoechst

Dyes and Chemicals Limited would be transferred to another such subsidiary company. Similarly, the holding of MIL in MF would be transferred to a third subsidiary company. In this way three subsidiary companies were to take over the investments of MIL in certain companies. In

consideration of such transfer the said three subsidiary companies would be required to issue shares to the existing shareholders of MIL in

proportion of one share of the subsidiary company for one share held by such shareholder in MIL. It was also envisaged that the shares held by

MIL as investment shall be transferred at the book value as shown in the books of MIL. In this way, the operation of the separation of the holdings

of MIL in the aforesaid three companies may be put through and this can be achieved by a scheme of arrangement/reconstruction u/s 394 of the

Companies Act. It was further envisaged that all the shareholder of the Mafatlal family holding shares in MIL would apply for such shares issued

by subsidiary companies. The MHM group, which was to have the control over MIL would sell off their holdings in the respective subsidiaries to

the respective groups of ANM, YNM and RNM which groups in turn were to sell off their holdings in MIL to the MHM group. The object and

purpose of the scheme envisaged was that some of the companies then controlled by MIL would be hived off to the subsidiary companies which

were to be under control of ANM, YNM and RNM groups and the remaining companies which were not hived off would continue to be under

control of MIL under the MHM group.

20. It is the case of Miheer that although three subsidiary companies were to be floated as suggested by Mr. C. C. Chokshi, he was told by the

seniors in the family and Mr. C. C. Chokshi that it would be in his best interest not to be in charge of any company independently at this young age

and that it would also be in his best interest to be with the senior most member, Arvind Mafatlal. It is his further case that his grandmother and

mother and he himself as a young child had implicit faith in Arvind Mafatlal as he was looking after the affairs of his family since the premature

death of his father. It is his case that Arvind Mafatlal also assured him that at a later date he would separate the Group A companies and would

manager the companies in Group A till Miheer formally established himself in the management thereof. Even Mr. C. C. Chokshi, who was the

adviser to the family also assured Miheer, his mother and grandmother that the division which was made was fair and would be worked out by

Arvind Mafatlal in the best interest of Miheer''s family.

21. It is his further case that as a part of the scheme of arrangement, the two subsidiary companies, Mahamaya Investment Limited and Sandeep

Holdings Limited, were floated. The first company was to be ultimately and is presently held by YNM group. Because of his young age and his managerial inexperience, the third subsidiary company was not floated. The non-floating of the third subsidiary company and failure to hive out the

Group B company into a third subsidiary company is said to be deliberate as according to Miheer, Arvind Mafatlal and different plans and he

never wanted to lose control over the companies in Group A, particularly MIL and through it NOCIL. Its failure to float the third subsidiary

company is described as the first step taken by Arvind Mafatlal with a view to continuing to control the Group A Companies, viz., MIL, MEIL and

NOCIL. It is Miheer''s allegation that in reality Arvind Mafatlal never wanted to give up his control over the vast Mafatlal empire through MIL and

never wanted to give Miheer''s due share in the management and control of the industries of the Mafatlal group. Miheer has in fact enumerated

seven steps taken by Arvind Mafatlal to show as to how Arvind Mafatlal gradually, systematically achieved, practically total ouster and exclusion

of Miheer''s family from the management of the Group A companies which was otherwise to go to the MHM group and as to how Arvind Mafatlal

managed to fully control all companies in group A. These seven steps shall be separately set out and discussed while dealing with objections Nos.

1 and 2 raised by Miheer more particularly in the context of finding out as to whether proposed scheme of amalgamation is just, fair and

reasonable and as to whether it is bona fide and proposed in good faith. I of the object behind the proposed scheme of amalgamation is to

tyrannise the minority group, or to exclude or oust the minority MHM group or to suppress or oppress the minority, the objections to the scheme

shall have to be upheld. While considering objections Nos. 1 and 2, in my opinion, seven steps or actions attributed to Arvind Mafatlal by Miheer

shall have to be closely examined and scrutinised and at this stage while setting out the family history, I do not propose to set out and discuss in

detail those seven steps.

22. Before this court proceeds to discuss and deal with the aforesaid objections, raised by Miheer, it would be appropriate, firstly, to highlight one

anomaly which has arisen in this case. Immediately after the proposed scheme of amalgamation was approved by the equity shareholders and

creditors of Mafatlal Fine, a company petition was filed in the Bombay High Court within whose jurisdiction, the registered office of MF (transferor

company) is situated for its sanction u/s 391 read with section 394 to the proposed scheme of amalgamation. The High court of Bombay has

already sanctioned the scheme based on the fact that the scheme is overwhelmingly passed by the statutorily required majority of shareholders. The

very scheme of amalgamation is seriously challenged before this court by one of the directors of MF and one group of equity shareholders of MF as well as MIL. This court, being the court in whose jurisdiction, the transferee company is registered, is therefore, required to decide such

company petition. One High Court of co-ordinate jurisdiction having already sanctioned the scheme, this court is called upon not to sanction the

scheme so as to reach findings inconsistent to those reached by the Bombay High Court. It is this animals which is required to be answered.

ANOMALY NOTED :

23. The proposed scheme of amalgamation, inter alia, stipulates that MF and MIL shall proceed with reasonable despatch to make necessary

applications in the respective High Courts for sanctioning the scheme of amalgamation and for the purpose of obtaining an order or orders u/s 394

of the Companies Act, 1956, for carrying into effect the scheme of amalgamation. It is further stipulated that transfer of properties of MF to MIL

shall be made under the scheme when sanctioned by the respective High Courts. It is further stipulated that the scheme of amalgamation will be

subject to such modifications as the High Court of Judicature at Bombay and the High Court of Gujarat while sanctioning such amalgamation may

direct. It is clear that the registered office of MF (transferor company) is situated at Bombay, i.e., within the jurisdiction of the High Court of

Judicature at Bombay while the registered office of MIL (transferee company) is situated at Ahmedabad, i.e., within the jurisdiction of the High

Court of Gujarat. The transferor company is, therefore, required to take necessary steps under sections 391 and 394 of the Act in the appropriate

forum being the Bombay High Court and to obtain requisite approval and sanction for the scheme. Similarly, the transferee company is required to

take necessary steps under sections 391 and 394 of the Act in the Gujarat High Court. It is also clear that MF (transferor company) had already

filed Company Petition No. 38 of 1994 in the High Court of Judicature at Bombay and the learned single judge of the Bombay High Court has,

vide judgment and order dated June 9, 1994, granted the prayers contained in clauses (a) to (g) of the petition whereby granting its sanction to the

proposed amalgamation of the transferor company with the transferee company. MIL (transferee company) has subsequently instituted the present

petition u/s 391 read with section 394 seeking approval and sanction of this court to the scheme of amalgamation. It is well settled by the decision

of this court in Kril Standard Products Pvt. Ltd., In re [1976] 46 Comp Cas 203 and the decision of the Bombay High Court in Bank of India Ltd.

v. Ahmedabad Manufacturing and Calico Printing Co. Ltd. [1972] 42 Comp Cas 211 that before the scheme of amalgamation can take effect, the

transferee company must also approach the appropriate court u/s 391(1) of the Act and seek proper direction for convening meetings of those affected by the scheme and get the approval of the concerned persons in the praised manner and also obtain sanction and direction of the

appropriate court u/s 391(1) and section 394 of the Act. The transferee company has, accordingly, initiated proceedings in this court under

sections 391 and 394. The anomaly which may arise in matters of this nature where two different High Courts are moved for appropriate orders

u/s 391 and section 394 of the said Act for sanction and approval to the scheme of amalgamation, with or without modification, is very succinctly

brought out by P. D. Desai J. (as His Lordship then was) in the case of Bank of Baroda Ltd. Vs. Mahindra Ugine Steel Co. Ltd., in the following

words (at page 233) :

It is true that when the registered offices of the transferor and transferee companies happen to be situate in different places within the jurisdiction

of two different High Courts, as in the present case, the compulsion of practical difficulties has necessitated the evolution of this somewhat

ingenious formula. I cannot help observing, however, that the solution is far from happy and that in some cases the resultant situation might be

embarrassing, especially in those cases in which, in the absence of a provision similar to that contained in clause 14 of the scheme herein, the court

in invitum has to accord sanction to a scheme subject to its approval and sanction by another company and court. In such a case, the High Court

which is first moved for according sanction to a scheme of amalgamation - and it would ordinarily be the High Court within whose jurisdiction the

registered office of the transferor company is situate - will, if it sanctions the scheme, make a judicial order which will be conditional upon the

approval of the scheme by the shareholders and creditors, if any, of the other company as well as upon the sanction of the scheme by the High

Court within whose territorial jurisdiction the registered officer of such company is situate. Such an anticipatory or conditional judicial order, which

depends for its becoming operative not only upon the concurrence of another court but also upon the will of the members and creditors, if any, of

one of the parties to the amalgamation scheme, is possibly unknown to any other jurisdiction, particularly when it is realised that the order would be

ordinarily made after full debate and deliberations. What is more, the possibility of conflicting orders being passed by two courts with regard to the

same scheme cannot be altogether ruled out because the scheme might be looked at by all concerned from two totally different angles. One of the

courts might sanction the scheme whereas the other might sanction it subject to certain modifications or it might altogether refuse to sanction it. This

possibility is inherent in the very situation. If the court to which the petition for according sanction is presented earlier in point of time, say, by the transfer company, not only gives anticipatory sanction but also makes a conditional order giving consequential direction u/s 394 including the

direction as to dissolution, it might possibly be urged that it becomes functus officio upon the passing of such orders and that if any modification is

made in the scheme by the court to which a similar petition is subsequently presented by the transferee company, it would have no jurisdiction to

modify the scheme so as to bring it in line with the scheme as amended by the other court. Such a result would bring about a complete deadlock

and the situation can presumably be remedied only by an appeal to the higher court. I am not expressing any opinion on the validity of such a

contention; it may be right or wrong; it might be possible to urge that even in such a case the court can still exercise the powers u/s 392 and find a

suitable way out. But the possibility of some complications arising in such a situation cannot altogether be ruled out. There is also one more angle

from which the question requires to be examined. In respect of some of the matters contemplated by sub-section (1) of section 394, both the

courts would be required to pass orders giving suitable directions and it is somewhat incongruous that provision be made for the same thing or

matter by two different judicial orders passed by two different courts presumably on two different dates. Could the Legislature have really

envisaged a situation of this nature ? Even if both the amalgamating companies are required to initiate proceedings under sections 391 and 394,

would it not be conducive to the achievement of the legislative object if the jurisdiction to sanction the scheme after following the prescribed

procedure in relation to both the companies is exercised on a comprehensive view of the whole matter by one court alone ? Is it possible to bring

about this result by interpreting the word ''court'' occurring in sections 391 and 394 in a manner which requires departure from its definition

contained in section 2(11) having regard to the subject and context ? Or is it a situation which can be remedied only by legislative intervention by

way of amendment ? These are some of the most (sic) questions which suggest themselves to me. But I choose not to express any opinion on them

in the present case and reserve liberty to consider them on appropriate occasion in the future, for, having regard to the presence of clause 14 in the

scheme, I will not be required to make a conditional order of sanction. In this context I might observe that, on a perusal of the decisions of this

court and that of the Bombay High Court referred to earlier, it appears that in both those cases the courts proceeded on the footing that the

petition by the transferee company will have to be filed in the court within whose territorial jurisdiction the registered office of such company was situate. The questions posed above, and more particularly the question relating to forum, were not raised not considered in those cases from the

above angle. The question is still, therefore, open for consideration and, as I said earlier, it might, if necessary, be considered on a future occasion.

24. In the present case, the Bombay High Court has in a petition moved u/s 391 of the said Act by MF (transferor company), l already approved

and sanctioned the scheme. It is pertinent to note that in such proceeding neither Miheer Mafatlal, the present objector, nor any shareholder has

filed objections. It will not be out of place to note that he is one of the directors on the board of directors of the transferor company and he could

have registered his objections before the Bombay High Court as well. Because of the amalgamation of the transferor company with the transferee

company being sanctioned by the Bombay High Court, the question of calling upon this court within whose jurisdiction the transferee company is

registered and located, to record finding inconsistent with those of the Bombay High Court would squarely arise. Miheer Mafatlal has chosen not

to file any objection to the proposed scheme of amalgamation in the proceedings before the Bombay High Court. However, in the proceeding

initiated before this court by the transferee company, he has seriously challenged the proposed scheme of amalgamation by filing a very detailed

reply and raising as many as nine objections. To this very scheme of amalgamation sanction and approval of court was sought by MF (transferor

company) in which Miheer is one of the directors and for reasons best known to him, he did not file any objection. By this conduct, he permitted

the Bombay High Court to sanction this very scheme of amalgamation. He thereby not only waived his objections but also invited an anomalous

situation to be created whereby, in case of acceptance of any of his objection, this court would be required to reach a conclusion inconsistent with

that of the Bombay High Court. When Mr. M. J. Thakore, learned counsel for Miheer, was confronted with this question, he submitted that there

was no justifiable explanation for Miheer not filing his objections to the proposed scheme of amalgamation in the proceeding initiated by MF

(transferor company) before the Bombay High Court. He, however, submitted that the proposed scheme of amalgamation is more prejudicial and

injurious to the interest of shareholders of MIL and therefore, Miheer has chosen to file his objections before this High Court. This, in my opinion,

is a very poor excuse to explain the conduct of Miheer. This court, however, would not throw away the objections of Miheer on the ground of his

conduct or on the principle of waiver only but would proceed to consider his objections on the merits. It has become once again imperative for this court to bring to the notice of Parliament this anomaly which could be better avoided by appropriately amending the Companies Act as suggested

by P. D. Desai J. in the aforequoted observations.

25. Having noted the aforesaid anomaly, it would be appropriate at this stage to make a reference to various binding/authoritative precedents of

this court and the apex court as well as to the persuasive precedents of other High Courts and English courts referring to the approach of the court

to a petition for sanction to a proposed arrangement, compromise or a scheme of amalgamation or reconstruction.

Court''s approach - General principles :

26. Before embarking upon the exercise of referring to legal principles guiding the approach of the court to such schemes of amalgamation which

are well crystallised due decisions of the courts of law, both Indian as well as foreign, it would be advantageous to look at the provisions of the Act

and the Companies (Court) Rules. Section 391 of the Act (which is corresponding to section 206 of the English Companies Act, 1948) makes the

members and creditors of the company primarily the judge of the reasonableness and fairness of the scheme. In a case where a scheme is

proposed the court is required to order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may

be, to be called, held and conducted in such a manner as the court directs. Though the power to convene, hold and conduct the meeting of the

concerned class is apparently given to the court, by now it is well established by judicial pronouncements that the burden is on the applicant,

moving a court for sanction of the scheme, to establish that separate meetings of various interests were convened in such manner that their interest

do not conflict and there is full scope for fair and open discussion, deliberation and determination. Section 39(2) prescribes the requirement of

statutory majority by providing that the approval to the proposed scheme shall be by a majority in number representing three-fourths in value of the

creditors, or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy, at the

meeting. The approval by such a large majority of the members/creditors is recognised by the Act to be prima facie in their business, commercial

interest. Upon the court according sanction to such scheme, it becomes binding on all the creditors and the members and also on the company

including the dissenting members and the creditors. The proviso to sub-section (2) of section 391 imposes very important statutory obligations on

the person or company moving an application u/s 391(1) to disclose to the court by affidavit or otherwise all the material facts relating to the company. Non-disclosure of relevant facts may result in misleading the court or suppressing from the court vital and material facts having a bearing

on the matter and may prove to be fatal so as to justify the court to refuse sanction/approval to the scheme. Section 394 (which is corresponding

to section 208 of the English Act), inter alia, provides that the scheme of amalgamation or compromise or arrangement or order of the court

sanctioning such compromise or amalgamation my provide for all or any of the following matters :

(i) The transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which,

under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or

arrangement; and

(iv) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and

effectively carried out.

27. The proviso to section 394(1) enacts a further embargo on the power of the court by providing that no scheme of amalgamation shall be

sanctioned by the court unless the court has received a report from the Company Law Board or the Registrar that the affairs of the company have

not been conducted in a manner prejudicial to the interest of the members or to public interest. Since a scheme of amalgamation may result in

dissolution of any transferor company without winding up, the second proviso to sub-section (1) requires that no order of dissolution of any

transferor company shall be passed by the court unless the official liquidator has, on scrutiny of the books and papers of the company, made a

report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public

interest. Section 394A of the Act provides that a notice of an application under sections 391 and 394 should be given to the Central Government

and the court shall take into consideration the representation, if any, made by the Government to consider public interest before passing any order.

28. Palmer''s Company Law, 23rd edition 79.13 to 79.16, states that the court has to be normally satisfied on four grounds, i.e.,

(i) statutory provisions must have been complied with.

(ii) the class must have been clearly represented.

(iii) the arrangement must be such as a man of business would reasonably approve, and

(iv) the arrangement must be compatible with legal provisions.

29. An oft-quoted passage in Buckley on the Companies Act, 14th edition reads (at pp. 473-474) :

In exercising its power of sanction the court will see, first that the provisions of the stature have been complied with, second, that the class was

fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order

to promote interest adverse to those of the class whom they purport to represent, and, thirdly, that the arrangement is such as an intelligent and

honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

30. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same

time, the court will be slow to differ from the meeting, unless either the class has not been property consulted, or the meeting has not considered

the matter with a view to the interest of the class which it is empowered to bind, or some bolt is found in the scheme.

31. The main principles as to what should be the correct approach of the court in a petition u/s 394 of the Companies Act, 1956, are no longer in

dispute and are stated and re-stated in different languages by different courts. The first question is to ascertain whether the statutory requirements

as laid down in section 391 have been complied with. The requirements of section 391 are the sine qua non for sanctioning the scheme. These

requirements must be complied with by the company applying to the court for sanction of the scheme. If the company fails to comply with the

statutory requirements, no further question arises in the matter. However, even if the statutory requirements have been complied with, it does not

mean that the court must sanction the scheme as a matter of course. The Legislature has purposely left a discretion with the court in this respect. It

is because of the clear language of the section that even in cases where the requisite majority has sanctioned a scheme, the court is not bound to

sanction it on the ground that the majority has accepted it. If this were the law, then, a petition to the court would be a mere formality. The very

fact that the Legislature has, even after requisite majority has sanctioned a scheme, provided that the court must be approached and its sanction

obtained, itself, indicates that the court should apply its judicial mind to the scheme and reach a conclusion of its own.

32. From this duty cast on the court, flows the second requirement and that is that the court should determine whether the scheme as a whole has

been arrive at by the majority bona fide and in the interest of the whole body of shareholders in whose interests the majority purported to act. This second requirement is insisted upon because the effect of a scheme which is not unanimously passed is likely to affect the interest of the dissentients

or minority. Even if the scheme is unanimously passed, it is likely in some cases to affect the interests of those who may not have voted or failed to

vote or even may not in law have had a right to vote. The discretion has been deliberately given by the Legislature to the court so that the interests

of those who do not see eye to eye with the majority or of those whose interests are affected by the scheme may be protected. In a case where a

scheme is voted by a majority, two conflicting claims are to be adjusted. If, on the one hand, a minority, were top take up an unreasonable attitude

in the matter of the scheme, then, the interests of the majority will suffer if the scheme cannot be sanctioned. In such a case, the majority will suffer

on account of the recalcitrant attitude of a minority or on account of the intransigence of the minority. On the other hand, if the majority has

interests adverse to the minority or where a majority wants to usurp total power so as to exclude the minority, the minority is bound to suffer or to

be tyrannised by sheer strength of numbers. It is, therefore, that the Legislature has provided that where a meeting has taken certain decision, the

court must apply its mind and consider whether it is in the interest of the company as a whole and of the class of persons for whom the majority

acts and whether the scheme is such that it must be pushed through. Therefore, the correct approach on the second question is to determine that

the court is neither called upon merely to register a decision of the majority will create a stalemate and thereby retard the progress which the

majority has legitimately and reasonably a right to expect and make. Similarly, it must also see that the majority does not act in a manner adverse

and prejudicial to the interests of minority with a view to suppress or oppress or coerce the minority. It is for the latter reason that D. A. Desai J.

(as His Lordship then was) in Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819 (Guj) observed that the

court in exercising its discretion in sanctioning the scheme must see it as cardinal that its function does not extend to usurp in the view of the

members or creditors. It must look at the scheme to see that it is a reasonable one and, while so doing, the court will be strongly influenced by a

big majority vote and the reasons which actuated the contesting creditors/shareholders in opposing the scheme. Nonetheless it is essential that the

scheme must be a fair and equitable one, though it is none of the business of the court to judge upon the commercial merits which in fact is the

function of the creditors and members. In this very sense in Alabama, New Orleans Texas and Pacific Junction Railway Co., In re [1891] 1 Ch

213 it was stated that due weight must be accorded to the fact that the majority has recorded a decision in favour of the scheme and the court must

not lightly ignore or set aside that decision. Whilst bearing that fact in mind the court must decide whether the scheme is, on the whole, one which

deserves to be sanctioned and in doing so, the court must test the scheme not from the point of view of a lawyer or an accountant or an expert but

it must look at it from the point of view of a reasonable and fair-minded person. The aforesaid approach of D. A. Desai J. in Maneckchowk and

Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819 (Guj) was further considered by P. D. Desai J. (as His Lordship then was)

in the case of Bank of Baroda Ltd. Vs. Mahindra Ugine Steel Co. Ltd., .

33. In Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819 (Guj) it was observed by D. A. Desai J. that

when the statutory majority has sanctioned the scheme acting bona fide unless there are some strong and cogent reasons to show that it was

conceived, designed or calculated to cause injury to others, the court will sanction the scheme. P. D. Desai J., however, felt that the aforesaid

observations of the court were not to be so narrowly interpreted so as to reduce the court to a mere registering agency and preventing it from

seeing whether there is such an objection to the scheme as that any reasonable man might say that he could not approve it. In this connection, P. D.

Desai J. pointed out that what is to be decided in each case is a question of fact, namely, whether to accord the sanction or not, and circumstances

are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and not too rigidly applied.

The proposition to accord sanction to a scheme simply because a thumping majority has approved it would, in the opinion of the court, tantamount

to abdication of the statutory function and duty imposed on the court and a breach of faith reposed in it by that class of small shareholders who for

obvious reasons cannot and do not participate in the meeting or in the proceedings before the court and also by the dissident members who look

upon the court to protect their interests even if they are not present before it having regard to the coasts and inconvenience involved. In this

connection the court proceeded to make the following observations (at page 241 of 46 Comp Cas) :

That apart, there are other equally goods and weighty reasons why such an approach is not justified. In the first place, in the modern times, the

industrial Government in which a middle class investor has a vital stake as a shareholder, has become a complex structure. It is a hard reality that

its leadership is sometimes vested in the hand of a few businessmen occupying strategic positions of great power. These business leaders often promote schemes of amalgamation which may appear at first sight to be sensible, prudent, nay, even beneficial to the shareholders, but which may

in fact conceal the cleaver design of those whose personal interests may be adverse to those of the innocent investors. Since these business

magnates usually hold controlling interest in the equity capital of the company or can procure proxies in diverse ways and since the few

shareholders who personally attend the meeting do not necessarily represent the informed opinion, such schemes are often pushed through even

with more than the statutory majority. Secondly, new class of shareholders has entered into the picture which has got to be reckoned with in view

of its power and prestige. Financial institutions, statutory corporations and Governments hold shares in certain joint stock companies and

sometimes between themselves they acquire controlling interest. In the case of the transferor-company itself, we find that out of its 5,00,000

shares, eight corporate bodies hold 2,27,373 shares and two Governments hold 36,339 shares. Their total shareholding comes to approximately

53 per cent. of the paid-up capital of the company. Now, this class of shareholders being usually well informed scrutinise the scheme with an

expert''s eye and it is presumed to act bona fide and for the benefit of the company as a whole. However, the possibility cannot be ruled out that

they might be in a position to gain more from the scheme than other members of the class by reason of their interests in some other capacity; for

example, they might give up something in favour of the transferee-company since they also hold shares in the said company and their such interest

may be sufficient to obtain for them a greater benefit in that capacity than what they lose by their sacrifice as members of the transferor company.

Thirdly, it cannot be overlooked that section 392 of the Act expressly confers very wide powers on the courts including the power to give such

directions in regard to any matter or to make such modifications in the scheme as it may consider necessary for its proper working and to supervise

the carrying out of the scheme. The power conferred is exercisable not only at the time of making an order sanctioning the scheme but also at any

time thereafter. Such power is not conferred on English courts by statute nor was if conferred on Indian courts u/s 153 of the Indian Companies

Act, 1913. Section 394(1) further-more authorises the court to make provision for those who dissent from the scheme. In our country, therefore,

the role which the courts have to play now is more vital and potent; it is not only an inquisitorial and supervisory role but also a pragmatic role

which requires the forming of an independent and informed judgment as regards the feasibility or proper working of the scheme and making suitable modifications in the scheme and issuing appropriate directions with that end in view. Lastly, the court must also take into account the

interest of the employees and ensure that they are not adversely affected by the scheme and that adequate provision is made for them.

34. After quoting the opinion of Bowen L.J. and Fry L.J. in Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re [1891] 1 Ch

213 and those of Chandrachud J. (as his Lordship then was) in Pioneer Dyeing House Ltd. Vs. Shanker Vishnu Marathe, P. D. Desai J. made the

following pertinent observations (at page 244 of 46 Comp Cas) :

In view of the foregoing discussion it appears to me that the court cannot abdicate its duty to scrutinise the scheme with vigilance and act as a

mere rubber stamp simply because the statutory majority has approved it and there is no opposition to the scheme in the court. So much weight

can not be attached to the views of the statutory majority as to require the court to mechanically put its imprimatur on the scheme. The court is not

bound to treat the scheme as a fiat accompli and to accord sanction merely upon a casual look at it. It must still scrutinise the scheme to find out

whether it was a reasonable arrangement which can, by reasonable people conversant with the subject, be regarded as beneficial to those who are

likely to be affected by it. In the pursuit of such enquiry, the court is not tied down by any rigid principles or straitjacket formulas and no

enumeration contained in judicial decisions of the factors which can be taken into account, howsoever precise, can be treated as exhaustive so as

to limit the scope of the inquiry which, having regard to varying circumstances, might differ from case to case. The burden lies on the petitioner

company to show that the scheme of amalgamation is fair, reasonable, workable and such that a man of business would reasonably approve. The

court would, of course, take into account the fact that it has been approved by a big majority vote, but it would not shirk its duty to scrutinise the

scheme, especially when it involves amalgamation of large companies in which many interests are at stake.

35. Thirdly, the court must see whether the scheme is such that a fair and reasonable shareholder will consider it to be one for the benefit of the

company and for himself. The scheme must be tested from the point of view of an ordinary reasonable shareholder, acting in a business like

manner, taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to

consider the scheme in question. The court must, therefore, decide whether the scheme is, on the whole, one which deserves to be sanctioned, and

in doing so, the court must test the scheme not from the point of view of a lawyer or an accountant or an expert, but, it must look at it from the point of view of a reasonable and a fair-minded person. The test in all such cases is to determine how a reasonable person endowed with ordinary

commonsense and acting honesty, will view the scheme having regard to all the circumstances bearing reasonably and property on it. While dealing

with a commercial or industrial company, the scheme has got necessarily to be looked at from the point of view of a prudent commercial man In

Re: Sidhpur Mills Co. Ltd., .

36. The scheme should not be scrutinised in the way a carping critic, a hair-splitting expert, a meticulous accountant or fastidious counsel would do

it, each trying to find out from his professional point of view what loopholes are present in the scheme, what technical mistakes have been

committed, what accounting errors have crept in or what legal rights of one or other side have or have not been protected. It must be tested from

the point of view of an ordinary reasonable shareholder acting in a business-like manner taking within his comprehension and bearing in mind the

circumstances prevailing at the time when the meeting was called upon to consider the scheme in question.

37. In Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re [1891] 1 Ch 213 a detailed statement about the approach of the

court to a scheme of amalgamation is to be found. Lindley L.J. made the following pertinent observations (at pages 238-39) :

... What the court has to do is to see, first of all, that the provisions of that statute have complied with; and, secondly, that the majority has been

acting bona fide. The court also has to see that the minority is not being overriden by a majority having interests of its own clashing with those of

the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting

honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by

businessmen. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and

whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see

whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man

might say that he could not approve of it.

38. To a similar effect are the observations of Fry L.J. which are as under (at page 247) :

Then the next inquiry is - Under what circumstances is the court to sanction a resolution which has been passed approving of a compromise or

arrangement ? I shall not attempt to define what elements may enter into the consideration of the court beyond this, that I do not doubt for a moment that the court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that

the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an

intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What

other circumstances the court may take into consideration I will not attempt to forecast.

39. D. A. Desai J. (as his Lordship then was) in the case of Navjivan Mills Co. Ltd., In re and Kohinoor Mills Co. Ltd., In re [1972] 42 Comp

Cas 265 (Guj) made the following observations about the approach of the court to a scheme of compromise and arrangement (at page 278) :

The approach of the court to the scheme of compromise and arrangement submitted to the court for its sanction now appears to be well settled.

The court undoubtedly has a discretion whether to accord sanction to a scheme of compromise and arrangement or not and in exercising its

discretion one way of the other, the court should like to examine the scheme from certain definite standpoints. The court will normally need to be

satisfied of three matters :

(i) that the statutory provisions have been fully complied with,

(ii) that the class or classes must have been fairly represented, and

(iii) that the arrangement must be such as a man of business would reasonably approve.

40. The Madras High Court in Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd., In re [1980] 50 Comp Cas 623 while sanctioning the

scheme under sections 391 and 394 of the Act held that the court should normally be satisfied in respect of the following four matters (at page

630) :

(1) The court should be satisfied that the resolutions are passed by the statutory majority in value and in number in accordance with section

391(2) of the Act a meeting or meetings duly convened and held. This factor is jurisdictional in the matter of confirmation of the scheme. The court

should not usurp the right of the members or creditors to decide whether they approve the scheme or not. Therefore, if a class whose interests are

affected by a scheme does not assent to the scheme or approve it at a meeting convened in accordance with the provisions or approve it at a

meeting convened in accordance with the provisions of section 391, the court will have not jurisdiction to confirm the scheme, even if it considers

that the class concerned is being fairly dealt with or that it would approve the scheme.

(2) The court should satisfy itself that those who took part in the meeting are fairly representative of the class and that the statutory meeting did not

coerce the minority in order to promote the adverse interests of those of the class whom they purport to represent.

(3) In exercising its discretion under sections 391 and 394 of the Act, the court is not merely acting as a rubber stamp. It is the function of the court

to see that the scheme as whole, having regard to the general conditions and background and object of the scheme, is a reasonable one and it the

court so finds, it is not for the court to interfere with the collective wisdom of the shareholders of the company. When once the court finds that the

scheme is a fair one, then it is for the objector to convincingly show that the scheme is unfair and that, therefore, the court should exercise the

discretion to reject the scheme, notwithstanding the views of a very large majority of the shareholders that the scheme is a fair one. If the court is of

the opinion that there is such an objection to it as any reasonable man would say that he would not approve of it, then the court may refuse to

confirm the scheme. However, if the scheme as a whole is fair and reasonable, it is the duty of the court not to launch on an investigation upon the

commercial merits or demerits of the scheme which is the function of those who are interested in the arrangement.

(4) There should not be any lack of good faith on the part of the majority.

41. To similar effect are the observations of the Madras High Court in the case of Cetex Petrochemicals Ltd., In re [1992] 73 Comp Cas 298.

42. There are certain well recognised limitations on the court''s power to sanction the scheme. The first limitation is that the court would not

sanction a scheme which would be invalid without the court''s sanction if every creditor or member concerned agreed to it. In other words, the

court has no power to sanction something which the parties could not do by agreement. The second fetter on the court''s power is that the court

cannot sanction an act being done if the law permits it only subject to conditions and the agreement seeks to dispense with those conditions such as

where the scheme of compromise and arrangement also includes within its ambit reduction in share capital in respect of which special procedure

provided in the Act and rules has not been carried out. The third known fetter on the court''s power is that the court would not ordinarily sanction a

scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. Within the limitation set out

above, the court will allow the companies the greatest freedom in devising schemes to suit their requirements and will approve those schemes if

they are fair to all whose interests are affected.

43. I shall proceed to set out, discuss an deal with the aforesaid nine objections, firstly by setting out the factual background for each objection,

secondly by examining the pleading of the parties and thirdly by deciding both factually as well as legally, in the context of relevant precedents, as to whether each objection is sustainable or not.

Objections Nos. 1 and 2 :

44. It is the case of Miheer that the proposed scheme of amalgamation is not for the avowed purposes or objects for which it is proposed. The

avowed objects or purposes for which the scheme is proposed are obviously to be found in the explanatory statement which was sent to the

shareholders of MIL by MIL along with notice u/s 393 of the Companies Act. The said explanatory statement shall have to be reproduced in

extenso. Miheer has very strongly assailed the said statement and has submitted before this court that such statement is not only misleading but has

materially failed in bringing to the notice of the shareholders the real objectives sought to be achieved by the proposed amalgamation. In other

words, purposes other than those which are stated in the explanatory statement are sought to be achieved by MIL and, therefore, the explanatory

statement u/s 393 has proved to be mere eyewash which has substantially misled the shareholders. Para 3 of the statement being material for the

purposes of this discussion is reproduced hereunder :

Explanatory statement :

It is proposed to amalgamate MF with MIL, so as to enable the carrying on of the combined business more economically and advantageously.

Amalgamation of both the companies would lead to substantial benefits in view of the synergy of operations. The amalgamation of both the

companies would give improved capital structure which would lend better flexibility in capital gearing which would enable the amalgamated

company to raise required finance at better terms. A large company would generate more confidence in the investors and with the persons dealing

with the company and will afford access to resources easily and at lower costs. The amalgamation of MF with MIL will pave the way for better,

more efficient and economic control in the running operations and would lead to economy in the administrative and management cost, resulting in

improving profitability. The amalgamated company will have a strong and large resource funds. The combined technological managerial and

financial resources would enhance the capability of the amalgamated company to invest in larger and sophisticated projects to ensure rapid growth.

The amalgamated company''s textile division with five operative units at it disposal will have flexibility in its operations.

45. By the second objection, Miheer has contended before this court that the proposed scheme of amalgamation is not in fact for the purposes for

which it is proclaimed to be. The proclaimed purposes are those which are stated in the explanatory statement reproduced hereinabove. He submits that there is another hidden, covert or concealed object behind the scheme and to achieve such object, the scheme is proposed. In other

words, the scheme is proposed for some ulterior motive, namely, that of defeating the rights flowing in favour of the MHM group from the family

arrangement arrived at in 1979 and rendering infructuous the counter claim filed by Miheer in Civil Suit No. 1010 of 1987. Put bluntly, Arvind N.

Mafatlal, with his towering personality, intends to devour and usurp fully the industrial and business interest which had otherwise fallen to the share

of the MHM group and in this connection Miheer has described seven steps allegedly taken by Arvind N. Mafatlal both to deprive Miheer and his

branch of their legitimate share and to oust him or exclude him from business systematically in a well organised manner step by step, so as to

strengthen his financial power and to denude Miheer and the members of his family of all their powers by rendering them a very hopeless minority.

By describing the seven steps gradually and systematically taken by Arvind N. Mafatlal in the course of time, Miheer has tried to demonstrate

before the court that the cumulative effect of all the steps is to suppress, oppress and smother Miheer and the members of his family to a helpless

situation so as to coerce them to go out of all business in which they had at one point of time practically more than one-half interest. By the second

objection, in substance, therefore Miheer contends before this court that the scheme lacks bona fides or good faith. It is a mala fide scheme

proposed with the ulterior motive set out hereinabove and, therefore, the court should not sanction the scheme.

46. While dealing with the two objections, one aspect of leading shall have to be kept in mind. The petition seeking sanction of the court to the

proposed scheme of amalgamation is filed by MIL, the transferee company. It is affirmed by Ramakant R. Patel, who is the company secretary of

MIL. In the affidavit filed by Miheer enumerating various objections against the proposed scheme of amalgamation, serious allegations are made by

Miheer against Arvind N. Mafatlal personally. Arvind N. Mafatlal has, however, chosen not to file any affidavit-in-reply or has not thought it fit

either to deny or controvert such allegations. Whether any adverse inferences should be drawn against Arvind N. Mafatlal for not controverting

serious allegations made against him or not is a question which shall have to be examined. On the other hand, Mr. M. J. Thakore, learned counsel

appearing for Miheer, has submitted before this court that the allegations made against Arvind N. Mafatlal by Miheer have practically remained

uncontroverted and a strong case of the scheme lacking in good faith is made out and in the facts and circumstances of the case, the court must

draw adverse inference against Arvind N. Mafatlal. At the appropriate place, this court would make a reference to this objection also.

Avowed objects for proposed scheme as stated in explanatory statement :

47. From the explanatory statement set out hereinabove, the following are the objectives sought to be achieved :

(1) The main objective is that as both the companies are in the same line of business, it would result in the synergy of operations.

(2) The proposed scheme will result in better flexibility in capital gearing.

(3) The proposed scheme would result in increasing the confidence of the shareholders and the shareholders would benefit from the scheme.

(4) The proposed amalgamations will pave the way for better, more efficient and economic control in running the operations and would lead to

economy in the administrative management and finally would improve profitability.

(5) The proposed amalgamation would result in creating strong and large reserve funds and the combined technological, managerial and financial

resources would enhance the capability of the amalgamated company to invest in larger and sophisticated projects to ensure rapid growth.

48. In his objections, Miheer has dealt with the aforesaid objectives seriatim and has tried to demonstrate that really none of the avowed objectives

would be or is likely to be achieved.

First objective :

49. Turning to the objective, he has pointed out that there is little scope for synergy of operations as the two companies do not have the same line

of business. MIL (transferee company) has main activities in Textiles and Chemicals, Electronic Component Divisions as its fundamental activity.

As against the activities of MIL, the activities of Mafatlal Fine (MF) are confined to Textiles and Chemicals and the chemicals which MF

manufactures are totally different from those being manufactured by MIL. It is because of this diversity in activity and in the field of operations of

the two companies that it is impossible to bring about synergy of operations. Amalgamation cannot bring about any positive gain and it would on

the contrary work to the detriment of both the companies, submits Miheer. Miheer has further referred to the report of C. C. Chokshi and

Company, wherein it is observed as under :

Over the years both MF and MIL have charted a similar course as far as their textile and chemical businesses were concerned. As a result there

are several synergies in the business of the two companies. In fact, even prior to the proposed merger, the two companies have had synergies

association in the area of purchase of raw materials, components and capital goods, sales of finished products and exports as well as requirements

of finance for working capital and long-term funds and modernisation and expansion.

50. Based on the aforesaid statement, Miheer has submitted before the court that if synergy of operation in all the possible fields is already achieved, the proposed amalgamation is not necessary, as what is already achieved cannot be gained by the proposed amalgamation. The proposed amalgamation is, therefore, not for the purpose of synergy of operations. Miheer has also relied upon the xerox copy of the interview of Hrishikesh A. Mafatlal, where he has reiterated that there is already (1) common brand name, (2) common wholesale marketing, (3) common retail outlets for the textile of both the companies, (4) common purchasing and marketing strategies. Based on such assertion of Hrishikesh A. Mafatlal, Miheer has submitted that when there already exists an integrated operation, there is absolutely no justification for amalgamation of the two companies to achieve synergy of operations.

51. In this connection, it would be relevant to refer to the stand of MIL. It is case of the company that the substantial activity of MIL is manufacturing textiles and chemicals. MIL and its subsidiaries have substantial investment in NOCIL which is engaged in manufacturing and marketing petrochemicals and agro-chemicals. In the matter of the common brand name, wholesale marketing and retail outlets and in the matter of purchasing and marketing strategies of textile products of the MIL and of MF, commonality is achieved. It is pointed out that because of the amalgamation, there will be tremendous benefit by way of flexibility of operations, particularly for rationalisation of product-mix. As against two textile units at the disposal of MIL, there would be five textile units after amalgamation which would given tremendous flexibility for product-mix rationalisation in the textiles sector alone. The textile business having a turnover contribution of over 75 per cent. in the total turnover of both the companies, it is the most prominent business of both the companies and the common operation of five textile units would greatly benefit the amalgamated companies. It pointed out that amongst all the five mills of the two companies, the total number of products go beyond 3,000.

Textiles being a non-continuous batch-wise manufacturing process, there are large quantities of in-process inventories at each of the stages of production. The larger the number of products, the larger is the inventory. It is pointed out that the textile business consists of the largest number of products like shirting, sheeting, mulls, voiles, sarees, checks, cotton coating, suitings of P/V and P/W, blends, lawns, cambrics, etc., and within each product group, there are innumerable individual distinct products which requires different counts of yarn, different weaves and different finishings. All these products could be either blended, dyed or printed with soft finish calendering, mat finishing, etc., which add to the complexity of the business. It is, therefore, submitted that due to amalgamation, there would be product rationalisation on a massive scale across the five textile

units because :

(a) The total number of products manufactured by each of the mills would go down.

(b) The types of raw materials used in each mill would go down and so the types of yarn produced would go down throughout the spinning

process.

(c) The yarn stocks of different types waiting for further process in weaving would go down. This is a major are of working capital lock up and

there would be a reduction in working capital requirements.

(d) A number of yarns presently manufactured at more than one mill would be produced mostly at one of the mills. This would substantially

increase the individual lot size requiring minimum change time and economies of scale. There would be saving in start up and change over costs.

(e) Costs arising as result of inter company transfer of yarn will not arise.

(f) Consequent rationalization would also be in the weaving department as a result of reduction in process inventory of fabrics, improvement in lot

size, economies of scale and saving in start up/change over cost. Working capital requirements would also go down.

(g) Rationalization of product-mix and consequent concentration on a smaller number of products in each unit will consolidate the effective and

efficient utilization of resources and the focused skills would bring about substantial improvement in quality.

52. From the details of the various stage of production in the textile division of the companies, the nature and number of products being

manufactured by the company and utilization of one unit for some of the purposes which would be common for the entire industry, would result in

each unit acquiring better experience and performance in the products assigned to it while other units would concentrate on their own products

which ultimately would result in better and faster production. This would be in the ultimate interest of the company. It appears that the substantial

business of the two companies is textile business and five different units of the two companies located at different places, would work under a

common management. Partially, the synergy of operations can be said to have been achieved and if in other aspects where synergy of operations

was lacking and is ultimately achieved, by the proposed amalgamation, it cannot be said that the said objective is not going to be achieved by the

proposed amalgamation. It shall have to be kept in mind that textile activity is the common activity of the two companies. It goes without saying

that ordinarily amalgamation of two companies, whose activities are the same, may help in bringing about synergy of operations. Ultimately, the question is commercial merit of the proposed scheme. From the aforesaid details of the nature of activities of the two companies in the textile

division, it is difficult for the court to hold that the first objective would never be achieved by the proposed scheme of amalgamation. It is also not

possible for this court to hold on this count that the scheme is not for the avowed object of bringing about synergy of operations. In fact, C. C.

Chokshi and Co. has in its report extensively dwelt upon the common factors of the two companies which would justify the proposal for

amalgamation. When there is a common platform, namely, that of existence of substantial common business, there is scope for bringing about

synergy of operations. Ultimately, it is a matter of the commercial wisdom of the shareholders. The approach of the court in such matters is pointed

out by the Calcutta High Court in the case of United Bank of India Ltd. v. United India Credit and Development Co. Ltd. [1977] 47 Comp Cas

689 wherein it is pointed out by the court that in sound exercise of its discretionary power to sanction the scheme, the court must consider the

scheme as a whole having regard to the general conditions, background, and object of the scheme and the present day conditions and atmosphere

in the State where the companies are functioning. The court cannot take a pedantic and strict view of each and every clause in the scheme and

speculate as to its future, feasibility and possibility at the stage of sanction. It is for the collective wisdom of the shareholders who are primarily

businessmen and investors guided by the directors of a company to determine the course of business they choose. The test to be applied by the

court is that of an ordinary reasonable shareholder acting in a business-like manner taking within his apprehension and bearing in mind all the

circumstances prevailing at the time when the meeting was called upon to consider the scheme in question. Viewed from the aforesaid angle, it is

not possible for this court to hold that there is no potentiality whatsoever of bringing about further synergy of operations, more so when a majority

of the equity shareholders which includes financial institutions and corporations has voted in favour of the scheme.

Second objective :

53. It is the case of Miheer that nothing is indicated in the scheme of amalgamation or the explanatory statement as to how flexibility in capital

gearing is going to the achieved. He was submitted that MIL has already disposed of substantial holding in Gujarat Gas Co. Limited (GGCL), a

profit making concern. Such decision of MIL was unwise, according to Miheer. MIL and its subsidiaries have borrowed huge funds to buy shares

of NOCIL held by SHELL. This decision was also irrational which has resulted in a heavy burden of interest of MIL. He has in this connection pointed out that paying back such borrowing has even resulted in not only wing out the profits of MIL but has reduced the substantial income of

MIL. He has also pointed out that MF has huge liabilities. Its plant and machinery are required to be renewed and renovated which would require

huge funds. There is, therefore, no possibility of bringing about flexibility in capital gearing, submits Miheer. Miheer has very seriously questioned,

in this connection, the decision to unload the shares of GGCL with a view to repay the loan taken for purchasing the shares of NOCIL from Shell.

He has pointed out that the investment in GGCL was yielding a very high return of investment. By disposing of such shares, the yield to MIL is

reduced. On the other hands, shares in NOCIL from SHELL were purchased at Rs. 950 per share, for which purpose a huge amount was

required to be borrowed from Peerless Finance Limited, HDFC Limited, Mahindra and Mahindra Limited, etc.

54. The defence to the aforesaid objection is that a larger company will have a better flexibility in tapping financial resources and in the changed

new economic scenario and globalisation of the economy will create more confidence in the persons dealing with the company. It is pointed out

that dilution of investment in GGCL and acquisition of shares in NOCIL sold by SHELL has no relevance to the scheme. It is pointed out that

NOCIL was jointly promoted by MIL and the SHELL group. MIL held about 13.58 per cent. of shares while the SHELL groups held about

33.33 per cent. of the paid up equity shares capital. Since the SHELL group decided to sell their shares in NOCIL, MIL being a co-promoter,

was offered the said shares en bloc by the SHELL group. MIL was in joint management of NOCIL with the SHELL group and could not afford

to have SHELL''s holding of NOCIL shares fall in undesirable hands, lest MIL should one its control on the management of NOCIL, the company

promoted by it and carrying on a highly profitable industry. It is pointed out that as the decision by the SHELL group to pull out of NOCIL was

taken at short notice, MIL faced a temporary financial crunch for its business requirements and as a result it had to raise funds by temporary

borrowings. MIL has in its affidavit-in-reply further pointed out diverse circumstances as to why its holding in GGCL was required to be diluted. It

has also enumerated the circumstances which led it to the borrowings. It is also pointed out that by taking various steps, the board of directors of

MIL has acted in the best interest of the company. Even after selling 4 lake equity shares in NOCIL, MIL has been able to retain its control in

NOCIL even in the most difficult circumstances. It is pointed out that MF has already modernised its manufacturing facilities by installing air jet

looms and other balancing equipment. It is, therefore, pointed out that by the proposed amalgamation there will be better liquidity of funds and larger scope for capital gearing.

55. From the aforesaid fact situation, through it is true that MIL has undergone a period of crisis on the sudden decision of the SHELL group to

walk out of NOCIL, it cannot be said that because of the amalgamation, in future there would be no possibility of capital gearing. In fact, the

aforesaid purpose shall have to be seen in the context of future business and prospects which the amalgamation may ring with it. When the activities

of the two companies stand united with the increase in its assets, the borrowing capacity would increase and the amalgamated company will be in a

better position to tap financial resources. In such circumstances, it cannot be said that the second objective will never be achieved or is not one of

the objective which may be achieved ultimately because of the amalgamation.

Third objective :

56. From the explanatory statement it becomes clear that it is the case of the company that the amalgamated company being larger would generate

more confidence in the investors and in the persons dealing with the company. It is pointed out by Miheer that the scheme is not likely to generate

any better confidence amongst the investors or shareholders, firstly, because the rights issue of the year 1987 of MIL was substantially under

subscribed. This would show that the shareholders lacked the requisite confidence and were not ready to subscribed even to the rights issue. He

has pointed out that none of the employees or very few of the employees have applied for the rights issue of 1987 as well as of 1992. He has also

pointed out that the rights issue of 1992 was just subscribed and did not receive overwhelming support from the shareholders. He has further

pointed out that this was the position of the shareholders of MIL prior to amalgamation. In this submission that after the amalgamation, firstly

looking to the poor performance of MF, secondly, the lower earning per share of MF which would result in reducing the earning per share of MIL

and, thirdly, in view of the huge liabilities of MF which shall have now to be borne by MIL, in fact, the confidence of the shareholders and investors

would not be boosted or increased, but it would be substantially reduced or there would be a lukewarm approach on the part of the shareholders

and investors towards MIL. Lastly, he has submitted that there is no documentary evidence produced by MIL in support of the statement that the

amalgamation would on the whole generate confidence in the shareholders and investors.

57. In reply to the aforesaid objection, it is pointed out that the amalgamation would lead to the formation of a larger company with substantially

higher assets and manufacturing units. Secondly, in view of various developmental projects, which were on hand and which would materialise in course of time, there are better further prospects for a larger company. Thirdly, the creation of one company would help the process of

modernisation of the units. Fourthly, in the export market, both the companies have been gradually performing better in the last five to six years.

Though it is true that the rights issue of 1987 was not satisfactorily subscribed the rights issue of 1992 was practically fully subscribed and even

employees subscribed to 50,556 equity shares out of 67,250 shares offered to them. Of the equity shares offered by the rights issue of 1992,

98.61 per cent. were subscribed by the persons to whom the said shares were offered and/or their renounces. It is pointed out that at the time of

the rights issue of 1992 even some of the shareholders applied for additional shares and to that extent the rights issue of 1992 was over-

subscribed. The renounces of the rights shares offered in the year 1992 commanded a premium in the market. In fact, Miheer and members of his

family, his investment companies and trusts renounced their rights entitlements and made a substantial profits exceeding Rs. 2 crores. It is submitted

that such overwhelming response received from the shareholders, investors and public financial institutions to the right issue of 1992 goes to

suggest and establish the confidence of the shareholders and investors in MIL. In fact, three textile units of MF and one chemical unit of MF would

help grow the business horizon of MIL tremendously so as to generate more and more confidence in the shareholders and investors.

58. The aforesaid assertions made by the company in support of this objective coupled with the fact that more than the requisite statutory majority

of shareholders have voted in favour of the scheme, would prima facie establish that the shareholders have not doubted the assertions made in the

explanatory statement. I do not attach importance to the fact that Miheer has by renouncing the rights issue in 1992, made a huge profit of over Rs.

2 crores because it is the case of Miheer that he was coerced to renounce his shares in view of his inability to subscribe to the same as a larger

number of his shares and shares of his family were lying under the control of Arvind N. Mafatlal and Arvind N. Mafatlal is claiming that they are

pledged to Mafatlal Gagalbhai since long as securities for loans advanced by the said firm to Miheer''s family. However, the fact that by renouncing

the rights shares of 1992. Miheer and the members of his family have made a profit cannot be denied. It would, therefore, be safe to assume that

shares in MIL re being sold at a reasonably high price and that the shareholders have not lost their confidence in the working of the company. It

cannot, therefore, be said that this objective is false or misleading or is not the real objective which would be achieved by amalgamation. Here also, it is required to be noted that more than the requisite majority of shareholders have voted in favour of the scheme. Had the scheme been so

discouraging or against the interest of investors and shareholders, substantial majority of shareholders would not have voted in favour of the

scheme.

Fourth and fifth objectives :

59. In the explanatory statement, it is stated by the company that amalgamation will pave the way for better, efficient and economic control in

running operations and will lead to economy in administrative management and finally would improve the profitability. According to Miheer, this

objective is not likely to be achieved as MF has a higher labour cost and raw material cost. He has further submitted that the benefit of larger

operations can reap better profitability if there is a proposed scheme ""post amalgamation"" for the reduction of cost of labour, overheads, marketing

and others. In fact, no steps are taken prior to amalgamation to reduce the cost of production of MF with the result that amalgamation is not likely

to bring about improved profitability.

60. In this connection, the company has pointed out that the alleged higher labour costs or raw material costs have in fact no relevance to the

question of amalgamation. The said two factors may have relevance in determining the fair exchange ratio of shares. In para 8 of the affidavit-in-

reply, five relevant factors are pointed out which would go to establish that the assertions made by Miheer in his objections are not correct. It is

pointed out that the comparison made in annexure-O to the affidavit of Miheer between the percentages of raw material costs and sales is

misleading. It is pointed out that figures of sales given in annexure-O are the figures of turnover of textile comprising cloth, yarn, waster, etc., given

in the notes of accounts and the directors'' report which includes sales of goods traded in, i.e. sales of cloth purchased and sold. However, the

figures of raw material cost taken in annexure-O would comprise the cost of raw materials consumed, namely cotton and fibre and yarn purchased

only, but would not include any part of the cost of cloth purchased and sold. Therefore, the ratio of raw material costs of sales as worked out in

annexure-O would be higher. It is pointed out that the sales of MIL are lows than the sales of MF in annexure-O. However, no break-up of the

figures of sales into figures for sales of cloth manufactured and sold and those of cloth purchased and sold is given. Such a statement is produced

by the company at annexure-I. The said statement would show that in the case of MIL, the relative component of cloth purchased and sold is higher than the corresponding ratio in the case of MF. This would be one factor leading to a lower percentage of raw material cost to sales.

Secondly, it is pointed out that the figures of sales given in annexure-O referred to sales of cloth, both grey and processed. The processing may be

bleaching, dyeing, printing etc. The cost of raw material namely cotton and fibre and yarn is up to the stage of grey fabrics and there is no addition

to the said raw material cost in any processing of grey cloth. At each stage of processing, there is an addition to the value material costs. It is

pointed out that the figure of raw material cost taken in annexure-O do not include, any cost of chemicals, colours or bleaching ingredients. Thirdly,

it is pointed out that the company may not itself process grey fabrics but may get the same processed by a processor on payment of processing

charges. In such cases, the cost of colours, chemicals and bleaching, etc., would be included in the processing charges. Therefore, if in the cloth

sold, the component of processed cloth compared with the component of grey cloth is relatively higher, the ratio of raw material cost to sales

would be lower. Fourthly, it is pointed out that in the context of the comparison of percentage of raw material costs with sales, the sale price alone

is not relevant and it would be necessary to take into account only manufacturing income, e.g., export incentive, duty drawback, etc. From the

detailed reasons set out in paragraph 8 of the affidavit-in-rejoinder filed by MIL, it becomes clear that in view of larger operations of a larger

company, there would be reduction in the average cost of labour, overheads, marketing and other costs and the same is a matter for the

commercial judgment of the members of the company. Once the majority shareholders have voted in favour of the scheme and in view of the

diverse factors which are to be taken into consideration, it would be wrong for the court to accept mere bald assertions of Miheer that the

aforesaid objectives 4 and 5 are not likely to be achieved or will not be achieved by the proposed amalgamation. Applying the test of a reasonable

and prudent shareholders, it would be difficult of this court or record a positive finding that by proposed amalgamation, there is no real purpose to

be achieved or that the aforesaid objectives set outing the explanatory statement are misleading or are not likely to be achieved. The submission of

Mr. M. J. Thakore, learned counsel appearing for Miheer, in this behalf is that by the proposed scheme or amalgamation, no positive purpose is

going to be served or not positive objective is going to be achieved. If the proposed scheme is one whereby no objective or purpose is going to be

achieved, no man of business would approve such a purposeless scheme. In the alternative, it is submitted that if no purpose is going to be served by the proposed amalgamation, it is not bona fide. Even if the stated objectives or some of them may be achieved, the scheme is still not a bona

fide scheme as the majority represented by Arvind N. Mafatlal by the proposed scheme intends to coerce and crush the minority represented by

the MHM group. Therefore, it is submitted that even faith court finds the proposed scheme of amalgamation to be a commercially viable scheme, it

should not sanction the same. The purposed scheme for the stated objectives, in reality and substance, is an attempt to totally oust the minority by

suppressing and oppressing it to the status of a helpless non-entity. It is submitted that in fact by various steps taken by Arvind N. Mafatlal spread

over a period of 10 years, the dubious device of getting total control of MIL to the total exclusion of the MHM group, could be clearly seen and,

therefore, not only the history of the family arrangement and other historical facts relevant to the family of the late Mafatlal Gagalbhai and its

industries and business are required to be seen, but, in fact, the corporate veil in required to be lifted in order to find out as to whether Arvind N.

Mafatlal has treated the entire business empire as if it is his fiefdom. Before I proceed to consider the alternative submission. I would at this stage

record my finding that it cannot be said that the proposed scheme of amalgamation is not for the stated objectives as brought outing the

explanatory statement. In short, it shall have to be stated that the proposed scheme of amalgamation may achieve the avowed objectives as set out

in the statement.

61. On such a finding being reached it is submitted that objection No. 2 also sands squarely answered. However, objection No. 2 refers to some

ulterior motive, which is sought to be achieved by the proposed scheme of amalgamation and it is in this context that the court shall have to

examine as to whether the scheme lacks bona fides or good faith. If some other concealed or secret motive is the guiding force, which ultimately

would result in total take over of the business by one group as opposed to the interest of the other group, the court shall have to independently

examine, in the light of the allegations made by the objector, as to whether the scheme is really going to coerce, suppress and oppress the minority.

If on this alternative submission, the court records findings against the company, it can still withhold the sanction or its approval despite its findings

that the scheme may achieve the stated objectives or purposes.

61A. Though covert or concealed, the real and paramount object of the proposed scheme of amalgamation is to defeat the rights flowing to the

HEM group from the family arrangement of 1979 and more particularly to defeat the substantial counter claim preferred by Miheer in Civil Suit

No. 1010 of 1987, pending before the Bombay High Court, submits Miheer to buttress his abjections to the effect that the proposed scheme of

amalgamation is actuated by ulterior motives. He has by reference to the board of directors of the two companies pointed out that Arvind N.

Mafatlal and his son Hrishikesh Mafatlal, who have proposed the scheme of amalgamation, are that the helm of affairs in both the companies and

the scheme is proposed by them with the sole object of seeking that Miheer cannot enforce his rights flowing from the family arrangement of 1979.

Mr. M. J. Thakore, learned counsel appearing for Miheer has by reference to a larger number of factors and specific steps taken by Arvind N.

Mafatlal and by a well connected process of reasoning to which a detailed reference is made hereafter, submitted before this court that each step

taken by Arvind N. Mafatlal since 1979 by taking advantage of the minority of Miheer was really actuated by a desire to gain greater control over

MIL and thereby to exclude Miheer and his groups from the family business. He has submitted that though prima facie each step may appear to be

an independent step by MIL or some other subsidiary company, in reality behind every step of MIL or other subsidiaries the towering personality

of Arvind Mafatlal could be seen. The various companies including MIL and MF and subsidiaries thereof were and are in reality just the puppets

of Arvind N. Mafatlal. He controlled their every movement, each company or subsidiary danced to his bidding. He pulled the strings. Transformed

into legal language, the two companies and their subsidiaries were merely the agents of Arvind N. Mafatlal to do as he commanded. He was the

principal guiding (misguiding) spirit behind all steps systematically and schemingly taken. He has, therefore, submitted that this is a fit case where

the court should not proceed by the corporate personality of MIL or MF but should pierce or lift the veil of corporate personality and if this

exercise is undertaken, the court would be more than convinced that Arvind Mafatlal was the moving spirit controlling all the companies and

subsidiaries as if all the companies were his fiefdom. He has very strongly urged before this court that if the various steps enumerated hereafter

which are taken either by MIL or by Arvind N. Mafatlal as the moving spirit of MIL are taken into account, a dubious diabolical device to

gradually usurp and control the companies which would have otherwise fallen to the share of the MHM groups and thereby to totally exclude the

MHM groups from business would come to light. This is one of those rare case, where under the cover of the scheme of amalgamation an attempt

is made by Arvind Mafatlal or the ANM group to exclude and outs the minority or to smother it to death. If such a device is brought to the notice of the court by reference to well knit scheming systematic steps, the court should be loath to encourage and sanction or approve such a scheme as

the ultimate objective thereof is to bitterly butcher the minority.

62. The various scheming systematic steps attributed to Arvind N. Mafatlal and/or majority group by Miheer as stated in his objective before this

court and as enumerated by his counsel M. J. Thakore before this court are required to be highlighted at this stage.

Factors aimed at ouster/exclusion of the MHM group to gain greater control and to establish the empire of Arvind N. Mafatlal :

63. First step. - By reference to the family history of the deceased, Mafatlal Gagalbhai, to which a detailed reference is made hereinabove, it is

asserted that on the date when the father of Miheer died on August 16, 1971, the Mafatlal family and running three apex companies (1) Mafatlal

Gagalbhai and Company Pvt. Ltd., (2) Surat Cotton Spinning and Weaving Mills Pvt. Ltd., and (3) Pransukhlal and Company Pvt. Limited. Of

these companies, the first one was an investment company and had invested in shares of different companies of the Mafatlal group. It was

controlling New Shorrock Spinning and Manufacturing Co. Ltd., Standard Mills Company Ltd., Mafatlal Fine Spinning and Manufacturing Co.

Ltd., Indian Dyestuff Industries Ltd., National Machinery Manufacturers Ltd., National Organic Chemical Industries Ltd. (NOCIL), Polyolefins

Industries Ltd. (PIL), Hoechst Dyes and Chemicals Ltd. He has pointed out that in the aforesaid three companies, the shareholding pattern would

clearly indicate that about one half of the share were held by the family of Hemant Mafatlal, while the remaining one half were held by the family of

Navinchandra consisting of Arvind, Yogindra and Rasesh. The MHG groups was, thus, having approximately one half of the shareholding in the

three apex companies of the Mafatlal family, which companies in turn were controlling and managing the other companies of the Mafatlal group. It

is his case that in or around 1979, there were certain disputes and difference amongst Arvind Mafatlal, Yogindra Mafatlal and Rasesh Mafatlal. It

was then felt that some arrangement should be worked out whereby there would be separation and division of the family business amongst four

branches, viz., Miheer''s family (MHM group), family of Arvind Mafatlal (ANM group), the family of Yogindra Mafatlal (YNM group) and family

of Rasesh Mafatlal (RNM group). It is his further case that Mr. C. C. Chokshi was requested to prepare a scheme for division of family business

and he prepared a note dated February 23, 1979, making six suggestions for the division of the Mafatlal group of industries into four groups. For

this purpose, the opinions of Mr. J. C. Shah, former Chief Justice of India, Mr. Ambalalbhai S. Parik, solicitor and Mr. J. M. Thakore, Advocate-

General of the Gujarat High Court, were sought by Mr. C. C. Chokshi. It is the case of Miheer that suggestion No. 5 put forth by Mr. C. C.

Chokshi with minor modifications was accepted at the meeting held on March 1, 1979, at which over and above the three brothers, Miheer and

two sons of Arvind Mafatlal remained present. Miheer has extensively relied upon this toe of Mr. C. C. Chokshi dated February 23, 1979, and

the minutes of the meeting held on March 1, 1979. By referring to suggestion No. 5, he has submitted that the companies stated in Group A were

to go to his group, i.e., MHM, as the holding of the MHM group was the largest. He has further pointed out that under the said suggestion, the

formation of three subsidiary companies was suggested. They were to be wholly owned subsidiary companies by MIL. It was envisaged that

shareholding of MIL in Standard Mills Co. Limited will be transferred to one such subsidiary company while the holding of Mafatlal Industries

Limited in Indian Dyestuffs Industries Limited and Hoechst Dyes and Chemicals Limited, would be transferred to another subsidiary company.

Similarly, the holding of MIL in Mafatlal Fine would be transferred to the third subsidiary company. In this way, three subsidiary companies were

to the over the investments of MIL in certain companies. In consideration of such transfer, the said three subsidiary companies would be required

to issue shares to the existing shareholders of MIL in the proportion of one share of the subsidiary company for one share held by such

shareholders in MIL. Accordingly, the MHM group, i.e., Miheer''s group, which was to have the control over MIL, would sell at their holdings in

the respective subsidiaries to the respective groups of ANM, YNM and RNM which groups in turn were to sell all their holdings in MIL to the

MHM group. The object and purpose of the scheme envisaged was that some of the companies then controlled by MIL would be hived off to the

subsidiary companies which were to be under the control of the ANM, YNM and RNM groups. He has further submitted that due to his tender

age, he was advised by C. C. Chokshi and seniors in the family that his interest would be safeguarded and protected by remaining with the senior

most member Arvind N. Mafatlal and by placing implicit reliance on him, he agreed to the aforesaid advice. According to him, his grandmother and

mother also had implicit faith in Arvind Mafatlal who was looking after the affairs of the family after the premature death of his father. Accordingly,

at that time, the MHM group remained with Arvind Mafatlal for the time being till Miheer would establish himself independently in the business. He

further points out that as part of the scheme of arrangement, two subsidiary companies, Mahamaya Investment Limited and Sandeep Holdings

Limited were floated. The first company is at present held by the YNM group, while the second company is held by the RNM group. However,

the third subsidiary company, which was to be floated as per the understanding was not floated. In fact, the companies of group A and B were

kept together because of the young age of Miheer. According to Miheer, Arvind Mafatlal had different plans and non-floating of the third

subsidiary company was the first step taken by Arvind Mafatlal in this direction of getting control of Group A. It is the case of Miheer that had he

floated the third subsidiary company and hived off MF and PIL, he would have lost control over the companies, namely, MIL, then MEIL and

NOCIL. In order to continue to control these companies, Arvind Mafatlal did not take any step to float a third subsidiary company of MIL as he

never wanted to give up his control over the vast Mafatlal empire and to give Miheer''s due share in the management and control of the industries

of the Mafatlal group. He has pointed out that instead of getting transfer the holdings of the YNM group and RNM group in MIL, Arvind Mafatlal

misused his fiduciary position and for an oblique motive got the shares held by the YNM group and the RNM group transferred to his group and

to a company where he had a controlling interest being Padmashree Synthetics Pvt. Ltd.

64. The second important step attributed to the ANM group by Miheer is that the ANM group effectively controlled Padmashree Synthetics Pvt.

Limited through various trusts which held shares of five private limited companies. It is alleged that a larger number of trusts both of the ANM

group and of the MHM group hold and/or are holding shares in MIL. He has pointed out that till the death of his father, all the trusts had four

trustees, namely, Arvind, Yogindra, Rasesh and Hemant. Even thereafter till 1979-80, all the trusts had four trustees and in the place of Hemant

(deceased father of Miheer), the fourth trustee used to be the wife of the respective brother in the case of a trust falling within the respective group

and in the case of a trust falling within the MHM group, Pannaben, mother of Miheer, was the fourth trustee. It is his case that after the

arrangement, the trusts falling within the MHM group continued to have four trustees of which two were from the family of ANM while two were

from Miheer''s family while the trust falling within the ANM group had three trustees from the ANM family and one from Miheer''s family. It is his

case that as these trusts were holding a large number of shares, the control over these trusts appear to be very material to Arvind Mafatlal and,

hence, to effectively neutralise the say of Miheer or the members of his family, Arvind Mafatlal saw to it that there were at lest who trustees out of

a total or four from the ANM family in all the trusts of the NHM group. He describes this strategy as a '"'shrewd manoeuvre'"' on the part of Arvind

Mafatlal to gain greater control over Padmashree Synthetics Pvt. Limited, MIL and thereby over various companies controlled by MIL.

65. The third step attributed to Arvind Mafatlal is that the shareholding of Padmashree Synthetics Pvt. Limited in MIL ought to have been transferred to the MHM group. In fact, as per arrangement, the MHM group had a right of pre-emption to purchase all the shares of MIL including those from Padmashree Synthetics Pvt. Ltd. It is submitted that Arvind Mafatlal contrary to and in breach of the rights of the MHM group transferred on December 23, 1993, wrongfully and dishonestly 25,136 share in MIL held by Padmashree Synthetics Pvt. Limited in favour of PIL and 24,688 shares in MIL in favour of Surabhi Investment Private Limited, which in turn transferred the said shares to PIL. The said PIL is a company belonging to group B which was ultimately to go the AMN group. By this method, the entire shares in MIL held by Padmashree Synthetics Pvt. Limited were transferred by Arvind Mafatlal to the companies controlled by him and him and this step was a deliberate step taken by Arvind Mafatlal to gain grater control over MIL.

66. The fourth step attributed to Arvind Mafatlal with a view to gaining greater control over MIL is that he purchased three per cent. shares in MIL from Yogindra Mafatlal in 1987 contrary to the stipulation into family arrangement of 1979 under which the shares of MIL ought to have been sold to the MHM group by Yogindra Mafatlal. The transfer of shares in MIL by Padmashree Synthetics Pvt. Limited to PIL and the purchases of shares in MIL by the ANM group from the YNM group resulted in the ANM group having control of almost 20 per cent. of the share in MIL.

67. The fifth step attributed to Arvind N. Mafatlal is that of an over of ar gifts issue in 1987 by MIL. In or round May, 1987, MIL offered 8,10,000 shares of the face value of Rs. 100 each for has at a premium of Rs. 200 per share to the existing shareholders on a rights basis of one shore of or one equity share help on April 11, 1987. The right issue opened on May 4, 1987, and closed on July 3, 1987. This rights issue was allegedly the fifth step taken by Arvind Mafatlal to gain control over MIL and to systematically oust Miheer from MIL. It may be mentioned at this stage that his right issue of 1987 was the subject matter of challenge by three shareholders in two spare suits, being Civil Suits Nos. 3181 of 1987 and 3182 of 1987, in the City Civil Court at Ahmedabad, wherein on the notice of motion, while rejecting the same, the City Civil Court by its judgment and order dated September 4, 1987, put certain restrictions on limitations, whereby the company was permitted to allot rights issue subject to the clear stipulation therein that allotment of such shares would be subject to the result of those litigations. The company was also

directed not to allot shares from the unsubscribed portion thereof to anyone except banks and/or public institutions without the previous permission

from the City Civil Court. A reference to this order of injunction of the City Civil Court is made while dealing with objections 7 as it is based on

such prohibitory order. It is the case of Miheer that despite such prohibitory injunction shares from the unsubscribed portion of the rights issue of

1987 were allotted to NOCIL and Sushripada Holdings Private Limited.

68. The sixth step attributed to Arvind Mafatlal by Miheer is that with a view to restraining or preventing Miheer and the members of his family

from availing of the right allotment of 1987, Arvind Mafatlal filed Civil Suit No. 1010 of 1987 prior to the rights issue and obtained an injunction

restraining Miheer and the members of his family from renouncing the rights in favour of any party other than Arvind Mafatlal. Miheer was also

restrained from transferring, amalgamating or pledging any of the shares held by him in MIL. Therefore, it becomes impossible for Miheer to obtain

the finance required for applying for the rights issue of 1987. The injunction granted by the single judge of the Bombay High Court was vacated by

the Division Bench of the Bombay High Court after the closure of the rights issue of July 27, 1987. Thus, by deliberate design and scheme, Arvind

Mafatlal could see to it that Miheer and the members of his family could not avail of the offer of the rights issue of 1987. That apart, it is alleged

that Arvind Mafatlal had kept in his control and possession a very large number of shares of Miheer and his family and, thus, he has succeeded in

enhancing his financial control over MIL and in substantially reducing the control of the MHM group in MIL. It is pointed out that the shareholding

pattern underwent substantial change after the rights issue of 1987 and the percentage of shares held by Arvind Mafatlal and companies controlled

by Arvind Mafatlal and his family went from 20 per cent. to 35 per cent. in MIL while the shares held by Miheer and the members of his family,

trusts and companies went down from 17.39 per cent. to 10.47 per cent.

69. It is pointed out as the seventh step that in the rights issue of 1987 more than 55 per cent. of the shares were cornered by and allotted to the

ANM group and companies controlled by Arvind Mafatlal. The sole object of Arvind Mafatlal in floating the rights shares was not to benefit MIL

but was solely to gain greater control over MIL so as to reduce Miheer and the members of his family to a helpless minority.

70. The eighth factor, rightly not described as a step is that because of some family circumstances, the ANM group wanted to take revenge against

Miheer. He has pointed out that the son of Arvind Mafatlal, namely, Padmanabh, was a confirmed alcoholic and he used to abuse his wife. This resulted in differences between the said Padmanabh and his wife, Miloni, which culminated in a divorce between them in 1982. Miloni, who was

harassed, came to Miheer for compassion. After the divorce, Miheer married the said Miloni. The said marriage and custody of the children born

out of the earlier marriage between Padmanabh and Miloni thus became an added reason for Arvind Mafatlal to suppress and oppress Miheer and

the members of this family.

71. The ninth step which is prior to the offer of the rights issue of 1987, is that Arvind Mafatlal instituted original Civil Suit No. 1010 of 1987 in the

High Court of Bombay and prayed for certain reliefs against Miheer, Rasesh, Yogindra. In such suit, as stated hereinabove, he was successful in

getting an order of injunction against Miheer so as to disarm and disable Miheer from subscribing to the rights shares. It is in this suit that Miheer

has filed a counter-claim claiming the following relief :

(a) that it be declared by this hon''ble court that the family arrangement contained in and/or evidenced by the note of Mr. C. C. Chokshi dated

February 23, 1979, and the minutes of the meeting held on March 1, 1979, exhibits 5 and 6 respectively to the written statement, is valid,

subsisting and binding on the defendants to the counter-claim and members of their groups;

(b) that it be declared by this honourable court that the defendants to the counter-claim and their nominees and members of their respective groups

are found and liable to act in accordance with the family arrangement mentioned in prayer (a) above;

(c) that it be declared by this honourable court that under the family arrangement the companies mentioned in exhibit 17 to the counter-claim are to

come under the management and control of the plaintiff to the counter-claim and his group;

(d) that the defendants to the counter-claim their nominees and members of their nominees and members of their respective groups be ordered and

decreed to specifically perform the family arrangement mentioned in prayer (a) above and for the said purpose to do all acts, deeds and things as

may be necessary for the purpose of placing the companies mentioned in exhibit 17 to the counter-claim under the management and control of the

plaintiff to the counter-claim and for the said purpose to delink the shares and the said companies from the group B companies;

(e) that the defendants to the counter-claim, their nominees and members of their respective groups be ordered and decreed :-

(i) to give to the plaintiff to the counter-claim irrevocable proxies on all shares held by them in the companies mentioned in exhibit 17 to the

counter-claim;

(ii) to forthwith tender their resignations as directors of the companies mentioned in exhibit 17 to the counter-claim and to appoint the plaintiff to the counter-claim and/or his nominees as directors in substitution of the resigning directors;

(iii) to tender their resignation from all the trusts mentioned in exhibits 8 and 10 to the written statement;

(iv) pending inter se transfer of shares between the groups if they or any of them desire to effect sale of shares in any of the companies mentioned

in exhibit 17 to the counter-claim they give to the plaintiff to the counter-claim the first opinion of refusal in exercise of the right of pre-emption of

the plaintiff to the counter-claim under the said family arrangement.

72. It is the case of Miheer that if the proposed scheme of amalgamation is sanctioned by this court, this substantial counter-claim wherein he has

prayed for the above-mentioned reliefs, would becomes infructuous and he would then never be in a position to enforce the rights flowing from the

family arrangement.

73. This court may incidentally mention that to support his say that under the alleged family arrangement of 1979, he was entitled to get control of

the companies falling in ""Group A"". Miheer has referred to Suit No. 1906 of 1985 filed by Arvind Mafatlal against Miheer, Yogindra Mafatlal and

Rasesh Mafatlal. He has also referred to a subsequent suit filed by Arvind Mafatlal being Arbitration Suit No. 2266 of 1986 claiming appointment

of Mr. C. C. Chokshi as arbitrator for determining the value of shares of MIL to be sold by Yogindra and Rasesh under the alleged concluded

agreement of 1985. It is the case of Miheer that in such suit, Yogindra Mafatlal and Rasesh Mafatlal have filed their written statement jointly

accepting that the companies of the Mafatlal group were to be separated into four groups as contemplated in suggestion No. 5 of the Note dated

February 23, 1979. Miheer has placed much reliance upon this written statement. It may be noted that such suit is pending in the Bombay High

Court.

74. The tenth step to strengthen the position of Arvind Mafatlal and to gain greater control over MIL attributed to him by Miheer is the rights issue

of 1992. By such rights issue, Miheer and the members of his family who had more than 10 per cent. interest in MIL are now reduced to

approximately 5 per cent. interest. In fact, the proposed amalgamation scheme is the final blow given by Arvind Mafatlal to the MHM group so as

to render Miheer and the members of his family to total non-entity and to establish his overall supremacy.

75. In the course of submissions before this court, Mr. M. J. Thakore, the learned advocate for Mihir, has further submitted that the court may also

examine the nature of shareholding in MIL and then ascertain as to whether a substantial class of shareholders have voted in favour of the scheme.

He has in this connection pointed out that as on December 31, 1993, the paid-up capital of the petitioner-company was Rs. 26,70,72,075 divided into 26,52,987 equity shares of Rs. 100 each paid up and 33,922 equity shares of Rs. 100 each on which Rs. 50 has been paid and 3,091 of

equity shares of Rs. 100 on which Rs. 25 has been paid and which have been forfeited. As against the aforesaid paid-up capital of the company,

he has pointed out that the meeting of January 22, 1994, was attended by 5,522 members present either in person or by proxy holding 20,48,513

fully paid-up equity shares of Rs. 100 each aggregating to Rs. 20,48,51,300. This would work out to 77 per cent. of the total share capital. He has

further pointed out that the total number of shareholders of the petitioner-company is 94,674 as against which 5,522 shareholders either personally

or by proxy remained present at the meeting. In the context of shareholders, only 5.83 per cent. of total shareholders attended the meeting and

94.17 per cent. of shareholders have not attended the meeting. His submission is that if the majority of the actual shareholders is to be taken into

account, a substantial number of shareholders have remained absent and only 5.83 per cent. of the total number of shareholders have attended the

meeting. However, if on the basis of the paid-up capital the majority is to be determined, 77 per cent. of the total shareholders was represented in

the said meeting out of which 73.02 per cent. voted in favour of the scheme while 3.24 per cent. voted against the scheme and 0.95 per cent. did

not exercise the vote. In his submission, the 73.02 per cent. who voted in favour of the scheme can be divided into three groups, i.e. :

(a) shares held and controlled by the ANM group and the companies controlled by that group. This would represent 38.04 per cent.,

(b) shares held by financial institutions like ICICI; this would represent 25 per cent., and

(c) shares held by other members of public; this would represent 9.6 per cent.

In his submission, from the aforesaid division of shareholding which has voted in favour of scheme it would be clear that this is a case where the

majority has coerced the minority or the majority has acted to achieve systematic ouster of the minority.

76. On the other hand, Mr. S. B. Vakil, the learned advocate for the petitioner-company, submitted that the aforesaid 73.02 per cent. of

shareholders who have voted in favour of the scheme out of 77.21 per cent. would work out exactly to 94.57 per cent. while those who voted

against the scheme would work out to 4.2 per cent. The 73.02 per cent. shareholding is divided as 29.92 per cent. belonging to the ANM group,

30.03 per cent. belonging to financial institutions and 13.07 per cent. belonging to other members of the public. In his submission, financial

institutions and other members of the public cannot be said to be part and parcel of the ANM group and they also constitute a substantial portion

of shareholders who voted in favour of the scheme.

77. This objection which is advanced in the course of oral submissions by Mr. M. J. Thakore, the learned advocate for Mihir, need not detain this

court any longer inasmuch as this court has to be whether the statutory requirement is complied with or not. u/s 391(2) if a majority in number

representing three-fourths in value of the members present and voting agree to the scheme of amalgamation, the court may sanction the scheme.

The three-fourths in value of the equity shareholders who were present and voted would be decisive. If this requirement is kept in mind the same is

fulfilled. The fact that a large number of shareholders from public has not remained present at the meeting should not assume any importance. To

ascertain the fact as to whether the statutory requirement is satisfied or not, the court shall have to find out as to whether three-fourths of the

majority of shareholders present and voting have voted in favour of the scheme and since the answer in the present case is in the affirmative, this

oral objection shall have to be rejected.

78. However, in the context of the majority coercing the minority or the majority lacking good faith, the fact of substantial shareholding of the

ANM group and the financial institutions shall have to be kept in mind. When the other group is reduced to the position of a helpless minority, any

decision or resolution of the majority which is adverse to the interest of the minority may give rise to a feeling of suppression or oppression. The

minority may develop the feeling that it is being coerced or that it is being ignored. In such a case the duty of the court, of exercising its judicial

discretion, becomes a delicate duty. Even if the requisite majority has sanctioned the scheme, the Legislature has desired that the court must be

approached and its sanction must be obtained. The court, therefore, shall have to apply its judicial mind. Even when the scheme is passed by the

majority, it may affect the interests of the dissentients or the minority and it may affect the interests of those who might not have voted or who might

have failed to vote. It is in this context that the observations made by Miabhoy J. (as His Lordship then was) in In Re: Sidhpur Mills Co. Ltd., ,

assume importance (310) :

In a case where a scheme is voted by a majority, two conflicting claims are to be adjusted. If, on the one hand, a minority were to take up an

unreasonable attitude in the matter of the scheme, then, the interests of the majority will suffer if the scheme cannot be pushed through - a scheme

which the majority considers to be reasonable and in the interests of the company and the class of persons whom it represents. In that case, the

majority will suffer on account of the intransigence of the minority. On the other hand, if the majority has interests adverse to the minority or where a majority has been rigged up, the minority is bound to suffer or to be tyrannised by sheer strength of numbers. Therefore, the Legislature has

provided that if a meeting has taken a certain decision, then, the court must apply its mind and consider whether it is in the interest of the company

as a whole and of the class of persons for whom the majority acts and whether the scheme is such that it must be pushed through"".

79. In the words of Lindley L.J. in Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re [1891] 1 Ch 213 the court has to see

that the majority has been acting bona fide. The court has also to see that the minority is not being overridden by a majority having interests of its

own clashing with those of the minority whom they seek to coerce. Bowen L.J., in the very decision, observed that a compromise or agreement

which has to be sanctioned by the court must be reasonable and that no arrangement or compromise can be said to be reasonable which a party

can get and give up everything. It would be improper for the court to allow an arrangement to be forced on any class of creditors if the

arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the

court would be a sanction to what would be a scheme of confiscation. The object of this provision is not confiscation. It is not that one person

should be a victim, and that the rest of the body should feast upon his rights. Its object is to enable compromises to be made which are for the

common benefit of some class of creditors as creditors, or for the common benefit of some class of creditors as such. In the context of the scheme

of amalgamation these observations of Bowen L.J. would equally apply to the members of the company. Therefore, it shall have to be kept in mind

that it is not compulsory upon the court to register a decision of the majority nor is the court called upon the act in such a manner that the majority

will create a stalemate and thereby retard the progress which the majority has legitimately and reasonably a right to expect and make. In every case

the court must be satisfied that the majority is acting in a bona fide manner. It is only if the majority is acting honestly and with due care and co-

operation that the decision will be binding upon the minority. If the court finds that the majority is acting in a mala fide manner then, it is duty of the

court to protect the minority from tyranny of the majority. It is in the context of this position of law that this court shall have to examine the

aforesaid factors or systematic steps attributed to Arvind Mafatlal towards elimination or exclusion of the minority. The broad defence put by the

company to the aforesaid objection may at this stage be summarised :

Defence :

80. Firstly, the note of the family arrangement prepared by Mr. C. C. Chokshi dated February 23, 1979, produced by Mihir at annexure ""E

containing six possible suggestions for dividing among four groups, 12 companies, their business, estates and properties is merely in the nature of

draft or proposal, it having not been finally accepted by all the parties by executing formal deed of the family arrangement. Secondly, the text of the

minutes of the meeting dated March 1, 1979, produced by Mihir at annexure ""F"" cannot be said to be an agreement or arrangement to which Mihir

is a party. It was in arrangement or agreement reached between three brothers only, namely, Arvind Mafatlal, Yogindra Mafatlal and Rasesh

Mafatlal. The presence of Mihir or two sons of Arvind Mafatlal at such meeting could not automatically make them parties to various stipulations

contained in the minutes of the said meeting. The said minutes of the meeting cannot, therefore, be regarded as a family arrangement to which the

MHM group was a party. Thirdly, the alleged family arrangement in the form of note dated February 23, 1979, or the subsequent minutes of

meeting dated March 1, 1979, at the most may be described as draft or memo of settlement. It was merely an inchoate instrument not creating any

enforceable right in favour of any party or against any of the 12 companies. Fourthly, assuming without admitting that such note of the family

arrangement and/or the minutes of meeting, dated March 1, 1979, were enforceable as against the parties thereto, the same were, in any case, not

binding on the 12 companies whose business, properties and assets were to be divided amongst the four groups. The companies were admittedly

not parties to the said note of the family arrangement or minutes of meeting dated March 1, 1979. The said note of the family arrangement or the

minutes of meeting dated March 1, 1979, do not form part and parcel of the record of the company, namely, MIL or MF. The said family

arrangement of the year 1979 is not made part and parcel of the articles of association of MIL or MF, and in view of the decision of the apex

court in the case of V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, , such family arrangement and/or agreement was not enforceable either

against the companies or its shareholders. In fact, suggestion 5 of note of the family arrangement dated February 23, 1979, or the minutes of the

meeting dated March 1, 1979, inter alia stipulates transfer of shares of one group to another group to the exclusion of other groups. Transfer of

shares to one group alone to the exclusion of other groups is the only mode by which one group can get control of the companies falling to the

share of that group. This would necessarily involve restriction against transfer of shares to another group. Therefore, in the absence of necessary amendment of the articles of association, the note of the family arrangement and/or the minutes of meeting, dated March 1, 1979, were not

enforceable. Fifthly, it emerges from the record of this case that on July 23, 1985, Mihir addressed a letter to Arvind Mafatlal expressing his desire

of segregating his group from the group of Arvind Mafatlal. Yogindra Mafatlal and Rasesh Mafatlal immediately thereafter on July 27, 1985,

addressed a letter to Arvind Mafatlal offering on their behalf and on behalf of respective members of their families and companies to sell balance of

equity shares of MIL held by them at a fair price to Arvind Mafatlal. They called upon Arvind Mafatlal to convey his decision within 48 hours with

further stipulation that the exact price of shares shall be agreed upon mutually within a period of 96 hours after Arvind Mafatlal conveys his

agreement in principle to buy out their stares. It was also stipulated in such letter that they have made such an offer to Arvind Mafatlal after

concurrence of Mihir and his branch is obtained. They also stated that the offer made by Mihir and others is one complete deal. Mihir has also on

that very day, i.e., July 27, 1985, addressed a letter to Arvind Mafatlal, inter alia, stating that he on his behalf and on behalf of his family was

offering to sell all the equity shares of MIL of his group to Arvind Mafatlal within 48 hours provided that Arvind Mafatlal gives his consent and he

also reiterated that the offer made by Yogindra Mafatlal and Rasesh Mafatlal and himself should be treated as one complete deal. Arvind Mafatlal

by his letter dated July 29, 1985, addressed to all the three parties stated that he was agreeable to buy out all the shares but suggested that in the

case of any dispute about the price of shares the same should be referred to arbitration of Mr. N. A. Palkhiwala. Since Yogindra Mafatlal and

Rasesh Mafatlal and Mihir Mafatlal were not ready to the intervention of any arbitrator, the sale of equity shares of MIL to Arvind Mafatlal and his

group did not materialise which led Arvind Mafatlal to file in the High Court Suit No. 1906 of 1985 to enforce the suit arrangement. From the

aforesaid correspondence which was exchanged between the parties it is submitted by Arvind Mafatlal that a binding concluded contract came into

existence for the enforcement of which he instituted Civil Suit No. 1010 of 1987 in the Bombay High Court. It may be stated that according to

MIL and Arvind Mafatlal, the family arrangement of 1979 and/or the minutes of meeting, dated March 1, 1979, were given a go by and a new

concluded contract came into existence as per which Yogindra Mafatlal, Rasesh Mafatlal and Mihir Mafatlal agreed to sell their total equity

shareholding in MIL to Arvind Mafatlal at a fair market price to be fixed. In view of this new contract, it is submitted before this court that the question of enforcement of any family arrangement of 1979 does not arise. Sixthly, the Civil Suit No. 1010 of 1987 instituted by Arvind Mafatlal,

while deciding the notice of motion taken out by Arvind Mafatlal, the learned single judge of the Bombay High Court has noticed that even at that

stage attempts were made to bring about reconciliation amongst the members of the family and that it was stated before the learned single judge by

senior counsel appearing for the parties that the matter was amicably settled between the parties and on such representation the matter was

adjourned, for the purpose of putting consent terms. Justice S. N. Variava has in his order dated June 23, 1987, noticed and observed that on the

next occasion the court was informed that defendant No. 3 (Mihir) has resiled and refused to sign the compromise. He observed that so far as the

court was concerned, there was not the slightest doubt that a senior counsel stated that the matter was settled, but consent was subsequently

withdrawn by Mihir. Based on the aforesaid development it is submitted that as far back as 1987 all attempts were made to settle the family

disputed amicably and practically all disputes were settled and at the last moment Mihir has backed out. It is thereafter that he has filed a counter-

claim in that very suit for enforcement of the family arrangement of 1979, and in such proceedings also no prohibitory order is obtained by him.

Mihir having thus expressly agreed in his correspondence to sell all his equity shareholding of his branch to Arvind Mafatlal at a fair price to be

fixed cannot now resuscitate the old family arrangement of 1979. By his conduct, he has deprived himself of any such relief. Seventhly, it is pointed

out that Mihir has been continuously trying since 1985 to thwart the progress of MIL. He having first agreed and offered to sell the shares of his

group of MIL to Arvind Mafatlal, then backed out. Thereafter, when an attempt was made by the company to increase its authorised share capital

from Rs. 10 crores to Rs. 50 crores, Mihir instituted Civil Suit No. 2614 of 1986 challenging the resolution passed at the seventh-fourth annual

general meeting of the company. In that suit it was his contention that as the articles of association of the company provided for authorised share

capital, a special resolution was necessary to amend the articles of association and mere amendment of the memorandum of association would not

be sufficient as the articles were not amended by special resolution. The said suit was dismissed by the Division Bench of the Bombay High Court

and the SLP filed against such decision was dismissed by the Supreme Court. He, thus, failed in the first attempt and the company succeeded in

increasing its share capital. Secondly, in the year 1987, when the rights issue of 1987 was published it is alleged that Mihir got instituted through his surrogates Civil Suit Nos. 3187 of 1987 and 3181 of 1987 in the City Civil Court at Ahmedabad to which a detailed reference is made at the

relevant place in this judgment. In such suit also a total prohibitory injunction as prayed for was not granted, with the result, that those rights shares

were allotted. The third step taken by Mihir was the institution of Civil Suit No. 5198 of 1992 when the rights issue of 1992 was published by the

company. No prohibitory injunction as prayed for was granted in the said suit also. Thus, after 1985, having backed out from the offer to sell the

shareholding of his branch and himself to Arvind Mafatlal, Mihir has taken various steps to retard the progressive steps taken by the board of

directors of MIL, from time to time, and he has consistently failed.

81. Based on the aforesaid factors taken cumulatively, it is submitted before this court that since 1979 till 1992, Mihir has adopted a recalcitrant or

obstinate attitude. At every stage, when MIL has taken any substantially progressive step, Mihir has come forward with objections and the present

objections filed are to be treated as a step taken solely with a view to retard, and if possible, to defeat the progress of the company by

amalgamation of MF with MIL. The court shall have to keep in mind as to how long a shareholder or the group of shareholders (admittedly in the

minority) could hold a company to ransom or could hold the company from taking a progressive step. It is submitted that the court should be loath

or slow to permit such an attitude on the part of the minority shareholders, more so, when by subsequent conduct in the year 1985 the alleged

family arrangement of 1979 is replaced by a subsequent agreement as could be read from the exchange of correspondence between the parties.

82. It is lastly submitted that neither the family arrangement of 1979 nor the agreement 1985 binds the company (MIL) or its shareholders. In the

matter of voting rights as well as in the matter of statutory rights flowing from the provisions of the Companies Act the entire class of shareholders

of MIL does not owe any fiduciary relationship to the minority shareholders. The entire class of shareholders while voting on the question of

amalgamation of MF with MIL is not required to take into account the hazards of the private arrangement or the family arrangement between the

members of the family. It is submitted that a different principle cannot apply and should not apply in the case of a dissenter like Mihir who has at

every stage by his negative and obstinate approach thwarted or tried to thwart the progress of the company. In this connection the attention of the

court is invited to the decision of the Supreme Court in Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, . In the

said case, the question arose in the context of a winding up petition filed before the High Court for winding up of a private limited company. The question before the court was as to whether the principles applicable in the case of dissolution of a partnership could be invoked in the case of a

company. Factually, it was noticed by the court that there was one group described as the RPJ and PCJ holding 1,875 shares in the company, and

there was another group described as VDJ holding 3,125 shares. The VDJ group took over the possession of the company and its factory and

ousted the other group, and it was in this context that the winding up petition was filed. While examining the question as to whether the principle

applicable in the case of dissolution of partnerships should be applied or not, the apex court made reference to a number of English decisions

which were cited. However, it noted that there is a positive enactment of the Indian Legislature, the proper course is to examine the language of

that statute and to ascertain its proper meaning uninfluenced by any considerations derived from the English law. The court observed as under (at

p. 104 of 46 Comp Cas) :

We will have to adjust, adapt, limit or extend the principles derived from English decisions, entitled as they are to great respect, suiting the

conditions of our society and the country in general, always, however, with one primary consideration in view that the general interests of the

shareholders may not be readily sacrificed at the altar of squabbles of directors of powerful groups for power to manage the company"".

83. From the aforesaid observations it becomes clear that the court has to look at the general interest of the shareholders, and such an interest may

not be readily sacrificed at the altar of a fight between two groups. Though the aforesaid observations were made in the context of a winding up

petition it was submitted before this court that ultimately the court must look at the interest of a large class of shareholders and not only at the

interest of Mihir and his group which is a minority group holding now only 5 per cent. shares. By upholding such objection of Mihir, the court

should not be instrumental in thwarting the progress of the company, submits Mr. Vakil.

84. Lastly, it is submitted that even if the doctrine of lifting the corporate veil is to be applied and the veil is to be lifted, it is not Arvind Mafatlal

who could be seen, but it will be the entire class of shareholders which will be visible. The equity shares held by other shareholders and financial

institutions are more in number than the equity shares held by the ANM group. It is, therefore, not correct to state that in all the subsidiary

companies the towering personality of Arvind Mafatlal is to be seen wearing a different hat. In fact, the just and equitable treatment which was

offered to Mihir in response to his offer to sell away his shares of MIL to Arvind Mafatlal, Mihir has rejected, and as noted by S. N. Variava J. of the Bombay High Court he has backed out. It is not, therefore, a case where the majority group of Arvind Mafatlal can be said to be coercing

Mihir or his group and the proposed scheme of amalgamation cannot be regarded as one whereby the proprietary rights of Mihir and his group are

confiscated or forcibly acquired. It was, therefore, urged before this court that it can not be said that the proposed scheme of amalgamation is with

an ulterior motive or that it lacks bona fides.

85. Consideration of a large number of factors thrown by each side in the scales of the balance so as to find out the bona fides or otherwise of the

proposed scheme of amalgamation is a very difficult task. This court shall have to find out in the process of discussion as to who has taken up an

unreasonable attitude and, secondly, ultimately whose interests will suffer - the interests of the majority, if the scheme cannot be pushed through on

account of intransigence of the minority, or the interests of minority, the majority having interests adverse to those of minority, or whether the

majority has been rigged up so as to tyrannise the minority by sheer strength of numbers. In this delicate process of weighing the diverse factors in

the two scales, the court shall have to keep in mind the fact that the alleged family arrangement of 1979 whereunder MIL (transferee company)

and other companies were to go to group A (MHM group) or the subsequently concluded contract as read from the correspondence which is

exchanged between ANM on the one hand and MHM, YNM and RNM on the other, are transactions to which MIL as an incorporated entity is

not a party. The said transactions are not fully acted upon or implemented. The enforcement of the family arrangement would necessarily involved

inter se transfers of shares by one group to the other so as to put the respective group in charge and total control of the various companies and

trusts falling to this share to the exclusion of the other groups. This would necessarily required change or alteration of the articles of association.

Admittedly, the articles of association of MIL or MF are not changed or altered so as to incorporate any of the stipulations of the family

arrangement of 1979. Admittedly, MIL as a legal person was and is not a party to such a family arrangement. Therefore, in the absence of an

amendment of the articles of association such family arrangement is neither binding nor enforceable both against MIL or MF.

86. The question as to whether the MIL, as a legal person, would be bound by such a private agreement or arrangement between the groups of

shareholders in the absence of necessary amendment of the articles of association now stands answered by the decision of the Supreme Court in

the case of Rangaraj (V. B.) v. Gopalakrishnan (V. B.) [1992] 73 Comp Cas 201: AIR 1992 SC 543, wherein the apex court in the context of transfer of shares consistent with the private agreement of shareholders but contrary to the articles of association took the view that the shares of

incorporated companies are transferable like any other movable properties. The only restriction on the transfer of shares of the company is as laid

down in the articles of association, if any. In the facts of the case before the Supreme Court as discussed hereinbefore it was found that the

agreement between the parties was not acted upon so as to amend the articles of association to bring them in conformity with such agreement. In

the absence of amendment of the articles of association the apex court took the view that the company was not bound by the agreement between

the brothers, and, therefore, the agreement was not enforceable. The terms and conditions of the alleged family arrangement of 1979, more

particularly the suggestion V thereof, were firstly, not acted upon and, secondly, to such a family arrangement the present company - MIL or other

companies - were not parties. Thirdly, the enforcement of the alleged family arrangement would necessarily involved transfer of shares of MIL

from all groups to the MHM group and the transfers of shares in other companies by the MHM group to other groups. Such a family arrangement

and/or the agreement to be binding upon MIL or under companies must be incorporated by necessary amendment of the articles of association of

MIL so as to be binding upon and enforceable against MIL. Admittedly, since 1979 till date at no point of time prior to 1987 even enforcement of

the alleged family arrangement is sought by Mihir nor are the articles of association of MIL amended so as to incorporate the provisions for take

over of all shares in MIL by the MHM group involving transfer of shares in MIL from other groups to the MHM group. The articles of association

also are not amended so as to put restrictions upon the shareholders of other groups from transferring their shareholding to any other party except

the MHM group. To accept the enforceability of the alleged family arrangement of 1979 would necessarily lead to restricting the rights of

shareholders of the MIL of ANM, RNM and YNM groups because under suggestion V of the family arrangement their shareholding in MIL was

to be transferred to the MHM group. This, in substance, would amount to restricting their right without amending the articles of association. In view

of the aforesaid decision of the Supreme Court and in the absence of an amendment of the articles of association of MIL, and in view of the fact

that MIL as a legal person was not a party to such a family arrangement, it shall have to be held that such a family arrangement of 1979 was not

binding on MIL as a legal person. By recording this finding this court is not deciding the question of the enforceability of the family arrangement as against individuals, namely, Arvind Mafatlal, Rasesh Mafatlal and Yogendra Mafatlal. The apex court has even in earlier case of Shanti Prasad Jain

v. Kalinga Tubes Ltd. [1965] 35 Comp Cas 351 reiterated the same proposition of law, and in my opinion, no exception can be made to this well

established position of law. It shall have, therefore, to be held that the family arrangement of 1979, more particularly, suggestion V thereof, was not

binding on MIL and was not enforceable as against MIL in the absence of due amendment of the articles of association of MIL.

87. There is yet another strong reason which would disentitle Mihir to claim enforcement of the alleged family arrangement of 1979. This factor is

one which emerges from subsequent correspondence in the year 1985 which is exchanged between Arvind Mafatlal on the one hand and his two

brothers, namely, Yogendra Mafatlal and Rasesh Mafatlal on the other and correspondence which is exchanged between Arvind Mafatlal and

Mihir Mafatlal. From a series of correspondence exchanged between these two parties in the year 1985, an attempt is made in pending

proceedings before the Bombay high court to read a concluded contract between the parties to which reference is required to be made. Mihir has

in his objection referred to the suit filed by Arvind Mafatlal being Suit No. 1906 of 1985 in the High Court of Bombay, against his two brothers as

well as Mihir. He has also referred to the exchange of subsequent correspondence between Arvind Mafatlal, Yogendra Mafatlal, Rasesh Mafatlal

and himself (Mihir) in the year 1985-86. It is thereafter that Arvind Mafatlal filed O.S. No. 1010 of 1987 in the High Court of Bombay against his

two brothers and Mihir and prayed for a declaration that there existed a valid and subsisting binding or concluded agreement between Arvind

Mafatlal on the one hand and Yogendra Mafatlal, Rasesh Mafatlal and Mihir Mafatlal and members of their respective families on the other to sell

off their shareholding in MIL to Arvind Mafatlal and his branch. It is in this suit that a reference is made to the correspondence that was exchanged

between the parties, more particularly, between Arvind Mafatlal and his two brothers and Arvind Mafatlal and Mihir. The material portion of the

text of such correspondence is reproduced by the learned single judge of the Bombay High Court in his order below Notice of Motion, dated June

23, 1987. I have already made a detailed reference to the gist of the text of the relevant correspondence hereinabove in para 87.

88. It may also be noted that S. N. Variava J. granted an injunction as prayed for by Arvind Mafatlal in the aforesaid suit but the same was

vacated in the month of July, 1985, by the Division Bench of the Bombay High Court. Even from the text of the judgment of the Division Bench of the Bombay High Court it becomes clear that the case of Arvind Mafatlal that there existed and subsisted a binding concluded contract requiring

Mihir Mafatlal, Rasesh Mafatlal and Yogendra Mafatlal to sell their shareholding in MIL to Arvind Mafatlal is prima facie accepted, though the

Division Bench held that such a contract would not bind the family trust or public trust. It is not necessary for this court to go into further details of

these orders, but it can be said that the said civil suit is pending and yet to be tried and decided by the Bombay High Court. It must also be stated

that S. N. Variava J. has noted in the order that it was reported to him that there was overall settlement of the dispute, and ultimately, the third

defendant has resiled and refused to sign the terms of the settlement. From the text of the letters exchanged between the parties, and more

particularly, the text of letters written by Mihir Mafatlal to Arvind Mafatlal it can be gathered that he agreed or was ready and willing to sell the

shareholding in MIL of his branch to Arvind Mafatlal at a price to be fixed by the arbitrator. This subsequent development would militate against

the claim of enforcement of the 1979 family arrangement. In my opinion, in appropriate proceedings between the parties which is pending before

the Bombay High Court, the court will decide and this court need not express any opinion on the question as to whether the subsequent contract

sought to be read from the exchange of correspondence would substitute and/or efface the alleged family arrangement of 1979 or as to whether

the family arrangement of 1979 was still enforceable so as to ultimately grant the relief prayed for by Mihir in the counter-claim filed by him in the

very suit. This is a moot question pending and sub judice before the Bombay High Court but it can be said that at the point of time when Mihir

addressed the communication to Arvind Mafatlal calling upon him to purchase his shareholding in MIL at a fair price he was then ready and willing

to give a go by to his rights, if there were any, under the family arrangement of 1979. This factor strongly weighs against Mihir when he is claiming

enforcement of the alleged family arrangement of 1979. It can be stated that even at that stage in 1985-86 though this was not a majority

shareholding, it was a substantial shareholding and even then he has offered (agreed) to sell his shareholding to Arvind Mafatlal. Prior to instituting

his counter-claim in the very suit except his letter dated July 23, 1985, Mihir has never sought enforcement of the family arrangement and in my

opinion by subsequent correspondence he has given a go by to his rights flowing from the alleged family arrangement. On the facts, I am, therefore,

not inclined to hold that the proposed scheme of amalgamation would defeat the rights of Mihir and his group flowing from the alleged family arrangement of 1979. The subsequent development and offer of Mihir to sell his shareholding to Arvind Mafatlal would go to establish that he was

reconciled to a position of encashing his shareholding in MIL provided he was offered his price.

89. Factually also the family arrangement at annexure-E to his objection sets out six possible solutions about division of properties. It is in the form

of a note prepared by Mr. C. C. Chokshi. Even if it is accepted that he acted as mediator or a family friend to suggest ways and means of fair

division of 12 companies, their assets and management amongst four groups, he merely prepared a formal draft indicating six possible ways in

which fair division could be effected. This document cannot be regarded as duly executed and agreed document of the family arrangement. On the

other hand, if one refers to annexure-F which is the note of the minutes of the meeting, dated March 1, 1979, it becomes clear that it was a

meeting of Arvind Mafatlal, Yogendra Mafatlal and Rasesh Mafatlal. At such a meeting, it was decided that suggestion 5 may be implemented as

agreed to between the brothers. It also becomes clear that the brothers inter se agreed not to enter into a family arrangement or a formal

agreement as it was advisable to keep the said note as an oral understanding between them. Lastly, though Mihir and two sons of Arvind Mafatlal

were present at such meeting, the agreement prima facie appears to be one amongst three brothers only. Since this question is sub justice before

the Bombay High Court in the proceedings referred to hereinabove, and in view of the defence of MIL that in fact the arrangement was between

three brothers only to which Mihir was not a party, it is not possible for this court to record a finding that the notes of minutes at annexure-F

constitute an enforceable arrangement so as to enable Mihir to enforce the said arrangement.

90. In view of the aforesaid discussion, both on the facts as well as on law, it is not possible for this court to hold that the proposed scheme of

amalgamation is an attempt to defeat or frustrate the counter-claim filed by Mihir in C.S. No. 1010 of 1987 or to deny the rights allegedly flowing

in favour of the MHM group from the family arrangement of 1979. In the absence of subsequent conduct of Mihir and his addressing

correspondence to Arvind Mafatlal in the year 1985 and his agreeing to dispose of shareholding of his group in favour of Arvind Mafatlal, the

matter would have assumed a different complexion. As against his claim to enforcement of the family arrangement there is the substantial claim of

Arvind Mafatlal to enforce the concluded contract alleged to have come into existence in the year 1985 by way of correspondence between the

parties. That apart, these are private arrangements between the parties to which the legal person - MIL is not a party. Admittedly, the articles of association of MIL are not amended so as to make the family arrangement of 1979 or the subsequent concluded of 1985 part and parcel of the

articles of association of MIL. Consistent with the principle of law enunciated by the Supreme Court it is not possible for this court to agree with

Mihir and to accept his submission that the concealed object behind the proposed scheme of amalgamation is to defeat the family arrangement of

1979 or to non-suit him in his counter-claim. It would not be out of place to mention at this stage that neither in the suit filed by Arvind Mafatlal nor

in the counter-claim filed by Mihir is MIL a party. To what extent an enforceable order against MIL could be passed in such civil proceedings

would be anybody''s guess and the matter being sub judice before the Bombay High Court this court is of the opinion that no further dilation on the

subject is necessary.

91. Before this court parts with the discussion on this aspect of the issue it would be appropriate to note that in the course of submissions the

petitioner-company has offered to buy over the shareholding in MIL of the MHM group at the market price or at any price which the court may

suggest. The suggestion was squarely put up to Mr. M. J. Thakor, learned counsel for Mihir and he has submitted before this court that the

suggestion was not acceptable and Mihir was not ready and willing to dispose of his shareholding or of the MHM group in MIL to the ANM

group. He also submitted that Miheer was ready and willing to buy over the total shareholding of the ANM group in MIL. In view of this counter-

offer the allegations of financial crunch or disability of Miheer to offer for the rights shares in 1987 and 1992 would be immediately proved hollow

and factually not acceptable. This is noted because the ulterior motive is attributed to Arvind Mafatlal and the proposed scheme is challenged on

the ground that it lacks any bona fides. From a party which acts in bad faith with a desire to smother the minority group, such an offer would not

ordinarily emanate. Nothing more is required to be observed.

92. The aforesaid discussion on the family arrangement of 1979 and the subsequent contract sought to be read in correspondence which is

exchanged between Arvind Mafatlal, his two brothers and Mihir Mafatlal, and the findings recorded hereinabove would answer steps I, III and IV

allegedly taken by Arvind Mafatlal towards achieving total ouster or exclusion of the MHM group. Mihir has referred to seven steps and attributed

the same to Arvind Mafatlal. Step I is referable to omission on the part of Arvind Mafatlal in forming the third subsidiary company as suggested in

suggestion 5 of the note of the minutes dated March 1, 1979. The formation of the two subsidiary companies and non-formation of the third company is with a view to gaining greater control over MIL, submits Mihir. The third step attributed to Arvind Mafatlal is that in contravention of right of pre-emption in favour of MHM group to purchase all shares of the MIL, Padmashree Synthetics Pvt. Ltd. transferred its shares in favour of PIL and some shares in favour of Surabhi Investments Pvt. Ltd. Similarly, the fourth step attributed to Arvind Mafatlal is that he purchased 3 per cent. shares in MIL from Yogindra Mafatlal in 1987 contrary to the stipulation in the family arrangement. In my opinion, the aforesaid three steps are based on the assumption that there existed on enforceable family arrangement under which Miheer and his MHM group was to get total control of companies falling in group A including MIL. Firstly, the note prepared by C. C. Chokshi at annexure E contains six possible modes of division of companies and assets. By no stretch of imagination can it be described as the concluded or the agreed family arrangement enforceable at the instance of any party. Secondly, the petitioner company, i.e., MIL, is not a party to such a family arrangement as a legal person nor are its shareholders in any way bound by stipulations in the family arrangement. Thirdly, in view of the decision of the Supreme Court in the case of Shanti Prasad Jain v. Kalinga Tubes Ltd. [1965] 35 Comp Cas 351 and Rangaraj (V. B.) v. Gopalakrishnan (V. B.) [1992] 73 Comp Cas 201 the family arrangement of 1979 and/or the subsequent concluded contract pleaded by Arvind Mafatlal, not being incorporated in the articles of association of MIL, are not binding on the petitioner-company or its shareholders so as to restrict the right of shareholders to sell or transfer their shares in favour of the MHM group only. It may be noted that, under the family arrangement of 1979, Mihir is claiming the right that the petitioner-company was to fall to his group and the other groups were to transfer their shareholding in MIL to the MHM group. This, in substance, would amount to restricting the right of other groups and their shareholders and in the absence of the company being a party to such arrangement and in the absence of any amendment of the articles of association such arrangement cannot be enforced. Legally, therefore, the aforesaid three steps cannot be attributed as steps taken by Arvind Mafatlal to effect ouster or exclusion of Mihir or his group. In the affidavit-in-rejoinder filed by the petitioner-company it is pointed out that the allegations made against Arvind Mafatlal have nothing to do with the petitioner-company or the scheme of amalgamation. It is pointed out that the personal disputes between Mihir and Arvind Mafatlal or disputes arising from the enforcement of the family arrangement and/or subsequent agreements are not matters of concern for the petitioner-company. In my opinion, the third and the fourth steps are only flowing from enforceability of the family arrangement. As noted hereinabove, there is no restriction or prohibition against

transfer of shares in the articles of association. Transfer of shares in MIL, therefore, cannot be said to be illegal. Mihir has at no point of time prior

to 1987 asserted his right or obtained any prohibition order against transfer of shares in MIL in favour of any party except his group. In fact, these

steps do not go to establish any mala fides on the part of Arvind Mafatlal.

93. This reference is obviously based on the statement of law as propounded by the apex court in the aforesaid case Rangaraj (V. B.) v.

Gopalakrishnan (V. B.) [1992] 73 Comp Cas 201. The reason as to why the third subsidiary company on the lines of Mahamaya Investments Ltd.

and Sandip Holdings Ltd. was not floated is not specifically forthcoming in the affidavit-in-rejoinder and from such omission only it would be

hazardous to assume or infer that the intention was a well-conceived plan on the part of Arvind Mafatlal to take over the control of MIL. In my

opinion, when serious allegations are made against the chairman and the managing director of the company attributing motives to him, a reply

affidavit by him would have enabled the court in clearing the doubts created about his intentions. In fact, to this the answer is to be found in the

pleading of Mihir himself that he agreed under the advice of elderly persons. Non-formation of a third subsidiary company at the stage perhaps

could have been explained. Even otherwise, why the third subsidiary company was not formed could have been stated before this court by Arvind

Mafatlal himself, but that omission on his part to controvert the allegations made specifically against him should not result in necessary inference of

mala fides. In my opinion, the first, third and fourth steps do not go to establish any mala fides on the part of Arvind Mafatlal. The mala fides of an

individual even otherwise would not assume which importance while deciding the question of granting sanction to a scheme of amalgamation which

is supported by an overwhelming majority of members who were present and voting.

94. As regards the fifth, sixth and seventh steps referable to the rights issue of 1987, it is the case of Mihir that the sole intention of Arvind Mafatlal

was to gain greater control over MIL by increasing the shareholding of the ANM group. By the sixth step he has tried to demonstrate before the

court that Arvind Mafatlal, in fact, not only strengthened the position of the ANM group but prevented the MHM group from subscribing to the

rights issue of 1987 by obtaining a prohibitory injunction in C.S. No. 1010 of 1987 from the Bombay High Court. He has pointed out that such an

injunction operated throughout from the commencement of the rights issue till the date of its closure with the result that Mihir and his MHM group were disabled from raising the necessary finance for applying for the rights issue of 1987. The order of injunction granted by the learned single

judge of the Bombay High Court undoubtedly rendered Mihir and his MHM group in a helpless situation, inasmuch as they were restrained from

transferring, mortgaging or pledging any of the shares held by them in MIL. He was also restrained from renouncing rights in favour of any party

other than Arvind Mafatlal. Such an injunction operated beyond June 27, 1987, that being the date of closure of the rights issue. It is his case that

he was thus put in a helpless situation so as not to permit the members of his group to apply for the rights issue of 1987 and the resultant effect was

increase in the shareholding of the ANM group from 20 per cent. to 35 per cent. These two steps, if taken together, demonstrate the design of

Arvind Mafatlal to gain greater control and to exclude the MHM group, submits Mr. Thakore, the learned advocate for the objector. Mr. Thakore

has further pointed out that the rights issue of 1987 floated by MIL coupled with the prohibitory order of injunction obtained by Arvind Mafatlal

against Miheer and his group would be sufficient to establish the ulterior motive or lack of bona fides on the part of MIL also because of the

following factors :

(i) The rights issue did not specify certain details in the letter of offer which was contrary to the guidelines issued by the Controller of Capital

Issues. Although the breach of the guidelines was condoned by the Controller of Capital Issues, the effect of non-disclosure of objectives is

indicative of there being concealed objects other than the ones for which the issue was floated.

(ii) The price of a share in MIL at the relevant time was in the vicinity of Rs. 300 and to offer a share of Rs. 100 at a premium of Rs. 200 would

hardly make any difference for the shareholder to go in for the rights share as at the very price the share was available in the market. This high

premium was with the object of dissuading the shareholders from subscribing to the rights shares which, according to Mr. Thakore, the ANM

group could corner which would result in strengthening its shareholding in MIL.

(iii) The rights issue did not achieve its desired objective but it was undersubscribed and the major subscription was from the ANM group and

other financial institutions.

(iv) Prior to the floating of the rights issue, Arvind Mafatlal instituted C.S. No. 1010 of 1987 and obtained a prohibitory injunction against Mihir

and the MHM group from mortgaging their shares in MIL, in any manner transferring or pledging their shares and from renouncing their rights in

favour of anyone except Arvind Mafatlal. Such a prohibitory injunction continued till the date of closure which incapacitated Mihir and his group from subscribing to the rights issue and the resultant effect was to increase the shareholding of the ANM group and reduce the MHM group to a

helpless situation. Contrary to the injunction issued by the City Civil Court at Ahmedabad even before the closure of the rights offer on July 3,

1987, and even before it was known to MIL whether the rights were going to be fully subscribed or not, NOCIL, a company allegedly controlled

by the ANM group applied for allotment of 1,50,000 shares and despite the prohibitory injunction against allotment from the unsubscribed portion

of capital, shares were allotted to NOCIL and similarly in breach of the order of the civil court shares were also allotted to Sushrupada.

95. To the aforesaid steps in connection with the rights issue of 1987 attributed to Arvind Mafatlal and MIL, the stand of the company is that by

the said rights issue of 8,10,000 equity shares of Rs. 100 each at a premium of Rs. 200 per share was offered to the shareholders on a rights basis

and 40,500 shares were offered to the employees of MIL at a premium of Rs. 200 each. MIL intended to raise Rs. 25.50 crores for the purpose

of its business. The Controller of Capital Issues by his letter dated February 27, 1987, accorded his approval to the rights issue. The rights issue

opened on May 4, 1987, and the last date for submission of application was July 4, 1987. It is the case of the company that during this period the

market price of MIL''s share was not below Rs. 300 each nor was it available at or around Rs. 290. It is further pointed out that the decision was

taken by the board of directors which included outside directors who were eminent persons including two nominees of financial institutions. The

financial institutions supported the rights issue.

96. It is further pointed out that C.S. No. 3181 of 1987 was filed by Kaushik N. Parekh and D. D. Desai while C.S. No. 3182 of 1987 was filed

by Jatin C. Shah in the City Civil Court at Ahmedabad against the rights issue of 1987. It is alleged that the plaintiffs in the said suit were the

employees/ex-employees of a company controlled by Mihir''s maternal uncle, Laxmikant Bhagubhai, and that the said suits were filed at the

instance of Mihir. On the notice of motion filed by the plaintiffs, while rejecting the same, the learned City Civil Judge granted a partial prohibitory

injunction on September 4, 1987.

97. In view of the aforesaid defence of the company the fact that the rights issue of 1987 was hopelessly undersubscribed cannot be denied by the

company or any of its officer. It is required to be noted that the rights issue opened on May 4, 1987, while Arvind Mafatlal instituted the suit, being

C.S. No. 1010 of 1987 prior thereto and obtained a temporary injunction. It is not clear as to whether any ad interim injunction was granted before judgment and order passed on notice of motion dated June 23, 1987, was pronounced. However, by such judgment the learned single

judge of the Bombay High Court restrained Mihir and his group from, in any manner, directly or indirectly disposing of, transferring, alienating the

shares of MIL held by the other persons or their companies or their trusts. They were also restrained from renouncing the rights shares in favour of

any party excepting Arvind Mafatlal. These actions taken by Arvind Mafatlal have incapacitated Mihir and his group from accepting the offer of the

rights shares by subscribing for such rights offer. Even if it is accepted that the decision of the rights issue of 1987 was taken by the board of

directors and was the decision of the company, and even if the court may not pronounce upon the wisdom or otherwise of the decision of the

company, the reason why Arvind Mafatlal was prompted to file the said suit so as to totally incapacitate Mihir and the MHM group from

subscribing to the rights shares is not forthcoming. This conduct of Arvind Mafatlal would, undoubtedly, create a doubt in the mind of a right

minded person. By such action one group has undoubtedly achieved the purpose of enhancing its shareholding in MIL while another group is

reduced to a helpless minority. This step of institution of the suit and of obtaining the injunction may, in the ultimate analysis, create doubts about

the intention of Arvind Mafatlal. However, his thinking or intention may not assume any importance when the action of the company, i.e., MIL, is

subject to judicial scrutiny before this court. This fact, if taken in isolation, may create a shadow of doubt about the intention of Arvind Mafatlal but

pales into insignificance if the subsequent fact of the rights issue of 1992 are kept in mind. The very objector, i.e., Mihir, has challenged such rights

issue by instituting a civil suit in the City Civil Court at Ahmedabad. Admittedly, at any state, on the rights issue of 1992 no order of prohibitory

injunction was granted. Admittedly, Mihir and his group renounced their rights shares of 1992 and according to the affidavit-in-rejoinder he and his

group have made a huge profit of Rs. 2 crores by such renunciation at premium. If one was very conscious of maintaining one''s shareholding in a

company which has allegedly fallen to his share in the family arrangement, this court fails to understand as to why he did not avail of the offer of the

rights issue of 1992, and as to why he renounced the shares of his group so as to make a huge profit therefrom. By subscribing to the rights issue

of 1992 he and his group could have definitely strengthened their position so as not to be reduced to the position of 5 per cent. shareholding only.

While considering this overall effect of this self-defeating attitude adopted by Mihir at the time of the rights issue of 1992 the court shall have to look at the conduct of the ANM group at the time of the rights issue of 1987. In my opinion, both the groups are not above board. Each is trying

to outsmart the other. It is, in this type of situation, that the court is reminded of its function as pointed out by N. M. Miabhoy J. in In Re: Sidhpur

Mills Co. Ltd., . I have also focussed my attention to this very point at the commencement of this discussion. The court must apply its mind to

considering whether it is in the interest of the company as a whole and of the class of persons for whom the majority acts and whether the scheme

is such that it must be pushed through. Keeping the aforesaid consideration in mind, in my opinion, much weight cannot be attached to the sixth

step attributed to Arvind Mafatlal by Mihir. Such an action on the part of Arvind Mafatlal in instituting a suit and obtaining an injunction not only

deserves denunciation though in a matter of a private dispute between the two groups he can always contend that he was simply enforcing his rights

flowing from the allegedly concluded contract as read from the correspondence exchange between the parties in 1985. However, the fact that he

was in elderly person in whom Mihir and his family members reposed confidence and trust is of equal importance. The factors and considerations

are so equally poised in this case between the two groups and as observed by me hereinabove it is a delicate function of weighing the adverse

factors in two scales. One additional factor, to which Mihir has adverted being eight enumerated hereabove, might have contributed to the rift

between family being widened. However, when the proposed scheme of amalgamation is, as found by this court, likely to achieve all or any of the

stated objectives, it would be wrong to hold that the scheme is vitiated by lack of good faith or bona fides. The sixth step attributed to Arvind

Mafatlal has, undoubtedly, resulted in the gaining of greater control by his group over the MHM group, but at the same time, the action of Mihir in

renouncing the rights shares in 1992 would establish that on his part there was no desire to hold and manage MIL or to get control over MIL. In

fact, the offer made by him in the year 1985 would also support the conclusion that he never wanted to gain control over MIL or to get total

control over the companies of group A of suggestion 5. Had he been consistent in his demand he would not have in the year 1985 offered to sell

away his shares in MIL to Arvind Mafatlal within 48 hours at a fair price to be fixed. His subsequent conduct, and more particularly, the conduct at

the time of the rights issue of 1992 would put this court on guard and would require this court to put a question to itself as to whether the majority

or the ANM group in this case can be said to have acted with the sole desire of tyrannising the minority or smothering the minority to a helpless condition. It is also required to be noted that though the ANM group in MIL has substantial shareholding it cannot be said to possess a majority

shareholding. Even in the voting pattern the financial institutions have independently voted in favour of the scheme. It is, therefore, not a case where

the ANM group is in a commanding position so as to suppress the dissenting voice of the minority. It is in the light of such factors that this court

shall have to decide the allegation of scheme being influenced by ulterior motive or the scheme lacking bona fides.

98. From the aforesaid discussion, and more particularly numerous steps attributed by Miheer to Arvind Mafatlal, and various factors put forth in

defence by MIL - the petitioner-company, the court is called upon to decide as to firstly, whether various steps taken by Arvind Mafatlal can be

said to be the steps of the company. Secondly, as to whether from various decisions taken by the petitioner-company, from time to time,

commencing from 1987, it could be held that Arvind Mafatlal was the guiding force and that he was the alter ego of the petitioner-company.

Thirdly, even if a distinction is made between the acts taken or resolutions passed by the incorporated body of the company and its director or

chairman, is it possible for this court to lift or tear the corporate veil, and even if such an exercise is undertaken, is it possible to reach a conclusion

that it was Arvind Mafatlal who was the main guiding spirit behind the various steps taken by the company or that all the steps were taken at his

instance and at his command. Mr. M. J. Thakore, the learned advocate for the objector has in the course of his submission by reference to various

steps enumerated hereabove, submitted before this court that step after step taken by the company since 1987 was at the instance and command

of Arvind Mafatlal and was directed towards gaining greater control over MIL and towards reducing the control of Miheer or the MHM group.

He has further submitted that, in fact, MIL is utilised by Arvind Mafatlal as a tool to achieve his goal and that there is no difference between MIL

and Arvind Mafatlal. In his words they are there mere alter ego of each other and it is in such circumstances that the court should lift the veil. He

has in this connection invited that attention of the court to the decision of the Court of Appeal in Wallersteiner v. Moir : Moir v. Wallersteiner

[1974] 3 All ER 217. Before the Court of Appeal, a question arose in the context if an action for libel instituted by Dr. Wallersteiner. One Mr.

Moir who was working in a stockbrokers" office challenged Dr. Wallersteiner, a man of influence in the city of London and issued a circular in

March, 1967, criticising Dr. Wallersteiner up hill and down dale. He sent the said circular, to the shareholders of Hartley Baird Ltd., which was a

public limited company. Dr. Wallersteiner gained control over it in 1962. He was in charge of 80 per cent. of the shares. The remaining 20 per cent. of the shares were held by members of the public. Mr. Moir was one of them. In the circular, Mr. Moir accused Dr. Wallersteiner of fraud,

Misfeasance and breach of trust. Thereupon, Dr. Wallersteiner issued a writ of libel claiming damages. He also applied for injunction. Mr. Moir put

up a spirited defence. He stated that what he has written in the circular he believed to be true. Dr. Wallersteiner launched a vigorous counter-

attack stating that Mr. Moir was actuated by express malice. He made a business out of this sort of thing. He got a few shares in a public company

and then harassed those in control of it. The battle lasted long. Mr. Moir got the support of other minority shareholders. He said that they had been

unjustly oppressed. He even brought the company, Hartley Baird, into the battle. On its behalf he made a counter-claim. He alleged that Dr.

Wallersteiner had acquired an 80 per cent. Majority by a cheat. He had not paid a penny in hard cash for the shares. Having got control, he

denuded the company of its resources. Dr. Wallersteiner did not meet these charges head on. He did not put up any defence for a period of twelve

months. Mr. Moir applied to dismiss Dr. Wallersteiner''s claim for libel. He also applied for judgment against Dr. Wallersteiner on the counter-

claim. It was in the contest of such a suit that the trial court convicted Dr. Wallersteiner outright. The trial court struck down the claim for libel and

made a declaration that Wallersteiner was guilty of fraud, misfeasance and breach of trust. The trial court ordered Dr. Wallersteiner to pay a sum

of Pounds 5,00,000 or more. Against such decision Dr. Wallersteiner appealed to the Court of Appeal. While dealing with a number of other

questions which were agitated, Lord Denning M. R. was also invited to decide the question of lifting of the corporate veil. It was argued that Dr.

Wallersteiner used many companies, trusts or other legal entities as if they belonged to him. He was in control of them inasmuch as any ""one-man

company"" is under the control of one who owns all the shares and is the chairman and the managing director. It was alleged that he made contracts

of enormous magnitude on their behalf on a sheet of note paper without reference to anyone else. Reference was also made to a number of powers

exercised by him so as to impress upon the court that he was the driving force. It was urged that various companies, trusts or legal entities were a

facade and each in substance was the alter ego of Dr. Wallersteiner. Each was in reality Dr. Wallersteiner wearing another hat. The court was,

thereupon, called upon to lift the veil and to find out as to whether actually the companies, trusts and legal entities were in any way different from

Dr. Wallersteiner. It was in this context that Lord Denning M. R. recorded a finding that the various companies were just puppets of Dr.

Wallersteiner, he controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them.

Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. It was after recording such a

finding that the court felt that the corporate veil was required to be lifted and if lifted, it was the action of one man alone and that Dr. Wallersteiner

was the moving spirit.

99. On the analogy of the fact situation which obtained in the aforesaid case, Mr. M. J. Thakore, the learned advocate for Miheer, submitted

before this court that the position of Arvind Mafatlal in the entire Mafatlal empire is that of Dr. Wallersteiner. He submitted that in MIL and MF as

well as in various other companies, trust and legal entities it was Arvind Mafatlal and his towering personality which was the moving spirit if the

corporate veil is lifted. He, therefore, submitted that though technically various steps are taken by MIL of MF or other subsidiary companies, in

reality and in substance, steps are taken by Arvind Mafatlal and the sole object of these steps was to gain greater control over and to slowly and

gradually elbow out the MHM group.

100. Mr. M. J. Thakore, the learned advocate for Miheer, also heavily relied on the decision of D. A. Desai J. (as His Lordship then was) in

Wood Polymer Ltd. and Bengal Hotels Pvt. Ltd., In re [1977] 47 Comp Cas 597 (Guj). Before the learned single judge the question arose in the

petition for obtaining sanction of the court to a scheme of amalgamation. It was contended before the court that the transferor company, i.e.,

Bengal Hotels Pvt. Ltd., was nothing but a mere facade of a corporate personality. It was pointed out that the only purpose discernible behind the

amalgamation was to defeat the payment of tax by creating a paper company and transferring an asset to such company which can without

consequence be amalgamated with another company to whom the capital asset was to be transferred so that on amalgamation it many pass on to

the amalgamating company. It was in this context that the court was invited to lift the veil of the transferor company to see the realities behind the

facade of corporate personality. After making reference to the observation of Lord Denning M. R. in Wallersteiner''s case [1974] 3 All ER 217

(CA) D. A. Desai J. observed that the incorporated company is legal entity having a legal personality and is described as an artificial person on

contrast with a human being, a natural person. By fiction of law it has been attributed aspects of a human being, it can sue and be sued, it has

perpetual succession, it can own and dispose of property and so on. But over a period the abuses of this corporate personality have become apparent. The courts have lifted the veil in order to see that corporate personality is not blatantly used as a cloak for fraud or improper conduct.

Ordinarily, corporate personality is to be respected, but when a benefit is misused, the court is not powerless and it can lift the veil of a corporate

personality to see the realities behind the veil because in so doing, the court subserves the important public interest, namely, to arrest misuse or

abuse of benefit conferred by law.

101. Keeping the aforesaid observations of courts of law in mind, it was submitted before this court that this is a fit case where the court must lift

the veil of corporate personality, namely, MIL, and must try to find out whether Arvind Mafatlal is the alter ego of Mil, or as to whether MIL

simply dances to the tune of Arvind Mafatlal.

102. In my opinion, the shareholding pattern of MIL and the total shareholding of the Arvind Mafatlal group on MIL prima facie, would not justify

the conclusion the MIL dances to the tune of Arvind Mafatlal. The shareholding of Arvind Mafatlal or the ANM group would work out to 30.42

per cent. approximately. As against the aforesaid shareholding the shareholding of the financial institutions in MIL would work out to 30.03 per

cent. and that of the MHM group works out to 5.21 per cent., while that of other shareholders would work out to 34.34 per cent. Hence, it

cannot be said that the leadership of the company is vested in the hands of a few businessmen occupying a strategic position of great power. It is

not a case where business leaders often promote amalgamation which may appear at first sight to be successful, prudent or even beneficial to the

shareholders, but may in fact conceal the clever design of those whose personal interest may be adverse to those innocent investors. The financial

institutions and statutory corporations hold a substantial percentage of shares in MIL. this class of share holders being so well informed, scrutinise

the scheme with an expert eye on its presumption to act bona fide and for the benefit of the company as a whole. The possibility cannot be ruled

out that they might be in a position to gain more in the scheme by reason of interest in some other capacity but, at the same time, it shall have to be

kept in mind that, in the facts and circumstances of the case, the ANM group could not be said to be in a controlling position at any point of time

as the financial interest or shareholding of the financial institutions though not higher can be said to be almost equal. It is also required to be kept in

mind that every time various steps are taken by MIL commencing from 1985, such steps are the subject-matter of challenge in a court of law either

by Miheer or by some persons allegedly acting at his instance. It is also required to be noted that excepting the partial injunction granted by the

City Civil court at Ahmedabad in two suits instituted by three shareholders in 1987 at no point of time any prohibitory order is granted by the

courts. Simply because steps and/or decisions are subject to challenge at various stages it cannot be presumed that the actions or decisions taken

by the company are bad in law or are not in the interest of the company, as a whole. In fact, despite various challenges to various steps taken by

the company, the rights issue of 1992 was fully subscribed or to an extent oversuscribed. The capital of the company has thus tremendously

increased. From the discussion on objection I, it would be at once clear that the company is likely to achieve the objectives set out in the

explanatory statement and that the scheme of amalgamation is likely to benefit the company as well as the entire class of shareholders. It is further

reinforced by the fact that more than the requisite majority of shareholders has voted in favour of the scheme. Objection, if any has come from

Miheer and the members of his family or the MHM group. Since 1985 the group has taken up the attitude of dissenter and has dissented and/or

objected to each and every step that the company has taken. It is in this contest that the court shall have to see as to whether the ANM group and

its holding in MIL can be said to be so numerous, huge or large so as to outwit all other shareholders to non-entity. From the figures hereinabove it

becomes clear that the shareholding of that group was at no point of time so commanding that it can be said to be in a position to coerce the rest of

the shareholders. In my opinion, therefore, it is not a case where the doctrine of lifting the veil of corporate personality can be applied here when

more than the requisite statutory majority has voted in favour of the scheme. It is required to be kept in mind that his voting patter would also

include the voting of financial institutions and such institutions are ordinarily not expected to vote blindly at the instance of a group or individual

person. Taking all these factors into consideration, it is not possible to agree with Mr. Thakore, the learned advocate for Mihir, that in fact Arvind

Mafatlal was a driving force or moving spirit in all the steps taken by the company from 1985 onwards. It is also not possible for this court to

agree, therefore, to lift the veil of corporate personality so as to see only the towering personality of Arvind Mafatlal behind the corporate veil of

MIL. In my opinion, such an exercise is not called for for the reasons given hereinabove, more so, when the shareholding pattern shows that

substantial shareholding is also of financial institutions. It is not possible to agree with Mr. M. J. Thakore that even the financial institutions having

such a substantial shareholding have acted at the instance of or at the command of Arvind Mafatlal and have surrendered their financial wisdom to the whims and caprices of one individual. Therefore, it is not a case where the court would prefer to undertake the exercise of lifting the veil of

corporate personality especially when the share holding pattern at the outset negates the charge of one man holding the company at his command.

Secondly, in view of the shareholding of the financial institutions also such a consequence is not justified. Thirdly, the substantial shareholding of the

public to the extent of 34.34 per cent. would also go to show that the public at large was also holding a substantial number of shares and that

13.07 per cent. thereof voted in favour of the scheme.

103. In view of the aforesaid discussion the objection of Miheer that the proposed scheme of amalgamation is with some ulterior motive or

purpose, namely, that of gaining greater control over MIL by the ANM group and to defeat the cross-objection filed by Miheer in C.S. No. 1010

of 1987 in High Court of Bombay has no substance and shall have to be rejected. While recording this finding in favour of MIL, I cannot resist

observing that the conduct of the ANM group and/or Arvind Mafatlal on two counts, i.e., (i) institution of the civil suit in the Bombay High Court

and obtaining an injunction against Miheer and the MHM group so as to practically make it impossible for him to subscribe to the rights issue of

1987, and (ii) allotting shares to NOCIL and Sushrapada from the unsubscribed portion of the rights issue of 1987 in contravention of the

prohibitory order issued by the City Civil Court, Ahmedabad, deserves to be deprecated and denounced. More annoying is the further stand

before this court and that is the contention before this court that even if the breach of order is committed the allotment in favour of NOCIL and

Sushrapada cannot be voided. I have at appropriate stage expressed my anguish over such conduct. However, from such conduct it is not possible

for this court to hold that the proposed scheme of amalgamation lacks bona fides or is actuated by an ulterior motive. In the suit instituted by

Arvind Mafatlal, being C.S. No. 1010 of 1987, Miheer has undoubtedly filed a counter-claim for specific performance of suggestion 5 of the

family arrangement of 1979. Before the Bombay High Court there are two rival versions and two rival arguments. The MHM group is claiming

enforcement of the family arrangement of 1979 and as against it the ANM group or Arvind Mafatlal is seeing enforcement of the subsequently

concluded contract from the correspondence of 1985. It would not be out of place to mention that MIL as a company is not a party to this

arrangement or agreement. MIL as a company is also not a party to the suit or counter-claim. It is also not disputed before this court that neither

the family arrangement not the agreement of 1985 is made part and parcel of the articles of association by duly amending the articles of association.

Unless the articles of association are amended MIL is not bound by such agreement or arrangement. In view of the aforesaid the pendency of such

proceedings cannot be the sole ground for withholding sanction to a scheme of amalgamation till such proceedings are decided. The court shall also

have to keep in mind the fact that despite the family arrangement of 1979 Miheer has by his own letter offered to sell off his entire share holding in

MIL to Arvind Mafatlal in 1985. The subsequent conduct of Miheer will be examined by the court which is seized of such proceedings. However,

in my opinion, in the light of that conduct, it would not be just and proper for this court to withhold its sanction to the scheme of amalgamation by

attributing an ulterior motive to the company, namely, that the company wanted to defeat such proceedings initiated by Miheer in the Bombay High

Court. On this count, therefore, I overrule the second objection also.

Objection No. 3 :

104. It is the case of Miheer that the proposed scheme of amalgamation is even otherwise not in the interest of Mafatlal Industries Limited as well

as in the interest of its shareholders. He has in this connection set out the following reasons as to why and how the scheme is against the interest of

the shareholders of MIL.

(1) By a detailed reference to average profits of MIL for the five years compared to the average profit of the last five years of MF as set out at

annexure ""M"" and annexure ""N"", he has submitted that the earning per share of MF is Rs. 7 and that of MIL is Rs. 30 per share. In the

circumstances, the shareholders of MIL would not be benefited by the proposed amalgamation because the low profit earning ratio of MF would

reduce the profit earning per share of MIL. It is his case that the decision which is likely to result in dipping of the EPS (earning per share) cannot

be said to be a decision in the interest of the company or its shareholders.

(2). The second reason canvassed by Miheer is that the manufacturing cost of the textile unit of MF is much higher than the manufacturing cost of

the textile units of MIL. The cost of raw materials consumed by MF is 25 per cent. higher than the cost of raw materials consumed by MIL.

Therefore, MIL is not going to reap any benefit by the proposed amalgamation.

(3) The third reason assigned by Miheer is that the cost of labour in the case of MF is higher than that of MIL. In fact, the cost of labour of

Mafatlal Fine is the highest in the industry and in this connection he has relied upon annexure ""P"" to his affidavit. Because of the amalgamation, such

a higher cost of labour shall have to be borne by MIL. He, therefore, submits that the higher cost of raw materials and labour will substantially reduce the profits of the post-merger MIL and would substantially reduce the EPS of the shareholder so MIL. One shareholder has even raised

such a query, to which the chairman of the meeting, Mr. Arvind N. Mafatlal, could not given an appropriate reply. He has, therefore, submitted

that the substantially higher cost of labour of MF compared to that of MIL is contra-indicative to the proposed scheme of amalgamation.

(4) The average debt equity ratio for the last five years of Mafatlal Fine and MIL are compared and they are stated to be as under :

MF : 2.08 : 1

MIL : 1.20 : 1

It is submitted that the debt equity ratio of Mafatlal Fine is adverse and as a result of the amalgamation MIL will be required to take over huge

debts of MF which would reduce the profitability of MIL and would be against the interest of the shareholders of MIL. It is submitted that MF has

an adverse debt equity ratio.

(5) Apart from having huge investments in other companies, MIL is also owning two commercial properties in the city of Bombay, which are very

valuable assets of the company. The said properties are ""Mafatlal House"" near Mantralaya and ""Mafatlal Centre"" at Nariman Point. These two

assets which are presently available to MIL and ultimately to its shareholders will be lost. As against the aforesaid, MF is said to have no

commercial assets or even if it is found that MF has assets, they are relatively of much lower value. Thus, the shareholders of MF will get the

benefit of the commercial assets of MIL while the shareholders of MIL will not reciprocally get any valuable assets.

(6) For the purpose of valuation of shares of MIL and Mafatlal Fine on the break-up value method, the value of investments in shares and stocks

should be considered at their market value and not at the book value and, therefore, the scheme of amalgamation which totally ignores the vital

parameters is totally against the interest of the shareholders of MIL. He has in this connection submitted that the shareholders of MF holding five

shares of an aggregate value calculated on the basis of the break-up value of Rs. 1,295 will get 2 shares of MIL of the aggregate value of Rs.

2,310 calculated on the break-up value basis. This, he submits, to be against the interests of the shareholders of MIL.

105. The aforesaid objections are resisted by the company, firstly, by submitting that primarily it is for the majority shareholders to decide as to

whether the scheme is in the interest of the transferee company and its equity shareholders. Since more than the statutorily required majority has

voted in favour of the scheme, the court should be loath to interject itself and to substitute its decisions or to substitute the decision of an objector like Miheer who has, by conveniently and deliberately remaining absent at the meeting of shareholders, avoided to point out and demonstrate to the

large class of equity shareholders present and voting as to how the proposed scheme of amalgamation was not in the interest of the company or its

shareholders. The objection which he has putt forward before the court could have been put forward by him before the class of equity

shareholders present and voting in the meeting which would have enlightened the equity shareholders and would have provided an opportunity to

all to consider such objection. Miheer having failed to remain present at the meeting and having failed to raise such objection to the scheme, cannot

now be permitted to veto the will of the majority by simply asserting that the proposed scheme of amalgamation is against the interest of MIL or its

equity shareholders. In my opinion, an objection of such nature when it comes from an individual objector personally or on behalf of his group or

family members, should be agitated at the meeting of equity shareholders so that there is full discussion and deliberation on the issue and the

shareholders effectively participate and decide as to how the proposes scheme of amalgamation is not in the interest of the transferee company or

its equity shareholders. A shareholder ordinarily should not be permitted to question the wisdom of the statutory majority of shareholders by

asserting that though approved and passed by a majority, the proposed scheme of amalgamation is against the interest of the transferee company

or its shareholders. Miheer has in this connection not given any explanation as to why he has not raised any objection to the proposed scheme of

amalgamation on this ground when he was satisfied and was having the necessary material to assert that the proposed scheme of amalgamation

was not in the interest of the transferee company. Miheer having failed, knowingly and deliberately to raise any objection on this count ordinarily

cannot be permitted to veto and smother the will of the majority when its as so eloquently and convincingly expressed. It was in the context of such

conduct that high Lordship Justice Mr. N. M. Miyabhoy (as His Lordship then was) observed in the case of Sidhpur Mills Co. Ltd. In re, AIR

1962 Guj 305 . Though on such technical ground, Miheer could be prevented from taking such objection, in the opinion of this court, it would not

be just and proper to reject such objection on demur only. Consistent with the duty cast on the court of law in dealing with an application for

sanctioning the scheme of amalgamation, as pointed out hereinabove, and as observed by P. D. Desai J. (as His Lordship then was) in the case of

Bank of Baroda Ltd. Vs. Mahindra Ugine Steel Co. Ltd., I would precede to decide the aforesaid factual objections to the scheme seriatim

hereafter in the context of the defence put forth by MIL.

Earning per share (EPS) :

106. It is the case of Miheer that apart from having manufacturing activity, MIL has substantial interest in various other companies as it holds in

other companies. The profits of MIL are attributable primarily and substantially to its investment. By reference to the statement at annexure M the

last five years'' average profit of MIL is worked out at Rs. 6.09 crores. As against the aforesaid, Miheer has by the statement prepared at

annexure N, worked out the average profits of the last five years of MF at Rs. 1.93 crores. According to Miheer the earning per share of MF is

Rs. 7 and that of MIL is Rs. 30 per share. He has, therefore, submitted that the shareholders of MIL as such are not going to be benefited by the

proposed amalgamation because the low profit earning ratio of MF would naturally reduce the profit earning per share of MIL. While dealing with

objection No. 8, the court would deal with this objection in detail. However, it would be just and proper at this stage to point out that the defence

of the company is that it would be irrational to consider amalgamation as one single time phenomenon with consequential benefits precipitation on

the day the amalgamation takes effect and to ignore its consequential benefits and advantages that may result over a time period. The EPS of the

amalgamated company cannot be worked out of the two merging companies. The further profits potential of the amalgamated company must take

into account the profits making capacity of the amalgamated company with the transfer of assets, undertakings and liabilities and the resilient

situation as regard all aspects of the business of the two companies. It is pointed out that the EPS worked out on the basis of the overall profit after

tax for the last five years in MIL at annexures M and N to Miheer''s reply is not correct as while working out such earning per share, loans written

of for Rs. 0.90 crore in 1988-89 and Rs. 5.56 crores in the year 1991-92 have been taken into account, whereas in annexure E to the report of

C. C. Chokshi an Co. it is mentioned in the footnote as under :

The amount in respect of Mafatlal Engineering Industrial Limited (MEIL) written of in 1990-91 of Rs. 5.56 crores is not considered as the same is

non-recurring in nature.

107. Similarly, it is pointed out that while preparing annexure N to the affidavit of Miheer, the profits for the years 1988-89 and 1990-91 have

been deflated to Rs. 1.18 crores from Rs. 1.32 crores for the year 1988-89 and Rs. 4.61 crores from Rs. 7.39 crores for the year 1990-91 while

taking the year 1988-89, the provision for taxation at Rs. 0.41 crore instead of Rs. 0.26 crore and by taking account of written off loans of Rs.

2.78 crores to MEIL during the year to reduce the profits from Rs. 7.39 crores. It is further pointed out that in the context of the determination of

the exchange ratio for the purposes of the scheme of amalgamation, the loss of Rs. 4.79 crores for the year 1989-90 is required to be ignored as

abnormal. On a perusal of the directors'' report for the year 1989-90 of MF, it indicates the following abnormalities :

(i) Substantial and student increases of 15% in power tariff in Bombay.

(ii) Payment of retrenchment compensation of Rs. 121.10 lakhs.

(iii) A new wage accord with the workers of the chemical division was finalised with an upward revision of wages, which had a substantial adverse

effect on the profitability of the company.

(iv) Writ of or Rs. 48 lakhs in respect of the Orissa project in the chemicals division.

108. It is pointed out that, therefore, C. C. Chokshi and Co. have rightly ignored the figures of an abnormal loss for the accounting year 1989-90.

Determination of the EPS considering the said abnormal loss would be unrealistic in the context of determination of the exchange ratio. It is further

asserted that the exchange ratio has no direct proportion to the EPS of the two amalgamating companies. The amalgamation involves extinction of

the shareholding of the transferor company and the shareholders of the transferor company receiving shares in the amalgamated transferee

company. It is, therefore, asserted that the process of amalgamation would benefit both the transferor and the transferee companies and their

shareholders. It is submitted that the per-merger EPS in the two amalgamating companies is relevant and must weigh and the same has been

weighed by both the companies and their shareholders in taking the decision in favour of amalgamation, the manner in and the extent to which the

EPS weighs with the shareholders depends upon their commercial wisdom. The requisite majority of the shareholders of the two amalgamating

companies have after properly within the factors of EPS voted in favour of the amalgamation.

109. In the affidavit-in-surrejoinder filed by Miheer he has reiterated his objection and has submitted that even if the last results are considered, the

earning per share of MF is Rs. 9.24 per share while that of MIL is Rs. 55.50 per share. He has further stated that there is no justification given as

to how the two companies when amalgamated are likely to relatively contribute to the future profitability penitential of the amalgamated company.

He has reiterated that the amalgamation is not going to benefit the shareholders of MIL but will be injurious to the shareholders of MIL. The

exchange ratio must have a co-relation to the earning per share. The shareholders of MF would receive a higher earning on amalgamation but that

would be at the cost of the existing earning of the shareholders of MIL.

110. While discussing the question of determination of the fair exchange ratio, this court would dwell upon the question of the earning per share

and to what extent the earning per share of each company can constitute a relevant factor for fixing the fair exchange ratio. However, if it is found

that there are other methods by reference to which the fair exchange ratio could be worked out, the differentiation between the earning per share

would not be a very valid consideration to hold that the low profit earning of MF would substantially reduce the earning per share of the equity

shareholders of MIL. Moreover, this factor of the earning per share ordinarily is always taken into consideration by the class of equity shareholders

while considering and voting in favour of or against the scheme of amalgamation. When the statuary majority of equity shareholders have voted in

favour of the scheme, they have not fund the scheme to be opposed to their interest nor have they found that the proposed amalgamation would in

future affect the earning per share of the equity shareholders of MIL. It would be noted that at the time of fixing the fair exchange ratio, C. C.

Chokshi and Co. has assigned reasons as to why on the basis of the E.P.S. solely it would not be proper to fix the fair exchange ratio and as to

why it has applied the break-up value of equity shares method. There is not mathematically accurate formula of valuation. An element of

guesswork or arbitrariness is involved involution. Therefore, to say that since the earning per share of Mafatlal Fine is lower than that of MIL, the

earning per share of MIL in future will be reduced is not correct because the other benefits which would flow from the scheme of amalgamation

including the substantial increase in the assets of the amalgamated companies, cannot be ignored and, therefore, it would not be just and proper for

this court to hold that the lower earning per share of Mafatlal Fine compared to the higher earning per share of MIL, would show that the scheme

is detrimental to the interest of MIL.

Manufacturing cost :

111. The second reason advanced by Miheer to counted that the scheme is not in the intent of the equity shareholders of MIL is that the

manufacturing cost of the textile units of MF is much higher than the manufacturing cost of the textile units of MIL. It is his say that more than 70

per cent. of the turnover of both companies is from their textile divisions. The cost of raw materials consumed by MF is 25 per cent. higher than

the cost of raw materials consumed by MIL. Therefore, MIL is not going to be benefited at all by the proposed amalgamation. In this connection,

he has referred to a statement at annexure-O (heading annexure 0.579) showing materials of Mafatlal Fine at annexure-O to his objection.

112. By such comparative statement of the last five years showing the raw material cost along with the selling price per meters of MIL and MF, he

has submitted that the percentage-wise cost in the case of MIL on an average for the last 5 years compared to Rs. 38.11 crores on an average of

MF.

113. The company has by the affidavit-in-rejoinder denied the aforesaid allegation and has pointed out that the alleged higher raw materials cost

has no relevance to the basic question of amalgamation of MIL and MF. It might have some relevance only to the question of determining the fair

exchange ratio of shares. The percentage of raw material cost would also depend upon the product mix as some varieties may give a higher profit

margin as compared to some other varieties. It is pointed out that the comparison in annexure-O by Miheer between the percentage of raw

material cost to sales is misleading. The figures of sale given in annexure-O are the figures of turnover of textiles comprising cloth, yarn, waste, etc.,

given in the notes on accounts and the director''s report of MIL which includes sales of goods traded in, i.e., shales of cloth purchased and sold.

Moreover, the figures of raw material cost taken in annexure-O would comprise the cost of raw materials consumed, namely, cotton, fibre and

yarn (purchased) only. It does not include any part of the cost of cloth purchased and sold. Therefore, the ratio of raw material cost to sales as

worked out in annexure-O would be higher if in the figures of sales, the competent of purchased cloth vis-a-vis manufactured cloth is lower. For

the purpose, the break up of the figures of sales into those for cloth manufactured and sold and those for textiles purchased and sold, is required to

be given, which the company has given at annexure-I to the affidavit-in-rejoinder. From such statement, it is pointed out that in the case of MIL,

the component of cloth purchased and sold is higher than the corresponding ratio in the case of Mafatlal Fine.

Secondly, the figures of sales given in annexure-O referred to sales of cloth, both gray and processed. The processing may be bleaching, dyeing

and printing, etc., the cost of raw materials, namely, cotton, fibre and yearn is up to the stage of gray fabric and there is not addition to the said raw

material cost in any processing of gray cloth. Moreover, with each stage of processing, there is an addition to the value of the cloth resulting in

higher sale price without affecting the raw material cost. It is pointed out that the figures of raw material cost taken in annexure-O do not include

any cost of chemicals, colour or bleaching or other ingredients used in processing.

Thirdly, it is pointed out that the company may not itself process all gritty fabrics, but any get the same processed by a processor on payment of processing charges. In such a case, the cost of colours, chemicals and bleaching and other ingredients would be included in the processing charges

and would not be considered for inclusion in the expenditure on stores and spare parts. Therefore, if in the cloth sold, the component of processed

cloth compared with the component of gray cloth is relatively higher, the ratio of raw material cost to sales as worked out in annexure-O would be

lower.

114. It is further pointed out that in the context of the comparison of percentages of raw material cost to sales, the sale price alone is not relevant

and it would be necessary to take into account other manufacturing income as for example export incentives, duty drawback, etc., Mafatlal Fine

has large export of grey cloth with the result that the sale price proper is relatively lower, but as against that Mafatlal Fine earns export incentives,

duty drawback, etc., and sales on Income Tax.

115. It is further pointed out that the figures of raw materials cost referred to raw materials consumed in a given financial year, whereas the figures

of sales would not include the value of the cloth manufactured but not sole during the year and which remained in stock at the end of the year.

Thus, by various figures and comparative statements annexed to the affidavit-in-rejoinder, the company has submitted that it would no be correct

to conclude that cost of raw materials in the case of Mafatlal Fine is higher, which would ultimately result in more manufacturing cost compared to

the manufacturing cost of MIL. From the various details furnished by the company in the affidavit-in-rejoinder as well as from comparative

statements annexed to the affidavit-in-rejoinder, it can be said that it would be hazardous to conclude, solely based on the statement at annexure-

O, that the manufacturing cost or the raw material cost in the case of Mafatlal Fine being higher than that MIL, the proposed scheme is not in the

interest of the shareholders of MIL. In fact, the conclusion itself is not justified that such cost is higher because both the companies manufactured

and traded in a large number of textile items. There are various processes involved in manufacturing final textile products. The distinction between

the final textile cloth and the grey fabric is well known. The dealing in grey fabric would necessarily exclude a large number of processes while

dealing in finally processed fabric would include a large number of processes calling for a large entity of raw materials. The various other benefits

which flow from export of the product to which the affidavit-in-rejoinder makes reference are also relevant. A court of law is ill-equipped in

working our the relevant cost of raw materials used by the two companies in their respective textile divisions and to record a finding that manufacturing cost or raw material cost is higher in one unit than the other. The board of directors of both the companies fully assisted by expert in

the field of manufacturing activity have resolved to amalgamate MF with MIL and it would be presumptuous for this court to interfere and thereby

to agree with Miheer that both the board of directors as well as the majority of shareholders have failed to take into account the alleged higher raw

material cost of MF resulting in a higher manufacturing cost of MF. On the contrary, from the affidavit-in-rejoinder filed by the company, it

becomes clear that the objection of Miheer on this count is not well founded and persons with commercial and business wisdom have not found

any substance in such objection as they have voted in favour of the scheme. From annexures I, II and III to the affidavit-in-rejoinder filed by the

company, it would be clear that production of cloth by Mafatlal Fine in the last five years is higher than that of MIL. Both the companies are also

undertaking the activities of purchasing and selling cloths, which would ultimately show that in the case of Mafatlal Fine, sales of grey fabrics are

higher while in case of MIL, sales of processed fabrics are higher. I am, therefore, of the opinion that in view of the overwhelming support received

by the scheme from the equity shareholders of the company which also include the financial institutions also, it would be difficult to hold that they

have exercised their commercial judgment in disregard of the alleged manufacturing cost or raw material cost, being higher in the case of Mafatlal

Fine which would affect the interest of equity shareholders of MIL adversely.

Labour cost :

116. Miheer has in this behalf pointed out that the cost of labour the case of Mafatlal Fine is mush higher than the cost of labour in MIL. He has

stated that the cost of labour of MF is the highest in the industry. He had in this connection, produced a comparative study in his statement at

annexure-P showing the average cost of labour of Mafatlal Fine at Rs. 37.95 crores as against average labour cost per year in MIL of Rs. 24.27

crores. He has, therefore, submitted that when the cost of labour in Mafatlal Fine is higher, it would not be in the interest of the shareholders of

MIL to amalgamate to such a company. Such amalgamation would ultimately cut into the profits of the post-merger MIL and would substantially

reduce the earning per share of the shareholders of MIL. In fact, he has pointed out that one shareholder of MIL did raise a query to the chairman

of the meeting and that Argued Mafatlal thought it fit not to answer such a query. In have already adverted to such a query raised by a shareholder,

namely, one Jitendra Sanghavi. He expressed his view that the shareholders do not doubt the anxiety and integrity of the chairman in prosing the scheme of amalgamation. However, he pointed out that since MF has two units in Bombay, their labour cost is very high and as a result, the

profitability of Mafatlal Fine goes down and it is not in the interest of shareholders of the company to amalgamate with Mafatlal Fine. In fact, to

such a query, the chairman has replied by stating that the labour cost in any particular unit cannot be taken in isolation without considering the skills

and efficiency of the labourers and other advantages.

117. Even on the aspect of labour cost, in the affidavit-in-rejoinder it is pointed out by MIL that the figures given in annexure P by Miheer are the

figures given in the balance-sheets of the companies under the head ""Payments to the provision for employees"" which comprise salaries, wages and

bonus, contribution to gratuity fund, provided fund and superannuation fund, etc., and welfare expenses. The figures are not confined to the labour

cost only for the concerned year. The number of employees in the two companies during the relevant years as given in the said balance-sheet are

reproduced which are as under :

Year MIL Mafatlal Fine

1987-88 6636 8663

1988-89 6761 8169

1989-90 6742 7702

1990-91 6902 7454

1991-92 7051 7574

1992-93 7154 7393

118. From the aforesaid, it becomes clear that the number of employees employed in MIL was low which has gradually increased while the

number of employees employed by MF was higher which has gradually decreased. The gradual decrease of employees in number every year

would necessarily invoke the payment of retrenchment compensation to the employees and/or the other benefits required to be offered to them

under the relevant labour laws. In MF, the number of employees have progressively gone done because of retrenchment and the voluntary

retirement scheme, whereas the number of employees in MIL have progressively gone up. MF was required to pay during the relevant years the

following amounts either by way of retrenchment compensation or under the voluntary retirement scheme.

Year Retrenchment compensation/

V.R.S. (rupees in lakhs)

1988-89 90.86

1989-90 129.81

1990-91 100.41

1991-92 29.43

1992-93 89.49

119. In the affidavit-in-rejoinder filed by MIL, reference is made to other relevant materials which must enter into consideration while finding out as

to whether the labour cost of MF is higher than that of MIL. It is stated that in the context of the employment cost, it is necessary to consider the

manufacturing activities of the companies and their requirements of the nature of employees/labour force. Both the companies have textile and

chemical divisions which are as under :

MIL MF

One textile unit at Ahmedabad (Guj) One textile unit at Navasari

(Guj).

One textile unit at Nadiad (Guj) One textile unit at Parel

One chemical unit, Dewas (MP) One textile unit at Mazgaon

One chemical unit at Bhestan

in Surat (Guj)

120. The products manufactured at MF''s chemical division are hazardous materials requiring employment of skilled and technical personnel

whereas for the manufacture of dye intermediates and chemicals at MIL''s unit at Dewas skilled labour of any high extent is not required. The

employees in MIL at Bombay are more skilled and efficient as compared to the employee of its units at other places. For this reason, the extent of

rejection of grey fabrics in the export market is much lower in the case of Mafatlal Fine than in MIL''s New Shorrock Mills at Nadiad (Gujarat). It

is also pointed out that though the labour cost in the textile division at Bombay is higher compared with the labour cost in Gujarat, other costs such

as electricity are higher in Gujarat and the following comparative table of power cost per energy unit purchased at Mafatlal Fine''s Bombay unit and

MIL''s unit at Ahmedabad and Nadiad brings out as to how even while calculating the labour cost, a number of other factors must enter the

consideration.

Year MF MIL

Bombay Ahmedabad Bombay

1988-89 1.02 1.37 1.42

1989-90 1.14 1.51 1.45

1990-91 1.21 1.58 1.51

1991-92 1.38 1.77 1.97

1992-93 1.83 1.92 2.19

121. It is, therefore, submitted by MIL that in the context of the scheme of amalgamation, any compression of cost of one input or factor divorced

from consideration of other inputs or factories is totally lopsided and without any meaning. The labour cost thus cannot be taken in isolation. It is

submitted that it is inherent in the larger appearance that there would be reduction in the average cost of labour, overheads, marketing and other

costs and the same is ultimately a matter of the commercial judgment of the members of the company, who vote on the proposal for amalgamation.

Miheer, in fact, did not remain present at the meeting of the company held on 22nd January, 1994, nor did any of this representatives raise any

question. In fact, there is no substantial disparity in the labour cost as pointed out hereinabove and if all the relevant factors are taken into

consideration, the marginal difference of one factor may be upset by the presence of another factor. In my opinion, therefore, it would not be just

and proper to hold, based on the alleged difference in the cost of labour that the proposed scheme of amalgamation would not work in the interest

of the shareholders of MIL or that it would only result in a lower yield to the shareholders of MIL and a lower profitability to MIL.

Debt enquiry ratio :

122. Miheer has further submitted that the average debt enquiry ratios for the last five years of Mafatlal Fine and MIL are as under :

M. Fine : 2.08 : 1

MIL : 1.20 : 1

123. According to Miheer, the debt equity ratio of MF is adverse and as a result of the amalgamation MIL will be required to take over huge

debts of Mafatlal Fine. Servicing of huge debts of Mafatlal Fine by MIL would reduce the profitability of MIL and would be against the interest of

shareholders of MIL.

124. In reply it is points doubt by MIL that what is relevant is the debt equity ratio for the last year 1992-93 which was 1.6 : 1. It is pointed out

that the relevance of the debt equity ratio is to borrowing capacity of a company because the financial institutions do not advance financial

assistance or permit borrowings to units whose debt equity ratio may be worse than the prescribed ratio. However, in cases of modernisation, expansion or diversification, even the financial institutions advance financial assistance despite the adverse debt equity ratio. It is further pointed out

that on amalgamation of companies having different debt equity ratios, the company with the more adverse debt equity ratio can benefit without any

corresponding detriment to the other company which is in a better financial position and can be convert this handicap of the first company to the

overall advantage of the amalgamated company.

125. In the affidavit-in-rejoinder, Miheer has referred to the following observations from the annual report of MF :

The company proposes to propane the date of conversion/redemption of Part B of Rs. 340 of 12.5% secured convertible debentures at a

premium of Rs. 240 intone equity share of Rs. 100 each on 1st November, 1992, instead of 8th August, 1993. The apparel of the said debentures

holders is proposed to be obtained at their meeting to be held on 5th August, 1992, as also a separate resolution is being proposed at item No. 11

of the notice of the ensuring annual general meeting.

126. He has submitted that there above exercise was undertaken solely with a view to presenting a healthier debt equity ratio of Mafatlal Fine. He

has submitted that by preponing the conversion of 12.5% secured convertible debentures by one year, the debt enquiry ratio is 1.6 : 1 of Mafatlal

Fine.

127. It is pointed out by MIL that the resolution to propane the date of conversion/redemption of rare B of Rs. 340 of 12.5 % secured convertible

debentures at a premium of Rs. 240 into one equity share of Rs. 100 each on 1st November, 1992, instead of 8th August, 1993, was taken prior

in point of time. The approval of the debenture holders was obtained at their meeting and a separate resolution was passed at the subsequent

annual general meeting. All necessary steps were, therefore, taken much in advance, i.e., in 1992 while the resolution of the board for

amalgamation in the case of MF was passed on 25th November, 1993, and notice for convening the meeting were issued on 22nd December,

1993. It is, therefore, submitted that the preponing of the conversion was not with the intention of presenting a healthier debt equity ratio of

Mafatlal Fine. It is submitted that in fact Miheer has relied upon the annual report of MF prior to August, 1992. For making out a case of debt

enquiry ratio. If subsequent steps are taken into consideration, the debt equity ratio of MF cannot be said to be in any way adverse so as to reduce

the profitability of MIL. In view of the fact that the debt equity ratio of MIL is not adverse and in view of the further fact that primarily the debt

equity ratio assumes importance for the purpose of judging the borrowing capacity, MIL, its board of directors and the equity shareholders must have taken into consideration the commercial interest of MIL. It cannot be said that while taking a vital decision, a large class of the equity

shareholders more particularly a substantial class of financial institutions holding shares in MIL as well as MF would ignore the debt equity ratio of

the two companies. After conversion, all debentures as aforesaid, in the relevant year, i.e., 1992-93, the debt equity ratio of MF has not remained

adverse and, therefore, it is difficult to agree with Miheer that the decision to amalgamate MF with MIL would work adversely to the interest of

shareholders of MIL on the alleged ground of adverse debt equity ratio of MF.

Average return to shareholders :

128. The objection of Miheer in this heading in fact is covered under the heading of earning per share. He had stated that the average return to the

shareholder of MF for the last five yeas by way of dividend is on an average 13.4 per cent. on the fact value of shares whereas the average return

to the shareholders of MIL is 28.4% on the face value of shares. He had also referred to the observation of C. C. Chokshi an Co. in their report

on fixation of the ratio where they have observed that the shares of Mafatlal Fine will have returns by way of dividends, but they do not have very

stable assets in view of the substantial contingent liability. In my opinion, in view of my finding already recorded on the question of the earning per

share, no separate finding is required. Even otherwise pre-amalgamation, the average return to the shareholders of the amalgamating companies

has no bearing in the matter of justification of otherwise of the amalgamation. It might assume importance only for the purpose of determining the

fair exchange ratio in which the shares in the transferee-company would be allotted against the shareholding in the transferor company.

129. As regards the two substantial properties, namely, ""Mafatlal House"" and ""Mafatlal Centre"", it is pointed out by MIL that substantial areas of

such properties are let out or are given on licence to tenants. Even Mafatlal Fine itself occupies about 17,000 sq. ft. area in ""Mafatlal Centre"". It is

also pointed out that Mafatlal Fine has also other commercial assets. It is owing nine flats in Bombay, of which four are situated in South Bombay

at Nariman Point, at Churchgate and at Cuffe Parade and at Peddar Road. Reference to the said properties of MIL, thus would not assume any

importance. In fact, the relative assets of both the companies do not bear upon the feasibility of viability of the amalgamation though it might be

relevant while considering the question of the fair exchange ratio.

130. While refereeing to the general principles the guiding approach of the court to the schemes of amalgamation, it is noted that the court has to

be normally satisfied on four grounds. One of them being that such amalgamation or arrangement must be such as a man of business would

reasonably approve. This very requirement is summed up by Buckley by staging that the amalgamation and/or arrangement must be such as an

intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The approach of the

court, even when the scheme is approved by a thumping majority of shareholders should be to scrutinise the scheme to find out whether it was a

reasonable scheme which can by reasonable people conversant with the subject be regarded as beneficial to those who are likely to be affected by

it. The burdens always lies on the petitioner-company to show that the scheme of amalgamation is fair, reasonable, workable and such that a man

of business would reasonably approve. The court would of course take into the fact that the scheme has been approved by a big majority vote, but

it would not shirk its duties to scrutinise the scheme especially when it involves amalgamation of large companies in which may interests are at

stake. It is said that the scheme must be tested from the point of view of an ordinary reasonable shareholder, acting in a businesslike manner, taking

within his apprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in

question. While scrutinizing the scheme, the court must not adopt the attitude of a lawyer or an accountant or an expert, but it must look at it from

the point of view of a reasonable and a fair minded person. The test in all such cases is to determine as to how a reasonable person, endowed with

ordinary common sense and section honestly will view the scheme having regard to all the circumstances bearing reasonably and properly on it.

While dealing with a company which is dealing in commerce or industry, the scheme has got necessarily to be looked at from the point of view of a

prudent, commercial man. The court will not view the scheme with a view to find out whether it is an ideal scheme. The scheme has not got to be

scrutinised by the court with that much care with which an expert will scrutinise it nor will the court approach it in a carping sport with a view to

pick holes in it. The court will test the scheme from the point of view of an ordinary reasonable shareholder acting in a businesslike manner.

131. Applying the aforesaid criteria to the proposed scheme of amalgamation, this court shall have to sit in the arm chair of a reasonable and fair

minded shareholder. In fact, a number of objections put forth by Miheer to contend that the proposed scheme was not in the interest of the equity

shareholders of MIL are in substance referable to the commercial aspect involved in the scheme of amalgamation. The question of manufacturing cost based upon raw material cost, or the question of labour cost being higher in the transferor company (MF) than the transferee company (MIL)

are couples questions of the working of commercial or industrial units deponent upon a large number of attendant facts. The nature of the product,

whether the product is a semi-final product or a final product, the question as to whether the company is involved in large scale export of the semi-

final product or the final product, the question as to whether in particular manufacturing activity skilled labour is needed or unskilled labour is

needed, the difference in cost of labour in different regions, the different in cost of living index prevalent in different States and different regions and

hosts of other factors and considerations shall have to be taken into account. The fact that the two companies have some common businesses and

that some of the business are different is not unknown to the shareholders and is specifically brought out in the explanatory statement. The question

of cost of raw materials being higher in MF than in MIL was present in the minds of the shareholders as one of the shareholders had put a specific

query on such question two which an answers is given by the chairman of the meeting. Even from the reply filed before this court by MIL as

discussed hereinabove, there does not appeal to be any serious commercial objection to the amalgamation on the twin aspects of the alleged higher

cost of raw materials or the alleged higher labour cost. In fact, the reasons for the higher labour cost are so clearly explained in the case of Mafatlal

Fine that it is difficult to subscribe to the view of Miheer that the labour cost in MF is higher than that of MIL. The gradual retrenchment of a large

class of employees coupled with the fact that a large number of employees have resorted to the benefit of the voluntary retirement scheme,

ultimately, resulting in payment of retrenchment compensation and/or benefits of the voluntary retirement scheme has in fact pushed up the labour

cost. If those factors are taken into account and such cost or retrenchment compensation is excluded from consideration, it is difficult to agree with

Miheer that the labour cost is higher in MF than in MIL. The earning per share which is obviously higher in MIL than in Mafatlal Fine is taken into

consideration by C. C. Chokshi and Co. while fixing the fair exchange ratio. As against five shares of MF only two shares of MIL are to be

allotted which would show that the disparity in the figure of the EPS was very much present in the minds of the class of shareholders. The low

earning per share of MF, therefore, has not escaped the attention of the shareholders. In their wisdom, the shareholders have ultimately sanctioned

the proposal that as against five shares of MF, two shares of MIL would be allotted. It is, therefore, not a case where the shareholders of MIL did not at all know the diversity in the ratio of earning per share of each company. If it is likely to result in future reduction of their earning on the share

of MIL, more than the statutory majority of equity shareholders on MIL would not have voted in favour of the proposal. It shall have to borne in

mind that a substantial number of shares in MIL are held by financial institutions/corporations and such corporations would not have blindly voted

in favour of the scheme had the scheme been disadvantageous to the shareholders of MIL. From the break-up of equity shares (fully paid) entitled

to vote at the extraordinary general meeting held on 22nd January, 1944, it becomes clear that the financial institutions held around 30.03 per cent.

of the total votes as against 30.42 per cent. of the total votes held by the ANM group. 30.03 per cent. of the financial institutions, i.e., the total

votes of financial institutions are cast in favour of the proposed scheme of amalgamation. Thus, the shareholders are enlightened corporate

management and it would not be unreasonable to assume that they must have approved the scheme after a minute and a thorough examination.

There is nothing to show that they had not acted bona fide. In view of the aforesaid, in my opinion, it would be difficult to agree with Miheer that

the proposes scheme of amalgamation is not in the interest of the shareholders of MIL.

132. The aforesaid grounds were pressed into service by Miheer to make good his objection that the proposed scheme of amalgamation is not in

the interest of the shareholders of MIL. For the aforesaid reasons, I do not agree with any of the grounds put froth by Miheer. The class of

shareholders have by requisite statutory majority approved the scheme of amalgamation. To undo the wisdom of such class on such jejune grounds

would not be a permissible exercise especially when it is not found by this court that the proposed scheme of amalgamation would be detrimental

to or work against, the interest of shareholders of MIL. This objection must also, therefore, fail.

Objections Nos. IV and VII :

133. By this objection No. IV, Miheer for himself and his MHM group claims a right to a special, separate and distinct class meeting from that of

other shareholders of MIL. In this submission, by virtue of the provisions connoted in the family arrangement of 1979, his group was to get control

of MIL. On the date of the proposed scheme the shareholding of his group was around 5 per cent. He submitted that because of disputes in the

family, his group has distinct and operate interest from that of other classes of shareholders. By objection No. VII he has submitted that a

particular class of shareholder, namely, allottees of shares of the rights issues of 1987 and 1992, namely, NOCIL and Sushrupada Investments

Pvt. Ltd., were illegally and unauthorisedly allotted shares in contravention of the prohibitory order of injunction granted by the City Civil Court at

Ahmedabad, and, therefore, they were not entitled to attend the meeting of shareholders held on January 22, 1994. Since, such shareholders

attended the meeting, the resolution is vitiated.

134. In order to deal with this objection, it will be necessary to refer to the relevant provisions of the Act and the Rules and in context of ""class

meetings"" to refer to the statement of law as could be gathered from binding and persuasive precedents. I will also refer to expert comments on

one of the cited precedents as must reliance is placed on such preceded by Mr. M. J. Thakor.

135. On application being made u/s 391(1) of the said Act, the court may order a meeting of the creditors or class of creditors, members of class

of members, as the case may be, to be called, held and conducted in such a manner as the court directs. This power of the court has to be read

with the power of the court to issue necessary directions at the hearing of summons for directions taken out u/s 391(1). Rule 69 of the Companies

(Court) Rules empowers the company judge to issue directions which he may think necessary in respect of various matters enumerated therein

which include the direction in respect of determining the class or classes of creditors and/or of members whose meeting(s) have to be held for

considering the proposed compromise or arrangement. Consistent with this provision MIL moved and application u/s 391(1) seeking various

directions for holding the meeting of the members of the company. One such application, being Company Application No. 892 of 1993, the

learned single judge (Y. B. Bhatt J.) of this court passed an order which, inter alia, included directions for appointing Arvind Mafatlal as chairman

of the meeting as well as the following directions for convening a meeting of the equity shareholders of MIL :

That a meeting of the equity shareholders of Mafatlal Industries Limited, Ahmedabad, the applicant abovenamed, be convened and held at

Premabhai Hall, Bhadhra, Ahmedabad, on Saturday the 22nd day of January, 1994, at 9.30 a.m. for the purpose of considering, and if though fit,

approving, with or without modifications, the said scheme of amalgamation proposed to be made between Mafatlal Fine Spg. and Mfg. Co. Ltd.,

and the applicant-company.

That Shri Arvind Mafatlal, the chairman and the managing director, designated as Senior President of the applicant-company and filing him Shri

Hrishikesh A. Mafatlal, vice-chairman of the applicant-company, shall be the chairman of the said meeting of the equity shareholders of the

applicant-company, to be held on the 22nd day of January, 1994, as aforesaid.

That the chairman appointed for the said meeting referred to above.

136. Consistent with the aforesaid diffractions, the meeting of the equity shareholders of MIL is held on January 22, 1994, under the chairmanship

of Arvind Mafatlal at Ahmedabad.

137. The objections of Mihir to convening and holding of such a joint meeting of the entire class of the equity shareholders are three-fold and they

are as under :

(A) In view of the family history and background, more particularly set out hereinabove, it is submitted that the shares held by Miheer in his

personal capacity as well as shears held by him as karta of a Hindu undivided family, or trustee of private and charitable trusts and all the shares

held by the members of his family form a class by themselves. They, as such, have a separate and distinct interest from that of the other equity

shareholders, historically ask well as flowing from the family arrangement of 1979. Being a distinct and separate class, they cannot be equated with

the other equity shareholders of MIL, and their separate meeting ought to have been called as they constitute a separate and distinct class within

the class of the equity shareholders. Since such a separate meeting of this distinct class is no convened or held, his group has no opportunity of

representation and of presenting its views against the proposed amalgamation. Instead of a separate meeting of the shareholders a common

meeting of the shareholders has resulted in the majority controlling and overruling the minority at the meeting held for approving the scheme on

January 22, 1994. This omission to call a meeting of a separate and distinct class is fatal and must result in vitiation of the ultimate resolution.

(B) It is submitted that the meeting of the shareholders held on January 22, 1994, inter alia, included the shareholders of the company who have

been allotted shares pursuant other rights issues of 1987 and 1992. Both the said rights issues are subject to the final outcome of Civil Suits Nos.

3181 and 3182 of 1987 filed by the three shareholders and Civil Suit No. 5198 of 1992 filed by Miheer. It is submitted that these shareholders or

the transferee from them may even cease to be shareholders in the event of the City Civil Court''s coming to the conclusion that the issue was not in

the interest of the company, and, therefore, these shareholders ought not to have been permitted to participate in the meeting of January 22, 1994,

or at least, for such shareholders there should have been a separate meeting.

(C) It is pointed out that some of the allottees in the rights issue of 1987, such as NOCIL and Sushrupada Investments Pvt. Ltd., have been

allotted shares in utter violation and disregard of the order of the City Civil Court, Ahmedabad. These shareholders cannot be permeate to participate in the meeting and their participating and voting had adversely affected the resolution passed by the meeting, and, therefore, the

resolution passed by the meeting ought not to be sanctioned.

138. At the outset, this court would like to deal with one preliminary defence raised the aforesaid objection by MIL through its counsel, Mr. S. B.

Vakil. It is submitted that the company has merely to apply to the court u/s 391(1) to permit it to convene, and hold a meeting of its members or

class of members, and it is for the court to direct the company to convene, and hold such meeting. It is submitted that in the present case on

Company Application No. 892 of 1993 being filed in this court with all necessary material and particulars, Y. B. Bhatt J. has, vide order dated . . .

simply directed the convening, holding and conducting of a meeting of the equity shareholders of MIL. The court did not direct a separate and

distinct meting of the group of shareholders being represented by Miheer and his family members nor did the court direct a separate meeting or

exclusion of the shareholders to the 1987 right issue or the right issue of 1992 did the court direct exclusion of the shareholders of NOCIL and

Sushrupada Investments Pvt. Ltd., who were allotted shares allegedly in violation of the order of the City Civil Court, Ahmedabad. In the absence

of any specific direction no separate class meeting could have been convened, or held and, therefore, no fault can be laid at the doors of MIL.

Since Y. B. Bhatt J. has not found it necessary to convene separate meetings of the aforesaid classes, the resolution of the petitioner-company

should not be voided, submits Mr. Vakil, the learned advocate for the petitioner-company.

In my opinion, this preliminary defence has no force and is devoid of any merit.

139. The question as to whether Miheer and his group constitute a separate and distinct class whose interests in the meeting of the equity

shareholders of MIL is in conflict with or dissimilar to the interest of the majority shareholders of MIL or the question as to whether the

shareholders who were allotted shares in the right issue of the year 1987 or 1992 with respect to which civil suits are pending in the City Civil

Court at Ahmedabad and as to whether they constitute a distinct and separate class so as not to be entitled to participate in the meeting of the

equity shareholders of MIL or, thirdly, the question as to whether those shareholders of NOCIL and Sushrupada Investments Pvt. Ltd., to whom

the equity share were allotted allegedly in breach of the order of injunction issued by the City Civil Court, Ahmedabad, constitute a separate and

distinct class or not are questions which shall have to be answered keeping in mind the statutory requirement of section 391 of the said Act read

with the provisions of rule 69 of the Companies (Court) Rules, 1959.

140. In substance, the question is ""would an order of the company court issuing directions for convening meetings u/s 391(1) read with rule 69 final

so as to forceclose or shut out any objection on the ground the no proper class meting was convened or held ?"" Mr. Vakil submits that the court

not having ordered separate or distinct meetings, there is no need to call a distinct or separate class meeting even if such class existed.

141. Palmer''s Company Law (24th edition), page 1140, in this connection observes as under :

The court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the company

to decide, in accordance with what the scheme purports to achieve. The application for an order meetings is a preliminary step, the applicant taking

the risk that the classes which are fixed by the judge, usually on the applicant''s request, are sufficient for the ultimate purpose of the section, the

risk being that if in the result and we emphasise the words ''in the result'' they reveal inadequacies, the scheme will not be approved. If, e.g., rights

of the ordinary shareholders are to be altered, but those of the preference shares are not touched, a meeting of the ordinary shareholders will be

necessary but not of the preference shareholders. If there are different groups within a class the interest of which are different from the rest of the

class, or which are to be treated different under the scheme, such groups must be treated as separate classes for the purpose of the scheme.

Moreover, when the company has decided what classes are necessary parties to the scheme, it may happen that one class will consists of a small

number of persons who will all be willing to be bound by the scheme. In that case, it is not the practice to hold a meeting of that class, but to make

the class a party to the scheme and to obtain the consent of all its members to be bound. It is, however, necessary for at least one class meeting to

be held in order top give the court jurisdiction under the section.

It will be seen from what has been said above that great care must be taken in considering what for the purpose of the scheme constitute a class. If

meetings of the proper classes have not been held, the court may not sanction the scheme.

142. From the aforesaid observation of the learned author, it become clear that an application to the court for an order for meeting is a preliminary

step. If the classes fixed by the court at the request of the applicant are in the result not found to be proper or inadequate, the applicant takes the

risk of the scheme being not approved.

143. The present section 391 of the Companies Act, 1956, closely resembles and is practically in pari material to its counterpart in the English

Companies Act, 1948. The old English statute, namely, the Joint Stock Companies Arrangement Act, 1870, also contained a similar provision in section 2 which empowered the court to order a meeting of creditors of such class of creditors as may be necessary. Ordinarily, therefore, the

court orders meetings of creditors of class of creditors or members or class of members, as the case may be. However, the question as to whether

all such creditors constitute one class having common interest so as to confer and deliberate upon the issue at a common meeting or as to whether

they have distinct conflicting interests so as not to be able to confer, discuss and deliberate upon the issue in joint or common meeting is a very vital

question. The party who applies for such meeting cannot be absolved from the liability to bring to the notice of the court the conflicting, distinct and

separate interests of persons in the same class or class within the class so that the persons having conflicting or distinct and separate interest and

provided effective to confer, deliberate, discuss and decide the issue.

144. In Hellenic and General Trust Ltd., In re [1976] 1 WLR 125 Templeman J. stressed that it is the responsibility of the applicants to see that

the class meetings are properly constituted. In that case, it was held a that the majority shareholders, being a wholly owned subsidiary of the

outside purchaser for the shares, constituted a separate class from the other shareholders and that accordingly the scheme failed. It was also

suggested that a parent company owing 50 per cent. or more of the share of the subsidiary company can be assumed to have a community of

interest. In that case by a proposed scheme of arrangement u/s 206 of the Companies Act, 1948, all the 15 million issued and fully paid ordinary

shares of 10 p. each of a company were to be cancelled and new ordinary shares of the same amount and value were to be issued and credited as

fully paid-up to Hambros, who would pay the ordinary shareholders 48 p. per share for the loss of their shares. Hambros through his wholly

owned subsidiary MIT already owned 53.01 per cent. of the ordinary shares. At a separate meeting of the ordinary shareholders summoned to

consider, and if thought fit, approve the scheme, approximately 91 per cent. of the shareholders by value attended and voted, and 84.67 per cent.

in value, including the vote of the wholly owned subsidiary voted in favour of the arrangement. The minority shareholders holding 13.95 per cent. in

value, voted against the arrangement. When the company moved a petition for sanction of the court to such arrangement, the minority shareholders

objected principally on the ground that the interests of the wholly owned subsidiary of an intended purchaser of shares under a scheme of

arrangement were different from those of the other ordinary shareholders and different considerations applied in deciding whether to approve the

scheme, and, therefore, the purchasers'' wholly owned subsidiary was a different class from the other ordinary shareholders and since the meeting had not been constituted the court had no jurisdiction to sanction the scheme. In the aforesaid backdrop of facts, Templeman J., while considering

the objection, observed as under (at page 125) :

The shareholders who were summoned to the meeting consisted it is submitted, of two classes. First there were the outside shareholders, that is to

say the shareholders other than MIT; and secondly, MIT, a subsidiary of Hambros. MIT were a separate class and should have been excluded

from the meeting of the outside shareholders. Although section 206 provides that the court may order meetings, it is the responsibility of the

petitioners to see that the class meetings are properly constituted, and if they fail, then the necessary agreement is not obtained and the court has no

jurisdiction to sanction the arrangement. Thus, in United Provident Assurance Co. Ltd., In re [1910] 2 Ch 477 the court held that the holders of

partly paid shares formed a different class from holders of fully paid shares. The objection was taken there should have been separate meetings of

the two classes, and Swinfen Eady J. upheld the objection saying at page 481 :

''... the objection that there have not been proper class meetings is fatal, and I cannot sanction the scheme.''

Similarly, Eve J. issued a practice direction, Practice Note [1934] WN 142 in which he reminded the profession, in dealing with the producer of

section 206, that the responsibility for determining what creditors are to be summoned to any meeting as constituting a Class rests with the

petitioner, and if the meetings are incorrectly convened or constituted, or an objection is taken to the presence of any particular creditors as having

interest competing with the others, the objection must be taken on the petition for sanction and the petitioner must take the risk of having the

petition dismissed. That direction applies equally to meeting of the shareholders.

145. From the aforesaid observations, it becomes clear that it is the primary responsibility of the petitioner to see that the class meetings are

properly constituted and if they fail the necessary agreement is not obtained. If the meetings are incorrectly convened or constituted or if any

objection is taken by persons of any particular class having interests conflicting with the others, the objection shall have to be taken on the hearing

the petition for sanction and the petitioner always takes the risk of having the petition dismissed if the court finds that the meetings were not

correctly convened or constituted. This position of law is followed and reiterated by D. A. Desai J. (as His Lordship then was) in Maneckchowk

and Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819 (Guj) while dealing with the objection to the effect that in the absence of

proper directions for convening separate meeting of different classes of creditors and the members of the company, proper meetings of distinct classes of members and creditors were not held, and, therefore, the resolution was vitiated, the court held that it is at the stage when the judge''s

summons is taken out u/s 391 for convening meetings of different classes, that proper classification of members and creditors may be made. The

court observed as under (at page 873) :

When the judge''s summons is taken out for seeking directions for convening meetings a duty is cast on the company to put proper materials

before the court so that the court may give proper directions for separate meetings of different classes of creditors and members. If the creditors

and members are not properly classifies and if the meeting of proper class of creditors and meetings is not separately held, the scheme approved at

such meeting cannot be sanctioned. [Vide Court Practice Note [1934] WN 142.] The responsibility for determining what creditors are to be

summoned to any meeting as constituting a class is if the applicant-company and if the meetings are incorrectly convened or constituted or an

objection is taken to the presence of any particular creditor as having interests competing with the others such objection if successfully taken at the

hearing of the petition for sanctioning the scheme, the company must take risk of having it dismissed.

146. It is thus clear that the responsibility is always on the petitioner for determining what class is to be summoned to any meeting as constituting a

class. Mr. Vakil, learned counsel for the petitioner-company, is, therefore, not right in his preliminary defence that once direction were issued by Y.

B. Bhatt J. in Company Application No. 892 of 1993 and once the meeting is held in compliance with such directions, the objection on the ground

that a particular class of shareholders constitute a distinct and separate class and that a separate meeting should be convened cannot be accepted.

The objection to a particular class, having distinct and separate interests, having been wrongly included in a common meeting or a separate meeting

of such a class was required to be held could be taken only when petition is filed for sanction or approval of the court to such a scheme or

arrangement, and, therefore, if the objection taken by Miheer on the ground that the separate class meeting is not convened is to be upheld, he

cannot be non-suited nor can his objection be overruled solely on the ground that Y. B. Bhatt J. has ordered one common meeting of the equity

shareholders of MIL. This preliminary defence must, therefore, fail, and is hereby rejected.

147. Having disposed of the aforesaid preliminary defence, this court is required to consider as it whether the aforesaid three classes set out in

sub-paras (A), (B) and (C) hereinabove, in my case, would constitute a separate and distinct class of the shareholders having different competing or conflicting interest with those of the rest of the equity shareholders. It is always a moot question as to what constitutes a ""class"". Even Buckley

on the Companies Acts has found that it is formidably difficult to say what constitutes ""a class of creditors"". In order to decide as toe what should

be the approach of the court, and what relevant questions are required to be raised and considered while deciding the objection on the ground that

a class of the equity shareholders constitutes a separate, distinct class having conflicting interest it would be necessary to refer to certain English as

well as India precedents on the subject.

148. The first statement of law on the subject is to be found in the case of Sovereign Life Assurance Co. v. Dodd [1892] 2 QB 573. Before the

Court of Appeal, the question was as to whether the persons whose policies had matured and those whose policies had not matured constitute a

separate distinct class so as to justify summoning and convening of a separate meeting. In that case a meeting of the policyholders was summoned

u/s 2 of the Joint Stock Companies Arrangement Act, 1870, at which a statutory majority agreed to an arrangement between the plaintiff-company

and the Sovereign Life Assurance Co., whereby it was provided that the policies of the plaintiff-company should be transferred to Sovereign Life

Assurance Co., and that the holders of the policies in the plaintiff-company should in full satisfaction of all claims upon the plaintiff accept certain

reduced payments from the Sovereign Life Assurance Co. At such a meeting, the statutory majority agreed to the arrangement but the defendants

whose policies had then not matured and who had obtained two loans from the plaintiff upon mortgage of the policies objected to the arrangement.

The objection was that the persons summoned to the meetings were the policyholders of the company and no separate meeting was summoned of

those policyholders whose policies had not matured. While upholding the objection that a separate meeting of such class ought to have been held

under the Act in order to make an arrangement binding upon the members of that class, Lord Esher M. R. made the following pertinent

observations (at page 579) :

Now, as to the meeting, we have to consider the persons who must be summoned to it, and who are to be dealt with as different classes; that is,

we must consider the state of affairs at the date of the meeting, for the attend it are those who have a right to attend it as that time, and it is that

state affairs, and not the position of things at the date of the original contract, that we must look at. The Act says that the persons to be summoned

to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes-classes which the Act of

Parliament recognises, though it does not define them. This, therefore, must be done : they must be divided into different classes. What is the

reason for such a course ? It is because the creditors composing the different class have different interest : and, therefore, if we find a different state

of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

149. From the aforesaid quotation, it becomes clear that if different state of facts exist qua different creditors or the shareholders which differently

affect or influence their minds and their judgments, they must be divided into different classes. It is also required to be seen as to whether within a

class itself there are sub-classes or micro-classes having different interest. Once such a sub-class or micro-class having different interest is visible

and if a different state of facts is put forth which would differently affect or influence their minds and judgments and their common meeting cannot

subserve the objective of section 391, namely, that of effectively consulting the different interest or different classes, no sanction to the resolution

can be accorded even if a statutory majority has passed it. In this very judgment, Bowen J., in a concurring but a separate opinion, made the

following pertinent observations (at page 583) :

If we are to construe the section as it is suggested on behalf of the plaintiffs it ought to be construed we should be holding that a class of the

policyholders whose interest are uncertain may by a mere majority in value override the interests of those who have nothing to do with futurity, and

whose rights have been already ascertained. It is obvious that these two sets of interest are inconsistent, and that those whose policies are still

current are deeply interested in sacrificing the interests of those whose policies have matured. They are bound by no community of interest, and

their claims are not capable of being ascertained by any common system of valuation. Are we, then, justifies in so construing the Act of Parliament

as to include theses persons in one class ? The word ""class"" is vague, and to find out what is meant by it, we must look at the scope of the section,

which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the

term ""class"" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons

whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

150. The test to be applied is that the term ""class"" must be construed to include those persons whose rights are not so dissimilar as to make it

impossible for them to consult together with a view to further their common interest. If the right of persons are dissimilar or conflicting or diametrically opposite, a common meeting of such persons will not provide a common meetings place for consultation of common interest. Persons

with such different or diametrically opposite interest may not constitute one class though in a wider classification they may fall in the category of

either creditors or the shareholders. If a common meetings of persons having dissimilar or diametrically opposite interest or conflicting interest

results in injustice to a smaller class, sanction must be withheld.

151. In this connection, we may notice the decision in Holders Investment Trust Ltd., In re [1971] Ch. 583; [1971] 2 All ER 289. Before

Megarry J. the petitioner company sought confirmation or sanction to the reduction of the company''s capital. The company''s petition for

confirmations was opposed by the minority preference shareholders. The majority preference shareholders supporting the reduction were also

holders of 52 per cent. of the company''s ordinary stock and non voting ordinary shares. The court was approached by asking a question :

Whether the majority preference shareholders shall act in the interest of the class as a whole in voting for the reduction of capital so that an

effectual sanction had been given to the modification of class rights ? To such a question the answer was given by making reference to the

observations of Viscount Haldane in British America''s case [1927] AC 369 which are as under (at page 291 of All ER) :

... a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities, namely, that the

power given must be exercised for the purposes of benefiting the class as a whole, and not merely individual members only.

152. Having quoted the aforesaid observations, Megarry J. was of the view that the court has to see whether the majority was honestly

endeavouring to decide and act for the benefit of the class as a whole, rather than with a view to the interest of some of the class and against that of

others. This is a conclusion which the court has to reach on the evidence before it.

153. From the aforesaid observations, another facet emerges and that is to find out as to even in such a common meetings where there was no

common meeting ground whether the majority honestly tried to decide and act for the benefit of the class as a whole. If such an exercise is visible

or could be justifiably read, the individual interest of some of them would not be paramount. The test is, therefore, one of fairness to the body of

shareholders and not to the body of a few individuals.

154. Substantial reliance is placed upon the decision of the Chancery Division in Hellenic and General Trust Ltd., In re [1976] 1 WLR 123 and

more particularly upon the observation of Templeman J., where the court accepted the objection of the minority shareholders to the effect that the meeting of the ordinary shareholders summoned to consider the arrangement was not properly constituted. As is clear from the facts set out

hereinabove on the petition of the company, the court summoned a meeting of the ordinary shareholders. The resolution agreeing to the

arrangement was carried as 91 per cent. of the shareholders by value attending and voting voted in favour of the arrangement. The MIT

(Merchandise and Investments Trust Ltd.) holder of 53.01 per cent. shares also voted in favour of the arrangement. The arrangement was

approved by 86.61 per cent. in number and 84.67 per cent. in value of those who attended and voted. The National Bank of Greece holding

13.95 per cent. of the ordinary shares voted against the arrangement. The minority shareholders objected to the sanction being granted on the

ground that the shareholders who were summoned in one meeting consisted of two classes, namely, outside shareholders, i.e., to say the

shareholders other than MIT and, secondly, MIT, a subsidiary of Hambros. The contention was that MIT were a separate class and should have

been excluded from the meeting of the outside shareholders. While dealing with the aforesaid objection, Templeman J. referred to and relied upon

the oft-quoted observation of Lord Esher M. R. and Bowen L.J. in the case of Sovereign Life Assurance Co. v. Dodd [1892] 2 QB 573. Having

quoted the said observations (which are already quoted hereinabove) the court came to the conclusion that in the facts of the case a separate

meeting was necessary. The objection was accepted and it was held to be fatal.

155. In the context of the facts of that case the court then proceeded to consider one another objection, namely, that if the scheme were

sanctioned by the court, the objectors, namely, the National Bank of Greece, would be liable to pay capital gain tax in Greece. In this context, the

court considered the effect of section 209 of the Companies Act, 1948, which is more or less similar to section 395 of our Act. It was notice that

section 209 provides safeguards for the minority shareholders in the event of a takeover bid and in a proper case provides machinery for a small

minority of shareholders to be obliged to accept the takeover against their wishes. It was notice that if the arrangement has been carried out u/s

209, MIT as a subsidiary of Hambros would have been expressly forbidden to join in any approval for the purposes of section 209 and in any

event the objectors could not have been obliged to sell because they held 10 per cent. of the ordinary shares of the company. It was also found

that the company cannot succeed u/s 209 because of the express provisions of that section and the size of the shareholding of the objectors. They

can only succeed u/s 206 by using votes of their own subsidiary company - MIT to secure necessary majority. Thus, having found that the petitioners cannot succeed at all u/s 209 and that the petition u/s 206 was an attempt to overcome the provisions of section 209, Templeman J.

held that they cannot fairly succeed u/s 206. Having noticed the aforesaid purpose of moving a petition u/s 206 a question was put as to why if the

scheme was beneficial, it was not acceptable to the objectors, i.e., the National Bank of Greece. The answer to such a question given by the

objector was that in their opinion there was some advantage in retaining their present shareholding. The second answer was that they would

become liable to swinging capital gains tax in Greece. It was not disputed that the objector would be liable to capital gains tax in Greece. In the

circumstances, the court was of the opinion that it would be unfair to deprive the objectors of shares which they were entitled to assume were safe

from compulsory purchase and it cannot have the effect of putting on the objectors a swinging fiscal import which they could have avoided had the

matter proceeded u/s 209 of the Companies Act.

156. The aforesaid objection of the objector was sought to be met by the company by contending that the liability to pay tax by the objector must

be ignored because while considering the votes at a meeting u/s 206 each shareholder must put himself in the impossible position of deciding what

it in the best interest of the class. Such a power must be exercised for the purpose of benefiting the class as a whole and not merely individual

members. It was contended that the test was one of fairness to the body of the shareholders and not to individuals. To such a contention,

Templeman J. replied by the following observation (at page 131) :

In a good many cases so it would be, but in the present case it seems to me that the individual loss which the objectors will suffer from the scheme

is one which should be borne in mind.

157. The aforesaid observations and the final order passed by Templeman J. in this decision are pressed into service by Mr. J. Thakore, learned

counsel appearing for Miheer, to contend that a separate meeting of Miheer and the members of his branch ought to have been called as their

interest as equity shareholders was quite distinct separate and conflicting to the interest of the rest of the shareholders. In his submission, the family

history, the devolution of shares in the family business and the family arrangement of 1979 cumulatively go to establish that the interest of Miheer

and members of his family and his branch was conflicting with the interest of the ANM group, YNM group and RNM group. He submitted that

had a separate meetings of the class been convened, he could have put forth his objections to the proposed scheme of amalgamation and could have pointed out objections and reasons for which the proposed amalgamation was not require to be carried through. In this connection, special

emphasis was laid by learned counsel on the reasoning and ultimate conclusion of Templeman J. in Hellenic and General Trust Ltd. [1976] 1 WLR

123 where the court from the scheme shall have to be borne in mind. Mr. Thakore there submitted that if Miheer and the members of his branch

were to suffer individual loss and/or were to be deprived of their which were to flow under the family arrangement of 1979 by the proposed

scheme of amalgamation, a separate meeting of such class of shareholders was essential as their interest was conflicting with the interest of the

majority equity shareholders.

158. In the context of class meetings, it would not be out of place to refer to the summation of the law on the subject by D. A. Desai J. (as His

Lordship then was) in Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819 (Guj) wherein his Lordship

observed, after referring to the observation of Buckley on the Companies Acts as well as the observations of the Court of Appeal in Sovereign

Life Assurance Co. [1892] 2 QB 573 as already quoted hereinabove in para 149 as under (at page 873) :

Speaking very generally, in order to constitute a class, members belonging to the class must form a homogeneous group with commonality of

interest. If people with heterogeneous interest are combined in a class, naturally the majority having a common interest may ride rough shod over

the minority representing a distinct interest. One test that can be applied with reasonable certainty is as to the nature of compromise offered to

different groups or classes. The company will ordinarily by expected to offer an identical compromise to person belonging to one class, otherwise,

it may be discriminatory. At any rate, those who are offered substantial different compromises each will form a different class. Even if there are

different groups within a class the interest of which are different from the rest of the class or who to be treated differently in the scheme, such

groups must be treated as a separate class for the purpose of the scheme. Broadly speaking, a group of persons would constitute one class when it

is shown that have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as

a class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. This will

provide rational indicia for determining the peripheral boundaries of classification. The test as stated earlier would be that a class must be confined

to those persons whose right are not so similar as to make it impossible for them to consult together with a view to their common interest"".

159. It is in the light of the position of law, as summed up hereinabove, this court is called upon to answer the objection as to whether the aforesaid

three groups at (a), (b) and (c) constitute ""separate classes"" requiring a separate and differential treatment to each when contrasted with the larger

class of equity shareholders of MIL. If the answer to any of the three groups is in the affirmative, omission to call a separate meeting of that

particular group or exclusion of that particular group from the group of equity shareholders on January 22, 1994, would be fatal to the ultimate

resolution passed. On the other hand, if I find that any of the three groups does not possess or represent a separate, distinct or conflicting interest

to the interest of the class of equity shareholders, the objection must fail.

160. Before this court proceeds to decide as to whether the aforesaid objection may be upheld or not, at the outset, it is necessary to deal with the

principle of law propounded and relied upon by Mr. M. J. Thakor, learned advocate for Miheer, in the case of Hellenic and General Trust Ltd.

[1976] 1 WLR 123 in my opinion, it shall have to be kept in mind that as a matter of fact it was found by Templeman J. that the scheme before

him, in fact and in substance, was one for compulsory purchase of shares which were held by the minority. It was also found that MIT was the

wholly owned subsidiary of the transferee-company. The scheme for compulsory purchase of shares was in fact governed by the provisions of

section 209 equal to section 395 of our Companies Act, 1956, which required 9/10ths majority, and since nearly 14 per cent. of the shares were

held by the majority and was never likely to succeed if the scheme was moved u/s 209. As a subterfuge, therefore, the scheme was moved u/s 206

of the English statute. The resort to section 206 was therefore, found to be not bona fide and was found to be not bona fide and was found to be

one solely for the purpose of out-voting the minority shareholders. IT is in this fact situation that the observations were made by Templeman J.,

which could not be applied as a general proposition of law in a scheme for amalgamation u/s 391 of our Act which is in pari materia with section

206 of the English statute. It would be pertinent to mention that this decision of Templeman J. in Hellenic and General Trust Ltd., In re [1976] 1

WLR 123 is subjected to severe criticism by almost all the English authors on company law. In Hahlo''s Cases and Materials on Company Law,

third edition, after digesting Hellenic and General Trust Ltd., In re [1976] 1 WLR 123 it is noted by the author that the decision is adversely

commented upon by D. D. Prentice in [1976] 92 LQR 13 and by J. A. Hornby in [1976] 39 MLR 207. It is pointed out that the essence of the

distinction was held to be the dissimilarity of rights, not the dissimilarity of interests. Dissimilar interests alone, not arising from legal rights, were not to be regarded as sufficient ground for the separation of classes of creditors. The interests of Miheer and his group cannot be said to be dissimilar

to the interests of the other equity shareholders. Even if such interest is assumed to be dissimilar which is not arising from any legal right they do not

deserve any separate treatment as separate a class.

161. In Gore-Browne on Companies, 44th edition, at para 30, under sub-heading 14.1 while examining the relationship between sections 425 and

428 (comparable to our sections 391 and 395) the author has noted that in Hellenic and General Trust Ltd., In re [1976] 1 WLR 123 a minority

shareholder complained that the effect of a scheme u/s 425 amounted to a compulsory purchase of its shares and that, since it owned more than 10

per cent. of the shares affected, it could resist compulsory acquisition u/s 428, and its rights under that section were being evaded under the

scheme, Templeman J. accepted this contention and refused to make an order approving the scheme u/s 425, even though he found the scheme

was fair or more than fair to the ordinary shareholders as a class"". He relied upon the two decisions on the relationship between sections 425 and

582. Those cases have already been discussed at 30.7 where it was seen that they were open to criticism so far as they hold that a scheme, which

could not be brought u/s 582 anyway, will not be confirmed u/s 425. Even if the cases on the relationship between section 582 and 425 can be

taken as establishing that where it would be possible to proceed u/s 582 then, in a scheme u/s 425, the rights of dissentient shareholders are to be

preserved in the same way as u/s 582, this means no more than that dissentients as u/s 582(5) should get a fair value for their shares. It does not

means that they are entitled to retain their shares and have the scheme thrown out when the cash price they were being offers was ""fair or more

than fair to the ordinary shareholders as a class"". If authorities on the relationship between sections 582 and 425 are to be applied to that between

sections 428 and 425 then this aspect of the analogy should hold good.

162. From the aforesaid observations, it becomes clear that even in a scheme u/s 395 equal to section 209 or section 428 of the English statute

where the purpose is compulsory purchase of the shares of the minority, the dissentients or the minority must get a fair value for their shares. They

have no right to retain their shares, and have the scheme thrown out when the cash price they were being offered was fair or more than to the

ordinary shareholders as a class. On principle also, it appears that the ratio laid down in Hellenic and General Trust Ltd., In re [1976] 1 WLR 123

is not accepted as a proposition of law.

163. In Palmer''s Company Law, 24th edition, at page 1184, it is pointed out by the learned authority that if the proposed arrangement is one for

the purchase of all the company''s shares this may be achieved u/s 425 by a three-quarters majority which then becomes binding on a dissenting

minority. u/s 428, the purchase of shares in a takeover bid only becomes compulsory on the minority if nine-tenths of the shares have been

purchased. Thus a dissenting shareholder with more than one-tenth, but less than a quarter, of the shares who can successfully oppose the sale of

his shares u/s 428 may lose that protection if a scheme is approved u/s 425. This situation arose in Hellenic and General Trust Ltd., In re [1976] 1

WLR 123 where it was accepted, following National Bank Ltd., In re [1966] 1 WLR 819; [1966] 1 All ER 1006 that since section 425 unlike

section 428 required the court''s consent, the smaller majority required for expropriation of the minority''s shares could be justified. There is,

therefore, no requirement of a nine-tenths majority for a scheme u/s 425 which is akin to a scheme u/s 428. But the court refused to sanction the

scheme, even though it was fair to the ordinary shareholders as a class, and the dissenter who owned 13.95% of the shares, objected for personal

fiscal reason. The court would not allow section 425 to be used to deprive the dissenter of his property, which he could lawfully retain u/s 428

without a ""very high standard of proof"" from the applicant. This had not been discharged, principally because the majority accepting shareholder

was a wholly owned subsidiary of the purchaser. It thus becomes clear that according to Palmer also the distinction made in Hellenic and General

Trust Ltd., In re [1976] 1 WLR 123 is mainly because the scheme was regarded as one in the nature of a takeover bed u/s 428 equal to the old

section 209 of the English statute.

164. Gower in his Principles of Modern Company Law, fifth edition, at page 697, while dealing with this very decision has in the foot note

observed that although the scheme was eminently fair to the shareholders generally it was not fair to compel those shareholders who did not want

to sell their shares in circumstances where they could not have been compelled to do so under what is now section 429.

165. In my opinion, from the views expressed by the learned authors it shall have to be held that the interests of the individual shareholder or a

group under his control does not entitle him or separate or distinct treatment if his legal rights are not in anyway distinct from the rights of the entire

class of the shareholders.

166. Group A. - Turning now to group A referred to hereinabove which comprises Miheer in his personal capacity and as karta of his HUF and as

trustee of trusts and his family members, it is required to be examined as to whether this group constitutes a distinct class of shareholders having a

separate interest in the company in view of the family agreement, dated March 1, 1979, and as to whether this group is required to be treated as a

separate class of shareholders requiring a separate meeting for considering the proposed scheme of amalgamation.

167. In the wider class of share holders, the law itself distinguished between the equity shareholders and the preference shareholders. However,

under the provisions of the Companies Act or the Rules, a further classification in the class of equity shareholders is not made. In the context of

section 391(1) of the Act, for the purpose of determining different class or classes of shareholders of the company, ordinarily, over and above the

provisions of the Act and Rules reference is to be mace to the classification of shares under the memorandum of association and the articles of

association of the company. Reference in this connection may be made to the articles of association of MIL which are produced at annexure A to

the petition. Article 6, inter alia, provides that the share capital of the company which may be issued shall be of two kinds, i.e., (i) equity share

capital, and (ii) preference share capital. By article 7, it is stipulated that the provisions of section 75 to 90 of the Act in so far as they may be

applicable, shall be observed by the company. Article 11, inter alia, stipulates that the shares or other interest of any member in the company shall

be movable property, shall be transferable in the manner provided by the articles of the company. Articles 12 to 19 deal with the procedure to be

followed for shares, issuance of shares, expenses of shares and liability of the jointholders of shares. Article 22 provides that the issuance of

certificates or renewal of shares, or duplicates shares shall be governed by the provisions of section 84 of the Act. Article 23 provides as to how

certificates of shares shall be issued and as to how the members of the company can transfer such share certificates. the entire procedure for

transfer and transaction of shares and debentures is stipulated under articles 48 to 61. The aforesaid provisions dealing with the issuance of shares,

class of shares, etc., do not justify any further classification except one between the equity share holders and the preferential shareholders.

168. At this stage reference may may also be made to the provisions do the Act, namely, section 82 to 87, Part VI of the Companies Act deals

with ""share capital and debentures"". Section 82 provides that the shares and interests of the members of a company shall be movable property and

can be transferred in the manner provided in the articles of the company. Section 84 provides for the issuance of share certificates specifying the

number of shares held by any member which shall be prima facie evidence of the title of a member to such shares. Section 85 deals with the two kinds of share capital, viz., (i) preference share capital, and (ii) equity share capital. Section 86 stipulates that the share capital of a company limited

by shares shall be of two kinds only. Section 87 deals with the voting rights of every member of a limited company. From a perusal of sections 85

to 90 of the said Act, it is not possible to read any further classification in the class of equity shareholders.

169. Thus, neither from the provisions of the Act nor from the provisions of the articles of association of MIL is it possible to identify a class within

a class or to record Mihir and the members of his family and his HUF and his trusts as a separate and distinct class of the equity shareholders.

Ordinarily, therefore, the separate meeting of this group A from the entire class of the equity shareholders was not permissible nor is any

justification found from the provisions of the Act or the articles of association for giving a separate and distinct treatment to this group A.

170. However, the submission of Mihir is that inter se agreement between the shareholders in the nature of the family arrangement of 1979 shall

have to be taken into consideration. It is submitted that this court cannot turn a Nelson''s eye to the broad realities which are reflected from the

draft of the family arrangement produced at annexure E to the affidavit-in-reply and the final agreement at annexure F. It is further submitted that

the existence of the family arrangement and/or the subsequent agreement dated March 1, 1979, is not at all disputed by any of the parties to such

agreement, more particularly, by Arvind Mafatlal against whom specific allegations are made extensively in the petition filed before this court. It is

submitted that in the light of the family arrangement and the subsequent note on the discussion at the meeting held on March 1, 1979, it becomes

clear that each group in the family has a separate and distinct interest from that of others and such interest was recognised by the family

arrangement and the subsequent note of the meetings. It is, therefore, submitted that the family arrangement and the subsequent agreement must

have a bearing while determining as to whether within the class of the equity shareholders there existed a further class having a distinct, separate

and conflicting interest to that of the majority class.

171. In considering the nature of interest of a class of the shareholders in the context of the scheme of amalgamation, in my opinion, the general

principle propounded by Megarry J. in Holders Investment Trust Ltd. [1971] Ch 583; [1971] 2 All ER 289 that the power conferred on a

majority of a class must be exercised for the purpose of benefiting the class as a whole and not merely individual members only shall have to be

kept in mind. Similarly, in Grierson, Oldham and Adams Ltd., In re [1967] 1 WLR 385; [1967] 1 All ER 192 it was held that the test was one of fairness to the body of shareholders and not to individuals. Secondly, in the context of class meetings when an objection is taken on the ground that

a group of the shareholders constitute a separate and distinct class the test applied by D. A. Desai J. (as His Lordship then was) in Maneckchowk

and Ahmedabad Manufacturing Co. Ltd. [1970] 40 Comp Cas 819 (Guj) namely, ""how the interests of these shareholders are different from the

other shareholders ?"" is required to the applied. In the present case in view of the provisions of the articles of association as well as the provisions

of the Companies Act and Rules there is no justification for holding that a group of shareholders which is described as the minority shareholders or

the MHM group constitutes a separate and distinct class of the equity shareholders. It is also required to be kept in mind that the provision of the

family arrangement and/or the subsequent note of agreement on which reliance is placed are not acted upon and made effective by properly

amending the articles of association. In the absence of proper amendment of the articles of association making special provision for one of the four

groups as envisaged by the family arrangement, legally it is not permissible for this court to classify this group of equity shareholders as a separate

and distinct class. In this connection, the attention of this court is invited by Mr. S. B. Vakil to the decision of the Supreme Court in the case of

V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, . Before the Supreme Court, the question was as regards transfer of shares of a company in

the context of section 82 of the Companies Act, 1956. Sawant J., speaking for the court, formulated a question as to whether the shareholders can

among themselves enter into an agreement which is contrary or inconsistent with the articles of association of the company. Before the Supreme

Court, the third defendant was a private limited company having a total of 50 shares. The joint family of the plaintiff and the defendants, initially

held 13 shares, the rest of 37 shares being held by the outsiders. In course of time, the family acquired the rest of 37 shares and became the sole

shareholders of the company. The family consisted of two brothers, namely, Baluswamy Naidu and Guruviah Naidu. Each brother held 25 shares

in the company. The plaintiff, defendants Nos. 1 and 2 and one Selvaraj were the sons of Baluswamy Naidu and defendants Nos. 4 to 6 were the

sons of Guruviah Naidu. It was the case of the plaintiff that in 1951 there was an oral agreement between the two brothers that each branch of the

family should always continue to hold an equal number of shares, namely, 25 and that if any member of either of the branches wishes to sell his

shares he should give the first offer of purchase to the members of that branch, and if such offer is not accepted only then would it be sold to others. The defendants disputed such an agreement. However, the articles of the company were not amended to bring them in conformity with the

said agreement. Contrary to such agreement, the first defendant sold the shares to defendants Nos. 4 to 6 who were the sons of Guruviah Naidu.

Thereupon, the plaintiffs, who were the sons of Baluswamy Naidu filed a suit for a declaration and for a permanent injunction restraining

defendants Nos. 4 to 6 from applying for registering the said shares in their names. It was in this context that the Supreme Court examined the

various provisions of the Companies Act and Rules. In this context, the Supreme Court held that under the Companies Act or the Transfer of

Property Act, the shares are transferable like any other movable property. The only restriction on the transfer of shares in the company can be as

laid down in its articles of association, if any. The restriction which is not specified in the articles is, therefore, if any. The restriction which is not

specified in the articles is, therefore, not binding either on the company or on the shareholders. After referring to the various decisions and

observations of the learned authors on the company law, ultimately, in para 9 of the judgment, the Supreme Court concluded as under (at page

208 of 73 Comp Cas) :

Hence, the private agreement which is relied upon by the plaintiffs whereunder there is a restriction on a living member to transfer his shareholding

only to the branch of family in which he belongs in terms imposes two restrictions which are not stipulated in the article. Firstly, it imposes a

restriction on a living member to transfer the shares only to the existing members, and, secondly, the transfer has to be only to a member belonging

to the same branch of family. The agreement, obviously, therefore, imposes additional restrictions on the member"s right to transfer his share which

are contrary to the provisions of article 13. They are, therefore, not binding either on the shareholders or on the company. In view of this legal

position, the finding recorded by the courts below that the sale by the first defendant of his shares to defendants Nos. 4 to 6 is invalid as it is in

breach of the agreement, is erroneous in law. In view of our above finding, it is unnecessary to go into the question whether the High Court was

justified in directing the transfer of shares by defendants Nos. 4 to 6 to the plaintiffs even if its finding that the sale was invalid was correct.

172. To similar effect is the decision of the Supreme Court in the case of Shanti Prasad Jain Vs. Kalinga Tubes Ltd., . In the case before the

Supreme Court the company was not a party to the agreement between the two groups of shareholders and the third group came forward to

supply finance on terms that he be allotted shares equal to those held by the two groups after increasing share capital. Since the company has not a party to such agreement it was held that it was not bound by it and it was open to the company in its general meeting to decide that the new shares

should not be issued to the existing shareholders but to other private individuals.

173. From the aforesaid observations, it becomes clear that the provisions of the articles of association are determinative of the rights and liabilities

of the shareholders inter se. Their further classification in view of any agreement or the family arrangement shall have to be recognised by the

articles of association and in the absence thereof the family arrangement shall not be binding on the company. In the present case, it is an admitted

fact that the alleged family arrangement is not fully implemented and enforced. In fact, from the affidavit-in-rejoinder filed by the company, the

alleged family agreement itself is denied and subsequent minutes of agreement are stated to be only an agreement binding on three brothers,

namely, Arvind Mafatlal, Yogindra Mafatlal and Rasesh Mafatlal. Over and above the dispute as regards the nature of the agreement and the

parties to whom such an agreement is to be applied, there is the further omission that such agreement is not made part and parcel of the articles of

association. Neither Miheer, nor any member of his family nor any of his trusts has moved at any stage for appropriately amending the articles of

association of MIL. Legally, therefore, it is not possible to permit Miheer to regard himself and the members of his family as a separate and distinct

class of equity shareholders from the rest of the equity shareholders of MIL.

174. Even factually, it is required to be noted that according to Miheer in the year 1979 his group was holding approximately 16.15% of shares of

MIL which gradually came to be reduced to 5%. As a group it was not a group of majority shareholders and was not possessing any special right

or treatment. Amongst the class of equity shareholders, it is not possible to classify the group of Miheer and the members of his family as a distinct

and separate group entitled to a separate class meeting. As 5% shareholders of the total share capital of MIL, the group of Miheer and the

members of his family could have objected to the proposed scheme. Their separate meeting, in my opinion, would not have made any difference as

even otherwise in the absence of that group the resolution in the present case is passed by the requisite majority. Even if at a separate meeting of

that class everyone belonging to that separate class had objected to the scheme or voted against the scheme, it would not have had any significant

impact on the ultimate resolution which was passed by the meeting of the equity shareholders. This finding his recorded on the assumption that

Mihir and the members of his group constitute a separate class. In reality, as recorded hereinabove, there is no justification either in law or on the facts to hold that Mihir and his group would constitute a separate and distinct class of equity shareholders requiring a separate meeting. It is also

required to be kept in mind that at a meeting of this nature where the equity shareholders are required to consider the proposed scheme of

amalgamation of MF with MIL, all shall have to think as to whether such an agreement would be beneficial or advantageous both to the company

as well as to the shareholders. The right to vote which they exercise at such a meeting is a corporate right or a right which flows from the articles of

association. The shareholders, inter se, are not in any fiduciary relationship. While taking into consideration the benefits and advantages of the

scheme the paramount question the shareholders ask is as to whether it is for the benefit of the company, and, secondly, as to whether it was for

the benefit of the class of shareholders. The inter se dispute between groups of the shareholders or the existence or otherwise of any private

agreement amongst the groups of the shareholders ordinarily are not matters of concern for the entire class. It is always open to the shareholders,

to whichever group they may belong, to remain present and put forth his/their views/objections to the proposed scheme. By separating them from

the class of equity shareholders to which they belong and by insisting that their separate meeting ought to have been convened, no useful purpose is

served as free and fair discussion and deliberation is not denied to them at the meeting of the equity shareholders. It is not open to the court to

decide as to how their interest as equity shareholders is distinct and separate from the interest of the entire class of equity shareholders. The

objection of this group A as contained in objection No. 4 must, therefore, fail and the same is overruled.

175. Groups B and C. - That would bring this court to the objection of groups B and C which is put as composite objection No. VII.

176. Group B. - In group B would fall the shareholders who applied or/and allotted shares of MIL pursuant to the rights issue of 1987 and the

rights issue of 1992. It is submitted that the rights issue of 1987 was the subject-matter of challenge at the instance of the three shareholders who

instituted two civil suits, being Civil Suits Nos. 3181 and 3182 of 1987 in the City Civil Court at Ahmedabad and the rights issue of 1992 was also

the subject-matter of challenge in the suit, being Civil Suit No. 5189 of 1992 instituted by Miheer himself in the City Civil Court at Ahmedabad.

177. Turning now to the rights issue of 1987, it opened on May, 4, 1987, and closed on July 3, 1987. The same was challenged by the three

shareholders in two separate suits abovereferred to. The said shareholders have taken out a notice of motion for a temporary injunction restraining

MIL from issuing rights shares. The said notice of motion was rejected by the City Civil Court at Ahmedabad mainly on the ground that the suits were belatedly filed on 27th June, 1987, only a few days before the closure of the rights issue and, therefore, the balance of convenience was not

in favour of the plaintiff. The notice of motion in the said suit was decided on September 4, 1987. The learned Civil Civil Judge, while rejecting the

notice of motion, observed that some of the important guidelines issued by the Controller of Capital Issues were not fulfilled. It was found that the

guideline contained in clause 17 required every company to send a letter to the existing shareholders containing detailed information as to how it

proposes to utilise the additional money and to give some broad idea of future investment of such additional capital before making application to

the Controller of Capital Issues for issuance of rights shares. This clause of the guidelines has not been complied with by MIL. It was found by the

learned City Civil Judge that had such a letter been sent to the shareholders including the plaintiffs, they, perhaps, could have instituted litigations

well in advance. The learned City Civil Judge has, however, noted that non-compliance with the aforesaid clause 17 was condoned by the

Controller of Capital Issues by a subsequent letter of consent. Despite such observations, the learned City Civil Judge felt the need of imposing

some restrictions as he was not inclined to grant full clearance with respect to allotment of shares. He, thereupon, passed the following operative

order :

The notices of motion in both the cases partly succeed. The defendants are directed not to proceed with NOCIL deal at least till 30th November,

1987.

The defendants are permitted to allot shares to the applicants in the rights issue subject to the clear stipulation therein that the allotment of such

shares would be subject to the result of these litigations. They are also directed not to allot shares from the unsubscribed portion thereof to any one

except banks and/or public financial institutions without the previous permission from this court.

178. From the aforesaid operative order passed by the learned City Civil Judge in the aforesaid two suits of the shareholders, it becomes clear that

the petitioner-company was permitted to allot shares to the applicants of the rights issue, subject to the clear stipulation therein, that allotment of

such shares would be subject to the result of these litigations. The second restriction is as regards the allotment of shares from the unsubscribed

portion to which reference shall be made hereafter.

179. Based on the aforesaid order of the learned City Civil Judge, Miheer has submitted that the rights of the shareholders to whom the rights

shares were allotted in 1987 the rights issue were under a cloud as they were expressly subject to the outcome of the two suits instituted by the shareholders in the City Civil Court at Ahmedabad. It is, therefore, submitted that the allottees of these shares or their transferees could not have

participated in the meeting of the equity shareholders and the resolution which was passed after participation of such equity shareholders was,

therefore, bad and the scheme, therefore, cannot be sanctioned.

180. In reply to the aforesaid objection, the petitioner-company has pointed out in its affidavit-in-rejoinder the need of issuance of the rights issue

of 1987. It is, thereafter, pointed out various factors to submit that in fact allotees of shares in response to their applications for the rights issue of

1987 could not be treated as a class by themselves and could not be denied the status of equity shareholders. Firstly, it is pointed out that the

learned City Civil Judge has not, in fact, granted injunction against the allotment of shares to the applicants. Once such shares are allotted to the

applicants they becomes the equity shareholders of the company and would form part and parcel of the class of equity shareholders. They enjoy all

rights including the right to transfer their shareholding like other equity shareholders. Secondly, it is pointed out that the learned City Civil Judge has

not put any prohibition or restriction on the rights of such allottees inasmuch as the allottees are permitted to transfer or deal with their allotted

shares in every manner permissible under law. Such allottees, therefore, cannot be treated as a separate class. Thirdly, it is, pointed out that the

plaintiffs, being Kaushik N. Parikh and Dhirubhai D. Desai of Civil Suit No. 3181 of 1987 and Jatin C. Shah, the plaintiff of Civil Suit No. 3182 of

1987, were employees or ex-employees of the company controlled by Miheer''s maternal uncle, Lakshmikant Bagubhai. It is submitted that in fact

the suits were instituted by the plaintiffs at the instance of Miheer and the plaintiffs were stooges of Mihir. Fourthly, it is submitted that the only

ground on which the prima facie case was believed at the stage of deciding the notice by the Controller of Capital Issues. It was pointed out that

the non-compliance with the said clause was also condoned by the Controller of Capital Issues. Fifthly, it was pointed out that though the hearing

of both the suits was expedited and fixed in the month of November, 1987, the hearing of the said suits had not commenced, and in fact, because

of the inaction or non-co-operation of the said plaintiffs, the City Civil Court has by order dated 7th July, 1989, de-expedited the hearing of both

the suits. It is pointed out that the said suits are till date not heard. Sixthly, it is submitted by Mr. Vakil, learned advocate for the company, that the

direction of the City Civil Court that the allotment of shares to the applicants of rights issue would be subject to the result of litigations was clearly

stipulated and provided for in the letter of allotment of shares to the applicants. Seventhly, it is submitted that the rights issue of the company was governed by the provisions of section 81(1) of the Act and that from such provision as well as from the order of the court the allottees of the rights

issue are not subject to any disqualification or disability. The allottees were the equity shareholders and the right issues were allotted to them. On

allotment of such issues they have not become a class distinct or separate from the equity shareholders more so that even right to transfer their right

shares to any other person is not in any way restricted. Such a shareholder being not under any disability or disqualification and being even

otherwise holders of the equity shares were entitled to participate, attend and vote at the meeting of the equity shareholders. In the absence of any

disqualification disentitling them to vote, simply because the litigation is pending in the court, they cannot be treated as a separate and distinct class.

Eighthly, it is submitted that it is also not pointed out by Miheer as to how these shareholders constitute a separate and distinct class whose interest

is in now way separate and distinct from the interest of entire class of the equity shareholders. Mere institution of a suit would not reduce them to a

less qualified class of equity shareholders. Lastly, it is submitted that the plaintiffs in those suits being the stooges of Mihir they have subsequently

taken no interest in the litigation, and despite directions of the City Civil Court to decide the said suits expeditiously in November, 1987, they have

not shown any readiness and willingness to proceed further with the suits and have by their non-co-operation compelled the City Civil Court to de-

expedite the hearing of the suits. The suits are, therefore, simply lying in cold storage and for years to come the entire class of shareholders to

whom the rights issues are allotted cannot be regarded as a class sub-ordinate to the class of equity shareholders or a class distinct and separate

from the class of equity shareholders. This court also fails to understand as to how the institution of suits simpliciter without any prohibitive order

against issuance of rights issue or any prohibitive order disqualifying or subjecting them to disability can disqualify a class of equity shareholders

from being equally treated with the other equity shareholders more so when such itself was comprising the equity shareholders to whom the rights

issues were issued. For the aforesaid reasons, I do not find any substance in the objection of Mihir that the allottees of the rights issue in 1987

constitute a separate and distinct class of equity shareholders whose rights were under cloud of pending litigation and, therefore, they were not

entitled to participate at the meeting of the equity shareholders. The said objection is, therefore, overruled.

181. As regards the rights issue of 1992, it must be noted that Mihir himself was instituted Civil Suit No. 5198 of 1992, inter alia, challenging the

said issue on the ground that it was for the object mentioned in the letter of offer and that it was with the ulterior motive of reducing his interest in

MIL. It must be stated that in the said suit though Mihir applied for injunction by taking out notice of motion, no injunction was granted by the Civil

Civil Court at Ahmedabad and the rights issue of 1992 was not subjected to any limitation or prohibition. The rights shares pursuant to such issue

of 1992 were already issued to the allottees. It would not be out of place to mention that Mihir, the members of his family, his charity trusts and his

investment companies which/who were entitled to allotment of the rights shares took full advantage of the said issue inasmuch as they renounced

their right to subscribe to the rights issue to public financial institutions. It is alleged by the petitioner-company that thereby Mihir and his branch

made huge profits of more than rupees two crores. Though this fact may not be important in the context of deciding the point of class meeting it is

mentioned only to reflect upon the conduct of the objector. It is, therefore, not possible for this court to hold that the allottees of the rights issue of

1992 and/or their transferees were under any disability or disqualification so as to render themselves a separate and distinct class from the general

class of the equity shareholders. In the absence of any prohibitive order by the City Civil Court when transfer of such rights shares by allottees to

another person is also permitted, one fails to understand as to how in a suit of this nature, any detriment or prejudicial relief could be granted to the

class of equity shareholders to whom the rights shares were allotted in 1992. I, therefore, do not find any substance in this objection and the same

is overruled.

182. Group C. - In Group C of his objection No. VII, Miheer has, inter alia, contended that in the rights issue of 1987 in view of the prohibitive

order issued by the City Civil Court at Ahmedabad, no shares could have been issued in favour of NOCIL and Sushrupada Investments Pvt. Ltd.

The allotment of shares of NOCIL and Sushrupada was illegal and in contravention of the prohibition contained in the order of the City Civil

Court, Ahmedabad, and such shareholders, therefore, could not have legitimately participated at the meeting of equity shareholders. Their

participation, submits Mr. Miheer, has vitiated the ultimate resolution passed by the petitioner-company, and, therefore, the scheme should not be

sanctioned.

183. It is undoubtedly true that in the operative portion of the injunction granted by the City Civil Court, Ahmedabad, in the aforesaid two suits

filed by the shareholders challenging the rights issue of 1987 it was clearly stipulated that the company shall not allot shares from the unsubscribed

portion to anyone except banks and/or public financial institutions without prior permission of the court. It is pointed out that as against 35%

holding of the public in the pre-rights equity shares of MIL, less than 10% applied for the rights shares. It is further asserted that of the total issue of

8,50,500 shares more than 55% was not subscribed. The company was prohibited from allotting any share from the unsubscribed portion of the

rights issue by the City Civil Court. It is Miheer''s case that despite such prohibitory orders 1,24,400 shares were allotted to NOCIL a company

controlled by MIL on December 14, 1987, after the order was passed by the City Civil Court on the basis of an application made by NOCIL by

letter dated 2nd July, 1987, to the board of directors of MIL requesting the board to treat their application for investment and to participate in the

equity to the extent of 1,50,000 shares. It is pointed out by Miheer that NOCIL was not even a shareholder of MIL on the record date and was

not, as such, entitled to any share under letter of offer dated May 4, 1987. It is his case that NOCIL obtained renunciation of certain rights

entitlements in its favour and applied for 9,256 rights shares on the basis of such renunciation as a renounce. As there was specific prohibition

restraining MIL from allotting shares from the unsubscribed portion of the rights issue to anyone, excepting to banks and public financial institutions

with the previous permission from the court no shares could have been allotted to NOCIL. It is submitted that no additional shares could have

been allotted to any shareholder who had applied for additional shares as such shares could only be allotted from the unsubscribed portion of the

rights issue. It is further pointed out that Sushrupada Investments Pvt. Ltd. had 563 shares in MIL and was, therefore, entitled to just 563 shares of

the rights issue. However, the said company has been allotted shares to the tune of 42,500 which again were issued from out of the unsubscribed

portion of the rights issue and that was also in total disregard of the prohibitory order of the City Civil Court.

184. To this objection, there is a three-fold defence from the company. The first defence is that the allotment of shares to NOCIL or Sushrupada

is not from any unsubscribed portion of the rights issue. In this connection, it is pointed out in the affidavit-in-rejoinder that the subscription in the

rights issue was 70% only and, therefore, 30% would remain as unsubscribed. It is pointed out that from this 30% unsubscribed portion no shares

are allotted either to NOCIL or to Sushrupada. The second defence is that even if it is assumed that the allotment of shares of NOCIL and

Sushrupada was in breach of the order of injunction issued by the City Civil Court such allotment would not be invalid. At the most, the

consequence would be one arising from breach of the order of the court, namely, liability for contempt. It was pointed out that such a contempt

would be a civil contempt and would afford a cause of action to the plaintiffs of those suits and to none else. The plaintiffs have already initiated an action for contempt of court in the City Civil Court which is pending. By reference to various decisions of the High Courts it was contended before

this court that the allotment of shares in breach of the prohibition imposed by the City Civil Court would not render the allotment bad or void and

that the allottees would nonetheless remain holders of the equity shares. The third defence is that even if it is held that the shares issued to NOCIL

and Sushrupada allegedly in breach of the prohibitory order of the City Civil Court were void and/or were not lawful and that such shareholders

cannot participate at the meeting of the equity shareholders, even in the absence of such shareholders and by excluding them from the meeting also

the requisite majority has voted in favour of the resolution and, therefore, the ultimate resolution passed by the shareholders cannot be voided.

185. At the outset, it must be clarified that NOCIL was admittedly not a shareholder of MIL on the record date. It was, therefor, not entitled to

any offer of the rights issue as of right. As regards Sushrupada it was the holder of only 563 shares of MIL and was, therefore, entitled to allotment

of just 563 rights shares. As against the aforesaid factual position, it is admitted that NOCIL made an application dated 2nd July, 1987, for

participating in MIL''s equity shares to the extent of 1,50,000 shares. If reference is made to such application, NOCIL subscribed to 1,50,000

shares for allotment u/s 81(1)(d) of the Act. It is the case of the company that the rights issue was governed by section 81(1) of the Act. All

8,10,000 equity shares covered by the said issue were offered to the existing shareholders under the letter of offers (LOO) as required by clauses

(aa) and (b) of sub-section (1) of section 81 of the Act. u/s 81(1)(c) of the Act the person to whom the shares were offered under clauses (a) and

(b) of sub-section (1) have the right to renounce the shares offered to them. The renouncee in whose favour the shareholder renounces any share

to which he is entitled as of right has the right to allotment u/s 81(1)(c) of the Act. The number of share which the shareholders fail to subscribe or

renounce as aforesaid can be disposed of by the board of directors in such a manner as they think most beneficial to the company under clause (d)

of section 81(1) of the Act. The power of the board to dispose of such surplus shares is very wide and the board can dispose of such surplus

shares to non-members as well. The law imposes no time limit for receipt by the board of subscription for surplus shares which it can dispose of

u/s 81(1)(d). Even before the availability or extent of such shares can be ascertained or is known for facility of procedure and expeditious disposal,

the shareholders are invited simultaneously to apply or subscribe for additional shares by the very letter of offer by which they are entitled to subscribe to their rights entitlement. Just as a shareholder can in advance subscribe for allotment of additional shares disposable u/s 81(1)(d) of the

Act, it is submitted that a non-member can also apply. It is the further case of the company that the shares allotted u/s 81(1)(d) to non-members

are not additional shares but the shares in respect of which the existing shareholders have not exercised their right of pre-emption contemplated in

section 81(1).

186. From the aforesaid stand taken by the petitioner-company, it would be necessary to refer to the provisions of section 81 of the Companies

Act, in so far it is relevant :

81. (1) Where at any time after expiry of two years from the formation of a company or at any time after the expiry of one year from the allotment

of shares in that company made for the first time after its formation it is proposed to increase the subscribed capital of the company by allotment of

further shares, then -

(a) such (further) shares all be offered to the persons who, at the date of the offer, are holders of the equity shares of the company, in proportion,

as nearly as circumstances admit, to the capital paid-up on those shares at that date;

(b) the offer aforesaid shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days from the

date of the offer within which the offer, if not accepted, will be deemed to have been declined;

(c) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned

to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (b) shall contain a statement

of this right;

(d) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that

he declines to accept the shares offered, the board of directors may dispose of them in such manner as they think most beneficial to the company"".

187. From the aforesaid provisions, it becomes clear that with the object of increasing the subscribed capital of the company, it can issue further

shares. Clauses (a) and (b) refer to the offer to be made by the company to the persons who at the date of the offer are the holders of the equity

shares of the company. Clause (b) stipulates the manner and procedure by which such offers will be made. Clause (c) of sub-section (1) of section

81 deals with the right of the holder of share to renounce the shares offered to him or any of them in favour of any other person. Clause (d) of sub-

section (1) of section 81 provides that after the expiry of time specified in the notice stipulated by clause (b) or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the board of directors may dispose of them in such manner

as they think most beneficial to the company. In view of the aforesaid provisions admittedly the case of NOCIL cannot fall under clauses (a) and

(b). It is the case of the company that it has under clause (d) offered shares or allotted the shares of NOCIL as well as to Sushrapada. The gist of

the defence is that what is allotted to Sushrapada and NOCIL is not from the unsubscribed portion of the rights issue but is from out of additional

shares. Such subscription is under clause (d) of section 81(1). The subscription under this head was received from NOCIL, a non-member, even

prior to the issuance of the prohibitive order of the City Civil Court. It is the case of the company that before the City Civil Court when it was

disclosed that 70% have subscribed to the rights issue, it wanted to convey the subscription by members as well as non-members. It is submitted

that the right of non-members flowing from section 81(1)(d) cannot be ignored and, therefore, consistent with the right conferred upon the board of

directors if shares are allotted u/s 81(1)(d) is cannot be said that such an allotment is from the unsubscribed portion of shares. How the 70% of

shares are disposed of out of the total issue of 8,10,000 shares is stated by the company in its affidavit-in-rejoinder and the same is reproduced

hereunder :

Amount

No. of shares received at

applied for Rs. 150 per

share

1. From shareholders under the

entitlement (i.e., themselves

exercising pre-emptive right

u/s 81(1)(a)) 2,98,653 4,47,950

2. From renouncees (exercising

pre-emptive right under

section 81(1)(c)) 4,351 64,87,650

3. Applications for additional

shares from shareholders (under

section 81(1)(d) including

42,500 shares applied for by

Sushrupada) 72,777 1,09,050

4. Applications from NOCIL under

section 81(1)(d) 1,50,000 2,25,00,000

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5,64,631 8,46,94,650

Les : Defective applications not

considered 4,192 6,28,800

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5,60,439 8,40,65,850

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Total issue 8,10,000 shares. Therefore, 5,60,439 out of 8,10,000 shares is about 69.19% of the total issue. Against 1,50,000 equity shares

subscribed by NOCIL, this company allotted to NOCIL 1,24,000 equity shares.

188. It is the case of the petitioner that before the City Civil Court when it stated that approximately 70% of the total issue of 8,10,000 equity

shares are subscribed it had also received legal advice with NOCIL''s letter dated 2nd July, 1987, and the accompanying payment to the

subscription to the equity shares of 8,10,000 share and that the company could then receive such subscription for allotment of shares which its

board which dispose of u/s 81(1)(d) of the Act. It is its further case that the company has also received legal advice that it was not prevented or

restrained, by any interim order of the trial court or even by law, from allotting to NOCIL the shares allotted to it.

189. From the aforesaid objection and the nature of defence, this court is called upon to decide as to whether the allotment of shares to NOCIL

and Sushrupada can be said to be out of the unsubscribed portion of the issue and as a result, therefore, it could be said to be in breach of the

prohibitive order of injunction issued by the City Civil Court, and, thirdly, if the answer to the second question is the affirmative, what is the effect

on the rights of such shareholders. It is true that section 81 of the Companies Act principally deals with further issue of capital to the persons who

are the holders of the equity shares of the company on the date of offer. It, therefore, refers to offer to the equity shareholders. Such shareholders

have the right to accept the offer in its entirety. He has also the right to partially accept the offer and while rejecting the offer partially he has the

right to renounce the offer in favour of another person whereupon such renouncee would become entitled to allotment of shares. It is, therefore,

clear that the shares allotted to the right offeree or renouncee are from the subscribed portion. In fact, the renouncee is a person stepping into the shoes of the offeree to whom the shares were initially offered, and on acceptance of such offers it can be said that it is from the subscribed portion

of shares that the shares are being allotted. However, in the context of section 81(1)(d) when applications were made by NOCIL and Sushrupada

for additional shares it is contended that by the very nature of the provision the board of directors is left only with the unsubscribed portion of

shares and that they cannot allot such shares in view of the prohibition stipulated in the order of the City Civil Court. The shares which are not

accepted or the offer which are not accepted would result in not subscribed to the offer and, therefore, all such shares should be treated as

unsubscribed shares which are left with the board of directors under clause (d) of section 81(1), submits learned counsel for Miheer.

190. In this connection, what was noted by the learned City Civil Judge while passing the aforesaid prohibitory order of injunction on September

4, 1987, is required to be noted. In para 23 of the judgment, the learned City Civil Judge has noted that he was informed at the Bar that the rights

issue has been undersubscribed. The subscription thereto is to the extent of 70% of the size thereof. Thereupon, he directed the company that the

undersubscribed portion of the rights issue should not be allotted to anyone except to banks or to public financial institutions with the prior

permission of the court. The prohibitive order of the City Civil Court is more than clear. It has acted on the statement of learned counsel appearing

for the company. Now, at this stage, based on the tabular statement produced hereabove, it is contended before this court that 70% included

those shares which are allotted to NOCIL pursuant to its application. It is the case of the company that what was prohibited by the City Civil

Court was only the remaining 30% which was treated by the company as unsubscribed portion.

191. In my opinion, the City Civil Court has only offered to the unsubscribed portion of the shares, and it has not relied upon the aforequoted

tabular statement as that was never produced before it by the company. Simply because the company on its own interpretation of section 81(1)(d)

regards allotment to NOCIL as falling in the subscribed portion of the issue, it cannot be said that what was allotted to NOCIL was from the

subscribed portion of the issue.

192. The question as to whether the board of directors could issue additional shares to non-members in exercise of their power u/s 81(1)(d) of the

said Act in view of the prohibitive order of the City Civil Court is a moot question. In my opinion, the shares which are subscribed in acceptance of

the offer made by the company either by the shareholders themselves or by persons in whose favour they have renounced their right (renouncee) constitute a class of subscribed shareholders, i.e., the shares which are not at all subscribed would constitute the unsubscribed portion thereof. It is

undoubtedly true that u/s 81(1)(d), the board of directors has discretion to dispose of such shares for which offerees have declined. The language

of clause (d) itself makes it abundantly clear that it is referable to that portion of capital which is not subscribed. Therefore, I do not accept the

defence of the company that the shares allotted to NOCIL and Sushrupada are from the subscribed portion of share capital nor do I accept their

defence that the power which the board of directors exercised u/s 81(1)(d) of the Companies Act to dispose of the additional shares would cover

the shares other than unsubscribed shares. On my reading of section 81(1)(d) it is referable only to the unsubscribed share capital as such power

could only be exercised by the board of directors after the expiry of time specified in the notice to be issued under clause (b) to the shareholders

entitled to issue of rights shares or after receipt of information from such shareholders that they decline to accept the offer. It, therefore, leaves no

room for doubt to conclude that the portion of issue which is not subscribed by the right offerees would only remain with the board of directors for

which they can exercise power u/s 81(1)(d) and, therefore, the first part of the defence of the company is not tenable in law and is hereby rejected.

193. The second part of the defence of the company is that even if it is assumed that the shares allotted to NOCIL and Sushrupada are out of the

unsubscribed portion of the rights issue, it may at the most amount to breach of the order of temporary injunction issued by the civil court during

the pendency of the civil suit. It was submitted that for breach of an order of injunction the remedy available to the plaintiff is provided under Order

39, rule 2A of the Civil Procedure Code. It was submitted that in the present case the respective plaintiffs have already moved the civil court for

appropriate action under Order 39, rule 2A, Civil Procedure Code, and, therefore, the action of allotting shares from the unsubscribed portion of

the rights issue as such would not become null and void conferring no right, whatsoever, on NOCIL or Sushrupada to whom the shares were

allotted. Mr. Vakil, learned counsel appearing for the company, very vehemently urged that if such action of the company is treated as contempt of

court, it would amount to ""a civil contempt"" for which action can be taken by the plaintiffs of these suits and by none else. He submitted that

Miheer who is admittedly not the plaintiff of suits of 1987 cannot take any action for contempt of court against the company. The action which is

taken by the plaintiffs of suits of 1987 is pending in the civil court and, therefore, this court must not decide an issue which is sub-judice. However, he further submitted that even if it is held that the action of the company in issuing shares of NOCIL and Sushrupada from the unsubscribed portion

of the rights issue is held to be in contravention of the order of temporary injunction granted by the City Civil Court, the action of allotment itself

would not become illegal or null and void nor would the allottees be deprived of their right flowing from such an allotment. In order to make good

this submission, Mr. Vakil has invited the attention of this court to a large number of decisions of various High Courts. The first case in point of time

which is throughout followed is that of Beli Ram and Bros. v. Ramlal, AIR 1925 Lah 644, where the Division Bench was called upon to decide the

effect of transfer of a house when a temporary injunction was granted restraining the defendants from transferring the house. Such injunction was

granted on February 2, 1915. On October 28, 1918, the defendants sold the house to defendant No. 4. The plaintiff brought a suit for declaration

that the suit house was still the property of original defendants Nos. 2 and 3 against whom the order of injunction was granted. It was in this

context that the Division Bench of the Lahore High Court made a distinction between the order of injunction and the order of attachment of

property. Where property has been attached by the order of the court any transfer of property in the face of such attachment is void if the

attachment has been made by actual seizure or by written order duly intimated or made known. The court held that a temporary injunction has no

such effect. Bona fide purchasers of property for valuable consideration without notice of any fraud of collusion on the part of vendor are

protected. Such transferees are not in any way affected by the order of injunction which was passed against the transferor. This view is reiterated

subsequently by the Lahore High Court in Hakim Singh v. Wasan Singh AIR 1928 Lah 639 Darbari Ram v. Ghulam Farid-Fazal Karim, AIR

1930 Lah 858 and Lal Chand v. Sohan Lal, AIR 1938 Lah 220. It is not necessary for this court to burden this judgment by a detailed reference

to the subsequent decisions of the same High Court.

194. In the case of Kusuma Dei and Others Vs. Malati Bewa and Others, , the learned single judge of the Orissa High Court followed the decision

of the Lahore High Court in Lal Chand v. Sohan Lal, AIR 1938 Lah 220 to hold that where an attachment has been made u/s 64 any private

transfer or delivery of the property attached or of any interest therein contrary to such attachment is void as against all claims enforceable under the

attachment. The same principle has no application to an injunction order. The effect of non-compliance with an injunction issued under Order 39,

rule 1, is not a nullity as being without jurisdiction.

195. This position of law was approved and reiterated by the Division Bench of the Orissa High Court in the case of Pranakrushna and Others Vs.

Umakanta Panda and Others, . The Division Bench, after referring to the earlier decision in the case of Kusuma Dei and Others Vs. Malati Bewa

and Others, as well as the decision of the Lahore High Court in Lal Chand v. Sohan Lal, AIR 1938 Lah 220 held that if the scheme of section 64

and Order 39, Civil Procedure Code, is examined there appears an apparent distinction between an alienation made in violation of an order of

injunction and alienation made in violation of an order of attachment. The Division Bench noticed that although the view of the English court has

been that since a transferee pendente lite from a party would be bound by the result of the suit, no injunction need be granted against a party that

he should not make any alienation of the property in suit. The consensus of the Indian courts is that the fact that a party is protected by lis pendens

is no ground why he should not also be further protected by an order of injunction restraining the other party from alienating the property. The

Division Bench noted that the person obtaining an order of injunction has got some additional advantage of prosecuting the offender and also

getting his properties attached and sold as provided by Order 39, rule 2A, Civil Procedure Code. This would work as a deterrent to his indulging

in the act of violation of the order of injunction. The order of injunction does not, in any way, militate against the right, title and interest of the

offender in the property in question like an order of attachment of property which makes the property in custodia legis. The order of restraint does

not in that way deprive or suspend any right of a person but only aims at a prohibition to act in a particular manner.

196. Similar view is taken by the Allahabad High Court in the case of Sukhdeo Rai and Others Vs. Ram Narain Rai and Another , where the

learned single judge of the Allahabad High Court held that as and when breach of an order of injunction was committed the remedy is to apply

under rule 2(3) of Order 39. The existence of a temporary injunction does not render alienation made in contravention of the injunction void.

197. Based on the aforesaid position of law, learned counsel for the petitioner-company, Mr. Vakil, submitted that even if the petitioner-company

has allotted shares from the unsubscribed portion of the rights issue to NOCIL and/or Sushrupada such action would, at the most, amount to

contravention of the order of injunction for which remedy to the aggrieved plaintiffs lies under Order 39, Rule 2A, Civil Procedure Code. None

else could make a complaint about it. Mihir in any case cannot make grievance against such contravention, firstly, because he was not the plaintiff

in the suit of 1987 and, secondly, because he relied upon such contravention in subsequent suit at the time of the rights issue of 1992 and failed to get temporary injunction both in the City Civil Court and up to the Supreme Court. Thirdly, he pointed out that even if the action of the petitioner-

company is regarded as ""contempt of court"", at the most it would be ""civil contempt"" as defined under the Contempt of Courts Act for which

action could be taken by the aggrieved person only, they being the plaintiffs of suits of 1987 but not Mihir.

198. Mr. M. J. Thakore, learned advocate for Mihir, on the other hand, submitted that the order of injunction issued by the City Civil Court must

have some sanctity. The person injuncted or prohibited cannot brazen-facedly and shamelessly after committing blatant contravention of the order

state to the court that despite the court''s order he has acted to the contrary. He submitted that acceptance of the ratio decidendi of the aforesaid

decisions of the courts of law in substance would amount to putting imprimatur on lawlessness and would amount to encouraging breach of order

or contravention of the orders of the court. He submitted that though it may be treated that the third party or a transferee from the defendant who

has committed a breach of order of injunction may or may not be strictly aware of the terms and conditions of injunction, a party prohibited or

injuncted by the order cannot and should not be permitted to contend that despite injunction he has acted to the contrary. In his submission, this

would lead to total chaos in an orderly society which should abide by the orders of courts of law. He further submitted that even if a finer

distinction between the order of attachment and order of temporary injunction is to be ultimately accepted, a defence of this nature from a

corporate body should be discouraged as a large number of persons may be put to detriment by the corporate body resorting to blatant breach or

contravention of the order of the court.

199. A company court, in my opinion, should be slow to uphold such a defence coming forth from a corporate body and I would, therefore, not

accept even the second defence of the petitioner-company.

200. In my opinion, the objection raised by Mr. M. J. Thakor, learned advocate for Miheer, is well-founded. The petitioner-company which was

injuncted by prohibitory order of the City Civil Court is estopped from contending that even if it has committed breach of order of the court, the

only remedy is an action for civil contempt and that the allottees of the shares can legitimately participate in the meeting of the equity shareholders.

A party which is injuncted by an order of injunction cannot be permitted to contend that it having violated injunction, nothing further could be done

or no relief could be granted by the court. Such a stand coming from a corporate body shall have to be discouraged both with a view of encouraging reverence and regard for the orders of the court and for discouraging the attitude of no respect for the orders of the court.

201. Turning now to the third defence of the petitioner-company, it is submitted that even if allotment of shares to NOCIL and Sushrupada in the

rights issue of 1987 as excluded from consideration the resolution is passed by the requisite majority as required u/s 391. It was pointed out that in

the rights issue of 1987, 1,24,400 shares were allotted to NOCIL and 42,500 shares were allotted to Sushrupada. Total equity shares allotted to

the aforesaid two parties would work out to 1,66,900. In the 1992 rights issue one rights share was issued for the equity share and, therefore,

1,66,900 shares were issued to NOCIL and Sushrupada in the aforesaid proportion. Total shares allotted to NOCIL and Sushrupada in the 1987

and 1992 rights issue would work out to 3,33,800 shares. In the meeting of the equity shareholders held on January 22, 1994, 19,36,964 shares

were in favour of the scheme. If from such shares the shares allotted to NOCIL and Sushrupada are excluded, votes in favour of the scheme

would work out to 16,03,164. The votes against the scheme are 86,061. The votes in favour of the scheme would, therefore, work out

approximately to 94.91% as against the votes against the scheme which would work out to 5.1%. It was, therefore, submitted that even if the

shares allotted to NOCIL and Sushrupada are excluded from consideration, the resolution passed at the meeting of the equity shareholders is not

required to be voided. If this class of the shareholders is held to be not entitled to vote or not entitled to attend the meeting, the resolution would

not be different as in the absence of such class of shareholders also the requisite majority has passed the resolution approving the proposed

scheme of amalgamation.

202. In this connection, the attention of the court was invited to the decision of this court in Maneckchowk and Ahmedabad Manufacturing Co.

Ltd., In re [1970] 40 Comp Cas 819 (Guj) to submit before this court that even if the shares allotted to NOCIL and Sushrupada are excluded

from consideration, the resolution in question is passed by the requisite majority and the court of law can uphold such resolution by excluding from

consideration the shares allotted to NOCIL and Sushrupada which are the subject-matter of dispute. Before the learned single judge of this court it

was noticed that the company did not take proper directions with regard to convening the meeting of the unsecured creditors. In the case of

unsecured creditors the workers of the company who would be preferential creditors have been grouped together with the other unsecured

creditors. The grouping of working of the company with the unsecured creditors was found to be beneficial. It was noticed that in respect of workers a different compromise was offered while to the remaining unsecured creditors a different compromise was offered. In every sense,

therefore, it was found that they constituted two distinct and separate classes. The court also noticed that if the meeting is not properly convened

the scheme approved at such meeting cannot be sanctioned. However, from the report of the chairman, the learned single judge found out the

number of preferential creditors who attended the meeting of unsecured creditors and what was the number and value of their votes. Having

ascertained the number of preferential creditors who attended the meeting of unsecured creditors they were separated from the number of and

value of votes of the remaining unsecured creditors and then the court proceeded to examine the result of voting as if two separate meetings were

called. The learned single judge, thereupon, instead of remitting the scheme to separate meetings of unsecured and preferential creditors, based on

the ample material available from the report of the chairman worked out as to what would be effect of not convening a separate meeting of two

such distinct and separate classes. The submission of learned counsel appearing before the learned single judge that there should have been seven

separate meetings of unsecured creditors was not countenanced but as regards two classes of workers who were preferential creditors of the

company it was noticed that they constitute a separate class, separate and distinct from the other unsecured creditors. Having accepted that no

such separate meeting was convened from the material on record the court came to the conclusion that even if the two classes were regarded as

distinct and separate it was not possible for the court to hold that the proposed scheme has not been approved by the requisite majority of different

classes of groups and members.

203. Based on the aforesaid course of reasoning adopted by D. A. Desai J. (as his Lordship then was) in the case of Maneckchowk and

Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819 (Guj) Mr. Vakil, learned counsel for the company, submitted that even if the

shares allotted to NOCIL and Sushrupada are excluded from consideration and the proportionate number of votes allegedly cast by them are also

excluded from consideration, the proposed scheme is passed by the requisite majority under the provisions of the Act and, therefore, the objection

is required to be overruled. In my opinion, this submission has merit and force. Even if votes cast by NOCIL and Sushrupada are totally excluded

from consideration the proposed scheme is passed by the requisite majority as pointed out hereinabove. In the ultimate analysis, therefore, on the

statutory majority resolving to approve the scheme it is not just and proper for this court to nullify the effect of will of the majority on the ground that based on the share certificates allotted to NOCIL and Sushrupada they could not have attended the meeting or they could not have voted. On

such grounds, the ultimate resolution passed by the meeting cannot be rendered meaningless and nugatory. I, therefore, on the third defence of the

company overrule the objection of Mihir on this ground also.

Objection No. :

204. The proposed scheme of amalgamation is challenged, inter alia, on the ground that in the meeting of the shareholders held on 22nd

December, 1993, Arvind Mafatlal acted as chairman of the meeting. Since Arvind Mafatlal was interested in getting the scheme approved and

sanctioned, he was having a personal interest in the scheme and he was, therefore, not qualified to chair the meeting and at the same time to obtain

proxies from the shareholders to vote in favour of the scheme.

205. The aforesaid objection shall have to be examined in the context of the relevant rules. Rule 67 of the Companies (Court) Rules, 1959,

requires an applicant to take out summons for directions to convene a meeting of creditors and/or shareholders or any class of them. Ordinarily,

the summons is to be moved ex parte. Rule 69 of the said Rules, inter alia, provides as to what directions the court can issue at hearing of

summons. The power of the company judge upon hearing of such summons includes power to give such directions as he may think necessary in

respect of matters provided in clauses 1 to 7 of rule 69 and rule 69(3) empowers him to issue directions appointing a chairman for the meeting to

be held. It appears that in the company application which was filed under rule 67 being Company Application No. 872 of 1993, Y. B. Bhatt J.

issued directions under rule 69 which included directions to the effect that Arvind N. Mafatlal failing him Hrishikesh Mafatlal shall be the chairman

of the said meeting of the equity shareholders of the company to be held on 22nd January, 1994. Notices dated 22nd December, 1993, under the

signature of Arvind N. Mafatlal convening the meeting of the equity shareholders of MIL on 22nd January, 1994, were sent to all shareholders and

was also published in local daily newspapers, Times of India in English at Ahmedabad and Bombay and in Gujarat Samachar in Gujarati in

Ahmedabad. Personal notice to Miheer as shareholder was issued and received by him. Miheer, therefore, knew right from December, 1993, that

the meetings of the shareholders of both MIL and MF were to be convened and to be presided over by either Arvind N. Mafatlal or Hrishikesh

Mafatlal. Miheer never objected to the appointment of Arvind Mafatlal or Hrishikesh Mafatlal as chairman of the meeting. From December, 1993, to January, 1994, there was more than sufficient time at the disposal of Miheer to take appropriate steps by moving an application in the Gujarat

High Court to seek modification in the court''s order. He did not take such step. Even at the meeting of the equity shareholders of MF, convened

on 18th January, 1994, or the meeting of the equity shareholders of MIL, convened on 22nd January, 1994, he could have by remaining present of

by sending any of his representatives by proxy, objected to Arvind N. Mafatlal being the chairman of the meeting on the ground that he has

personal interest or that he was interested in seeing to it that the proposed scheme is approved and sanctioned by the shareholders. Admittedly,

Miheer did not remain present at the meeting of the equity shareholders of MIL on 22nd January, 1994, nor did any of his representatives take

objection to Arvind Mafatlal being the chairman of the meeting Miheer also did not move any application in the High Court of Gujarat seeking

modification of the order of Y. B. Bhatt J. appointing Arvind Mafatlal, failing him Hrishikesh Mafatlal to be the chairman of the meeting of the

equity shareholders.

206. If is also pertinent to note that in elaboration of this objection, Miheer has not alleged that the chairman, Arvind Mafatlal, has committed any

wrong in the conduct of the meeting of the shareholders. It is also not alleged that the chairman of the meting has acted partially or has suppressed

the expression of views of any person present and voting who intended to participate on the discussion or deliberation. It is also not alleged that the

chairman of the meeting was not in a position to control the meeting or to maintain law and order situation in the meeting. It is also not alleged that

due to uproar or commotion or unruly scenes, no conscientious decision was reached. It is also not stated that as chairman of the meeting, her gave

wrong reply or erroneous decision or ruling. It is also not averred that he took advantage of his office as chairman of MIL to unduly influence the

voting. He has also not explained as to why he immediately did not mover the court for the modification of the order of the court. He has also not

stated as to why he did not object to Arvind Mafatlal being the chairman of the meeting of the equity shareholders of MIL held on 22nd January,

1994. He has not given any reason as to why he did not register his protest or objection in writing or even orally at any point of time prior to or

during the course of the meeting of the equity shareholders of 22nd January, 1994. Miheer has taken this objection for the first time before this

court in the affidavit filed by him objecting to the proposed scheme of amalgamation. In the aforesaid facts situation, this court shall have to

examine as to whether factually and legally the objection is sustainable so as to set at naught the decision of the majority of the equity shareholders.

207. In this connection, the attention of the court is invited to Shackleton on the Law and Practice of Meetings, seventh edition. The author, while

describing the qualities in a chairman, points out that it is difficult or hard to define qualifications required to a chairman. The chairman of a meeting

should ordinarily be a man of self-confidence, fair-mindedness and he must have the ability to arrive at correct decisions on the spur of the

moment. He must have the power to express with facility and discretion the mind of the meeting on the particular question under discussion. He

must avoid both garrulousness and secretiveness. He must be careful to subordinate his own views to those of the meeting, both of the majority

and the minority. It is further observed on page 52 as under :

A person who is not a member can usually neither be chairman nor present at meetings, and this would also apply to class meetings, but the

chairman of the board of the directors would properly take the chair at a class meeting even though he held no shares of the class concerned. He

would, however, have no vote.

208. The attention of the court was also invited to the observations of Horseley''s Meetings - Procedure, Law and Practice, second edition, where

in para 1601, it is observed that every meeting needs to have a chairman. The basic role of this presiding person is to superintend all aspects of the

meeting, exercise control as needed and generally enable those present to fulfil the function and purpose of the meeting in an orderly, lawful fashion.

The primary responsibility of a chairman is to preserve order. Even in cases where a chairman is unable to prevent obscene and offensive

interruptions taking place in a large meeting, the resolutions will be upheld, provided the will of the meeting is clearly evident at the time when the

motions are put to the vote.

209. From the aforesaid observations it becomes clear that the chairman of a meeting is appointed so as to superintend and exercise control for

orderly, lawful holding of a meeting. He is required to exercise procedural control over a meeting. Ordinarily, the chairman is appointed by persons

present and voting. The authority of the chairman is derived from the meeting itself. Those present at the meeting have, therefore, the right to raise

objections to any person occupying the chair. Those who have raised no objection to his occupying the chair under a rule or regulation governing

the appointment of a chairman or who have even failed to raise objection at the meeting cannot be permitted to raise such objection after the

meeting is successfully conducted and the will of the shareholders is lawfully ascertained.

210. In view of the failure of Miheer to raise objection to the appointment of Arvind N. Mafatlal as chairman at the earliest possible opportunity,

on receipt of the notice of meeting on January 22, 1994, coupled with his failure to get the order of the High Court appointing Arvind N. Mafatlal

as chairman of the meeting duly modified and also in view of his failure to object of Arvind N. Mafatlal being the chairman of the meeting actually at

the time of the meting either by personally remaining present or by sending his representative, in my opinion, would disentitle him from raising such

objection, which in the facts and circumstances of the case, is found to be merely procedural and not substantial. It is not pointed out to the court

that Arvind N. Mafatlal has failed to control or manage the meeting or to render any correct decision on objections raised. It is also not submitted

that he has either personally or through his speech or through any other method influenced the shareholders present and voting so as to render them

incapable of reaching the correct decision. The fair and free voting at the meeting is not disputed from which the will of the meeting is clearly

evident. In my opinion, therefore, this objection must fail and it is not shown to the court that as chairman of the meeting, Arvind N. Mafatlal, has in

may way influenced or affected the voting pattern of equity shareholders either by express act or by omission to act.

211. It is faintly suggested in the affidavit of Miheer in para 4.3 that Arvind N. Mafatlal, as chairman, has failed to reply to the query raised by a

shareholder. Factually it is required to be noted that such query raised by a shareholder of MIL at the extraordinary general meeting of MIL which

related to the labour cost. One Jitendra Sanghvi, a shareholder of the company expressed his view that the shareholders do not doubt the honesty

and integrity of the chairman in proposing the scheme of amalgamation. (It is pertinent to note that such assertion by a shareholder has remained

uncontroverted). He is, however, of the view that since Mafatlal Fine has two units in Bombay, their labour cast is very high and as a result, the

profitability of MF goes down and, therefore, it is not in the interest of the shareholders of the company to amalgamate MF. In this view, the share

exchange ratio mentioned in the scheme of amalgamation was unjustified. To such a query, the chairman of the meeting has replied as under :

The chairman pointed out that though the labour cost in any particular unit cannot be taken into isolation without considering the skills and

efficiency of the labourers and other advantages.

212. Factually also, therefore, it is not established that appointment of Arvind N. Mafatlal as chairman of the meeting has in may way adversely or

prejudicially affected the decision of the equity shareholder. No equity shareholder excepting Miheer, in response to the notice issued by this court,

has come forward and objected before this court that Arvind N. Mafatlal, as chairman of the meeting has acted unfairly or partially or has influenced the shareholders present and voting or has done any overt act or omitted to do any act expected of him which would influence the mind

of shareholders adversely. Miheer also does not specify for what personal interest Arvind N. Mafatlal could not have chaired the meeting. The

mere fact that he was the managing director or a member of the board of directors which resolved to amalgamate the two companies has not

disqualified Arvind N. Mafatlal from acting as chairman of the meeting, Similarly, in the absence of attribution of overt acts on the part of Arvind

Mafatlal as chairman of the meeting to anyhow push through the proposed scheme by means fair and foul, it would not be permissible for this court

to hold that he was disqualified to act as chairman of meeting. No over-zealousness or unnecessary enforcement is attributed to Arvind N. Mafatlal

as chairman of the meeting to any how push through the proposed scheme of amalgamation. It cannot, therefor, be said that he was disqualified to

act as chairman simply because be was desirous of the proposed scheme being approved by the meeting. The functions of the chairman, as seen

hereinabove, are to preside over the meeting, to give directions or to decide points of order which may arise and to conduct the proceedings in

accordance with law. By obtaining proxies to vote in favour of the scheme, the chairman does not disqualify himself from chairing the meeting. The

proxies could also be given to oppose the scheme also. The scheme of voting by proxy in the meeting of corporate body, whose shareholders are

very large and spread over the entire country is a well-known statutorily accepted device for ascertaining the wishes of as many members as

possible. The right to vote at meeting either as a shareholder or as proxy holder could not disqualify Arvind Mafatlal from becoming the chairman

of the meeting. In view of the aforesaid legal and factual position, this objection No. V is overruled and held to be not sustainable so as to withhold

sanction of this court to the scheme of amalgamation.

213. It would not be out of place to mention that on number of occasions, this court has, while entertaining applications u/s 391 to convene a

meeting of shareholders/creditors of the company to consider a scheme of compromise or amalgamation, appointed the chairman of the transferee

company as chairman of the meeting and the attention of the court was invited to several instances, as per example, amalgamation of Reliance

Industries Limited and Reliance Petrochemicals Limited by order in Company Application No. 93 of 1992, amalgamation of Apar Industries

Limited and Apar Lamps Limited in Company Applications Nos. 218 and 219 of 1992, by order dated August 17, 1992, and in the case of

Veraval Finance and Investment Limited and Trust Investment and Holding Limited. The concerned company judges of this court have in the past appointed the chairman of applicant company as chairman of the meeting of shareholders convened for considering the scheme of compromise or

arrangement or amalgamation. Though the aforesaid precedents alone necessarily do not justify the appointment of Arvind Mafatlal as chairman of

the meeting, in view of the serious objections raised by Miheer, these precedents are stated to highlight the point that ordinarily such appointment is

made on an exparte application for convening meeting and issuing directions on the summons for direction taken out by the applicant company. On

such exparte application, the practice of this court is to pass such order, In the facts and circumstances of this case, not on the ground of any

precedent, but on my findings reached hereinabove, I am satisfied that the appointment of Arvind Mafatlal as chairman of the meeting has not in

may way adversely or prejudicially affected the majority decision of the shareholders nor is any foundation laid for successfully submitting that the

minds of the equity shareholders present and voting at the meeting were prejudicially or adversely influenced or affected by the presence of Arvind

Mafatlal.

Objection No. VI : Non-disclosure of material facts :

214. From the text of the objections, as set out hereinabove, the objection is the effect that all relevant material facts relating to MIL (transferee

company) and MF (transferor company) were not placed before the shareholders either by incorporating them in the scheme of amalgamation or

with the explanatory statement annexed thereto. The shareholders, therefore, were not in a position to exercise an intelligent judgment as to

whether they should vote in favour of the scheme or against sit. Therefore, the meeting and the resolution passed therein are of no effect, and the

court should not sanction the scheme.

215. In support of this objection, Miheer has firstly relied upon the statutory obligation on the petitioner company to disclose to the court by

affidavit or otherwise all material facts relating to the company, the latest auditor''s report on the accounts of the company, the pendency of any

investigation proceedings in relation to the company under sections 235 to 251 and the like. Section 391(2), proviso, casts the aforesaid obligation

on the company.

216. The proviso came to be inserted on the recommendation of Daphtary-Shastri Committee by the Companies (Amendment) Act, 1965. The

committee observed that in order that the court may not proceed to sanction an arrangement or amalgamation with to little material on record and

without information as to important facts which, if they were present before the court, would weigh heavily against the sanction of the scheme, must be disclosed by the company or may other person who has applied for sanction.

217. However, this obligation is referable at a point of time when an application is made to the court u/s 391 for its sanction to the proposed

scheme. The obligation arising from the proviso to section 391(2) is not referable to non-disclosure of material facts at the time of the meeting of

creditors and/or shareholders or any class of them. Section 391(a) casts an obligation that where a meeting of members or any class of members is

called u/s 391, along with every notice calling the meeting which is sent to a member, there shall be sent also a statement setting forth the terms of

compromise or arrangement and explaining its effect, and in particular stating any material interests of the directors, managing director or manager

of the company whether in their capacity as such or as members or creditors of the company, or other-wise, and the effect on those interests of the

compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons.

218. Section 173 provides for annexation of the an explanatory statement to the notice. Sub-section (1) provides as to when and which items of

business to be transacted at the meeting are deemed to be special. Sub-section (2) enacts that where business of the meeting is seemed to be

special, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business including

in particular the nature of the concern or interest, if any, therein of every director. The object of this section is that the shareholders must know all

the material facts and interests of the managerial personnel in each item of business so that they may not be duped by the management and may not

be persuaded to act in the manner desired by the management. Where the notice or the explanatory statement does not disclose all material facts,

the resolution would be invalid. It is hardly necessary to emphasize that a notice which is not accompanied by a proper explanatory statement

would defeat the very purpose for which the statement is prescribed by law. The courts of law nave, therefore, deprecated the practice of

incorporating a statement in the notice that inspection of the material documents will be offered at the registered office of the company. The reason

assigned is that a large body of shareholders may be residing at places far away from the registered office of the company. This provision is,

therefore, held to be mandatory and non-compliance thereof shall result in invalidation of the resolution passed at the meeting.

219. According to Miheer, the following material facts ought to have been disclosed, and non-disclosure thereof would vitiate the resolution of the

meeting held on January 22, 1994 :

(i) MIL has not disclosed material facts, such as, pendency of Original Suit No, 1010 of 1987, in the High Court of Bombay which is filed by its

director and chairman, Arvind Mafatlal for declaration and enforcement of the alleged concluded contract as read from the correspondence

exchanged between him and Yogendra, Rasesh and Miheer in the year 1985, and more particularly, the material fact being institution of counter-

claim by Miheer in such suit claiming ownership and management of MIL based on the family arrangement of 1979. It is submitted that had this

fact been disclosed, the learned single judge of the Gujarat High Court would not have appointed Mr. Arvind Mafatlal as chairman of the meeting.

(ii) MIL has not disclosed the fact of pendency of two civil suits, being C.S. Nos. 3181 and 3182 of 1987, filed by three independent shareholders

against allotment of the rights issue of 1987 and C.S. No. 5198 of 1992 filed by Miheer against allotment of the right issue of 1992. It is pointed

out that partial temporary injunction granted by the City Civil Court in the suits of shareholders was very material fact as large number of shares

were allotted in the rights issues of 1987 and 1992 in total contravention of the express prohibitory order of the City Civil Court at Ahmedabad.

Moreover, the entire allotment of shares in the rights issues of 1987 and 1992 is subject to pending litigation and till the final outcome is known, the

rights of such shareholders were under a cloud and they could not have participated along with the regular shareholders at the meeting held on

January 22, 1994.

(iii) It is alleged that a large number of shares were allotted at the rights issues of 1987 and 1992 in contravention of the express prohibitory order

of the City Civil Court, and, therefore, the shareholders who were allotted either in 1987 or in 1992 should not have been permitted to vote at the

time of meeting held on January 22, 1994. The allotment of hares in the rights issues of 1987 and 1992 was expressly subject to the order of a

competent court in pending litigation and till the final outcome to the said litigation is known, such shareholders who were allotted shares in 1987

and 1992 should not have been permitted to participate along with the other shareholders at the extraordinary general meeting held on January 22,

1994.

(iv) The scheme of amalgamation circulated amongst the shareholders contains no details of the balance-sheet of MF which is to be amalgamated.

In the absence of such materials the shareholders could not arrive at an intelligent decision.

(v) The company has also not disclosed the fact that compared to the investments made by MIL in shares and stock, the investments made by MF in shares and stocks has not appreciated. In fixation of fair exchange ration since the book value of investments in shares and stocks is relied upon

this disclosure is essential.

220. In the affidavit-in-rejoinder filed by R. R. Patel, the company secretariat of the petitioner company it is pointed out that the proviso to section

391(2) and section 393 operate at different stages. It is further pointed out that the annual report of the company for the year ending March 31,

1993, was filed in the court along with the company application. It is the further case of the company that pendency of Civil Suit No. 1010 of 1987

in the High Court of Bombay or the counter-claim filed by Miheer in such suit do not constitute material facts relating to MIL. It is also further

pointed out that pendency of Civil Suits Nos. 3181 and 3182 of 1987 filed by the two shareholders against the rights issue of 1987 and Civil Suit

No. 5198 of 1992 filed by Miheer against the rights issue of 1992 or the orders passed therein have no material bearing on the scheme of

amalgamation.

221. Having referred to the statutory provisions of the proviso to section 391(2), section 393(1) and section 173 and the necessary pleadings of

the parties and having noticed the facts which according to Miheer are material, non-disclosure of which may prove fatal to the resolution passed

by the meeting of shareholders on January 22, 1994. I may now refer to the position of law as propounded by judicial decisions on the issue.

222. u/s 393(1) along with every notice calling a meeting u/s 391(1) which is sent to creditors or members there is an obligation to sent also a

statement setting forth the terms of the compromise or arrangement and explaining its effect and in particular stating any material interest of the

directors and the managing director, etc., of the company and the effect on those interests of the compromise or arrangement, if and in so far as it

is different from the effect on the like interests of other persons. This obligation is to an extent different from the obligation on the company while

issuing notice of the special general meeting u/s 173. The Division Bench of the Bombay High Court has recently in the case of amalgamation of

Tata Oil Mills Co. Ltd. (TOMCO) with Hindustan Lever Ltd. decided on May 18, 1994 Hindustan Lever Employees Union Vs. Hindustan Lever

Ltd. and others, observed that too right interpretations which would hamper the conduct of the business should not be adopted. After all, the

explanatory statement is a business document intended to give a clear idea of the nature to be conducted, and must be used in a commonsense

business way. Minor insignificant matters do not render the proceedings null and void. In the context of non-disclosure u/s 393 the court observed that the statement is required to state clearly (i) the compromise or arrangement and its effects, and (ii) the manner in which the material interests, if

any, of specified categories of persons in any capacity are likely to be affected by the scheme, in case, the effect if different from the effect on the

like interests of non-specified categories of persons. The purpose of such disclosure is to enable the shareholders to make their objections because

once they have approved the scheme, there is no chance of questioning its arithmetics subsequently. It is thus clear that every non-disclosure

cannot be fatal, and unless it is fraudulent and has prejudicial effect on the decision-making process of the members, the decision cannot be set

aside or voided.

223. In the case of Kalinga Tubes Ltd. and Others Vs. Shanti Prasad Jain and Others, , in the context of explanatory statement u/s 173 the

Division Bench of the Orissa High Court took the view that even if it is assumed that some facts which were material to the notice had been

omitted from it, the further question that would arise for consideration in whether the mere omission of such facts would invalidate the notice or

resolution passed in the meeting convened by the said notice. The court found that if any such objection would have been taken to the notice the

chairman might have accepted the same and taken steps to call a fresh meeting in accordance with the provisions of law. The court found that in

the case before it the person not only did not object but permitted the meeting to proceed. In this context, the court found that it is well-settled that

where the shareholder by his conduct shows that he knew the real facts of work to be transacted at a meeting, he cannot complain against the

notice on the ground of its insufficiency. What are the material facts and what is the nature and extent of interest u/s 173(2) are questions of fact

dependent on the facts of each case. When a party is in the know of the facts which according to him would have a bearing on the decision-making

process may object at the earliest possible opportunity by showing that certain facts which were material were required to be disclosed. The

aforesaid view of the Orissa High Court was approved by the Supreme Court in the appeal arising from the decision of the Orissa High Court in

the case of Shanti Prasad Jain Vs. Kalinga Tubes Ltd., . Such an approval is a tacit approval if reference is made to para 22 of the reported

decision. The court has found that the objection to a notice u/s 173 was not taken in the petition and, therefore, the same cannot be permitted to

be taken before the Supreme Court. The court noticed that though such an objection was not taken, Das J. has dealt with it at length and the

Supreme Court would have agreed with him, if the Supreme Court had permitted the question to be raised.

224. In the case of Sheth Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. [1964] 34 Comp Cas 777 (Guj) Bhagwati J.

(as His Lordship then was) was dealing with a petition under sections 397 and 398 of the Companies Act, 1956. The company sold the movable

and immovable properties to Bharat Kala Bhandar Ltd. The case of the minority was that such sale was oppressive to the minority shareholders or

was prejudicial to the interest of the company. One of the challenges to the validity of the sale was that the meeting of the company at which the

resolution was passed was convened without complying with the requirements of section 173 of the Companies Act, 1956. In that context, the

court examined section 173 of the Act and the question as to whether its provisions were mandatory or directory. In this connection the court

observed as under (at page 841) :

The object of enacting section 173 is to secure that all fact which have a bearing on the question on which the shareholders have to form their

judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provision is enacted in the

interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders

and they also know what is the nature of the concern or interest of the management in such item of business, the idea being that the shareholders

may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their

own judgment on the question after being placed in full possession of all material facts and apprised of the interest of the management in any

particular action being taken. Having regard to the whole purpose and scope of the provision enacted in section 173, I am of the opinion that it is

mandatory and not directory and that any disobedience to its requirements must lead to nullification of the action taken.

225. In Maneckchowk and Ahmedabad Manufacturing Co. Ltd., in re [1970] 40 Comp Cas 819 (Guj) D. A. Desai J. (as His Lordship then was)

was called upon to decide a contention as to by whom the statement u/s 393 should be signed, and the further contention that the effect of the

scheme on the material interest of directors and managing directors has not been clearly set out in the statement, and while negating the objection

His Lordship made the following pertinent observations (at page 887) :

The statement u/s 393 should be drawn up as to convey to the members and creditors sufficient information so that they may be able to bring to

bear upon the scheme their intelligent judgment. They must have information which would help in considering the scheme on its own merits. In may opinion, in this case, the scheme as whole as was annexed to the notice along with various statements and statement u/s 393 gave the necessary

information to the creditors and members so that they may be able to intelligently deliberate upon the scheme keeping the view the commercial

feasibility of the scheme and on the material supplied they were in a position to decide intelligently whether the scheme should or should not be

approved. It is of course true that some further information was sought at the meeting and the chairman of the company, till the date of appointment

of the provisional liquidator was unable to furnish that information. But the information sought was not of such a vital character that non-availability

of it would have come in the way of the creditors and members deliberating upon the scheme. Therefore, considering the matter from all the

aspects, in may opinion, the statement as required by section 393 was annexed to the notice convening he meetings and the provisions of section

393 have been duly complied with.

226. In Khandelwal Udyog Ltd. and ACME Mfg. Ltd., In re [1977] 47 Comp Cas 503 the court was dealing with a scheme of amalgamation of

the two companies which were doing the same kind of business. One of the objections to the grant of sanction was that the company did not make

disclosure of directors'' interest, the valuation report and the report of the chartered accountant. In this context, the learned single judge of the

Bombay High Court examined section 173 as well as section 393. The court noticed that section 173 occurs in Chapter I, Part IV, of the

Companies Act, 1956. It is amongst a congeries of sections dealing with ""meeting and proceedings"". The focus of the said catena of section is on

the convening or calling of the meetings of a company. In this context, the provisions of section 173 are held to be general provisions pertaining to

the meetings of the company, whether an annual general meeting or an extra-ordinary meeting. As against such provisions, clause (a) of sub-section

(1) of section 393 deals with ""a meeting of creditors of any class of creditors or members or any class of members called u/s 391"". The provisions

of section 393 take their colour from section 391 which contemplates convening of meetings under the directions of a court, ""of creditors or of the

members or class of members, as the case may be"". Sections 391 and 393 are a complete code in themselves in respect of the provisions or

procedure relating to sponsoring of the scheme, the approval thereof by the creditors or the members, as the case may be, and the sanction thereof

by the court. In this connection the court observed as under (at page 516) :

A combined reading of sections 391 and 393 and its comparison with the provisions of section 173 shows that the former section deals with a specific situation to the exclusion of the general provisions made by section 173. Furthermore, section 173 postulates a meeting of a company

whereas sections 391 and 393 contemplate convening of a meeting of members or a class of members. It is true that any meeting of a company is

factually also a meeting of the members of that company but the thrust of the two sets of sections clearly establishes a different legal identity of such

meetings. This distinction is also borne out when the language of section 392 is contrasted with the language of section 186 of the Companies Act,

1956. Both the sections confer power on the court (section 156 prior to its amendment by the Act 41 of 1974) to convene meetings. Sub-section

(1) of section 186 in terms refers to a "meeting of a company". Section 391 refers to a "meeting of creditors or class of creditors or members of

class of members". There is a deliberate omission of the words "of a company" in section 391. This omission postulates that different fields and

situations are contemplated. The legislative intent appears to provide by section 391 and 393 for meetings of the creditors or the members or

classes thereof as contra-distinguished from the meetings of the company. This understanding is further buttressed by the fact that the chairman of

the company does not preside over the meetings of the members convened under the provisions of section 391. In may opinion, having regard to

the principle that the specific excludes the general, it must be held that when a specific mode is provided by sections 391 and 393 the said mode

displaces the general mode relating to the meetings provided by the catena of sections falling within the group "meetings and proceedings" in

Chapter I of Part VI of the Companies Act.

The court further observed as under (at page 517) :

There is no warrant for the contention that the statement annexed to the notice convening the meetings of the members did not comply with the

requirements of clause (a) of sub-section (1) of section 393. The said clause requires that the statement contemplated thereby should (i) set out the

terms of the compromise or arrangement, (ii) explain the effect of the terms of such compromise or arrangement, (iii) in particular state the material

interest of the directors, managing director or manager of the company, and (iv) effect on those interests of the compromise of arrangement, if any,

and in so, far as it is different from the effect on the like interests of other persons. These ingredients are culled out by the me from the express

language of the said clause (a) of sub-section (1) of section 393. Unlike sub-section (2) of section 173 clause (a) of sub-section (1) if section 393

does not require disclosure of all material facts. The clause required disclosure of the facts enumerated therein. It is not disputed before me that the statement accompanying the notice convening meetings of the members in the present case did disclose the terms of the compromise or the effects

of the said terms. The argument, however, is that in so far as it was not disclosed that there were common directors on the boards of the two

companies there was a non-disclosure section 393 mentioned above. This, in may opinion, is a misconception. The disclosure contemplated by the

said limb relates only to the effect on the interest of the directors, etc., of the scheme in so far as such effect is different from the effect on the like

interest of the other persons. I am unable to appreciate as to what effect can there be of the scheme on the common directors of the two

companies or much more how would such effect be different from the effect on the like interest of other persons, assuming without deciding that

interests of the directors are to be disclosed. Even so, there would be no breach of the provisions. Interest of directors is an expression which has

a well defined connotation. The term "interest" relates to the interest which is peculiar to each of the directors and does not refer to the factum of

knowledge of a director in regard to the status of every other director or his being concerned as a director of any other company. Nothing has

been shown to me in support of such a contention. I do not find any authority or justification for taking such a view.

227. In the case of United Bank of India Ltd. Vs. United India Credit and Development Company Ltd., in the context of the scheme of

amalgamation once again the court was called upon to decide the requirements of the explanatory statement issued with the notice u/s 393. In this

context, while overruling the objection, the court made the following observations (at page 731) :

Then, on the question of sufficiency or adequacy of explanatory statement u/s 393 of the Companies Act, 1956, I am of the view that there is

nothing wrong in the said explanatory statement. As such notice is settled by the officer of the court under the rules, I accept the contention of Mr.

Nag that the explanatory statements in the notice are not at all defective. No objection was taken in the meeting nor is there any material

suppression of any relevant facts in view of the meeting previously adjourned due to pandemonium and it cannot be said that anything material was

not known to them. In any event, in may view, the notice and the explanatory statements were not defective and in substantial compliance with the

statutory provisions and the rules made thereunder. There is material distinction between the explanatory statement under sections 173 and 393 of

the Companies Act, 1956. In this particular case, the notice has been settled by the Registrar under the relevant company rules and it is in

substantial compliance with the provisions of the Act. Therefore, I hold that there is no substance in the said contention of the opposing shareholders that the explanatory statements were misleading or insufficient. In any event, none of the shareholders in fact has been misled and

raised any objection regarding the said notice at the meeting which has been duly held and convened pursuant to the order of the court made u/s

391(1) of the Companies Act, 1956.

228. The court found that the objection about the non-disclosure of material facts could have been taken at the earliest possible opportunity or at

least in the meeting which was duly held. Secondly, the notice and the explanatory statements were not found to be defective. It was also found

that they were in substantial compliance with the statutory provisions. The court also pointed out the distinction between the explanatory statement

u/s 173 and section 393 of the Companies Act.

229. In Suri and Nayar Ltd., In re [1983] 54 Comp Cas 868 the learned single judge of the Karnataka High Court examined the question of the

court''s power to investigate into the bona fides of the statement u/s 393 and observed that unless per se a fraudulent intention could be gathered

from the statement u/s 393, the court will not investigate into the bona fides of the statement required to be made u/s 393(1) of the Act. The court

found that if the facts stated in the statement were otherwise true, one possibly could not object to the statement resulting in bias against the scheme

of amalgamation. In my opinion, the statement of law made by the learned single judge of the Karnataka High Court of the scope of the statement

u/s 393 is rather too wide. Even if the facts stated in the statement are true, non-disclosure of material facts or suppression of vital facts might

assume importance as the purpose of the statement is to give a true and accurate picture to all concerned. By concealing or not disclosing vital

facts the persons present and voting can be deprived of material facts which will have a bearing on the decision-making process of shareholders. It

is, therefore, not correct to state that simply because the facts stated in the statement were true the court would not undertake the further exercise

of finding out as to whether it suffers from the vice of non-disclosure of material facts having a bearing on the issue of amalgamation.

230. In the case of Jitendra R. Alembic Chemical Works Co. Ltd. [1988] 64 Comp Cas 206 in the context of the scheme of amalgamation the

Division Bench of the Gujarat High Court was called upon to decide the requirement of the explanatory statement. The Division Bench found that

the issue was no longer res integra and was considered by Miabhoy J. (as His Lordship then was) in Sidhpur Mills Co. Ltd. In Re: Sidhpur Mills

Co. Ltd., . The Division Bench observed as under (at page 214) :

The first part of clause (a) of section 393(1) requires not only that the terms of the scheme must be stated, but also it further requires that the

effect of the scheme must be explained. Therefore, observed the learned judge the statement must contain not only the terms of the scheme, but

also further explain as to what its effect would be. The clause does not state in terms as to the effect on what has got to be mentioned in the

statement. Broadly speaking, however, it is quite clear that what has got to be explained are not the details of the scheme, but the effect which the

scheme will have obviously on such matters as to the welfare of the company and the welfare of its shareholders or creditors with whose interests

the scheme purports to deal. Learned judge went on to observe that ''effect'' means consequence, the condition which arises as a result of certain

course of action. If there is anything in the scheme, compromise or arrangement which is not quite obvious to a person reasonably acquainted with

the facts of a case by merely reading the terms of the scheme, then, a duty is cast upon the persons concerned to mention what the consequence

will be if the scheme is approved. In order words, it is only the consequence or the result which has got to be explained which would arise on

account of the approval of the scheme. If something is implied in the scheme, which is not obvious, the same must be brought to the notice of the

shareholders.

The Division Bench further observed as under (at page 215) :

The dictionary meaning of the word ''effect'' so far as it is relevant for out purpose given in The Random House Dictionary of the English Language

is as follows : ''.... : result; consequence ...'' ""''effect'' means consequence(s); result; this has reference to something produced by action or cause"".

In other words, the effect is that which is produced and as observed by Miabhoy J. a condition which arises as a result of certain course of action.

The aforesaid clauses (a) of section 393(1) does not lay down as to the effect on who has got to be mentioned in the statement. When it speaks of

explaining the scheme''s effect, it does not mean details of the scheme or the particulars of the effect, consequence or result which would follow the

scheme. The requirement is to state and explain the effect and the details or particulars of the consequence or result. In other words, the basis of

working on which certain consequence or result of the scheme would flow from the scheme is not required to be stated. It is only the resultant

effect of the scheme which is required to be stated. As observed in Sidhpur Mills Co. Ltd., In Re: Sidhpur Mills Co. Ltd., , if there is anything in

the scheme of compromise or arrangement which is not quite obvious to a person reasonably acquainted with the facts of the case by merely reading the terms of the scheme, then, a duty is cast upon the persons concerned to mention what the consequence will be if the scheme is

approved of. If something is implied in the scheme which is not obvious, it must be brought to the notice of the creditors and shareholders.

"231. From the aforequoted observations of various High Courts in the context of the explanatory statement u/s 173 and one u/s 393(1)(a), it

becomes abundantly clear that the two provisions operated at different times, have distinct purposes to achieve and non-compliance thereof may

lead to different results. It also becomes clear that both the provisions operate in different fields and deal with distinct situations. When put in

juxtaposition, the following of distinction emerge :

Section 173 :

1. This provision finds place in Part VI, Chapter I under the heading ""General provisions"" and sub-heading ""Meetings and proceedings"".

Section 173(2) :

2. This in substance is a general provision pertaining to the meetings of the company. This postulates meeting of a company.

3. The provision is held to be mandatory, non-compliance whereof may lead to nullification of the action taken.

4. Where any items of business to be transacted at the meeting are deemed to be special u/s 173(1), explanatory statements shall be annexed to

the notice of the meeting setting out all material facts concerning each item of business, including in particular the nature of the concern or interest, if

any, therein, of every director and the manager, if any. Under the proviso, if such item of special business affects any other company, and if any

director or manager holds 20 per cent. or more of the paid-up share capital of that other company then that should be mentioned. If approval of

the meeting is necessary to any document, then the explanatory statement will also mention time and place where documents can be inspected. This

clause thus requires disclosure of all material facts.

5. Section is general in nature which requires a statement setting out all the material facts concerning each special item of business. The notice

which is not accompanied by a proper explanatory statement defeats the very purpose for which the statements are prescribed by law. The object

of the section is that the shareholders must know all the material facts and the interests of the managerial in each item of business so that they may

not be duped by the management and may not be persuaded to act in any manner desired by the management.

Section 393(1)(a) :

1. This provision finds place in Part VI, Chapter V, under the sub-heading ""Arbitration, compromise, arrangement and reconstructions"".

Section 393(2) :

2. This is a special provision of dealing with meetings of creditors or class thereof or members or class thereof of an company called u/s 391(1).

This provision read with section 391(1) postulates meetings of creditors or members or class thereof.

3. The provision is not mandatory. Substantial compliance may save the action. Test of resultant prejudices to be applied.

4. Section 393(2) requires that the statement contemplated thereby should (i) set out the terms of the compromise or arrangement, (ii) explain the

effect of the terms of such compromise or arrangement, (iii) in particular state the material interests of the directors, managing director, manager of

the company, and (iv) effects on these interests of the compromise or arrangement, if any, and in so far as it is different from the effect on the like

interests of other persons.

5. The statement under this section should incorporate only specified items such as terms of compromise or arrangement and must explain the

terms of such compromise, arrangement or amalgamation. It is quite clear that what has got to be explained are not the details of the scheme, but

the effect which the scheme will have obviously on such terms as to the welfare of the company and the welfare of the shareholders or creditors for

whose interest the scheme purports to be. The word ""effect"" means consequence, the condition which arise as a result of certain cause of action. If

there is anything in the scheme or compromise or arrangement which is not quite obvious to a person reasonably acquainted with the facts of the

case by merely reading the terms of the scheme then a duty is cast upon the persons concerned to mention what the consequences will be if the

scheme is approved. In other words, it is only the consequence or the result which has got to be explained which would arise on account of the

approval of the scheme.

232. In the context of distinctions between the two provisions set out hereinabove, this court shall have now to examine as to how and to what

extent the explanatory statement issued u/s 393(1)(a) can be said to be defective in not bringing out all material facts, as alleged by Miheer. It is, at

once, clear that section 393(1), being a special provision, deals with setting out of certain details in the statement which are more particularly

provided in the section itself. Firstly, such statement must set out the terms of the compromise or arrangement or the scheme of amalgamation. It is

not disputed before this court that this requirement is fully complied with. Secondly, such statement shall explain the effect of the terms of such

compromise or scheme of amalgamation and the effects of the scheme of amalgamation are also clearly stated. The other two requirements are not material for the purpose of this discussion. This section does not refer to disclosure of all material facts concerning a special item of business.

Therefore, such statement should only comply with the statutory requirement of section 393(1)(a). Various details of litigations between Arvind

Mafatlal on the one hand and his brothers and Miheer on the other would not fall under any of the stipulations of section 393(1)(a). It may be

noticed at this stage that C.S. No. 1010 of 1987, pending in the Bombay High Court is a suit filed by Arvind Mafatlal against his brothers and

Miheer for specific performance of the allegedly concluded agreement. In such suit neither MIL nor MF is a party. In such suit Miheer has filed his

counter-claim for specific performance of the family arrangement alleged to have been reached amongst the family members in 1979. Details of

such suit are matters of/for concerned parties to the proceedings and not to the entire lass of shareholders. Neither the alleged family arrangement

of 1979 nor the allegedly concluded agreement of 1985 between Arvind Mafatlal, his two brothers and Miheer are incorporated in the articles of

association of the company or companies by appropriate amendments thereof. The alleged family arrangement of 1979 or the allegedly concluded

contract of 1985 amongst family members, therefore, cannot bind the company/companies nor can such private agreements have any effect or

consequence upon the rights of the shareholders. The details of such litigations, in my opinion, therefore, do not constitute material facts non-

disclosure of which would affect the interests of shareholders. Similarly, details of two civil suits being C.S. Nos. 3181 and 3182 of 1987 filed by

three shareholders in the City Civil Court, Ahmedabad, need not be stated. In fact, the shareholders have challenged the legality and validity of the

rights issue of MIL of 1987. Admittedly, in such suits no prohibitory injunction against the rights issue is granted which would prohibit the company

from allotting rights issues. Once rights issue is permitted mere pendency of civil litigation would not adversely affect the right of the shareholders.

Holders of such shares may also change in future as there is no prohibition against transfer of such rights shares to other persons. Once the rights

issue is permitted by the court, one fails to understand or comprehend as to how at any stage in any proceedings such issue could be invalidated as

admittedly the original allottees or transferees thereof are not parties to the suit. The capital of the company stands increased by such rights issue.

Partial injunction granted by the City Civil Court against prohibition from allotting rights issue from the unsubscribed portion thereof has no bearing

whatsoever on the scheme of amalgamation of MF with the transferee company. The shareholding of MIL is not going to be disturbed by the proposed scheme of amalgamation as the transferee company shall continue and its shareholdings are not going to be affected. I am, therefore, of the opinion that pendency of such suits at instance of three shareholders has no bearing whatsoever on the proposed scheme of amalgamation. It would not be out of place to notice at this stage that it is the case of MIL in its affidavit-in-rejoinder that the three plaintiffs (shareholders) are persons of confidence of Miheer and are closely connected with him. They are the stooges dancing to the tune of Miheer and they, as shareholders, had instituted suit against the rights issue of 1987, and have obtained a partial order of injunction, and even such shareholders have at no point of time objected to the scheme of amalgamation on the ground that the allottees of the rights issue of 1987 constitute a separate class or were required to be separately consulted. In may opinion, therefore, non-disclosure of the pendency of such litigation is of no consequence. As regards the third suit filed by Miheer in the City Civil Court at Ahmedabad against the rights issue of 1992 it must be stated that the learned chamber judge of the City Civil Court has not granted prohibitory injunction with the result that the rights shares were allotted to the allottees and the capital of the company stood increased thereby. On the one hand, Miheer has challenged the rights issue of 1992 and sought to restrain MIL from allotting shares in the rights issue and on the other hand during hearing of the said notice of motion, Miheer, his family members, his family trusts, his charity trusts and investment companies renounced their rights to subscribe to the rights issue to public financial institutions and made a high profit of more than Rs. 2 crores. The fact of pendency of this litigation was specifically known to Miheer and the non-disclosure thereof has not in any way prejudiced him. Disclosure of such facts to the entire class of shareholders was not necessary u/s 393(1)(a) of the said Act. In fact, u/s 393(1)(a) such facts are not required to be disclosed. Non-disclosure thereof, therefore, cannot vitiate the explanatory statement nor can it be said that ultimate resolution passed at the meeting is vitiated because of the alleged non-disclosure.

233. Mr. M. J. Thakore, learned advocate for the objector, has strenuously urged before this court that in the explanatory statement Arvind Mafatlal was expected to state his interest in MIL. He ought to have brought to the notice of the shareholders the fact that the suits were pending between him and his brothers and his nephew, Mihir and that by the proposed scheme of amalgamation of Mafatlal Fine with MIL such suits would be rendered infructuous. He further submitted that as chairman and the managing director of MIL it was his duty to disclose his personal interest in the entire transaction. He submitted that had his personal interest coupled with the pendency of litigations between himself and other

members of the family and the various orders passed by the court in such proceedings been disclosed, firstly, the court would not have appointed

him as chairman of the meeting and, secondly, the voting pattern would have been different. He has in this connection invited the attention of the

court to the decision of the Bombay High Court in Sakamari Steel and Alloys Ltd., In re [1981] 51 Comp Cas 266. The learned single judge of

the Bombay High Court, while dealing with an application u/s 391(1) of the Companies Act, 1956, for various directions stipulated by rule 67 of

the Companies (Court) Rules, 1959, noticed that such an application is to be moved ex parte. Even in such ex parte proceedings the court has to

apply its mind and it has to be prima facie satisfied about the merits of the application. From the language of section 391(1) read with rule 69 it

becomes clear that even in such an ex parte order the court has to exercise its judicial discretion and directions thereto issued ""unless he (the judge)

thinks fit for any reason to dismiss summons for directions"". It is, therefore, not obligatory or compulsory for a judge u/s 391(1) to give directions

to convene a meeting. Even on such an application and/or prayer to appoint a particular individual as chairman of the meeting, the court has to

consider the diverse circumstances which would vary from case to case. In this connection, some relevant circumstances are pointed out by the

learned single judge reference to which for the purposes of this petition is not necessary, and, therefore, the same is avoided. The learned single

judge, thereafter, observed that if the court has jurisdiction to refuse to sanction a scheme prepared by a company and creditors concerned, it

would also have jurisdiction to refuse to give directions to convene a meeting if the circumstances of the case so demand. Section 391(1) is not a

sign-post but a check-post whereat it is the duty of the court to examine the scheme for itself. The obligation on the court is greater because the

application is ex parte and it is not practicable to give notice to numerous creditors of member of the company. At this stage, various factors could

be examined by the court and such an examination of the various factors, enumerated by the learned single judge, includes the factor as to whether

the company is ready with the statutory information under the proviso to sections 391(2) and 393(1)(a). It has also observed that the court''s role

u/s 391(1) is no less important than u/s 391(2) and the very said role is entrusted to the court u/s 391. The court also observed that it is more

necessary to examine the essential nature of the scheme at the stage when it is launched. If, at the initial stage, the court can satisfy itself as to the

viability of the scheme, and if it has any doubt, it should not hesitate either to reject the scheme as proposed or ask for additional material to safeguard the interests of all concerned or even make necessary observations while giving directions so that the creditors, members of the company

can take note of pitfalls, loopholes and defects of the scheme. There cannot be a casual or mechanical approach at the time of giving directions for

convening a meeting u/s 391(1). The court''s role u/s 391(1) is equally useful, vital and pragmatic as u/s 391(2).

234. Based on the aforesaid observations of the learned single judge of the Bombay High Court, Mr. M. J. Thakore, learned counsel appearing

for Mihir, very strenuously urged before this court that had there been a full disclosure of the paramount personal interest of Arvind Mafatlal in

proposing the scheme and had various details of suits filed by Arvind Mafatlal for partial enforcement of the concluded agreement of 1985 or for

the appointment of arbitrator, etc., been brought to the notice of the learned single judge of this court (Y. B. Bhatt J.) the learned single judge

would not have appointed Arvind Mafatlal as chairman of the meeting and even otherwise would have insisted on some further disclosure and,

thirdly, the court would have permitted a separate class meeting of the minority shareholders comprising Mihir''s family and/or other persons who

were opposed to the ambitions of Arvind Mafatlal to rule and capture control over MIL.

235. In my opinion, the purpose of issuance of the statement u/s 393(1)(a) is as stated in the case of Sidhpur Mills Co. Ltd., In Re: Sidhpur Mills

Co. Ltd., , so as to bring out the effects of amalgamation to the shareholders. In this process undoubtedly the fact relevant for such scheme of

amalgamation shall have to be stated. The various details of litigation regarding the rights issue of the company, when such issue is already closed

and the equity shareholders are already allotted and issued shares are not only not material facts for the scheme of amalgamation but would tend to

unnecessarily confuse the equity shareholders. It may be mentioned that in the absence of any prohibitory order of injunction against the rights issue

of 1987, the pendency of two civil suits filed in the City Civil Court at Ahmedabad by the shareholders against the rights issue of 1987 pales into

insignificance as it has no bearing whatsoever on the issue of amalgamation as well as on the rights of equity shareholders to whom the shares were

already allotted. Such pendency of litigation simply constitute insignificant history which has no bearing whatsoever on the proposed scheme of

amalgamation. Similarly, the pendency of the civil suit filed by Mihir against the rights issue of 1992 of MIL was very much known to Mihir and his

group. It is also very much known to all the shareholders to whom the shares were allotted in 1992 as it was stipulated in the order of the City Civil

Court itself that such allotment of the rights shares was subject to the final outcome of the civil suit. Each allottee was, therefore, through covering letter, given to know that the shares were allotted to him/her subject to the final outcome of the civil suit. Such a fact, which is so widely known to

the present objector as well as to the large class of shareholders, is not required to be stated in the explanatory statement to be issued u/s 393(1)

(a) of the said Act. Such a fact is, once again, not material or a vital fact having a bearing on the issue of amalgamation of Mafatlal Fine with MIL

and non-disclosure of such facts has, in no way, an adverse effect on the decision-making process of the shareholders present and voting. It is

pertinent to note that Mihir and his group though in the full know of the facts have remained absent and have not thought it fit to disclose such facts

even at the meeting so as to change the voting pattern. If such facts were to have such tremendous effects as to even change the voting pattern the

objector and the other persons of his group would have very well brought such facts to the notice of all shareholders present and voting by

remaining present in the meeting or could have insisted on the disclosure of such facts. Therefore, remaining absent at the meeting would also

suggest that the facts pointed hereinabove did not constitute material facts so as to be incorporated in the explanatory statement u/s 393(1)(a) of

the said Act. The non-disclosure of the said facts, in my opinion, does not in any way adversely or prejudicially effect the decision-making process

of the shareholders present and voting in the meeting held of January 22, 1994. This objection must fail and is hereby overruled.

Objection No. VIII :

236. From the text of objection No. 8 which relates to fixation of fair exchange ratio, it appears that Miheer has two-fold objections. One

objection is a procedural objection to the effect that while fixing the exchange ratio, the petitioner-company has sought reliance upon the report of

C. C. Chokshi and Co. and ICICI, Securities and Finance Company, both of whom were interested parties in the proposal of amalgamation and,

therefore, they could not have given any report nor could the company have fixed the fair exchange ratio based on such interested and biased

report. The second objection is a factual and substantive objection to the effect that the exchange ratio at the rate of two fully paid-up equity shares

of MIL for every five fully paid-up equity shares of MF is not just, fair and proper and is not in the business or commercial interest of the petitioner

company. This objection, therefore, shall have to be discussed and decided by answering the aforesaid two aspects of the objection.

Allegation of bias or partisan attitude against C. C. Chokshi and Co.

237. It is alleged by Miheer that for the purpose of fixing the fair exchange ratio, the scheme of amalgamation has relied upon the report of C. C.

Chokshi and Co. and ICICI. C. C. Chokshi and Company was an interested party and it could not have given any report, based on which the

exchange ratio could be fixed. It is pointed out by Miheer that C. C. Chokshi and Co. are not only the auditors of the company since ages but the

partners thereof have a close relation with Arvind N. Mafatlal being advisers in personal capacity. It is pointed out that even the family arrangement

of 1970 was prepared by a senior partner of the said firm, C. C. Chokshi and Co. It is, therefore, suggested that MIL as well as MF ought to

have taken an independent report of any independent chartered accountant regarding the fair exchange ratio.

238. In the affidavit-in-rejoinder filed by the company, it is denied that C. C. Chokshi and Co. could not have given any report based on which the

fair exchange ratio is fixed. It is further pointed out that C. C. Chokshi and Co. is a very reputed firm of chartered accountants in India and its

partners are held in high esteem in the profession as also in industrial and commercial circles and they have high standards of professional ethics

and integrity. It is also pointed out that they are the statutory auditors of the company as well as of Mafatlal Fine for the last several years. They are

being re-elected as auditors of the said companies by their shareholders from year to year. Miheer, who is a shareholder and director of MF for

the last several years, never objected to their appointment of C. C. Chokshi and Co. nor has he ever suggested that the said company has ever

acted with any partisan interest.

239. From the aforesaid nature of the objection, the question which immediately arises for consideration is as to whether the doctrine of bias would

apply to the report of an independent chartered accountant or to an expert opinion obtained either from the chartered accountant from the other

expert financial institutions. The concept of bias either pecuniary or personal or bias as to the subject-matter or policy bias is well-known to the

administrative law in the context of fair hearing or natural justice. The principle that a man should not be a judge of his own cause or that an

adjudicator must be impartial falls from the wider principles of natural justice and is referable to a judge or an adjudicator, who acts under a duty to

act judiciously. It is, therefore, said that an adjudicator must be a person who should be free from bias, personal, pecuniary or bias as to the

subject-matter or policy bias. The bias is an attitude of mind leading to a predisposition towards the issue. When an adjudicator suffers from any

bias of the kind sated above, his decision may become vulnerable. However, the concept of bias cannot perhaps apply to opinion or report of an

expert body. Such an opinion or a report is not determinative of the rights nor is it binding on the parties. The report or opinion is sought as the individual possesses necessary expertise and learning so as to give an opinion or report on the issue. The party to whom the opinion or report is

given is not bound by such opinion nor does such opinion/report finally affect the decision of the party to whom such report/opinion is given. Very

often such report or opinion is in the nature of mere recommendation. It may not have any effect by itself and a higher body may have to accept it

or to reject it. S. A. de Smith in his Judicial Review of Administrative Action, fourth edition, has referred to such reports as preliminary decisions at

page 275 and has observed as under :

Whether a report or determination lacking final effect may nonetheless have serious prejudicial effect on the legally protected interest of an

individual (as for example when it is a necessary prerequisite of a final order) the person making the report or preliminary decision may not be

affected by interest or likelihood of bias.

In the case of a report or opinion of an expert, in my opinion, it is difficult to hold that it is likely to have effect on the interest of individuals. Firstly,

the person tendering the report or opinion is not acting in the position of an adjudicator. Therefore, excepting a duty to act fairly, icy impartiality is

not expected. Therefore, in the sense in which the doctrine of bias is applied in the administrative law, the same is not required to be applied in the

context of opinion/report of an expert on the subject.

240. With the aforesaid preface in mind, it shall have to be kept in mind that C. C. Chokshi and Co. have been working as auditors and chartered

accountants of both the companies continuously since the last number of years. They are, therefore, having a complete knowledge of the working

of MIL and MF, their liabilities, assets, standing in the market and future prospects of development. The fact that they have been appointed from

year to year as chartered accountants of both these companies would go to show that there is no earthly reason for them to take any partisan

attitude either to MIL or to MF. Secondly, their report of opinion is merely in the nature of the opinion of an expert, not binding on the company or

its shareholders. The companies and their shareholders have the right to reject such opinion. Thirdly, by such report/opinion, they are not deciding

any list between the parties or any dispute between the parties nor do they perform any adjudicatory role. They simply function as experts on the

subjects giving their opinion/report. The final voice is with the companies and/or their shareholders. Fourthly, C. C. Chokshi and Co. have always

been found to be working impartially and independently in giving their report and the report in the present case is a very well-considered report running into about 50 pages and reflecting upon the various relevant factors taken into consideration for the purpose of fixing the fair exchange

ratio. I, therefore, do not find any substance in the objection of Miheer that no reliance could have been placed on the report of C. C. Chokshi and

Co. on the ground that they were interested in the scheme of amalgamation. Miheer has also failed to show the nature of such interest of C. C.

Chokshi and Co. nor has he clarified as to how C. C. Chokshi and Co. can be said to be interested in the proposed scheme of amalgamation

especially when it has been working as a chartered accountant and auditor for both the companies.

Allegation of bias against ICICI :

241. Miheer has objected that for fixation of the fair exchange ratio, the company should not have placed any reliance upon the report of ICICI

Securities and Finance Company Ltd. He has submitted that the said company was interested in the proposal of amalgamation. He has in this

connection averred that ICICI has a huge investment in MF. It is alleged that MF has stood as guarantor for the loan advanced by ICICI to MEIL

and as MEIL is closed down, the said loan is required to be repaid by MF to ICICI. It is further alleged that such a repayment is now to be done

by issuance of equity capital to ICICI. MF has tied up with ICICI for long-term finance by way of issue of debentures aggregating to Rs. 17

crores over and above being committed to issue equity warrants to enable ICICI to subscribe for further 1,00,000 ordinary shares of MF. It is,

therefore, alleged that ICICI would like to see that in the proposed scheme, MF gets itself amalgamation with MIL on the best possible terms. It is

alleged that ICICI would, therefore, try to see that more benefits go to MF and, therefore, ICICI cannot be said to be an independent party and

on its opinion, no reliance could have been placed. In the alternative, it is submitted that the opinion of ICICI even otherwise is very vague and

cannot form the basis for fixation of the fair exchange ratio.

242. The company has in this connection pointed out that ICICI is a very well-known financial institution in India. ICICI prepared project

appraisal reports for various companies in which it holds shares or to which it has advanced substantial term loans and they are relied upon by

various companies at the time of public issues. ICICI is allowed by SEBI to act as managers to many public issues. It is, therefore, submitted that

ICICI could not be said to be interested in fixing a ratio unfair to either of the two companies because of its shareholding and financial participation

in MF. It is further pointed out that in the present case the report of exchange ratio is not given by ICICI but is given by ICICI Securities and

Finance Company Ltd.

243. In order to answer this objection, in my opinion, it will be necessary to refer to the relevant portion of the text of the report/letter dated 10th

November, 1993, given by ICICI Securities and Finance Company Ltd. This letter is given in response to a letter of MIL calling upon the said

company to give its opinion on the fair exchange ratio for the merger of MF with MIL. The relevant text reads as under :

After studying the proposal, on the basis of the information made available to us and on the prevailing conditions, we are of the opinion that the

exchange ratio of the shares for the purpose of effecting the merger be two fully paid-up equity shares of Mafatlal Industries Ltd. for every five fully

paid-up equity shares of the Mafatlal Fine Spinning and Manufacturing Co. Ltd.

We have formed our opinion on the basis of the net asset value, the prevailing market prices of the shares and the future prospects of the two

companies as provided by you.

In giving our opinion, we have relied upon and assumed, without any independent verification, the accuracy and completeness of all information

that has been furnished to us by you or otherwise reviewed by us. We have not verified the accuracy and completeness of any such information

and we have not conducted any evaluation or appraisal of assets or liabilities of the two companies.

This letter is provided solely for the benefit of the board of directors of the company and shall not confer rights or remedies upon any shareholder

of any of the companies or any other person.

244. From the aforesaid text of the letter it becomes clear that the said report is merely the nature of a letter provided solely for the benefit of the

board of directors of MIL. It is expressly stipulated that it shall not confer rights or remedies upon any shareholder of any of the companies or any

other person. The criticism of Miheer that such report is absolutely vague and is not based on any independent study appears to be well founded.

In the report itself it is admitted that the said company has not undertaken any independent verification and has relied upon the accuracy and

completeness of information that has been furnished by MIL. They have also not conducted any evaluation or appraisal of assets or liabilities of the

two companies. This type of letter cannot be regarded as an expert opinion and cannot be made the basis for determining the fair exchange ratio.

Had fixation of the fair exchange ratio been solely dependent upon this report only, this court would not have accepted the said fair exchange ratio

in the absence of other considered report from independent expert body. However, in the present case, the company has not placed any reliance

upon the said letter of ICICI, but has determined the exchange ratio on the basis of a detailed well considered report of C. C. Chokshi and Co. In fact, the said report is called for by the chairman of MF as well as the chairman of MIL. For both these companies, C. C. Chokshi and Company

has been working as chartered accountants since last several years and it was in the know of all details of the working of the two companies, the

investment of the companies, the assets and liabilities of the companies, the growth prospects, if any, in each of the two companies. It has after

taking into consideration all the relevant facts and the gradual progress of the two companies commencing from the inception of each company till

date, decided the fair exchange ratio. In that view of the matter, while accepting the criticism of Miheer about the report of ICICI, in my opinion,

the fixation of the fair exchange ratio based on the report of C. C. Chokshi and Company cannot be said to be bad as ultimately vitiating the

resolution passed by the meeting.

245. C. C. Chokshi and Co. has submitted a report dated November 10, 1993, and from such report, it becomes clear that the chairman of

Mafatlal Fine and the chairman of MIL have requested C. C. Chokshi and Co. submits a report on the air basis of amalgamation of MF with MIL.

On such request after undertaking the exhaustive study of various relevant factors set it in the detailed report such as intrinsic value of the share, the

market exception considered along with the rack record of the companies, break-up value of the shares on historical cost basis, market values of

the fix assets and investments, the break up value existing as on the effective date of amalgamation, etc., and has stated that as the proposal

involves the amalgamation of MF with MIL, MF would thereunder offer its entire undertaking including all the assets and liabilities to MIL. In

consideration, MIL would allot shares to the shareholders of MF. After taking the relevant factors into consideration, the report reads as under :

21. In the ultimate analysis, valuation will have to be tempered by the exercise of judicious discretion and judgment taking into account all the

relevant factors. There will always be servile factors, e.g., quality and integrity of the management, present and prospective competition, yield on

comparable securities and market sentiment etc. which are not evident from the face of the balance-sheets but which will strongly influence the

worth of share. This concept is also recognised in judicial decisions. For example, Viscount Simon said in Gold Coast Selection Trust Limited v.

Humphrey [1943] 30 TC 209 and was quoted with approval by the Supreme Court of India in the case reported in 88 ITR 44 as under :

"If the asset takes the form of fully paid shares, the valuation will take into account not only the terms of the agreement but a number of other

factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, so forth. There may also be an

element of value in the fact that the holding of the shares gives control of the company. If the asset is difficult to value, but is nonetheless of the

money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor

indeed is it possible."

22.1. On a consideration of all these factors and other relevant factor, in our opinion, the fair and equitable basis for amalgamation of MF is as

under :

(i) All the assets and liabilities of MF as at the close of business on March 31, 1993, shall vest in and become the assets and liabilities of MIL, the

subsequent operations from April 1, 1993, being to the account of MIL.

(ii) MIL shall allot to the holders of the equity shares of MF (other than shares of MF held by MIL) as at the date to be fixed by the board of MIL,

on completion of the requisite formalities of amalgamation, 2 (two) equity shares of MIL of Rs. 100 each credited as fully paid-up for every 5

(five) equality shares of Rs. 100 each of MF.

(iii) The 12,06,914 equity shares of MF held by MIL representing about 39.58 per cent. of the paid-up share capital of MF shall stand cancelled

on amalgamation taking effect.

246. In the proposed scheme of amalgamation at annexure G to this petition, in para 5 it is proposed as under :

5. (a) The amalgamation of MF with MIL will be made on the basis that every member of MF shall in respect of every five ordinary shares in MF

of Rs. 100 each held by him on the day when this scheme becomes effective, be entitled as of right to an allotment to himself of two equity shares

in MIL of Rs. 100 each credited as fully paid-up and MIL shall, without any application, allot to such member in MF shares in MIL to which such

member may become entitled.

(b) MIL holds ar present 12,06,914 ordinary sores in MF. As MIL cannot make any allotment of shares to itself the said 12,06,914 shares in MF

shall stand cancelled.....

(e) MIL shall allot to the holders of ordinary shares of MF as of the date to be fixed by the board of directors of MIL on completion of the

requisite formulates of amalgamation, 2 equity shares of Rs. 100 each credited as fully paid-up in respect of 5 ordinary shares of Rs. 100 each held

by such person in MF. This would result in an issue of 7,06,096 equity shares of Rs. 100 each by MIL as referred to above in clause Nos. 5(c)(i),

(ii) and (iii). MIL shall also issue and also 70,848 equity shares of Rs. 100 each credited as fully paid-up on October 1, 1994, to the financial

institutions and banks in the same ratio as referred to above in clause No. 5(c)(iv) being the number of equity shares corresponding to 1,77,120

ordinary shares of Rs. 100 each agreed to be issued by MF in discharge of its guarantee obligations.

247. The objections of Miheer to the aforesaid fixation of the exchange ratio if properly summarised boil down to the following :

(i) MIL is company which apart from having manufacturing activity has substantial interest in various other companies. The profits of MIL are

attributable primarily of its investments. The last five years'' average profit of MIL is Rs. 6.09 crores. As against the said profit, the average profits

of the last five years'' of MF are Rs. 1.93 crores. The earning per share (EPS) of MF is Rs. 7 as against that of MIL being Rs. 30 per share. In the

circumstances, the shareholders of MIL as such are not going to be benefited by the proposed amalgamation. It is suggested that the low profit

earning ratio per share of MF will, as a consequence, reduce the profit earning per share of MIL. It is alleged that C. C. Chokshi and Co. has

miscalculated the earning per share of MF at Rs. 14 per share by ignoring the figure of a huge loss incurred during the accounting year ending on

March 31, 1990. It is suggested that this is done with a view to giving a rosy picture of MF and to misguide the shareholders of MIL. It is

suggested that had the loss of year ending March 31, 1990, been taken into consideration, the earning per share would have been Rs. 7 per share.

It is suggested that the ratio of 5 : 2 would have an average earning attributable to those shares at Rs. 35 while the two shares of MIL would be

earning Rs. 60. It is, therefore, suggested that there is clear discrepancy between the existing earning of shareholder of five shares of MF and the

subsequent earning after the said holder of shares is allotted two shares of MIL in lieu thereof. It is suggested that the higher earning which the

shareholders of MF would receive would be at the cost of the existing earning of the shareholders of MIL. It is submitted that the earning per share

(EPS) must weigh with both the company and their shareholders in thing any decision. The decision which is likely to result in dipping of the EPS

(earning per share) cannot be said to be a decision in the interest of the company or its shareholders. It is, therefore, submitted that the proposed

scheme which would result in dipping of the profits of MIL should not be sanctioned as it would not be in the interest of shareholders of MIL to

amalgamate with MF.

248. Miheer has in his objection tried to assail the exchange ratio by pointing out that on the basis of the earning per share, the exchange ratio fixed

is not proper. He has produced at annexure M statement showing the working results of MIL of the last five years ended March 31, 1993, and

based thereon has worked out the earning per quite share after depreciation and tax at Rs. 30 so far as MIL is concerned. By an identical

statement at annexure N showing the working results of MF for the last five years ended March 31, 1993, he has worked out the earning per

equity share of MF after depreciations and tax at Rs. 7. Five shares of MF would earn Rs. 35 while two shares of MIL would earn Rs. 60 per

year. By taking the earning capacity on the basis of the last year''s profit, he has submitted that earning of MIL per share was Rs. 55 as compared

to the earning per share of MF at Rs. 9.24. In order to make good this earning per share on the basis of the last year''s working, he has relied upon

the balance-sheet of the last years of MIL and MF. He has, therefore, submitted that on the basis of earning capacity, the fair exchange ratio

would work out to 1 : 6 and not at 2 : 5. Therefore, he has suggested that on amalgamation of MF with MIL, the earning of MIL would go down

as the earning would now be distributed to the equity shareholder of MF who would get better returns. Miheer has also referred to a statement

showing the working results of MIL for the last five years ending on March 31, 1993, at annexure-E in his reply. The total profits before tax for the

five years from March 31, 1989, to March 31, 1993, are stated to be Rs. 41.86 crores minus the amount he has deducted Rs. 4.90 crores

towards provision for taxes and has worked out the average profit after tax at Rs. 7.49 crores per year. Therefore, the earning per equity share

after depreciation and tax in the case of MIL would work out to Rs. 37 per share while the earning per share for MF would work out to Rs. 17

per share. The second objection to the fixation of the exchange ratio is on the ground that compared to the investments made by MIL in shares and

stocks, the investments made by MF in shares and stocks have hardly appreciated. It is pointed out that the market value of the investments in

stocks and shares as on March 31, 1993, of MIL is Rs. 168.85 crores as against the cost price thereon of Rs. 39.20 crores. In the case of MF,

the market value of investment in stock is Rs. 6.63 crores as against the cost price of Rs. 5.36 crores. The grievance of Miheer is that while fixing

the fair exchange ratio, C. C. Chokshi and Co. had relied upon the book value of the investments in stock and shares and other securities. It is

submitted that there exists a wide gap between the book value of investments in stock and shares and other securities as again the market value of

investments in stock and shares and other securities. It is pointed out that the market value of shares and stocks of MIL is approximately give times its cost price while the market vale of the investments of MF and the cost price thereof are almost identical. The disparity in the value of shares and

stock and other securities when compared on the basis of market value would show that the fixation of the exchange ratio was not just, proper or

fair.

249. The third objection raised by Miheer is that MIL, apart from having huge investments in other companies, textile and chemical divisions, is

also owing two commercial properties in the City of Bombay which are very valuable assets of the company. The said properties are ""Mafatlal

House"" near Mantralaya and ""Mafatlal Centre"" a Nariman Point. These two assets which are available to MIL and ultimately to it shareholders.

250. Applying the method of break-up value, it is submitted by Miheer that if the value of shares were to be determined on the market price basis

as at March 31, 1993, the value per share of MIL will be Rs. 1,155 as against that of Rs. 259 of MF. In this connection, Miheer has along with his

affidavit-in-reply produced the break-up value of shares of MIL on the basis of the aforesaid as at March 31, 1993, as well as break-up value of

shares of MF on the bass of the audit balance-sheet as at March 31, 1993. As per such statement, the value per equity share of Rs. 100 of MIL

works out to Rs. 1,155 while that of MF would work out to Rs. 259. He has, therefore, submitted that on application of this method also, the fair

equity ratio would work out to one equity share of MIL as against five equity shares of MF. The exchange ratio fixed by C. C. Chokshi and Co.

is, therefore, not consisted with second method ordinarily applied, namely, the method of break-up value of shares of fixation of the change ratio.

251. Fourthly Miheer has submitted that on the basis of the market value of the respective shares as quoted at the stock exchange, the exchange

ratio would not work out at 2 : 5 but it would work either at 1 : 6 or 1 : 5.

252. Based on the aforesaid different methods of exchange ratio, Miheer has tried to demonstrate that the amalgamation of MF with MIL at the

exchange ratio of 2 : 5 is in every resent detrimental to the shareholders of MIL as the class of shareholders is not going to be benefited in any

manner. He has submitted that in fact because of amalgamation, the earning of the shareholders of MIL would go down and in every respect the

shareholders would suffer.

Reply of MIL :

253. In response to the aforesaid objections, the petitioner company has in the affidavit-in-rejoinder submitted that Miheer''s opposition to the

scheme is belated, fraudulent and mala fide. He has been a shareholder both of MIL as well as of MF and he was a director of MF at all relevant times. The proposal of amalgamation of MF and MIL was on the agenda of the meeting of the board of MF held on November 25, 1993. The

said agenda item made reference to the reports of C. C. Chokshi and Co., Chartered Accountants, Bombay, and ICICI Securities and Finance

Co. Limited with respect to the exchange ratio for the purposes of the scheme as follows :

C. C. Chokshi and Company, Chartered Accountants, Bombay, were requested to examine and report on the fair and equitable basis for the

amalgamation of MF with MIL on the basis of the balance-sheet as at March 31, 1993, of both the companies. They have submitted their report

dated November 10, 1993, and according the said report, the fair and equitable basis of amalgamation of MF with MIL would be allotment of

two equity shares of MIL for every five equity shares of MF in consideration for transfer of the entire business of MF, together with all assets and

liabilities of MIL. Copy of the said report is circulated herewith marked as annexure II.

ICICI Securities and Finance Co. Ltd. have also given their opinion, vide letter dated November 10, 1993, that the exchange ratio of the shares

for the purpose of effecting the amalgamation be two equity shares of the company for five equity share of MF on the basis of the net asset value

prevailing market prices of the share and the future prospects of both the two companies. Copy of the said opinion letter is attached with the report

of C. C. Chokshi an Co....

The board to pass suitable resolution approving the basis of amalgamation as suggested by C. C. Chokshi and Co., and authorise Mr. Arvind N.

Mafatlal, chairman, Mr. Hrishikesh A. Mafatlal, vice-chairman and the managing director, Mr. Praful R. Amin, executive vice-president (ex

textiles) and Mr. Prem Malik, executive vice-president (textiles marketing) of the company to take all such steps that maybe necessary for giving

effect to the proposed amalgamation.

254. Notice of the board meeting and agenda were sent to Miheer. He, however, did not remain present at the board meeting of MF held on

November 25, 1993, at which the board resolved, inter alia, that in its opinion, the exchange ratio recommended by C. C. Chokshi and Co. was

fair and reasonable. The minutes of the board meeting were circulated to all directors including Miheer. Similarly, pursuant to the order passed on

Company Application No. 886 of 1993 a general meeting of the members of MF was convened on December 20, 1993, which was issued to

Miheer over and above the public notice in the Free Press Journal and Bombay Samachar. Similarly, the order passed in Company Application

No. 872 of 1993 by the Gujarat High Court for convening a meeting of the equity shareholders of MIL was also publicised. Miheer did not attend the meeting of shareholders. He did not point out the objection to the fair exchange ratio at any time prior to holding of the meeting or at the

meeting by remaining present. By his conduct, therefore, he is estopped from now challenging the exchange ratio as determined by the majority

shareholders.

255. Before this court proceeds to examine the report of C. C. Chokshi and Co. for fixation of the exchange ratio, it must be stated at the outset

that Pennington in his Principles of Company Law mentions four factories which had to be kept in mind in the valuation of shares. There are :

(1) Capital cover,

(2) Yield,

(3) Earning capacity, and

(4) Marketability.

For arriving at the fair value of share, three well-known methods are applied :

(1) The manageable profit basis method (the earning per share method),

(2) The net worth method or the break up value method, and

(3) The market value method.

256. The principles which emerge from the judicial decisions in the matter of approach to the different methods of valuation have been set out

succinctly in the book Valuation of Shares by Adamson, fifth edition, at page 667, Chapter 7, dealing with the judicial methods of approach. The

said principles are adverted to by a learned single judge of this court in the case or Shahibag Entrepreneurs P. Ltd., In re [1976] 46 Comp Cas

642 . In Commissioner of Wealth Tax Vs. Mahadeo Jalan and Mahabir Prasad Jalan and Others etc., a question arose before the Supreme Court,

whether the Appellate Tribunal was justified in law to follow the method involving the principle of break-up value instead of the method involving

the principle of yield value in determining the value of the shares u/s 7 of the Wealth-tax Act. In that context, Jaganmohan Reddy J., speaking for

the court, observed as under (at page 633) :

An examination of the various aspects of valuation of shares in a limited company would lead us to the following conclusion :

(1) Where the share in a public limited company are quoted on the stick exchange and there are dealings in them, the price prevailing on the

valuation date is the value of the shares.

(2) Where the shares are of a public limited company which are not quoted on a stock exchange or of a private limited company, the value is

determined by reference to the dividends, if any, reflecting the profit-earning capacity on a reasonable commercial basis. But, where they do not,

then the amount of yield on that basis will determine the value of the shares. In other words, the profits which the company has been making and

sold be making will ordinary determined the value. The dividend and earning method or yield method are not mutually exclusive; both should help

in ascertaining the profit earning capacity as indicated above. If the results of the two methods differ, an intermediate figure may have to be

computed by adjustment of unreasonable expenses and adopting a reasonable proportion of profits.

(3) In the case of a private limited company also where the expenses are incurred out of all proportion to the commercial venture, they will be

added back to the profits of the company in computing the yield. In such companies the restriction on share transfers will also be taken into

consideration as earlier indicated in arriving at a valuation.

(4) Where the dividend yield and earning method break down by reason of the company''s inability to earn profits and declare dividends, if the set

back is temporary then its is perhaps possible to take the estimate of the value of the shares before set-back and discount it by a percentage

corresponding to the proportionate fall in the price of quoted shares of companies which have suffered similar reverses.

(5) Where the company is rip for winding up then the break-up value method determines what would be realised by that process.

(6) As in Attorney-General of Ceylon v. Mackie [1952] 2 All ER 775 a valuation by reference to the assets would be justified whereas in that

case the fluctuations of profits and uncertainty of the conditions at the date of the valuation prevented any reasonable estimation of prospective

profits and dividends.

In setting out the above principles, we have not tried to lay done any hard and fast rule because ultimately the facts and circumstances of each

case, the nature of the business, the prospects of profitability and such other considerations will have to be taken into account as will be applicable

to the facts of each cases. But, one thing is clear, the market value, unless in exceptional circumstances to which we have referred, cannot be

determined on the hypotheses that because in a private limited company one holder can bring it into liquidation, it should be valued as on

liquidation, by the bread-up method. The yield method is the generally applicable method while the break-up method is the one resorted to in

exceptional circumstances or where the company is ripe for liquidation but none the less is one of the methods.

257. In the aforesaid case, B. K. Mehta J. has also noticed that when a leading firm of accountants and values had after taking into consideration

all relevant factors, suggested the exchange ratio, and when such ratio is not shown to be patently unfair or unjust, the court shall be slow to set at

naught the entire scheme of amalgamation. It is also to be kept in mind that valuation of shares is essentially a technical matter, requiring expertise.

In given cases, there can be genuine differences of opinion about the correct valuation shares. When there are more than on method of valuation,

adoption of one method to the exclusion of other methods, may at times, bring about differences of opinion. In the case of Piramal Spinning and

Weaving Mills Ltd., In re [1980] 50 Comp Cas 514 the learned single judge of the Bombay High Court, while approving the scheme of

amalgamation, held that the valuation of shares was a technical matter which required considerable skill and expertise. There were bound to be

differences of opinion as to what the correct value of the shares of any given company was. Simply because it was possible to value the shares in a

manner different from the one which had been adopted in a given case, it could not be said that the valuation which had been agreed upon was

unfair. What was important in this case was that the majority shareholders of both the companies had accepted the valuation which was arrived at

by the auditors. It was, therefore, upon the person who challenges the valuation, toe satisfy the court that the valuation arrived at was grossly

unfair. In Re: Piramal Spinning and Weaving Mills Ltd., .

258. Similarly, in the case of Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd., In re [1980] 50 Comp Cas 623 a learned single judge of

the Madras High Court observed that it is impossible to calculate the real value of any share with mathematical accuracy. The court took the view

that the value of a shares is the price which a buyer will pay for it, and that price will depend on the number of shares offered by sellers and sought

by buyers at any particular time. The amounts so offered will change from day-to-day and so in consequence will the ruling price. If the shares are

dealt in on a stock exchange, the value of the shares may be said to be the price at which they are quoted on that exchange. Ordinarily, when the

shares in a company are quoted at the stock exchange, the quotation of the stock exchange would be a safe and proper basis for fixing the ratio

unless it is demonstrated that the stock exchange quotation is not reliable and does not represent the true value. Reliance was also placed on the

observation of the Rajasthan High Court in Cotton Agents (Rajasthan) Limited, In re [1969] 39 Comp Cas 663 where the law been stated as

under (at page 667) :

Valuation of shears in an amalgamations made on a consideration of some or all of a number of relevant factors. Thus, the stock exchange prices of the shares of the two companies, the dividends paid on the shares, the relevant growth prospects of the companies, the ratio of distributable

earnings to dividends paid during the year, the value of the net assets of the two companies, etc., are factor on which the valuation is often rested.

The answer to the question whether some or all of these factors can be applied in the case of a given scheme of amalgamation depends on the

circumstances of each case. It is necessary, however, that the same factors should be taken into account in assessing the two sets of shares.

259. Amalgamation involves exchange of shares. The exchange is by way of allotment of shares of the transferee company to the shareholders of

the transferor company for their shares in the transferor company. The share exchange ratio is decided by the fair value of shares of the transferor

and transferee companies. The fair value of shares is arrived at after consideration of different modes of valuation and diverse factors. There is no

mathematically accurate formula of valuation. An element of guess-work or arbitrariness is involved in valuation. Subject to this the following

methods of valuation are summarised by Datta on the Company Law, at page 1108.

Open market price : This hypothetical open market sale of sores is between a willing seller and a willing buyer in a market operation under perfect

competitive conditions. As the hypothetical situation does not exist, this method will give a rough and ready estimate of the ratio of exchange of the

shares of the companies. It will be more scientific, equitable and satisfying to the shareholders and the court if all the other aspects are considered

and then the exchange ratio is decided.

Stock exchange quotation : The stock exchange quotation of shares given an indication about the value of shares. In respect of private limited

companies and closely held public limited companies, whose shares are not listed, the stock exchange does not help. Further, the prices quoted on

the stock exchange may not reflect the true value of the shares with reference to asset breaking or earning potential. Market price may be

influenced by persons concerned with the companies and stock exchange, and speculation of the investors.

Assets basis : The intrinsic value of shares may be determined on the basis of the assets. The assets ar to be valued, liabilities to be ascertained and

calculation is to be made to find out a fair value. The value of plant and machinery is determined with reference to the wear and tear suffered and

the likely price that they would fetch if sold in the open market. The land and building value due to inflation must be higher that the book value. The

realisable value of most of the fixed assets will be generally much more than that shown in the books. These are to be done on the assumption that the business will continue to be in operation. For valuing goodwill, the amount for reasonable return on capital employed in the business and the

quantum of super earnings or super profits has to be determined with reference to the facts and circumstances of the case. Where the realisable

value of the fixed assets is not suitable the book value is to be taken.

Yield basis : The normal expected annual profits of the company and the rate of yield for capitalisation of normal profit are determined. To arrive at

the normal earning capacity from the profits shown in the print and loss account, certain adjustments are to be made. Deductions are to be made

from the profits or additions to be made, as the case may be, of non-recurring items such as loss of exceptional nature through fire and floods,

profit or loss of any isolated transaction, receipt of commissions for a special service; profits or losses from non-trading investments, capital profits

or loss; provision for bad and doubtful debts; adequate depreciation provision; valuation of stock consistent with previous years; deduction of tax

at current rates after making all adjustments as in past years. Rate of yield is the return which an investor expects to earn on his investment. It varies

with profitability and from industry to industry.

260. Having referred to various permissible methods of valuation of shares as propounded by the experts on the subject and as referred to by

various courts in their respective judicial pronouncements, this court would now undertake the exercise of referring in some detail to the report of

C. C. Chokshi and Co. It must be mentioned that the report is called for by the chairman of MIL as well as the chairman of MF. For both these

companies, C. C. Chokshi and Company have been working as chartered accountants since the last several years. From the report, it becomes

clear that it has gone through the audited statement of accounts and annual reports of the two companies, i.e., MF and MIL, for five years

commencing from April 1, 1988. It has also considered the projected working results of MF and MIL for the next five years ending March 31,

1998, taking into account the participation in units to be set up, the modernisation efforts of the companies and the export potential likely to result

therefrom. They have also stated the working results and the financial position of the two companies. They have also noticed that under clause 13

of the memorandum of association of MF and clause 44 of the memorandum of association of MIL, there is power to enter into partnership or any

arrangement for sharing profits or amalgamation. It is also noticed that over the years both MIL and MF have adopted a similar course in their

textile and chemical business which has brought about several synergies in the areas such as purchase of raw materials, components and capital goods, sale of finished products and exports. They have also noticed that MF is an established company in textile and chemical industries while

MIL is a large multi-division, multi-location company, carrying on diversified activities, dyes intermediates and chemicals. They have extensively

referred to the licensed and installed capacity of MF and MIL, net details of fixed assets of MF and MIL, net additions to fixed assets up to

March 31, 1993. They have, in para 9.3, noticed that the paid-up capital of MF, on giving effect to the fact that the company has furnished a

guarantee to financial institutions and banks on behalf of MEIL, would work out to Rs. 31.49 crores as on March 31, 1993. MIL holds 12,06,914

ordinary shares of Rs. 100 each of MF which constitutes about 45.96 per cent. of the present paid-up equity capital of MF. Even after issue of the

shares to financial institutions and banks in terms of the memorandum of understanding and to ICICI against warrants, the said holding would

continue to constitute a significant percentage of the paid-up share capital of MF. On the amalgamation taking effect, these shares would be

cancelled and, therefore, this factor would have a significant effect on the fair exchange ratio. They have also referred to the fact that because of the

rights issue of 1992 by MIL to its shareholders in the ratio of 1 : 1, the paid-up equity share capital of MIL is increased to Rs. 26.90 crores with

an increase in the share premium account by Rs. 26.90 crores. They have also referred to the proposal of MIL to raise funds in the international

market in the near future by way of issue of bonds of US dollars 100 each, aggregating to US dollars 50 million with detachable warrants issued at

the rate of seven warrants for every ten bonds. In the case of MF, against the paid-up capital of Rs. 26.26 crores as at March 31, 1993, the

company has reserves and surplus of Rs. 40.35 crores. Thus, as at March 31, 1993, the net worth of the company is Rs. 66.61 crores. It is on this

basis that the value per share of MF works out to Rs. 254. It is then referred to the fact that MF was required to issue and allot equity shares to

the financial institutions and banks on October 1, 1993, and October l, 1994, and if the said shares are taken into account, the value per equity

share of Rs. 100 comes to Rs. 221 per share. As against that position of MF, in the case of MIL, paid-up capital is Rs. 20.01 crores as at March

31, 1991, and the company has reserves and surplus of Rs. 82.69 crores. The reserves of MIL are more than four times its paid-up share capital.

Thus, on the basis of the balance-sheet as on March 31, 1993, the net worth of MIL is Rs. 102.70 crores, based on which the value per equity

share would work out to Rs. 509 per share of Rs. 100 each fully paid-up. If is pointed out that the rights shares issued by the company in 1992 were then partly paid but would become fully paid-up in May, 1993, and if that is taken into account, the value per equity share of Rs. 100 each

on the basis of the revised net worth would work out to Rs. 507 per equity share. In para 11.5 of the report, it is noticed as under :

11.5 The investments of MIL in shares, debentures, bonds and Government securities of the book value of Rs. 39.20 crores include shares of

various quoted companies, whose market value is substantially higher. The market value of these investments is Rs. 168.85 crores as on March

31, 1993. On this basis, the net worth of the company would be substantially higher than the net worth on the basis of the book value of its assets

and in making any comparison of the net worth of the two companies, this position would need to be considered.

261. The report has also noticed that for the purpose of amalgamation, it was important to study the earning power of the companies and by

comparing the working results of the last five years of MF and MIL, it is noticed that the working results of MF for the last five years indicate that

there is a steady increase in the turnover of the company from Rs. 177.39 crores for the year ended March 31, 1989, to Rs. 219.27 crores for the

year ended March 31, 1991, and further to Rs. 306.57 crores for the year ended March 31, 1993. However, it is noticed that the profits of the

company have been fluctuating from year to year. It is also noticed that the profit before tax for the year ended March 31, 1989, which was Rs.

1.58 crores decreased to a loss of Rs. 4.79 crores for the year ended March 31, 1990, and has thereafter risen to Rs. 7.39 crores for the year

ended March 31, 1991, but has declined to Rs. 2.01 crores for the year ended March 31, 1993. As against the aforesaid, the working results of

MIL for the year ended March 31, 1989, were at Rs. 125.28 crores, which have risen gradually to Rs. 257.69 crores for the year ended March

31, 1993. The turnover has thus increased by about 105 per cent. over the last five years. The profits of the company have also been increasing;

the profit before tax for the year ended March 31, 1989, was Rs. 1.56 crores. It has increased to Rs. 13.84 crores for the year ended March 31,

1991, but has declined to Rs. 8.26 crores for the year ended March 31, 1993. The profits after depreciation but before taxation of MF during the

last five years ended on March 31, 1993, as compared to MIL are stated as under :

Year MF MIL

(Rs. in crores) (Rs. in crores)

1988-89 1.58 1.56

1989-90 (4.79) 3.65

1990-91 7.39 13.84

1991-92 6.72 14.55

1992-93 2.01 8.26

262. The average profits of MIL per year after tax on the basis of the working results of the last five years works out to Rs. 7.59 crores. On this

basis the earning per share of the equity shareholders is Rs. 37 per share. If the rights shares issued in 1992-93 were to be considered as fully

paid, the earning per share works out to Rs. 27 per share.

263. In para 14.2 of the report, it is noticed that in the case of both MF and MIL, there are several factors which need to be considered on

account of which the past results may not properly reflect the potential of these companies to earn profits in future. With respect to MF three

factors are enumerated in para 14.3. As regards MIL, around 11 factors are set out in para 14.4. Thereafter, in para 14.5, the following

conclusion is recorded :

14.5 In the light of the above, in the present proposal, the valuation cannot obviously proceed only on the basis of what is known as historical

profits or profits of past years. It is necessary to take into account what is known as estimated or future maintainable profits. For example, the well

known author on valuation Bonbright has averred "value, under any plausible theory of capitalised earning power, is necessarily forward looking. It

is an expression of the advantages that the owner of the property may expect to secure from the ownership in the future. The past earnings are,

therefore, beside the point, save as possible index of future earnings". Moreover, Williams J. has observed in Martin"s CMF that "the extent of the

net profits made in the years concerned is only imported as supplying a guide to the probable future prospects of the business".

264. The report has thereafter considered the projected working results of MF for five years ending on March 31, 1998, as well as those of MIL

for the last five years. On that basis the earning per share of equity shareholders works out to Rs. 41.89 per share of Rs. 100 each in the case of

MF while in the case of MIL, the earning per share works out to Rs. 140.86 per share. The report, therefore, rightly concludes that the projected

results of both the companies are in the realm of future probabilities and must accordingly only be kept as background data in a scheme of

amalgamation.

265. The report then reflects upon the second method of valuation or the principle of ""value to the owner"" or the report based on the intrinsic

worth of the assets of the two companies. From para 15.1, the application of this principle is considered by observing that in a scheme of amalgamation such as the one under consideration where both the companies are well established undertakings with a large net asset backing built

up over a period of years, it would be very relevant to consider the intrinsic worth of the assets of the two companies. C. C. Chokshi and Co. has

referred to James Bonbright in his book Valuation of Property, where the author has observed as under :

The value of a property to its owner is identical in amount with the adverse loss, direct and indirect, that the owner might expect to suffer if he

were to be deprived of the property.

266. It is observed that in other words one has to look at the market value of the assets rights to which a owner would be relinquishing on

amalgamation of the company. The true value of the property in such a situation to its owner necessarily takes account of all the direct and indirect

advantages that the property affords its owner. The report further observes in para 16.5 that the market price of an equity share as quoted on a

stock exchange is normally considered as the fair value of the equity shares of that company where such quotations are arising from the shares

being regularly and freely traded in, subject to the element of speculative support that may be inbuilt in the value of the shares. It is further noticed

that there could be situations where the value of the share as quoted on the stock market would not be regarded as a proper index of the fair value

of the share especially where the market values are fluctuating in a volatile capital market. The report makes reference to the decision of the

Supreme Court in the case of Commissioner of Wealth Tax Vs. Mahadeo Jalan and Mahabir Prasad Jalan and Others etc., , where, while dealing

with shares of quoted companies, the court observed (at page 627) :

Where shares in a company are bought and sold on the stock exchange and there are no abnormalities affecting the market price, the price at

which the shares are changing hands in the ordinary course of business is usually their true value. These quotations generally reflect the value of the

asset having regard to the several factors which are taken into consideration by persons who transact business on the stock exchange and by the

buyers who want to invest their money in any particular share or shares.

267. The report has also made a reference to the decision of P. D. Desai J. (as his Lordship then was) in the case of Bank of Baroda Ltd. Vs.

Mahindra Ugine Steel Co. Ltd., . It is thus clear that even another method of fixation of the exchange ratio on the basis of the market price of the

equity share quoted by the stock exchange is also considered by the report. Thereafter, while concluding as to why it has taken into account the

break-up existing as on the effective date of amalgamation, the report has observed as under :

The data which has been considered in this valuation report has taken into account the break-up value existing as on the effective date of

amalgamation. It has also taken into account the adjustments necessary to be made to the capital structure. In the case of realisable investments the

market value of investments has also been considered. In addition to the break-up value the earnings per share on historical results basis have been

considered keeping in mind the observations of the courts and authorities on the subject-matter of valuation. The earnings per share have been

adjusted to take into account the actual tax burden falling on each of the companies as well as the adjustments required to be made for

depreciation. A post-tax return which is because of tax shelters available is also required to be adjusted keeping in mind the fact that certain tax

shelters could be because of lower operational surpluses. These adjustments have also been kept in mind while considering historical performance.

In a scheme of amalgamation such as this where there is a wide spread of shareholders and the scrips are regarded as long-term investments their

market values are indicative of general investor expectation. In coming to the conclusion of what should be a fair exchange ratio these factors have

also been kept in mind.

In the present analysis where the proposal is of amalgamation of two companies, what is relevant is not the determination of the individual value of

the shares of the companies separately, but the determination of the values of the shares of one company in terms of the value of the shares of the

other company. It is similar to a barter transaction.

268. Having extensively referred to all permissible methods of valuation of equity shares of a company and having examined the various methods

for the purpose of fixation of a fair, proper and just exchange ratio, the company has ultimately decided to apply one method in preference to

another. For not applying the other method, namely, the method of valuation of shares at the market price quoted on the stock exchange, C. C.

Chokshi and Co. has given reasons for ultimately reaching the decision it has rightly concluded as quoted hereinabove. That valuation will have to

be tempered by the exercise of judicious discretion and judgment taking into account the relevant factors. Several factors, such as quality and

integrity of the management, present and prospective competition, yield of comparable securities and market sentiments, etc., which are not evident

from the face of the balance-sheet, but which will strongly influence the worth of a share are taken into account. The observations of the House of

Lords in Gold Coast Selection Trust Ltd. [1943] 30 TC 209 quoted hereinabove are also kept in mind. The fixation of the exchange ratio is thus an outcome of a well considered report of C. C. Chokshi and Co. From the aforesaid gist and substance of the report, it is difficult to accept any

of the objections of Miheer to the fixation of the fair exchange ratio. From the report of C. C. Chokshi and Co., it becomes clear that it has taken

into consideration all relevant factors. They were acting as experts and not as an arbitrator. As an expert, they were to certify, what, in their

opinion, was the fair value of the shares. In such cases, the approach of the court should be as pointed out by Denning L.J. in Dean v. Prince

[1954] 1 Ch 409 as under (at page 426) :

The task of the auditor here was to act as an expert and not as an arbitrator; and, as an expert, he was to certify what, in his opinion, was the fair

value of the shares. .. The reason is because it is so much a matter of opinion that it is very difficult to say it was wrong. But difficult as it is,

nevertheless if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties. .. For instance,

if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely; or

interpreted the agreement wrongly; or proceeded on some erroneous principle. In all these cases the court will interfere. .. on matters of opinion,

the courts will not interfere; but for mistake of jurisdiction or of principle, and for mistake of law, including interpretation of documents, and for

miscarriage of justice, the courts will interfere.

269. In my opinion, having seen the position of law about the scope of judicial interference, when an expert body after studying all relevant factors,

has given its opinion and report, a reference is still required to be made to the decision of the learned single judge of this court in the case of Bank

of Baroda Ltd. v. Mahindra Ugine Steel Co. Ltd. [1976] 46 Comp Cas 227 wherein P. D. Desai J. (as his Lordship then was) was of the opinion

that it would not be possible for the court to discharge its duties unless sufficient material is placed on record as regards the method and basis of

valuation. If there is serious contest on the question of valuation, the court would be unable to accord sanction unless proper material including, if

necessary, an expert''s report about valuation is placed on record. The argument that the question of valuation and the fixation of ratio of exchange

was a matter of commercial judgment and that the court should not sit in judgment were it was negatived and the court observed that when there is

opposition to the fixation of ratio of exchange, the court not only will but also must go into the question and if it is not satisfied about the valuation, it

would be justified in refusing sanction to the scheme. There is enough power in the court and in such a situation, the court may even call for the report of an independent chartered accountant.

270. Even keeping the aforesaid observations in mind, on consideration of the report of C. C. Chokshi and Co. where the fair exchange ratio is

fixed on the basis of the break-up value, it is not possible for this court to agree with Miheer that the said exchange ratio is unfair or unjust to the

shareholders of MIL or that it would result in gradual decrease in their per share income. The submission that the other method, namely, the

earning per share method, could be applied and that by that method the proper exchange ratio could be worked out is liable to be rejected on the

ground that in the report of C. C. Chokshi and Company that method is also taken into consideration and it is pointed out that the other relevant

factors are also to be kept in mind. The report is a well considered report, wherein all the relevant factors are at length considered and discussed.

It is also required to be noted that the majority of shareholders have accepted the proposed scheme of amalgamation despite the aforesaid fixation

of exchange ratio. It is also required to be noted that in the company petition filed in the Bombay High Court by the transferor company for its

sanction to the proposed scheme of amalgamation which is granted by the Bombay High Court, no objection is raised by any of the shareholders

of MIL as against the shareholders of MF. The majority of shareholders of MIL have not raised any objection to the exchange ratio as being unfair

or unjust or being detrimental to the interests of the shareholders. Over and above the aforesaid consideration, another independent expert body,

ICICI, has also, though not in a well considered report, on the basis of the material supplied to it, opined that the exchange ratio fixed is a fair

exchange ratio. I may at once make it clear that I may not solely rely upon the report of ICICI as, in my opinion, the report is very sketchy and is

not based on proper evaluation but on the basis of the materials supplied to it in its one page report which is in the form of a letter, it has opined

that the proposed exchange ratio is a fair exchange ratio. In view of the aforesaid, I do not find any substance in this objection raised by Miheer

and, therefore, the same is overruled.

Objection No. IX :

271. By this objection, Miheer has submitted that the proposed scheme of amalgamation of MF with MIL vitally affects the secured and unsecured

creditors of MIL and in view of the fact that the necessary meeting of such class of creditors has not been called, this court should not grant

sanction to the scheme of amalgamation. Under the proposed scheme of amalgamation, MF (transferor company) is to be amalgamated with MIL (transferee company). On such an amalgamation the transferor company shall stand dissolved. On amalgamation being sanctioned the entire

undertaking of the transferor company including all its properties, i.e., movable and immovable, tangible and intangible, property rights, rights,

claims and powers as provided under the scheme of amalgamation shall stand transferred to and vested in the transferee-company (MIL).

Similarly, all debts, liabilities, duties and obligations of the transferor company, on the scheme of amalgamation being sanctioned, shall stand

transferred to and vested in the transferee company. In fact, by the proposed scheme of amalgamation the properties, movable or immovable,

tangible and intangible, of the transferee company are not going to be affected. The creditors of the transferee company are not, in any way, going

to be affected by the proposed scheme of amalgamation as the proposed scheme would result in the increase of all movable and immovable assets

of the transferee company and it would not in any way result in transferring or vesting any of the properties of MIL to anyone else. As such, by the

proposed scheme of amalgamation the class of creditors of the petitioner company is not going to be affected at all. u/s 391, on an application

being made to the court, the court passes appropriate orders to call, hold and conduct the meeting. Since in a petition for sanction to the scheme of

amalgamation the properties of the transferee company are not to be adversely affected and since they are available to the class of creditors,

ordinarily, their meeting is not required to be convened. Shackleton on Law and Practice of Meetings notes that ""where the proposed arrangement

is one between one company and its members, meetings of creditors are not necessary u/s 206 of the English Act. No meeting of any class which

is not involved in the proposed scheme is required. A meeting should be convened of any class which is affected. Since the creditors of the

transferee company (MIL) are not going to be affected adversely, in any manner, their meeting is not required to be convened. In the directions

issued by Y. B. Bhatt J. on December 22, 1993, no direction was given to convene a separate meeting of creditors of the transferee company and

in my opinion rightly so, as such a meeting is not stipulated by section 391.

272. Miheer has, however, submitted in his objections that the total assets available to the creditors of MIL in relative terms are going to

substantially decrease and, therefore, the creditors of MIL re going to be vitally affected by the proposed scheme of amalgamation. Such an

assertion is not made good by any evidence or by reference to the provisions to the proposed scheme as to how by the proposed scheme of

amalgamation the properties, movable or immovable, of the transferee company are going to be reduced. In fact, from the provisions of the scheme, it appears that because of the amalgamation all the properties, movable and immovable, tangible or intangible of MF shall stand

transferred to and vested in the transferee company. The assets of MF are very substantial and by no stretch of imagination can such assets be said

to be negligible. One, therefore, fails to understand the assertions of Miheer as to how the proposed scheme of amalgamation is going to reduce

the assets of the transferee company so as to vitally affect the creditors. It is also pointed out that the transferee company has applied by institution

of Company Application No. 872 of 1992 to this court seeking direction of the court as regards convening of meeting under rules 67 and 69 of the

Companies (Court) Rules, 1959. In such application it is pointed out that the proposed amalgamation would not have any material effect on any

class of creditors of MIL or MF. It was also pointed out that due provision has been made by both the companies for payment of their Income

Tax dues. It was in these circumstances that Y. B. Bhatt J. by the aforesaid order expressly dispensed with the meeting of creditors of the

transferee company. It is also pointed out that under the proposed scheme of amalgamation the properties, rights, claims and powers of MF

without further act or deed shall stand transferred to MIL with effect from April 1, 1993. Therefore, the creditors of the transferee company are

not in any way going to be adversely affected. In view of the aforesaid I do not find any substance in this objection of Miheer. Mr. Thakore has

also not made any submission on this objection. I do not find any substance in this objection so as to vitiate the resolution passed by the requisite

statutory majority approving the scheme of amalgamation. I, therefore, overrule this objection.

* * *

273. The aforesaid were the only objections which were raised, canvassed and agitated before this court. I have overruled all the objections. Once

the objections are overruled and when I have found the scheme of amalgamation to be one which is otherwise just, fair and reasonable which any

reasonable man of prudence would approve, I do not see any impediment in approving and sanctioning the proposed scheme of amalgamation and

in granting the prayers contained in para 23A in toto. Accordingly, the company petition stands granted. Towards fees of the Additional Central

Government Standing Counsel, Mr. Jayant Patel, the same is quantified at Rs. 5,000 and the transferee company is directed to pay the same.

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