Corporate Restructuring under the Scheme of Amalgamation: A comparative analysis

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Cite as: (2010) PL December S-1 Introduction Corporate restructuring has a wide meaning which includes a complete set of tools to transform existing organisational structure or capital of a company, in order to achieve its corporate objectives and to attain certain strategic and financial synergies, companies go for corporate restructuring. The definition of corporate restructuring that we have today was totally different before 1991. Earlier, restructuring was preferred by the companies to overcome difficulties and re-establish the business. Some of the tools or modes of corporate restructuring are mergers or amalgamation, demergers, takeover, disinvestment, joint ventures, etc.

The procedure or statutory requirements to carry out a compromise, arrangement, which includes merger or amalgamation is explicated under the provisions of Sections 391 to 394 A of the Act. The companies can enter into a compromise or arrangement (a) between themselves and their creditors or any class of them, (b) between themselves and their members of any class of them. It covers restructuring, merger, demerger and hiving off of a unit by a company.1

The term amalgamation is not defined in the Companies Act but generally â€œamalgamationâ€ means unification or fusion of two or more than two existing companies into one single company. As per the definitions given in various leadings books amalgamation is the blending of two or more undertakings into one undertaking, the shareholders of each blending undertaking becoming substantially the shareholders of the other company which holds blended undertakings.2

While considering a petition for sanction of a scheme, the Court has to act in supervisory capacity, even though all the conditions specified in the act have been fulfilled. Before the Court sanctions a scheme, it normally needs to be satisfied that the statutory requirements have been complied with.3 Procedure for restructuring under a scheme

â€œSchemeâ€ is a document containing complete details of the compromise and arrangement agreed upon between the companies, their members and creditors. The company that transfers its assets and liabilities to the other company is called the â€œtransferor companyâ€ and the company into which the transferor company merges or transfer its assets and liabilities is called the â€œtransferee companyâ€. Valuation of the shares of all the involved companies forms an integral part of the â€œschemeâ€, and on its basis only, it is calculated as to how many shares in the transferee company are to be received by the shareholders of the transferor company. Once the scheme is passed by the Board of Directors of all the companies involved, the procedure can be initiated.

The Supreme Court has held that the exchange ratio of the shares of the transferee company to be allotted to the shareholders of the transferor company should be worked out by a recognised firm of chartered accountants. These accountants should be experts in the field of valuation and if no mistake can be pointed out in the said valuation; it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies. However, it does not mean that the court is bound to treat the same as it is, the court can view it from the test of fairness. The court on certain occasions does appoint independent valuers where dissenting shareholders or creditors make a strong case for such an action.

If any one of the companies is a listed company then the scheme has to be filed with the stock exchanges concerned at least one month before it is filed in the Court. It is to be noted that listing agreement requires that the scheme be filed with the stock exchange, a month before the same is filed in the High Court for approval, and it does not mandate that the sanction of the stock exchange has to be received before filing of the scheme. 4 Once the â€œno objectionâ€ of the stock exchange is obtained or the period of one month after filing the scheme with the stock exchange(s) has elapsed; a first motion application or petition for convening or dispensing with the meeting of each class of shareholders and creditors of the companies, involved in the scheme is filed with the High Court(s) having requisite jurisdiction. Meetings are convened if ordered by the Court, wherein approval of majority representing 3/4th in the value of shareholders and creditors present and voting is required. If the meetings are dispersed with on the basis of prior written no-objection letters of the shareholders and creditors of all the companies involved in the â€œschemeâ€ then a second motion petition is filed with the High Court(s), seeking sanction to the â€œschemeâ€. Once the scheme is approved by the shareholders and the creditors of the companies involved, then a second motion petition is filed with the High Court, primarily to sanction the scheme and in the meantime, to issue notice to the Regional Director and the Official Liquidator attached to the High Court.

The Regional Director and Official Liquidator, on the basis of information submitted by the companies, file their report or affidavit about veracity of the scheme. Notice of the final hearing needs to be published in English and in a regional language newspaper of wide circulation in the State, where the Registered Office is situated. Thereafter, if the Court is satisfied that the scheme is not prejudicial to the interest of shareholders or creditors, and is not against the public policy and there are no tenable objections raised by the authorities, then the Court tends to sanction the scheme. Process of amalgamation

The amalgamating as well as amalgamated companies are required to seek approval from the respective High...
Courts in accordance with the provisions contained in Sections 391 to 394 of the Companies Act, 1956. The orders are issued in Milind Holdings (P) Ltd. v. Mihir Engineers Ltd.5 It was laid down that the Court’s sanction to the scheme of amalgamation is necessary.

The considerations before the Court for approving the scheme of amalgamation were laid down by the Supreme Court in Marshall Sons and Co. (India) Ltd. v. ITO6 and the Hon’ble Court laid down that where a court is satisfied that the statutory formalities have been duly complied with and the scheme is fair and a reasonable one and beneficial to the interest of the companies and its members, the Court may sanction the scheme.

The High Court has wide powers to sanction a scheme of amalgamation that involves other approvals under the Companies Act e.g. change of objects clause, change of name, increase in authorised share capital, etc. In Centron Industrial Alliance Ltd. v. Pravin Kantilal Vakil7, the Court held that once the members of the company have approved the scheme in the manner laid down under Section 391, it is not open to the shareholders to requisition a meeting for the purpose of passing a resolution asking the company to withdraw the petition filed by it for sanctioning the scheme.

In a recent case of Meghal Homes (P) Ltd. v. Shree Niwas Girni K.K. Samiti8 the Court placed its reliance on the decision given by the Hon’ble Supreme Court in Miheer H. Mafatlal v. Mafatlal Industries Ltd. 9, where the Court has laid down various parameters for sanctioning a scheme. On the expression language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them has to be convened. This clearly pre-supposes that if the scheme of arrangement or compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive.

Power to look into commercial merit or demerit of a scheme, the Bombay High Court in Mather and Platt (I) Ltd., In re10 has pronounced that the High Court would not enter into commercial merit/demerits of a scheme specially when the scheme is passed by overwhelming majority of shareholders after all the necessary materials are placed before them. The power of the Court in respect to sanctioning of the scheme is primarily limited to ensuring that there has been no violation of any provision of law, and that every member, creditor or any class of them has been represented properly. The scope of the Court’s power is very wide, even where the Court feels that some information has not been provided at the meeting while the member or creditor were put to vote, the Court on receipt of correct information has the power to order reholding of the meeting on the basis of correct factual position.11

When a scheme could be challenged and role of court (A) The scheme is ultra vires the object of MoA The memorandum of association is a constitutional, fundamental charter and basic document of every company registered under the Companies Act.12 Section 16 of the Companies Act recognises this as unalterable charter of a company.13 It contains the objects for which the company is formed therefore it identifies the possible scope of its operations.

B.N. Srikrishna, J. of Bombay High Court held that merely because there is absence of power to amalgamate in the objects clause of the memorandum of association of the transferee company, sanction of a scheme of amalgamation could be refused.14 The Bombay High Court held that Section 391 of the Act, invests the Court with powers to approve or sanction a scheme of amalgamation, which is for the benefit of the company.15 The Calcutta High Court16 held that the scheme that was being sanctioned was a conditional scheme, which would be validated only when the altered memorandum was registered. The Court further observed that æœthe power to amalgamate may flow from the memorandum of association or it may be acquired by resorting to the statuteæ•. Section 17 of the Companies Act indicates that a company, which desires to amalgamate with another company, will take necessary steps to come before a company for alteration of its memorandum in aid of such amalgamation.

It was held in Oceanic Steam Navigation Co. Ltd., In re17 that æœa company has no power to enter into, nor can the Court sanction, any arrangement or compromise, which necessarily involves the doing of any act which is ultra vires the company, being in excess of its corporate powers as defined in its memorandum of association æ•. A court will interfere only if the rights of the shareholders are infringed or if a case of fraud or ultra vires action is made out.18

(B) The object clause and the doctrine of ultra vires Stating the objects of the company in the memorandum of association of a company is not a mere legal technicality but is a necessity of great practical importance. Lord Parker summed up the importance of object clause:

æ€The truth is that the statement of a company’s objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company, and who can infer from it the extent of the company’s powers.19

A company cannot readily change its object clause so as to have a totally different object. If the object clause fails, the company should fail.20 When the company exceeds its powers i.e. when the act done is ultra vires the memorandum, more particularly the object clause of the memorandum, such an act is void.21 The rule of ultra vires was for the first time laid down by the House of Lords in Ashbury Railway Carriage and Iron Co. v. Riche22. Lord Cairns also observed,23 that:
the MoA of a company defines the limitation on the powers of the company; it contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation and it states, if it is, necessary to state, negatively, that nothing shall be done beyond that ambit.

(C) When approval of scheme is an act of oppression? The act of oppression is something which is harsh or burdensome. The meaning of the term "oppression" as explained by Lord Cooper in the Scottish case of Elder v. Elder and Watson Ltd.24 was cited with approval by Wanchoo, J. of the Supreme Court of India in Shanti Prasad Jain v. Kalinga Tubes Ltd.25 In this case the Supreme Court considered four important English cases26 and quoted the following summary given in Meyer case which lays down certain considerations to be kept in view while determining the scope of Section 397.27 There are certain preliminary conditions which must entitle the shareholder to some relief under the section.28 These conditions are inbuilt in the language of the section itself. The section comes into play when, (1) the company’s affairs are being conducted in a manner, (2) prejudicial to the public interest or oppressive to any member or members, are the ones which are relevant in the current context.

In the area of minority shareholder protection the law has been dominated by a rule that was established in Foss v. Harbottle.30 The Court held that under the exceptions to Foss v. Harbottle31 there was no requirement to fulfill the strict criteria of fraud. Such an action could be brought for negligence if such a breach had personally benefitted the wrongdoers. The core wrong was misuse of power.

There can be two techniques for the protection of minority shareholders. The first consists of giving power to the Court to review the decision of the majority on the ground that it is in some sense unfair to the minority. The second is treating the shareholders whose interests are at risk from the decision as a separate group whose consent is needed for the decision to go ahead, whether or not under the company’s constitution the separate consent of that group would be required. The first of these two techniques obviates the difficulty of having to predict in advance which decisions are acceptable and which not, for the decision is subject to ex post scrutiny on a case by case basis by the courts. The second technique is an extension of the policy of excluding interested parties from voting on a decision.32

(D) The scheme is not fair and reasonable The Court is bound to consider the proposal and decide whether they are fair and reasonable taking everything into consideration. On the issue of fairness of the scheme, if the Court is satisfied that the scheme is discriminatory and unfair, it can reject the scheme.33 For this it is not enough to show that the members of the company had unanimously agreed to the scheme.

Amalgamation should not only be beneficial to the companies, but should also be in the interest of [the] creditors and members of both the transferor and transferee companies and should also be in public interest.

Further, the Court also laid down the test of fairness of the scheme in which it was stated that the test of fairness is fair to the individual shareholders or to the body of shareholders as a whole and not whether it is fair to a particular shareholder in the particular circumstances of his own case.36 Further the Bombay High Court in Sandvik Asia Ltd., In re37 has by the principle and held that when the scheme is highly inequitable and unjust, even a single minority shareholder is entitled to oppose the scheme. The Court should not examine the merit of a scheme or objection thereto while considering petition to order meeting for approval of the scheme. However, at that stage the Court has to satisfy itself that the scheme is, prima facie, valid.38

Even on the face of the facts that a scheme of compromise or arrangement was approved by the requisite majority and without coercion on minority, the Court is not bound to confirm the scheme. In a more recent case the Supreme Court of India has laid down a set of guidelines for consideration of the Court in the matter of sanction of a scheme under Sections 391 and 394 of the Act.39 The Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy.

The Court does not function as a mere rubber stamp or post office and it is incumbent upon the Court to be satisfied prima facie that the scheme is genuine, bona fide in the interests of the creditors and the company.40 If the creditors and members are not properly classified and if the meeting of the proper creditors and members are not separately held, the scheme approved at such meeting cannot be sanctioned. The scheme has to be approved by the special majority of each class of creditors at their separate meetings.41 The principle of separate consent is well established in relation to proposed alterations of the articles where these alterations may affect the rights of a class of members.42

(E) Scheme is contrary to public interest The Supreme Court, opined that:
6. Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between the parties that it should not be unfair or contrary to public policy or unconscionable.

The expression "public interest" is not capable of precise description. It has been held to be an elusive abstraction meaning general social welfare or regard for social good and predicating of the general public in matters where a regard for the social good is of the first moment. In case of a company intended to operate in a modern welfare state, the concept of public interest takes the company outside the conventional sphere of being a concern in which the shareholders alone are interested. It emphasises the idea of the company functioning for the public good or general welfare of the community, at any rate, not in a manner detrimental to the public good.

In the leading case of Brown v. British Abrasive Wheel Co. it was held that the addition of a provision in order to enable the majority to expropriate the minority could not be for the benefit of the majority. Hence an injunction was granted restraining the company from passing the resolution. Further, the High Court of Australia laid down an objective test which had to be applied, even if the price was fair and the majority had acted in good faith, which the majority found in the notion of proper purposes.

(F) Approval of the scheme by financial banks

Approval of scheme by the financial institutions is an important condition of amalgamation. The Board of Directors should in fact approve the scheme only after it has been cleared by the financial institutions/banks which have granted loans to these companies to avoid any major change in the meeting of creditors to be convened at the instance of the company courts under Section 391 of the Companies Act, 1956. In particular Regulation 7 of the above Regulation provides for compliance with certain conditions in the case of scheme of merger or amalgamation as approved by the Court.

(G) Non-disclosure of material fact

In St. Mary's Finance Ltd. v. Jayaprakash R.G. the Court held that there must be full and fair disclosure of the interests of Directors as members of the company.

The proviso to Section 391(2) lays down that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company has disclosed to the Court all material facts relating to the company. The Court would see whether the proposals contained in the scheme have been made in good faith and there is no misrepresentation or concealment.

The class must have been fairly represented; the role of the Court is inquisition and supervisory. The Court can pierce corporate veil and if the scheme is found to be fraudulent and intended for a purpose other than the purpose stated, it may be rejected even at the outset. The principle is that, expressed in another connection by Justice Lindley, M.R. in Allen v. Gold Reefs of West Africa Ltd.

â€œIt must be exercised not only in manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied and are seldom, if ever expressed.

The material fact is a fact on which the claim relies. The amendment in the Act made by the 1965 Amendment Act gave effect to the following recommendation of the Daphtry-Sastry Committee Report: In Daphtry-Sastry Committee Report, it was suggested 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 presented before the Court, would weigh heavily against the sanction of the scheme. The Report further suggested that other considerations include procedural compliance, latest financial statements, duty of disclosure. It lays down heavy duty on the Director to act in good faith and in the interest of the company.

Since the proviso is cast in a negative form, it is mandatory. Making of the disclosure as required by the proviso is a condition precedent to the exercise of jurisdiction for sanctioning the scheme. Unless this condition precedent is fully satisfied, the Court will have no jurisdiction to sanction the scheme.

General principles for sanctioning a scheme of amalgamation by the court

The scheme of amalgamation is designed to overcome difficulties and re-establish the business. Moreover decision of amalgamation must be reached after prudent consideration and corporations should consider facts such as commercial understanding, veracity of its accounts and statements, if there is any dire necessity.

(A) Sanctioning of amalgamation scheme by the courts

The well-established principles on which mergers are sanctioned by the Court were summarised by D.A. Desai, J. in Navjivan Mills Co. Ltd., In re58. The principles were referred to by the Court in Mafatlal Industries Ltd. (MIL). In re59. Further, it was stated that there are certain limitations on the Court's power to sanction the scheme such as not to sanction a scheme which is invalid even if every creditor or member (shareholders) agreed to it. The Court is not to sanction a scheme which includes something which can ordinarily be affected by resort to other provisions of the Companies Act.
(B) The scheme is beneficial to the interest of the company      The scheme can be done for maintaining or increasing a company’s growth, operating efficiencies and synergy, etc. In a clear statement of legal position the Delhi High Court has held that diversity of object of the companies concerned is not a bar to amalgamation.

In Ion Exchange (I) Ltd., In re61, the Bombay High Court has laid down that in the area of mergers and amalgamation has recognised the importance of the Court not sitting as an appellant authority over the commercial wisdom of those who seek to restructure business.

(C) Court cannot decline to sanction a scheme, unless illegality or fraud is involved in a scheme. The Supreme Court in Employees Union v. Hindustan Lever Ltd.62 held that unless it is shown that there is some illegality or fraud involved in the scheme, the Court cannot decline to sanction a scheme of amalgamation. There can be no question of giving minority shareholders as absolute veto over new share issues as that could be commercially disastrous.

(D) Scheme is not an act of oppression An application for oppression is made where the affairs of the company are being conducted in a manner oppressive to any member or members or prejudicial to public interest. This provision is an exception to a well established principle of Foss v. Harbottle64 and only where it can be proved that the act is detrimental to the interest of the company. In the instant scheme, the decision has been duly reached through requisite votes provided under law. This does not call for any action by minority shareholders under Section 397 of the Act. In fact the allegation of oppression is tainted and such baseless allegations are not in the interest of the company.

In Brook Bond Lipton India Ltd., In re65 the Court held that when the stake of the objectors is very small, the wishes of the majority shareholders cannot be ignored.

(E) The MoA is in consonance with the object of the company The Calcutta High Court does not, however, agree that the Court is powerless to sanction an arrangement where the company does not have power as per its object clause, to have jurisdiction for amalgamation.66 Similar view was expressed by the Bombay High Court as also in Sir Mathuradas Vissanji Foundation, In re67 these views of the Calcutta High Court proceed on the basis that a power which is conferred by the statute itself need not to be a derivative of the objects clause of the memorandum. Moreover, to amalgamate, with another company, is an inherent power of a company and need not to be the object of the company.

Once again, the Calcutta High Court in Eita (I) Ltd.68 has held that the power to amalgamate is a statutory power and this power may be exercised notwithstanding the fact that the memorandum of association of the company does not contain express power to amalgamate with another company. The company should have the power to amalgamate. In case such power is not defined in memorandum, in articles of association of the companies, the same should be amended. The Calcutta High Court in Marybond and Kyel Tea State Ltd., In re69 held that Section 394 gives jurisdiction to the Court to sanction and arrangement even though there may be no power in its memorandum and the Court is empowered to sanction a scheme of amalgamation without specific powers in memorandum of both the companies and without an application under Section 17 of the Act for alteration of the objects clauses.

In earlier decision in Hari Krishna Lohiya v. Hoolungooree Tea Co. Ltd.70, the Calcutta High Court had also taken a view that even if there is no express power in the memorandum of a company to amalgamate with another company, by virtue of statutory power under Section 391 of the Companies Act, 1956 a court can always sanction a scheme of amalgamation if the statutory requirements are complied with.

Similarly, in Feedback Reach Consultancy (P) Ltd.71 the Delhi High Court expressed that there is no need to have in the memorandum a clause empowering a company to amalgamate with another company, and held:

It is quite clear that the powers under Sections 391 to 394 are not circumscribed or predicted on the applicant company possessing powers under its objects clause to amalgamate with any other company.

In S.M. Holding Finance (P) Ltd. v. Mysore Machinery Manufactures Ltd.72 (In liquidation) the Karnataka High Court took the view that where sanction of the Court for a scheme of arrangement or compromise is sought under Section 391 of the Companies Act 1956, the Court must look at the scheme and see whether the act has been complied with, whether the majority is bona fide and whether the scheme is reasonable one or whether there is any reasonable objection to it or such an objection to it that any responsible person might say that he could not approve it. Thus, in all the above decisions the Court has been of the view that where the statutory requirement have been complied with, and where the decision of amalgamation has been reached by the majority acting in bona fide manner, any objection to such scheme can be brought only on the ground that it is unreasonable. The test of such reasonableness is based on the premise that the scheme is just and fair and not excessive and extreme.

(F) Duties of the court with respect to amalgamation In Mcleod Russel, In re73 the Court held that in matters relating to scheme of amalgamation, it is for the shareholders to consider on commercial plans as to whether the amalgamation would benefit the companies involved. It is not necessary that in a scheme of amalgamation companies should be involved in similar business.
To ascertain the wishes of the members the Court will not usually go into the question of business decision of amalgamation and the fact that two companies under amalgamation have totally different business may not be relevant for the Court.74

Conclusion  In their pursuit to grow and to attain certain strategic and financial synergies, companies go for corporate restructuring. The subject â€œcorporate restructuringâ€ is of immense importance to every corporate professional and entrepreneur to understand and apply in the ever changing economic scenario. The procedure or statutory requirements to carry out a compromise, arrangement, which includes merger or amalgamation is explicated under the provisions of Sections 391 to 394 A of the Act.

The benefit of merger and amalgamation weigh far more than the effort, time and money put in for carrying out the same. The term â€œcompromiseâ€ or â€œarrangementâ€ used in Section 391 of the Act; is wide enough to include every possible form of restructuring, be it with a companyâ€™s member or creditors or other stakeholders. The main reason behind getting a â€œschemeâ€ approved from the Court is that it should not prejudicially affect the interest of shareholders, creditors or public at large.

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- List of such matters was drawn in Sakamari Steel & Alloys Ltd., In re, (1981) 51 Comp Cas 266 (Bom); see also Vasant Investment Corpn. Ltd. v. Official Liquidator, (1981) 51 Comp Cas 20 (Bom).
- Idco Rama Textiles Ltd. and Spentex Industries Ltd.; CLC Global Ltd. and Spentex Industries Ltd., the court has observed that there is no requirement for taking the consent of the stock exchanges, under the act or in the company rule.
- (1984) 55 Comp Cas 731 (Bom).
- (2007) 7 SCC 753, para 45.
- (1997) 1 SCC 579.
- Travancore National and Quilon Bank Ltd., In re, AIR 1939 Mad 318 : (1939) 9 Comp Cas 14 (Mad).
- Dr. J.C. Verma, supra, n. 2.
- Section 16(1) says that a company shall not alter the conditions contained in its memorandum of association except in the cases, in the mode, and to the extent, for which express provision is made in this Act. Further Section 16(2) says that: 16. (2) Only those provisions which are required by Section 13 or by any other specific provisions contained in this Act, to be stated in the memorandum of the company concerned shall be deemed to be conditions contained in its memorandum.
- Sir Mathuradas Vissanji Foundation, In re, (1996) 1 Comp LJ 530 (Bom); see also, A. Lakshmanaswami Mudaliar (Dr.) v. LIC, AIR 1963 SC 1185.
- PMP Auto Industries Ltd., In re, (1994) 80 Comp Cas 289 (Bom).
- Jalpaiguri Tea Co. Ltd., In re, (1974) 44 Comp Cas 335 (Cal).
- (1939) 9 Comp Cas 229 (Ch D).
- Parshuram v. Tata Industrial Bank Ltd., ILR (1923) 47 Bom 915.
- German Date Coffee Co., In re, (1882) 20 Ch D 169 : (1881-85) All ER Rep 372 (CA).
- Dr. J.C. Verma, supra, n. 2, 14.
- (1875) LR 7 HL 653, 669-70 : (1874-80) All ER Rep Ext 2219; see also, Oceanic Steam Navigation Co. Ltd., In re, 1939 Ch 41 : (1938) 3 All ER 740.
- Ibid.
- 1952 SC 49 (Scotland).
- AIR 1965 SC 1535, 1543, para 18, the Court stated that the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely.
- Supra, n. 25, 1542, para 15, the Court laid down that:
  1. The oppression, complained must relate to the manner in which the affairs of the company concerned are being conducted.
  2. The oppressive act must be brought about by a majority of members exercising as shareholdersâ€™ predominant voting power in the conduct of the companyâ€™s affairs.
  3. This section by way of an appropriate order might open to the minority shareholders with a view to bring the end oppressive conduct of the majority to an end.
4. Under Section 397, it is not legality or illegality of action complained of its primary importance but whether the act(s) is oppressive is of paramount importance.

It is also permissible in petition under Ss. 397 and 398 to bring further facts and grounds before the final hearing of the petition provided such facts/grounds disclose additional cause of action and the same is arguable. The complaining shareholder must be under a burden which is unjust or harsh or tyrannical. aœœA persistent and a persisting course of unjust conduct must be shown.aè The Supreme Court observed that a resolution passed by the Directors may be perfectly legal and yet oppressive.

- (1843) 2 Hare 461 : 67 ER 189; see also, Pavlidas v. Jenson, 1956 Ch 565 : (1956) 3 WLR 224 : (1956) 2 All ER 518; Daniels v. Daniels, 1978 Ch 406 : (1978) 2 WLR 73 : (1978) 2 All ER 89.
- Ibid.
- See supra, n. 29, 653.
- TCI Infrastructure Finance Ltd., In re, (2008) 146 Comp Cas 133 (Raj); see also, Calicut Bank Ltd. v. Devani Ammal, AIR 1940 Mad 621.
- Carron Tea Co. Ltd., In re, (1966) 2 Comp LJ 278 (Cal).
- Shankaranarayana Hotels (P) Ltd. v. Official Liquidator, (1992) 74 Comp Cas 290 (Kant), 300.
- (2004) 50 SCL 413 (Bom).
- JVG Leasing (Securitising and Finance) Ltd., In re, (2007) 79 SCL 541 (Del).
- Supra, n. 9.
- Swamy (D.A.) v. India Meters Ltd., (1994) 79 Comp Cas 27 (Mad).
- See, supra n. 29, 663, para 19-11.
- Employeesâ€™ Union v. Hindustan Lever Ltd., 1995 Supp (1) SCC 499, 508, para 6; see also, Union of India v. Ambalal Sarabhai Enterprises Ltd., (1984) 55 Comp Cas 623 (Guj). The Court here held that if the proposed amalgamation of the companies is not in public interest, the Court has power to refuse to sanction the scheme of amalgamation.
- In the words of Frankfurter J. of the United States, Supreme Court, âœœthe idea of public interest is a vague, impalpable, but all controlling considerationâ€œ. A thing is said to be in public interest where it is or can be made to appear to be contributive to the general welfare rather than to the special privileged of a class, group or individual.
- (1919) 1 Ch 290. This decision, however, was almost immediately distinguished by the Court of Appeal in Sidebottom v. Kershaw, Leese and Co. Ltd., (1920) 1 Ch 154 (CA). This was upheld on the basis that it was obviously beneficial to the company. In contrast, shortly thereafter in Dafen Tinplate Co. v. Llanelly Steel Co., (1920) 2 Ch 124, it was held at first instance that a resolution inserting a new article empowering the majority to buy out any shareholder as they thought proper, was invalid as being self-evidently wider than could be necessary in the interest of the company.
- (2000) 99 Comp Cas 359 (Ker).
- Calcutta Industrial Bank Ltd., In re, (1948) 18 Comp Cas 144 (Cal).
- Bihari Mills Ltd., In re, (1985) 58 Comp Cas 6 (Guj).
- (1900) 1 Ch 656, 671 : (1900-03) All ER Rep 746 (CA).
- Order 6 CPC, 1908.
- The Court cited J.S. Davar v. Dr. Shankar Vishnu Marathe, AIR 1967 Bom 456 as an authority to the effect that the Court is not bound by the majority approvals. It may reject a scheme where it is satisfied that material facts were intentionally withheld from or otherwise not placed before the meeting at which majority approvals were obtained.
- Pioneer Dyeing House Ltd. v. Dr. Shankar Vishnu Marathe, (1967) 37 Comp Cas 546 (Bom).
- (1972) 42 Comp Cas 265 (Guj).
- (1996) 87 Comp Cas 792 : (1995) 3 SCL 69 (Guj). The Court before according sanction under section 391(2) of the Companies Act, 1956 to a scheme of compromise and arrangement must satisfy that provisions of the statute have been complied with; the class or classes of shareholders were fairly represented by those who attended the meetings; the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and That the arrangement is such that an intelligent and honest man might reasonably approve. Court further stated In Mafatlal case laid down the Court is not bound to sanction the scheme on the ground that the majority shareholders have accepted it, the Court should determine whether the scheme as a whole arrived at by the majority is bona fide and in the best interest of the company and also that the majority does not act in a manner against minority. And the Court must carry out the test of fair and reasonableness to determine how a reasonable person with common sense and acting honestly will view the scheme.
- (2001) 32 SCL 56.
- Supra, n. 43; Mayfair Ltd., In re, (2003) 46 SCL 672 (Bom).
- Supra, n. 30.
- Supra, n. 14.
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