

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 26.10.2016
Judgment pronounced on: 16.01.2017

CO.APPL.(M) 150/2016

IN THE MATTER OF:-

ADOBE PROPERTIES PRIVATE LIMITED

...Transferor/Applicant Company No.1

WITH

AMP MOTORS PRIVATE LIMITED

...Transferee/Applicant Company No.2

Through: Mr. D.K. Malhotra & Mr.
Rajesh Kr. Malhotra,
Advocates for the Applicants.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present application has been filed jointly, under Sections 391 & 394 of the Companies Act, 1956 (hereinafter referred to as 'the Act') by Adobe Properties Private Limited (hereinafter referred to as 'Transferor Company') and AMP Motors Private Limited (hereinafter referred to as 'Transferee Company') seeking directions of this Court to dispense with the requirement of convening meetings of their equity shareholders,

secured and unsecured creditors; to consider and approve, with or without modification, the proposed Scheme of Amalgamation (hereinafter referred to as 'proposed Scheme') of the Transferor Company with the Transferee Company.

2. The Transferor Company and the Transferee Company are hereinafter collectively referred to as 'Applicants'.

3. The facts as are necessary for disposal of the present application are as follows:

- a. The registered offices of the Applicants are situated at New Delhi, within the jurisdiction of this Court.
- b. The Transferor Company was incorporated under the Act on 03.01.2014, with the Registrar of Companies, N.C.T. of Delhi & Haryana at New Delhi.
- c. The Transferee Company was incorporated under the Act on 22.10.2009, with the Registrar of Companies, N.C.T. of Delhi & Haryana at New Delhi.
- d. It has been stated by counsel for the Transferor Company and the Transferee Company that the Applicants herein are Private Limited Companies and their shares are not listed in any stock exchange.

- e. The authorized share capital of the Transferor Company as on 31.03.2015 is Rs.10,00,000/- divided into 1,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up share capital of the Transferor Company as on 31.03.2015 is Rs.1,00,000/- divided into 10,000 equity shares of Rs.10/- each.
- f. The authorized share capital of the Transferee Company as on 31.03.2015 is Rs.5,00,00,000/- divided into 50,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up share capital of the Transferee Company as on 31.03.2015 is Rs.4,87,18,000/- divided into 48,71,800 Equity Shares of Rs.10/- each.
- g. Copies of the Memorandum of Association and Articles of Association of the Applicants have been filed alongwith the present application and the same are on record. The audited balance sheets, as on 31.03.2015, of the Applicants along with the auditor's report have also been filed alongwith the present application and the same are on record.
- h. It is claimed by the Applicants that the proposed scheme will result in achieving synergy in business operations and greater work efficiency, which would be achieved by bringing the

Applicants together under a single control. This improvement would include economies of scale, financial efficiency and smooth functioning of the businesses.

- i. So far as the share exchange ratio is concerned, it is stated on behalf of the Applicants that upon the proposed scheme being effective, no consideration shall be payable by the Transferee Company to the equity shareholders of the Transferor Company, since the Transferor Company is the wholly owned subsidiary of the Transferee Company. The resulting authorized share capital of the Transferee Company on the proposed scheme getting sanctioned would be Rs.5,10,00,000/- divided into 51,00,000 equity shares of Rs.10/- each.
- j. It has been stated by the Applicants that no proceedings under Sections 235 to 251 of the Companies Act, 1956 (or their corresponding Sections in the Companies Act, 2013) are pending against the Applicants, as on the date of filing of the present application.
- k. The Board of Directors of the Applicants in their separate meetings held on 29.12.2015 have unanimously approved the proposed scheme. Copies of the Resolutions passed at the

meetings of the Board of Directors of the Applicants have been filed and the same are on record.

1. The status of the equity shareholders, secured and unsecured creditors of the Applicants and the consents obtained therefrom to the proposed scheme, has been set out in the following table: -

Company	No. of Equity Shareholders	Consents Given	No. of Secured Creditors	Consents Given	No. of Unsecured Creditors	Consents Given
Transferor Company	1 (One)	All	None	N.A.	6 (Five)	5 (Five) in number and 99.91% in value.
Transferee Company	7 (Seven)	4 (Four) in number constituting 94.45% of shareholding.	4 (Four)	All	65 (Sixty-Five)	20 (Twenty) in number constituting 97.49% of value.

4. The prayer sought by learned counsel appearing on behalf of the Applicants, is to seek dispensation of the meetings of the equity shareholders and unsecured creditors of the Applicants; the secured creditors of the Transferee Company; thereby seeking dispensation of the requirement of giving individual notices in Form No. 35 of the Company (Court) Rules, 1959 and publication of notices of the meetings of the said shareholders and creditors.

5. In support of the prayer sought, learned counsel appearing on behalf of the Applicants would urge that no prejudice will be caused to equity shareholders or creditors of the Applicants if their meeting, as contemplated under Section 391(1) of the Act, is dispensed with. Learned counsel appearing on behalf of the Applicants would further urge that the Transferor Company is the wholly owned subsidiary of the Transferee Company. Additionally, it would be canvassed that the proposed scheme is not a compromise or an arrangement with the creditors of either of the Applicants.

6. Learned counsel appearing on behalf of the Applicants, in support of the relief sought herein, would rely on the following decisions:

- a. ***M/S. Mazda Theatres Pvt. Ltd. and Another versus M/S. New Bank of India Ltd. And Others***, reported as ***1975 (1) ILR 1 (DB)***.
- b. ***S.M. Holding Finance (P) Ltd. versus Mysore Machinery Manufactures Ltd. (In Liqn.)***, reported as ***I.L.R. 1991 KAR 2672***.
- c. ***M/S. GE Capital Transportation Financial Services Ltd. versus M/S. GE Capital Services India***, reported as ***162 (2009) DLT 31***.
- d. ***Dabur Foods Ltd. & Anr.***, reported as ***2008 (144) Comp Cas 378***.
- e. ***Madhusudan Auto Ltd. & Anr.***, reported as ***2013 V AD (Delhi) 527***.

f. ***Masterji Mettalloys (P) Ltd. & Good Luck Steel Tubes Ltd.***, reported as ***227 (2016) DLT 313***.

7. I have heard the learned counsel appearing on behalf of the Applicants, considered the decisions relied upon by them and perused the entire material placed on record.

8. The issue that arises for consideration in the present application is *whether the Court has the power to dispense with the requirement of convening meetings, as contemplated under Section 391(1) of the Act, in order to enable the members or any class thereof and/or creditors or any class thereof to consider, and if thought fit, approve, with or without modifications, the proposed scheme.*

9. The Transferor Company has 01 equity shareholder whose written consent/NOC has been placed on record. The said written consent/NOC has been examined and found in order.

10. The Transferor Company has no secured creditors.

11. The Transferor Company has 06 unsecured creditors, out of which, 05 (representing unsecured debt of 99.91% in value of the total unsecured debt) have given their written consents/NOCs to the proposed scheme. The said written consent/NOCs have been examined and found in order.

12. The Transferee Company has 07 equity shareholders out of which, 04 (representing 94.45% of the total shareholding) have given their written

consents/NOCs to the proposed scheme and same have been placed on record. The said written consents/NOCs have been examined and found in order.

13. The Transferee Company has 04 secured creditors. All the secured creditors have given their written consents/NOCs to the proposed scheme and same have been placed on record. The said written consents/NOCs have been examined and found in order.

14. The Transferee Company has 65 unsecured creditors out of which 20 unsecured creditors (representing 97.49% in value of the total unsecured debt) have given their written consents/NOCs to the proposed scheme and the same have been placed on record. The said written consents/NOCs have been examined and found in order.

15. Before proceeding further, it would be beneficial to examine the legal position with regard to the subject issue and consider the decisions relied upon by the learned counsel appearing on behalf of the Applicants.

16. In ***Masterji Mettalloys (P) Ltd. & Good Luck Steel Tubes Ltd. (supra)*** a Single Judge of this Court, whilst considering a scheme of amalgamation, dispensed with the requirement of convening meetings of the shareholders and creditors of the Transferee Company under section 391(1) of the Act on the basis, that the Transferor Company was the wholly owned subsidiary of the Transferee Company and the rights of the

said shareholders and creditors of the Transferee Company would remain unaffected by the Scheme.

17. A single judge of this Court in ***Madhusudan Auto Ltd. & Anr. (supra)***, dispensed with the requirement of convening meetings of the equity shareholders, creditors and unsecured debenture holders of the applicant companies, to consider and if thought fit, approve, with or without modifications, the scheme of arrangement proposed therein. The said decision was arrived at in view of the circumstance that the written consents/NOCs to the scheme had been given by a majority of such shareholders, creditors and unsecured debenture holders of the applicant companies.

18. In ***Dabur Foods Ltd. & Anr. (supra)***, the Court whilst placing reliance on the decision in ***Sharat Hardware Industries Limited***, reported as ***(1978) 48 Comp Cas 23***, dispensed with the requirement of convening meeting of the equity shareholders of the Transferee Company on the ground that Transferor Company is the wholly owned subsidiary of the Transferee Company and that the shareholding pattern of the Transferee Company prior and post amalgamation would remain the same, not requiring any reorganization or restructuring of the capital and thus not adversely affecting the shareholders thereof. Further, the meeting of the creditors of the Transferee Company was also dispensed with in view of

the circumstance that the Transferor Company was a wholly owned subsidiary of the Transferee Company; the said scheme would not result in any variation in the rights of the creditors of the Transferee Company; and that the consent of the secured creditors representing 97.6% in value of the total secured debt had been obtained outside a meeting. However, the meeting of the unsecured creditors of the Transferor Company was directed to be convened by the Court in view of the absence of the NOC/written consent.

19. At this juncture, it would be relevant to examine the decision in ***Sharat Hardware Industries Limited (supra)***. A Single Judge of this Court therein, whilst sanctioning a scheme of arrangement, proposed therein, between the wholly owned subsidiary and its holding company, observed as hereinunder:

“4. I had noticed in the order dated 19th April, 1976, that a question had been urged before me whether the scheme had to be sanctioned by the transferee-company, M/s. Choudhari Metal Industries (P.) Ltd., as well as by the petitioner-company. No doubt, the proposed scheme has been passed by the requisite majority of the shareholders of the petitioner-company. In fact, it has been unanimously passed. The question which was raised was whether a similar requirement is necessary qua the shareholders of M/s. Choudhari Metal Industries (P.) Ltd., i.e. the transferee-company. I had noticed a decision of the Bombay High Court, Bank of India Ltd. v. Ahmedabad Manufacturing & Calico Printing Co. Ltd. [1972] 42 Comp Case 211 (Bom), where this question had been analysed. It had there been noticed

that in certain cases it would be necessary for the transferee-company to get the proposed compromise or scheme sanctioned by the court before it would become binding on both companies. I also noticed that the transferor-company (the petitioner) was a wholly-owned subsidiary company of the transferee-company and, therefore, it was not necessary for the transferee-company to approve the scheme. The reason I reached this conclusion was that Section 391 of the Act deals with two special cases : (a) when there is a compromise or arrangement between a company and its creditors or any class of them and (b) where the compromise or arrangement is between a company and its members or any class of members. Considered from the point of view of the petitioner-company there is a scheme affecting the members of the company because as a result of the scheme, the transferor-company will cease to exist and will be fully merged in the transferee-company. When the scheme comes into operation, the shareholders of the petitioner-company will cease to have any shares in the petitioner-company. Therefore, there is a compromise between the petitioner-company and its shareholders. Considered from the point of view of the transferee-company, there is no such proposal. The assets and liabilities of the petitioner-company will be appropriated under the scheme by the transferee company, the shareholding and other rights of the members of the transferee-company will be unaffected, because no new shares are being issued and there is not going to be any change in the capital structure of the transferee-company. These are facts which are ascertainable on an analysis of the scheme. Therefore, the scheme or arrangement considered from the point of view of the transferee-company is not a scheme or arrangement coming within the field of operation of Section 391 and does not seem to require the approval of creditors or a subsequent sanction by the court. Now, two other cases have been brought to my notice in which the question whether the transferee-company is also required to approve the scheme, has been considered. Those two cases are In re Carron Tea Co. Ltd. [1966] 2 Com LJ 278 (Cal) decided by the Calcutta High Court and In re Union Services Private Ltd. [1973] 43 Comp Case 319 (Mad) decided by the Madras High

Court; although both these cases are somewhat different on facts, the decision in both cases was that the scheme does require the approval of the transferee-company under Section 391 of the Act. In both cases there was some change affecting the members or creditors of the transferee-company. That position is not true in the present case. The point that requires analysis is whether, in law, the present scheme requires the approval of the transferee-company, because if it does, it would be pointless approving the scheme which could not be carried into effect qua the transferee-company.

5. For this purpose, it is necessary to keep in view the essential features of a scheme or arrangement. In essence, a scheme is a contract between two or more parties. It requires the necessary approval in accordance with Section 391 of the Act, if it is a scheme covered by that provision, otherwise any other contract entered into by a company does not require such approval. The essential features of the present scheme under consideration are that two companies are merging with each other. Therefore, it is a contract between companies. Such a contract does not require the approval of the court. But, as one of these companies will merge into the other and will thereafter have to be dissolved under Section 394 of the Companies Act, 1956, considered from the point of view of that company which is to cease to exist, the scheme or arrangement between the two companies is also a scheme or arrangement between the transferor-company and its shareholders and creditors, etc. That is why the scheme requires to be placed for consideration in the manner required by Section 391. It also requires the sanction of the court. Seen from the point of view of the transferee-company, the agreement is essentially a contract which does not affect the creditors or members of the transferee-company in any manner. Therefore, the scheme does not require to be sanctioned from the point of view of the transferee-company under Section 391 of the Act. However, if the scheme had some flaws whereby the rights of the transferee-company were affected, it would require the approval of those persons at a meeting or meetings held in accordance with Section 391 and would also require the sanction

of the court having jurisdiction which in this case would be the Calcutta High Court.

6. In the analysis, I have considered also one possible case which might arise which is, let us assume that the scheme is approved by the members of the transferor-company but, later, the transferee-company refuses to give effect to the scheme. That is the position also analysed in the case of Union Services Private Ltd. [1973] 43 Comp Case 319 (Mad) referred to earlier and decided by the Madras High Court. Obviously, if the transferee-company refuses to give effect to the scheme, the purpose and object of the scheme would be demolished. Now, is there any material before me to suggest that M/s. Choudhari Metal Industries (P.) Ltd. has approved the scheme or has agreed to be bound by the scheme ? For this purpose, there are two pieces of evidence before me. Firstly, the holding company qua the petitioner-company is M/s. Choudhari Metal Industries (P.) Ltd. and I am told that it is holding 100 per cent, of the shares of the petitioner-company. As the present scheme has been approved by the members of the petitioner-company, it follows that M/s. Choudhari Metal Industries (P.) Ltd. has approved of the scheme fully by participating at the meeting of the members of the petitioner-company. In fact, without the approval of the transferee-company, the scheme could not have been passed by the members of the petitioner-company. Secondly, the scheme could not have been put forward as a proposal unless there was an arrangement between the petitioner-company and M/s. Choudhari Metal Industries (P.) Ltd. Thirdly, I now have the resolution passed by the members of M/s. Choudhari Metal Industries (P.) Ltd. before me. This resolution was passed as a result of a general meeting of that company held under the orders or directions of this court. The resolution and the affidavit accompanying it show that almost all the shareholders of the transferee-company attended the meeting. Thus, the members of the transferee-company have also approved the scheme. Therefore, there is nothing at all to show that the transferee-company is not intending to be bound by the scheme. In fact, as the transferee-company is the holding company and also owns

all the shares of the transferor-company, it would follow that the transferee-company has not only approved the scheme but has actively brought about the arrangement and certainly wants to enforce the scheme. For these reasons, I think that in the present case, there can be no doubt that the scheme is not going to be thrown overboard . and there is no such intention. The contract is, therefore, binding on the transferee-company. All it requires now is the approval of the court. As soon as the scheme is sanctioned, it becomes effective.”

(Emphasis supplied.)

20. In *M/S. GE Capital Transportation Financial Services Ltd. (supra)*, the Court dispensed with the requirement of convening meeting of the creditors of the transferor and transferee companies on account of the applicant companies therein giving an undertaking to the effect that, upon Court notice being issued in the confirmation petition, the applicant companies would issue notice to their creditors inviting objections, if any, to the proposed scheme. The same was done in view of the circumstance that upon the scheme coming into effect, the entire business and undertaking would stand transferred to the Transferee Company thereby leading to no variation of rights of the said creditors. Further, the majority shareholder of the Transferor Company with a holding of 92.74% of the paid up equity share capital was exempted from participating in the shareholders meeting on account of his NOC/written consent being given beforehand.

21. In ***S.M. Holding Finance (P) Ltd. (supra)***, a Single Judge of the Karnataka High Court, whilst dealing with a scheme of arrangement and/or compromise proposed by the company in liquidation, to discharge its debts, observed that Section 391(2) of the Act is not prohibitory but directory in character, unlike its proviso and it would suffice if there is substantial compliance thereof.

22. In ***M/S Mazda Theatres Pvt. Ltd. (supra)***, a Division Bench of this Court, whilst laying down three exceptions to the normal rule of convening meeting, as contemplated by the provisions under Section 391 of the Act, observed as follows:

“Let us examine whether the second part of the arrangement relating to the subsidiary and its members complies with the requirements of section 391. Ordinarily a company acts by its Board of Directors and the shareholders act in a general meeting of the shareholders. The meeting contemplated in section 391 is analogous to an extraordinary general meeting of the members of the company inasmuch as a three-fourths majority is required to pass the required resolution. The normal rule is that the consent of the shareholders whether it is unanimous or by a three-fourths majority must be obtained in a meeting summoned on the orders of the Court under section 391. This is in accordance with the general principle that the members must act in a general meeting.

Inroads have, however, been made on this formal doctrine. Firstly, the consent of all the shareholders given even outside a meeting is sufficient to comply with the requirement of a meeting. After this principle was established by judicial decisions, a legislative recognition was given to it by paragraph 5 of Part II of Table A of the English Companies Act, 1948 which applies to the management

of a private company limited by shares and is relevant for our purpose. It runs as follows: —

“Subject to the provisions of the Act, a resolution, in writing signed by all the members for the time being entitled to receive notice of and to attend and vote at general meetings (or being corporations by their duly authorised representatives) shall be as valid and effective as if the same had been passed at a general meeting of the company duly convened and held.”

Further, section 143 of the English Companies Act, 1948 now expressly enables written resolutions which are not passed at a general meeting to be registered. This change is reflected in India also. Under section 82 of the Indian Companies Act, 1913, special and extraordinary resolutions passed at general meetings alone were capable of being registered. But section 192 of the Companies Act, 1956 enables written resolutions not passed at general meetings to be registered.

The second inroad on the requirement of a formal meeting is that the consent of the shareholders may be ascertained without calling any meeting at all. Further, the doctrine of lifting the veil of incorporation and looking at the reality of the action of the members of the company enables us to hold that the consent of the overwhelming majority of the shareholders outside a meeting is sufficient to show that the resolution was supported virtually by all the members of the company. Professor L. C. B. Gower calls this as “informal ratification by the members of the acts done on behalf of the company.” He draws the distinction between the formal and the informal acts as follows: —

“The law normally insists that only a resolution duly passed at a meeting of the company can be regarded as an act of the company itself. In a number of cases, however, the question has arisen whether something less formal than a resolution passed at a duly convened meeting will suffice. In other words, can the veil be lifted so as to equate a decision of the members with a decision of the company itself ?”

(The Principles of Modern Company Law, 3rd Edn., pages 206-209).

Decisions on this subject may be classified into (a) those requiring a formal compliance, and (b) those requiring only a substantial compliance.

Formal compliance: —

In *Re George Newman Ltd.*, (1895) 1 Ch. 674, C.A., (11) it was held by Lindley L. J., that “individual assents given separately may preclude those who have given them from complaining of what they have sanctioned, but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting.” In *Re Express Engineering Works*, (1920) 1 Ch. 466 (12), and in *E.B.M. Co. Ltd. v. Dominion Bank*, (1937) 3 A.E.R. 555 (13), the decisions proceeded on the view that the consent of all the shareholders was necessary if no meeting was called.

Substantial compliance: —

In *Parker & Cooper Ltd. v. Reading*, (1926) Ch. 975 (14), the decisions in *Re George Newmaa Ltd.* (11) and in *Re Express Engineering Works* (12) were fully considered but were distinguished on the ground that the transactions requiring ratification in those cases were illegal. It was held that when transaction was not illegal it was not necessary that the shareholders should meet in a meeting summoned for that purpose if the transaction is an honest *bona fide* one entered into for the benefit of the company. In *Re Duomatic Ltd.*, (1969) 2 W.L.R. 114 (15), also no meetings of the shareholders were called. Of the transactions to be ratified one was ratified by all the shareholders but the other was not approved by the minority ordinary shareholders but only by the holder of the majority of shares. The minority shareholders did not object. The ratification was held to be valid. All the relevant case-law was reviewed before the decision was arrived at.

A third exception to the rule that all the shareholders of a company must cast their votes in a formally called meeting is made by the doctrine of acquiescence. If all the shareholders acquiesce in a certain arrangement, the question of a meeting having been called does not arise at all, Professor R. R. Pennington in the third edition of his “Company Law” at pages 557-558 has expressed this doctrine of acquiescence in the following words: —

“The court has said in some cases that a company may be treated as bound by a resolution, even though it is not shown that it was duly passed at a general meeting or that it was assented to by all the members. Thus, it has been held that a company loses its right to rescind a contract with its promoters if substantially all its members are aware of the right to rescind and fail to act for an unreasonable length of time. (*Erlanger v. New Sombrero Phosphate Co.* (1878) 3 A.C. 1218) (16). It has also been held that a company could not sue its directors for borrowing beyond the powers conferred on them by the articles (*Re Norwich Yarn Co. Ex parte Bignold* (1856) 22 Beav. 143) (17), nor treat an irregular surrender of partly paid shares as void (*Phosphate of Lime Co. v. Green* (1871) L.R. 7 C.P. 43) (18), when all the members had an opportunity of discovering the irregularity, and no one had taken steps to challenge it for several years. Similarly, where members of a company which had gone into voluntary liquidation took an active part in the liquidation proceedings, fully aware of a procedural defect in the passing of the resolution to wind up the company up, it was held that neither they nor the members who voted for the resolution could challenge its validity (*Re Bailey, Hay & Co. Ltd.* (1971) 3 A.E.R. 693) (19). Again, where no properly subscribed articles had been filed on the incorporation of a company, but it had acted for many years as though an informal document which had been filed contained its articles, it was held that the members must be taken to have adopted the informal document as the company's articles (*Ho Tung v. Man On Insurance Co.* (1902) A.C.

232) (20). It is submitted that the first three of these cases can be explained by the fact that the company was asserting a right against the other party to the litigation which could be lost by acquiescence, and that when acquiescence by a company is alleged, it is not necessary to show that every member of it expressly or tacitly assented to what was done. The fourth case (*Re Bailey, Hay & Co. Ltd.*) (19) was one in which the company sought to recover money paid to the 1 members in question as a fraudulent preference, and they relied on the invalidity of the winding up resolution as a defence, clearly it is right that a member should not be able to challenge the validity of a liquidation when he has acquiesced in the liquidator's acts or has allowed it to continue without drawing the liquidator's attention to the defect of which he complains, but in the instant case the court merely treated him as estopped from pleading the invalidity as a defence, and it certainly did not rule that the winding up resolution must be deemed valid against all persons and for all purposes. The fifth case (*Re Bailey, Hay & Co. Ltd.*) (19), it is submitted, was merely an application of the principle that the law will presume that acts have been done regularly and properly when they appear to have been, and it is noteworthy that the court said that it was entitled to infer that all, and not merely some, of the members had assented to the adoption of the informal document as the company's articles.” ”

(Emphasis supplied.)

23. The decisions in *M/S Mazda Theatres Pvt. Ltd. (supra)* and *S.M. Holding Finance (P) Ltd. (supra)* were relied upon in the decision of this Court in Company petition No. 251 of 2000 titled as '*In Re: DCM Estates*

and Infrastructure Limited' rendered on 30.09.2003. The relevant paragraphs thereof are reproduced hereinunder:

"In the backdrop of this decision as well as on proper interpretation of section 391(2) which is not mandatory, but directory and there has been substantial compliance that three-fourths value of the unsecured creditors have agreed to and approved the scheme, the contention of the objector that there was no proper compliance with the Act and that the court has no jurisdiction to sanction the scheme will have to be rejected. As already noticed, once the scheme is held to be reasonable and proper, merely because there is one objector to the approval of the scheme, who is none other than the sole dissenter, the court should not refuse to sanction the scheme. What the court could do in such circumstances is to give protection to the dissenter, by amending the scheme. The above views of mine receive support from Palmer's Company Law, volume 1, twenty-third edition, para 79-13, which reads:

"..... The court will not, however, upset a scheme for minor irregularities, as where consent of a class has been subsequently obtained, and where the necessary majority of one class was absent when the petition was presented, the court allowed a fresh petition to be presented subsequently when the necessary majority was later obtained, without requiring the other class meetings to be held again."

Thus not only the Karnataka High Court in the above judgment, but also this Court in Mazola's (sic) Theatres (P) Ltd. 's case (supra) have approved the consents given outside a meeting held under Section 391 of the Act. The view of Palmer on Company Law noticed above is also to the effect that such minor irregularities of a

subsequent consent will not persuade the court to upset a scheme which has subsequently obtained the requisite majority's approval.

(29) So far as plea of SHF that the majority in the meeting of the secured creditors was manipulated is concerned, subsequently during the proceedings in this Court IFCI HDFC, ICICI Bank and Gruh Finance have recorded their consents to the scheme. Whatever be the merit of the SHF's plea in view of the position of law laid down in SM Holding Finance Pvt. Ltd's case (supra), such consents even given after the meeting are valid as per the said judgment and consequently such consents Constituting 93.11% in value and 5 out of 6 in numbers comply with the statutory requirement. Accordingly this plea of SHF is not sustainable.”

(Emphasis supplied.)

24. A Single Judge of the Andhra Pradesh High Court, in ***Magnaquest Solutions P. Ltd., In re***, reported as ***(2008) 141 Comp Cas 728***, whilst sanctioning a scheme of amalgamation, proposed therein, between the wholly owned subsidiary and its holding company, has made the following observations:

“SCHEME OF ARRANGEMENT BETWEEN THE COMPANY AND ITS MEMBERS: SHOULD A MEETING OF THE CREDITORS BE HELD?

10. While the sole secured creditor of the transferor company, M/s Centurian Bank of Punjab, for Rs. 44,021/- and its unsecured creditors for Rs. 93,98,865/- have given individual letters of consent to the scheme of amalgamation, the sundry creditors, as reflected in the Balance sheet under the head "current liabilities", have not.

11. A creditor, who has a debt due from the transferor company, would, on the scheme of amalgamation being sanctioned, be required to look not to the transferor for repayment of his dues but to the transferee with whom he neither had any dealings in the past nor privity of contract prior to its substitution in the place of transferor. In a given case, the transferee company may have negative assets or may not have sufficient liquidity to repay the creditor, as per the original terms agreed between him and the transferor company. Whether he would be adversely affected by being required to deal with the transferee, in substitution of the transferor, is a matter of perception of the creditor. (Zee Interactive Multi Media Ltd., In re (2002) 3 Comp Cas 733 (Bomb), Mayfair Limited and Zodiac Clothing Co. Ltd. In re (2003) 4 Com. L.J. 102 (Bom), Union of India v. Asia Udyog Pvt. Ltd. (1974) Vol.44 Com. Cases 359 (Delhi)).

12. On the question whether a meeting of the creditors is statutorily required to be called for, even in a scheme of arrangement between the company and its members, one view is that the creditors are not entitled, as of right, to participate in the process of consideration of sanction of the scheme, as the Companies Act does not contain a specific provision for notice being given to the creditors at any stage either prior to the making of the order or subsequent thereto, except in so far as the creditors may have notice of it by public advertisement, (Asia Udyog Private Limited), and that the legislature has cast a duty on the Court to ascertain whether the Scheme affects the interests of the creditors to such an extent that holding of their meeting is essential and, if the Court were of the view that the interests of the creditors are adversely affected, it could refuse to sanction the scheme unless their consent has been obtained. (Ansal Properties and Industries Ltd., In re (1978) 48 Comp Cas 184 (Delhi)).

13. Another facet of this view is that, under Section 391 of the Act, a compromise or arrangement is either between a

company and its creditors or between a company and its members. An arrangement, in the nature of amalgamation, is the result of an agreement between the amalgamating company and its members, as well as a corresponding agreement between the transferee company and its members, and there is, therefore, no provision for the participation of persons other than the members of the two companies to vote on an arrangement of amalgamation proposed between a company and its members. (Nav Bharat Ferro Alloys In re (A.P.) Vol. 89 (1997) CC 285; Mafatlal Industries Ltd., In re (1995) 84 Comp Cas 231 (Guj); Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd., In re (1980) 50 Comp Cas 623 (Madras); Telesound India Ltd., In re (1983) 53 Comp Cas 927 (Delhi) and Nav Chrome Ltd., In re Vol. 89 1997 CC 285 (AP))

14. A slightly different view was taken by D.G. Karnik, J of the Bombay High Court, in Re: ICICI Bank Limited (2002) 104 Bom LR 399. To quote:

...I have my own doubt about the view taken by the Delhi High Court in expressing that the creditors have no right to participate in the process of consideration of the Scheme of Arrangement between the Company and its members. Section 391(1) gives a discretion to the Court to convene a meeting of the creditors or any class of them. The Court would exercise the discretion by convening a meeting of creditors if the creditors are likely to be adversely affected by an arrangement between the Company and its members. Attending the meeting and voting are steps of participation in the process of consideration of the Scheme....

...I am of the firm view that while considering any Scheme of Arrangement or Compromise proposed under Sections 391 to 394 of the Companies Act the Court is duty-bound to consider the interests of all the creditors. What importance should be given to the fact that the creditors are

likely to be affected would vary from case to case but the Judge would certainly treat whether the creditors are adversely affected or not as the relevant circumstance. How then Court is to ascertain as to whether the creditors are adversely affected? If the creditors have no right of hearing at the time of hearing of the petition under Section 391 as held by Delhi High Court and this Court, (I have my own doubts about the correctness of this view) the only way of ascertaining whether the creditors are affected or not would be through the wishes of the creditors which may be expressed by them in a meeting which the Court undoubtedly is entitled to convene under Sub-section (1) of Section 391. Therefore, the Court would exercise discretion as a matter of course to convene meeting of the creditors of the Company under Sub-section (1) of Section 391 unless the Court is prima facie satisfied that the interests of the creditors are not likely to be adversely affected by the Scheme. I am of the opinion that if an anomaly, as pointed out in Telesound India Limited, by the Delhi High Court exists in Section 391, the Courts would not fold their hands and wait for the Legislature to provide a cure, but would exercise their discretion under Sub-section (1) of Section 391, almost in every case in which creditors are likely to be affected, and convene a meeting of the creditors and ascertain their wishes by looking not only at the Resolutions passed in their meeting but looking at the entire report of the Chairman of the meeting which is expected to contain the details of the proceeding in brief and the views expressed by the creditors in the meeting....

15. Can failure to hold a meeting of the creditors, in a scheme of arrangement between the company and its members, be justified on the ground that it is always open to the Court, on a bare perusal of the audited financial statements placed before it, to ascertain whether or not their interests are safeguarded? Would that not amount to usurping the rights of the creditors to decide for themselves whether or not to approve the scheme? In the light of the

settled legal position that the Court has no power to usurp the rights of the class of members or creditors to decide whether or not to approve the scheme, if the class whose interests are affected by the scheme, neither assent to nor approve of it in a meeting held in accordance with the statutory provisions and that the Court cannot confirm the scheme even if it considers that the class concerned has been fairly dealt with or that it would have approved the scheme (Palmer's Company Law), would the Court be justified in examining the scheme and recording its satisfaction that the interests of the creditors are not affected, when these are matters which the creditors should have been permitted to examine and decide for themselves in a meeting to be called for this purpose?

16. If the jurisdiction of the Company Court, in examining a scheme of arrangement, is peripheral, supervisory and not appellate, since it does not have the expertise to delve deep into the commercial wisdom of the members who have ratified the scheme by the prescribed majority, (Miheer H. Mafatla), on what basis would the Court decide that, in the facts and circumstances of a given case, a meeting of the creditors or a class of them should or should not be held to ascertain whether they approve of the scheme or not?

17. Section 391(1), enables the Court, on the application of a company or a creditor or a member of the company, to order a meeting of the creditors/or the members "as the case may be" to be held and conducted in such a manner as the Court directs. Under Section 391(2), if a majority representing 3/4th in value of the creditors/members agree, in the meeting, for the compromise or arrangement, the scheme, on its sanction by the court, would be binding on all the creditors/members "as the case may be" and also on the company. The expression "as the case may be" finds place both in Sub-sections (1) and (2) of Section 391. If the words "as the case may be" in Section 391(1) are construed as requiring the Court to order the meeting of only the members, in a Scheme of arrangement between the

Company and its members, and only a meeting of the creditors in a Scheme of arrangement between the Company and its creditors, should the expression "as the case may be" in Section 391(2) then not be read as to bind only the members where a meeting of the members is held and only the creditors where a meeting of the creditors is held? The safeguard in the provision, of 3/4 the members or creditors in value voting in the meeting to approve the scheme, is that the wishes of a majority of the class should prevail, and the dissenting minority of 1/4th or less of the class should not be permitted to derail the scheme of arrangement unless, of course, the Court, on examining the scheme, finds that the objection of the minority is justified. If no meeting of the creditors is required to be held, in a scheme of arrangement between the Company and its members, then, in the absence of ascertaining whether 3/4th in value of the creditors approve the scheme or not, would the Court be justified in statutorily imposing such a scheme of arrangement on the creditors, even though their consent has not been obtained or their wishes ascertained? If it were held that not holding the meeting, and ascertaining the wishes of the creditors, would result in the scheme of arrangement not to bind them, would the very purpose of sanctioning the scheme by the Court not be defeated and approval of the scheme not be an exercise in futility? If, on the other hand, the view, that a meeting of the creditors/members must necessarily be held in all cases irrespective of whether the scheme of arrangement is between the Company and its members or the creditors, is accepted would that not render the words "as the case may be" in Section 391(1) mere surplusage? These are several questions which need answers.

LIFTING THE CORPORATE VEIL: PERMISSIBLE IN CASES WHERE A HOLDING COMPANY AND ITS SUBSIDIARY ARE INVOLVED:

18. It is, however, not necessary for us to seek answers to the aforesaid questions in the present case, as a wholly

owned subsidiary is sought to be amalgamated with its holding company. Under Section 4(1)(a) and (b)(ii) of the Companies Act, a company shall be deemed to be the subsidiary of another only if that other controls the composition of its Board of Directors or where the other company holds more than half, in nominal value, of its equity share capital. In the present case, the entire nominal value of the equity share capital of the transferor is held by the transferee.

19. The legal entity of the Corporation is separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them. Similarly, the creditors or the members have no right to the assets of the Corporation. However the doctrine, that the Corporation or a Company has a legal and separate entity of its own, has been subjected to certain exceptions by the application of the fiction that the veil of the Corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil has been applied in five categories of cases: where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six month after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes and stamps, particularly where the question of "controlling interest" is in issue; in the law relating to exchange control; and in the law relating to trading with the enemy where the test of control is adopted. (Tata Engineering and Locomotive Co. Ltd. v. The State of Bihar ; Palmer's Company Law)

20. In *DHN Food Distributors Ltd. v. London Borough of Tower Hamlets* (1976) 3 All ER 462, Lord Denning quoted with approval the statement in Gower's Company Law that:

there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group, and observed that "this group is virtually the same as a partnership in which all the three companies are partners". He called it a case of "three in one" - and, alternatively, as "one in three....". Goff, L.J. said : "This is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil." The observations of Shaw, L.J. were:

Why then should this relationship be ignored in a situation in which to do so does not prevent abuse but would on the contrary result in what appears to be a denial of justice?

21. Similarly in *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies* (1995) 1 All ER 725 it was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the holding company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. The argument was rejected by Lord Reid with the observation: "This is too technical an argument", "This is an argument in re mercatoria, and it must be construed in the light of the facts and realities of the situation."

22. The aforesaid judgments, in which the corporate veil was lifted, were quoted with approval by the Supreme Court in *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.* and *New Horizons Limited v. Union of India*. In *State of U.P. v. Renusagar Power Co.* the Supreme Court lifted the veil to hold that Hindalco, the

holding company, and Renusagar Power Co., its subsidiary, should be treated as one concern and the power plant of Renusagar must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis. It was observed:

...It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation.... The horizon of the doctrine of lifting of corporate veil is expanding....

23. Lifting the corporate veil, in cases where a wholly owned subsidiary is amalgamated with its holding company, would establish that the creditor is, and has always been, dealing with the transferee company de-facto though he is the creditor of the transferor company de-jure. In such limited cases of amalgamation, as the creditors' rights cannot be said to be affected, holding of a meeting to ascertain their views, and obtain their consent to the scheme of amalgamation, may not be necessary.”

25. The legal position that emerges from a conspectus of the above decisions can be summarized as follows:

- i. *The Court may dispense with the requirement of convening meetings of members and/or creditors or a class thereof, in view of the circumstance that a scheme is not being proposed to members and/or creditors or a class thereof.*
- ii. *The Court may dispense with the requirement of convening meetings of the members and/or creditors of the holding company in the event a wholly owned subsidiary is being*

amalgamated into its holding company and no variation of rights is being caused to such members and/or creditors of the holding company.

- iii. *The Court may dispense with the requirement of convening meetings of creditors or a class thereof, of the wholly owned subsidiary, in the event a wholly owned subsidiary is being amalgamated into its holding company and the rights of creditors of wholly owned subsidiary remain unaffected therein.*
- iv. *The Court may exercise its discretion to dispense with the requirement of convening meetings of members and/or creditors, or a class thereof, in view of the consent obtained from majority in number and three-fourths in value of such members and/or creditors, or a class thereof, as the case may be, in writing to the proposed scheme.*

26. In order to further amplify the reasons underlying the *dicta* in the above decisions, it would first be convenient to reproduce sub-sections (1) and (2) of Section 391 of the Act, which read as hereunder: -

“Section 391. Power to compromise or make arrangements with creditors and members.

(1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them; the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company, which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three- fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

***** ”

27. Section 391 of the Act is a complete code in itself and acts as a ‘single window clearance’ system, so to speak in order to safeguard the rights of parties, members and creditors, or any class thereof, of companies; and to ensure that they are not put to any avoidable, unnecessary and cumbersome procedures in order to effectively implement such a scheme of compromise or arrangement proposed by the companies.

It vests wide amplitude of powers in the Court to approve a scheme which is for the benefit of the companies and the members and creditors thereof.

28. A bare reading of the provision of sub-section (1) of section 391 of the Act reveals that the expression that has been used therein is ‘*may*’. As a general principle of interpretation of statutes, the expression ‘*may*’, as used in sub-section (1) of section 391 of the Act, is permissive and operative to confer discretion. The intent of the Legislature is to empower the Court, with wide powers in order to approve the Scheme whilst ensuring that the rights of members and creditors of the company proposing the scheme are protected.

29. Therefore, whilst adjudicating an application pertaining to a compromise or arrangement proposed, between a company and its members; or between a company and its creditors, the Court has been vested with the power under the provision of sub-section (1) of section 391 of the Act, to direct that meetings of members, creditors, or a class thereof, as the case may be, be called, held and conducted. Such meetings can be called, held and conducted in any manner as directed by the Court, in order to enable the members, creditors, or a class thereof, to consider, and if thought fit, to approve, with or without modifications, the proposed scheme.

30. In light of the settled principles of interpretation of statutes, it is trite to state that there can be no manner of doubt that the Court may, *prima facie*, dismiss the application under the provision of sub-section (1) of section 391 of the Act on various grounds, including the scheme being opposed to public policy and public interest; prejudicial to any member and/or creditor or a class thereof; unconscionable.

31. Therefore, it would not be incorrect to conclude that this judicial discretion conferred on the Court under the provision of sub-section (1) of section 391 of the Act may also be exercised in a manner so as to dispense with the requirement of convening meetings of members and/or creditors or a class thereof, in certain circumstances.

32. Thus, the discretion so conferred upon the Court under the provision of section 391(1) can be summarized as follows:

- i. Upon taking a *prima facie* view, the Court may dismiss the application, proposing a scheme of compromise or arrangement between a company and its creditors or any class thereof; or between a company and its members or any class thereof, on various grounds; OR
- ii. Direct convening of meetings of the members and/or creditors or any class thereof, of the company, to whom a scheme of compromise or arrangement is proposed, in order to enable

such members and creditors to consider and if thought fit, approve, with or without modification, such s scheme; OR

iii. Dispense with the requirement of convening meetings of members and creditors or any class thereof, of the company proposing a scheme of compromise or arrangement.

33. However, it would be trite to state that when a statute confers discretionary power on the Court, such power has to be exercised judicially, as and when an occasion arises, to further the ultimate aim and objective of the statute which confers such discretion; and the specific provision therein. Therefore, ordinarily discretion must be brought to bear on every case as and when it comes up before the Court.

34. Thus, in order to further elaborate the circumstances in which the Court may exercise its judicial discretion to dispense with the requirement of convening meetings of members and/or creditors, or a class thereof, of the applicant companies, it would be necessary to advert to the facts of the present case. In the present case, the proposed scheme which is the subject matter of the present application is one of amalgamation between a wholly owned subsidiary and its holding company. The expressions ‘wholly owned subsidiary’ and ‘holding company’ have been defined under the provisions of section 4 of the Act. Section 4 is extracted hereinbelow for the sake of convenience:

“4. Meaning of "holding company" and "subsidiary".

(1) For the purposes of this Act, a company shall, subject to the provisions of sub- section (3), be deemed to be a subsidiary of another if, but only if,-

(a) that other controls the composition of its Board of directors; or

(b) that other-

(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

Illustration: Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of clause (c) above. If Company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A, by virtue of clause (c) above; and so on.

(2) For the purposes of sub-section (1), the composition of a company' s Board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person, can appoint or remove the holders of all or a majority of the directorships; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say-

(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid;

(b) that a person's appointment thereto follows necessarily from his appointment as director, managing agent, secretaries and treasurers, or manager of, or to any other office or employment in, that other company; or

(c) that the directorship is held by an individual nominated by that other company or a subsidiary thereof;

(3) In determining whether one company is a subsidiary of another-

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to the provisions of clauses (c) and (d), any shares held or power exercisable-

(i) by any person as a nominee for that other company (except where that other is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other company, not, being a subsidiary which is concerned only in a fiduciary capacity; shall be treated as held or exercisable by that other company;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded-,

(d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary[not being held or exercisable as mentioned in clause (c); shall be treated as not held or exercisable by that other, if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company shall be deemed to be the holding company of another if, but only if, that other is its subsidiary.

(5) In this section, the expression "company" includes any body corporate, and the expression "equity share capital" has the same meaning as in sub- section (2) of section 85.

(6) In the case of a body corporate which is incorporated in a country outside India, a subsidiary or holding company of the body corporate under the law of such country shall be deemed to be a subsidiary or holding company of the body corporate within the meaning and for the purposes of this Act also, whether the requirements of this section are fulfilled or not.

(7) A private company, being a subsidiary of a body corporate incorporated outside India, which, if incorporated in India, would be a public company within the meaning of this Act, shall be deemed for the purposes of this Act to be a subsidiary of a public company if the entire share capital in that private company is not held by that body corporate whether alone or together with one or more other bodies corporate incorporated outside India.”

35. Thus, in view of the foregoing and on a perusal of the record in the present case, the Transferor Company is the wholly owned subsidiary of the Transferee Company.

36. Discussing the nature of a scheme of amalgamation, in ***Magnaquest (supra)***, the Andhra Pradesh High Court further observed as hereunder:

“33. In *Telesound India Ltd., In Re*, [1983] 53 Comp Cas 926, the Delhi High Court observed (page 942):

“...Amalgamation of a company with another or an amalgamation of two companies to form a third is brought about by two parallel schemes of arrangements entered into between one company and its members and the other company and its members and the two separate arrangements bind all the members of the companies and the companies when sanctioned by the court. *Amalgamation is, therefore, an absorption of one company into another or merger of both to form a third which is not a mere act of the two companies or their*

members but is brought about by virtue of a statutory instrument and to that extent has statutory genesis and character, and to that extent it is distinguishable from a mere bilateral arrangement to merge or join in a common endeavour, an undertaking or enterprise. (J.K. (Bombay) P. Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd. (1970) 40 Comp Cas 689 (SC). Once the court sanctions the amalgamation, the amalgamation is made effective and binding by virtue of statutory power, inter alia, by the transferor to the transferee-company of the whole or any part of the undertaking, property rights and liabilities of the transferor-company by virtue of the provisions of Section 394 of the Act, which are intended to facilitate the process of amalgamation: Sailendra Kumar Ray v. Bank of Calcutta Ltd. (1948) 18 Comp Cas 1 (Cal). The expression "property" and "liabilities", which can be transferred on amalgamation, under Section 394(1) have been defined in very wide terms by Sub-section (4)(a) of that section, so as to include "rights and powers of every description" and "duties of every description" respectively. The expression "property" would, therefore, be wide enough to include rights under a contract, including a contract of tenancy. These are co-extensive with the property and right which the transferor-company has in relation to its assets, but would not be wider than what the transferor-company was entitled to enjoy. The rights, property, as indeed the liabilities of the transferor-company, become the rights, property and liabilities of the transferee-company by virtue of the order of vesting made by the court consequent on amalgamation. It is neither an assignment of right or property, nor an assignment of property by the company. It is the transfer of rights, property and liabilities along with the company itself and it is only a result of confusion of thought that it could be described as an assignment by the company to another-person, which is independent and distinct from the company. Such a notion ignores the peculiar position of amalgamation in company law and its true legal incident. It is for historical reasons that the device of amalgamation was built into the company law for facilitating the merger of companies, inter alia, with a view to help restoration of sick units to health, better, more effective and economical management of the

corporate sector to ensure continued production, increased employment avenues and generation of revenues. Section 72-A of the I.T. Act is one of the incentives for this kind of absorption of one company into another. *On amalgamation the transferor-company merges into the transferee-company shedding its corporate shell, but for all purposes remaining alive and thriving as part of the larger whole. In that sense the transferor -company does not die either on amalgamation or on dissolution without winding up under Sub-section (1) of Section 394. It is not wound up because it has merged into another. Winding-up is unnecessary. It is dissolved not because it has died, or ceased to exist, but because for all practical purposes, it has merged into another forming part of one corporate shell. The dissolution is the death of its independent corporate shell, because a company cannot have two shells. It is, therefore, dissolved because the independent shell or corporate name is superfluous.*”

37. A reading of the above extract makes it clear that ordinarily, by virtue of a scheme of amalgamation, the Transferor Company merges its corporate identity into the corporate identity of the Transferee Company. All the properties and liabilities of the Transferor Company are transferred to the Transferee Company upon the scheme of Amalgamation coming into effect.

38. In case of a wholly owned subsidiary amalgamating into its holding company, the wholly owned subsidiary merges its corporate identity into the corporate identity of its holding company. In order to ascertain whether the rights of the creditors of the wholly owned subsidiary would be affected by the proposed scheme, it becomes necessary to pierce the

corporate veil of the wholly owned subsidiary and determine whether the creditors of the wholly owned subsidiary are, and have always been, dealing with the holding company *de-facto* though they are the creditors of the wholly owned subsidiary *de-jure*. [Ref: **Magnaquest (supra)**]

39. Ordinarily, seen from the lens of the holding company, a scheme of amalgamation is essentially a contract which does not affect the creditors or members of the holding company in any manner. Therefore, the scheme is not required to be sanctioned from the point of view of the holding company, under Section 391 of the Act. [Ref: **Sharat Hardware industries (supra)**]

40. However, if the Court, on examination of the record and the proposed scheme, is of the view that the scheme is found to have some flaws/drawbacks, inasmuch as, whereby the rights of the members and/or creditors or a class thereof, of the holding company stand varied, it would require the approval of such members and/or creditors, at a meeting or meetings held in accordance with Section 391 of the Act and would also require the sanction of the Court.

41. In the present case, by virtue of the proposed scheme, the entire business and undertaking of the Transferor Company is being taken over and transferred to the Transferee Company. Further, upon the proposed scheme coming into effect, as consideration, there will be no issuance of

new shares by the Transferee Company to the shareholders of the Transferor Company in view of the circumstance that the latter is the wholly owned subsidiary of the former.

42. Therefore, in effect, in the instant case, on the proposed scheme coming into effect, no variation in the rights of the *equity shareholders* of the *Transferee Company* shall be caused. Resultantly, judicial discretion can be exercised to dispense with the requirement of convening the meetings of the equity shareholders of the Transferee Company, in the case of a wholly owned subsidiary being amalgamated into the Transferee Company, on the ground that no variation in rights thereof is contemplated by way of the proposed scheme.

43. In so far as the *creditors* of the *Transferee Company* are concerned, no variation in their rights is being proposed by way of the proposed scheme. Thus rights of the creditors of the Transferee Company, pre and post amalgamation, as against the Transferee Company would not stand varied.

44. In so far as the requirement of convening a meeting of the *unsecured creditors* of the *Transferor Company* is concerned, by lifting the corporate veil, in the present case, of wholly owned subsidiary being amalgamated with its holding company, it would be established that the creditors of the Transferor Company are, and have always been, dealing with the

Transferee Company *de-facto* though they are the creditors of the Transferor Company *de-jure*.

45. Further, it has been noted that, upon the proposed scheme coming into effect, all the existing liability, debts, duties, obligations, *inter alia*, of the Transferor Company shall in any event stand transferred to the Transferee Company. Therefore, no variation in the rights of the unsecured creditors of the Transferor Company is proposed.

46. Hence, in effect, it could not be said that any 'compromise or arrangement' is being offered by way of the proposed scheme to the creditors or shareholders of the Transferee Company; or the unsecured creditors of the Transferor Company. Therefore, in view of this circumstance and the foregoing discussion, the requirement of convening a meeting of the creditors and equity shareholders of the Transferee Company; and the unsecured creditors of the Transferor Company, to consider, and if thought fit, approve, with or without modifications, the proposed scheme can be dispensed with. Directed accordingly.

47. It has been noted that the sole equity shareholder of the Transferor Company is the Transferee Company, the former being the wholly owned subsidiary of the latter. The sole equity shareholder/Transferee Company has given its written consent to the proposed scheme and the same is on record. Therefore, the requirement of convening meeting of the sole equity

shareholder of the Transferor Company to consider and if thought fit, to approve, with or without modifications, the proposed scheme is also dispensed with.

48. Since the Transferor Company has no secured creditors, therefore the question of convening a meeting thereof does not arise. Ordered accordingly.

49. In view of the circumstance that the requirement of convening meetings of the creditors and members of the Applicants has been dispensed with hereinabove; the requirement of giving individual notices in Form No. 35 of the Company (Court) Rules, 1959 and publication of notices of the meetings of the shareholders and creditors of the Applicants is also dispensed with. Directed accordingly.

50. Resultantly, in view of the foregoing discussion with regard to the legal position and the determination upon the facts, the issue that arose for consideration stands answered in the affirmative.

51. The application stands allowed in the aforesaid terms and is accordingly disposed of.

SIDDHARTH MRIDUL, J

JANUARY 16, 2017
ap/sb/mk