CHAPTER-II
LEGAL AND REGULATORY FRAMEWORK
FOR MERGERS AND AMALGAMATIONS

2.1. Introductory

The unleashing of Indian Economy has thrown open lucrative and dependable opportunities to business communities as a whole. The absence of restrictions on the size and volume of business is encouraging enterprises to opt for mergers and amalgamations with intent to produce on massive scale, to enjoy the benefits of scales of operation, to reduce cost of production and to make prices internationally competitive. Mergers and amalgamations have become symbol of the new economic world.

In business combinations, in any form of takeover, acquisition, merger or amalgamation, the individual and community interest of different parties viz. shareholders, creditors, employees and consumers are involved from different angles. Involvement of social interests in the economic activities implies application of law with a view to regulate the activity to ensure safeguard of general public interest. Provisions have been made in different statutes for regulating the procedure of mergers and takeovers or any form of business organisations with a view to ensure that such business reorganisations do not result in jeopardising the public interest either by squeezing or exploiting the minority shareholders of the company or the interest of prospective investors and creditors of the company or the consumers, the end-users of the company’s product or services.

For these reasons, it is imperative to comprehend and understand the provisions of various corporate laws including the Companies Act, 1956 relating to mergers and amalgamations.

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In the words of Justice Dhananjaya Y Chandrachud:

“Corporate restructuring is one of means that can be employed to meet the challenges and problems which confront business. The law should be slow to retard or impede the discretion of corporate enterprise to adapt itself to the needs of changing times and to meets the demands of the increasing competition. The law as evolved in the area of mergers and amalgamations has recognised the importance of the court not sitting as an appellate authority over the commercial wisdom of those who seek to restructure business.”

India’s economic system, so far has been tinged to regulated economy to meet the planned objectives of socialist pattern of economic development. As such, all formations, reorganisation and combinations of business enterprises have been viewed from the angle of anti-monopoly and lessening the concentration of economic power in few hands. The government, as a part of public policy had come out with restrictions on the private sector corporate enterprises with a view to ensure regulation or control on their growth and to channelise the growth into these directions where maximum public good could be achieved. It is only very recently in the beginning of 1990s that the government has started taking some steps to liberalise the economy from the restrictions particularly relaxing such restrictions inbuilt in the legal system. Therefore, our company law is also being changed by our legislature to suit the needs of liberalised economy in the form of the new Companies Act, 2013.

Therefore, in this chapter the provisions of the Companies Act, 1956 relating to schemes of arrangement encompassing mergers and amalgamations would be elaborately and critically looked into so that one can understand the procedural labyrinth involved in successfully accomplishing a scheme of amalgamation. Alongwith that we will have a sneak peak into the provisions of the new Companies Act, 2013, important concepts introduced by the 2013 Act and the procedural formalities involved in a scheme of merger or amalgamation. Last, but not the least, the judicial attitude towards mergers and amalgamations has been analysed along with relevant provisions as well as separately

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3 Ion Exchange (India) Ltd., In re, (2001) 105 Com Cases 115 (Bom.).
2.2. Provisions of the Companies Act, 1956 Regulating Mergers and Amalgamations

With a total of 658 sections and 14 schedules, the Companies Act is the largest legislation on the statute book. At the same time, if one looks at the provisions dealing with corporate reorganisation there are hardly seven sections that deal with the procedural aspects, reducing the various methods which one can conjure, into bare legal abstracts sections 390-396A. The entire legal procedure for the processes of mergers, amalgamations and takeovers has been incorporated in sections 391 to 396 of the Companies Act, 1956 which jointly deal with the compromise and arrangement with creditors and members of a company needed for a merger.\(^5\) Whereas in the Companies Act, 2013, sections 230-240 regulate compromise, arrangement and amalgamation.

Before discussing the law and the relevant procedures to be followed under the Companies Act, 1956 for effecting a scheme of arrangement, including merger or demerger, it would be necessary to understand the meaning of various expressions like schemes of arrangements, amalgamations etc. Corporate restructuring is effected by schemes of arrangement and therefore the definitions assume importance.

2.3. Important Definitions

2.3.1. Amalgamation and Reconstruction

According to Charlesworth Company Law:

“Neither the word ‘reconstruction’ nor ‘amalgamation’ has any definite meaning. A reconstruction is where a company transfers its assets to a new company with substantially the same shareholders. An amalgamation is the merger of two or more companies whose shareholders are issued with appropriate number of shares in the new company.”\(^6\)

The term ‘reconstruction’ has been used in section 394 alongwith the term ‘amalgamation’. The term has not been defined therein but it has been used in the sense not synonymous with amalgamation. As we have already discussed in detail the meaning of the term merger as well as amalgamation in the previous chapter so the

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terms will not be delved in here. In Indian context, the term reconstruction would cover various types of arrangements or compromises which may include merger as well as demerger. Lets study some important judicial pronouncements which will further clarify the meaning.

In *South African Supply and Cold Storage Co., In re,* Buckley J., while dealing with the word ‘reconstruction’ observed:

“What does ‘reconstruction’ mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on—that would be a mere sale—but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on.”

In the Indian context, it has been very appropriately defined by the Kerala High Court in *Kerala State Cashew Development Corporation v. Commissioner of Income Tax,* as “reconstruction is the rejuvenation or rehabilitation of an existing undertaking. The original business or undertaking continues to exist without its identity being lost.”

### 2.3.2. Arrangement and Compromise

According to section 390(b), the expression ‘arrangement’ includes a re-organisation of the share capital of the company by the consolidation of shares of different class, or by the division of shares into shares of different classes or, by both theses methods. Thus, the expression ‘arrangement’ has been defined in section 390(b) of the Act, it is, only an inclusive definition. The Act treats amalgamation as a scheme of ‘arrangement’ with members. The Act thus enunciates two possibilities of scheme of arrangement. They are (a) between a company and its creditors (b) between a company and its members. Despite the tenuous difference, a scheme of arrangement with members (for amalgamation and mergers) is clearly distinguishable from a mere scheme of compromise with creditors.

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7. (1904) 2 Ch 268.
8. (1994) 205 ITR 19 (Ker.).
The word ‘arrangement’ has a very wide meaning and is wider than the word ‘compromise’. The word ‘compromise’ implies some element of accommodation on each side. Similarly, the word ‘arrangement’ also implies some element of give and take. There can be no compromise unless there is some dispute e.g. as to the power to enforce rights or as to what those rights are.\(^\text{10}\) Compromise refers to the process of restructuring under which a company enters into a scheme with its creditors for settlement of debts.

### Case Law

In *Vasanth Investment Corporation Ltd., In re*\(^\text{11}\), it was held:

“An arrangement under section 391 does not mean that it should be with creditors alone or must involve changes in the rights of the members of the company. The words used in section 391 are wide enough to cover all arrangements made between a company and its members including an arrangement to restart the company.”

To conclude, the meaning of both the terms can be well understood from the judgement of Gujarat High Court in *Navjivan Mills Co. Ltd., Kalol, In re*\(^\text{12}\).

“The word ‘arrangement’ is such that even where there is no dispute, arrangement can be brought in. ‘Compromise’ postulates the existence of a dispute and giving and taking on either side. ‘Arrangement’, on the other hand, is something by which parties agree to do a certain thing notwithstanding the fact that there was no dispute between the parties. If such is the wide connotation of the word ‘arrangement’ as used in section 391, obviously, the arrangement by which shares of one company are taken over by the other company would not be outside the scope of the word ‘arrangement’. ‘Compromise and Arrangement’ covered by section 391 are of the widest character, ranging from a simple composition or moratorium to an amalgamation of various companies, with a complete reorganisation of their share and loan capital. If this is the scope of section 391, it does appear that section 391 is a complete code by itself.”

To summarise, from the above judgements we are introduced to the word ‘arrangement’ which in used in section 391 and 393 and the term ‘compromise’ by way of exposition


\(^{11}\) (1982) 52 Com Cases 139 (Bom.).

\(^{12}\) (1972) 42 Com Cases 265 (Guj.).
by various cows. When a company has a dispute with a member or a class of members or with a creditor or a class of them, a scheme of compromise may be drawn up. When there is no dispute but there is need for re-adjusting the rights or liabilities of a member or a class of them or of a creditor or a class of them, the company may resort to a scheme of arrangement with them. The provisions of section 391 and 393 show that a compromise or arrangement can be proposed between a company and its creditors or between a company and its members. Such a compromise would also cover any scheme of amalgamation or merger of one company with another.

Thus, section 390 introduces us to the subject compromise, arrangement and reconstructions explained in chapter V of the Companies Act, 1956. This self-contained code begins with definitions in section 390. These definitions, if looked at in abstract terms, will hardly help us either to understand or proceed further unless they are studied along with the provisions of compromise, arrangement, reconstruction and amalgamation in sections 391-396.

The substantive law governing scheme of arrangement including amalgamations are contained basically in section 391 to 394 A of the Act. These five sections not only prescribe the procedure to be followed but also lay down the law to be complied with for such schemes.

2.4. Power to Compromise and Make Arrangements with Creditors and Members (Section 391)

Section 391 authorises the sanctioning of compromises or arrangements and deals with the rights of companies to enter into a compromise or arrangement (a) between itself and its creditors or any class of them (b) between itself and its members or any class of them as regards restructuring, merger, demerger and hiving off a unit without going into liquidation. For any scheme of arrangement, there are two basic requirements namely, (a) to get the scheme approved by members/creditors in a meeting and (b) get the same sanctioned by the High Court/Tribunal. It would not be an exaggeration if it is said that the entire law and all the procedural requirements centre around these two requirement.

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This automatically leads us to a basic question as to who will move an application before High Court for getting a direction for holding a meeting. This question is answered hereunder to find out the law as to the persons who are entitled to apply. Section 391 answers this question.

2.4.1. Persons who are Competent to Make an Application under Section 391

In terms of section 391 of the Act, where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the court (Tribunal) may order a meeting of the creditors or class of creditors or of the members or a class of members, on the application of the company, or a creditor, or member of the company or in the case of a company which is being wound up by the liquidators. Since an amalgamation is also a scheme of arrangement the above said persons are entitled to apply under section 391 for a court’s sanction for such amalgamation under sections 391 and 394 of the Act.\(^{15}\)

(1) Application by the Company: The company can make an application for scheme of arrangement under section 391 and for scheme of merger or amalgamation under section 394. In case of merger or amalgamation both transferor or transferee can make on application on behalf of the company, the said application is moved by its authorised representative who is one of the directors. In case of listed companies, before making an application to the court, a copy of scheme should be filed with the stock exchange for approval.\(^{16}\) If no approval is received with 30 days, it is presumed that the concerned stock exchange has no objection.

(2) Application by Members of a Company: The members have a right to apply under sections 391 and 394 for sanction of a scheme. The expression ‘member’ is to be understood as defined under section 41 of the Act.\(^{17}\) The term ‘members’ will include both equity shareholders, preference shareholders as also all other class of shareholders.

\(^{15}\) N.R. Sridharan and P.H. Arvind Pandian, 2010, p. 120.

\(^{16}\) Clause 24(f) of the Listing Agreement.

\(^{17}\) Section 41 of the Companies Act, defines who is a member

1. The subscribers to the Memorandum of a company shall be deemed to have agreed to become members of the company and on its registration shall be entered as members in its register of members.

2. Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be treated as a member of the company.
So long as the person is holding shares and his name is recorded in the register of members maintained by the company or the depository, he will be treated as a member.

**Successor to a member as well as transferee of shares are also entitled to apply**

In *N.K. Mohapatra v. State of Orissa*,\(^{18}\) it was held that a successor to shares of a deceased member has in the normal course locus standi to maintain an application under section 391 and 395. However, his claim as successor of a deceased member would depend on his producing documentary proof for the same, whereas in *A.K. Misra v. Wearewell Cycle Co. (India) Ltd.*,\(^{19}\) the Delhi High Court held that an application can also be made by transferee of shares.

(3) **Application by Creditors:** The creditors also have a right to apply to the court generally for schemes in the nature of ‘compromise’. There is no bar on the creditor for making an application for a scheme of internal reconstruction not being scheme of compromise but in the nature of arrangement. For example, ‘conversion of debt into equity’ would come under this category. The term ‘Creditor’ in section 391 would take in its fold all categories of creditors whether secured or unsecured, actual or contingent.\(^{20}\) However, it would seem secured creditors would play a more pivotal role than unsecured creditors. In *Auto Steering India Pvt. Ltd., In re*,\(^{21}\) it was laid down that scheme rejected by secured creditors is deemed to have been rejected by all creditors.

The Halsbury’s Laws of England\(^ {22}\) interprets the expression ‘creditor’ to include every person having a pecuniary claim against the company. Such pecuniary claim can be actual or even contingent. In the leading judgement of *Seksaria Cotton Mills Ltd. v. A.E. Naik and Others*,\(^ {23}\) it was held that the word ‘creditor’ in section 391 in used in the widest sense so as to include all persons having pecuniary claims against the company. The amount due need not be ascertained and the claim may be is present or future, certain or contingent, ascertained or sounding only in damages.

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\(^{18}\) (1995) 1 Comp LJ 266.

\(^{19}\) (1993) 78 Com Cases 252 (Del.).


\(^{21}\) (1977) 47 Com Cases 257 (Del.).


\(^{23}\) (1967) 37 Com Cases 656 (Bom.).
In ‘Inland Steam Navigation Workers’ Union v. River Steam Navigation Company Limited’, under an agreement arrived at between the company and the workers under the Industrial Dispute Act, the company had to pay substantial sum to the workers, it was held that the workers could not be considered to be creditors of the company and, hence, they were not entitled to oppose the scheme. In Reliance Communications Ltd., In re, the Bombay High Court said that an intervener who was neither a creditor nor a shareholder of any company had no locus standi to raise any objection to the scheme.

(4) Application by Liquidator: The Liquidator is also empowered to make an application to the court for consideration of schemes. However, his right is restricted to only those cases where the companies are in liquidation. In the case of a company being wound up, the liquidator is only an additional and not an exclusive person who could make an application to the court for proposing of a scheme.

2.4.2. Classes of Members and Creditors

As discussed above, the creditors and members are competent to apply under the provision of chapter V of Part VI to the court for an arrangement/amalgamation. Further, sub-division of the above two categories of applicants into ‘classes of creditors’ and ‘classes of members’ becomes necessary as section 391 recognises the fact that only those classes are to be made party to the scheme whose interest are effected. The nature of these sub-divisions who constitute class, their meaning, rights, and other connected issues are discussed hereunder.

Class: Where there are different groups within a ‘class’ (of members or creditors) whose interests are different from the rest of the ‘class’ or who are to be treated differently for the purposes of a scheme, such groups will have to be treated as a separate class for the purpose of the scheme. Buckley on the Companies Act makes an observation that ‘class’ must be confined to those persons whose rights are no dissimilar so as to make it impossible for them to consult together with a view to their common interest. To sum up, the group styled as class should, ordinarily be homogeneous and

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24 (1968) 38 Com Cases 99 (Cal.).
25 (2010) 153 Com Cases 233 (Bom.).
must have commonality of interest and the compromise offered to them must be identical.

Whether a particular group of members or creditors would form a class distinct from other members or creditors would depend largely on the facts and circumstances of each case. As where shares are issued with differential rights, every shareholder having the same rights could form a class. For example, preference shareholders will form a separate class from equity shareholders. Debenture holders may form a class by themselves. Convertible debenture holders may form a separate class from non-convertible debentures. Shareholders with fully paid-up shares may form a different class from partly paid up shares. Similarly in case of class of creditors-there could be preferential and unsecured creditors.

The meaning of the term classes of members can be understood better from the various pronouncements of the court from time to time. The most important judgement which discussed what constitutes a ‘class of members’ is judgement of the Apex Court in Mihir H. Mafatlal v. Mafatlal Industries Ltd., 29 In this case, the Supreme Court drew support from what Palmer in his treatise on Company Law (24th Edition) had to say:

“What constitutes a class. The court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the company to decide, in accordance with what the scheme purports to achieve. The application for a order for meetings is a preliminary step, the applicant taking the risk that the classes are fixed by the judge, unusually on the applicant’s request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, they reveal inadequacies, the scheme will not be approved.”

The court further said:

“If e.g. rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be treated differently under the scheme, such groups must be treated as separate class for the purpose of the scheme.”

29 AIR 1997 SC 506.
Whereas in the case of *SIEL Ltd., In re*, the Delhi High Court observed that:

“A reading of section 391 would make it amply clear that where different terms are offered to different class of creditors under the proposed compromise or arrangement, then in that event a separate class could be said to be constituted in respect of each class of creditors or shareholders and in that event, separate meetings are to be held for such different class of creditors. If the creditors do not have a commonality of interest and if their rights and interests under a compromise would have different effect, they are to be separately treated and cannot be included into one class. Those who are offered substantially different compromise have to be treated separately and differently. A group of persons would constitute one class when it is shown that all of them have a common interest and they are not adversely situated. This test provides the criteria for formation of a class or a group.”

However, to determine the class/classes of members and/or creditors whose meetings have to be held for considering the proposed compromise or arrangement, the court may consider certain members or creditors as a class. For example, the interest of a wholly-owned subsidiary of a company which is taking shares in another company under a scheme of arrangement, when the subsidiary holds shares in that other company are different from those of the other ordinary shareholders and therefore the subsidiary is in a different class from the other ordinary shareholders and separate meetings must be held to approve the scheme, if the court so direct.

In *Ram Kohli v. Indrama Investment (P.) Ltd.*, in the scheme of amalgamation, each 500 shares held in transferee company were to be replaced with one share in new company and shares below 50 in number were to be treated as fractional shares and to be sold by trustee through private placement. It was contended that shareholders whose shareholding was being treated as fraction under scheme, should be treated as separate class and a separate meeting should be held for them. But the Delhi High Court held that the decisive factor for determining class of shareholders is not shareholding pattern.

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32 (2013) 120 SCL 125 (Delhi).
but category of shares one holds and merely because individual held small fraction of shares would not make them a separate class.

It is a settled law that the interest of the individual shareholder or a group under his control does not entitle him to separate or district treatment if his legal rights are not in any way distinct from the rights of the entire class of shareholders. We have already discussed as to who can make an application under section 391. When such an application is made, the court does not ordinarily decide whether a particular group of members or creditors form a separate class and the order for convening the meeting or meetings is usually passed on the bases of the averments made in the application and the classifications as proposed by the applicant. It is the applicant who proposes the classification at the risk of the scheme being rejected ultimately if the court at the hearing of the petition which is filed subsequently for sanction of the scheme finds that classification proposed by the applicant was improper and the separate meetings of the proper classes have not been held.

2.4.3. Requirement as to Majority for Passing a Scheme of Compromise or Arrangement [Section 391(2)]

The effect of the consensus that emerges from the meeting of the members or the creditors, as the case may be, is spelt out in sub-section (2). According to section 391(2), if a compromise or arrangement is approved by a majority in number representing three-fourth in value, then subject to the sanction of the court, the said compromise or arrangement will be bindings on all the creditors, members and also by the company. To put it in simpler terms, this sub-section indicates that the will of the majority will prevail in successfully implementing a compromise or arrangement in the interest of the company.

The checks and balances to prevent the majority from abusing their position by suppressing the minority are also contained in the said sub-section. They are:

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33 Mafatlal Industries Ltd., In re (1995) 5 Comp LJ 38 (Guj.).
1. The required majority for approving compromise or arrangement is three-fourths in the value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy.

2. The scheme of compromise or arrangement should be further approved by the court.

Unless both the conditions are satisfied, a scheme cannot be implemented. The purpose of the rule which requires approval to scheme by a majority of three-fourth in value is given in an English case: ‘The purpose is to prevent a numerical majority with a small stake, out voting a minority with a large state e.g. to prevent members with one share each outvoting 49 members with 10 shares each.’\(^\text{36}\)

Moreover, the three-fourths majority envisaged under section 391(2) has to be of the value of the creditors present and voting and not of the total value of the creditors.\(^\text{37}\)

### 2.4.4. Courts to Ensure Compliance with Statutory Provisions before Sanction

The matters which the court has to consider in giving its sanction were explained by Astbury J. in *Anglo Continental Supply Co, In re*,\(^\text{38}\) as follows:

1. Firstly, the provisions of the statute have been complied with.

2. Secondly, the class was fairly represented by those who attended the meeting and that the statutory majority are acting bonafide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent.

3. Thirdly, that the arrangement is such as a man of business would reasonably approve.

As Indian Courts follow English Law in this regard, similar parameters were laid by Indian Courts in *Kamala Sugar Mills Ltd., In re*,\(^\text{39}\) which were as follows:

1. Under section 391(2) of Companies Act, 1956, the scheme of amalgamation should be approved by a majority in number representing three-fourth in value

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\(^{36}\) N.F.U. Development Trust Limited (1972) 1WLR 1548 at p. 1553.


\(^{38}\) (1922) 2 Ch 723 at p. 736.

\(^{39}\) (1954) Com Cases 308 at pp. 312-313.
of the members or class of members present and voting either in person or proxy.

2. The next aspect which the court has to bear in mind is to see whether the majority of the members has been acting bonafide and whether the minority has been overridden by the majority having interests of its own clashing with those of the minority whom they seek to coerce.

3. The next aspect that has to be born in mind whether sanction should be accorded to the scheme of amalgamation or not is that the scheme as a whole is a fair and reasonable one or not. It is not for the court to substitute its judgement for the collective wisdom of the shareholders of the two companies, if the court finds having regard to the general conditions and background and object of the scheme that the scheme as a whole is fair and reasonable. If the court finds, the scheme is fair and reasonable the burden will be on the objector to show that the scheme is so unfair and unreasonable that no reasonable man would accept it, notwithstanding the views of the large majority of the shareholders that the scheme is fair one, then the court should refuse to confirm the scheme of amalgamation.

For the purpose of exercising its powers, the courts may evolve and follow certain policies, precedents, standards and rules for the purpose of guiding them in exercise of their discretion. They may also fix a time frame for submission of schemes.  

2.4.5. Reasonableness and Fairness of a Scheme

For a scheme to be considered for sanction by a court, it has to be fair and reasonable. But what is meant by ‘fair and reasonable’ is left to the court to decide using its discretion. It has been held that a scheme must be considered to be unfair to the ‘meanest intelligence’ before it is rejected by the court. A scheme should be supported by sensible people to be for the benefit of each class of members or creditors concerned, in other words, if a scheme has to be rejected it must be obviously and patently unfair even to the ‘meanest intelligence’.  

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40 Sidhpur Mills Co. Ltd., In re, (1980) 50 Com Cases 7 (Guj.).
For the purpose of sanctioning a scheme, the correct approach would be to look at it from the viewpoint of ordinary reasonable shareholder, acting in a business like manner taking within his comprehensions and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme. The scheme should not be scrutinised in the way a carping critic, a hair-splitting expert, a meticulous accountant or a fastidious counsel would do it. Though the court would see whether a scheme is fair and reasonable, the initial burden in this respect would be that of the petitioner.42

Thus, the powers of the judiciary in the matters of sections 391 and 394 of the Companies Act can be involved only when it is revealed that the whole scheme is unfair, unreasonable, contrary to law and public policy held Skipper Electrical India Ltd., In re.43

The court in Ganesh Synthetics (P.) Ltd., In re44 found that since matter of restructuring of finance of company was being monitored by Corporate Debt Restructuring Cell, it obviated any chances of company indulging in any kind of surreptitious or under hand dealing and therefore court sanctioned the scheme after finding that all the formalities were complied with and scheme was not against any public interest whereas in Vodafone Essar Ltd., In re45 the scheme does not involve any consideration but a transfer by way of gift. Income tax department objected to the scheme on this ground. But since policy of government of India had recommended that sharing of infrastructure be promoted and that incentives be given for this and since the scheme was propounded with that object in view, it could not be said that object of scheme was aimed at avoidance of tax and it was against public interest. Therefore, court sanctioned the scheme.

2.4.6. Effect of Court’s Order

An order of the court sanctioning the scheme becomes binding on all the creditors, and the liquidator and the contributories so that whether it is valid or not, a shareholder

42 Siddhpur Mills Co. Ltd., In re, (1980) 50 Com Cases 7 (Guj.).
43 (2007) 75 SCL 270 (Raj.).
44 (2010) 100 SCL 195 (All.).
45 (2011) 107 SCL 51 (Del.).
cannot afterwards question it.\textsuperscript{46} In \textit{J.K. (Bom.) P. Ltd. v. New Kaiser-I-Hind Spinning and Weaving Co. Ltd.}, \textsuperscript{47} the Apex Court explained the effect of the court’s sanction of scheme in the following words.

“The scheme when sanctioned does not merely operate as an agreement between the parties but has a statutory force and is binding not only on the company but even on dissenting creditors or members, as the case may be. The scheme once sanctioned, cannot be altered except with the sanction of the court even if the shareholders and the creditors acquiesced in such alteration.”

Sub-section (2) of section 391 allows the decision of the majority prescribed therein to bind the minority of creditors and shareholders and it is for that reason that a scheme is said to have statutory operation and cannot be varied by the shareholders or the creditors unless such variation is sanctioned by the court.

The order of the court under section 391(2) is given a lot of weightage and it even overrides the non-observation of other statutory provisions. Recently Calcutta High Court in \textit{Castron Technologies Ltd. v. Castron Mining Ltd.}, \textsuperscript{48} has held that an order of the court sanctioning instant scheme becomes binding on all the shareholders and shareholders cannot, afterwards, question it. The sanction of the court operates as a judgement \textit{in rem}.

\textbf{2.4.7. Effect of Proviso in Section 391(2)}

This proviso was inserted by the companies (Amendment) Act of 1965 consequent to the recommendation of the Daphtry Shastri Committee. Arising out of the finding of the Vivian Bose Commission, the Daphtry Shastri Committee has recommended that provision should be made for the disclosure of all material facts to a court such as the financial position, the latest audit report, the pending of investigation proceeding, etc, before court accepts proposal of compromise or arrangement at the instance of the liquidator.\textsuperscript{49}

\begin{thebibliography}{99}
\bibitem{47} AIR 1970 SC 1041.
\bibitem{48} (2012) 111 SCL 259 (Cal.).
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The power of the court in sanctioning the scheme is further restricted by a proviso to section 391 (2) which casts an obligation on the applicant to disclose certain information such as the:

- Latest financial position of the company.
- Latest auditor’s report regarding accounts of the company.
- The pendency of any investigation proceedings in relation to the company under section 235 to 251 and the like.

But the 2013 Act in proviso to section 230(7) has replaced the disclosures with a certificate by the company’s auditor that accounting treatment is in conformity with accounting standards.

In Maneckowk and Ahmedabad Mfg Co. Ltd., In re,\textsuperscript{50} the court while explaining the effect of proviso to section 391(2) stated that:

“\textquote{The proviso to section 391(2) is cast in negative form. As the proviso is prohibitory in character, it is not possible to treat it as merely permissive. As it provides conditions precedent to the court’s exercise of jurisdiction for sanctioning the scheme, it definitely appears to be mandatory in character and must be strictly complied with. In the absence of the fulfillment of this condition the court will have no jurisdiction to sanction the scheme.}”

To conclude, we can say that the broad and general principle in any compromise or settlement is that it should not be unfair, contrary to public policy and unconscionable or against the law.\textsuperscript{51}

**Latest Financial Position:** In the event of the latest authenticated financial position of the company not being placed before the court at the time of filing of petition, court can return the scheme without sanction.\textsuperscript{52} The latest auditor’s report of the company which is required to be disclosed is the one which would be available as on the date of filing of the application for sanction.\textsuperscript{53}

\textsuperscript{50} (1970) 40 Com Cases 819 (Guj.).
\textsuperscript{51} Aksh Optifibre Ltd., In re, (2007) 77 SCL 219 (Raj.).
\textsuperscript{52} Bharat Synthetics Ltd. v. Bank of India, (1995) 82 Com Cases 437 (Bom.).
\textsuperscript{53} Aradhna Beverages and Food Company Ltd., In re, (1998) 93 Com Cases 899 (Del.).
But when there is a long gap between filing of the latest balance sheet and the time when the court considers the scheme for sanction then the court may require the company to file latest financial position again. But otherwise, it is clearly held by the courts time and again that the latest financial position should be disclosed as at time of filing of the petition.\textsuperscript{54}

2.4.8. Other Relevant Provisions of Section 391

- An order passed by the court/tribunal approving the scheme shall take effect from the time a certified copy is filed with the Registrar.\textsuperscript{55}

- A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy has been filed with the Registrar and in case the company is not having memorandum to every copy of the instrument constituting or defining the constitution of the company.\textsuperscript{56}

- If any default is made in complying with this provision the company and every officer of the company who is in default shall be punishable with fine of Rs. 100 for each copy in respect of which default is made.\textsuperscript{57}

These sub-sections were presumably introduced to ensure notice of the order sanctioning the scheme to persons dealing with the company so that they may deal with the company henceforth with the knowledge of the scheme.\textsuperscript{58}

2.4.9. Separate Petition to be Filed by the Transferor and Transferee Companies

On this point, the courts are divided. The Karnataka High Court in \textit{Electro Carbonium Pvt. Ltd., In re},\textsuperscript{59} held that a common petition is not maintainable but two separate petitions must be filed by the transferor and the transferee companies though for the same purpose.

\textbf{Contrary View:} There is no indication in section 394(1)(b)(vi) that the transferee and transferor companies have to make separate applications at all. The right to relief in all

\textsuperscript{54} Blue Star Ltd., \textit{In re}, (2001) 104 Com Cases 371 (Bom.).
\textsuperscript{55} Section 391(3) of the Companies Act, 1956.
\textsuperscript{56} Section 391(4) of the Companies Act, 1956.
\textsuperscript{57} Section 391(5) of the Companies Act, 1956.
\textsuperscript{59} (1979) 49 Com Cases 825 (Kar.).
these applications arises out of the same act or transaction and even if the companies file separate applications the common question of law or fact would arise in all the applications which has to be decided by the court as held in *Chembra Orchard Produce Ltd., In re*, the Karnataka High Court did not stop here and further elaborated that the Electric Carbonium judgement has been rendered *per incuriam* and would not be a binding precedent.

2.4.10. Dispensing with Meeting in Schemes of Arrangement

Where the court observes that any of the following circumstances exist in the case of a mergers, it may not order a meeting:

1. Generally, where the shareholders are few in number or where the members is restricted to a single family, Hindu Undivided Family or close relatives.

2. Where it is a wholly owned subsidiary and the company and its holding company are involved in a merger:

3. Where the members or creditors are scattered at various places but have given their consent otherwise by the doctrine of acquiescence; and

4. Where shareholding pattern of transferor and transferee companies are identical.

However, even though one or more of the above circumstances exist, the court may exercise its discretion to dispense with the meeting on a case to case basis without categorising the circumstances.

The Bombay High Court in *ICICI Ltd., In re*, held that where the arrangement is purely between the company and its members, not adversely affecting creditors or any class of them, the court is not bound to convene a meeting of the creditors. However, where the arrangement between the company and its members is likely to adversely affect the creditors, it would be proper for the court to exercise its judicial discretion to convene the meeting of the creditors, unless majority of the creditors representing three-fourth in value of the creditors have otherwise given consent for the same.

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62 Id., p. 156.
63 (2002) 36 SCL 682 (Bom.).
In the case of *Dabriwala Steel and Engineering Co. Ltd. (In Liquidation), In re,*\(^{64}\) the Punjab and Haryana High Court held that since all shareholders of company had themselves filed petition, separate meetings of such shareholders becomes unnecessary. Moreover, all secured creditors claims had been satisfied except two and said claims had also been adjudicated by official liquidator, there could be, therefore, no specific direction for convening of any meeting of secured creditors.

Further in the case of *Skipper Electric India Ltd., In re,*\(^{65}\) the shareholders and the creditors of the companies have agreed in writing to the proposed amalgamation and have also agreed that the respective meetings as required under section 391(1) need not be held. The court thus sanctioned the scheme to be fair, reasonable and not contrary to the interest of the shareholders and creditors.

Further, in *Shyam Telecom Ltd., In re,*\(^{66}\) the court held that a meeting of shareholders and creditors to approve a scheme or arrangement could be dispensed with if the company was a wholly owned subsidiary of the applicant company and if its entire share capital was held by the applicant company.

**Contrary View**

The Supreme Court in *B.V. Gupta v. Bangalore Plastics (unreported)*,\(^{67}\) has held that ordinarily the convening of meeting is a must and the discretion to dispense with such meeting should be exercised only in exceptional circumstances whereas Karnataka High Court in *Ansys Software (P.) Ltd., In re,*\(^{68}\) has held that the whole object of making an application under section 391(1) of the Act is for permission to hold a meeting. A prayer for dispensation of holding of such meetings is contradiction of the terms of this provision. The holding of a meeting, the deliberations that can take place in such a meeting, the discussions, exchange of ideas, analysis of the pros and cons of the proposal or the merits of the scheme, cannot be said to be the same as a mere consent letter issued by such member or creditors by themselves. A consent letter of the type that has now been given by the members and shareholders can never be a substitute for

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\(^{64}\) (2011) 105 SCL 186 (Punj. & Har.).
\(^{65}\) (2007) 75 SCL 270 (Raj.).
\(^{66}\) (2006) 64 SCL 622.
\(^{67}\) C.A. No. 1676/1981, decided on 19.08.1981.
\(^{68}\) (2004) 122 Com Cases 526.
the holding of the meeting of a members and creditors as contemplated in law. When the law says that there should be a meeting of the members and creditors for the purpose of discussing and approving a proposed scheme, it has a definite purpose and object. That cannot be done away by a process of dispensation.

Seeing the judicial attitude in this respect, the new Companies Act, 2013 in section 230 (9) has provided that the Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety percent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement. This provision has been added in the new Act to speed up the process of mergers.

Often the carrying and holding of a meeting can be a lengthy, cumbersome process which could waste management vital time.69

2.4.11. Relevant Case Law Explaining the Scope of Section 391

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. ITO,70 wherein 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 company and its members, the court may sanction the scheme.

In Unique Delta Force Security (P.) Ltd. v. Summet Facilities (P.) Ltd.,71 the applicants submitted that they realised ‘at certain stage’ that the scheme of arrangement or compromise under section 391 of the Companies Act 1956/section 230 of the Companies Act, 2013 was not giving the desired results and advantages to both the companies and it was prejudicial to the interest of members and creditors. Therefore they approached the court for recalling or setting aside the order sanctioning the scheme.

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70 AIR 1997 SC 1763.
71 (2014) 123 SCL 289.
But the Bombay High Court held that order sanctioning a scheme under section 391 operates *in rem*. It affects the rights of several persons including creditors, investors etc. It also creates liabilities in favour of persons like the Income Tax Authorities etc. The court cannot exercise inherent powers to abrogate/rescind/cancel scheme once sanctioned and effective. In any event if the scheme was not workable than the company could certainly seek directions or modifications to the scheme in order to make it workable. It could not cancel the scheme on this ground. Section 392 has clearly empowered the court to give directions and allow modifications in the compromise or arrangement but has not given any powers to the court to recall/rescind/cancel the order sanctioning the compromise or arrangement. However, if the applicants were determined to have the scheme rescinded/cancelled, they would have to follow the procedure prescribed under section 391 and revert back to status *quo ante*.

Another case which came up under section 391 of Companies Act, 1956/section 230 of the Companies Act, 2013 is *Sterlite Industries (India) Ltd., In re*, 72 the Madras High Court held that where unless scheme under section 391 was shown to be contrary to any law or shocks conscience of court or is patently unfair to members or creditors or any class of them or is against public interest or against public policy, court should not reject it. All the statutory provisions have been complied with. The liabilities of all unsecured creditors get transferred to the amalgamated company, which is financially stronger. The court further held that the petition for sanction of a scheme under section 391 is not a tool in the hand of creditors to recover the debt or to force the company to pay especially when the debt is not admitted and the objecting creditor must show to the court that the scheme is malafide or fraudulent and is likely to adversely affect him or the creditors or any class of creditors to whom he belongs.

Overall, the scope of section on the role of the courts can be well explained by going through the judgement of Gujarat High Court in *Reliance Petroleum Ltd., In re*. 73

“The position in law is well settled that while exercising the jurisdiction and power to sanction a scheme, the court is required to ensure that statutory provisions have been complied with, that the class of persons

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72 (2014) 124 SCL 58 (Mad.).
who attended the meeting was fairly represented and that the statutory majority was acting bonafide and lastly that the arrangement i.e. scheme was such which an intelligent and honest man, acting in respect of his interest, might reasonably approve. The court, at the same time, is not required to differ from the decision of the majority arrived at the meeting unless any of the factors was found to be wanting. It is the commercial wisdom of the parties to the scheme, who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the court. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditor and members of the company who have ratified the scheme by the requisite majority.”

Thus, compromise and arrangement covered by section 391 are of the widest character, ranging from a simple composition or moratorium to an amalgamation of various companies, with a complete reorganisation of their share and loan capital. If this is the scope of section 391, it does appear that section 391 is a complete code in itself. There is inherent evidence which would support this conclusion. Manekchowk and Ahmedabad Manufacturing Co. Ltd., In re, it was held that:

“It therefore, appears that section 391 is a complete code which provides for sanctioning of the scheme of compromise and arrangement. If such a scheme of compromise and arrangement includes increase of share capital which would be part of the arrangement that would be brought about between the company and its members.”

Thus, the provisions of section 391, together with extracts culled from the well reasoned judgements, will enable one to confidently embark on the task of restructuring companies in any of the possible modes: arrangement, reconstruction or amalgamations.

2.5. Supervisory Power to Enforce Compromise or Arrangement (Section 392)

The Tribunal has been vested with supervisory powers. Section 392(1)(a) provides that once the Tribunal makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it shall have power to supervise the carrying out of the compromise or an arrangement.

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75 (1970) 40 Com Cases 819 (Guj.).
76 Section 392(1)(a) of the Companies Act, 1956.
The Tribunal is also given the powers to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement either at the time of making the order or at any time thereafter.\textsuperscript{77} Thus the Tribunal not only acts as an authority to approve a scheme of compromise or arrangement, but also has the power to implement it. Hence in the course of implementation, if the tribunal finds the need for modification, it has the power to do so.\textsuperscript{78}

The Tribunal, if it finds that the scheme as sanctioned with or without modification cannot be worked satisfactory then it has the power to order the winding up of the company. Any order so passed will be deemed to be an order under section 433 of the Companies Act. This power it could exercise on its own volition or on an application made by any person interested in the scheme.\textsuperscript{79} In view of the amendment made by the Companies (Amendment) Act, 2002, under which the power have been given to the Tribunal instead of the Court, it is provided that in all cases where the court has passed the order under the provisions prior to the amendment, the Tribunal has been empowered to supervise and/or make modifications in respect of such orders passed by the court.\textsuperscript{80}

\textbf{2.5.1. Underlying Principle of the Section}

The purpose underlying section 392 is to provide for effective working of the compromise or arrangement once sanctioned and over which the court must exercise continuous supervision and if over a period there may arise obstacles, difficulties or impediments, to remove them, again, not for any other purpose but for the proper working of the compromise or arrangement. This power either to give directions to overcome the difficulties or if the provisions of the scheme themselves create an impediment, to modify the provisions to the extent necessary, can only be exercised so as to provide for the smooth working of the compromise and/or arrangement. To effectuate this purpose, the power of the widest amplitude has been conferred on the

\textsuperscript{77} Section 392(1)(b) of the Companies Act, 1956.
\textsuperscript{78} K.R. Sampath, 2008, p. 496.
\textsuperscript{79} Section 392(2) of the Companies Act, 1956.
\textsuperscript{80} Section 392(3) of the Companies Act, 1956.
High Court/Tribunal and this is a basic departure from the scheme of the U.K. Act in which provision analogous to section 392 is absent. The sponsors of the scheme under section 206 of the UK Act have tried to get over the difficulty by taking power in the scheme of compromise or arrangement to make alterations and modifications as proposed by the court. But the Indian legislature foreseeing that a complete or complicated scheme of compromise or arrangement spread over a long period may face unforeseen and unanticipated obstacles, has conferred powers of the widest amplitude on the court to give directions and if necessary, to modify the scheme for the proper working of the compromise or arrangement. But such modifications should be only for the proper working of the compromise or arrangement.\(^8\)

2.5.2. Meaning of the term ‘Modification’

In the context of section 392, ‘modification’ would mean addition to the scheme of compromise and/or arrangement or omission therefrom solely for the purpose of making it workable. Reading section 392 by substituting the definition of the word ‘modification’ in its place, if something can be omitted or something can be added to a scheme of compromise by the court on its own motion or on application of a person interested in the affairs of the company for the proper working of a scheme, there is no justification for cutting down its meaning by a process of interpretation and thereby whittle down the power of the court to deal with a scheme for the purpose of making it workable in the course of its continued supervision as ordained by section 392 of the Act.\(^8\)

In addition to explaining the meaning of modification, the court laid down the following principles in the above case of *S.K. Gupta v. K.P. Jain*:\(^8\)

1. The power under section 392 is of wide amplitude, the only limitation being that it must be exercised for the proper working of the compromise and/or arrangement.

2. The court can *suo motu* act and it is immaterial as to who drew the attention of the court to a situation which necessitated court’s intervention. Therefore, the question of *locus standi* is irrelevant.

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\(^{83}\) AIR 1979 SC 734.
3. Omission of the original sponsor and substituting another one would not change the ‘basic fabric’ of the scheme. As one sponsor of a scheme can be substituted for another sponsor by way of modification, the court must examine the bonafides of the person applying to be substituted as sponsor, his capacity, his ability, his interest qua the company and to the relevant considerations before substituting one sponsor for the another.

2.5.3. Judicial Interpretation of Section 392

Commenting on this section, it has been held in Bank of Baroda Ltd. v. Mahindra Ugine Steel Co. Ltd.: 84

“In our country, therefore the role which the courts have to play now is more vital and potent, it is not only an inquisitorial and supervisory role but also a pragmatic role which requires the forming of an independent and informed judgement as regards the feasibility or proper working of the scheme and making suitable modification in the scheme and issuing appropriate directions with that end in view.”

In Castron Technologies Ltd. v. Castron Mining Ltd., 85 the Calcutta High Court held that the provisions of section 391 and 392 can be invoked for the purpose of proper working of the compromise or arrangement. The power conferred by the said sections on the court is a power of superintendence, which may be exercised by issuing appropriate direction or effecting necessary modification so as to ensure the proper working of such compromise or arrangement. Therefore, direction or modification, whatever is necessary, is only to ensure proper working of the compromise or arrangement. 86

In Mansukh Lal v. M.V. Shah, Official Liquidator, Liquidator of Hathising Mfg. Co. Ltd., 87 the Gujarat High Court held:

“The framers of the company law in India have conferred the power of the widest amplitude on the court under section 392(1)(b) and the width and the magnitude of the power can be gauged from the language employed in section 392(1)(a) which confers a sort of supervisory role

84 (1976) 46 Com Cases 227 (Guj.).
86 Para 22 and para 23 of the above judgement.
87 (1976) 46 Com Cases 279 (Guj.).
on the court during the period the scheme of compromise or arrangement is being implemented. Reading clauses (a) and (b) of sub-section (i) of section 392, it appears that parliament did not want the court to be *functus officio* as soon as the scheme of compromise and arrangement is sanctioned by it. The court has a continuing supervision over the implementation of compromise and arrangement. Parliament has conferred power on the court not only to make modifications even at the time of sanctioning the scheme, but at any time thereafter during the period the scheme is being implemented. Conceding that before the court sanctions the scheme, it partakes the character of an emerging contract between the company and the creditors and members; one the court approves it, it becomes a statutorily enforceable contract even on dissidents, with power in the court to modify, amend or correct or revise the contract, the outer periphery or its limit on the power being that, after testing it on the arrival of probabilities, surrounding circumstances and the prevalent state of affairs, it can be done for the proper working of the compromise and arrangement and subject to this limit on the court’s power. The power seems to be absolute and of the widest amplitude and it would be unwise to curtail it by process of interpretation.”

Moreover, modifications can be made at the instance of any person who is interested in the affairs of the company and the court can also introduce modifications *suo moto* as held in *Maharashtra Apex Corporation Ltd., In re*.\(^{88}\)

Further in *Deepika Chit Fund (P.) Ltd. In re*,\(^ {89}\) it was pointed out by the honourable court that the object and purpose of section 392 is that the court sanctioning the scheme does not become *functus officio*, as in the position in the United Kingdom. The object of section 392 is not to limit or restrict the power of the court but to widen it and stretch it beyond the sanction of scheme. Secondly, a close examination of sections 391 and 392 would reveal that sections 391 and 392 operate in different stages and they do not control each other, section 392 comes into operation after enquiry under section 391 is over.

### 2.5.4. Winding up order under Section 392

There are two basic powers to the court/tribunal under section 392, namely:

\(^{88}\) (2005) 57 SCL 305 (Kar.).

\(^{89}\) (2004) 56 SCL 566.
1. Power to supervise the carrying out of the compromise and arrangement and to give such directions in regard to any matter or make such modifications in the compromise or arrangement as the tribunal may consider necessary for the proper working of the compromise or arrangement and

2. Power to make an order for winding-up the company if the court is satisfied that a compromise or arrangement sanctioned under section 391 cannot work satisfactorily with or without modification either on its own motion or on the application of any person interested in the affairs of the company. Such an order passed for winding up shall be deemed to be made under section 433 of the act.

In *J.K. Bombay (P) Ltd. v. New Kaisar Hind Spg. & Mfg. Co. Ltd.*,\(^90\) the Supreme Court considered the question of passing a winding up order, when the scheme cannot be carried out satisfactorily in any case. The court held:

“The effect of a scheme between a company and its creditors is that so long as it is carried out by the company by regular payments in terms of the scheme, a creditor who is bound by it cannot maintain a winding up petition. But if the company commits a default, there is debt presently due by the company and a petition for winding up can be sustained at the instance of a creditor. So long as the scheme is in operation and is binding on the company and its creditors, the rights and obligations of those on whom it is binding are undoubtedly governed by its provisions. But one the scheme is cancelled section 392(2) on the ground that it cannot be satisfactorily worked and a winding up order passed, such an order is deemed to be for all purposes to be one made under section 433. After that, rights of creditors and others will only be those that could be claimed under the winding up, no one can put forward and claim as per terms of the scheme.”

In *Real Lifestyle Broadcasting (P.) Ltd. v. Turner Asia Pacific Ventures Inc.*,\(^91\) the Delhi High Court held section 392(1)(b) and section 392(2) give liberty to ‘any person interested in the affairs of the company’ to make an application that the scheme which had been sanctioned by the court is not working satisfactorily and he can accordingly under section 392(2) seek directions to enable the scheme to work satisfactorily with or

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\(^90\) AIR 1970 SC 1041; 1970 Com Cases 689 (SC).

\(^91\) (2013) 122 SCL 43 (Del.); Also see *Siemens Information Processing Services (P.) Ltd., In re*, (2012) 111 SCL 121 (Kar.).
without modifications. The court may make certain modifications in the scheme as it may consider necessary for the proper working of the said compromise or arrangement. While the power under this section may be of a widest amplitude but it cannot be read to be unlimited. It may be invoked only for the purpose of determination or adjudication of any right or interest claimed under the sanctioned scheme. Alternatively, if the court is satisfied that the scheme cannot work satisfactorily, it may pass an order for winding up of the company. The powers of the court under this section, however, do not go beyond the implementation of the scheme which already stands sanctioned under section 391.

2.5.5. Changes brought by the Companies Act, 2013

But under the new Companies Act, 2013, the power to enforce sanctioned scheme of compromise/arrangement or make modifications in it which were vested with the jurisdictional High Court under the 1956 Act have been transferred to the Tribunal. Most importantly unlike the 1956 Act, mere non-workability of sanctioned scheme is not enough to wind up the company. It must also be established that the company is unable to pay its debts as per the scheme. Thus, the role of the court (now tribunal) is stressed in unmistakable terms in section 392. Courts have the power to supervise, modify and also pass winding up order as and when the situation arises in terms of section 392 itself.

2.6. Information as to Compromises or Arrangement with Creditors and Members (Section 393)

Section 393 of the Companies Act has been adopted from section 426 of the English Companies Act. Section 393 provides certain specific requirements relating to calling of meeting of creditors or any class of creditors or of members or any class of members, for examples, sub-section (1) provides the extent of the disclosure norm to be observed while proposing a scheme of compromise or arrangement.

According to section 393, every notice calling the meeting of the creditors or members should be accompanied by a statement which should make the following disclosures:

1. The terms of compromise or arrangement and explaining its effects.
2. Any material interests of the directors, managing director or manager of the company in any capacity (whether in their capacity as members or creditors or otherwise).

3. The effect on these interests of the compromise on arrangement, if and in so far as it is different from the like interests of other persons.

4. Where the compromise or arrangement affects the rights of debenture holders, the said statement shall give similar information and explanations with respect to the trustees of any deed for securing the issue of debentures as it is required to give with respect to the company’s directors (referred in above).

Similarly, in every notice calling the meeting which is given by advertisement, these shall be included:

- Either a statement as mentioned in (1), (2) and (3) above, or

- A notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.

If so requested by the creditor or member entitled to attend the meeting, on making an application in the manner indicated in the notice of advertisement, the company will have to furnish copy of the statement free of charge.

In *Suri and Nair Ltd., In re*,\(^ 92\) the Karnataka High Court held that the purpose of such disclosure is to enable the shareholder to make their objections, because once they have approved the scheme, there is no chance of questioning its arithmetics. Subsequently, the question is thus not purely theoretical and every non-disclosure cannot be fatal unless it is fraudulent and has prejudicially affected the decision making process of the member.

**2.6.1. Interpretation by Courts on the Scope of Section 393**

We can properly understand the scope of section 393 by comparing it with section 173 of the Companies Act. Under the scheme of the Act, the law and procedure relating to issue of notice and disclosure of material interest etc, in respect of meetings to be

\(^{92}\) (1983) 54 Com Cases 868 (Kar.).
convened by the company and requisitionists are contained in section 173 of the Act. But section 173 is not applicable for a court convened meeting under section 391. Therefore, for a court convened meeting compliance of section 393 of the Act is more relevant than that of sections 171/173 of the Act.93 There is also difference in wordings of the section as the words used in section 173(2) are ‘material facts’ whereas the words used in section 393(1)(a) are ‘material interests’.

In *Tata Oil Mills Co. Ltd. & Hindustan Lever Limited, In re*,94 the Bombay High Court pointed out that the explanatory statement as required under section 173 is quite different from the explanatory statement required under section 393(1)(a). The court relied on its earlier decision in *Khandelwal Udyog Limited and Acme Manufacturing Limited In re*,95 where it was observed *inter alia* that section 393(1)(a) does not ordain disclosure of all material facts. Clause (a) not only enumerates the categories of particulars, but it deliberately makes a departure by omitting any reference to material facts. It was further held that the legislature having used a different phraseology in the said two provisions, it must be held that the legislative intent under section 393 was not to provide for disclosure of all material facts.

Where the employees Union took an appeal from the judgement of the Bombay High Court in the Hindustan Lever’s case, one of the ground of objection was that the explanatory statement was not proper and was lacking in material particulars. The Supreme Court did not sustain the above objection considering the overwhelming manner in which the shareholders, the creditors, the debenture holders, financial institutions had supported the scheme and they had not complained about any lack of notice or lack of understanding of what the scheme was about.96

The entire case law on this section was reviewed in the case of *Mafatlal Industries Limited, In re*,97 the court pointed out in section 391 the reference is to ‘the meeting of creditors or class of creditors or members or class of members. There is a deliberate omission of the words ‘of a company’ in section 391 whereas sub-section of section 186

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94 (1994) 3 Comp LJ 46(Bom.).
95 (1977) 47 Com Cases 503 (Bom.)
97 (1995) 3 SCL 69 (Guj.).
refers to ‘a meeting of a company’. The legislative intent appears to provide that the meetings held under sections 391 to 393 are to be contra distinguished from the meetings of the company. The learned judge further pointed out the following points of distinction between section 173 and 393(1)(a) in the above case:

1. Provision under section 173 is held to be mandatory and non-compliance may lead to nullification whereas provision of 393(1)(a) is not mandatory and even substantial compliance may save the action. Test of resultant prejudice is to be applied.

2. The object of explanatory statement under section 173 is that the shareholders must know all the material facts and interest of the managerial personnel in each item of business so that they may not be duped by the management and may not be persuaded to act in any manner desired by the management whereas it is only the consequence of the result which has got to be explained under section 393 that would arise on account of the approval of the scheme.

Thus, it is made abundantly clear that there must be an explanatory statement in terms of clause (a) of section 393(1) of a notice required under section 391. Therefore, section 173(2) subject to certain exceptions, is a general provision. Hence, section 173 and section 391 lie in different fields. Consequently, the application of section 173 is excluded to meeting under section 391. Section 173 is a general rule for all meetings subject to certain exceptions whereas section 391 is a special provision for one class of meeting.98

In Model Financial Corpn. Ltd. v. A.P. Mahesh Co-operative Urban Bank Ltd.,99 the Andhra Pradesh High Court clearly highlighted the effect, scope and rationale of section 393 in following terms:

“Section 393(1)(a) stipulates that where a meeting of the creditors or any class of creditors or members or any class of members, is called for under section 391, with every notice calling the meeting, which is sent to a creditor or member, there shall also be sent a statement setting forth the

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terms of the compromise or arrangement and explaining the effect. The requirement under section 393(1)(a) is to state and explain the effect and not the details or particulars of the consequence or result.\textsuperscript{100}

The court further observed:

“The very purpose of requiring the effect of the scheme or arrangement to be explained, in the explanatory memorandum, before the scheme meeting is held, is to ensure that the body of persons, entitled to vote at the scheme meeting have been properly informed of all necessary facts which they should take into account when considering how to cast their votes whether in favour of or against the scheme of arrangement. It is evident that failure of the petitioners to explain the effect of the scheme to the bondholders has resulted in their exercising their vote without comprehending the effect and purport of the scheme in its entirety.”\textsuperscript{101}

As the companies had not made full and frank disclosure of effect of scheme to persons effected by way of explanatory statement before such meeting, the court refused to accord sanction to the proposed scheme.

\textbf{2.6.2. Disclosures to be Proper under Section 393}

While disclosing the material interests of the directors and its effects, a full and proper disclosure should be made. If there has been material oversight or material facts are intentionally withheld or object of the scheme is to prevent an inquiry into transactions which require investigation, then court will be justified in rejecting the scheme. This happened in the case of \textit{St. Mary’s Finance Ltd. v. R.G. Jaya Prakash}.\textsuperscript{102} In this case, a scheme of compromise was presented and notice for consideration of such scheme was sent to creditors, it was held by Kerala High Court that there must be full and fair disclosure of the interest of the directors as the members of the company which is the pre-requisite and statutory in terms of section 393(1)(a) of Companies Act. But in this case, the interest of directors and the real beneficiaries of the scheme, which was a valid information was held back not only from creditors but also from the chairman, though the scheme was approved by majority, the meeting had no validity in the eyes of law for which reason itself the scheme suggested cannot be accepted even if modified.

\textsuperscript{100} Para 22 of the above judgement.

\textsuperscript{101} Para 25 of the above judgement.

\textsuperscript{102} (2000) 99 Com Cases 359.
But omission to disclose information not required to be disclosed, even though the omission may be deliberate, does not preclude the court from sanctioning an arrangement, if the scheme is otherwise fair. It is only ‘the effects’ not the details of the scheme which have to be disclosed.

2.6.3. Judicial Interpretation of the Term ‘Material Interest’ and ‘Like Interest of Other Persons’

The Gujarat High Court delved in detail the meaning of these terms in its significant judgement of *Sidhpur Mills Co. Ltd., In re.*\(^{103}\) In this case, the court held that in terms of section 393(1)(a), in the notice, the company is required to state the material interest of the directors, managing director etc. This ‘material interest’ disclosure should not only be confined to their interest as directors but should extend to their other capacities and positions in the company like creditors and members. But shareholdings of relatives or friends or supporters of directors etc. need not be disclosed. Further, it is the requirement of section 393(1)(a) of the Act that while disclosing ‘material interest’ of directors etc in the scheme, it is enough to disclose their interest in so far it is different from the effect on the ‘like interest of other persons’. In this context, the meaning of the expression ‘like interest of other persons’ assumes more importance. What is sought to be established here is a comparison of ‘material interest’ of non-concerned persons vis-à-vis the affairs of the company with those of the concerned persons. If such a comparison shows that these interests are different, the effect of such interest must be mentioned.

The Supreme Court in its landmark judgement of *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*,\(^{104}\) held that the special interest of the director which is required to be brought home to the voters in terms of section 393(1)(a) of the Act must satisfy the following requirements of the section before it can be treated to be relevant special interest of the director which is required to be communicated to the voters:

1. The director’s interest must be a special interest different from the interest of other members who are voters at the meeting.

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\(^{103}\) AIR 1962 Guj 305.

\(^{104}\) AIR 1997 SC 506.
2. The compromise or arrangement which is put to vote must have an effect on such special interest of the director.

3. Such effect must be different from the effect of compromise and arrangement on similar interest of other persons who are called upon to vote at the meeting.\textsuperscript{105}

Thus, section 393 stipulates the disclosure norms for the purpose of effecting the compromise or arrangement. Such disclosures help the shareholders to take an effective decision regarding the scheme after having complete material in hand. If such disclosure norms or the statutory provision mentioned in this section is not complied with, the scheme will not be sanctioned as can be seen by going through various case laws on the topic.

2.7. Provisions for Facilitating Reconstruction and Amalgamation of Companies (Section 394)

The most important power in the context of a scheme (including compromises, arrangements, mergers/demergers and amalgamation) i.e. power to sanction a scheme is in section 391 whereas section 394 deals with other powers to facilitate reconstructions and amalgamations. Section 391 covers within its ambit all forms of arrangements like merger/demergers and amalgamations and scheme of compromise between a company and its creditors and between a company and its members whereas section 394 is in fact only an extension of section 391 if the scheme of arrangement is in the nature of merger/demerger/amalgamation as it provides certain powers to facilitate the same. Section 391 is a complete code by itself whereas section 394 cannot be complied with without compliance of section 391.\textsuperscript{106} However, whether the scheme falls under section 391 only or under both, the procedure to be followed for effecting such a scheme is virtually common.

2.7.1. Power of Amalgamation

If we look at the principle laid down by majority of judicial pronouncements, then the deduction would be that non-existence of power in the memorandum to amalgamate

\textsuperscript{105} Para 30 of the above judgement.
should not stand in the way of sanctioning a scheme as High Court in exercise of its wide powers is competent to sanction the scheme without compelling the company to follow the procedure laid down under section 17 for alteration of memorandum.\textsuperscript{107}

Earlier in \textit{Oceanic Steam Navigation Co., In re},\textsuperscript{108} it was held that an act which is ultravires the company cannot be provided through a scheme and thus where the memorandum of association of a company does not contain the provisions for amalgamation/reconstruction, it cannot be carried out through a scheme. Where the memorandum does not contain the powers to amalgamate and an amalgamation is desired, the course to the followed should be to first amend the memorandum to incorporate the provisions providing powers of amalgamation in it and then make an application to the court for approval of the scheme.

Whereas the Calcutta High Court in \textit{Harikrishna Lohia v. Hoolungoore Tea Company Ltd.},\textsuperscript{109} had also taken a view that there is a statutory provision dealing with amalgamation of companies. No object clause in the memorandum is necessary for its amalgamation with another company. It is not the object but the power of the company to amalgamate which has force of law and the court can sanction it under section 391 and 394. Similarly in its later decision of \textit{Marybond & Kyel Tea Estate Ltd.},\textsuperscript{110} it was held that section 394 gives jurisdiction to the court to sanction an 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 object clauses.

More recently, Delhi High Court in the case of \textit{Feedback Reach Consultancy Pvt. Ltd., In re},\textsuperscript{111} held that “it is quite clear that powers under sections 391 to 394 are not circumscribed or predicated on the applicant company possessing powers under its objects clause to amalgamate with any other company.”

\textsuperscript{108} (1939) 9 Com Cases 229 (Ch. D).  
\textsuperscript{109} AIR 1969 Cal 312: (1970) 40 Com Cases 458 (Cal.).  
\textsuperscript{110} (1977) 47 Com Cases 802 (Cal.).  
\textsuperscript{111} (2003) 115 Com Cases 897 (Del.).}
2.7.2. Scope of Section 394

Section 394 comes into operation only in the case of reconstruction of any company or companies or the amalgamation of any two or more companies. Even a reconstruction or amalgamation may involve a compromise or arrangement with members or creditors as the case may be. A reading of section 391 with section 394 proves that the starting point of the whole exercise is the drawing up of a scheme, which in all probability will take one of the forms viz: ‘arrangement’ ‘compromise’ ‘reconstruction’ or ‘amalgamation’. But for section 394 to be attracted, the scheme of compromise or arrangement drawn up should be for the purpose of or in connection with a scheme of reconstruction or amalgamation of companies.

Section 394(1) provides that when compromise or arrangement has been proposed for the purpose of or in connection with a scheme of amalgamation/reconstruction, then an application has to be made to the Tribunal. Under the scheme, the whole or any part of the undertaking, property and liabilities of any company concerned in the scheme is to be transferred to another company. If the above two conditions are satisfied, then the court can exercise certain facilitating powers, which are as under:

2.7.2.1. The Transfer to the Transferee Company of the Whole or any Part of the Undertaking, Property or Liabilities of any Transferor Company: This facilitating power provides that when an order is made by the court/tribunal under section 394(1)(i) or section 232(3)(i), the transfer of the whole or part of the undertaking or property or liabilities of the transferor company, then by virtue of the said order, the property of the transferor company shall be transferred to and vest in the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company.

Under section 394(4)(a), the word ‘property’ is defined to include property, rights and powers of every description, and similarly, the word ‘liabilities’ is defined to include duties of every description. The transfer of assets and liabilities of the transferor company to the transferee company takes place on an order being made under section

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113 These facilitating powers are also provided under section 232(3) of the Companies Act, 2013.
394(1) by operation of sub-section (2) of section 394.\textsuperscript{114} In \textit{Nokes v. Doncaster Amalgamated Collieries Ltd.},\textsuperscript{115} the House of Lords observed as follows:

“An order made under the section does not automatically transfer contracts of personal service. The word ‘contract’ does not appear in the section at all and the view expressed in the court of appeal that a right to the service of an employee is the property of the transferor company is not correct. Such a right cannot be subject of gift or bequest, it cannot be bought or sold, it forms no part of the assets of the employer for the purpose of administering his estate. In short, when section provides for ‘transfer’ it is providing for the transfer of those rights which are capable of transfer and is not contemplating the transfer of rights which are in their nature incapable of being transferred. The word ‘property’ in section, whether considered alone or in conjunction with the words ‘rights and powers of every description’ means property with which the original company has the right to deal without having to obtain consent of the third party.”

Thus company’s contracts of personal service with its employees are not included in the word property and the court has no power to enforce the transfer of such contracts.

In \textit{Ambalal Sarabhai Enterprises Ltd. v. Rajeev Daga},\textsuperscript{116} the Calcutta High Court held that in a scheme of amalgamation, tenancy is a non-transferable object that could only extend to others either by an explicit contract or by a clear statute. In the present case, neither there is any statutory law to support transfer of tenancy on amalgamation nor any agreement executed between the landlord and the tenant to deal with such eventuality. Voluntary act of the tenant making its own position vulnerable would have no bearing on the landlord. Moreover, where order of amalgamation was not served on landlord by transferee company and landlord continued to issue rent receipt in name of (dissolved) transferor company though he accepted rent from transferee company, no right of tenancy was created/transferred in favour of transferee company.

In \textit{L. Mullick and Co. v. Binani Properties (P.) Ltd.},\textsuperscript{117} the Calcutta High Court held that where the amalgamation is of the entire undertaking, the scheme of amalgamation

\textsuperscript{114} Madhu Intra Ltd. v. Registrar of Companies, (2005) 58 SCL 160 (Cal.-DB).
\textsuperscript{115} (1941) 11 Com Cases 83 (HL).
\textsuperscript{116} (2014) 124 SCL 30 (Cal.).
\textsuperscript{117} (1983) 53 Com Cases 693(Cal.).
providing for the transfer of all the properties (both movable and immovable), it is difficult to hold that the non-mention of a particular property in the schedule belonging to the transferor company will keep the property outside the scope of the order of transfer under section 394(2) of the Act.

2.7.2.2. The Allotment or Appropriation by the Transferee Company of any Shares, Debentures Policies or Other Like Interests in that Company which, under the Compromise or Arrangement, are to be Allotted or Appropriated by the Company to or for any Person: This is the most important facilitating power of the court. In exercise of this power, the court approves the exchange ratio of shares provided for in the scheme of amalgamation and earlier approved by members in their meetings. The exchange ratio is nothing but consideration paid by the transferee company to the shareholders of the transferor company. This consideration need not necessarily be in shares.\textsuperscript{118} It can also take the form of allotment or appropriation of any debentures, policies, cash or other like interests in that company besides shares. For determining the exchange ratio, the shares of both companies are valued. Since the exchange of shares depends on the valuation placed on the shares to be exchanged, it is also important to study ‘valuation of shares’ which is discussed later on in this chapter.

2.7.2.3. The Continuation by or against the Transferee Company of any Legal Proceedings Pending by or against any Transferor Company: The Court/Tribunal is given one more power to transfer the legal proceedings by or against the transferor company to the transferee company in a scheme of merger/amalgamation. This ensures the continuity of proceedings to the creditors who owe some debt against the transfer company and continuity of proceeding against persons who owe money to the transferor company. Thus this provision protects one of the important fundamental characteristics of corporate personality i.e. right to sue and being sued in a scheme of merger/amalgamation.

In Abhineet Pesticide (P.) Ltd., In re,\textsuperscript{119} the Delhi High Court said that if any suit, appeal or other proceeding against transferor company is pending, same shall not abate

\textsuperscript{118} N.R. Sridharan and P.H. Arvind Pandian, 2010, p. 262.
\textsuperscript{119} (2013) 120 SCL 25 (Del.).
or be discontinued or in any way be prejudicially affected by reason of scheme of amalgamation rather said proceedings would be continued against transferee company in same manner and to same extent as it would have continued against transferor companies as if scheme of amalgamation has not been made.

In *State of U.P. v. Jaya Shree Textiles and Industries Ltd.*,\(^{120}\) the Allahabad High Court held that the State Government could amend its petition to implead the emerging company from a merger in respect of a pending litigation for arrears of certain amount due from the transferor company. That’s why, most of the amalgamation scheme, contain the following clause: “All legal and other proceedings by or against the transferor company on the appointed date and relating to the said undertaking, its liabilities, obligations, duties, covenants, shall be continued and enforced by or against the transferee company, as the case may be.”

**2.7.2.4. The Dissolution without Winding up of the Transferor Company:** In the case of merger or amalgamation, the transferor companies invariably transfer all assets and liabilities to the transferee company. All the shareholders of the transferor company become the shareholders of the transferee company. So the outcome is only the shell of the transferor company. That’s why tribunal has been given another facilitating power to order dissolution without winding up of the transferor company. This is an important power. An order by the Tribunal of dissolution without winding up avoids the need to go through the requirements of winding up of a company before its dissolution i.e. ceasing to exist.\(^ {121}\) To further understand, the meaning of this sub-clause we will have to understand the meaning of winding up (which is bypassed here) and dissolution of the company.

Winding-up proceeding can be compared to a living person who is ‘brain dead’ and not ‘clinically dead’. Just like breathing continuous in the case of a ‘brain dead’ person, the company after passing of a winding up order continuous to ‘live’ and is not ‘legally dead’. The legal personality of the corporate body continues but the ‘brain’ vests with the liquidator or the official liquidator depending upon whether the winding up is

\(^{120}\) AIR 1985 All 212.

through voluntary process or through the tribunal instead of with the board of directors. However, dissolution of a company will result in ‘death’ or ‘extinction’ of the corporate entity.\textsuperscript{122}

\textbf{2.7.2.4.1. Conditions Precedent:} The powers of the tribunal are subject to two conditions, namely:

1. It is provided that no compromise or arrangement proposed for the purpose of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Tribunal unless the Tribunal has received a report from the registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interests.\textsuperscript{123}

2. Further, it is provided that no order of the dissolution of a transferor company under clause (iv) of section 394(1) shall be made by the Tribunal unless the official liquidator has, on scrutiny of the books and papers of the company, made a report of the tribunal that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interests.\textsuperscript{124}

\textbf{2.7.2.4.2. Impact of the Two Provisos:} The two provisos were inserted on the recommendations of the Daphtary Sastri Committee by the Companies (Amendment) Act, 1965.\textsuperscript{125} The intention behind these two provisos was that malpractices prevalent in the process of scheme of compromise and arrangement or reconstruction and amalgamation be curbed and checked.

The relationship between the two provisos was very well explained by the Madras High Court in \textit{Sugarcane Growers and Sakthi Sugars Shareholders Association v. Sakthi Sugars Ltd.}\textsuperscript{126} The High Court observed that the distinction between the two provisos

\begin{itemize}
\item \textsuperscript{122} \textit{Ibid.}
\item \textsuperscript{123} First Proviso to section 394(1) of the Companies Act, 1956.
\item \textsuperscript{124} Second Proviso to section 394(1) of the Companies Act, 1956.
\item \textsuperscript{125} For further details, see, J.C. Verma, 2009, p. 222.
\item \textsuperscript{126} (1996) 2 Comp LJ 108 (Mad.).
\end{itemize}
can easily be discerned while the first proviso requires a report on the affairs of the company, before sanctioning the scheme of amalgamation, if the company is wound up and not otherwise, the second proviso would require a report of the official liquidator before passing an order of dissolution. The difference in the language is significant.

2.7.2.4.3. Object of the Report of the Official Liquidator in Sanction of Schemes: The report of the official liquidator is of great significance in a scheme of amalgamation; because the court considering sanction of the scheme, needs to consider all the aspects pertaining to the affairs of the company, like the assets of the company, its liabilities, any transfer made etc for examining the desirability of the scheme. As the official liquidator’s report brings all these facts to the knowledge of the court, it assists the court in this regard.

In Shankaranarayana Hotels Pvt. Ltd. v. Official Liquidator, Government of Karnataka, the Court observed that the very object of calling for the report of the official liquidator is to satisfy the court that the interests of the shareholders and public interest are not prejudicially affected by the amalgamation.

In Zydus BSV Research and Development (P.) Ltd., In re, the report of official liquidator stated that the transferor (petitioner) company has not paid stamp duty of Rs. 9800 on share certificates. The company had to pay the duty to get the scheme sanctioned. Thus report of Official Liquidator acts as a check and prevent any malpractice on behalf of transferor or transferee company.

2.7.2.4.4. Public Interest: From the above it would be seen that the Tribunal prior to passing an order for amalgamation of companies which involve dissolution, without winding up, of the transferor company it must get the report from either the Official Liquidator or the Registrar of Companies that the affairs of the transferor company had not been conducted in a manner prejudicial to the interests of its members or ‘public interests’.

128 (1992) 74 Com Cases 290 (Kar.).
129 (2010) 98 SCL 36 (Guj.).
It will be appropriate here to ascertain what is meant by the term ‘public interest’. In *Hindustan Lever Employees Union v. Hindustan Lever Ltd.*, the Supreme Court observed:

“What would be public interest cannot be put in a strait jacket. It is a dynamic concept which keeps on changing. It has been explained in Black’s Law Dictionary, as something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, whereas the interest of the particular locality which may be affected by the letters in question. Interest shared by citizens generally in affairs of local, state or national Government. It is an expression of wide amplitude. It may have different connotation and understanding when used in service law and yet a different meaning in criminal or civil and its share may be entirely different in company law. Its perspective may change when merger is of two Indian companies. But when it is with a subsidiary of a foreign company the consideration may be entirely different. It is not the interest of the shareholders or the employees only but the interest of the society which may have to be examined. And a scheme valid and good may yet be bad if it is against public interest.”

“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 parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the Courts have evolved, the principle of, ‘prudent business management test’ or that the scheme should not be a device to evade law. But when the Court is concerned with a scheme of merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximising profits of the shareholders or whether the interest of employees was protected but it has to ensure that merger shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective.”

130 AIR 1995 SC 470.
131 Para 5 of the judgement.
132 Para 6 of the judgement.
The words ‘public interest’ was explained in the case of *Wood Polymer Ltd., In re*,\(^\text{133}\) as follows:

“Amalgamation of companies must fulfill some felt need, some purpose, some object and that must have some correlation to public interest. The expression ‘public interest’ must take its colour and content from the context in which it is used. The context in which the expression ‘public interest’ is used should permit the court to find out why the transferor company came into existence, for what purpose it was set up, who were its promoters, who were controlling it, what object was sought to be achieved through creation of the transferor company and why it is now being dissolved by merging it with another company. All these aspects will have to be examined in the context of the satisfaction of the court whether its affairs have not been carried on in a manner prejudicial to public interest. That is the colour and content of the expression ‘public interest’ as used in section 394(1), second proviso. If the only purpose appears to be to acquire a capital asset through the intermediary of the transferor company which was created for that very purpose to meet the requirement of law and in the process to defeat tax liability that would otherwise arise, it can never be said that the affairs of the transferor company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital asset, through its medium, have not been carried on in a manner prejudicial to public interest. Public interest looms large in this background, and the machinery of judicial process is sought to be utilised for defeating public interest and the court would not lend its assistance to defeat public interest.”

But the new Companies Act, 2013 has omitted both the provisos which were there to keep a check on the malpractices prevalent in the scheme of compromise and arrangement including reconstruction and amalgamation.

2.7.2.5. The Provision to be Made for any Person who, within Such Time and in Such Manner as the Court Directs, Dissent from the Compromise or Arrangement: As we have already noted that once a compromise or arrangement is approved by the requisite majority as envisaged in section 391, the same is binding on all parties (both creditors and members). But, if certain shareholders dissent from the scheme of compromise or arrangement, then the court is empowered under this sub-clause, to look at their grievance and pass suitable order as may be warranted in the circumstance of the case.

\(^{133}\) (1977) 47 Com Cases 597 (Guj.).
The court can make provision under sub-clause (v) of section 391(1) for any person who dissents from the scheme. Though the said clause does not use the word ‘fair’ in regard to the provision, the notion of fairness is necessarily implicit in the said clause. The court can even be asked to analyse the fairness of the provision which is made for the dissentient shareholders under the scheme. This point came up for the consideration of the court in the case of *Dena Bank Ltd., In re*. In this case, a scheme of amalgamation was proposed indicating the value of shares in the following manner:

- Value per share as per the scheme Rs. 145.
- Shareholders who opt for cash option will be paid Rs. 110.

The court was asked to analyse the fairness of the provision of cash option of Rs. 110 for dissentient shareholders. The court observed as follows:

“Section 394(1) empowers the court, *inter alia*, by the order sanctioning a scheme, to make provision for any person who dissents from that scheme. It is true that clause (v) of section 394(1) does not use the word ‘fair’ in regard to such a provision, but the court cannot be expected to make an order which is unfair to any of the parties concerned in such a scheme. The notion of fairness is necessarily implicit in clause (v) of section 394(1). In the present case, the amount of Rs. 110 per share which was offered to the dissenting shareholders was a little over 24 percent less than the amount of Rs. 145 which was the value of the package per share which the shareholders of the petitioner bank who accepted the scheme would receive. Since the dissenting shareholders in scheme got spot cash which could be utilised in the investments as high rate of return they must get substantially less than the value of the package per share which those who accepted the schemes would get. In the present case, it was no doubt true that the amount of Rs. 110 per share which the dissentients would get under the scheme was well over Rs. 84 which was the market value of the share before the scheme was announced but that could not be the sole criterion. This was a matter which was not capable of mathematical calculation, but had also to be governed by business considerations.”

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135 (1976) 46 Com Cases 541 (Bom.).
Thus, an interesting principle is laid down in this judgement which is that once the scheme is approved by the requisite majority, the dissenting shareholders can be given a cash option, which in certain circumstances can be lower than the price at which the shares are valued for the purpose of allotment to the assenting shareholders of the transferee company.

2.7.2.6. Such Incidental, Consequential and Supplemental Matters as are Necessary to Secure that the Reconstruction or Amalgamation shall be Fully and Effectively Carried out: The court has a facilitating power under sub-clause (vi) in respect of incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out. Before the court passes an order under this clause, it should be shown that the directions, are required to complete the amalgamation/reconstruction.

In the case of Asia Udyog Pvt. Ltd. and Others, In re,\textsuperscript{136} the Division Bench of the Delhi High Court held that clause (f) of section 153A of 1913 Act [[(section 394(i)(vi)] provided for matters to secure that the reconstruction and amalgamation may be fully and effectively carried out. The reconstruction or amalgamation can otherwise be fully and effectively carried out, without making any provision for payment of tax dues. The petition was therefore not maintainable wherein it was prayed for a direction for realisation of income tax and business profit tax from the transferor company after 12 years by revising the amalgamation order.

2.7.3. Effect of Court Order Passed under Section 394

If the order of the tribunal under section 394(2) provides for the transfer of any property or liabilities, then by virtue of that order, that property shall be transferred to and vest in the transferee company and the liabilities shall also be transferred and become the liabilities of the transferee company. In case the order directs that the property to be freed from any charge, it will be freed from any charge which will cease to have effect by virtue of the compromise or arrangement. This means that the court can also in appropriate cases, pass an order freeing the property transferred from any charge by

\textsuperscript{136} (1993) 78 Com Cases 468 (Del.-DB).
specifying the same in that order and if the court does so, the said charge shall cease to have effect.

2.7.4. Filling of the Order with the Registrar

Within 30 days after the making of an order under this section every company in relation to which the order is made shall cause a certified copy thereof to be filed with the registrar for registration. If default is made in complying with this sub-section, the company and every officer of the company who is in default, shall be punishable with a fine which may extend to Rs. 500.\(^\text{137}\)

2.8. Valuation Aspects of Mergers and Amalgamations

In any merger or amalgamation, financial aspects of the transaction are of prime importance. It denotes the benefits in terms of financial benefits i.e. increase in productivity, improved profitability and enhanced dividend paying capacity of the merged or the amalgamated company, which the management of each company involved in this exercise would be able to derive.\(^\text{138}\) The valuation of shares of the amalgamating company and the amalgamated company is perhaps one of the most important aspects of the scheme of amalgamation and the basis for the allotment of shares in the amalgamated company to the shareholders of the amalgamating company in lieu of share held by them which is an integral part of the scheme of amalgamation. In a scheme of amalgamation, it plays an important part because the basis of amalgamation and the formulation of the proposals in this regard would essentially depend upon the value of the shares of the respective companies.

Valuation is the device to assess the worth of the enterprise which is subject to merger or takeover so that consideration amount could be quantified and the price of one enterprise for the other could be fixed. Such valuation helps in determining the value of shares of the acquired company as well as the acquiring company to safeguard the

\(^{137}\) Section 394(3) of the Companies Act, 1956, Rs. 500 substituted for Rs. 50 by the Companies (Amendment) Act, 2000.

interest of the shareholders of both the companies.\textsuperscript{139} The complex problem of valuation arises because a chain of factors, including the psychological attitudes of the buyer and seller, influence the valuation.\textsuperscript{140}

Valuation of shares has always been a subject of practical difficulties in the accounting profession and generally agreement is not reached on the valuation of shares of companies as invariably, it involves the use of personal judgement on which professional men mostly differ. There are no statutory guidelines available for the valuation of shares in connection with the scheme of amalgamation. The scheme of valuation of shares for purposes of amalgamation should, therefore be based upon the normally accepted commercial and accounting principles.

The importance of court valuation could be gauged from the fact that collapse of one of the Europe’s bigger cross border mergers of Switzerland’s Alusuisse Lonza with Germany’s Viag. The Swiss-German ambition and carefully crafted strategic deal which could have created Germany’s sixth biggest industrial group, fell apart officially because of differing valuations of the companies.\textsuperscript{141}

As remarked by Supreme Court in its landmark judgement of *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*\textsuperscript{142} “Valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy.” Since valuation is essentially a matter of judgement there may be difference in valuation of the same property made by different experts, but so long as the differences are not significant or far reaching, the valuation accepted by the majority of the shareholders would be regarded as the proper value by the court in considering the scheme of amalgamation. Similarly, in the landmark judgement of *Hindustan Lever Employees Union v. Hindustan Lever Ltd.*,\textsuperscript{143} the Supreme Court remarked:


\textsuperscript{141} The Institute of Company Secretaries of India, 2010, p. 81.

\textsuperscript{142} AIR 1997 SC 506.

\textsuperscript{143} AIR 1995 SC 470.
“When in case of amalgamation of company admittedly more than 95% of the shareholders who are the best judge of the interest and are better conversant with market trend agreed to the valuation determined, it could not be interfered by the court, as it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The Supreme Court further held that the court’s obligation is to satisfy that the valuation was in accordance with law and carried by an independent body.”

2.8.1. Methods of Valuation of Shares

The most commonly used methods of valuation of shares are:

(1) **Intrinsic Value or Net Asset Basis or Break up Value Method:** Under this method, all business assets (excluding assets which are not held by a company in its character as a trader but held by it as an investor) are aggregated and their market value on the date of amalgamation is ascertained in respect of each one of them. Thereafter, the total of all the liabilities to outsiders including the debenture holders should be deducted from the aggregate value of the assets. If there are preference shares issued by the company, the amount payable to the preference shareholders can also be excluded by deducting the same from the total of the net assets. The balance (which would also include the value of goodwill and other similar intangible assets) should be divided by the number of equity shares to ascertain the intrinsic value of such shares.

The valuation of shares even under the intrinsic value method is based on the going-concern concept; that is, it is expected that the business would continue to function in the normal manner and would continue to provide a reasonable rate of return on the investment to the investor. The value of the various assets for the purpose of determination of the intrinsic value of shares is generally ascertained in the case of fixed assets by professional valuers and in the case of current assets at their realisable value. For instance, in the case of stock-in-trade, the value of stock should be determined at its replacement price whereas in the case of work-in-progress, its value may be ascertained to be the actual cost after making suitable adjustments to the cost of raw materials contained or included therein to bring it to the current replacement price. The cost of

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labour and a reasonable proportion of the overhead expensive attributable to the process of production should also be included in the actual cost of the work-in-progress. In the case of bad and doubtful debts, suitable provision should be made and adjustments in respect thereof should be provided while determining the value of debtors. In the case of investments held by the amalgamating company or companies, the value may be taken to be the value at which these are quoted at the time of amalgamation.

(2) Earnings Basis or Yield Basis or Market Value Method: In this method of valuation of shares, valuation can be based on rate of return. The term ‘rate of return’ here means a return which a shareholder earns on his investments. The rate of return can further be classified as

- Rate of dividend
- Rate of earning

(i) Valuation Based on Rate of Dividend: This method of valuation of shares is suitable for small blocks of shares because small shareholders are usually interested in dividends.\(^{146}\)

\[
\text{Value of Share} = \frac{\text{Possible rate of dividend}}{\text{Normal rate of dividend}} \times \text{Paid up value of share}
\]

(ii) Valuation Based on Rate of Earning: This method of valuation of shares is particularly suitable in case of big investors because they are more interested in company’s earnings rather than what the company distributes in the form of dividends.

\[
\text{Value of Share} = \frac{\text{Possible earning rate}}{\text{Normal earning rate}} \times \text{Paid up value of share}
\]

Where

\[
\text{Expected Return} = \frac{\text{Expected profits}}{\text{Equity capital}} \times 100
\]

(3) **Dual Method or Fair Value Method:** Many accountants are of view that neither the net assets basis nor the earning basis of valuation of shares is correct, but the fair valuation method should be adopted which is an average of the two methods of valuation of shares.\(^{147}\)

\[
\text{Value of a share} = \frac{\text{Value of share on net assets basis} + \text{Value of share on earning basis}}{2}
\]

Since this method takes the average of the values obtained in net assets basis and earning basis, it makes an attempt to minimise the demerits of both net assets basis and earnings basis methods.

### 2.8.2. Determination of Exchange Ratio

When two or more companies are combined, there has to be some financial consideration for the amalgamating or acquired company. The financial consideration is generally in the form of exchange of shares. This requires that relative value of each firm’s share be evaluated and a particular exchange ratio determined. This exchange ratio reflects the relative weightage of the firms under consideration. The determination of the exchange ratio, is therefore, based on the value of the shares of the companies involved in the merger.

\[
\text{Share exchange ratio} = \frac{\text{Share price of the acquired firm}}{\text{Share price of the acquiring firm}}
\]

Normally, share exchange ratio is determined on the basis of the fair value of shares of companies calculated according to fair value method.

According to Weinberg and Blank,\(^{148}\) some or all of the following factors will have to be taken into account in determining the final share exchange ratio:

1. The Stock Exchange prices of the shares of the two Companies before the commencement of negotiations or the announcement of the bid.

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\(^{147}\) *Id.*, p. 17.32.

2. The dividends presently paid on the shares of the two Companies. It is often difficult to induce a shareholder, particularly an institution, to agree to a merger or share-for-share bid if it involves a reduction in his dividend income.

3. The relative growth prospects of the two Companies.

4. The cover (ratio of after-tax earnings to dividends paid during the year) for the present dividends of the two Companies. The fact that the dividend of one company is better covered than that of the other is a factor which will have to be compensated for at least to some extent.

5. In the case of equity shares, the relative gearing of the shares of the two Companies. The ‘gearing’ of an ordinary share is the ratio of borrowings to the equity capital.

6. The values of the net assets of the two Companies. Where the transaction is a thorough-going merger, this may be more of a talking-point than a matter of substance, since what is relevant is the relative values of the two undertakings as a going concerns.

7. The voting strength in the merged enterprise of the shareholders of the two Companies.

8. The past history of the prices of the shares of the two Companies.

2.8.3. Valuation by Experts

The only conclusion that can be drawn from all the above is that valuing acquisitions is an imprecise science. Every business has a different value to every purchaser and there is no single ‘correct’ method of determining how much that business is worth. As valuation is an important aspect of merger and acquisition transaction, it should be done by a team of experts keeping into consideration the basic objectives of acquisition. Team should comprise of financial experts, accounting specialists, technical and legal experts who should look into various aspects of valuation from different angles. Accordingly, subjective judgement is likely to be at least as important as objective mathematical principles and it is to hoped that the quality of that judgement can be

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149 The Institute of Company Secretaries of India, 2010, p. 87.
improved by a thorough understanding of the legal and tax principles. It will be more better if the experts use more than one method for valuation of shares and compare the results arrived at by using various methods.

2.8.4. Judicial Pronouncements on Disputes in Valuation of Shares and Determination of Fair Exchange Ratio

As we all know that one of the basic requirement of any scheme of merger or amalgamation is the determination of the exchange ratio of shares between the shareholders of the transferor and the transferee companies. But often this lead to dispute. A look at the catena of case laws on the subject of amalgamation reveal that the most common dispute that is raised in the scheme is regarding the valuation of shares and the exchange ratio incorporated in the scheme.\textsuperscript{151}

\textit{United Bank of India Ltd. v. United India Credit and Development Co. Ltd.}\textsuperscript{152}

The Calcutta High Court observed that it is well settled that the onus of showing the unreasonableness and unfairness of the exchange ratio and the scheme of amalgamation is entirely on the dissentent shareholders.

\textit{Carbon and Chemicals India Ltd. v. Philips Carbon Black Ltd.}\textsuperscript{153}

In this case, the exchange ratio was fixed by the experts and approved by overwhelming majority of members of both the transferor company and the transferee company. The respondents contended that the share exchange ratio was unjust, improper and detrimental to the interests of the shareholders. However, no evidence was adduced to establish the same. It was held that the shareholders are the best judges of their own interest and are better conversant with the market trend available. Hence, the contention of the respondents was held to be unsustainable.

\textit{German Remedies Ltd., In re}\textsuperscript{154}

In this case, the valuer had made valuation by considering three methods of valuation, namely, the net asset value, profit earning value and the market value of shares as quoted in stock exchange. Valuation was done by considering these three methods

\begin{flushleft}
\textsuperscript{151} S. Ramanujan, 2012, p. 80. \\
\textsuperscript{152} (1977) 47 Com Cases 689 (Cal.). \\
\textsuperscript{153} (1999) 5 Comp LJ 27 (Ker.). \\
\textsuperscript{154} (2004) 50 SCL 77 (Bom.).
\end{flushleft}
along with various qualitative methods, business dynamics and growth potential of the company. Valuation made by different methods widely differed so they adopted weighted average of the valuation determined by the different methodologies to arrive at fair market value. In the present case, two renowned firms of valuers had considered different methods and made an unanimous report. The exchange ratio is in the realm of commercial wisdom of well-informed equity shareholders. It is not for the court to sit in appeal over the valued judgement of the equity shareholders who are supposed to be commercial men who know their common benefits and interests underlying the proposed scheme, with open eyes, had okayed the swap ratio by an overwhelming majority of 90 percent in numbers and 99 percent in value of the members present and voting. The limited jurisdiction of the court is only to see whether the ratio is so wrong or the error is so gross as would make the scheme unfair or unjust or oppressive to the minority of members or any class of them.

*Indian Metals and Ferro Alloys Ltd., In re*\(^{155}\)

In this case, the swap ratio was arrived at by two reputed valuers and nothing was brought before the court to show as to why the said valuation with regard to the swap ratio should not be accepted, the same was not disturbed.

*Hindustan Lever Employees Union v. Hindustan Lever Limited*\(^{156}\)

But the final word on the subject was recently spelt out by the Supreme Court in this case. The following observations of the Supreme Court are relevant:

“On valuation of share for exchange ratio the court found that a well reputed valuer of a renowned firm of chartered accountants and a director of TOMCO determined the rate by combining three well known methods, namely, the net worth method, the market value method and the earning method. The figure so arrived could not be shown to be vitiated by fraud and mala fide and the mere fact that the determination done by slightly different method might have resulted in different conclusion would not justify interference unless it was found to be unfair.”\(^{157}\)

\(^{155}\) (2007) 77 CLA 247 (Ori.).

\(^{156}\) AIR 1995 SC 470.

\(^{157}\) Para 1 of the judgement.
The Court further observed:

“But what was lost sight of that the jurisdiction of the court in sanctioning claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercises an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere because the figure arrived at by the valuers is not as better as it would have been if another method would have been adopted. What imperative is that such determination should not have been contrary to law and that it was not unfair for the shareholders of company which was being merged. The Court’s obligation is to be satisfied that the valuation was in accordance with law and was carried out by an independent body. The High Court appears to be correct in its approach that this test was satisfied as though the Chartered Accountant performed this function was a director of TOMCO but he did so as a member of renowned firm of chartered accountants. His determination was further got checked and approved by two other independent bodies at the instance of shareholders of TOMCO by the High Court and it has been found that the determination did not suffer from any infirmity. The company court, therefore, did not commit any error in refusing to interfere with it. May be as argued by the learned counsel for the petitioner that if some other method would have been adopted probably the determination of valuation could have been a bit more in favour of the shareholders. But since admittedly more than 95% of the shareholders who are the best judge of their interest and are better conversant with market trend agreed to the valuation determined it could not be interfered by courts, as certainly, it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme.”

*Miheer H. Mafatlal v. Mafatlal Industries Ltd.*

It was contended before the apex court that share exchange ratio was unfair and unreasonable. The court held that a reputed firm of chartered accountants had formulated the said exchange ratio after thoroughly analysing and applying all financial tools and after considering all factors and circumstances. The Supreme Court rejected the contention and held that:

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158 Para 3 of the judgement
159 AIR 1997 SC 506.
“The court will have no further jurisdiction to sit in appeal over the commercial wisdom of majority of class of persons who with their open eyes have given their approval to the scheme even if in the view of the court, there could be a better scheme for the company and its members or creditors for whom the scheme is framed.”

2.8.5. Recent Judicial Trends

The Bombay High Court in the landmark judgement of *Reliance Industries Ltd., In re*,160 where a dispute arose regarding valuation of shares held that:

“Significantly, in the instant case, the companies appointed a renowned firm to undertake the determination of swap ratio of the respective shares. No one had doubted the integrity or honesty of the said expert. Moreover, the company got checked and approved the opinion of the former by two other independent firms, who, in turn, had agreed with the said determination to be fair. It was also not possible to take the view that the concerned meetings of the creditors or members or any class of them were not furnished with the relevant material to enable them to arrive at an informed decision for approving the scheme-in-question. On the other hand, it was noticed that requisite majority of the concerned class of voters had found the scheme to be just and fair to the class as a whole. If so, their decision would legitimately bind even the dissenting members of that class.”161

“All the parameters to be borne in mind had been fulfilled in the instant case. It necessarily followed that the Court would have no jurisdiction to sit over the commercial wisdom of the majority of the class of persons, who with their open eyes had given approval to the scheme. Merely because some other method of valuation could be resorted to and would be a bit favourable to the shareholders, that alone could not militate against granting approval to the scheme propounded by the company. What is imperative is that the determination should not be contrary to law and/or unfair to the shareholders of the company which was being merged. The Court’s obligation was to be satisfied that valuation was in accordance with law and it was carried out by an independent body.”162

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160 (2009) 94 SCL 35 (Bom.).
161 Para 9 of the above judgement.
162 Para 10 of the above judgement.
In *Placer Mercantile and Investments (P.) Ltd., In re*, an inadvertent error was noticed in the scheme as well as petition with regard to the exchange ratio. Therefore an additional affidavit was filed to correct said error in proposed scheme of amalgamation. The scheme was sanctioned subject to modification/substitution of the said clause.

Most recently in *Sesa Goa Ltd., In re*, the Bombay High Court held that the court is expected to be guided by the experts’ opinion in respect of fairness report, valuation report and feasibility report given by the experts. The court reiterated that:

> “It is a well-settled position in law that the court, while making inquiry under section 391 cannot substitute the conclusions which are arrived at by the experts.”

> “Submissions of objector are nothing but conjectures and surmises and his own opinion in respect of valuation and fairness report and his own analysis as to how the swap ratio which is arrived by the valuers is incorrect. It is an admitted position that the objector was present at the court convened meeting, and, at that time, no amendment was proposed to the swap ratio nor any valuation report was submitted by him. Therefore, it is now not open for the objector to make a submission that the court should appoint fresh valuers on the basis of objector’s own analysis of the valuation report and other documents.”

Although the Apex Court in Hindustan Lever’s case and Miheer H. Mafatlal’s case has clearly settled the law but still majority of litigation in case of amalgamation is regarding dispute on exchange ratio. But the court’s approach is one of non-interference. If valuation is done by an independent professional expert by adopting the well known methods of valuation and is approved by the requisite majority of the shareholders as required under section 391(2) of the Companies Act, it cannot be questioned unless a fraud or malafide on the part of the valuer is proved.

### 2.9. Notice to Central Government (Section 394A)

This section was brought into the statute by virtue of the Companies (Amendment) Act, 1965. Let’s have a look at the wordings of the section: ‘The court shall give notice of

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163 (2010) 102 SCL 33 (Guj.).
165 Para 21 of the above judgement.
166 Para 23 of the above judgement.
every application made it to under section 391 to 394 to the Central Government and shall take into consideration the representations if any made to it by that Government before passing any order under any of these sections.

This section marks the turning point of the law relating to scheme of arrangement involving mergers and amalgamations as it expects a positive role from the Central Government. This sections enables the Central Government to study the proposal and raise such objections as it thinks fit in the light of the facts and information available with it and also place the court in possession of certain facts which might have not been disclosed by those who appear before it so that the interest of the investing public at large may be fully taken into account by the court before passing its order.168

The purpose of enacting section 394-A was that the court should hear the representations of the Central Government before passing final orders on application for scheme of arrangement including merger or amalgamation. The purpose of this section is to safeguard public interest when companies propound scheme of amalgamation.

2.9.1. Powers Delegated to Regional Directors

The powers of Central Government to make representations have been delegated to the respective Regional Directors by the Department of Company Affairs.169 Therefore, when court causes the copy of the petition to be served on the Central Government, the applicants should ensure that a copy is served on the Regional Director concerned.

2.9.2. A Supplementary Role under Section 394A of the Act

From the wordings of the section, it is clear that only in cases where applications are made to the court either under section 391 or section 394, the court is bound to give the notice to the Central Government. This point is further clarified in the case of M.C. Golcha v. Official Liquidator, Golcha Properties Pvt. Ltd.,170 where in the court held that section 394A is not applicable to proceedings under section 392 and it is not necessary to serve a fresh notice to the Central Government while making alterations and modifications to supervise the scheme of arrangement. But the Central Government

168 The Notes on Clauses to the Companies (Amendment) Act, 1965, explained the section in these words.
170 (1981) 51 Com Cases 103 (Raj.).
is expected to play clearly a secondary, sub-ordinate and a supplementary role under this section by assisting the High Court concerned to weigh the various issues before sanctioning any scheme and therefore, much ado is made about convincing the Central Government (i.e. Regional Director) that the scheme should be recommended to the court as a fit one for being sanctioned.\footnote{N.R. Sridharan and P.H. Arvind Pandian, 2010, p. 309.}

2.9.3. Case Law to Explain the Scope of the Section

\textit{Union of India v. Ahmedabad Manufacturing and Calico Printing Co. Ltd.}\footnote{(1977) 47 Com Cases 165 (Guj.-DB).}

In this case, the division bench of Gujarat High Court held that the central government has locus standi to appear and make its representations but it does not become a party to the proceedings.

\textit{Ucal Fuel Systems Ltd., In re:}\footnote{(1992) 73 Com Cases 63 (Mad.).}

“Section 394A makes it obligatory on the court to give notice to the Central Government of every application made to it under section 391 or section 394 and to take into consideration the representations made by that Government before passing any order on the proposed scheme of amalgamation. This would enable the Central Government to study the proposal and raise objections thereto as it thinks fit in the light of the facts and information available with it and also place the court in possession of certain facts which might not have been disclosed by those who appear before it so that the interests of the investing public at large may be fully taken into account by the court before passing its order. The powers and functions of the Central Government under section 394A have been delegated to the Regional Directors who are to exercise the same, subject to the control of the Company Law Board. The role played by the Central Government in cases of amalgamation is that of an impartial observer who acts in public interest and advises the court whether it is or it is not feasible for the two companies to amalgamate. If on an overall consideration of the entire picture, the court’s conscience is satisfied that an amalgamation would benefit not only the company amalgamating but the company with which amalgamation is made and it is in the mutual interests of both the companies that such a scheme should be sanctioned, the court should not hesitate to sanction the compromise and should not falter in giving effect to the genuine and bona fide scheme chalked out by the two companies.”
Bhagyaraaj Vyapaar (P.) Ltd. v. Regional Director, Ministry of Corporate Affairs, Eastern Region, Kolkata

Scheme of amalgamation of four companies came before court. Notice of amalgamation was served on Central Government through Regional Director under section 394-A. Central Government through Regional Director asked for copies of valuation report justifying share premium suggested by proposed scheme of amalgamation. Due to non-receipt of any reply, Central Government raised objection to sanctioning of proposed scheme. Therefore, company judge, passed an order directing Directorate of Revenue Intelligence to conduct an enquiry. The High Court refused to interfere with the order of company judge since the appellant companies (the four companies) failed to supply necessary documents as required by the Central Government.

Chembra Orchard Produce Ltd., In re

It was held that the words ‘every application’ used in section 394A do not mean that each company to the scheme should make separate application. All that it means is every application made to it under section 391 or 394 should be notified to the Central Government and thereafter views of the Central Government has to be considered by the court before passing any order under those provisions. When a joint application is filed, it necessarily means that there is more than one company and the Central Government shall have ample notice of the same and they have to submit their views in respect of each company which is included in the said application.

RIDS Securities Ltd., In re

In this case, the Regional Director raised following objections:

1. Transferee company being a listed company had not submitted no objection certificate from Ahmedabad Stock Exchange and should obtain fairness opinion of merchant bankers on share exchange ratio.

2. Transferee company should ensure that new shares allotted to shareholders of transferor company would be listed on relevant stock exchanges.

176 (2010) 103 SCL 53 (Guj.).
3. After amalgamation, its name will not be in consonance with business carried on by it, so name to be changed.

The Gujarat High Court sanctioned the scheme only after all the objections were complied by transferee company.

*Heritage Housing Finance Ltd., In re*\(^{177}\)

In this recent judgement, it was held that the plain reading of the provisions contained under section 394A does not postulate the nature of the objection required to be raised by the Central Government but what is provides is that the court before passing any order either under section 391 or section 394 must take into consideration the representation or objections raised by the Central Government. Thus, the Central Government is within the competence to raise objection regarding share exchange ratio as main thing which the Central Government is required to see is that no unfairness is shown to creditors or members and the public interest, which certainty imbibes in itself the power to question the said share exchange ratio.

2.9.4. Changes Introduced by the Companies Act, 2013

The Companies Act, 2013 has retained provisions of section 394A in section 230(5) but in a modified form. It says that the notice along with such documents as may be prescribed\(^{178}\) shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board of India, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India, if necessary\(^{179}\) and such other sectoral regulatory authorities which are likely to be affected by the compromise or arrangement and if the above authorities want to make any representations they shall make them within a period of thirty days from the date of receipt of notice. If no representations is received from these authorities within the above said period, it shall be presumed that they have no representations to make on the proposals.

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\(^{177}\) (2014) 124 SCL 319.

\(^{178}\) Documents shall be prescribed under the rules to be framed under the Companies Act, 2013. The rules have not yet been notified.

\(^{179}\) The notice to CCI is mandatory if the combination crosses the thresholds set under the Competition Act, 2002.
Thus, section 390 to 394 (along with section 394A) covers the complete gamut of the legal and procedural aspects of law governing ‘corporate restructuring’. Sections 391 to 394 of the Companies Act, 1956 are a complete code which is intended to be a single window clearance system. Even the Bombay High Court in *Sadanand S. Varde v. State of Maharashtra*,\(^{180}\) held that the fasciculus of sections 391 and 394 of the Companies Act, 1996 constitute a complete code on the subject of amalgamation.

### 2.10. Take-over and Acquisition of Minority Interest (Section 395)

Section 395 provides for another type of amalgamation, that is, by taking over of the undertaking of one company by another company by purchase of its shares. This section obviates the need to obtain the High Court’s sanction as contemplated under section 394. The section further provides for the procedure to be followed for acquiring the shares of dissenting members.\(^{181}\)

If any of the above schemes involve acquisition of the shares of one company by another company, it may do so by making an offer to the transferor company, so that the scheme or contract may be placed before the shareholders of the company. The shareholders have the option to approve the offer within four months. Approval must be accorded by at least nine-tenths in value of the shares whose transfer is involved. This number must be exclusive of any shares already held by the transferee company or by its nominees or by its subsidiary. Once the approval by nine-tenth majority is accorded, the transferee company gets the right to acquire the shares of the dissenting shareholder, if any. Within two months, after the expiry of the above four months, the transferee company should give a notice to such shareholders that it desires to acquire their shares. Within one month from the date of the notice, the dissenting shareholders may apply to the court. But if no application is made, the transferee company gets the final right and also becomes bound to acquire those shares on the terms on which the shares of other shareholders are to be transferred.\(^{182}\)

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\(^{180}\) (2001) 30 SCL 268 (Bom.).


\(^{182}\) Section 395(1) of the Companies Act, 1956 as quoted in Avtar Singh, *Company Law*, Eastern Book Company, 2013, p. 634. This provision corresponds to sections 235(1) and 235(2) of the Companies Act, 1956.
Important Points to be Noted:

- The period of four months after offer is a maximum period and the transferee company may prescribe a shorter period within which it must be approved. This point was authenticated by the judgement of Delhi High Court in *AIG (Mauritius) LIC v. Tata Televentures (Holdings) Ltd.*\(^{183}\) The Delhi High Court held that the phrase ‘within four months’ can quite possibly indicate the outer limited and not necessarily the entire period within which approval is to be available.

- If shorter period is prescribed, extension of the period or closing date of acceptance does not amount to a new offer.

- The act does not say which form the consideration offered to shareholders of the transferor company shall take. This is left entirely to the discretion of the transferee company. But the transferee company will try to make the consideration as attractive as possible so that the directors of the transferor company recommend their shareholders to accept the offer.

2.10.1. Fairness of Takeover Bids

Section 395 confers a very wide discretion on the court (now tribunal) to sanction or disallow the attempt to acquire. The court will take two principles while allowing or disallowing attempt to acquire. The first is that the scheme should be fair and burden to prove unfairness is on the dissenter. When 90 percent shareholders in value have agreed upon the scheme, the court shall presume fairness and the dissenting minority has to prove unfairness. But the burden to prove unfairness may be reversed where the court finds that the take over bidder and the accepting majority are the same parties. This problem happened in the case of *Bugle Press Ltd., In re.*\(^{184}\) Here the scheme of takeover was adopted to get rid of a minority. The ninety percent majority formed a new company which made the offer and it was approved by them. They then attempted to acquire the minority interest in terms of the scheme. It was held that the burden of proving fairness lay on them and the mere fact that the compensation was fair was not sufficient to discharge the burden.

\(^{183}\) (2003) 43 SCL 22 (Del.).
\(^{184}\) (1960) 3 All ER 791(CA) as quoted in Avtar Singh, 2013, p. 635.
The fairness of takeover deal was again challenged *Gierson Oldham and Adams Ltd., In re.* In this case, offer was accepted by 99 percent shareholders. Two shareholders holding mere 1 percent in value of shares objected to the scheme alleging that the scheme was unfair considering the future prospects of the company. But the court rejected the contention and laid down the following principles:

1. The test is whether the offer was fair to the body of shareholders as a whole and not to individuals.
2. The onus is on the applicants to prove that offer was unfair which they have failed in the present case.
3. A more generous treatment of preference shareholders will not make the offer unfair to ordinary shareholders.
4. The acquisition or control of shares is not a matter to be taken into account in valuing the shares.

In India, in the case of *Benarsi Das Saraf v. Dalmia Dadri Cement Ltd.*, it was held that:

1. The onus of proof is on the dissentients to establish that the price was unfair
2. The test of fairness is whether the offer is fair to the offerees as a body of shareholders as a whole and not whether it is fair to a particular individual shareholders in the peculiar circumstances of his own case. It would quite obviously be impossible for the offeror to know the circumstances of every individual shareholder and to frame an offer which would necessarily be fair to every individual shareholder.
3. The fact that the applicants may be able to demonstrate that the scheme is open to criticism or is capable of improvement is not enough to discharge the onus of proof.

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185 (1967) All ER 192.
186 (1958) 28 Comp Cases 435 (Pun.).
2.10.2. Object and the Underlying Principle behind this Section

The object of the section is to prevent the deadlock which would otherwise arise when a minority of shareholders oppose a scheme which the majority considers to be advantageous. Thus, the object is to bring the dissentient shareholders in line with the majority and force them to part with their shares, if the specified conditions are fulfilled.

The principles underlying section 395 is that where a company obtains 90 percent of the shares of a class of shareholders under a scheme of arrangement, it can compel the dissentient minority to part with its shares. Conversely, the dissenting shareholders are also entitled to compel the company to acquire their shares as well and on the same terms.

Section 395 is invoked in two situations First, in case of merger or reorganisation between the several transferor companies with the transferee company. Second, in an altogether different scenario, i.e. take-over situation, where company A offers to buy out all the shares of all the shareholders of company B. In this eventuality, company A would make an offer for the purchase of shares at a certain price and if 90 percent of the shareholders of company B agree to sell their shares at the said price, a contract would come into existence which neither party could resile from. By the operation of section 395 (now section 235), take-over contract would be enforceable not only for the 90 percent shareholders but also for the dissentent shareholders if the transferee company voices and expresses its intent to do so by giving a notice to the dissenting 10 percent, within the expiry of the four months’ period. Once the notice is issued, the transferee company would not be empowered to withdraw the offer.\footnote{Jehangir M.J. Sethna, \textit{Indian Company Law}, Modern Law Publications, Allahabad, 2010, Vol. III, p. 3391.}

**Exception:** An exception has been made to the above provision in section 395(1) by giving a provisio to section 395(1). The proviso says that where at the date of offer, shares of the same class as the shares whose transfer is involved are already held as aforesaid to more than one-tenth in value by the transferee company or its subsidiary or nominee for them, then section 395(1) shall not apply, unless:
1. The transferee company offers the same terms to all the holders of the shares or each class of shares whose transfer is involved, and

2. The holders who approve the scheme or contract, besides holding at least nine-tenths in value of the shares whose transfer is involved are also not less than three-fourths in number of the holder of such shares. The section 235 of the 2013 Act has omitted this proviso.

2.10.3. Further Opportunity for Non-accepting Minority

Section 395(2) gives further opportunity to non-accepting minority to extricate themselves. If the transferee company acquires in pursuance of any scheme or contract 90 percent (or nine-tenths in value) of the shares of the transferor company, or the shares acquired together with the shares already held in its own name or in the name of the nominees aggregate more than 90 percent then within one month of the date of transfer which brings the acquisition to nine-tenths in value, the transferee company must give notice to the dissenting shareholders. This notice will give information to the dissenting shareholders of the prevailing position and must be given in addition to any other notice given under foregoing provisions. Sub-section (2) of section 395 has been done away in the Companies Act, 2013.

2.10.4. Dissenting Shareholder Rights

The dissenting shareholder may thereafter within 3 months of the notice require the transferee-company to acquire his shares and the transferee company is bound to do so on the terms on which, under the scheme the shares of the approving shareholders were transferred or on such terms as may be agreed, or fixed by the court on the application of either the transferee company or the shareholders. 188

2.10.5. Contrary Order by the Tribunal

Where notice has been given to a dissentient shareholder and no application has been made or tribunal has passed on the application by the dissenting shareholder, an order to the contrary, the transferee company shall send a copy of the notice to the transferor

188 Section 395(2) of the Companies Act, 1956. This provision has been omitted by the Companies Act, 2013.
company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferor company and on its behalf by the transferee company. The transferee company shall pay or transfer to the transferor company, the amount of consideration and the transferor company shall thereupon registrar the transferee company as the holder of those shares and within one month of the date of such registration, inform the dissenting shareholder of the fact of registration.  

2.10.6. Treatment of Consideration Received

Any sum received by the transferor company shall be paid into a separate bank account and to be held by it in trust for the entitled shareholders. The Companies Act, 2013 has provided a new provision for time-bound distribution of purchase consideration received by transferor company to its entitled shareholders within 60 days of receipt by it.

2.10.7. Other Procedural Requirements

Every offer of a scheme or contract involving transfer of shares from transferor company to transferee company has to fulfill certain further procedural requirements where are as follows:

1. Every such offer or circular containing the terms or recommendations to the members of the transferor company by the directors to accept such offer shall be accompanied by such information as may be prescribed.

2. Every such offer shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that the necessary cash will be available.

3. Every circular containing or recommending acceptance of such offer shall be registered with the registrar and no such circular shall be issued until it is so registered.

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189 Section 395(3) of the Companies Act, 1956 corresponding to section 235(3) of the Companies Act, 2013.
190 Section 395(4) of the Companies Act, 1956.
191 Section 235(4) of the Companies Act, 2013.
192 Section 395(4-A) of the Companies Act, 1956 inserted by Act 31 of 1965 w.e.f. 15.10.1965 i.e. Companies (Amendment) Act, 1965. It corresponds to section 238 of the Companies Act, 2013 with certain modifications.
(d) The registrar may refuse to registrar any such circular which does not contain
the information required to be given or which sets out such information in a
manner likely to give false information.

(e) An appeal shall lie to the court against an order of the Registrar refusing to
registrar any such circular.

The Companies Act, 2013 has little bit altered clause (b) to sub-section 4-A in the
corresponding section 238(3) of the Companies Act, 2013. Section 238(3) provides that
every director who issues a circular which has not been presented for registration shall
be punished with fine which shall not be less than twenty five thousand rupees but
which may extend to five lakh rupees. The powers under section 395(4-A) of the 1956
Act to hear appeal against Registrar of Companies refusal to register circular was with
the court. These powers have been transferred to Tribunal under section 238(2) of the
Companies Act, 2013.

Mrs. Leela Mahajan v. T. Stanes & Co. Ltd.\textsuperscript{193}

The court held that under the section, court has no power to direct purchase of shares of
dissentient shareholders at a particular price. It can direct that the transferee company is
not to exercise the powers of compulsory purchase given by the section over the shares
of the dissenting shareholders but the court has no power to direct the transferee
company to pay the dissenting members something which they have not offered to pay
even when the offer price was less than the market price i.e. the court cannot determine
the fair value.

AIG (Mauritius) LLC v. Tata Televentures (Holdings) Ltd.\textsuperscript{194}

Various important points relating to various important aspects of section 395 were
settled by the Delhi High Court.

1. By the operation of section 395, takeover contract would be enforceable not
only for 90 percent shareholders but also for the dissentient shareholders if the
transferee company voices and expresses its intent to do so by giving a notice to

\textsuperscript{193} (1956) 26 Com Cases 366 (Mad.).
\textsuperscript{194} (2003) 43 SCL 22 (Del.).
the dissenting 10 percent within two months of the expiry of the four months
period. Once the notice is issued, the transferee company would not be
empowered to withdraw the offer.

2. In cases where section 395 is sought to be invoked, an extra-ordinary situation
comes into existence making it essential for the party relying on the section to
dispel each and every doubt about its bonafides and to establish that its every
action was imbued with fair play.

3. It is extremely important that ninety percent majority should comprise of
different and distinct persons since this would then fall in line with the rationale
of the section and justify overriding the rights and interests of the dissentients. It
is also imperative that this majority should not be same as the party seeking to
acquire the shares.

4. Four months has been considered an appropriate period by the legislature and
there is no reason to construe the provisions in a manner as would curtail or
diminish it. This four months period permits democracy to reign in the company,
enabling an exchange of information and views and discussion between the
shareholders. Even if on the expiry of the period of four months a person
holding less than ten percent of the shares, resolutely refuses to sell its shares, it
is not incumbent or mandatory on the ‘taking over’ company to purchase these
shares. If it intends to do so then the ‘taking over’ company must record and
articulate its intention to purchase the dissentients shares by giving a notice in
the manner prescribed in the section to the dissentient shareholders within two
months of the expiry of four months.

2.11. Amalgamation by the Order of Central Government (Section 396)

This section deals with a different method of amalgamation i.e. amalgamation by the
order of Central Government. This means that sections 391 to 394A i.e. five sections
(which form a complete code) have no role to play in the scheme of things under section
396 of the Act i.e. the companies whose amalgamation is ordered under Section 396 do
not have to go through the lengthy procedural requirements of the five sections.
Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may by order notified in the Official Gazette provide for the amalgamation of those companies into a single company.\textsuperscript{195}

2.11.1. Pre-conditions of Making the Order [Section 396(4)]\textsuperscript{196}

The Central Government can not make any order as aforesaid, unless a copy of the proposed order has been sent in draft to each of the companies concerned and the Central Government has considered and made such modifications, if any, in the draft order as may seem to it desirable in the light of any suggestions and objections which may be received by it from any such company, within such period as the Central Government may fix in that respect, not being less than two months from the date on which the copy is received by that company or from any class of shareholders or any creditors or class of creditors.

2.11.2. Order to be Notified in the Official Gazette

Section 396(1) provides that such order, in order to take effect, has to be notified in the Official Gazette and it shall state that the company that is formed after amalgamation’s constitution, its property, powers, rights, interests, authorities and privileges together with its duties, liabilities and obligations. Section 396(2) provides that the order of the Central Government (like the order of the Tribunal in section 394) can provide for continuation of legal proceedings by or against the transferor company and may also contain such incidental, consequential and supplementary provisions as may, in its opinion, be necessary for giving effect to the amalgamation without any difficulty.\textsuperscript{197}

2.11.3. Interests of Members or Creditors

Further, the interest of the members and creditors\textsuperscript{198} are protected by providing that the members and creditors have as nearly as possible, the same rights and interests in the

\textsuperscript{195} Section 396(1) of the Companies Act, 1956. This section corresponds to section 237(1) to the Companies Act, 2013.

\textsuperscript{196} Section 396(4) corresponds to section 237(5) of the Companies Act, 2013.

\textsuperscript{197} Section 396(2) corresponds to section 237(2) of the Companies Act, 2013.

\textsuperscript{198} Interest of members and creditors are protected under sub-section (3) of section 396 corresponding to sub-section (3) of section 237 of the Companies Act, 2013.
amalgamated company as they originally enjoyed in the company before amalgamation. In case the rights of the member or creditor are less in the transferee company as compared to the said rights in the transferor company, they are entitled to compensation as decided by the authority constituted for the purpose.

2.11.4. Right of Appeal by Members a Creditors [Section 396(3A)]

Any person aggrieved by any assessment of compensation made by the prescribed authority may prefer an appeal to the tribunal and then the assessment of the compensation shall be made by the tribunal.

2.11.5. Parliamentary Control

Copies of every order of the Central Government made under section 396, must, as soon as may be after the order has been passed, be laid before both the Houses of Parliament.

2.11.6. Some Important Observations on this Section

It would be interesting to note that the heading of the section 396 speaks about power of Central Government to order amalgamation in national interest whereas in the opening sentence of the section words are public interest. The words ‘national interest’ were substituted by the words ‘public interest’ by the Companies (Amendment) Act, 1965. Whatever is in public interest in the normal course will be in national interest but the converse may not always be true. Thus, the marginal heading denotes the original intention whereas the substituted words denote the dilution of the concept so that the section can be used in a wider context.

However Sridharan and Pandian (2010) are of the view that these viewpoints are merely academic and would not in any way reduce or increase or jeopardise the scope of the section. Most of the amalgamations that have taken place under section 396 are between public sector banks, sick textile mills and public sector companies. Examples

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199 This section corresponds to section 237(4) of the Companies Act, 2013.
200 Section 396(5) of the Companies Act, 1956 corresponds to section 237(6) of the Companies Act, 2013.
are: Amalgamations of Tamil Nadu Meat Corporation Ltd. with Tamil Nadu Poultry Development Corporation Ltd. by the order of Ministry of Law, Justice and Company Affairs under the Central Government dated 18-11-1993. Very recently, the Government decided to merge National Spot Exchange Limited (NSEL) which is embroiled in a Rs. 5600 crore payment crisis with its holding group Financial Technologies (India) Ltd. in ‘public interest’ by a draft order dated 21 October 2014. Thus, section 396 provides a faster and speeder process for amalgamation overriding the provisions of sections 394 and 395 of the Companies Act. The companies wanting to amalgamate instead of going through the rigorous process from sections 391-394 i.e. obtaining shareholders and Tribunal’s approval can directly approach Central Government to order amalgamation. But till date no company has approached Central Government and moreover, Central Government has also ordered amalgamation of only public sector companies.

2.12. Preservation of Books and Papers of the Amalgamated Company (Sec 396-A)

Section 396-A provides that the books and papers of the company which has been amalgamated with or whose shares have been acquired by another company in accordance with the provisions of this chapter shall not be disposed of without the prior permission of the Central Government. Before granting such permission, the Central Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence as to commission of an offense in connection with the promotion or formation or the management of the affairs, of the first mentioned company or its amalgamation or the acquisition of its shares.

Object of the Prohibition for Destruction of Records: The object of the provision for prohibition on disposal of records without prior permission of Central Government is to prevent disappearance of evidence of fraud, branch of trust, misfeasance and other wrongful acts of the management on amalgamation with another company.

203 For further details, and model copy of the order, see, N.R. Sridharan and P.H. Arvind Pandian, 2010, pp. 345-351.
205 Section 396-A corresponds to section 239 of the Companies Act, 2013.
2.13. Amalgamation/Merger without Court’s Order

Section 494 provides another mode of amalgamation and reconstruction in addition to section 391 to 396A of the Companies Act, 1956. This is evident from the judgement of Calcutta High Court in Hari Krishna Lohia v. Hoolungoree Tea Co.\(^{206}\) The relevant extract from the judgement which refers to this is reproduced below:

“It may be said that there are four methods for effecting reorganisation of a company. One of the methods is to be found in section 391 following a second method is compulsory amalgamation by the Government under section 396, the third method would be what is contemplated in section 494 of the Companies Act and the fourth is amalgamation without coming to court.”

Section 494 contains an alternative method of reconstruction of a company by means of voluntary liquidation in which the liquidator may transfer the assets of a company called the transferor company in consideration of shares of another company called transferee company.\(^{207}\) The liquidator therefore distributes the shares acquired in the transferee company amongst the shareholders of the transferor company.

**Statutory Right:** Every limited company has under this section a statutory right of effecting an arrangement whereby it is amalgamated with another company. No express power need to be contained in the Memorandum of Association, for the scheme of amalgamation does not depend for its validity upon the constitution of the company as contained in the Memorandum and Articles.\(^{208}\) The provisions of section 494 are supreme and cannot be controlled by the memorandum.\(^{209}\)

2.13.1. Amalgamation under Section 494

The essential ingredients of this section are:

1. A company is in the course of member’s voluntary winding up.

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\(^{206}\) AIR 1969 Cal 312.


2. Whole or part of the business is proposed to be transferred or sold to the transferee company,\textsuperscript{210} then the liquidator is authorised by passing of a special resolution.

- Receive, by way of compensation for the transfer, sale, share, policies or other like interest in the transferee company and distribute it among the members.
- Enter into any other arrangement whereby the members of the transferor company in lieu or in addition to interest mentioned above (i) participate in profits or receive any other benefit from the transferee company.

Any sale or arrangement entered as above is binding on the members of the transferor company.\textsuperscript{211} Section 319 of the 2013 Act which corresponds to this section has added an proviso to sub-section (1) which requires that the secured creditors should also consent to the arrangement, then only the company liquidator can accept such arrangement.

2.13.2. Right of Dissentient Shareholders

Dissentient shareholders who are covered under this sub-section are those:

- Who voted against the special resolution
- Who did not vote at all

Section 494 provides better protection to minorities and dissentient shareholders. Firstly, the manner of voting is more equitable since at every general meeting, voting at first instance is done by a show of hands. Secondly, shareholders have a wider right of dissent since he has right to dissent from the scheme in its entirety.\textsuperscript{212} These dissentient shareholders can express their dissent in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of resolution and can make the liquidator do either of the following:

\textsuperscript{210} The transferee company need not be a company within the meaning of the Act. It can be a foreign company or a company established under the Special Act or an unincorporated firm carrying on some commercial or industrial activities.

\textsuperscript{211} Section 494(2) of the Companies Act, 1956. This section corresponds to section 319(2) of the Companies Act, 2013.

1. To abstain from carrying the resolution into effect.

2. To purchase his interest at a price to be determined by agreement or by arbitration, i.e. if the dissentient member and the liquidator agree to the purchase price, the dissentient shareholders’ shares are brought out at the price. If the liquidator and dissentient members cannot agree, the matter is referred for arbitration.

The section further says that if the liquidator elects to purchase the member’s interest, the purchase money shall be paid before the company is dissolved and to be raised by the liquidator in such manner as determined by the special resolution.

2.13.3. Last Few Words on Section 494

Under section 494, all that is contemplated is that a special resolution is passed by the company by which power is conferred on the liquidator to carry out the proposed arrangement. Therefore, in contrast, the court does not come into the picture, and time taken to complete a merger under this section would be substantially less and the process less cumbersome. These days, most companies perform a diligence exercise before mergers. A long time frame which happens in case of merger under section 391-394-A i.e. with court intervention will render the whole due diligence exercise less fruitful. Therefore, if the provisions of this sections are retained as such under the new Companies Act, 2013, which has been done this section may attract companies to amalgamate under its fold.

2.14. Procedure/Steps for a Merger or Amalgamation

We have already discussed the statutory provisions relating to amalgamation of companies under sections 390 to 396A of the Companies Act, 1956. But a company undergoing merger or amalgamation has not only to fulfill those statutory requirement but also the procedural compliances as mentioned in the Rules 67 to 87 of the

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213 Section 494(3) of the Companies Act, 1956 which corresponds to section 319(3) of the Companies Act, 2013. The 2013 Act has substituted ‘arbitration’ with the words ‘price determined by the registered valuer’.

214 Section 494(4) of the Companies Act, 1956 which corresponds to section 319(4) of the Companies Act, 2013.

Companies (Court) Rules, 1959. No doubt, we now have a new legislation i.e. Companies Act, 2013 replacing the old Act. But the rules under the 2013 Act have not been framed yet. So the companies undergoing merger or amalgamation still have to comply with the Companies (Court) Rules, 1959.

The procedure is complex, involving not only the compromises or arrangement between the company and its creditors or any class of them or between the company and its members or any class of them but it involves safeguard of public interest and adherence to public policy. These aspects are looked after by the Central Government through Official Liquidator, Regional Director, Ministry of Corporate Affairs and the court has to be satisfied of the same.216

(1) Observing the Memorandum of Association (MOA): Object clause of MOA should have adequate provisions or special power for its amalgamation with another company. No doubt, as discussed earlier also, various judicial pronouncements217 have pointed out that there is no necessity to have special power in the object clause of the MOA of a company for its amalgamation with another company. But the offices of the Regional Director and the Official Liquidator insist for this clause in the MOA, so it is better to amend the object clause so that it does not act as an impediment while their clearance is obtained.218

Secondly, MOA of the transferee company should be checked to verify that the objects of the transferee company should cover the objects of transferor company. Lastly, provision in object clause of adequacy of authorised capital to be able to absorb the capital structure of the transferor company within its own framework of authorised capital. In case there is no provision in MOA for the above three matters, then object clause is amended in accordance with the requirements of section 17 and section 18 of the Companies Act, 1956. The company need to file electronically the resolution at its Board meeting and the special resolution at general meeting of shareholders with Registrar of Companies in e-form no. 23, a general notice in the notice before obtaining confirmation from the Company Law Board (now Tribunal).

217 Various judicial pronouncements are already discussed in the topic ‘Power of Amalgamation’.
218 The Institute of Company Secretaries of India, 2010, p. 49.
(2) **Government/Reserve Bank Approval:** Important approvals of Central Government or Reserve Bank are required in certain cases. For example, Reserve Bank of India’s approval is required in case of transfer of shares involving foreign nationals or non-resident Indians under regulation 7 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000. Now under the Competition Act, 2002, approval of Competition Commission of India (CCI) has to be obtained, if the combination crosses the threshold limits prescribed under the Act.

(3) **Preparation of Scheme of Amalgamation:** The companies which have decided to merge should prepare a scheme of amalgamation in consultation with company’s auditors, legal advisors and practicing company secretary. There is no particular form for scheme of amalgamation prescribed in rules. However, scheme should contain following particulars.

(a) Particulars about transferor and transferee company.
(b) Appointed and effective date.
(c) Description of proposed share exchange ratio.
(d) Status of the employees of the transferor company- whether they will be absorbed by transferor company at terms which are not less favourable to them.
(e) The specific approvals required by the scheme.
(f) Revocation/cancellation of scheme if the requisite approvals are not obtained
(g) The transferor company to be dissolved without winding up.
(h) In case the scheme could not be implemented by a particular date, or such further period, the scheme to become null and void.

(4) **Preparation of Valuation Report:** After preparation of scheme of amalgamation, an expert is appointed to prepare the valuation report and swap ratio for consideration by the boards of both the companies. Such report should be vetted by the authorised merchant banker.

(5) **Approval of the Board of Directors:** Respective Board of Directors of transferor and transferee company are required to approve the scheme prepared above and the share exchange ratio.
(6) **Approval of the Scheme by Financial Institution, Banks or Trustees for Debenture Holders:** 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 or the debenture trustees to avoid any major change in the meeting of creditors to be convened at the instance of the company court (now tribunal) under Section 391 of the Companies Act, 1956.\(^{219}\)

(7) **Intimation to Stock Exchange:** Notice has to be given to the regional stock exchanges and other stock exchanges where shares of the company are listed and SEBI under the Listing Agreement at least two days before the Board Meeting is proposed to be held for the purpose of approving the amalgamation.\(^{220}\) Within 15 minutes after the Board Meeting, the Regional Stock Exchange and all other stock exchanges are required to be given intimation of the decision of the Board.

(8) **Application to the High Court (now Tribunal) for Directions:** An application seeking directions to call, hold and conduct meetings is made to the court in the manner prescribed under the Companies (Court) Rules.\(^{221}\) The application is by way of summons supported by an affidavit. The summons shall be in Form no. 33 and affidavit in Form no. 34 of Company (Court) Rules.\(^{222}\) It must be ensured that the proposed scheme of amalgamation is attached to the above mentioned affidavit. The summons shall be accompanied *inter alia* by the following documents:

1. A certified copy of the memorandum and articles of association of each of the two companies.

2. A certified copy of the company’s latest audited balance-sheet and profit and loss account.

3. A copy of the Board resolution which authorities the Director to make application to the High Court.

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\(^{221}\) Rule 67 of the Company (Court) Rules, 1959.

\(^{222}\) *Ibid.*
On hearing the application, the High Court has to be satisfied that the scheme is genuine, bonafide and largely in the interest of the company and its members and the judge may summon or order a meeting of the members or may give following directions as regards the convening of the meeting.223

(a) Fixing the time and place of holding of meeting.
(b) Appointing the chairman of the meeting.
(c) To determine the class/classes of members or creditors whose meeting have to be held for considering the proposed compromise or arrangement.
(d) Fixing the quorum and the procedure to be followed in case of voting by proxy.
(e) Advertisement of the notice of the meeting.
(f) Time limit for the chairman to submit report to the court regarding the result of the meeting.

The Registrar of the concerned High Court accords his approval to the draft notice, explanatory statement under section 393 of the Companies Act, 1956 and the form of proxy and then they are signed by the chairman of the meeting.

(9) Dispatch of the Notices: Notices alongwith explanatory statement, proposed scheme of compromise or arrangement and proxy are to dispatched to the shareholders after giving statutory notice required for the purpose, namely 21 clear days and two days of service of documents as required under the Companies Act, 1956. The notice must be sent individually to each of the members or creditors by the Chairman appointed for the meeting, if the court so directs by the company or the liquidator and other person as the court may direct.224 The notice must be sent by post under certificate of posting to the last known addresses of the member/creditors.225

But in EITA India Ltd., In re,226 the Calcutta High Court has held that non-receipt of notice by the member/creditor would not invalidate the proceeding of the meeting.

223 Rule 69 of the Company (Court) Rules, 1959.
224 Rule 73 of the Company (Court) Rules, 1959.
225 Ibid.
226 (1997) 24 CLA 37 (Cal.).
Moreover in *Ambika Prasad Modi v. Roadco India (P.) Ltd., In re*,\(^{227}\) the Calcutta High Court held that the contention of the applicant that he had not received any communication with regard to scheme of amalgamation could not be accepted as advertisement was duly published in two newspapers. The notice of the meeting must also be advertised in such English and Hindi newspapers as the tribunal may direct not less than 21 clear days before the date fixed for the meeting.\(^{228}\) Every creditor or member entitled to attend the meeting shall be furnished by the company, free of charge and within 24 hours of a requisition being made for the same with a copy of the proposed compromise or arrangement together with copy of the statement required to be furnished under section 393, unless the same had been already furnished to such member or creditor.\(^{229}\)

**(10) Affidavit of Service of Notice:**\(^{230}\) The chairman appointed for the meeting or the company or other person directed to issue the advertisement shall file an affidavit atleast seven days before the meeting confirming that the directions relating to issue of notices and advertisements have been duly complied with.

**(11) Convening of General Meeting:** The general meeting is held on the day fixed beforehand and resolution will be passed in that meeting approving the scheme of amalgamation with such modification as may be proposed and agreed to at the meeting. The resolution relating to the approval of the amalgamation has to be approved by majority in number representing three fourths in value of the creditors or class of creditors or members or class of members as the case may be present and voting either in person or by proxy.\(^{231}\) In the case of *ESL India Ltd., In re*,\(^{232}\) the Rajasthan High Court held that the voting by proxy is permitted provided proxies in the prescribed form duly signed by the person entitled to attend and vote at meeting is filed at the registered office of the company not later than 48 hours before the meeting. Thus, for resolution to be passed both criteria i.e. majority in number and three-fourth in value has to be

\(^{227}\) (2011) 106 SCL 15 (Cal.).
\(^{228}\) Rule 74 of the Company (Court) Rules, 1959.
\(^{229}\) Rule 75 of the Company (Court) Rules, 1959.
\(^{230}\) Rule 76 of the Company (Court) Rules, 1959.
\(^{231}\) Section 391(2) of the Companies Act, 1956.
\(^{232}\) (2009) 95 SCL 133 (Raj.).
fulfilled. Further, Rule 77 of Company (Court) Rules prescribes that the decisions of the meeting held pursuant to a court order should be ascertained only by taking a poll.

At the general meeting, the following resolutions can be passed:

(a) A resolution for approving the scheme of amalgamation.

(b) In case of transferee company, a special resolution authorising allotment of shares to persons other than existing shareholders.

(c) A resolution as directed by court/tribunal to deal with dissenting shareholders.

(d) In case there is need of an ordinary/special resolution (as required in articles), it shall be passed for increasing the authorised share capital.

The minutes of the meeting should be finalised in consultation with the Chairman of the meeting and to be signed by him.

(12) Submission of the Report of the Chairman: The chairman of the meeting within seven days of the conclusion of the meeting or such time as may be fixed by the court report the result of the meeting to the court.\textsuperscript{233} The report shall state accurately the following matters:\textsuperscript{234}

(a) The number of members/creditors who voted at the meeting either personally or by proxy.

(b) The percentage of members/creditors who voted in favour of the scheme.

(c) The individual value of the votes.

(d) The way they voted.

(13) Submission or Presentment of Petition: A petition in Form 40 of the Court Rules is required to be filed within 7 days of the filing of the Chairman’s Report to the court for confirmation of amalgamation.\textsuperscript{235}

(14) Issues of Notice to Central Government under Section 394A: On receipt of the petition for amalgamation under section 391 of the Companies Act, 1956, the court will
give notice of the petition to the Central Government (Regional Director) and will take into consideration any representations made by it.

(15) Date and Notice of Hearing (Rule 80): The Tribunal shall fix a date of the hearing of the petition and the notice for this shall be advertised in the same papers in which the notice of the meeting was advertised or in such other papers as the court may direct not less than 10 days before the date fixed for hearing.

(16) Confirmation of the Scheme/Approval of the Court: After hearing of the petition, if the court finds that there is no objection to the scheme from Regional Director or others who are entitled to object, it may pass an order in Form 42 of the Court Rules approving the scheme of amalgamation.

If the Regional Director has any objections to the proposed amalgamation, he may direct his advocate to attend the hearing and plead before the High Court. On the day of hearing, any person interested including creditors or employees can appear before the court to make any submission. Before sanctioning the scheme, the court has to see whether the scheme is reasonable and fair to all parties concerned. The High Court has discretion to modify the scheme for its proper working. The petition, and affidavit has to be submitted to the High Court for confirmation of scheme of amalgamation after being prepared by company’s solicitor in consultation with company’s executive/merchant banker managing the merger proceedings. After the High Court/Tribunal sanctions the scheme, it takes about four-six weeks to obtain a copy of order from the High Court.

(17) Filing of the Tribunal’s Order Certified copy of the High Court’s order has to be filed with the Registrar of Companies (ROC) in the state in which the registered office of the company is situated within 30 days from the time when certified copy of the order is obtained as required by section 391(4). A copy of the High Court/Tribunal’s order should be annexed to every copy of the Memorandum and Articles of the transferee company issued after certified copy has been filed as aforesaid.

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236 The Institute of Company Secretaries of India, 2010, p. 56.
237 Cannon Tea Co. Ltd., In re, (1966) 2 Comp LJ 278 (Cal.).
238 The petition is prepared in Form 40 (Rule 79).
(18) **Dissolution of the Transferor Company:** The section 394(1)(iv) vests power in the High Court to order dissolution without winding up of the transferor company either by order sanctioning the scheme or subsequent order. But the court shall not pass this order unless the official liquidator has on scrutiny of books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members.

(19) **Transfer of Assets and Liabilities:** Section 394(2) vests power in the High Court to order for the transfer of any property or liability from the transferor company to transferee company. In pursuance and by virtue of such order, such properties and liabilities of the transferor company shall automatically stand transferred to the transferee company from the date of filing of court’s order with ROC.  

(20) **Allotment of Shares to the Shareholders of the Transferor Company:** As per the sanctioned scheme, the shareholders of the transferor company are entitled to get cash or shares in the transferee company in the exchange ratio provided under the said scheme. After allotting shares to the shareholders of the transferor company, the transferee company is required to file electronically with ROC the return of allotment in e-form no. 2 appended to the Companies (Central Governments) General Rules and Forms within 30 days from the date of allotment in terms of section 75 of the Companies Act.

(21) **Listing of Shares at Stock Exchange:** After the amalgamation is effected the transferee company should apply to the stock exchange where its securities are listed for listing the new shares allotted to the shareholders of the transferor company.

(22) **Report on the Working of the Scheme:** At any time, after the passing of the order sanctioning the compromise or arrangement, the court either on its own motion or application of any person interested make an order to the company or its liquidator (where company is being wound up) to submit a report on the working of the compromise or arrangement. If any difficulty arises in working of such compromise or arrangement, the company or any creditor or member or liquidator (in case of company which is being wound up) apply to the court for determination of any question

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240 Id., p. 444.
241 Rule 86 of the Company (Court) Rules, 1959.
relating to the working of the compromise or arrangement. The court may on such application pass such orders and give such directions as it thinks fit and can also make such modification in the scheme as it considers necessary for the proper working of the scheme.

The above list set out briefly the procedure for effecting mergers and amalgamations in India. As is evident a lot of paper work and documentation is required during the process of mergers or amalgamations in India. If there is no objection from shareholders or creditors the time period is 254 days (app.). Time taken to complete depends a lot on the objection raised by various shareholders/creditors. So, overall a merger process in a normal case can be completed between six to twelve months.

2.15. Important Changes Made by the Companies Act, 2013

The Companies Act, 1956 was enacted by the Indian legislature over half a century ago. In that over half a century ago, a radical and drastic change has taken place in the way the business is conducted which has necessitated that robust and young corporate laws are introduced in the system. The globalisation and liberalisation of Indian economy has created a complex, diverse and dynamic business environment. The Companies Act, 2013 has been enacted to suit the requirements of such complex business environment. The amendments have been discussed and elaborated along with the discussion on relevant sections of Companies Act, 1956. But certain new concepts have been introduced by the new Act which are elaborated herewith. Though the sections of the new act dealing with mergers and amalgamations have not been notified but lets have a sneak peak into them.

(I) Establishment of National Company Law Tribunal: The new Act proposes that the National Company Law Tribunal (NCLT) will assume the jurisdiction of High Courts in context of restructuring schemes.\(^{242}\) The Act envisages that all the powers and functions of the Company Law Board, Company Court, BIFR under the Sick Industrial Companies Act will now onwards be exercised by NCLT. This move is welcome one since it will be specialised body dealing only with cases under company and related

laws thereby introducing elements of timelines and efficiency. As under the earlier framework, the approval by High court no doubt ensured oversight and fairness but the process normally look around six months and in certain cases about one to two years. The establishment of NCLT will facilitate the speedy disposal of cases. Establishment of a single forum which is dedicated to corporate matters is a welcome move and will remove the problem of multiple regulators. ²⁴³ Although the setting of NCLT has been on the anvil for a long time, with the passing of the Act, the process may get expedited. ²⁴⁴

(2) Objections to the Scheme of Mergers and Amalgamations: The Companies Act by introducing a proviso to section 230(4) has sought to create a threshold for making an objection to the scheme of arrangement. The new Act provides that persons holding atleast 10 percent of share holding or 5 percent of the total outstanding debt as per the latest audited financial statements is eligible to raise objections. ²⁴⁵ No doubt, the main aim of the threshold is to result in efficiency in implementation of the scheme by reducing frivolous litigations by few small shareholders or creditors. But on the other hand, the interest of minority shareholders and creditors are being undermined by substantially eroding their power of objections in case of restructuring schemes.

(3) Extinguishment of Holding of ‘Treasury Stocks’: Treasury shares are those that a company holds in itself and are created as a result of buy-backs from the open market or M&As. Since companies cannot hold their own stock, they hold it through a trust or special purpose entity (SPE). ²⁴⁶ For example, company X and Y are going to merge such that one company i.e. company Y would seize to exist and all the shareholders of Y would be shareholders of company X. Company X already has shares in the erstwhile

²⁴⁵ Proviso to section 230(4) of the Companies Act, 2013.
Company Y before the merger took place. While implementing the scheme of amalgamation if Company X decides to use a method of share swap by which Company X will be issuing its shares to buy the shares of Company Y. Now, what does Company X do about the shares it held in erstwhile Company Y which has become Company X? Company X cannot hold shares in itself. Now, in such a scenario, the Company X may transfer the shares to a special purpose entity (SPE), usually a Trust. Therefore, by this method a company is able to hold its own shares.\(^{247}\) This provision has been provided in the proviso of the section 77 of the old Companies Act, 1956.

This provision of ‘treasury stock’ results in dual advantage to the company as it provides them liquidity in future, while still allowing the promoters to retain a controlling stake over the company. But the 2013 Act abolishes the practice of companies to hold their own shares through a trust and requires that cross-held shares to be compulsorily cancelled.

(4) Cross-border Mergers: Under the Companies Act, 1956, while foreign companies can be amalgamated into an Indian company, the reverse is not permissible i.e. an Indian company cannot merge with a foreign company as section 394(4)(b) provides that transferee company has to be an Indian company. But the 2013 Act has removed this barrier and allowed both inbound and outbound cross-border mergers between Indian companies and foreign ones. Now Indian company can merge into a foreign company incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government.\(^{248}\) But prior approval of RBI and NCLT would be required and the consideration for the merger can be in the form of cash or in depository receipts or in both.\(^{249}\) The introduction of this provision could have a far-reaching impact and will facilitate and promote cross-border M&A as cross-border M&A have ground breaking significance in plotting India on the global M&A landscape. Moreover, many corporate deals have fallen through or failed to meet their desired objectives in the past due to lack of such provisions in the 1956 Act.

\(^{247}\) Ibid.
\(^{248}\) Section 234(1) of the Companies Act, 2013.
\(^{249}\) Section 234(2) of the Companies Act, 2013.
(5) Fast-Track Mergers/Short form Mergers Allowed: The Companies Act, 2013 has created a new provision i.e. section 233 which provides for the option of simplified and fast track merger between:

- Two or more small companies
- Holding company and its wholly owned subsidiary
- Prescribed class/classes of company

Such form of mergers do not require any approval from NCLT. But notice of such merger has to be issued to Registrar of Companies and Official Liquidator inviting any objections or suggestions to the scheme. The objections and suggestions received are considered by the companies in their respective general meeting and the scheme needs to be approved by at least members holding 90 percent of the total number of shares or by nine-tenths in value of creditors or class of creditors. Once the scheme is approved, a copy of the scheme has to be filed with the Central Government, Registrar and the Official Liquidator. This provision will remove the bureaucratic barriers involved in court proceeding and in turn simplify the process and also reduce the time involved in the process and thus will lead to faster disposal of the matter.

The researcher is of the view that this a welcome move as it would save the time of both the courts and of the company. As we know in today’s ultra-competitive globalised economy, time is of essence. If a company want to merge speedily, the purpose is better served by the Companies Act, 2013 then by the Companies Act, 1956. Although, we are not aware of the speed and efficiency of the new provisions in practice as the new provisions have not yet been notified, we can still assume that fast track mergers will speedify the process.

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250 Section 2(85) defines ‘small company’ as a company other than a public company:
   (i) Paid-up share capital of which does not exceed Rs. 50 lakh or such higher amount as may be prescribed which shall not be more than five crore rupees.
   (ii) Turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.
251 Section 233(1)(a) of the Companies Act, 2013.
252 Section 233(1)(b) and (d) of the Companies Act, 2013.
253 Section 233(2) of the Companies Act, 2013.
The Provision is the Result of Progressive Judicial Interpretation: Even before the enactment of the 2013 Act, the judicial mood seemed to be leaning towards facilitating quicker mergers between holding and wholly owned subsidiaries. We can quote the judgement of Delhi High Court in *Sharat Hardware Industries (P.) Ltd., In re,*\(^{255}\) where the court ruled that no application of section 391 or 394 of the Companies Act will be necessary if the merger does not affect the rights of members and creditors of the transferee company or the scheme does not involve the reorganisation of the share capital of the transferee company. Whereas Bombay High Court in *Bank of India Ltd. v. Ahmedabad Manufacturing & Calico Printing Co. Ltd.*\(^{256}\) observed that where the transferor company was a wholly owned subsidiary of the transferee company, the transferee company need not file a separate petition to get the approval for the scheme. Petition by the transferor company is enough.

Even recently in the judgement of the Gujarat High Court in *Reliance Jamnagar Infrastructure Ltd., In re,*\(^{257}\) the conglomerate Reliance Industries Ltd., wanted to merge its subsidiary Reliance Jamnagar Infrastructure Ltd., into itself. The Gujarat lowered the procedural barriers and held that it was not necessary for both High Courts (i.e. Bombay High Court for Reliance Industries Ltd. and Gujarat for Reliance Jamnagar Infrastructure Ltd.) to approve the merger and approved the merger on behalf of Bombay High Court.

**(6) Notice to Regulatory Authorities:** Section 230(5) of the 2103 Act provides that notice of the meeting should also be sent to various statutory authorities like:

- Central Government
- Income-tax Authorities
- Reserve Bank of India
- Securities and Exchange board of India
- The Registrar

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\(^{255}\) (1978) 48 Com Cases 23 (Del.).
\(^{256}\) (1972) 42 Com Cases 211 (Bom.); also see, *Mahamba Investment Ltd. v. IDI Ltd.*, (2001) 33 SCL 383 (Bom.).
\(^{257}\) (2012) 116 SCL 475 (Guj.).
• Respective Stock Exchanges
• Official Liquidator
• Competition Commission of India, if necessary
• Other sectoral regulators or authorities which are likely to affected by the compromise or arrangement.

If above statutory authorities want to make any representation, they have to make it within a period of thirty days failing which, it shall be presumed that they have no representations to make on the proposal. There was no such provision in the Companies Act, 1956.

(7) Merger of Listed Company with Unlisted Company: The 1956 Act does not contain any specific provision governing the merger of a listed company with an unlisted one. It is generally assumed that shares issued pursuant to the merger of a listed company with an unlisted one (or vice versa) need to be listed on the stock exchanges where the transferor company was listed. There have been cases, even in the present scenario, where the resulting company has continued to be unlisted after the demerger. Recent precedents include the schemes of demerger of Wipro Ltd. and Sundaram Clayton Ltd. 258

The 2013 Act sets out formal guidelines and provides an option to a transferee company to remain unlisted till it is listed or applies for listing, provided the shareholders of the merged listed company are given an exit opportunity. It also provides that provision should be made by the NCLT for an exit route for the shareholders of a transferor company who decide to opt out of the transferee company by making payment amounting to the value of the shares and other benefits, in accordance with a pre-determined price formula or after a valuation report is produced (which should not be less than the value prescribed by SEBI’s regulations). 259

259 Ibid.
(8) **Squeeze out Provisions**: Companies Act, 2013 has introduced squeeze out provisions in section 236. The Act has introduced an exit mechanism for minority shareholders. The intent of this provision is to reduce litigation as a result of objection by minority shareholders. The Act says that in the event of acquirer alongwith person acting in concert with such acquirer becomes registered holder of ninety percent or more of the issued share capital of a company by virtue of amalgamation, share exchange, conversion of securities or for any other reason to compulsorily notify its intention to buy out minority shareholders.\(^\text{260}\) The offer to be made at a price determined on the basis of valuation by a registered valuer is in accordance with rules as may be prescribed.\(^\text{261}\) In addition, the minority shareholders may also offer their shares *suo-moto* to majority shareholders.\(^\text{262}\)

No doubt minority buyout has been undertaken by corporate organisations through various corporate restructuring means in the past but this provision has virtually recognised minority squeeze out as a legal option. Moreover, another positive aspect is that in addition to reduction of litigation, the shares of minority shareholders need to be acquired by majority shareholders and not by the company so their will be funds outflow of majority shareholders and not the company. This provision has provided exit option to shareholders of both listed as well as unlisted companies.

(9) **Approval of Scheme by Postal Ballot**: The 2013 Act provides that the scheme has to be approved by majority of persons representing three-fourths in value of the creditors or class of creditors, members or class of members in person or by proxy or by postal ballot.\(^\text{263}\) The 1956 Act did not allow this and shareholders and creditors could only cast votes physically.\(^\text{264}\) This provision will protect the interest of those shareholders who are scattered all over the country and find it difficult to present themselves physically or

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\(^\text{260}\) Section 236(1) of the Companies Act, 2013.
\(^\text{261}\) Section 236(3) of the Companies Act, 2013.
\(^\text{263}\) Section 230(12) of the Companies Act, 2013.
provide a proxy. It will ensure wider participation and greater flexibility to cast their votes.

(10) Valuation Report: The Companies Act, 1956 does not mandate disclosing the valuation report to the shareholders. But the Companies Act, 2013 in section 230(3) makes it obligatory for the company undergoing a scheme to annex the valuation report to the notices for the meeting to enable ready access to the shareholders and creditors. Though before the new Act, in practice valuation reports are included in list of documents shared with shareholders and sent to courts as part of the appraisal process but it was not mandatory. But the new Act has made it mandatory. This will enable the shareholders to understand the business rationale of the transaction and take an informed decision.265 As we are familiar with the fact and discussed beforehand that majority of disputes in schemes of arrangement relate to matters of valuation and determination of share exchange ratio. That’s why, the new Act has made it obligatory to obtain the report of expert as regards the matter of valuation and circulate it for the purposes of meeting ordered by the tribunal.266

(11) Streamlining the Accounting Process: Every scheme of arrangement including merger or amalgamation has huge valuation and accounting implications. Valuation implications have been discussed above. The 2013 Act has introduced a new requirement that no scheme of compromise or arrangement whether for listed or unlisted company shall be sanctioned by the tribunal unless a certificate of company’s auditor has been filed with the tribunal certifying that the accounting treatment is in conformity with the prescribed accounting standards.267 Such compliance with accounting standards has already been mandated under the listing agreement but it was only mandatory for listed companies.268 Where all listed companies while filing any

266 Section 232(2)(d) of the Companies Act, 2013.
267 Proviso to section 232(2) of the Companies Act, 2013.
draft scheme with the stock exchange for approval are mandatory to file such auditors certificate. But the new Act has made it mandatory for both listed as well as unlisted companies. The purpose of this provision is that the court does not consider schemes involving ‘dubious’ financial re-engineering.

(12) Set-off of the Fees Paid on Authorised Capital by the Transferor Company: The 2013 Act provides that where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation. This is in accordance with practice followed by various courts. This provision will result in lowering cost in an amalgamation scheme.

(13) Compromise or Arrangement to Include Take-over Offer: Section 230(11) specifically provides that any compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer shall be as per the guidelines issued by the SEBI. An aggrieved party may make an application to the tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the tribunal may, on application pass such order as it may deem fit.

Finally, we can say that the 2013 Act is a step towards bringing greater transparency, flexibility and accountability in the age-old procedures of M&As, to make our company law more acceptable and in line with the global arena. In many cases the rules followed in practice have been codified into law. But the full impact of the law can be known only when once final rules are framed under the provisions regulating M&As as many matters will be governed by rules.

269 Section 232(3)(i) of the Companies Act, 2013.
271 Section 230(12) of the Companies Act, 2013.
2.16. An Overview of Judicial Attitude towards Mergers in India

The topic of mergers and amalgamations in general is fraught with litigation as no scheme can be sanctioned without court’s approval. Thus court’s have to play a very vital and potent role. It is not only an inquisitorial and supervisory role but also a pragmatic role which requires the forming of an independent and informed judgement as regards the feasibility or proper working of the scheme and making suitable modifications in the scheme and issuing appropriate directions with that end in view.\(^{272}\)

The general principles on which mergers are to be sanctioned by the court were very well summarised by justice D.A. Desai in the case of *Navjivan Mills Co. Ltd., Kalol, In re,*\(^{273}\) the court held that following points should be kept in mind by a court sanctioning a scheme:

1. That provisions of the statute have been complied with.
2. That the class or classes of shareholders were fairly represented by those who attended the meetings.
3. That the statutory majority are acting bonafide and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent.
4. That the arrangement is such that an intelligent and honest man might reasonably approve.

These principles were reiterated by Gujarat High Court in *Mafatlal Industries Ltd., In re,*\(^{274}\) and Rajasthan High Court in *Aksh Optifibre Ltd., In re.*\(^{275}\)

2.16.1. Power to Look into Commercial Merits/Demerits of the Scheme

This point came up before Bombay High Court in *Mather and Platt (I) Ltd., In re,*\(^ {276}\) in which the court pronounced that it would not enter into commercial merits/demerits of the scheme specially when the scheme is passed by overwhelming majority of

\(^{272}\) *Mafatlal Industries Ltd., In re,* (1995) 84 Com Cases 230 (Guj.).

\(^{273}\) (1972) 42 Com Cases 265 (Guj.).

\(^{274}\) (1995) 3 SCL 69 (Guj.).

\(^{275}\) (2007) 77 SCL 219 (Raj.).

\(^{276}\) (2002) 39 SCL 58 (Bom.).
shareholders after all the necessary details are placed before them. The power of the court in respect of 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 Supreme Court has finally, in the case of *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*,\(^{277}\) summed up the scope and ambit of the jurisdiction of company court as follows:

1. The sanctioning Court has to see to it that all the requisite statutory procedure for supporting a scheme has been complied with and that the requisite meeting as contemplated by section 391(1)(a) have been held.

2. That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391, sub-section (2).

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

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

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

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

7. That the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting *bona fide*.

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\(^{277}\) *AIR 1997 SC 506, para 28-A at p. 520.*
and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

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

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

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court’s jurisdiction.

2.16.2. Section 391-394 a Complete Code on Amalgamation

Section 391-394 of the Companies Act, 1956 are a complete code which is intended to be a single window clearance system. This was held by Gujarat High court recently in *Elitecore Technologies (P.) Ltd., In re.*\(^ {278} \) The court held that once the scheme of arrangement falls squarely within the four corners of this section, it can be sanctioned even if it involves doing acts for which the procedure is specified in other sections of the Companies Act. It is submitted that it is now established and accepted in a number of cases by various High Court and this court that the principle of single window clearance permits all other formal requirements of the Companies Act, such as approval of change of objects or any alteration in MOA for the purposes of scheme to be

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formalised in a single petition. This single window clearance system simplifies the process for company undergoing M&A and saves cost and time.

2.16.3. Courts are not a Rubber Stamp

The court is not a mere rubber stamp. It will look at the scheme to see that it is a reasonable one. The approval by majority is a prerequisite but court need not sanction a scheme merely because it has been approved by majority. While it is true that a scheme under section 391-394 cannot be scrutinised in the way of harping critic, a hair splitting expert, a meticulous accountant or a fastidious counsel, yet the court will not act as a rubber stamp or register as a matter of course or treat the scheme as a fait accompli to accord sanction merely upon a casual look at it. It is obligatory upon the court to scrutinise the scheme and see whether there has been compliance of the provisions of law and whether it conforms the standards of reasonableness. It must be ensured that the majority is acting bonafide and the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce.279

In Kirloskar Electric Co. Ltd, In re,280 the Karnataka High Court held that the company court, which is called upon to sanction the scheme is not merely to go by the ipse dixit of the majority of the shareholders or creditors or the respective classes who might have voted in favour of the scheme with the requisite majority, but the court has to consider the pros and cons of the scheme with a view to find out whether the scheme is fair, just and reasonable and is not contrary to any provision of law and it does not violate any public policy. The court is not merely to act as a rubber stamp and must automatically put it seal of approval on such a scheme being approved by the majority.

Similarly in Bedrock Ltd, In re,281 the Bombay High Court held that for ascertaining the real purpose underlying the scheme, the court can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the scheme. Where the court finds that the scheme is fraudulent and is intended for a purpose other than what it

280 (2003) 116 Com Cases 413 (Kar.).
281 (2000) 101 Com Cases 343 (Bom.).
professes to be, it may be rejected even at the outset without calling a meeting of the creditors. The court does not function as a rubber stamp or post office and it is incumbent upon the court to be satisfied that the scheme is genuine, bonafide and in the interest of creditors of the company.

In *Sesa Industries Ltd. v. Krishna H. Bajaj*,\(^{282}\) the Supreme court said that the court is obliged to examine the scheme in its proper perspective together with its various manifestations and ramifications with a view to find out whether scheme is fair, just and reasonable to concerned members and is not contrary to any law or public policy.

To sum up, from the study of various judicial pronouncements, the researcher comes to the following conclusion that the tribunal/court will normally need to be satisfied of three matters:

(a) That the statutory provisions have been fully complied with.

(b) That the class or classes must have been fairly represented.

(c) That the arrangement or scheme of amalgamation must be such as man of business would reasonably approve.

In *Bank of Baroda v. Mahindra Ugine Steel Co. Ltd.*,\(^{283}\) the Gujarat High Court observed as follows:

“In view of the foregoing discussion it appears to me that the court cannot abdicate its duty to scrutinise the scheme with vigilance and act as a rubber stamp simply because the statutory majority has approved it an there is no opposition to the scheme in the court. So much weight cannot be attached to the views of the statutory majority as to require the court to mechanically put its imprimatur on the scheme. The court is not bound to treat the scheme as a *fait accompli* and to accord sanction merely upon a casual look at it.”

Thus, extreme vigilance on the part of courts have helped in annulling many motivated schemes which are discussed below. Thus, there have been many instances in the past where the courts refused to act as a mere rubber stamp but instead after weighting all the evidence rejected many amalgamation schemes.

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\(^{282}\) (2011) 106 SCL 239.

\(^{283}\) (1976) 46 Com Cases 227 (Guj.).
Wood Polymer Ltd., In re\textsuperscript{284}

“When once it is shown to the court to which the petition under section 391(2) is presented for accordance of sanction to a scheme of amalgamation that the requisite statutory formalities have been duly carried out, the question for the court would be; has it an option or jurisdiction to reject the claim or has it merely to rubber stamp the scheme. In the present case, the transferor company and the transferee company have filed petitions under section 391 and all the requisite formalities have been carried out. The report of the Official Liquidator, however, stated that the transferor company appeared to have been created solely to facilitate the transfer of a building to the transferee company without attracting the liability to pay capital gains tax by taking advantage of section 47(iv) and (vi) of the Income-tax Act 1961, and in the scheme of amalgamation, dissolution of the transferor company without winding up was sought.”

On the petition, although the High Court of Calcutta had already approved the scheme, the Gujarat High Court rejected it by holding that:

“Amalgamation must, accordingly, fulfil some felt need, some purpose, some object and that must have some correlation to public interest. If the only purpose discernible behind the amalgamation is defeating certain tax and prior to the amalgamation a situation is brought about by creating a paper company and transferring an asset to such company which can without further consequence be amalgamated with another company to whom the capital assets was to be transferred so that on amalgamation it can pass on to the amalgamated company, it would distinctly appear that the provision for such scheme of amalgamation was utilised only for the avowed object of defeating tax. If the party seeks assistance of the court only to reduce tax liability, the court should be the last instrument to grant such assistance or judicial process to defeat a tax liability or even to avoid tax liability.

If the only purpose appears to be to acquire a capital asset through the intermediary of the transferor company which was created for that very purpose to meet the requirement of law and in the process to defeat tax liability that would otherwise arise, it can never be said that the affairs of the transferor company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital asset, through its medium, have

\textsuperscript{284} (1977) 47 Com Cases 597 (Guj.).
not been carried on in a manner prejudicial to public interest. Public interest looms large in this background and the machinery of judicial process is sought to be utilised for defeating public interest and the court would not lend its assistance to defeat public interest.

When a compromise or arrangement is offered to a class and is accepted by the statutory majority of that class, when sanctioned by the court, it would be binding on the dissenting minority. Now, when the court exercises the power conferred upon it by section 391(2) for sanctioning the scheme of compromise or arrangement, the court by its act is imposing the scheme on dissenting members of that class. Before taking such an action, it would be open to the court to examine the scheme in proper perspective in its various manifestations and ramifications before imposing it on unwilling or dissenting members of the class. That being the position in law, the court obviously would have a discretion either to sanction or to refuse to sanction the scheme. It cannot, therefore, be said that merely because statutory formalities are duly carried out, the court has no option but to sanction the scheme.”

Thus, the case of Wood Polymer’s Ltd. became the forerunner in spelling out the powers and duties of the sanctioning court when petitions under sections 391 to 394 are presented.

Pioneer Dying House Limited v. Dr. Shanker Vishnu Marathe

The trial court found the managing director guilty of fraud and misfeasance. The company was ordered to be wound up and liquidators were appointed who initiated action against the managing director. Subsequently, a scheme of reconstruction was submitted to the creditors without disclosing the fact of proceedings for fraud and misfeasance. But the court did not approve the scheme on the ground that no disclosure was made regarding the pending misfeasance proceedings against the directors.

Vodafone Essar Gujarat Ltd., In re

In the scheme, there was admittedly no consideration and therefore ‘no give and take relation’ between parties, scheme was not an arrangement under section 391 and therefore not a reconstruction capable of being sanctioned under section 391. A scheme

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286 (2012) 115 SCL 94.
of arrangement without consideration is void under section 25 of Indian contract Act which cannot be sanctioned. The transferee company was nothing but a paper company being only a intermediary for transferring passive infrastructure assets from transferor companies to Indus (another company) for purpose of tax evasion and therefore scheme proposed by petitioner company could not be sanctioned.

**Rajeev S. Mardia and Rasik S. Mardia, In re**\(^{287}\)

In this case, it was found that scheme, as proposed, did not contain any provision for payment of statutory preferential claims of government like income-tax, sales tax, customs, excise etc. Similarly, no concrete proposals were found with regard to satisfaction of dues of workers or re-employment of such workers. The Gujarat High Court held that though the scheme was approved by the requisite statutory majority of shareholders as well as secured and unsecured creditors, the court had to see the legality, validity, propriety and fairness of the scheme. The fairness of the scheme has to be kept in view by the court while putting its seal of approval on the concerned scheme placed before its sanction. The court has to see that the scheme as a whole must be found to be just, fair and reasonable from the point of view of prudent man of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant. The court thus found that the scheme was not just, fair or proper and refused to grant its sanction.

**AOP (India) (P.) Ltd. Workers Union v. Official Liquidator**\(^{288}\)

Workers along with the well-wisher who was holding 36 percent shares in company filed an application for sanction of scheme. But 36 percent shareholding was effected by purported transfers effected after winding up order was made and thus illegal. Approval of unsecured creditors obtained. No approval of secured creditors was obtained. Further, financers to scheme were no longer desirous of financing the scheme. Thus, half-baked scheme with which applicants had approached court, unequivocal assertion of a secured creditor of company that it was not willing to support scheme unless paid a substantial amount upfront, and the inability of applicants to put such money on table, resulted in the refusal by court to sanction the scheme.

\(^{287}\) (2010) 103 SCL 72 (Guj.).  
\(^{288}\) (2011) 105 SCL 75.
Integrated Finance Co. Ltd. v. Reserve Bank of India (SC)\textsuperscript{289}

The Supreme Court dismissed the appeal and said that the High Court has correctly concluded that non-disclosure of action taken and initiated by the RBI as apparent from the letter dated 18-01-2005 amounted to non-disclosure of material facts which are required to be disclosed under section 391(1) read with section 393(1) of the Companies Act. This would clearly reflect on the lack of bonafide of the company in proposing scheme of arrangement. The Company Court whilst examining the fairness and the bonafides of the arrangement does not act as a rubber stamp. It cannot shut its eyes to blatant non-disclosure of material information, which could have a major influence/impact on the decision as to whether the scheme has to be approved or not.\textsuperscript{290} The High Court has rightly refused the sanction of the scheme.

2.17. Conclusion

The Companies Act, 1956 has various provisions for regulating the procedure of mergers so as to protect the interest of shareholders and creditors. Section 390 to 394 (along with section 394A) covers the complete gamut of the legal and procedural aspects of law governing ‘corporate restructuring’ including mergers and amalgamations. Indeed, section 391 to 394 of the Companies Act, 1956 are a complete code which is intended to be a single window clearance system. Sections 395, 396, 396A and 494 deal with specific situation whereas rules 67 to 87 of the Company (Court) Rules, 1959 provide the procedure for effecting mergers and amalgamations.

Our Companies Act, 1956 was enacted more than 50 years ago. During this period, a lot has changed in the way business is conducted. The resultant growth and expansion of the Indian economy has lead to the development of a complex, diverse and dynamic business environment. That’s why Companies Act, 2013 was enacted on 29 August 2013 to deal with such complexities. The Act has added robust and progressive new provisions such as cross-border mergers, short-form mergers, dispensation with meetings, statutory auditor’s certification, valuation from experts etc., some of which were followed in practice, but not contained in law. The new Act has taken a step forward to give new dimensions to corporate restructuring through mergers and amalgamations. The aim of the new Act is to introduce certain simplistic and forward-

\textsuperscript{289} (2013) 121 SCL 94.
\textsuperscript{290} Para 58 of the above judgement.
looking concepts to bring about transparency and accountability in the age old procedure, thereby making company law regulating mergers and amalgamations relatively friendlier and more acceptable in the global arena.

But the full impact of the law cannot be predicted here as the provisions (sections 230-240) of the new Act regulating mergers and amalgamations have not been notified and no rules framed. But the new Act raises certain areas of concern (discussed later on) which the regulators should pay heed to while notifying rules and issuing clarifications.

As various legislative provisions regarding mergers and amalgamations have developed and become an inseparable part of the corporate jurisprudence with the help of judicial perception, that’s why judicial perception at various steps has been given due weightage. Each and every area has been discussed along with up to date case law on the topic. At the end, the researcher has analysed in detail the judicial attitude towards mergers in India. The researcher concludes that courts do not merely act as a rubber stamp but instead after weighting all the evidence accept or reject on amalgamation scheme. Many instances of past as well as immediate past have been highlighted where merger proposals were turned down, derailing many dreams. All the case laws highlighted in the topic have great relevance for a corporate planner or entrepreneur planning to restructure his business. If one is not careful, one will burn one’s hand as it happened in these cases.

To sum up, the court/now tribunal is not required to examine the scheme in the way of a carping critic, a hair splitting expert, a meticulous accountant or a fastidious counsel. However at the same time, the court is not bound to superficially add its seal of approval to the scheme merely because it received the approval of the requisite majority at the meeting held for that purpose. The court is required to see that all legal requirements have been complied with. At the same time, the court has to ensure that the scheme of arrangement is not a camouflage for a purpose other than the ostensible reasons. If any of the aforesaid requirements appear to be found wanting in the scheme, the court can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.291

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