Madras High Court
M/S. Subhiksha Trading Services ... vs Mafatlal Industries Ltd [Vol.87 ... on 25 October, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/10/2010

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

C.P.Nos.239 and 240 of 2008
and
A.No.308 of 2009 in C.P.No.239 of 2008

In the matter of the Companies Act, 1956
and
In the matter of Sections 391 and 394 of
the Companies Act, 1956
and
In the matter of the Scheme of Amalgamation
of
M/s. Subhiksha Trading Services Limited
with
M/s. Blue Green Constructions & Investments Limited

M/s. Subhiksha Trading Services Limited
Registered Office: 6th Floor, Habib Complex
No.5, Durgabai Deshmukh Road — Petitioner in
R.A.Puram, Chennai 600 028 — C.P.No.239 of 2008/
rep. By its Director R.Subramanian .. Transferor Company

M/s. Blue Green Constructions & Investments Limited
Registered Office:
6th Floor, Habib Complex
No.5, Durgabai Deshmukh Road — Petitioner in
R.A.Puram, Chennai 600 028 — C.P.No.240 of 2008/
rep. By its Director R.Subramanian .. Transferee Company

Petitions under Sections 391 and 394 of the Companies Act praying for the reliefs as stated the

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For Petitioners : Mr.R.Murari For Objectors : Mr.AL.Somayaji, S.C.

For Mr.R.Shankaranarayanan Mr.Vikram Trivedi Mr.P.H.Arvindh Pandian Mr.Karthik H.Seshadri Mr.Rahul Balaji Mr.N.V.Srinivasan Mr.S.Vasudevan Mr.T.K.Baskar Mr.P.R.Raman Mr.A.K.Mylsamy Ms.Meghna Nair Mr.P.Vinod Kumar For Central Mr.M.Devendran Government :

Sr.P.C.C.G.

For Official Liquidator : Mr.Jayakumar Deputy O.L.

O R D E R

These petitions are by the transferor and the transferee companies, filed under Sections 391 and 394 of the Companies Act, 1956, praying for sanctioning a Scheme of Amalgamation, with effect from 30.6.2008, so as to be binding on all the shareholders and creditors of both the companies and for the dissolution of the transferor company without being wound up.

2. I have heard Mr.R.Murari, learned counsel appearing for the petitioners, Mr.Vikram Trivedi and Mr.P.H.Arvind Pandian, learned counsel appearing for the shareholders-objectors and M/s.A.L.Somayaji, learned Senior Counsel, Karthik H. Seshadri, Rahul Balaji, N.V.Srinivasan, S.Vasudevan, P.R.Raman, S.Raghunathan, P.Meghna Nair, P.Vinod Kumar, A.K.Mylsamy and T.K.Baskar, learned counsel appearing for the creditors-objectors, Mr.M.Devendran, learned Senior Panel Counsel for the Central Government and Mr. Jayakumar, learned Deputy Official Liquidator.

3. M/s.Subhiksha Trading Services Ltd., the petitioner in C.P.No.239 of 2008 is the transferor and M/s.Blue Green Constructions and Investments Ltd., the petitioner in C.P.No.240 of 2008 is the transferee.

4. The averments contained in C.P.No.239 of 2008, in brief, can be summarised as under:-

(a) The transferor company was first incorporated as a private limited company on 10.4.1997 and later got converted to a public limited company with effect from 30.3.2005.

(b) The primary objects of the company are to trade in any articles, to carry on the business of store keepers and to buy, sell and deal in goods, stores and consumable articles, both wholesale and retail.

(c) The authorised share capital as on 31.3.2008 as per the unaudited accounts ending on 31.3.2008, is Rs.50 crores, divided into 5 crores equity shares of Rs.10/- each. The issued capital as on that date was 3,25,70,370 shares of Rs.10/- each and the subscribed and paid up capital was Rs.31,80,79,470/-. A sum of Rs.76,24,230/- was receivable from the Employees Stock Option Trust.

(d) After the preparation of the latest unaudited accounts, certain changes took place in the financial position of the transferor company, including (i) an increase in the authorised capital from Rs.50 crores to Rs.74 crores by the creation of 2,40,00,000 equity shares of Rs.10/- each, by the resolutions passed at the Extraordinary General Meeting held on 25.7.2008 (ii) the approval in the EGM held on 25.7.2008, for the issue of 4,07,08,236 preferential warrants, with each warrant carrying a right to subscribe to one equity share of Rs.10/- each at par on a future date to the non promoters and (iii) the consent of the members, by way of a special resolution, passed at the EGM

held on 25.7.2008, authorising the Board to enter into a business arrangement with the transferee, so as to enable the transferee to have a right to the use of all business assets of the transferor.

(e) Since the current financial year of the company had been extended by 3 months, to end as on 30.6.2008 instead of 31.3.2008, the annual accounts would be audited and laid before the members in the AGM to be held on or before 30.12.2008.

(f) The transferee company was originally incorporated on 16.11.1995 with a different name and had its name changed with effect from 9.9.1998. The main objects of the transferee company are almost identical to those of the transferor company.

(g) The authorised share capital of the transferee company as on 31.3.2008 is Rs.5,50,00,000/-, divided into 55,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid up capital as on 31.3.2008 is Rs.5,05,01,000/- divided into 50,50,100 fully paid up equity shares of Rs.10/- each.

(h) After the date of the latest audited accounts, certain changes took place in the financial position of the transferee company, including (i) an increase in the authorised capital from Rs.5.5 crores to Rs.15 crores by the creation of 95,00,000 equity shares of Rs.10/- each ranking pari passu with the existing equity shares, approved in the EGM held on 25.7.2008 (ii) the approval in the General Meeting held on 25.7.2008, for the issue of 65,09,489 preferential warrants, with each warrant carrying the right to subscribe to one equity share of Rs.10/- of the transferee company at a price of Rs.3,618/- per share at a future date subject to SEBI (SAST) Regulation 1997 (iii) the issue of preferential warrants to R.Subramanian and Subhiksha Trading Services Ltd., on receipt of 10% of issue price per share viz., Rs.361.80 per warrant on 7.8.2008 and 8.8.2008 and (iv) the surrender of the Certificate of Registration as NBFC to the Reserve Bank of India and the execution of a business arrangement with the transferor.

(i) The annual accounts of the transferee company for the year ending 31.3.2008 was approved in the AGM held on 26.9.2008.

(j) The Board of Directors of both the companies approved a Scheme of Amalgamation, in the meetings held on 30.6.2008, whereby the assets and liabilities of the transferor company will stand vested in the transferee.

(k) The reasons and circumstances justifying the proposed scheme are (i) that both companies are engaged in the same line of business and are currently under the same management; (ii) that the Amalgamation is to pool the resources and capabilities of both companies so as to strengthen and enhance their retailing businesses and achieve cost efficiency; and (iii) that to achieve the said purpose, a Memorandum of Understanding had already been entered into and the proposed scheme is the second stage.

(l) The aggregate assets of the transferor and the transferee are more than sufficient to meet all liabilities and the Scheme will not adversely affect the rights of any of the creditors of both the companies and due provisions have been made for payment of all liabilities as and when they fall

due in usual course.

(m) By an order dated 25.9.2008 passed in C.A.No.2378 of 2008, the Company Court directed a meeting of the shareholders of the transferor company to be held on 31.10.2008 for the purpose of considering and approving with or without modification, the present Scheme and the Court also appointed Mr.R.Subramanian as the Chairman of the meeting.

(n) The meeting of the shareholders was accordingly held on 31.10.2008 and Mr.R.Subramanian, the Chairman of the meeting submitted a report on 5.11.2008.

(o) The meeting was attended by 5 equity shareholders, either personally or by proxy and all of them, who together hold 2,26,55,971 equity shares of Rs.10/- each, voted unanimously in favour of the Scheme.

(p) By another order dated 25.9.2008 passed in C.A.No.2377 of 2008, this Court directed a meeting of the secured creditors to be held under the chairmanship of R.Subramanian.

(q) Accordingly, a meeting of the secured creditors was held on 31.10.2008, in which, 11 secured creditors, who are together entitled to receive Rs.696.71 crores, attended the meeting either personally or by proxy and approved the Scheme unanimously.

(r) Therefore, with the approval so granted unanimously by the requisite majority of the shareholders as well as the secured creditors, the transferor has come up with this company petition.

5. In the body of the petition (C.P.No.239 of 2008), the transferor company has also furnished the salient features of the Scheme and the list of Directors of the transferor as well as the transferee companies and the shares held by each one of them. In para-20 of this petition, the transferor company has also furnished the list of secured creditors and the amounts due to them, as on 31.3.2008 and 30.6.2008. The list shows the names of Bank of Baroda, HDFC Bank, HSBC Bank, Standard Chartered Bank, ICICI Bank, Kotak Mahindra Bank, ABN Amro Bank, Yes Bank, Federal Bank, Development Credit Bank, Bank of India and IndusInd Bank, as the secured creditors. The total liability to these Banks as on 31.3.2008 is shown as Rs.639.83 crores and as on 30.6.2008 is shown as Rs.732.05 crores.

6. Most of the averments contained in C.P.No.240 of 2008 filed by the transferee company, are only a repetition of the contents of the petition filed by the transferor company. Therefore, only those averments in C.P.No.240 of 2008, which do not find a place in C.P.No.239 of 2008 alone are extracted as under:-

(a) The annual accounts of the transferee company for the year ended 31.3.2008 has been approved by its shareholders in the meeting held on 26.9.2008.

(b) The aggregate assets of the transferor and the transferee are more than sufficient to meet all their liabilities and the Scheme will not adversely affect the rights of any of the creditors.

(c) The transferee company has no secured creditors, as seen from the balance sheet as on 31.3.2008 and as certified by the Auditor to that effect.

(d) The transferee is a listed company, whose shares are listed only on the Madras Stock Exchange Ltd. The Madras Stock Exchange have granted "in-principle approval" to the Scheme, by its letter dated 5.8.2009, subject to the condition that at least 25% of the shares issued in pursuance of the Scheme to the promoters, would be locked in for 3 years and the balance for 1 year. The transferee has requested the Stock Exchange to delete the condition and the said request is pending consideration.

(e) The transferee has made an application on 14.8.2008, seeking the listing of its shares in the Calcutta Stock Exchange Association Ltd. By a letter dated 16.10.2008, the Calcutta Stock Exchange Association Ltd., has permitted the trading of the shares of the transferee company.

(f) As per the order of this Court dated 25.9.2008 in C.A.No.2379 of 2008, a meeting of the equity shareholders of the transferee was held on 31.10.2008 and the Chairman of the meeting R.Subramanian has submitted his report on 05.11.2008.

(g) The meeting was attended either personally or by proxy, by 15 equity shareholders, holding 34,41,500 equity shares of Rs.10/- each. All of them voted in favour of the Scheme unanimously.

Therefore, the transferee company has sought the sanction of the Scheme of Amalgamation, with effect from 30.6.2008.

7. The Regional Director of the Ministry of Corporate Affairs has filed an affidavit, after being served with the copies of the petitions and after examining the Scheme. Except pointing out two technical objections, one relating to the combining of the authorised capital of both the companies and another relating to the manner in which the name of the transferee company is sought to be changed after the Scheme becomes effective, the Regional Director has not recorded any serious objection to the Scheme. The Regional Director has also made a mention about a complaint received from an employee of the transferor to the effect that he had not received salary for the past 3 months on account of all shops of the transferor remaining closed. But, he has indicated that clause 9 of the Scheme protects the interests of the employees of the transferor. Thus, in effect, there is no substantial objection to the Scheme from the Regional Director.

8. The Official Liquidator has filed a report stating that as per the report of the Chartered Accountants engaged by him, there is no material to come to the conclusion that the affairs of the transferor are being conducted in a manner prejudicial to the interests of its members or public interest. Thus, the Official Liquidator has also not recorded any objections to the proposed Scheme.

9. Therefore, if we look at the petitions superficially, all the requirements for sanctioning a Scheme, stand satisfied, since (i) the majority of the shareholders present at the court convened meeting have approved it; (ii) the majority of the creditors present at the court convened meeting have approved it; (iii) the Regional Director has not recorded any substantial objections; and (iv) the Official Liquidator, on the basis of the report of the Chartered Accountant appointed by him, has concluded that the affairs of the transferor are not conducted in a manner prejudicial to the interests of the members or the public. It is also relevant to note at this juncture that the majority of the shareholders and the majority of the creditors gave consent to the Scheme, even before the date of filing of the petitions for sanction of the Scheme. To be precise, the Bank of India, Development Credit Bank Limited, HDFC Bank, HSBC Bank, ICICI Bank and IndusInd Bank, gave letters of no objection to the Scheme on 12.8.2008, 22.8.2008, 05.8.2008, 05.8.2008, 05.8.2008 and 04.8.2008 respectively. Similarly, the shareholders Zash Investments and Trading Co. Pvt. Ltd. (which holds 10% of the shares in the transferor) and ICICI Venture Funds Management Company Ltd., (which holds 23% of the shares in the transferor) gave letters of no objection on 07.7.2008 and 20.7.2008 respectively. In view of the majority of the creditors (Banks) having issued letters of no objection, the transferor actually came up with an application in C.A.No.2355 of 2008 for dispensing with the meeting of creditors and dispensing with the production of letters of no objection from the other Banks, viz. Bank of Baroda, Kotak Mahindra Bank, ABN Amro Bank and Federal Bank. But, that application was dismissed by this Court by an order dated 23.9.2008. Therefore, the petitioners came up with applications in C.A.Nos.2377 and 2378 of 2008 for convening the meetings of shareholders and creditors. This Court ordered meetings to be convened and accordingly, meetings were convened on 31.10.2008. Even in the court convened meeting, the majority of the shareholders and creditors of the transferor consented to the Scheme. Therefore, in normal circumstances, one would expect the Scheme to pass through the green channel without much ado.

10. But it is not to be so. Two shareholders viz., (i) ICICI Venture Funds Management Company Ltd., holding approximately 23% of the shares in the transferor company, and (ii) Zash Investment and Trading Co.Pvt. Ltd., holding approximately 10% of the shares in the transferor company, have objected to the Scheme tooth and nail. Similarly, some of the creditors such as ICICI Bank Ltd. and Kotak Mahindra Bank Ltd. have filed objections to the Scheme. As a matter of fact, the shareholders-objectors ICICI Venture and Zash Investment as well as the creditor-objector ICICI Bank, had earlier given consent for the Scheme. But, they have come up with serious objections, contending that the consent given earlier would not operate as estoppel.

PRELUDE:

11. Before we consider the merits of the Scheme vis-a-vis the objections, a small prelude is essential, to have a clear understanding of the issues involved. It is as follows:-

(a) The total issued, subscribed and fully paid up capital of the transferor company is 3,25,70,370 equity shares of Rs.10/- each, out of which, 7,62,423 shares are not fully paid up, as they represent the receivables from the Employees Stock Option Scheme. The shareholding pattern shows that (i) the promoter R.Subramanian holds 1,42,36,911 equity shares, (ii) his father and mother hold 11 shares each, (iii) Zash Investment and Trading Co. Ltd., holds 32,57,037 shares, and (iv) a company

by name Cash and Carry Wholesale Traders Pvt. Ltd., holds 51,62,001 shares. Apart from them, ICICI Venture Funds Management Company Ltd Funds Management Company Ltd, hereinafter referred to as 'ICICI Venture', holds about 23%.

(b) On 30.6.2008, the Boards of Directors of the transferor and transferee companies approved the proposal for merger. In pursuance thereof, the transferor company wrote a letter dated 04.7.2008 to the key shareholders, asking for their consent. In response, ICICI Venture Funds Management Co. Ltd., which has 23% shareholding sent a reply dated 20.7.2008, giving consent. Similarly, Zash Investment and Trading Co. Ltd., which holds about 10%, also wrote a reply dated 07.7.2008, giving consent. The consent was specifically for (i) the business arrangement of the transferor with the transferee; (ii) the issue of preferential offer of warrants at par to non promoter shareholders of the transferor; (iii) the acquisition of 55% stake in transferee; and (iv) the merger of the transferor with the transferee.

(c) The General Meetings of both the companies were convened on 25.7.2008 and the business arrangement that the transferor proposed to have with the transferee was approved. Thereafter, on 26.7.2008, a Memorandum of Understanding was entered into between the transferor and the transferee. By this MOU, the transferor granted a license to the transferee to carry on the business of retailing, presently carried on by them, using the rights, assets, goodwill, trademarks etc., and using the name and style of "SUBHIKSHA". For granting the license, the transferee agreed to pay a refundable security deposit of Rs.2,300 crores, carrying interest at 6% per annum. Out of the said amount, a sum of Rs.230 crores was to be paid on or before 15.8.2008 and the balance of Rs.2,070 crores was to be paid on or before 15.10.2008. In addition to the said refundable security deposit, the transferee was obliged to pay a license fee at the rate of Rs.138 crores per annum.

(d) By separate letters and mails, the transferor also sought the concurrence of the secured creditors. By letters dated 04.8.2008, 04.8.2008, 05.8.2008, 05.8.2008, 05.8.2008, 12.8.2008, 20.8.2008, 22.8.2008, 29.9.2008 and 03.10.2008, the IndusInd Bank, ICICI Bank, HSBC Bank, HDFC Bank, Yes Bank, Bank of India, Standard Chartered Bank, Development Credit Bank, The Federal Bank and Bank of Baroda respectively conveyed their no objection/express consent to the proposed Scheme.

(e) Apart from giving consent to the proposal, the two key shareholders viz., ICICI Venture and Zash Investment also attempted to raise capital/debt for the transferor and ICICI Venture went to the extent of lending Rs.50 crores on 27.9.2008.

(f) By an order dated 25.9.2008, passed in C.A.Nos.2377 and 2378 of 2008, this Court ordered a meeting of the shareholders and the meeting of the secured creditors to be convened, for considering the Scheme of Amalgamation. Accordingly, two meetings, (one, of the shareholders and the other, of the secured creditors) were held on 31.10.2008.

(g) As per the report of the Chairman of the meeting, five equity shareholders viz., (i) the promoter R.Subramanian, (ii) his father, (iii) his mother, (iv) a company by name Cash and Carry Wholesale Traders Pvt. Ltd., and (v) Zash Investment and Trading Co. Pvt. Ltd., who altogether hold

2,26,55,971 shares participated in the meeting and approved the Scheme without any modification. It is relevant to note here that the company Cash and Carry Wholesale Traders Pvt. Ltd., is a closely held Private Limited company, of which R.Subramanian is the key operator. In so far as Zash Investment and Trading Co. Pvt. Ltd., is concerned, an authorised representative of the company had already signed blank proxy forms and handed them over to the representative of the transferor and hence their participation in the meeting was through their proxy.

(h) Similarly, the meeting of the secured creditors of the transferor company was attended by 11 secured creditors, including the 10 secured creditors, who had already issued letters of consent/no objection in August/ September 2008. The dues of these 11 secured creditors actually constitute 95.17% of the total secured debt of the transferor company. This meeting was not attended by only one secured creditor viz., Kotak Mahindra Bank Ltd.

(i) Thereafter, in November 2008, the transferor and the transferee filed the above C.P.Nos.239 and 240 of 2008 for the approval of the Scheme of Amalgamation. During the pendency of these petitions, the transferor company suffered a serious financial crisis and the attempts to have the debts restructured failed.

(j) During the pendency of the above proceedings, Kotak Mahindra Bank Ltd., one of the secured creditors of the transferor company, which did not take part in the meeting of the secured creditors held on 31.10.2008, filed a petition in C.P.No.68 of 2009 for winding up the company. By an order dated 31.3.2009, this Court appointed an Official Liquidator as the Provisional Liquidator, after dispensing with the service of notice on the respondent. The Court also ordered paper publications to be effected.

(k) Immediately thereafter, the transferor company moved applications in C.A.Nos.443 and 444 of 2009, seeking stay of paper publications and also seeking suspension of the order appointing the Provisional Liquidator. On these applications, an order was passed on 15.4.2009, staying the publications, but not suspending the appointment of the Official Liquidator as Provisional Liquidator. The Court also directed the transferor company to file balance sheets of the three immediate preceding years within 10 days.

(l) As against the said order passed on 15.4.2009, the transferor filed an appeal. In the appeal, the appointment of the Provisional Liquidator was stayed. But the further proceedings in the petitions for winding up were not stayed. Therefore, arguments were advanced on the main petition C.P.No.68 of 2009 and an order was passed after hearing, on 28.8.2009 admitting the company petition and directing paper publications as well as the publication in the Government Gazette to be effected.

(m) In the meantime, Cash and Carry Wholesale Traders Pvt. Ltd., one of the shareholders of the transferor company filed applications in C.A.Nos.1066 and 1067 of 2009, for convening meetings of non-lender creditors and lender creditors of the transferor company for considering a Scheme of arrangement/compromise under Section 391. The substance of the Scheme of Arrangement proposed by this shareholder-applicant was that the lender creditors would give up all interest

liabilities for a period of 120 days from 01.10.2008 after the effective date and would also waive 50% of the principal. The balance 50% of the principal was to be paid in a phased manner over a period of 10 years. The Scheme envisaged the payment of the amounts in full to the non-lender unsecured creditors in 12 monthly instalments during the calendar year 2011, after waiving all interests, penal charges and damages.

(n) Three secured creditors intervened even at that stage and opposed these applications C.A.Nos.1066 and 1067 of 2009. Cash and Carry Wholesale Traders Pvt. Ltd., the applicant therein, objected to the very entitlement of the secured creditors, to intervene at that stage on the ground that they had no role to play at that stage and that whatever they wanted to say could be said in the meeting. However, P.Jyothimani,J., dismissed both the applications C.A.Nos.1066 and 1067 of 2009 by an order dated 28.8.2009. The appeals filed by the shareholder in OSA Nos.301 and 302 of 2009 were dismissed by the Division Bench by an order dated 5.11.2009. Against the said order, Cash and Carry Wholesale Traders Pvt. Ltd., filed Special Leave Petitions in SLP(C) Nos.29827 and 29828 of 2009, on the file of the Supreme Court of India.

(o) When SLP(Civil) Nos.29827 and 29828 of 2009 came up for hearing, the Court took note of all the developments, such as the filing of the winding up petitions, the appointment of the Provisional Liquidator, the subsequent stay of that order etc. The Court also took note of (i) the Scheme of Arrangement proposed by Cash and Carry Wholesale Trading Pvt. Ltd.; (ii) the Scheme of Amalgamation proposed by the transferor and the transferee companies; and (iii) the pendency of various petitions for winding up. Thereafter, the Apex Court disposed of the Special Leave Petitions by an order dated 24.11.2009. The said order reads as follows:-

"We are informed that C.P.Nos.239 and 240 of 2008 (which deals with the Scheme of Amalgamation) and C.P.No.26 of 2009 and C.P.No.68 of 2009 and others (which deals with winding up of the company) are due for hearing on 26th November, 2009 before the Company Court.

Having heard learned counsel on both sides, we see no reason to interfere in these Special Leave Petitions, except to the extent indicated herein-below:-

We are requesting the Company Court to take up for hearing on 26th November, 2009 the afore-stated Scheme for Amalgamation first in point of time. On examination of the said Scheme, if the Company Court finds merit in the said Scheme in the context of financial viability of the said Scheme, then, dependent upon the view of the Company Court, it will look into the Scheme of Arrangement sponsored by Cash and Carry Wholesale Traders (P) Ltd., (C.A.Nos.1066 and 1067 of 2009). However, if the Company Court finds that the Scheme of Amalgamation is not viable financially, then, consequent upon that finding, the Company Court will take up for hearing the winding up petitions (C.P.No.26 of 2009, C.P.No.68 of 2009 and other connected winding up petitions).

Before concluding, we may state that the Company Court will decide the financial viability of the Scheme of Amalgamation uninfluenced by the observations made in the impugned judgment.

Accordingly, the Special Leave Petitions stand disposed of."

(p) It is in pursuance of the above order of the Supreme Court that the petitions C.P.Nos.239 and 240 of 2008 seeking sanction of the Scheme of Amalgamation were taken up for hearing.

JUSTIFICATION FOR THE SCHEME:

12. The transferor and the transferee companies seek to justify the Scheme, on the following grounds:-

(a) The merger is not inconsistent with any of the principles laid down by Courts. The Scheme is also not found to be objectionable by the Regional Director of the Ministry of Corporate Affairs and the Official Liquidator.

(b) The objectors, who fall either under the category of shareholders or under the category of secured creditors, have not been able to show how the proposed Scheme is prejudicial to their interests. The sanctioning of the Scheme may or may not improve their position, but it will not certainly result in deterioration of their condition. On the contrary, the rejection of the Scheme would only weaken the position of the objectors further.

(c) The merger has been approved unanimously by the shareholders as well as the secured creditors of the transferor, in the meetings convened by orders of Court. It was also approved unanimously by the shareholders of the transferee, in the meeting convened by orders of Court. Therefore, the objectors cannot easily resile from the consents given at the statutory meetings, without adequate justification and without establishing serious prejudice.

(d) As per the terms of the business arrangement entered into by the transferor with the transferee, in terms of the Memorandum of Understanding dated 26.7.2008, the retailing business of Subhiksha has been licensed to the transferee, making the transferor, a holding company with 55% stake in the transferee. Therefore, the merger would lead to cost synergies and operational consolidation and make the shareholders of the transferor have direct holding in the operating company.

(e) If the merger fails, the amount of about Rs.230 crores paid by the transferor to the transferee, will get forfeited. But if the merger is allowed, the amount will get adjusted under the Scheme and the transferor will not suffer any loss.

(f) As per the Scheme of arrangement/compromise, proposed by Cash and Carry Wholesale Traders Pvt. Ltd., which is a shareholder in the transferor as well as the transferee company, a sum of Rs.250 crores may be infused into the company after merger, to enable the company to recommence its operations, which remain suspended since January 2009 due to severe financial crisis. This opportunity would be lost if merger is not sanctioned, since the shareholder who had proposed the Scheme of arrangement, had made merger a precondition for infusing the funds.

OBJECTIONS OF TWO SHAREHOLDERS:

13. The objections of ICICI Venture, which has approximately 23% shareholding in the transferor company, are as follows:-

(a) In June 2008, Mr.R.Subramanian, promoter, Managing Director and majority shareholder of the transferor, proposed a plan in the nature of a Scheme of Amalgamation and the investors accorded their consent on 31.10.2008, on the basis of the representation made by him and taking into account the circumstances prevailing at that time.

(b) But, during the pendency of the proceedings for merger, the investor learnt that the financial position of the transferor was grim and that the affairs of the company were not conducted by the promoter, as was expected of him.

(c) In the meeting of the Board of Directors of the transferor held on 22.11.2008, the Managing Director failed to give a satisfactory explanation on various issues raised by the nominee Directors. He also failed to cooperate in conducting an independent review.

(d) The investors were forced to withdraw their nominees from the Board of the transferor company on account of the failure of the Managing Director to carry out an independent review of the operations of the transferor by M/s.KPMG and to appoint a Chief Financial Officer.

(e) The transferor is facing enquiries from the Regional Provident Fund Commissioner and the Directorate of Standard Weights and Measures and an enquiry into allegations of non-payment of salaries and wages.

(f) Therefore, the investors decided to withdraw their consent for the proposed Scheme and they accordingly issued a letter dated 12.02.2009 through their Advocate.

(g) The decision to recall the consent given earlier was on account of several factors such as (i) the change of circumstances, from what existed in June 2008; (ii) the weakening of the financial status of the transferor company, during the pendency of the proceedings for merger; (iii) the failure of the promoters to keep the investors and their nominee Directors, apprised of the true financial position of the company, till a meeting of the Board was convened on 22.11.2008; (iv) the failure of the Managing Director of the transferor to implement the decisions of the Board, taken at its meeting held on 22.11.2008; (v) the failure of the promoters to apprise the investors and their nominee Directors, of the legal notices served on the transferor by the creditors; (vi) the defaults in payment of salaries, wages and statutory dues; (vii) the filing of winding up petitions by several creditors due to non-payment of dues; (viii) the lack of confidence on the part of the creditors; (ix) the challenge made by the Managing Director to the resignation of some of the Directors; (x) the closure of more than 1600 shops of the transferor throughout the country, resulting in the business of the transferor virtually coming to a standstill; and (xi) the failure to provide latest audited accounts.

14. The other shareholder, Zash Investment and Trading Co. Ltd., have filed an application in A.No.308 of 2009 seeking leave to withdraw their earlier consent and to file objections to the Scheme. Their objections are as follows:-

(a) The objector holds about 10% of the paid up share capital in the transferor company. It was purchased from ICICI Venture.

(b) The objector, being a minority shareholder, did not have a representation on the Board of Directors of the transferor.

(c) Under the Articles of Association, the promoters of the transferor were obliged to furnish to the objector, (1) unaudited consolidated monthly, quarterly and annual financial statements of the company within 30 calendar days after the end of each calendar month or within 30 calendar days after the end of each calendar quarter or within 120 calendar days after the end of each financial year, as the case may be and (2) MIS information/reports on a monthly basis, duly certified by the promoters by the 15th of the following month.

(d) Though the unaudited quarterly financials for the period ending 31.3.2008, 30.6.2008 and 30.9.2008 were furnished, the statement for the period ending 31.12.2008 was not furnished. The monthly MIS was also not furnished for any of the months, despite repeated requests made through several e-mails.

(e) The audited financials for the year ending 31.3.2008 were not furnished.

(f) In July 2008, the transferor sought the consent of the objector to the Scheme that was already approved by the Board of the transferor at its meeting held on 30.6.2008 and the objector accorded their consent, based upon the representations made by the Board and also considering the financial position of the company, as projected in the unaudited financials upto the period ending 31.3.2008.

(g) In September 2008, reports appeared in the press about the defaults committed by the transferor to their vendors. Though the promoters denied the reports, they admitted in a meeting held in October 2008 that there was liquidity crunch.

(h) In December 2008, the objector learnt for the first time that the transferor was under serious financial stress, leading to non-payment of salaries, non-remittance of contribution to the provident fund, non-payment of rentals and default in payment of dues to vendors and service providers. It was also learnt that ICICI Venture had provided loans to the transferor in September 2008, but the same was not disclosed to the objector (Zash), either at the time of draw down or in the meeting held in October 2008.

(i) The objector also provided a short term bridge loan to the transferor in December 2008, on the assurance given by them that they would comply with several obligations and also have an audit conducted by the statutory auditors and furnish a report by 31.01.2009.

(j) In a meeting held on 16.01.2009, the transferor and its promoters finalised the scope of review of the financials of the transferor and agreed to have the review completed by 31.01.2009. But no steps were taken by the transferor to enable the statutory auditors to initiate and conduct the review.

(k) In the light of the above developments, a material adverse change has occurred in relation to the financial position of the transferor, after the grant of consent on the basis of unaudited financials upto the period ended 31.3.2008.

(l) The severe financial crisis into which the transferor was trapped, was disclosed to this objector only in December, 2008. The crisis could not have happened all of a sudden, but would have brewed over a period of time, which could and ought to have been detected if the monthly MIS had been furnished by the transferor. Therefore, the consent given on the basis of the unaudited financials as on 31.3.2008 cannot be relied upon.

(m) As on date, there is no cash flow and the transferor and its promoters have also lost physical control over the stores and properties, leading to significant loss of stock in all branches. Thus there had been a material adverse change in the business of the transferor, from what was projected at the time when consent was sought and given. Therefore, by a letter dated 13.02.2009 issued through their Advocate, the objector placed on record their decision to withdraw the consent earlier given.

OBJECTIONS OF SECURED CREDITORS:

15. ICICI Bank Ltd., which is one of the secured creditors of the transferor company, not only filed objections but also sought certain directions including (i) a direction to the transferor and the transferee to furnish their latest financial statements; (ii) a direction to the transferor and the transferee to submit ledger extracts duly certified by statutory auditors, showing the cash flows by and between them, after the execution of the Memorandum of Understanding dated 26.7.2008; (iii) a direction to the transferor and the transferee to disclose the details of all banking accounts operated by them; and (iv) a direction to the promoter-Managing Director Mr.R.Subramanian to disclose on oath, the source of money for purchasing 1,51,770 warrants at the rate of Rs.3,618/- per warrant and for purchasing 1,090 shares of the transferee.

16. The objections raised by ICICI Bank are as follows:-

(a) The total debts due and payable by the transferor to the objector (ICICI Bank) was Rs.189.26 crores. It was secured by the hypothecation of stocks and movable assets and the personal guarantee of Mr.R.Subramanian. The shares held by Cash and Carry Wholesale Traders Pvt. Ltd., in the transferor company are also pledged as security for the due repayment of the dues by the transferor.

(b) In the letter dated 10.7.2008, sent by the transferor seeking the consent of ICICI Bank to the proposed Scheme, there was no mention about the proposal to transfer the business of the transferor under the Memorandum of Understanding. As per the terms and conditions of the grant of facility and the loan agreements, the transferor was obliged to obtain prior written consent of ICICI Bank before entering into any such arrangement. But no such consent was obtained. On the

contrary, the transferor and its Managing Director suppressed material facts relating to the said arrangement. Therefore, the Bank was entitled to withdraw its consent.

(c) In the meeting held on 31.10.2008, convened by orders of this Court, the Bank participated and gave consent, honestly believing the statements and representations made by the transferor, without knowing the consequences or the contents of the MOU.

(d) Though it is stated in C.P.No.239 of 2008 that the transferor would place its audited annual accounts, in the AGM to be held on or before 30.12.2008, the transferor failed to submit the audited accounts. Thus the transferor is clearly in breach of the statutory provisions.

(e) The audited financial statements are a pre-requisite for taking an informed decision/consent. In any case, the audited financial statements are to be examined by this Court for considering the grant of approval.

(f) Recent reports in the media regarding the closure of all outlets of the transferor and the transfer of the business under the MOU, have created apprehensions and hence without the financial status of the transferor being properly evaluated, the Scheme cannot be approved.

(g) By entering into a Memorandum of Understanding, the transferor has already transferred its business to the transferee, thereby completing Phase-I of the merger even before seeking the sanction of the Court. Under this MoU, the transferee was supposed to transfer Rs.2,300 crores by way of security deposit and a sum of Rs.138 crores by way of license fee, on or before 15.10.2008. If this money had actually come into the books of the transferor, all the secured creditors could have been paid and the transferor could have saved all the retail outlets from being closed. But the financial position of the transferor was actually deteriorating. Therefore, the financial statements of the transferor have to be audited by an independent agency, in order to ascertain if the transferee has actually paid the amounts to the transferor, towards deposit and license fee.

(h) As per the averments contained in C.P.No.239 of 2008, the transferor and its Managing Director R.Subramanian had jointly subscribed to the preferential allotment of warrants totalling to 65,09,489 at a prefixed price of Rs.3,618/- per share on 07.8.2008 and 08.8.2008. An amount of Rs.361.80 per warrant, totalling to Rs.230 crores is said to have been paid by the transferor to the transferee towards advance payment. But the date of payment is not indicated. It is stated in C.P.No.239 of 2008 that R.Subramanian is already vested with 1,51,770 warrants and 1,090 shares in the transferee. The cost of acquisition of the warrants at the rate of Rs.3,618/- per warrant, would work out to Rs.54,91,03,860/-. It is in the interest of all the stake holders that the source of money for purchasing these warrants, is disclosed by Mr.R.Subramanian.

(i) The events narrated in the company petition, including the execution of the MoU, indicate that the entire undertaking of the transferor has been transferred and vested with the transferee, without real flow of consideration. In this background, the financial statements of the transferor and the transferee have to be examined by an independent auditor, to ascertain the actual state of affairs, which is essential before the Court grants approval for the Scheme.

17. The objections raised by Kotak Mahindra Bank Ltd., are as follows:-

(a) This objector has already filed C.P.No.68 of 2009 for winding up the transferor. The Official Liquidator was appointed as Provisional Liquidator by this Court by an order dated 31.3.2009 passed in C.A.No.389 of 2009. Therefore, the transferor has to be necessarily represented, only by the Provisional Liquidator and all further proceedings are to be prosecuted only by the Provisional Liquidator, especially in view of the subsequent orders passed in the application for suspending the publication of notices.

(b) The objector believes that the promoters of the transferor company have secreted the assets, thereby making the security created in favour of the objector becoming illusory. The objector believes that the books of accounts of the transferor are manipulated and have not even been audited as required by law.

(c) The objector sanctioned a working capital demand loan of Rs.15 crores on 13.12.2006 with a sub-limit of cash credit of Rs.5 crores. They also sanctioned a non revolving short term loan of Rs.15 crores. A demand promissory note, a deed of hypothecation and a deed of guarantee were all executed.

(d) Thereafter, the facilities were further enhanced from Rs.15 crores to Rs.30 crores vide sanction letter dated 21.6.2007 and from Rs.30 crores to Rs.50 crores vide sanction letter dated 31.7.2007. The revised working capital demand loan and cash credit facility were secured against a pari passu first charge on all existing and future current assets and a first pari passu charge on all movable assets of the transferor within Tamil Nadu and a second pari passu charge on the movables outside Tamil Nadu.

(e) Contrary to the terms of sanction of the facilities, the transferor failed to service the loan regularly and also failed to route its cash flows through the cash credit account. When confronted, the Managing Director of the transferor agreed to repay the entire outstanding amount by 31.3.2008.

(f) But the commitment was not honoured. Even the subsequent commitment, to pay an amount of Rs.3,597.27 lakhs on or before 30.9.2008 was not kept up. An extension of time was granted upto 31.12.2008 and the transferor issued a cheque for Rs.35 crores. But the cheque bounced, forcing the objector to initiate proceedings under Section 138 of the Negotiable Instruments Act.

(g) As on 17.01.2009, a sum of Rs.38,66,88,190.87 is due and payable by the transferor and its Managing Director, together with an additional interest. In such circumstances, the objector opposes the Scheme of Amalgamation, as opposed to public policy and as a fraud perpetrated on the creditors.

(h) According to the objector, the Scheme cannot be sanctioned since (i) it is based on unaudited balance sheet of the transferor; (ii) the transferee company has a net worth of Rs.5.07 crores while its paid up capital itself is only Rs.5.05 crores; (iii) the terms and conditions of the MoU dated

26.7.2008 are not known to the objector; (iv) the payment of Rs.230.02 crores, for the purchase of preferential warrants in the transferee company, has occurred without the consent of the objector, though the funds ought to have come to the objector in the normal course; (v) the Scheme is a fraud on the public and the secured creditors; (vi) there is no basis of methodology to arrive at the value of Rs.3,618/- per share of Rs.10/- each of the transferee company; and (vii) the transferee company appears to be a shell company with no assets.

On the above averments and contentions, the objector has not only opposed the Scheme, but also sought a detailed investigation into the affairs of the transferor to see how monies to the tune of Rs.800/- crores had been diverted by the transferor.

18. The Standard Chartered Bank has filed its affidavit of opposition, the contents of which are as follows:-

(a) The transferor had been sanctioned Over Draft facility of Rs.25 crores and an additional Over Draft facility of Rs.10 crores. The repayment of the loan was secured by Hypothecation Deed dated 23.10.2006. The transferor hypothecated by way of a first charge, all its movable assets.

(b) As on 7.10.2009, the outstanding liability of the transferor company was Rs.41,43,88,295.24 together with further interest from 08.10.2009. The transferor company has huge arrears towards Employees' Provident Fund and other statutory dues etc.

(c) The transferor company has filed O.A.No.161 of 2009 for recovery of their dues. The objector has also issued notices under Section 433 (e) and 434(1)(a) of the Companies Act, 1956, since the transferor is not commercially sound and it is liable to be wound up.

(d) In the light of several irregularities in the accounts and the conduct of the transferor leading to a substantial depletion in the security coupled with the delay in stating the exact financial position and various other circumstances, the consent for merger earlier given was withdrawn by this objector.

(e) There is no transparency in disclosing the facts and there are number of irregularities. The meetings held by the Secured Creditor Banks and Financial Institutions reveal that the exposure of the transferor company to the secured creditors will be more than Rs.620 crores and the transferor has no security or stock to match the outstanding dues.

(f) The Scheme, if sanctioned, will be detrimental to the interest of the secured creditors such as this objector.

19. The Adlabs Films Ltd (FM Radio Initiative) has filed its affidavit of opposition, the contents of which are as follows:-

(a) The services of this objector were engaged by the transferor for an advertising campaign in their FM Channel. The invoices raised by the objector for the services rendered, totalling to an amount of

Rs.41,06,558/- remain unpaid.

(b) The Scheme, if sanctioned, will be against public interest and also against the interest of unsecured creditors like this objector.

20. M/s.Aura Finance and Holdings Pvt. Ltd., Medhas Consultants Pvt. Ltd., Chafex Marketing Pvt. Ltd., CSK Properties and Investments Pvt. Ltd., Esvee Marketing Pvt. Ltd., and Analog Capital Managers Pvt. Ltd., have filed their statement of objections in common, the contents of which are as follows:-

(a) A Share Transfer Agreement dated 12.4.2000 and a Debenture Transfer Agreement dated 16.5.2000 and an Agreement of Pledge dated 12.4.2000, in connection with the transfer of certain shares in the transferor, were entered into by the objectors with 3 companies, which are together known as "ASS Group". Mr.R.Subramanian is the promoter of this group of companies.

(b) One of the companies belonging to ASS group executed a pledge of 1,62,000 shares of the transferor company, in favour of the objectors, to secure the repayment of the amount of Rs.2.50 crores due under the aforesaid Agreement.

(c) But subsequent to the transfer, the objectors were informed by R.Subramanian that the ASS group had sold their entire shareholding in the transferor company to a partnership firm by name RS Associates, which is also controlled by R.Subramanian. Therefore, an amendment letter was executed on 29.4.2004, pursuant to which, the sum of Rs.2.5 crores became liable to be paid to the objectors. Subsequently, a fresh Deed of Pledge was executed on 30.11.2004 and RS Associates also executed a Deed of Guarantee on the same day.

(d) In terms of the above, an amount of Rs.2.50 crores is due and payable by ASS group to the objectors and the same is secured by a pledge of the shares owned by RS Associates in the transferor. In such circumstances, if the merger is sanctioned, all the shares of the transferor company would cease to exist and a fresh allotment in the transferee company would be necessitated.

(e) By a letter dated 22.7.2008 followed by another letter dated 25.7.2008, the objectors called upon the transferor to confirm that the amount due would be paid, upon the merger being approved. The objectors also made a demand, by letter dated 11.8.2008. But the counsel for the objectors received a letter dated 20.8.2008, despatched on 11.9.2008, issued on behalf of Mr.R.Subramanian, to the effect that the Agreement of Pledge dated 12.4.2000 was cancelled by mutual consent. After the objectors sent a reply on 29.9.2008, R.Subramanian and RS Associates lodged a caveat on the file of this Court. However, the amounts due were not paid.

(f) Therefore, upon coming to know of the proposed Scheme of Amalgamation, the objectors have come up with a common statement of objection, on the ground that the Scheme, if sanctioned, would extinguish the securities held by them and that the proposed Scheme operates as a devise to divest the objectors of the valuable security held by them, for the due repayment of the amounts.

(g) The transferee company, which is a listed company, has suppressed the pre and post shareholding pattern that would have been submitted to the Stock Exchange for obtaining their approval in terms of clause 24 of the Listing Agreement. The notice convening the meeting and the explanatory statement under Section 393 has also not been filed along with the Chairman's report.

(h) Clause 24(f) of the Listing Agreement contemplates that a fairness opinion of a merchant banker registered with SEBI, is placed at the meeting of the shareholders, in relation to the valuation of shares, for a proper consideration of the Scheme. But the Chairman's report does not indicate that any such opinion was placed before the shareholders. This requirement, intended to protect the minority shareholders and to provide transparency, does not appear to have been complied with.

(i) The proposed Scheme is nothing but a back door entry for providing liquidity and the listing option to the shareholders of the transferor, since they will be issued with the shares of the transferee company. But by this process, the valuable security given to the objectors will get extinguished. Even the letter issued by the counsel for the promoters shows that they have no intention to pay and there is an attempt to liquidate the valuable securities.

21. Tata Teleservices Limited and Tata Teleservices (Maharashtra) Limited, have filed independent affidavits of opposition, the gist of which is as follows:-

(a) The transferor availed 7,671 services of Tata Teleservices Ltd., in 14 States from February 2005 onwards. As at the end of December 2008 billing cycle, the transferor is due to pay to Tata Teleservices Ltd., Rs.9,36,70,471/-. This objector is an unsecured creditor and they will not be in a position to realise the amounts from the transferee company, if the Scheme is sanctioned.

(b) The transferor availed 2,829 connections of Tata Teleservices (Maharashtra) Ltd., in Maharashtra and Goa circles from April 2006 onwards. As at the end of January 2009 billing cycle, the transferor is due to pay to Tata Teleservices (Maharashtra) Ltd., Rs.2,45,31,280/-. This objector is an unsecured creditor and they will not be in a position to realise the amounts from the transferee company, if the Scheme is sanctioned. This objector has already sent a notice dated 02.02.2009 under Section 434 of the Companies Act, 1956. Therefore they are objecting to the Scheme of Amalgamation.

22. Drive India Enterprise Solutions Limited, which is engaged in the business of retailing Tata Indicom Handsets and Services, have filed an affidavit of opposition, contending that the transferor entered into an arrangement with them for stocking and retailing the objector's products and services and that a sum of Rs.21,85,734/- is due and payable, for the handsets and instruments supplied between 11.3.2008 and 26.7.2008. A legal notice dated 29.01.2009 had already been issued under Section 434 of the Companies Act, 1956. The objector does not know the financial position of the transferee and is not willing to be a creditor of the transferee.

23. Adani Wilmar Limited, which delivered edible oils to the stores of the transferor, has filed an affidavit of objections, pointing out that a sum of Rs.1,53,86,199/- is due from the transferor. The objector has already issued a legal notice dated 10.12.2008, to which there is no response. The

transferee company's total funds stand at Rs.5,07,12,721/-, while the loans and advances said to have been made by the transferee, is shown to be Rs.5,04,75,013/-. The increase of the authorised capital of the transferee company from Rs.5.5 crores to Rs.15 crores, without an increase in the paid up capital and the issue of huge number of preferential warrants to the promoter of the transferor, all go to show that the entire corpus of the transferee was injected only by the transferor company. Therefore, this objector opposes the Scheme of Amalgamation on the ground that the Scheme lacks bona fides and also on the ground that the transferee will not be in a position to discharge the liabilities.

24. HCL Infosystems Ltd., is also an unsecured creditor, who made supplies of Nokia Cellular Mobile telephone products to the transferor. An amount of Rs.9,32,69,205/- is allegedly due as of November 2008 to the said company and hence a notice under Sections 433 and 434 of the Companies Act, 1956, has already been served on the transferor. Therefore, they have objected to the Scheme on the following grounds:-

(a) The transferee is only a shell company, which has had a miniscule turnover of just Rs.2 lakhs, as per the 12th Annual Report for the year 2007-2008. There was no sale of groceries, indicating thereby that the transferor and the transferee are not in the same line of business, as claimed in the petitions seeking sanction for the Scheme.

(b) There is a significant non disclosure, in the petitions, with regard to the Memorandum of Understanding.

(c) The real purpose of the Scheme appears to be to merge one of the largest retail chains in the country with a shell company, so as to get it listed in a Stock Exchange, through back door methods.

(d) The unaudited balance sheet as on 31.3.2008, filed by the transferor, does not contain all relevant schedules. Therefore, it cannot be relied upon. Even the entire audited accounts of the transferee are not furnished.

(e) There are no liquid assets available, to provide for payment to any of the unsecured creditors like this objector.

(f) As per Section 391, the latest financial statements are to be disclosed. The unaudited financial statements, which are not even updated to reflect the current financial position, would not satisfy the requirement of Section 391.

25. Mediaedge:CIA India Pvt. Ltd., which is part of a global communications planning and implementation agency, was engaged by the transferor to provide a range of media services, under two Agreements dated 20.11.2007 and 15.5.2008. For the services rendered by this company under the first Agreement, the transferor is due to pay a sum of Rs.9,31,16,173.44. For the services rendered under the second Agreement, a sum of Rs.97,55,997/- has become due. The objector has already issued a statutory notice followed by a petition for winding up in C.P.No.155 of 2009 and it is pending. Inasmuch as there are numerous creditors, whose interests are not taken care of, the

proposed Scheme lacks bona fides and is against public interest.

26. Hindustan Unilever Ltd., which claims to have supplied various products in terms of an Agreement dated 01.3.2006, has stated in their objections that a total amount of Rs.4,61,04,943.34 is due and payable as of November 2008. Apart from stating that the Scheme does not take into account the interests of the unsecured creditors, this objector has also stated that the transferor has not disclosed all material facts relating to the company, as required by the proviso to Section 391(2) of the Act. The other objections stated by this objector are similar to the objections filed by HCL Infosystems Ltd. Therefore, they are not repeated.

27. Reliance Communications Ltd., provided MPLS VPN connectivity to all the 706 shops of the transferor by investing a huge amount. In terms of the invoices raised by the objector from 15.4.2008 to 15.11.2008, the transferor was due to pay Rs.2,34,90,960/-. Out of the said amount, a part payment of Rs.25 lakhs was made on 31.7.2008, after which no payment was made. Therefore, they object to the Scheme on the ground that it is prejudicial to the interests of unsecured creditors and also on the ground that the transferor had filed only unaudited balance sheet without relevant schedules.

28. M/s.Shree Vignesvarra Hi-Tech Promoters is a partnership firm which had leased out their property at door No.1095, Avinashi Road, Coimbatore. They have objected to the Scheme on the ground that the tenant has no right to transfer his tenancy, without the express consent of the landlord. If the Scheme is sanctioned, it would result in the transfer of tenancy, in violation of the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1961. The transferor is in arrears of rent and has also not paid service tax. A proceeding for fixation of fair rent filed by the objector and a suit filed by the transferor are now pending. Therefore, they have objected to the Scheme.

PARAMETERS FOR CONSIDERING A SCHEME OF AMALGAMATION:

29. Having seen the justification projected by the transferor and the transferee for sanctioning the Scheme and the objections raised by (i) secured creditors; (ii) unsecured creditors; and (iii) the shareholders, it is necessary at this stage to look into the broad parameters on which the Scheme has to be tested.

30. In Miheer H.Mafatlal vs. Mafatlal Industries Ltd [Vol.87 (1996) Comp. Cases 792 (SC)], the Supreme Court enlisted the broad contours of the jurisdiction of the Company Court, while considering a Scheme of Amalgamation, as follows:-

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

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

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

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

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

(6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

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

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

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

After laying down the aforesaid 9 parameters, the Supreme Court also added a note of caution that the list was not exhaustive but only illustrative.

31. In addition to the above parameters, the Supreme Court has directed this Court, by its order dated 24.11.2009 passed in SLP(C) Nos.29827 and 29828 of 2009 (arising out of the applications of Cash & Carry) to examine the scheme and find out if there is merit in the Scheme in the context of the financial viability of the Scheme. Therefore, the focus of the learned counsel for the transferor and the transferee, was actually on the financial viability of the Scheme, while the focus of all the learned counsel appearing for the objectors, was on the financial viability of the transferor and the transferee. Keeping in mind this distinction sought to be maintained by the rival parties, the Scheme

has to be tested on the broad parameters laid down by the Apex Court in Mafatlal.

32. But before doing so, a preliminary objection raised by the petitioner needs to be addressed. As seen from the narration given above, persons who are vocal in opposing the Scheme today, are the very same persons who gave consent to the Scheme even before this Court ordered a meeting to be convened. Thereafter, they also participated in the Court convened meetings of members and creditors and agreed to the Scheme. Therefore, it is the contention of the petitioners that having agreed to the Scheme, these members and creditors are not entitled to oppose it now. According to the petitioners, even if these members and creditors are held entitled to do so, they must make out a strong justification, since their opposition to the Scheme would tantamount to unilateral withdrawal of consent. Therefore, let me first deal with this preliminary objection.

DISPUTES RAISED WITH REGARD TO THE COURT CONVENED MEETING AND THE CONSENT RECORDED THEREIN:

33. As seen from the background facts narrated in the preceding paragraphs, two shareholders viz., ICICI Venture Funds Management Co. Ltd., and Zash Investment and Trading Co. Pvt. Ltd., together holding about 33% of the total share capital of the transferor, gave consent to the proposed Scheme of Amalgamation in the earliest stages. Today, Zash Investment not only oppose the Scheme but also challenge (i) the very validity of the court convened meeting and (ii) the validity of the consent accorded on their behalf, by using the proxies, in the Court convened meeting. Similarly, 11 out of 12 secured creditors, except Kotak Mahindra Bank, also accorded consent in the Court convened Meeting held on 31.10.2008. Now, those two shareholders as well as a majority of the secured creditors seek to withdraw their consent and object to the Scheme vociferously. Though Kotak Mahindra Bank did not participate in the meeting and accord its consent, it was contended on behalf of the transferor that even Kotak Mahindra Bank is bound by the majority decision (unanimous decision in this case) taken at the Court convened meeting.

34. Therefore, four questions arise viz., (i) whether the meeting of the members convened by the Court was valid or not; (ii) whether Zash Investment can be said to have participated in the Court convened meeting and accorded their consent; (iii) whether the consent already given, (if held to have been validly given), can be withdrawn and if so, under what circumstances; and (iv) as to what is the effect of a decision taken unanimously or by majority, at the Court convened meeting, upon a member or creditor, who chose to remain absent, despite being put on notice.

(i) VALIDITY OF THE MEETING:

35. In a valiant attempt, Mr.P.H.Arvindh Pandian, learned counsel for Zash Investments, questioned the very validity of the Court convened meeting on the ground that it was in violation of statutory provisions. It is his contention that under Article 18(a) of the Articles of Association of the transferor company, the quorum for the General Meeting shall be only two members personally present. Therefore, going by the prescription contained in the Articles, the transferor made a prayer in its application, C.A.No.2378 of 2008, to fix the quorum for the meeting of equity shareholders, to be convened for the purpose of considering the Scheme, at three members present in person or by

proxy (para 27 of the affidavit in support of C.A. No. 2378 of 2008). This Court also passed an order on 25.9.2008 directing a meeting of equity shareholders to be convened on 31.10.2008, fixing the quorum for the meeting as two persons present in person or by proxy.

36. However, Section 174 (1) of the Act mandates that unless the Articles of the company provide for a larger number, five members personally present, shall be the quorum for a meeting of the company, if the company is a public company, other than the one covered by Section 43A. Section 170(1)(i) makes the provisions of Sections 171 to 186 applicable to general meetings of a public company, notwithstanding anything to the contrary in the Articles of the company.

37. As a cumulative effect of Sections 170(1)(i) and 174(1) , it is clear that the quorum for a meeting of a public company, shall be five members personally present and that the Articles of the company may only provide for a larger, but not smaller number. Therefore, it was contended by Mr.P.H. Arvindh Pandian, learned counsel for Zash Investments that (i) the provisions of Article 18(a), (ii) the prayer made in C.A.No.2378 of 2008 for fixing the quorum at 3 and (iii) the order passed on 25.9.2008 fixing the quorum at two, were all contrary to the statutory provisions. The learned counsel also contended that though Rule 69(4) of the Companies (Court) Rules, 1959 empowers the Judge, hearing an application under Section 391, to fix the quorum and the procedure to be followed at the meeting, the quorum so fixed cannot run contrary to the statutory provisions and that therefore, the very meeting ordered by this Court in C.A.No.2378 of 2008 to be convened on 31.10.2008 with a quorum of three members was contrary to law. Consequently, it is his contention that the consent accorded to the Scheme, in the meeting of the members held on 31.10.2008, was no consent in the eye of law.

38. However, Mr.R.Murari, learned counsel for the transferor company submitted that the provisions of Sections 171 to 186 have a limited application to the proceedings under Sections 391 to 394 and that since the proceedings for sanctioning a Scheme are special in nature and are governed by special provisions which would have an overriding effect, the meeting held on 31.10.2008 and the consent of the members obtained therein, cannot be said to have been vitiated. In support of his contention, Mr.R.Murari relied upon a decision of the High Court of Bombay and the provisions of Annexure B to The Companies (Central Government's) General Rules and Forms, 1956.

39. In In Re: Khandelwal Udyog Ltd. and Acme Mfg. Ltd. [(1977) 47 CC 503 (Bom.)], the dissentient shareholders, while opposing the Scheme, contended that the companies did not make a proper disclosure as contemplated under Section 173 and hence, the resolutions passed by the majority, at the meetings convened for the purpose, were a nullity. While dealing with the said contention from paragraph 21 onwards, the Bombay High Court pointed out that all the provisions from Sections 171 to 186, are general provisions pertaining to the meetings of the company, whether annual general meeting or extraordinary general meeting. In contrast, Sections 391 and 393 are a code complete in themselves, in respect of the procedure relating to the sponsoring of the Scheme, the approval of the same by the members/creditors and the sanctioning thereof by the Court. The distinction between these provisions were succinctly drawn by the Court as follows:-

"A combined reading of section 391 and 393 and its comparison with the provisions of section 173 shows that the former section deals with a specific situation to the excision of the general provision 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 section clearly establishes a different legal identity of such meetings. This distinction is also borne out when the language of section 391 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 or class of members". There is deliberate ommission of the words "of a company" in section 391. The ommission postulates that different fields and situations are contemplated. The legislative intent appears to provide by sections 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 covered under the provisions of section 391. In my opinion, having regard to the principle that specific excludes the general, it must be held that when a specific mode is provided by section 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 IV of the Companies Act, 1956."

Strongly placing reliance upon the above decision, Mr.R.Murari contended that it was open to the Court to fix a quorum, lesser than the one prescribed under Section 174(1), while considering a Scheme, since the provisions of Sections 391 to 394 are a complete code in themselves.

40. Similarly, Rule 7(a) of The Companies (Central Government's) General Rules and Forms, 1956, issued by the Central Government in exercise of the powers conferred by clauses (a) and (b) of sub-section (1) of Section 642, stipulates that sections 171 to 186 shall apply with respect to meetings of any class of members of a company, as adopted and modified in the form set out in Annexure B. However, the proviso to the Rule makes it clear that the application of Sections 171 to 175 and 177 to 186, as in Annexure B shall be subject to such other provisions as may be made either in the Articles of the Company or in a contract binding on the persons concerned.

41. Annexure B to the above Rules contains the "Form in which Sections 171 to 186 of the Act are to apply with respect to meetings of any class of members of the company". It is not necessary for us in this case, to find out all the differences between Sections 171 to 186 as found in the body of the Act and those found in Annexure B to the above Rules. The only provision where the difference between the language employed in the body of the Act and the language employed in Annexure B, which is of relevance to the case on hand, is Section 174(1). Therefore, let me now make a comparison.

42. In the body of the Act, Section 174(1) reads as follows:

"174. Quorum for meeting.- (1) Unless the articles of the company provide for a larger number, five members personally present in the case of public company (other than a public company which has

become such by virtue of section 43A), and two members personally present in the case of any other company, shall be the quorum for a meeting of the company."

In Annexure B to the above Rules, section 174(1) reads as follows:

"174. Quorum for meeting.- (1) Unless the articles of the company provide otherwise, five members belonging to the class present in person or by proxy in the case of a public company (other than a public company which has become such by virtue of section 43A), and two members personally present in the case of any other company, shall be the quorum for a meeting of the class and the provisions of sub-sections (2), (3) and (4) shall apply with respect thereto."

43. There is an important distinction between Section 174(1) as found in the body of the Act and Section 174(1) as found in Annexure B to the aforesaid Rules. In Section 174(1) as found in the body of the statute, the phrase used is "unless the articles of the company provide for a larger number". Section 174(1) as found in Annexure B uses the phrase "unless the articles of the company provide otherwise". The word 'otherwise', may include a larger or a smaller number. The substitution of the word 'otherwise' for the words 'for a larger number', is a clear indication of legislative intent that in respect of meetings convened by a Court for the purpose of Section 391, it is permissible for the Court to fix a smaller quorum.

44. The above conclusion is also corroborated by the provisions of Section 170, which reads as follows :

"170. Sections 171 to 186 to apply to meetings.- (1) The provisions of Sections 171 to 186-

(i) shall, notwithstanding anything to the contrary in the articles of the company, apply with respect to general meetings of a public company, and of a private company which is a subsidiary of a public company; and

(ii) shall, unless otherwise specified therein or unless the articles of the company otherwise provide, apply with respect to general meetings of a private company which is not a subsidiary of a public company.

(2)(a) Section 176, with such adaptations and modifications, if any, as may be prescribed, shall apply with respect to meetings of any class of members or of debenture-holders or any class of debenture-holders of a company, in like manner as it applies with respect to general meetings of the company.

(b) Unless the articles of the company or a contract binding on the persons concerned otherwise provide, Sections 171 to 175 and Sections 177 to 186 with such adaptations and modifications, if any, as may be prescribed, shall apply with respect to meetings of any class of members, or of debenture-holders or any class of debenture-holders, of a company, in like manner as they apply with respect to general meetings of the company."

45. A clear distinction is maintained between sub-section (1) and sub-section (2) of Section 170. Sub-section (1) makes the provisions of Sections 171 to 186 applicable to general meetings of a public company, notwithstanding anything to the contrary contained in the Articles of the company. On the contrary, sub-section (2)(b) entitles a public company to frame its Articles in such a manner that the provisions of Sections 171 to 186 (except 176) are adopted with modifications and adaptations, in so far as meetings of any class of members are concerned.

46. Therefore, it is clear that the Act itself maintains a clear distinction between 'the general meetings of a company' and 'meetings of any class of members'. While it is not permissible for a company to provide in its Articles anything to the contrary than what is provided in Sections 171 to 186, insofar as general meetings are concerned, it is certainly permissible for a company to adopt these provisions with modifications, insofar as meetings of any class of members are concerned.

47. Therefore, the prescription of a quorum of two members under Article 18(a), even if contrary to Section 170(1)(i), in so far as general meetings of the company are concerned, is in tune with Section 170(2)(b) and Section 174(1) as found in Annexure B referred to in Rule 7 of the 1956 Rules, in so far as meetings of a class of members are concerned. Even Section 9 of the Act providing for an overriding effect, for the provisions of the Act over the Articles of a company, with a non obstante clause, cannot persuade me to take a different view. This is in view of the fact that Section 9 begins with the phrase 'save as otherwise expressly provided in the Act'. Therefore, Section 170(2)(b) and Section 174(1) as found in Annexure B, will hold the field, insofar as meetings of a class of members are concerned. Consequently, the order passed by this Court on 25.9.2008 in C.A.No.2378 of 2008 fixing a quorum of three members for the meeting of members to consider the Scheme, cannot be said to be violative of statutory provisions.

(ii) WHETHER THERE WAS PARTICIPATION BY ZASH :-

48. The learned counsel appearing for Zash Investment, also raised a dispute with regard to the claim of the transferor that the meeting of the members held on 31.10.2008 was attended by Zash. This contention stems from a contradiction between the contents of the report of the Chairman of the meeting and the contents of the counter affidavit filed by R.Subramanian.

49. In the report filed by R.Subramanian, appointed as the Chairman for the meeting of the members convened on 31.10.2008, he has indicated in Annexure 1 that five equity shareholders namely, (i) Cash & Carry Wholesale Traders Private Limited (ii) R.Subramanian (iii) G.S.Ramaswami (iv) Mohana Ramaswami and (v) Zash Investment and Trading Company Private Limited attended the meeting. However, in the counter affidavit filed by R.Subramanian to the application taken out by Zash Investment, he had taken a stand that Zash Investment did not attend the meeting. But, this contradiction was later explained in the form of an affidavit.

50. However, I do not think that Zash Investment can really make a mountain out of a mole hill, for two reasons. The first is that the transferor company had made paper publications, in one edition of the English daily 'Business Line' and in one edition of the Tamil daily 'Daily Thanthi' on 07.10.2008. Even the individual notice sent by the transferor, for the Court convened meeting, was admittedly

served on Zash Investment, on 29.10.2008, as seen from the admission made by them in paragraph 4.4 of the rejoinder filed on 24.4.2009. The second is that even according to Zash, their authorised representative had handed over signed unfilled proxy forms to R.Subramanian. Though it was contended by the learned counsel for Zash that the proxy form is of no value, as it did not contain any indication of the nature of the meeting, a perusal of the proxy form shows that there was a clear mentioning of the date, time, venue and the purpose of the meeting. Therefore, today, Zash Investment cannot be heard to contend that there was no participation on their behalf in the Court convened meeting of the members held on 31.10.2008.

51. As a matter of fact, even as early as on 13.02.2009, Zash Investment had issued a legal notice to the Managing Director of the transferor. In the said notice, all that Zash Investment sought to do, was only to withdraw the consent. If there was actually no participation, as contended by them, there could have been no consent and consequently, there would have been no occasion to withdraw the consent. Therefore, I reject the contention of the learned counsel for Zash Investment that there was no participation on their behalf, in the Court convened meeting held on 31.10.2008.

(iii) WHETHER CONSENT CAN BE WITHDRAWN:-

52. As seen from the narration of facts given in the preamble, the transferor had taken the consent of the shareholders both before and after the Court convened meeting. Therefore, the question that arises for consideration is as to whether the consent once given can be permitted to be withdrawn.

53. Two shareholders (who hold 33% of the paid up share capital) and a majority of the creditors, now seek to go back on their consent on two grounds, viz., (a) that their consent was obtained by fraud and misrepresentation; and (b) that in any case, a material adverse change in the financial condition of the company had taken place, after the consent, justifying the withdrawal of consent. But, it is the contention of the petitioners that there was no fraud or misrepresentation and that in any case, fraud and misrepresentation are not pleaded by the shareholders and creditors. It is also the contention of the petitioners that the financial position of the company as on 31.10.2008, when the Court convened meeting was held, was as good or as bad as it is, on date.

54. It is true that allegations of fraud are to be pleaded specifically, as required by Order VI, Rule 4, CPC. By virtue of Rule 6 of the Companies (Courts) Rules, 1959, the provisions of the Code of Civil Procedure are applicable to all proceedings under the Act. Therefore, there can be no doubt that allegations of fraud have to be specifically pleaded.

55. In the objections filed by ICICI Bank, they have taken a stand that in the letter dated 10.7.2008 seeking their consent, no mention about the MOU that the transferor had with the transferee was made. Therefore, ICICI Bank has taken a stand that there was suppression of material facts. But, in the same breathe, the Bank admits that their representatives attended the Court convened meeting on 31.10.2008 without knowing the consequences of the MOU. Therefore, in effect, they were at least put on notice of the MOU, in the statement accompanying the notice for the Court convened meeting. ICICI Bank cannot also plead that they were totally unaware of the financial position of the company, since the transferor had committed default in payment of interest even from July 2008,

despite which the Bank gave consent in the meeting held on 31.10.2008. As a matter of fact, most of the creditors including ICICI Bank agreed to a CDR Scheme only thereafter. Therefore, I do not think that the transferor can be held guilty of fraud and misrepresentation, though it might be possible to accuse them of mesmerising the shareholders and creditors to accord consent, by clever salesmanship.

56. Similarly, the transferor has filed a set of correspondence exchanged between them and various creditors on 15.9.2008 to show that the financial position of the company was also made known to them. They have also filed a set of correspondence to show that periodical reviews were undertaken. Therefore, I am unable to find as to what exactly were the material particulars that were actually withheld by the transferor from the creditors at the time of obtaining their consent.

57. Insofar as the two shareholders, ICICI Venture and Zash Investments, are concerned, I do not know if between themselves, they can really point an accusing finger against the transferor, in the light of their own conduct. It is interesting to note that ICICI Venture purchased 33% of the shareholding in the transferor company for a total consideration of about Rs.90 crores. But, they off-loaded 10% of the shares by selling it to Zash for a total consideration of Rs.305 crores, at a heavy premium, only in March 2008. Hopefully, Zash purchased 10% of the shareholding from ICICI Venture, after conducting due diligence (for whatever it was worth). But, even according to the transferor as well as the objectors, the financial condition of the transferor started deteriorating from June 2008 onwards (within three months of the purchase of 10% of the shares by Zash from ICICI Venture). From August 2008 onwards, both ICICI Venture and Zash started looking for victims, in the form of foreign investors. A set of correspondence that took place between ICICI Venture and Zash on the one hand and a few foreign investors on the other hand, has been filed by the transferor, which reveals the following:

(a) A e-mail dated 14.8.2008 sent by one Mr.Sanjay Mehrottra, Head-Capital Markets of ICICI Venture shows that he held meetings with several prospective investors at Singapore on 21st and 22nd August 2008.

(b) A e-mail dated 25.8.2008 sent by the very same person shows that in pursuance of the meetings held at Singapore on the above dates, he forwarded the Presentation and Financials, audited till 2007 and unaudited for 2008. In the Presentation accompanying the said mail, the sender of the e-mail (representative of ICICI Venture) has actually presented a very rosy picture (may be as furnished by the transferor). These Presentations and Financials have actually been prepared by M/S. Deloitte Haskins and Sells, the firm of Chartered Accountants.

(c) In the Presentation accompanying the above mail sent by ICICI Venture, it is claimed that as of July 2008, the Company had more than 1,500 stores, while as a matter of fact, all the shops had been closed.

(d) Another mail dated 26.8.2008 sent by Sanjay Mehrottra to one Frances Dydasco shows that ICICI Venture was all praise for Subhiksha for being asset disciplined, building revenues of more than Rs.2,300 crores with just a net owned fund of hardly Rs.250 crores. Interestingly, Frances sent

a reply on the same date pointing out his discomfort and indicating that he was not sure why there was a rush.

(e) A mail dated 04.9.2008 sent by Sanjay Mehrottra to one Navroz Udwadia of Eton Park International LLP, London shows that ICICI Venture explored even the European Capital Market. But, Navroz Udwadia had replied that though they were excited about the business model, they were not willing to throw "stupid money around".

(f) There is yet another mail dated 28.8.2008 sent by Sanjay Mehrottra to Asian Equities Prudential Asset Management (Singapore) Ltd exploring the possibility of investment.

(g) In a mail dated 01.9.2008 sent by Sanjay Mehrottra to one Arun Mehra, the representative of ICICI Venture sent a Financial model of the transferor. Even in that model, he had presented the projections upto March 2012, based upon certain presumptions. The projections given by him are so convincing that any investor would have been lured to bring equity.

58. Therefore, it is clear that even upto September 2008, ICICI Venture was looking for foreign investors, to bail the company out of the woods. They were taking the lead in scouting for foreign investors from July to September 2008 and gave consent for the Scheme in the Court convened meeting held on 31.10.2008. It is relevant to note that ICICI Venture had nominated their representatives in the Board of Directors of the transferor and they constituted the majority. Therefore, they cannot really feign ignorance of what was happening in the transferor company, except by coming up with a confession that such nominee Directors failed to perform their duties and obligations. Actually, ICICI Venture withdrew its nominees from the Board of the transferor only on 08.01.2009, showing thereby that till then their relationship with the transferor did not run into rough weather. If ICICI Venture had actually succeeded in inviting investments, they might have off-loaded the balance 23% of their shareholding also with a margin (as they had done with Zash) and perhaps escaped from the scene. In such circumstances, I am unable to accept the contention of the shareholders that their eyes were opened only after the Court convened meeting and that till then, they were kept in the dark.

59. Insofar as Zash is concerned, they became victims, not at the hands of the transferor, but, at the hands of ICICI Venture in the first instance, by purchasing 10% of the shareholding, at a very heavy premium in March 2008. Even upto December 2008, their honey moon with the transferor and ICICI Venture did not come to an end, as can be seen from the fact that under a Bridge Loan Agreement dated 31.12.2008, one of its sister companies by name Hasham Investments and Trading Co. Pvt. Ltd. granted a Bridge Loan of Rs.442 million. The only securities offered by the transferor were (i) a pledge of 32,57,037 equity shares; (ii) post dated cheques; (iii) personal guarantees; and (iv) demand promissory notes. I am unable to convince myself that after most of the 1500 outlets of the transferor throughout the country had been shut down by July 2008 and defaults in payment of statutory dues had already occurred, Zash was still willing to offer a loan to the transferor, without any kind of due diligence. Therefore, I do not wish to decide the issue of the right of the shareholders and the creditors to withdraw their consent, on the basis of allegations of fraud and misrepresentation.

60. However, that will lead us to the next question as to whether they are still entitled to withdraw their consent, atleast in view of the subsequent position of the company, even if not on account of fraud or misrepresentation. In order to find an answer to this question, it is necessary to have an understanding of the Scheme of Sections 391 to 394. Under Section 391(1), the Court is empowered, whenever an application is presented proposing a compromise or arrangement, to order a meeting of the creditors or class of creditors. The Court can also order a meeting of the members or class of members and the Court itself can prescribe the manner in which such meetings are to be called, held and conducted.

61. Under sub-section (2) of Section 391, read together with the proviso thereunder, the Court is obliged to take up the proposal for consideration, only if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, present and voting in person or by proxy agree to such compromise/ arrangement. If the majority does not agree to the compromise/arrangement, the Court may not take up the Scheme for consideration at all.

62. Even if the majority (three-fourths) of the shareholders or creditors or any class of them, agree to the Scheme, it is not necessary for the Court to shut its eyes and sanction the Scheme, since the Court is not obliged to act as a mere rubber stamp. Under the proviso to Section 391(2), the Court cannot order the sanctioning of the Scheme, unless it is satisfied that the applicant before the Court had disclosed all material facts relating to the company, such as the latest financial position, the latest auditor's report on the accounts of the company, the pendency of any investigation in relation to the company under Sections 235 to 351 and the like.

63. Apart from examining all material facts, an inclusive list of what is furnished in the proviso to Section 391(2), the Court is also obliged to do two things, before sanctioning a Scheme. The first is to receive a report from the Registrar, under the proviso to Section 394(1), to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest, if the proposed compromise/ arrangement is in connection with a Scheme of reconstruction or amalgamation. The second is that a notice of every application made under Section 391 or 394 is to be given to the Central Government and their remarks taken into consideration, under Section 394-A.

64. Thus there are three stages in the process of sanctioning a compromise/arrangement that involves the amalgamation of two or more companies. They are--

(i) the convening of the meeting of the creditors or any class of them or shareholders or any class of them and getting the consent of a majority representing three-fourths in value;

(ii) the issue of notice to the Central Government and taking into consideration their views and calling for a report from the Registrar to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest; and

(iii) arriving at a satisfaction that the applicant before the Court has disclosed all material facts such as the latest financial position, pendency of any investigation and the like.

65. Thus, the according of consent, is the first and foremost step in the entire process, if the Court chooses to pass an order convening a meeting. The Court may also dispense with the convening of the meeting, under certain circumstances, about which we are not concerned at present. However, it is to be noted that on the one hand, if the Court chooses to convene a meeting and consent could not be obtained in such meeting, the proposal gets aborted even at the initial stages. On the other hand, the grant of consent by itself, does not always ensure the seal of approval, since the Scheme has to pass through the other two check posts, before it is allowed to reach its destination. In The Calicut Bank Ltd. (in liquidation) v. Devani Ammal [1940 (10) CC 78], a Division Bench of this Court pointed out two things, viz., (i) that if there was misrepresentation, the consent given by the shareholders and the creditors, would be of no avail; and (ii) that if the company is hopelessly insolvent and the Scheme confers no apparent benefit on anyone, the Scheme cannot be accepted, even if the resolutions of shareholders and creditors had been passed after a disclosure of the true position. Therefore, the grant of consent by itself, would not ensure free passage through all check posts.

66. Even after an order sanctioning a Scheme is passed, the Court is empowered, under Section 392(1)(b), to order the modification of the Scheme, if the Court considers it necessary for the proper working of the Scheme. Section 392(2) empowers the Court even to order the winding up of the company, if it is satisfied that a compromise or arrangement already sanctioned under Section 391, cannot be worked satisfactorily.

67. Interestingly, the power of the Court under Section 392(2), can be exercised both suo motu and also on an application filed by any person interested in the affairs of the company. In other words, the entitlement to invoke action under Section 392(2), vests on "any person interested in the affairs of the company". This assumes significance in the light of two important facts. They are:-

(a) Section 391(1) speaks only about (i) company (ii) creditors or any class of them and (iii) members or any class of them and not about any person interested in the affairs of the company.

(b) Under Section 391(2), a compromise or arrangement sanctioned by the Court, is made binding on--(i) all creditors and all creditors of the class (ii) all members and all members of the class as well as (iii) the company, including those who either opposed the Scheme or who did not give consent to the Scheme. Like a settlement under Section 12(3) of the Industrial Disputes Act, 1947, a Scheme sanctioned by the Court under Section 391(2), is binding on all persons, including those who voiced their dissent.

68. Despite the fact----

(i) that a person interested in the affairs of the company, by himself, has no significant role (except as part of the majority) at the time of sanctioning the Scheme and

(ii) that such a person becomes bound by the Scheme so sanctioned, he is made entitled to come to court under section 392 (2) and seek a modification of the Scheme or the winding up of the company.

69. Seen in the context of the restriction placed upon the minority under Section 391(2), to be bound by the majority decision, the license given to "any person interested in the affairs of the company" under Section 392(2), to seek the winding up of the company on the ground that the Scheme cannot be worked satisfactorily, is of great significance. The expression "any person interested in the affairs of the company" is wide enough to include (i) a person who gave his consent (ii) a person who remained neutral as well as (iii) a person who opposed the Scheme, but formed part of the minority and who consequently became bound by the Scheme under Section 391(2).

70. Explaining the scope of Section 392, the Supreme Court held in J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spinning and Weaving Co. Ltd. [AIR 1970 SC 1041], as under:

"Under Section 392 of the Act the High Court which has sanctioned the Scheme has the power to supervise the carrying out of it and to give directions in regard to any matter or to make modifications in it as it may consider necessary for its proper working. But if the Court is satisfied that the scheme cannot be worked satisfactorily with or without modifications, it can either suo moto or on an application by any person interested in the company's affairs order its winding-up."

Thus, Section 392 gives scope for any person interested in the affairs of the company, to seek winding up of the company or the modification of the scheme. As pointed out earlier, such a person might have consented to the Scheme or opposed the Scheme or even remained neutral, in the meetings held for considering the Scheme.

71. As a matter of fact, the word "consent" is not what is used in Section 391(2). The word actually used therein is "agree". But by virtue of Section 13 of the Contract Act, 1872, two or more persons agreeing upon the same thing in the same sense (ad idem), are said to have "consented". A consent which is not caused by coercion, undue influence, fraud, misrepresentation or mistake, is a free consent.

72. An agreement to which the consent of a party is caused by misrepresentation, is voidable at the option of such party. However, such an agreement may not be voidable (i) if the party whose consent was so obtained had the means of discovering the truth with ordinary diligence or (ii) if the misrepresentation by itself did not cause the consent.

73. But what applies in the realm of contracts, may not in my opinion, apply stricto sensu, to the proceedings under Section 391 or 394. A Scheme under Sections 391 to 394, though partakes the character of a contract in the initial stages, surpasses the realm of contracts at the later stages. This is why, a Scheme sanctioned by Court, is thrust even upon persons who never gave consent or who actually opposed the Scheme. This is also why, a power is vested in the Court to alter the terms on which consent was given, thereby tampering with the mandatory requirement of ad idem. Take for instance a case, where a Scheme is approved by Court with modifications. In such a case, the

significance of the parties agreeing upon "the same thing in the same sense" as provided by Section 13 of the Contract Act, is lost, by the modifications imposed by the Court. Therefore, the rigours imposed by the provisions of the Contract Act, on the issues of free consent and the entitlement of a party to go back on it, cannot strictly be applied, in view of the peculiar nature of the procedure prescribed by Sections 391 to 394.

74. In J.K. (Bombay) (P) Ltd. cited above, the Court pointed out the following:

"A Scheme sanctioned by the Court does not operate as a mere agreement between the parties: It becomes binding on the company, the creditors and the shareholders and the statutory force: ..... By virtue of the provisions of Section 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dismanted from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration (cf. Premila Devi v. Peoples Bank). The effect of the scheme is "to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity". (Palmer's Company Law, 20th Edn. 664)."

75. Therefore, the agreement reached in the court convened meeting, by a majority of the shareholders and/or a majority of the creditors, to have a scheme, transcends the level of a mere agreement/contract, when the application for sanction is considered by the Court. The agreement reached in the meeting of the shareholders/creditors is a mere gate pass to gain entry into the next enclosure, where the Court takes up for consideration, all other issues necessary for determining whether sanction should be accorded or not. At that stage, the right of the shareholder or creditor, to speak up and place all material facts necessary for the Court to arrive at a proper decision, cannot be scuttled, merely by showing the consent that he gave in the meeting.

76. In view of the above, I am of the considered view that there could be no impediment for a shareholder or creditor, who gave consent to a Scheme, in a meeting convened by the Court, to come up before Court and establish that the requirements of the proviso to Section 391(2) are not satisfied by the applicant before the Court. It is especially so, since such a person is entitled under Section 392(2) even to come up after the sanctioning of the Scheme and establish that the Scheme cannot be worked satisfactorily. The objection so placed at the time of hearing of the main petition, need not be equated to a withdrawal of consent. The consent earlier given by a member or creditor cannot operate as estoppel, nor can it operate as a gag, choking his freedom to inform the Court that the Scheme fails to satisfy the twin tests of (i) interests of members and (ii) public interest. Therefore, on the preliminary objection raised by the petitioners, I hold that there are no fetters on the right of the shareholders/creditors, who had earlier given consent for the proposed Scheme, to place before court, relevant materials to show that the requirements of the proviso to Section 391(2) are not satisfied or that the Scheme is not financially viable.

(iv) CONSEQUENCES OF ABSENCE IN THE MEETING :-

77. As pointed out in the preamble, Zash Investment raised a plea that there was no representation on their behalf in the Court convened meeting of members. However, I have rejected the same. But, in so far as the meeting of the creditors is concerned, Kotak Mahindra Bank did not attend the Court convened meeting of creditors. Therefore, their right to oppose the Scheme, was challenged by the petitioner on the ground that a person, who chose to remain absent, was bound by the decision of the majority and that such a person, who abdicated his responsibility, cannot oppose the Scheme at a later stage.

78. In Alstom Power Boilers Ltd. v. State Bank of India and Anr. [2003 (4) Bom. CR 212], relied upon by Mr.R.Murari, learned counsel for the petitioner, the objectors-shareholders did not choose to attend the Court convened meeting, despite having been served with notice. The learned Judge of the Bombay High Court pointed out in paragraph 20 of his decision that if the objectors were so keen and serious, it was their fundamental duty and also responsibility to have attended the meetings convened for the purpose of approval of the Scheme.

79. In In Re: Maharashtra Apex Corporation Ltd. [(2005) 124 CC 637 (Kar.)], relied upon by Mr.R.Murari, learned counsel for the petitioner, an argument was advanced, while opposing a Scheme, to the effect that if a person did not attend the meeting, it must be inferred that he did not accord his approval to the Scheme. Rejecting the said contention, the Karnataka High Court held as follows:

"38. In fact, in Bessemer Steel & Ordinance Co.'s case (supra) (Volume I, Chancery Division Page 251) it was held that when all the creditors of the company received notice of the meeting, it must be presumed that those who did not attend left it to those who did to decide whether the agreement was advantageous or not, or they took so little interest in the matter that they did not think it worth their while to attend. At all events, under the Act of Parliament, only those creditors who were present at the meeting are to be attended to, and that three-fourths in value of those present are sufficient to sanction the contract.

39. Therefore, if the creditors who have been duly served with the notices of the meeting which was also accompanied by the Scheme, if they do not choose to be present in the meeting and express their view one way or the other, the only inference that could be drawn is prima facie, they have no objection for the said scheme being approved. Any other interpretation in this regard would make it impossible for any company to get any of the schemes approved. If a mere absence of the shareholder or a creditor of the company has to be construed as opposition to the scheme which is proposed, then it would render section 391(2) of the Act redundant and certainly that was not the intention of the Legislature. When the persons who had ample opportunity to oppose such a scheme, who are invited to attend the meeting and to cast their vote against the said scheme, do not choose to attend the meeting, participate in the meeting or express their views by casting vote against it, it only means that they have no objection for sanction of the scheme, and by absence and not opposing the scheme, they have given their implied consent, though not an express consent by being present in the meeting and voting for the scheme."

80. With great respect, I am unable to subscribe to the view that the absence of a member or creditor would tantamount to an implied consent. As pointed out elsewhere, two or more persons are said to consent, when they agree upon the same thing in the same sense. It is true that consent may be express or implied. But, to constitute implied consent, a mere inaction or lack of initiative, may not be sufficient. While construing the word 'consent' appearing in Section 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act, 1965, the Supreme Court held in P.John Chandy and Co.(P) Ltd. Vs John P.Thomas (2002 (5) SCC 90) that mere inaction in every case need not necessarily lead to an inference of implied consent. In that context, the Court referred to 'Words and Phrases Legally Defined', wherein the distinction between consent and acquiescence was indicated. While consent involves some affirmative acceptance, acquiescence arises even by merely standing-by and not objecting to something.

81. Therefore, if a person fails to attend a meeting, he may at the most be bound by the decisions taken at the meeting, by a majority. But, it cannot be construed as amounting to an implied consent. Construing the absence of a person as amounting to implied consent, may lead to absurd consequences. Say for example, the majority of the members present at the meeting reject the scheme. Can it then be construed that those who remained absent, should be taken to have approved the scheme, by virtue of their absence, by construing such absence as implied consent ? I hope not.

82. Therefore, the contention that a person, who did not participate in the Court convened meeting, should be taken to have accorded his implied consent, cannot be accepted. In any case, in view of the indications contained in Section 392(2), such a person cannot be taken to have forfeited his right to point out to the Court, the deficiencies in the scheme. The submissions made by such a person in the course of hearing of the application under Section 391, if have any relevance or bearing on issues of public interest, can always be taken into consideration by the Court. The submissions so made, need not necessarily be construed as adversarial, but can be construed as of assistance to the Court, to enable the Court to arrive at a conclusion as to whether the scheme deserves sanction or not. Therefore, the fourth point is answered accordingly.

83. Once it is concluded that the objections to the scheme, made by these persons can always be taken into account, then the next question that would arise for consideration, is as to whether the objections are of any significance. Therefore, let me now undertake a critical analysis of the objections to the scheme.

A CRITICAL ANALYSIS OF THE OBJECTIONS:

84. In paragraphs 13 to 28 above, I have enumerated the objections of the shareholders and the secured and unsecured creditors to the scheme. A careful analysis of the objections filed by each one of them would reveal that in sum and substance, all the objections revolve around the following:-

(i) The day-to-day worsening of the financial condition of the transferor company, as indicated by the default committed by them in the payment of salaries, statutory dues and the dues to the creditors.

(ii) The closure of almost all the shops (about 1,600) of the transferor company, leading to the entire stock getting depleted and the business coming to a standstill.

(iii) The non-availability of latest audited financial statements.

(iv) The suspicious circumstances surrounding the MOU dated 26.7.2008 between the transferor and the transferee and the allotment of preferential warrants.

(v) The non-impleadment of the Provisional Liquidator, appointed by this Court by order dated 31.3.2009 in C.A.No.389 of 2009.

(vi) The non-compliance with Clause 24 of the Listing Agreement.

(vii) The possible extinction of the securities viz., the shares of the transferor company, pledged with some of the creditors.

(viii) Non-disclosure of all material facts.

(ix) Prejudice to the interest of the creditors and the public at large.

85. Out of the above objections, some of them are not really material to the consideration of the scheme. The fact that the financial condition of the transferor company is worsening day-by-day, is not seriously disputed. The fact that the transferor company has committed default in payment of salaries to their staff members and the payment of even statutory dues such as Employees' Provident Fund, is also not disputed. The fact that more than about 1,600 retail outlets of the transferor company have been closed and the business has come to a grinding halt is also not disputed.

86. But these facts by themselves, are not sufficient to reject a scheme as unviable. The reason is that the object behind Chapter V dealing with compromises, arrangements, reconstructions and amalgamations, is not merely to enable healthy companies to re-arrange their affairs, but also to help unhealthy and sick ones to recover and recoupe. This is why, the very expression "company" appearing in Sections 391 to 393, is defined in Section 390(a) to mean a company liable to be wound up under the Act. What the Court is obliged to examine when an application is presented under Section 391 or 394 can be categorised as follows:-

(i) whether all material facts relating to the company, as provided by the proviso to Section 391(2) are disclosed by the applicant or not ?

(ii) whether the procedure prescribed by Section 393 for convening the meeting (if a meeting is ordered to be convened by the Court) has been followed or not ?

(iii) whether the consent of those, whose meeting was called for, was obtained as required by Section 391(2) ?

(iv) whether reports were received from the Registrar and the Official Liquidator, under the provisos under Section 394(1), to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest ? and

(v) whether a notice was given under Section 394-A to the Central Government and its views if any, received or not ?

87. None of the provisions of Sections 391 to 394-A stipulate that a company which is financially in the ICU (intensive care unit), has no right to seek sanction for a compromise/arrangement/amalgamation, so as to enable it to prolong its life span or even to become healthier. All that the Court is obliged to see is, as to whether in the process of recovery of such a company, any of its shareholders or creditors or the public may be sucked into the ICU. Therefore, the fact that the transferor company is terminally ill on the financial front, may not by itself, be a deterrent for considering the scheme.

88. In so far as the objection relating to the non-impleadment of the Official Liquidator is concerned, it is true that pending adjudication of a petition for winding up, this Court has appointed the Official Liquidator as the Provisional Liquidator for the transferor company. On an application taken out by the transferor for suspension of the order, the Court refused to do so, though the order for publication was stayed. But the said order was passed only on 31.3.2009. The applications in CA.Nos.2378 and 2379 of 2008 for convening the meetings of the members and the secured creditors were ordered by this Court on 25.9.2008 and the meetings themselves were held on 31.10.2008. Immediately thereafter, the main petitions under Sections 391 to 394 were presented on 11.11.2008 and notices were ordered. The Regional Director filed his affidavit by the end of January 2009 and the Official Liquidator also filed his report by the end of December 2008, after having an investigation conducted by the Chartered Accountants, into the affairs of the company.

89. Therefore, these petitions in C.P.Nos.239 and 240 of 2008 were ripe for hearing and disposal even by February 2009, much before the order passed on 31.3.2009 appointing a Provisional Liquidator. But before these petitions could be taken up for hearing, the applications filed by one of the shareholders of the transferor company by name Cash and Carry Wholesale Traders Pvt. Ltd., for convening a meeting of the creditors for considering a Scheme of arrangement came up for hearing. Even at that stage, the creditors opposed the very convening of the meetings on the ground that no purpose would be served by convening any meeting. Consequently, these petitions C.P.Nos.239 and 240 of 2008 were also proposed to be taken up together for hearing along with those applications of the shareholder for convening meetings. But the proposal was objected to by the transferor company on the ground that the petitions for considering the Scheme of amalgamation could be considered effectively only after the arrangement proposed by the shareholder was considered. Therefore, the applications of the shareholder proposing a Scheme of arrangement were taken up and they were dismissed by the learned Judge by order dated 28.8.2009. The order was also confirmed by the Division Bench on 5.11.2009 and in the Special Leave Petition filed by the transferor, the Supreme Court issued a direction to hear and decide these petitions for amalgamation.

90. In the light of the above, I do not think that the non-impleadment of the Provisional Liquidator should deter me from considering these petitions. Moreover, it appears that the order dated 31.3.2009 passed by the learned Judge, appointing the Provisional Liquidator, became the subject matter of challenge in O.S.A.Nos.84 and 93 of 2009 and an order was passed by the Division Bench on 27.04.2009. Therefore, the objection relating to non-impleadment of the Provisional Liquidator, cannot be sustained.

91. A few creditors with whom the shares held in the transferor company have been pledged as security, have objected to the Scheme on the ground that the securities that they hold will get extinguished, if sanction is accorded to the merger, since the transferor company will cease to exist after the merger. But such a fear may not be well founded. Clause 7A.1 of the Scheme of Amalgamation prescribes that the transferee company shall issue at par and allot one equity share of Rs.10/- each fully paid up in the transferee company for every 11.53 equity shares of Rs.10/- each fully paid up held by the shareholders in the transferor company. Therefore, the securities held by these creditors may not get extinguished, but would only get converted into shares of the transferee company, though there would certainly be a diminution in their value. But such diminution may get compensated in view of the fact that the transferor company is not a listed company, while the transferee is a listed company and Clause 7A.8 of the Scheme provides for listing and/or admitting these shares to trading in Stock Exchanges. At any rate, this Court has the power, under Section 394(1)(ii) to make provision either in the order sanctioning the Scheme or by any subsequent order, for the allotment or appropriation by the transferee company of any shares. Therefore, the mere fact that the shares held in the transferor company are under pledge with some creditors, may not be sufficient to reject the Scheme itself.

92. One of the objections taken by some of the creditors is that under Clause 24(f) of the Listing Agreement, a fairness opinion of a merchant banker registered with SEBI, in relation to the valuation of shares should be placed at the meeting of the shareholders and that the report of the Chairman of the Court convened Meeting of the shareholders does not disclose if any such opinion was placed.

93. It is true that in order to ensure that the listed companies do not in any way violate or override or circumvent the provisions of the security laws or stock exchange requirements, certain provisions are made in sub-clauses (f), (g) and (h) of Clause 24 of the Listing Agreement. Under sub-clause (f), the company is obliged to file a copy of the Scheme with the stock exchange for approval, at least a month before it is presented to the Court. This requirement has admittedly been complied with by the transferee and a copy of the letter of consent given by the Madras Stock Exchange has also been filed. Under sub-clause (h) of Clause 24 inserted by the circular SEBI/ SMD/Policy/List/Cir-17/2003 dated 8.5.2003, the company is obliged to disclose in the Explanatory Statement forwarded under Section 393, the pre and post arrangement or amalgamation capital structure and shareholding pattern. According to some of the objectors, no such disclosure was made in the Explanatory Statement to the shareholders.

94. But unfortunately, the two key shareholders viz., ICICI Venture Funds Management Co. Ltd., and Zash Investment and Trading Co. Pvt. Ltd., who together hold about 33% of the share capital,

have not come up with such an objection. These two shareholders have admittedly given consent to the Scheme and they have now come up with objections on a variety of grounds such as fraud, misrepresentation etc. But, they have not contended in their objections that the above requirement was not fulfilled by the company. The objectors who have raised this issue, are not the shareholders. Therefore, their averment that the above requirement was not satisfied, is not borne out of first hand personal knowledge. Consequently, this objection cannot be sustained, in the absence of any of the shareholders raising it as a ground for going back on the consent given earlier.

95. One of the main objections raised by 2 major creditors namely, the ICICI Bank and Kotak Mahindra Bank Ltd., is (i) about the circumstances surrounding the execution of a Memorandum of Understanding dated 26.7.2008 between the transferor and the transferee, (ii) the payment of an amount of Rs.230 crores and (iii) the issue of preferential warrants. This objection requires consideration in greater detail, as according to the transferor, the failure of the proposed merger would result in the forfeiture of the amount of Rs.230 crores already paid.

96. In the course of hearing of these petitions, the transferor filed an additional set of documents which contained a copy of the Memorandum of Understanding dated 26.7.2008 and an amendment executed on 1.12.2008 to the MOU. As per the MOU, the transferor granted a license to the transferee to carry on the business of retailing, under the name and style of "SUBHIKSHA" for a period of 3 years with effect from 1.8.2008. The relevant part of the MOU containing the terms of such license are as follows:-

"The scope of the License Agreement is to enable the Licensee to carry as its business the business of retailing presently carried out by the Licensor using the people's rights, assets, goodwill and trademarks vested with the Licensee. The license also permits the Licensee to carry on the retailing business in the name and style of Subhiksha from additional premises as they may deem appropriate.

(a) The Licensor will grant an exclusive license to the Licensee for conduct of retailing business in the name and style of Subhiksha. The license would be a comprehensive license under which the Licensee will be entitled to use of all facilities and arrangements presently vested with the Licensor including the use of all its premises owned or leased or otherwise in its possession infrastructure including IT and the services of employees. The right of use of premises will include the right to use Offices, Warehouses and shops.

(b) The license also includes the right of use of Brands, Trademarks, Service Marks, Goodwill etc., which belong to and are presently used by the Licensor. The Licensee shall also be allowed to use all Supply chain infrastructure including contracts etc., with vendors.

(c) (i) The Licensee shall pay the Licensor a licence fee at the rate of Rs.138 Cr. per annum payable annually in arrears.

(ii) The Licensee shall pay a refundable Security Deposit of Rs.2,300 Cr., on which interest at 6% per annum will be paid annually in arrears by the Licensor to the Licensee.

(iii) The Licensee shall pay Rs.230 Cr., out of the above said sum of Rs.2,300 Cr., on or before 15th August, 2008.

(iv) The balance sum of Rs.2,070 Cr., shall be paid on or before 15th October 2008.

(d) The Security Deposit stated as above, shall be refundable by the Licensor at the determination of the License Agreement. The Licensor and the Licensee shall each separately have the option to renew the arrangements for a further period of 3 years on each expiry."

97. In the Explanatory Statement under Section 393, issued to the members, at the time of convening the meeting of the shareholders, as per the orders of this Court, a mention is made in paragraph 4(c) about the consent given by the members by way of a Special Resolution passed at the meeting held on 25.7.2008, for the business arrangement entered into by way of the above MOU. It is only thereafter that the MOU was entered into on 26.7.2008.

98. As per Clause 3.c. of the MOU, the transferee ought to have paid, on or before 15.8.2008, a sum of Rs.230 crores towards part payment of the refundable security deposit of Rs.2,300 crores. The balance of Rs.2,070 crores should have been paid on or before 15.10.2008. The notice convening the meeting of the shareholders, was issued by the Court appointed Chairman on 30.9.2008 and the Explanatory Statement is perhaps dated subsequently (as it appears from the set of documents filed by the transferor). The meeting itself was held on 31.10.2008. Therefore, if the transferee had acted in tune with the MOU, an amount of Rs.230 crores ought to have been paid to the transferor, even before the notice dated 30.9.2008 was issued. The balance also ought to have been paid on 15.10.2008, which was 15 days before the date of the Court convened Meeting of the shareholders. But Explanatory Statement under Section 393 does not make a reference to the actual receipt of Rs.230 crores on 15.8.2008. The extract from the accounts of the transferor, furnished in para 4 of the Explanatory Statement reflects only an amount of Rs.9,52,79,934/- towards cash and bank balances as on the date of the Explanatory Statement. The current liabilities and provisions are indicated in para 4 to stand at Rs.154,91,40,920/- and Rs.10,91,56,151/- respectively. Thus, the amount of Rs.230 crores, which ought to have been received by 15.8.2008 (and claimed by the transferor to have been actually received), is not reflected in the financial position indicated in the Explanatory Statement.

99. In the 12th Annual Report of the transferee company, relating to the year 2007-2008, filed as part of the documents along with C.P.No.240 of 2008, the financial status of the transferee and the size and level of operations of the transferee are reflected. It is seen from the audited balance sheet as on 31.3.2008 that the "Sources of Funds" of the transferee comprised of the share capital of Rs.5,05,01,000/-, Reserves and Surplus of Rs.96,186/- and Profit and Loss Account of Rs.1,15,535/- totalling to Rs.5,07,12,721/-. The cash and bank balance are shown as Rs.1,20,679/-, other current assets are shown as Rs.2,55,538/- and loans and advances shown as Rs.5,04,75,013/-.

100. It is not known as to how a company of the size as above mentioned, entered into a MOU on 26.7.2008, agreeing to make a refundable security deposit of Rs.2,300 crores, within a short span of 3 months. As a matter of fact, it was only in the General Meeting held on 25.7.2008 that the

transferee company received the approval of the members to increase the authorised capital from Rs.5.50 crores to Rs.15 crores. It was in the very same meeting that they decided to issue 65,09,489 preferential warrants, each warrant carrying a right to subscribe to one equity share of Rs.10/- each of the transferee at a price of Rs.3,618/- per share. The preferential warrants themselves were allegedly issued, as per paragraph 11(c) of C.P.No.239 of 2008, on 7.8.2008 and 8.8.2008, after receiving 10% of issue price per share viz., Rs.361.80 per warrant.

101. If the averment contained in para 11(c) of C.P.No.239 of 2008 is true, R.Subramanian ought to have paid to the transferee company, a sum of Rs.5,49,10,386/- on 7.8.2008 (at the rate of Rs.361.80 for 1,51,770 warrants). Similarly, the transferor ought to have paid to the transferee, on 8.8.2008, a sum of Rs.230,02,22,734/-.

102. A combined reading of the averments in C.P.Nos.239 and 240 of 2008 and the MOU dated 26.7.2008 would show that by mutual adjustment, the transferor had shown payment of a sum of Rs.230,02,22,734/- on 8.8.2008 towards the price of preferential warrants and the transferee had shown payment of a sum of Rs.230 crores on or before 15.8.2008, towards part payment of the refundable security deposit under the MOU dated 26.7.2008. In other words, without the actual flow of cash from one to the other, the transferor and the transferee appear to have stage managed the passing of consideration. Though I am only drawing this as an inference from the circumstances, the same is inevitable in view of the fact that the bank statements are not before me. Given the size of the transferee company and the size of the transaction under the MOU, it is inconceivable that the transferee could pay such a huge amount of Rs.230 crores on or before 15.8.2008 with a promise to pay Rs.2,070 crores on or before 15.10.2008.

103. It is equally inconceivable that the transferor could make payment of Rs.230 crores on 8.8.2008 for the purchase of the preferential warrants issued by the transferee, in view of the admitted averments contained in the applications C.A.Nos.1066 and 1067 of 2009 filed by Cash and Carry Wholesale Traders Pvt. Ltd. In paragraph 5(o) and 5(p) of the affidavit filed in support of C.A.Nos.1066 and 1067 of 2009, it is admitted that post March 2008, there was a marked reluctance on the part of the lenders to extend credit facilities in general and that the company's financial position choked from July 2008. The relevant averment in para 5(p) reads as follows:-

"The company's liquidity was substantially stretched as it was in the process of executing the said large expansion without being able to secure funds required for such expansion thereby resulting in the complete choking up of cash flow and strain in payments to all concerned post July 2008"

104. If the financial position of the transferor from July 2008 was what is reflected above, it is not known how they managed to pay Rs.230 crores on 8.8.2008 to the transferee. Even assuming for the sake of argument that this payment had been made on 8.8.2008, then the transferee ought to have paid Rs.230 crores on 15.8.2008 and Rs.2,070 crores on or before 15.10.2008. Therefore, after 15.10.2008, the financial condition of the transferor ought to have become more than stable. But on the contrary, it is admitted in paragraph 5(q) and 5(s) of the affidavit in support of C.A.Nos.1066 and 1067 of 2009 that even in November 2008, the operations were on the verge of collapse and that the transferor was advised in January 2009 to resort to Corporate Debt Restructuring.

105. Interestingly, the transferor who claims to have paid Rs.230 crores to the transferee on 8.8.2008 for the preferential warrants, had actually committed default in payment of a sum of Rs.1,76,49,680/- towards payment of contribution to the Employees' Provident Fund, Employees' Pension Fund, Employees' Deposit Linked Insurance Fund and the administrative charges thereto, for the period from June 2008 to September 2008, as seen from an order dated 19.02.2009 passed under Section 7A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. Mr.R.Subramanian, the Promoter and Managing Director of the Transferor had admitted before the Regional Provident Fund Commissioner, in the enquiry under Section 7A that the EPF contributions for the period from June 2008 could not be remitted on account of a serious financial crisis and that all the sales outlets of the transferor ceased to function. He has further admitted that the establishment itself ceased to function from January 2009 due to financial problems. During the same period, the transferor had defaulted in payment of dues to several creditors. Therefore, it is clear that the transferor and the transferee have just brought about book entries on mutual basis as though Rs.230 crores was paid by the transferor to the transferee on 8.8.2008 towards the price of preferential warrants and an equivalent amount was paid at the same time by the transferee to the transferor towards part payment of the security deposit under the MOU, without the actual flow of cash from one to the other. In essence, the transferor and the transferee have just built castles in the air and have created an illusion, with the MOU. A person well versed in the weaknesses of the double entry system of accounting alone could have done this.

106. Keeping in mind, the above suspicious circumstances surrounding the execution of the MOU, let me now go to two other objections to the Scheme, viz., that all material facts are not disclosed and that the latest audited financial statements are not available.

107. There is no dispute about the fact that only the unaudited statement of affairs of the transferor are filed along with the petitions. The financial year 2007-2008 was extended by 3 months to end on 30.6.2008 instead of on 31.3.2008. Though the transferor had undertaken in para 7 of C.P.No.239 of 2008 that the annual accounts are to be audited and laid before the members at the AGM to be held on or before 30.12.2008, it could not be accomplished. Therefore, the unaudited accounts as on 31.3.2008 alone are available before this Court, in so far as the transferor is concerned. This is why, all the objectors have raised a serious objection that without complying with the mandatory requirement of submitting the latest audited accounts, the petitioners are not entitled to seek the approval of this Court for the Scheme.

108. As pointed out earlier by me, the proviso to Section 391(2) mandates that no order sanctioning a compromise or arrangement shall be made unless the Court is satisfied that the applicant before the Court had disclosed all material facts relating to the company such as (i) the latest financial position of the company and (ii) the latest Auditor's report on the accounts of the company.

109. The proviso to Section 391(2) was actually inserted by way of an amendment under Act 31 of 1965. The amendment was brought forth, to give effect to the recommendations of the Daphtary-Sastri Committee based on the report of the Vivian Bose Commission of Inquiry. The relevant portion of the recommendations of the Committee reads as follows:-

"With the active support of the liquidator a scheme of amalgamation with respect of a company in voluntary liquidation was presented to the Court and sanction of the Court was obtained without disclosing material facts such as improper transfer of assets, the existence of an order for an investigation into the affairs of the company, and the latest financial position of the company and that of the transferee company. In order that the Court may not proceed to sanction an arrangement or amalgamation with too 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, it is necessary that the following provisions should be made:

(i) .. ..

(ii) .. ..

(iii) The Court should have power to call for the report of an auditor on the state of affairs of the company as on the date of the application for the sanction of the scheme, and such other matters as it considers necessary for the purpose of sanctioning the scheme."

110. In view of the above recommendations which led to an amendment to Section 391(2) and also in view of the negative form in which the proviso under Section 391(2) is couched, it is clear that the requirement is mandatory and a condition precedent. However, on the interpretation of the word 'latest', there appears to be divergence of views.

111. In Bharat Synthetics Ltd. v. Bank of India [(1995) 82 CC 437 (Bom.)], a learned Judge of the Bombay High Court was of the view that the availability of unaudited (provisional) financial results, would not amount to compliance with the requirements of the proviso to section 391(2), relating to the furnishing of "the latest financial position of the company".

112. Similarly, another learned Judge of the Bombay High Court held in KEC International Ltd vs. Kamani Employees Union {2000 (1) Comp. LJ 351} that the expression "latest financial position of the company" would mean the financial position as at the time of final hearing of the petition and that this requirement is statutory. The relevant portion of the said decision, contained in paragraph 67 of the report, reads as follows:

"The learned counsel for the petitioner sought to argue that what is contemplated as latest financial position is as at the time of the meeting and also at the time of filing of the present petition. It would be rather strange in the sense that if the petition were to be heard almost after two years and in that event, to say that the petitioner need not disclose the latest financial position would render the whole objective absurd. If one were to look at the provisions regarding amalgamation scheme, the time appears to be the essence in approval of such schemes. In fact, within the time prescribed, the meeting has to be held, and within 15 days, the Chairman has to file his report in this court and within a week thereof, the petition has to be presented in this court so as to enable the court to consider the amalgamation scheme at the earliest. In a given case the petition may come up for hearing after three or four years and to say that the petitioner need not disclose the latest financial position of the company would render the entire objective meaningless. It is pertinent to note that

the words used 'court must be satisfied with regard to the latest financial position of the company'. In this context, as mentioned earlier, the judgment of the Delhi High Court in Bhagwan Singh's case, [(1983) 3 Comp LJ 397 (Del)] supra, the meaning of words 'latest financial position' has categorically been held as the financial position should be when the matter is due for sanction. Obviously, it means, at the time of final hearing of the petition and this requirement is statutory since the Supreme Court in Miheer H Mafatlal's case [(1996) 4 Comp LJ 124 (SC)], supra, has categorically held that all the statutory requirements have to be strictly complied with before sanctioning amalgamation scheme. Therefore, what is required is the latest financial position at the time of final hearing of the application, i.e., at the time of sanctioning."

113. In Blue Star Limited vs. In the matter of the Scheme of Arrangement {2000 (2) Bom. CR 525}, a learned Judge of the Bombay High Court held as follows:-

"Reading all the judgments together, one can say that the relevant point of time for disclosing the latest financial position would be at the time of filing of the petition. It is only as in the case of Bhagwan Singh (supra) when there is a long gap between the filing of the latest balance sheet etc., and the time when the Court considers the scheme for sanction that the Court may require the latest financial position. Otherwise it has been clearly laid down that the latest financial position should be disclosed at the time of moving/ filing of the petition."

114. In State Bank of India v. Alstom Power Boilers Ltd. [(2003) 5 Comp. LJ 268 (Bom.)], a Division Bench of the Bombay High Court held that "the proviso to sub-section (2) of Section 391 requires the company to disclose to the Court, all material facts relating to the company, the latest auditor's report on the accounts of the company, the pendency of any investigation and the like." The Court further held as follows:

"In order to ascertain whether the scheme is fair and just to all concerned or not, the court would necessarily have to look to the latest financial position of the company. The balance sheet, profit and loss account and the Auditor's report are important tools for the purpose of ascertaining the latest financial position of the company. It is for this reason that the court insists that the applicant must not only produce the latest balance sheet, profit and loss account and the Auditor's report as on the date when the application for sanction under section 391 is made but, should also produce the latest balance sheet, profit and loss account and the Auditor's report as on the date when the matter is actually heard by the court, especially when there is long gap between the date of the application and when the court considers the scheme for sanction [see Blue Star Ltd., In re (2000) 2 Comp. LJ 245 (Bom), page 255].

115. In Magnaquest Solutions (P) Ltd., In re. [2008 (3) Comp. L.J. 345 (A.P.)], a learned Judge of the Andhra Pradesh High Court held that "the words "latest auditor's report" connote the latest auditor's report available or which should normally be available at the time of filing of the petition". After pointing out that there will always be a time gap between the date on which the auditor audits the accounts and prepares his report and the date on which the company petition is filed and the date on which it is actually heard, the learned Judge pointed out that the requirement of the proviso to sub-section (2) of section 391 would mean the latest auditor's report for the period for which the

accounts are audited or ought to have been audited. Nevertheless, the Court also pointed out, after referring to the decision of the Bombay High Court in Zee Interactive Multimedia Ltd., that "when there is a long gap between the date of filing and the date of hearing, the Court is not powerless to ask for further details of the latest financial position as on the date of the hearing of the petition, or as near to the date of the hearing of the petition, as is reasonably practicable".

116. Despite the divergence of views, it is seen from a plain reading of the proviso to Section 391(2) that the focus of the proviso is on "the disclosure of all material facts relating to the company by the person making an application under Section 391(1)". The emphasis on the disclosure of all material facts, formed the subject matter of the opinions in two decisions of different High Courts. In Krishna H.Bajaj v. Sesa Industries Ltd. [2009 Vol.III (4) Bom. L.R. 1509], a Division Bench of the Bombay High Court, after considering the scope of the proviso to sub-section (2) of section 391, held that "the interpretation of the said proviso cannot be restricted only to a limited aspect that it takes care of the investigation pending in relation to the company under sections 235 to 251, as the words "and the like" are to be interpreted to mean that the company is required to disclose all material facts relating to the affairs of the company". After holding that the phrase "and the like" appearing in the proviso is very wide, the Court held that the affairs of the company should be transparent in all respects.

117. In Niulab Equipment Co. (P) Ltd., In. Re. [(2009) 91 SEBI & Corporate Laws Reports 387 (Bom.)], a learned Judge of the Bombay High Court held as follows:

"In a given case the Court may well order any additional facts not earlier noticed, to be placed before the members and/or the creditors of the company to enable them to reconsider their decision to support the scheme. This would depend upon the answer to two questions. Is the fact a material one, to wit, is it relevant or material to the scheme that is proposed. If the answer is in the affirmative, the next question is whether there was an adequate disclosure of the facts to the members, shareholders and other concerned persons. If the answer to either of the questions is in the negative there does not arise the necessity of placing the material before the concerned persons."

The reference in the proviso to (i) latest financial position of the company (ii) the latest Auditor's report on the accounts of the company and (iii) the pendency of any investigation proceedings in relation to the company, are all actually in relation to the obligation of the applicant before the Court to make a disclosure. Therefore, the applicant would have satisfied the requirement of the proviso to Section 391(2), if in his application, he had disclosed, by affidavit or otherwise, all material facts including the above three facts. That this was the object of the law makers in inserting the proviso to Section 391(2), is borne out by the recommendations of the Daphtary-Sastri Committee Report, which I have extracted earlier. The relevant portion of the report is extracted once again for easy reference as follows:-

"(iii) The Court should have power to call for the report of an auditor on the state of affairs of the company as on the date of the application for the sanction of the scheme, and such other matters as it considers necessary for the purpose of sanctioning the scheme."

118. Any doubt that one may have on the interpretation to be given to the word "latest" is dispelled by the relevant portion of the report extracted above. The emphasis therein is on the state of affairs of the company as on the date of the application for the sanction of the Scheme. Therefore, it is clear that an applicant would have satisfied the requirement of law if he had filed the latest financial position and the latest auditor's report as on the date of filing of the application.

119. But it does not mean that if after the filing of the application for sanction, it is brought to the notice of the court that any material change adverse to the interests of the members and the creditors had occurred, the Court should shut its eyes and just go by the latest financial position as on the date of filing of the application. One of the contours of the jurisdiction of the Company Court, as held in Miheer H. Mafatlal is that the Scheme as a whole should be just, fair and reasonable. Moreover, the reference to the element of "public interest", made under both the provisos to Section 394(1) makes it clear that the inquiry conducted by the Court need not necessarily be confined to the latest financial position as on the date of filing of the application. To put it differently, an applicant (including the transferor and the transferee companies) would have satisfied the requirement of disclosure of all material facts, if he had filed the latest financial position and the latest auditor's report on the accounts of the company as on the date of filing the application. But the role of the Court does not end with a mere scrutiny of such material, especially when a material change had occurred subsequently, adverse to the interests of the members, secured creditors or the public.

120. Viewed from the above perspective, it is seen that C.P.Nos.239 and 240 of 2008 were filed in November 2008. In the petitions themselves, the transferor and the transferee have disclosed the financial position of the transferor and the transferee as on 31.3.2008. While the financial position indicated in respect of the transferee, is as per the audited accounts, the financial position indicated in respect of the transferor, is as per the unaudited accounts. The companies have stated that due to the extension of the financial year upto 30.6.2008, the annual accounts were to be audited and laid in the AGM to be convened on or before 30.12.2008. Since the petitions were filed on 11.11.2008 and the audited results were to be placed before the AGM by 30.12.2008, there was justification for the transferor, not filing the audited results.

121. But what happened after 30.12.2008, has actually changed the complexion of the game. Neither by 30.12.2008 nor even by 30.12.2009, the transferor has been able to get the financial position of the company for the year ended 31.3.2008/30.6.2008, audited and presented before Court. The reason appears to be that all the 1,600 or more retail shops run by the transferor have been closed and the inventories valued at Rs.551 crores by the transferor, are said to have evaporated into thin air. Though the transferor has fought shy of admitting this fact, they have admitted that with the closure of all the shops, their access to the stocks/inventories in those shops, has become next to impossible.

122. If we look at the financial position of the transferor, as indicated in para 6 of C.P.No.239 of 2008, it is clear that the transferor is still shown as clinically alive, only on the ventilator of the inventories. Sans these inventories, the transferor is atleast clinically dead. A look at paragraph 6 of C.P.No.239 of 2008 shows the following position, as per the unaudited accounts:-

LIABILITIES	Rs.	ASSETS	Rs.

Share capital	31,80,79,470	Fixed Assets (Net)		396,58,53,934	
Reserves & Surplus	215,45,68,509	Capital work in progress			14,17
Secured loans	639,99,98,660	Inventories		551,01,68,257	
Unsecured loans	22,70,10,000	Sundry Debtors		82,64,538	
Deferred Tax liability	15,77,32,779	Cash and bank		9,52,79,934	
		Loans and Advances		119,43,95,980	
		Current liabilities & provisions			165,82,
	925,73,89,418				925,7

With the dissipation of stocks in entirety (valued at over Rs.551 crores), the question of unavailability of the latest audited financial position, assumes greater significance. While I do not find fault with the transferor for not filing the latest audited financial position as on 31.3.2008/30.6.2008, at the time when the C.P., was filed on 11.11.2008, I cannot also shut my eyes to the admitted inability on the part of the transferor to file it even after a year and the admitted dissipation of stocks, valued at over Rs.551 crores.

123. The objection that the latest financial position is not available, has therefore to be viewed in the context of "public interest" and in the context of the question whether the Scheme is just, fair and reasonable. What constitutes public interest and the role played by the principle of public interest in considering a Scheme, was considered by the Supreme Court in Hindustan Lever Employees' Union vs. Hindustan Lever Limited {1995 (83) Com. Cases 30}. It was held therein as follows:-

"What requires, however thoughtful consideration, is whether the Company Court has applied its mind to the public interest involved in the merger. In this regard the Indian law is a departure from the English law and it enjoins a duty on the Court to examine objectively and carefully if the merger was not violative of public interest. No such provision exists in the English law. What would be public interest cannot be put in a strait-jacket. It is a dynamic concept which keeps on changing. It has been explained in BLACK'S LAW DICTIONARY, as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, whereas the interest of the particular locality which may be affected by the letters in question. Interest shared by citizens generally in affairs of local, State or National Government." It is an expression of wide amplitude. It may have different connotation and understanding when used in service law and yet a different meaning in criminal law or civil law and its share may be entirely different in company law. It's perspective may change when merger is of two Indian companies. But when it is with a subsidiary of a foreign company the consideration may be entirely different. It is not the interest of the shareholders or the employees only but the interest of the society which may have to be examined. And a scheme valid and good may yet be bad if it is against public interest".

124. In J.S.Davar v. Shankar Vishnu Marathe [AIR 1967 Bom. 456], Y.V.Chandrachud, J, speaking for the Division Bench pointed out that "the creditors of a company may agree to accept a fraction of the amount due to them from the company and yet, on considerations of more lasting importance,

like public or commercial morality, the Court may refuse to accept the verdict of the majority". The Court further held as follows:

"It may also refuse to accept the scheme on the ground that it is not reasonable or that it is not feasible or that there is no chance that it will yield to a smooth and satisfactory execution. By 'reasonable' is generally meant that the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of the class which they represent. The Court will also not sanction the scheme if the facts which would have influenced decision of the majority were not known or disclosed to the majority, or if the sponsors of the scheme have misrepresented the true position of the company."

More importantly, the Court held that "if the acceptance of the Scheme would lead to the stifling of an inquiry into the conduct of the delinquent directors, the Court would be slow to give its sanction to the Scheme". After referring to the facts of the case before them, the Court held in paragraph 24 of its decision that "a Scheme of reconstruction of a company which is ordered to be wound up must postulate that on some reasonable hypothesis it is possible to revive the business of the company and that when the assets of the Company are so meagre and its liabilities so large, it is in a state of hopeless insolvency and that from that state it would be impossible to resuscitate it". The summary of the financial position of the company that was before the Bombay High Court, given in paragraph 34 of the report, is almost akin to the position of the transferor company in these proceedings. The company has not only large liabilities and meagre assets (actually no assets), but as matters stand today, it has neither a place to carry on its business nor the equipment with which to conduct it.

125. In Magnaquest Solutions (P) Ltd., In re. [2008 (3) Comp. L.J. 345 (A.P.)], a learned Judge of the Andhra Pradesh High Court pointed out that "the amalgamation must fulfil some felt need, some purpose, some object and must have some co-relation with public interest". After pointing out that in a departure from the English Law, the Indian Law enjoins a duty on the Court to examine objectively whether or not, the merger is violative of public interest, the Court held that "a valid and good Scheme may yet be bad if it is against public interest or if it is a device to evade the law".

126. However, in In Re: Maknam Investments Ltd. and Ors. [(1996) 87 CC 689 (Cal.)], relied upon by Mr.R.Murari, learned counsel for the petitioner, the Calcutta High Court referred to the decision of the Chancery Division in Sussex Brick Co. Ltd., In re., wherein, it was held that the person opposing the Scheme should affirmatively establish that notwithstanding the view of the majority, the Scheme is unfair. The Court also referred to the decision in Hindustan Lever Employees' Union v. Hindustan Lever Ltd. [(1995) 83 CC 30 (SC)], wherein, it was pointed out that the power of the Court is only to be satisfied whether the provisions of the Act has been complied with, whether the class or classes of persons are fully represented and whether the arrangement is such that a man of business would reasonably approve.

127. Mr.R.Murari, learned counsel for the petitioner relied upon the decision of the Gujarat High Court in Core Healthcare Limited v. Nirma Limited [(2007) 138 CC 304 (Guj.)], in support of his contention that the Court is not really concerned with the commercial decision of the shareholders unless and until the Court feels that the proposed merger is manifestly unfair or is being proposed

unfairly and/or to defraud the other shareholders. In this case, the learned Judge of the Gujarat High Court equated the Court to a supervisor, who cannot at all be treated as the author or a policy maker and who cannot, as a consequence, undertake the exercise of scrutinising the Scheme, with a view to find out whether a better Scheme could have been adopted by the parties.

128. In Modiluft Limited and Ors. v. S.K.Modi and Ors. [MANU/DE/2730/2005], the Delhi High Court referred to the observations in Sussex Brick Co. Ltd. , wherein, the Chancery Division pointed out that to reject a Scheme as unfair, it should be patently unfair, obviously unfair and unfair to the meanest intelligence and that "unfairness" in that context would mean patent unfairness, obvious unfairness and convincing unfairness. The Court also extracted the opinion rendered by the Gujarat High Court in In Re. Sidhpur Mills Co. Ltd. holding that the Scheme should not be examined in the way a hair splitting expert, a meticulous accountant or a fastidious counsel would do it.

129. But, I do not think that the role of the Company Court examining a Scheme is merely akin to the role of an Appeal Examiner in the Registry of a Court. This is why, the Supreme Court pointed out in Hindustan Lever that the Court has to examine the Scheme objectively and carefully, to see if the merger was not violative of public interest. The emphasis in Hindustan Lever was on the interest of the Society at large and not merely the interest of the shareholders and the employees.

130. Therefore, the Scheme for which the stamp of approval is sought, has to be examined from the point of view of public interest. This is why, some of the objectors have contended that the proposed Scheme is prejudicial to public interest and hence should not be sanctioned. Therefore, let me now turn on to the issue of public interest.

131. Admittedly, the transferee company was originally certified as a Non Banking Finance Company, but the Certificate of Registration was surrendered to the Reserve Bank of India. It is also a listed company with the Madras Stock Exchange. The Madras Stock Exchange has granted in-principle approval to the Scheme by a letter dated 5.8.2008 on condition that at least 25% of the shares issued to the promoters would be locked in for 3 years and the balance for one year. However, the transferee has admitted in para 21 of C.P.No.240 of 2008 that they have already addressed a letter to the Madras Stock Exchange to delete the condition and their request is pending consideration. The transferee has also made an application on 14.8.2008 to the Calcutta Stock Exchange Association Ltd., for listing its shares. By a letter dated 16.10.2008, they have permitted the trading of the shares.

132. Under Clause 7A.8 of the proposed Scheme, the new equity shares of the transferee company issued to the members of the transferor shall be listed and/or admitted to trading on the stock exchanges, where the shares of the transferee company are listed. Therefore, the whole idea behind the proposed Scheme, is obviously to raise huge funds both by way of debt and by way of equity.

133. Even as per paragraph 28 of C.P.No.239 of 2008, the total amount due to 11 out of 12 secured creditors who attended the Court convened Meeting on 31.10.2008 worked out to Rs.696.71 crores. This is in contrast to the figure indicated in para 6 at Rs.639.99 crores. There are also huge outstandings to the suppliers of goods and services and also to unsecured creditors. Therefore, in

order to dispel any doubt, I directed the learned counsel for the petitioners to submit an action plan. In response, the learned counsel submitted a revival plan. In short, the revival plan projected by the petitioners is as follows:-

(i) The transferor company would restart operations in the regions of Tamil Nadu, Kerala, Karnataka, Andhra Pradesh and the National Capital of Delhi.

(ii) A total of 738 super markets, 594 fruits and vegetables stores, 558 pharmacies, 110 telecom inclusive stores, 248 telecom exclusive stores and 7 warehouses, were to be opened. An estimated amount of Rs.303 crores would be needed for putting necessary assets in place for these new shops/stores. This amount could be raised by (a) salvaging the existing assets, valued at Rs.252 crores and reusing the same for revival and (b) investing the shortfall of Rs.51 crores. But it is admitted by the petitioners that given the nature of the assets and the geographical distribution, the realisable value of the existing assets would only be a small fraction of the salvage value.

(iii) The summary of the loans and liabilities pre-debt and post-debt restructuring, would be as follows:-

Loans and liabilities

	pre-debt restructuring	post-debt restructuring	Repayment and interest
Banks	Rs.800 Cr.	Rs.400 Cr.	Interest at 1 year Repayment 10 years.
Shareholder Lenders	Rs. 80 Cr.	Rs. 40 Cr.	Same as Banks
Non Lender Creditors	Rs.105 Cr.	Rs.105 Cr.	No interest Repayment over 2 years.

(iv) The summary of assets and liabilities of the merged entity, post-debt restructurin

Assets and liabilities of merged Entity Post-Debt Restructuring and Equity infusion

Equity	Rs.158 Cr.	Fixed Assets	Rs.303 Cr.
Debt/Convertible	Rs.100 Cr.	Cash/Bank Balances	Rs.199 Cr.
Loan Liabilities	Rs.440 Cr.	Goodwill	Rs.291 Cr.
Other Creditors	Rs.105 Cr.		
Total	Rs.803 Cr.	Total	Rs.803 Cr.

(v) But the learned counsel for the petitioners has also indicated in the revival plan

a) Infusion of Rs.150 Cr., as equity at par

b) Infusion of Rs.100 Cr., as Fresh Debt/Debt Convertible into Equity
c) Incorporating the effect of debt restructuring as per the Scheme proposed by the Sha
d) Utilisation of Rs.51 Cr., of the infused cash to create the balancing investments in

134. It is claimed by the petitioners that the above revival plan has been vetted by the Credit Rating Agency ICRA Limited, with an observation that it would be viable (i) if reduction of debt as per the Scheme of arrangement is achieved and (ii) if the infusion of Rs.250 crores into the company as equity is possible.

135. Thus the revival plan makes it clear that the transferor, who is not in a position to raise funds through any other means, has come up with the last available option viz., that of raising public equity. It is pertinent to note that all channels for the transferor to reach out to Banks and Financial Institutions, are now closed. From the objections filed by the suppliers of goods and services, it is clear that the transferor will not be in a position to restart operations, as per the revival plan, by securing goods and services on credit basis any more. In this whole drama, the members of the public alone, are yet to become victims and the proposed amalgamation obviously seeks to reach out to the members of the public, as a last straw on the camel's back.

136. In such circumstances, it is my considered view that it may not be in public interest to sanction the Scheme, as it would only result in millions of Peters being robbed to pay a few Pauls. The revival plan submitted by the petitioners, is based on several presumptions and surmises, some of which are as follows:-

(i) The first presumption is that post-merger, the company would be able to raise equity to the tune of Rs.250 crores.

(ii) The second presumption is that the salvage value of the existing assets would be Rs.252 crores, though admittedly the realisable value may only be a small fraction.

(iii) The next presumption is that the creditors would agree to the Scheme of compromise/arrangement for restructuring the debt.

137. Therefore, it goes without saying that even if any one of the above presumptions does not materialise, the revival plan will collapse. In that event, the merged entity is sure to sink. When it does, it would not only go down along with the existing creditors and shareholders who are already on board this Titanic, but also go down along with a new set of innumerable members of the public who subscribe to the share capital. Therefore, I am of the view that it would not be in public interest to permit such a Scheme.

138. The problem of persons floating companies, running them profitably for a few years, then taking them to the public and vanishing after collecting huge amounts by way of public issues, has been nagging the regulators for the past two decades. After the era of globalisation commenced in 1992, the Office of the Controller of Capital Issues was abolished and many promoters started raising funds from the public at fanciful premiums. Between 1992 and 1996, more than 4,000 companies raised more than Rs.54,000 Crores from investors through public and hybrid issues.

Another 1,500 companies raised over Rs.34,000 Crores through 'rights issues' at very high premia. Most of these companies simply vanished into thin air in no time, leaving investors high and dry. On 20.12.1996, a query was raised in the Lok Sabha about the number of companies which made their public issue from 1992 onwards and thereafter had become untraceable. The question was a sequel to certain reports that in the early 1990s, several companies appeared as comets in the horizon of financial market and disappeared with huge amounts of money collected from the public. Those companies came to be known popularly as "Vanishing Companies". Therefore, a public interest litigation was filed in 1998 on the file of the Lucknow Bench of the Allahabad High Court, which issued certain directions that actually paved the way for certain reforms.

139. Thereafter, the Ministry of Corporate Affairs and the Securities and Exchange Bureau of India jointly set up a Coordination and Monitoring Committee (CMC) in 1999 for identifying companies which raised money from the public and later became untraceable. A Task Force was set up for each Region to assist the CMC in identifying vanishing companies. In the meeting held on 1.7.2000, the following criteria were laid for identifying a company as a vanishing company:-

(a) If the company failed to file its returns with Registrar of Companies (ROC) for a period of two years;

(b) If the company failed to file its returns with Stock Exchange (SE) for a period of two years (if it continues to be a listed company);

(c) If the company is not maintaining its registered office at the address notified with the Registrar of Companies/Stock Exchange; and

(d) If none of its Directors are traceable.

140. Before the Joint Parliamentary Committee, which investigated the Securities Scam, it was pointed out by an association of investors that during the period from 1992 to 1996, about 15 million small investors came into the stock market through IPOs and that during the said period, a staggering amount of Rs.86,000 Crores were raised through public issues. The Joint Parliamentary Committee reported that though the number of companies which duped small investors ran into thousands, only 299 companies could be identified by the Monitoring Committee. The website of the Press Information Bureau provides the statistics relating to these companies.

141. In an order passed on 8.9.2000 in Appeal No.7 of 2000 in Integrated Amusement Limited vs. Securities and Exchange Bureau of India {MANU/SB/0016/2000}, the Securities Appellate Tribunal, Mumbai, observed as follows:-

"The menace of companies raising capital from the public with rosy promises and thereafter disappearing from the scene after duping the investors has become a common feature these days. Gullible investors are taken for a ride by the smarter persons by inducing them to part with their hard earned money by way of subscription to shares in the public issue. Authorities such as department of Company Affairs (responsible for administering Companies Act), Reserve Bank of

India and the respondent, being primarily concerned with the investor protection, the harassed investors often look at them for redressal of their grievances. But they could not do much to alleviate the grievances of the investors for various constraints. In fact they were subjected to adverse criticisms for their inaction in booking those fly by night operators".

142. Now the Securities and Exchange Board of India have issued regulations, known as "Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009", in exercise of the powers conferred by Section 30 of the Securities and Exchange Board of India Act, 1992. Chapter II of these Regulations lays down "common conditions for public issues and rights issues". Similarly, Part I of Chapter III prescribes "the eligibility requirements". Regulation 26 contains the conditions for initial public offer (IPO) and it reads as follows:-

"26. (1) An issuer may make an initial public offer, if:

(a) it has net tangible assets of at least three crore rupees in each of the preceding three full years (of twelve months each), of which not more than fifty per cent are held in monetary assets:

Provided that if more than fifty per cent of the net tangible assets are held in monetary assets, the issuer has made firm commitments to utilise such excess monetary assets in its business or project;

(b) it has a track record of distributable profits in terms of Section 205 of the Companies Act, 1956, for at least three out of the immediately preceding five years:

Provided that extraordinary items shall not be considered for calculating distributable profits;

(c) It has a net worth of at least one crore rupees in each of the preceding three full years (of twelve months each);

(d) the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year;

(e) if it has changed its name within the last one year, at least fifty per cent of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

(2) An issuer not satisfying any of the conditions stipulated in sub-regulation (1) may make an initial public offer if:

(a) (i) the issue is made through the book building process and the issuer undertakes to allot at least fifty per cent of the net offer to public to qualified institutional buyers and to refund full subscription monies if it fails to make allotment to the qualified institutional buyers;

or

(ii) at least fifteen per cent of the cost of the project is contributed by scheduled commercial banks or public financial institutions, of which not less than ten per cent shall come from the appraisers and the issuer undertakes to allot at least ten per cent of the net offer to public to qualified institutional buyers and to refund full subscription monies if it fails to make the allotment to the qualified institutional buyers;

(b) (i) the minimum post-issue face value capital of the issuer is ten crore rupees;

(ii) the issuer undertakes to provide market-making for at least two years from the date of listing of the specified securities, subject to the following:

(A) the market makers offer buy and sell quotes for a minimum depth of three hundred specified securities and ensure that the bid-ask spread for their quotes does not, at any time, exceed ten per cent;

(B) the inventory of the market makers, as on the date of allotment of the specified securities, shall be at least five per cent of the proposed issue.

(3) An issuer may make an initial public offer of convertible debt instruments without making a prior public issue of its equity shares and listing thereof.

(4) An issuer shall not make an allotment pursuant to a public issue if the number of prospective allottees is less than one thousand.

(5) No issuer shall make an initial public offer if as on the date of registering the prospectus with the Registrar of Companies there are any outstanding convertible securities or any other right which would entitle any person any option to receive equity shares after the initial public offer:

Provided that the provisions of this sub-regulation shall not apply to:

(a) a public issue made during the currency of convertible debt instruments which were issued through an earlier initial public offer, if the conversion price of such convertible debt instruments was determined and disclosed in the prospectus of the earlier issue of convertible debt instruments;

(b) outstanding options granted to employees pursuant to an employee stock option scheme framed in accordance with the relevant Guidance Note or Accounting Standards, if any, issued by the Institute of Chartered Accountants of India in this regard.

(6) Subject to provisions of the Companies Act, 1956 and these regulations, equity shares may be offered for sale to public if such equity shares have been held by the sellers for a period of at least one year prior to the filing of draft offer document with the Board in accordance with sub-regulation (1) of regulation 6:

Provided that in case equity shares received on conversion or exchange of fully paid-up compulsorily convertible securities including depository receipts are being offered for sale, the holding period of such convertible securities as well as that of resultant equity shares together shall be considered for the purpose of calculation of one year period referred in this sub-regulation:

Provided further that the requirement of holding equity shares for a period of one year shall not apply:

(a) in case of an offer for sale of specified securities of a Government company or statutory authority or Corporation or any special purpose vehicle set up and controlled by any one or more of them, which is engaged in infrastructure sector;

(b) if the specified securities offered for sale were acquired pursuant to any scheme approved by a High Court under Sections 391-394 of the Companies Act, 1956, in lieu of business and invested capital which had been in existence for a period of more than one year prior to such approval.

(7) No issuer shall make an initial public offer, unless as on the date of registering prospectus or red herring prospectus with the Registrar of Companies, the issuer has obtained grading for the initial public offer from at least one credit rating agency registered with the Board.

Explanation: For the purposes of this regulation:

(I) "net tangible assets" mean the sum of all net assets of the issuer, excluding intangible assets as defined in Accounting Standard 26 (AS 26) issued by the Institute of Chartered Accountants of India;

(II) "project" means the object for which monies are proposed to be raised to cover the objects of the issue;

(III) In case of an issuer which had been a partnership firm, the track record of distributable profits of the partnership firm shall be considered only if the financial statements of the partnership business for the period during which the issuer was a partnership firm, conform to and are revised in the format prescribed for companies under the Companies Act, 1956 and also comply with the following:

(a) adequate disclosures are made in the financial statements as required to be made by the issuer as per Schedule VI of the Companies Act, 1956;

(b) the financial statements are duly certified by a Chartered Accountant stating that:

(i) the accounts and the disclosures made are in accordance with the provisions of Schedule VI of the Companies Act, 1956;

(ii) the accounting standards of the Institute of Chartered Accountants of India have been followed;

(iii) the financial statements present a true and fair view of the firm's accounts;

(IV) In case of an issuer formed out of a division of an existing company, the track record of distributable profits of the division spun-off shall be considered only if the requirements regarding financial statements as provided for partnership firms in Explanation III are complied with;

(V) "bid-ask spread" means the difference between quotations for sale and purchase;

(VI) The term "infrastructure sector" includes the facilities or services as specified in Schedule X".

143. It was submitted by Mr.R.Murari, learned counsel for the petitioners that by prescribing a lock-in period of 3 years for 25% of the shares issued to the promoters and a lock-in period of 1 year for other shares, the Madras Stock Exchange has already taken care of this contingency. The learned counsel also submitted that this Court can also impose any other condition, for safeguarding the interests of the members of the public, while sanctioning the Scheme.

144. But given the financial status of the transferor and the transferee as on date, I do not think that any amount of safeguards can protect the gullible public from becoming victims. The reason for this conclusion of mine is that even while committing default in payment of statutory dues, from June 2008 onwards, the transferor and the transferee have managed to bring entries on record as though a sum of Rs.230 crores was exchanged as between themselves. Both the transferor and the transferee do not appear to have had so much of funds during the period from 8th August to 15th August 2008 and yet they claim that the transferor paid Rs.230 crores to the transferee and the transferee paid an equivalent amount to the transferor during the same period. The petitioners also claim that these payments were cheque payments, reflected in the books of accounts. Given the financial position of both, this could have been accomplished only by way of cross cheques issued by one to the other and the bank neutralising their effect by one credit entry and one debit entry. The companies which got engaged in such kite flying operations, cannot be allowed to enter into the public domain through stock market, since any amount of restrictions and conditions, may not achieve the desired result.

145. Today, there are lot of winding up petitions pending against the transferor. There are also civil cases as well as criminal proceedings under Section 138 of the Negotiable Instruments Act pending against the transferor and its Directors. As rightly pointed out by Kotak Mahindra Bank, the financial status of the transferor was alarming, as per the Scheme of Arrangement filed by one of the shareholders, viz. Cash and Carry Wholesale Traders Pvt. Ltd. The promoter of this shareholder and the promoter of the transferor company are one and the same. Yet, a rosy picture is painted in C.P.No.239 of 2010, while what was presented in the application of the shareholder was different. In comparison, the Scheme of Arrangement proposed by Cash and Carry Wholesale Traders Pvt. Ltd. was one in insolvency, while what is presented in C.P.No.239 of 2008 is one in solvency.

146. Therefore, in the light of the above, I am of the view that the proposed Scheme is not just, fair and reasonable, but is prejudicial to public interest. The revival plan submitted by the petitioners, makes it obvious that the proposed Scheme is not financially viable, since it is structured on many

ifs and buts and presumptions and surmises. Therefore, the Court cannot permit consciously, the transfusion of the blood of several members of the public, to a patient who has suffered multiple organ failure and various other ailments and whose chances of survival depends only on miracles. Hence, both these petitions are dismissed. There will be no order as to costs.

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