IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO.854 OF 2014
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO.728 OF 2014

In the matter of the Companies Act, of 956 and other relevant provision of Companies Act, 2013;

And

In the matter of Sections 391 to 394 of the Companies Act, 1956 and other relevant provision of Companies Act, 2013;

And

In the matter of Scheme of Amalgamation of ARSS ENGINEERING LIMITED, with TRIO MERCANTILE & TRADING LIMITED

TRIO MERCANTILE & TRADING)
LIMITED, a company incorporated)
under the Companies Act, 1956)
having its registered office at 613/B,)
Mangal Aarambh, Near Mc. Donalds,)
Kora Kendra, Off S.V. Road, Borivali)
(West), Mumbai – 400 092.)

…. Petitioner Company.

WITH

COMPANY SCHEME PETITION NO.855 OF 2014
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 727 OF 2014

In the matter of the Companies Act, of 956 and other relevant provision of Companies Act, 2013;

And

In the matter of Sections 391 to 394 of the Companies Act, 1956 and other relevant provision of Companies Act, 2013;

And

In the matter of Scheme of Amalgamation of ARSS ENGINEERING LIMITED, the transferor Company with TRIO

MERCANTILE & TRADING LIMITED, the Transferee Company.

ARSS ENGINEERING LIMITED,)
a company incorporated under the)
Companies Act, 1956 having its registered)
office at 14, Govrdhan Apt. Salasar Brij)
Bhumi Complex, 150 Feet Road,)
Bhayander West Thane 401 101) …. Petitioner Company.

Mr.Vinay Chauhan with Mr.Rajesh Shah i/b. Rajesh Shah & Co. for Petitioner.
Mr.Shiraz Rustomjee, Senior Advocate with Mr.Mihir Modi i/b. K. Ashar & Co. for SEBI.
Mr.A.R. Verma , Regional Director.
Mr.S. Ramakantha, Official Liquidator.

.....

CORAM: S.C. GUPTE, J.

: 8 SEPTEMBER, 2015.

P.C. :

This petition, filed under Sections 391 to 394 of the Companies Act, 1956, seeks sanction of the Court to a scheme of amalgamation ("Scheme") between Arss Engineering Ltd. ("transferor company") and Trio Mercantile & Trading Ltd. ("transferee company").

2. The Scheme broadly envisages transfer of the entire undertaking of the transferor company including all its assets and liabilities as on the appointed date, i.e. 1 April 2014, to the transferee company as a going concern. The Scheme has received the requisite consents of the equity shareholders; the meetings of secured and unsecured creditors were dispensed with under orders passed by this Court; and upon notice, no creditor has come forward to oppose the scheme. Neither the Regional Director nor the Registrar of Companies has any significant objection to the Scheme. The transferor and transferee companies pray for sanction of the Scheme.

3. The only opposition to the Scheme is by Securities and Exchange Board of India ("SEBI"). The objections of SEBI are two-fold. It is firstly submitted that the Scheme is aimed at evading the provisions of the Securities and Exchange Board of India Regulations ("SEBI Regulations") and the Issue of Capital and Disclosure Requirements, Regulations, 2009 ("ICDR") inasmuch as what is sought to be achieved through the expedient of the proposed amalgamation is conversion of shareholding in an unlisted company (the transferor company) into shareholding of a listed company (the transferee company) without having to go through any of the rigorous requirements including mandatory disclosures under the regulatory framework including the Act, SEBI Regulations and ICDR. Secondly, it is submitted that the consideration contemplated under the Scheme is arrived at by manipulating the financials of the transferor and transferee companies and the share swap ratio proposed in the Scheme is deliberately and wrongfully skewed in favour of shareholders of the transferor company at the cost of the shareholders of the transferee company, many of whom are members of the public.

4. The factual basis of these two objections may be broadly outlined as follows :

(i) Though the transferor company was incorporated as early as in the year 2008, it did negligible business in the years following its incorporation, FY 2010-11 and 2011-12 merely recording turnovers of Rs.2500 and Rs.3500, respectively;

(ii) On 5 March 2013 and 25 March 2013, the transferor company made preferential allotment of 1,00,55,000 equity shares of Rs.10 each at par, i.e. for Rs.10.05 crores, to 49 entities including 44 individuals and 5 companies;

(iii) Under the share swap ratio fixed under the Scheme, three equity shares of the transferee company, which is a listed company, are to be allotted for every five equity shares held by the shareholders of the transferor company, which is an unlisted company;

(iv) Considering the worth of the transferee company's shares on the stock exchanges, this swap ratio implies that the shareholders of the transferor company would receive an approximate value of Rs.17.64 crores on an investment of Rs.10.05 crores, thus making a profit of about 75% in a matter of a few months.

Based on these facts, the thrust of SEBI's submissions is that this effectively means a kind of a preferential allotment of shares of a listed company, i.e. the transferee company, (the initial allotment of shares at Rs.10.05 crores in the transferor company appearing to be merely to enable the allottees to obtain shares in the transferee company under the Scheme), without the company having to make mandatory disclosures or otherwise comply with ICDR, and besides, in the process, the allottees of these shares (i.e. the shareholders of the transferor company) are devised to make unjust gains at the cost of the transferee company.

5. Mr.Rustomjee, learned Senior Counsel for SEBI, submits that SEBI Regulations make provisions for initial public offer ('I.P.O.') of a company's to be listed shares, whilst ICDR provide for making of a preferential allotment by an already listed company. He submits that the matter can be viewed from two angles. What the Scheme achieves is getting round the SEBI Regulations for I.P.O., since effectively the shareholders of the transferor company have their shares listed in the process as a matter of initial allotment. Alternatively, it envisages preferential allotment of shares of a listed company (i.e. the transferee company) without complying with the ICDR. Either way, the Scheme, in its very conception, falls foul of one or the other of the regulatory frameworks. I feel it is somewhat far-fetched to suggest that there is any listing of unlisted

shares in the present case. Shareholders of the transferor company (an unlisted company) get shares of the transferee company (a listed company) at a particular swap ratio. That could, if at all, be likened to a preferential allotment, if we were to treat the Scheme as a strategy originally devised to see that allotment of listed shares is made to certain entities, who were initially asked to invest in the shares of an unlisted company only to get the listed shares by way of the Scheme through a share swap ratio later. Accordingly, in the following discussion, I have considered the effect of the ICDR *qua* the Scheme and not the aspect of listing requirements under the SEBI Regulations for an I.P.O.

6. Let us first see the requirements of ICDR concerning disclosures and compliance required under it to see if there is, as Mr.Rustomjee suggests, a breach of any of those. In the process, we also need to contrast them with the requirements of a scheme of arrangement from a legal and regulatory standpoint to see if the requirements of ICDR are, as suggested by learned Counsel for the Petitioner, already captured thereby. For if they are, there would be no substance in the contention that the Scheme is proposed only with a view to get over the ICDR.

7. The ICDR sets out the following requirements as conditions for preferential issue of shares by a listed company:

(a) A special resolution of shareholders; (b) Shares to be held by the proposed allottees in de-materialised form; (c) Compliance with conditions of continuous listing of equity shares as specified in the listing agreement with the recognised stock exchange; and (d) Permanent Account number of the proposed allottees to be obtained by the issuer.

The ICDR prohibits preferential issue of specified securities to an allottee, if the allottee has sold equity shares of the issuer during the six months preceding the relevant date. (This condition is subject to a relaxation which SEBI may grant under the proviso to Regulation 72.) So also, it prohibits issue of specified securities, on a preferential basis, to an allottee being a person belonging to promoter(s) or the promoter group having previously subscribed through warrants of an issuer, but failed to exercise the warrants. The ICDR requires certain disclosures to be made in terms of Regulation 73. These include disclosure of various particulars mentioned therein in the explanatory statement to the notice of the general meeting proposed for passing of the special resolution for preferential allotment. These particulars include objects of the preferential issue, the proposal of promoters, directors or key management personnel, etc., to subscribe to the offer, shareholding pattern of the issuer before and after the preferential issue, the time within which the preferential issue shall be completed, the identity of the proposed allottees, the percentage of post preferential issue capital that may be held by them and change in control, if any, in the issuer subsequent to the preferential issue, an undertaking to re-compute price of the specified securities in terms of ICDR and undertaking for continued lock-in of the securities till payment of the re-computed price. Regulation 73 also requires a certificate of statutory auditor of the issuer to be placed before the general meeting of shareholders certifying that preferential issue of capital was being made in accordance with the requirements of the ICDR. A special resolution to be passed in terms of these requirements is required to specify the relevant date on the basis of which price of the equity shares to be allotted on conversion or exchange of convertible securities shall be calculated. The allotment is required to be completed within a period of 15 days from the date of passing of the special resolution. As for the pricing of the equity shares to be allotted preferentially, the requirement contained in Regulation 76 is to the effect that if the equity shares of the issuer have been listed on a recognised stock exchange for a period of twenty six weeks or more as on the relevant date, the equity shares shall be allotted at a price not less than higher of the following :

(a) The average of the weekly high and low of the closing prices of the related equity shares quoted on the recognised stock exchange during the twenty six weeks preceding the relevant date; or

(b) The average of the weekly high and low of the closing prices of the related equity shares quoted on the stock exchange during the two weeks preceding the relevant date.

The relevant date in the case of preferential issue of equity shares is defined to mean a date thirty days prior to the date on which the meeting of the shareholders is held to consider the proposed preferential issue.

8. As against these, even a scheme of arrangement goes through a certain gamut of regulatory scrutiny. A Scheme of Arrangement has to be sanctioned by a special resolution to be passed by the shareholders of the issuer company; the shares are to be issued to the allottees in a de-materialised form; the issuer has to comply with the conditions of continuous listing of equity shares specified in the listing agreement; the disclosures to be made to the general meeting proposed for passing of the special resolution, which are specified in Regulation 73 of ICDR, are required to be broadly captured in the explanatory statement to the notice of the general meeting. Many of these particulars actually form part of the scheme petition and relevant disclosures to be made to the general meeting. A certificate of statutory auditors in this behalf is also to be placed before the general meeting. As required by the SEBI circulars of 8 May 2003, 3 September 2009, 4 February 2013 and 21 May 2013, listed companies, whose shares have to be issued as consideration for the Scheme of Arrangement, have to comply with several obligations. The listed companies are *inter alia* required to file the draft scheme with the stock exchanges in terms of Clause 24(f) of the listing agreement. They have to submit several documents mentioned in Part A of Annexure 1 to the circular of 4 February 2013. These include, apart from the draft Scheme of Arrangement, the valuation report from an independent Chartered Accountant, a report from the Audit committee recommending the draft scheme taking into consideration such valuation report, fairness opinion of an approved merchant banker, pre

and post amalgamation shareholding pattern of the unlisted company, audited financials of the unlisted company, compliance with listing agreement, complaints report, etc. The stock exchanges also process the draft scheme and forward their objection / no objection letter on the draft scheme along with the scheme and the documents referred to above to SEBI. SEBI thereupon issues its comments, which are passed on by the stock exchanges to the listed company in the form of an observation letter. All these requirements are insisted upon under the regulatory framework even before a scheme is placed for sanction before the company court. (A separate scrutiny then takes place in the company court in the presence of various stakeholders including the shareholders, creditors, department of company affairs, stock exchanges / SEBI, etc.)

9. A comparison of the two sets of provisions and the gamut of regulatory provisions which the Scheme in the present case has gone through, show that there is no ducking of the regulatory scrutiny such as the one contemplated in the case of preferential allotment of listed shares under the ICDR in the Scheme herein. The whole substance of the regulatory requirements of the ICDR is clearly captured in the scrutiny contemplated in the sanction of the Scheme insofar as allotment of shares of the transferee company to the shareholders of the transferor company is concerned. The Scheme has gone through these milestones and stages and in a broad sense, there is no breach of ICDR, either intentional or otherwise, involved in the scheme. On facts, besides, no breach of the provisions of ICDR, relating to any particular aspect, such as issuance of shares to promoters or anyone else in breach of the ICDR provisions, lock-in of securities, re-computation of price, etc. is shown by SEBI in this case.

10. That leaves us with the merits of the Scheme. The only objection of SEBI in this behalf is that an illegal or, at any rate, undue benefit is given to the shareholders of the transferor company and that has been at the cost of the

shareholders of the transferee company, many of whom are members of public. The contentions of Mr.Rustomjee in this behalf are based on an analysis of the Chartered Accountant's report used by the Petitioner to determine the share swap ratio. Let us now examine this aspect of the matter.

11. The basis of valuation of the shares of the transferor and transferee companies to arrive at the share swap ratio in the report of the Chartered Accountant may be explained thus : The recognized methods of valuation considered by the valuers were – (a) Net Asset Value Method (NAV), (b) Profit Earning Capacity Method (PECV), and (c) Market Price Method (MV). Having regard to these, the valuation was based on the following facts. The valuers, for calculating NAV, took into account the financials of the transferor and transferee companies for the year ended 31 March 2013. PECV was considered only for the transferee company based on P/E ratio recognized by market sources, but not for the transferor company since that company was formed only in the year 2008 and there had been no significant business activity in the company since, 2012-13 being the first year the company was involved in engineering projects and when equity capital was increased. Whilst MV of the transferee company was based on last twenty six weeks before the relevant date (that date being 28 June 2013) and high low average closing prices of its shares were accordingly determined, MV was not applicable for the shares of the transferor company since those were unlisted shares. Accordingly, the NAV, PECV and MV of the transferee company were respectively calculated at Rs.25.94, Rs.2.94 and Rs.24.71. On a composite valuation, the weighted average of all three methods gave the valuation of Rs.18 per share of Rs.10 each. The NAV of the transferor company was worked out at Rs.10.06. Other methods of valuation being inapplicable, as explained above, the composite valuation was worked out at Rs.10.06 per share of Rs.10. Based on the respective weighted averages of the two companies, the share swap ratio of three equity shares of Rs.10 of the transferee company for every five equity shares of Rs.10 of the transferor company was arrived at as a fair consideration.

12. The valuation exercise, noted above, only involves two questions which admit of a debate. One, whether the methods of valuation and their employment for arriving at individual values of shares of the two companies were conducive to a fair assessment and two, whether the relevant date for determining the MV (by taking a high low closing average of the shares of the transferee company) chosen as 28 June 2013 was appropriate and fair. Indeed, these were the only points urged by Mr.Rustomjee for SEBI in support of his case that the share swap ratio determined by the valuer was not fair.

13. There is no exception taken by Mr.Rustomjee to the methods employed by the valuers *per se.* The objection was about there being an unequal comparison of the two shares. Whereas all three methods were employed to arrive at the valuation of the shares of the transferee company, effectively only the MV of the shares of the transferor company was considered for their valuation (the other two methods yielding the value zero). All these methods of valuation are well known methods and working out of a weighted average based on individual valuations given by these methods also cannot be taken exception to. That is an accepted trade practice. It is equally unexceptionable that these three methods yield a weighted average value of Rs.18 for the shares of the transferee company, whilst the weighted average in mathematical terms for the shares of the transferor company would work out to Rs.10.06, the values considered for the individual method values themselves being correct. It is of course debatable whether in the facts of the case, considering that the PECV and MV of the transferor company would be nil, only the NAVs of the two companies ought to have been considered and not the valuations by the other two methods. But then there are approaches and schools of thought. One approach or school of thought could be different from the others. Valuation is not an exact science. It is rather like an art. The valuer has to exercise judicial discretion, take into account all relevant factors and employ methods which are suitable for the particular facts and circumstances of each individual case and

there arrive at what according to him is a fair valuation. What the Court has to do, whilst scrutinizing such valuation for exercising its jurisdiction to sanction a scheme of arrangement, (which, as I have noted above, is merely to see that laws and commercial morality are not breached and no unfair treatment is given to any of the stakeholders) is whether the exercise is bona fide and legitimate, and yields a result, which is not perverse. An expert valuer has carried out the exercise in the present case; the valuation is not questioned by any of the stakeholders; and it is backed by an opinion on fairness by a SEBI approved Merchant Banker. It employs acceptable canons of valuation and takes into account values which are supported by the record of the case. That must satisfy the conscience of the Court about the bona fides, the legitimacy and the acceptability of the exercise.

14. The date 27 June 2013 is chosen as the relevant date, since the board of directors of the transferee company considered the proposal of merger at their meeting of 28 June 2013. They would have considered the pricing of shares as of that date. The date has a natural claim to being an appropriate candidate for choice of the relevant date for considering the MV of the shares. Mr.Rustomjee suggests that ICDR requires the date of 30 days prior to the meeting of shareholders to consider the Scheme as the relevant date. By its vary nature, it is impossible to set that date as the relevant date for any scheme of arrangement. The board of directors of a company prepares a scheme; whilst preparing it, the board takes into account MV as reckoned with reference to a particular date; after considering such date, the board arrives at the MV and then recommends a particular share price as part of the scheme; then the draft scheme goes through the regulatory gamut; and finally a scheme comes before the company court, which orders a meeting of shareholders to consider the scheme or dispenses with it. It is impossible in this scenario to fix the date 30 days prior to the shareholders' meeting as a relevant date for calculating the MV and arrive at the consideration for the scheme on that basis. Alternatively, Mr.Rustomjee suggests that the preferential allotment of shares,

in the first place, to the allottees of the transferor company was made on 5 March 2013 and 25 March 2013 and that these dates should be reckoned as relevant dates for determining the value of the shares of the transferee company and thereby, an appropriate share swap ratio. Learned Counsel for the Petitioner has demonstrated from the record that even if we take these dates as relevant dates, the MV of the shares of the transferee company cannot be more than Rs.19.28 (as against the MV calculated in the actual valuation at Rs.24.71 and the weighted average worked out at Rs.18 on the basis thereof). Thus, even on the submission of SEBI concerning the appropriate relevant date, there is no demonstrable unfairness in the determination of the value of the transferee company's shares for the purposes of the Scheme.

15. Anyway, the foregoing discussion shows that the matter of determining an appropriate share swap ratio here is more of a 'matter of commerce', than a 'matter of commercial morality'. The shareholders of the transferee company are expected to take a decision on the consideration fixed under the scheme based on their commercial wisdom. They have indeed taken such a decision. In not one but two duly convened meetings of shareholders, the share swap ratio has been approved by the shareholders. Even the shareholders, who are members of public and who may not be themselves in a position to take an informed decision on the subject, have had the benefit of not only the auditor's report, but even an independent SEBI approved Merchant Banker's report. There are enough checks and balances in the regulatory framework and corresponding availability of information in the public domain in a matter like this to make it possible in principle for any shareholder to take an informed decision in the matter. There have been two meetings of shareholders including one convened by Court. The outcome of the meetings is a matter of record. There has been no complaint from any quarter so far, even at the stage of final hearing of the Scheme Petition before this Court. If that is so, it is not for SEBI to raise a red flag to the Scheme on the ground of want of appropriateness of

consideration.

16. Mr.Rustomjee submits that SEBI must intervene in a matter like this to ensure market integrity and investor protection. He relies upon observations in the cases of **N. Narayanan vs. Adjudicating Officer, Securities and Exchange Board of India**[1] and **Securities and Exchange Board of India vs. Pan Asia Advisors Ltd.**[2] in this behalf. In **Narayanan's** case (supra), the Supreme Court whilst dealing with SEBI's role *vis-a-vis* prevention of market abuse and preservation of market integrity, held as follows :

> "35. Prevention of market abuse and preservation of market integrity is the hallmark of Securities Law. Section 12A read with Regulations 3 and 4 of the Regulations 2003 essentially intended to preserve 'market integrity' and to prevent 'Market abuse'. The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors' protection. Securities market is based on free and open access to information, the integrity of the market is predicated on the quality and the manner on which it is made available to market. 'Market abuse' impairs economic growth and erodes investor's confidence. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality'. The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rice of scrip of the company. Investors are then lured to make their "investment decisions" on those manipulated inflated results, using the above devices which will amount to market abuse."

The Supreme Court sounded the following word of caution whilst underlining the role of SEBI as market regulator.

> "42. SEBI, the market regulator, has to deal sternly with companies

1 **(2013) 12 SCC 152**
2 **2015 SCC OnLine SC 626**

and their Directors indulging in manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Message should go that our country will not tolerate "market abuse" and that we are governed by the "rule of law". Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto. People with power and money and in management of the companies, unfortunately often command more respect in our society than the subscribers and investors in their companies. Companies are thriving with investors' contributions but they are a divided lot. SEBI has, therefore, a duty to protect investors, individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity."

So also in the case of **Securities and Exchange Board of India vs. Pan Asia Advisors Ltd.**[3], whilst dealing with the SEBI's role in the security market, the Supreme Court observed as follows :

"On a reading of the above statutory provisions, we find under Section 11(1) of the SEBI Act, 1992, a duty has been cast on the SEBI to protect the interest of investors in securities and also to promote the development of the securities market as well as for regulating the same by taking such measures as it thinks fit. The paramount purpose has been shown as protection of interest of investors on the one hand and also simultaneously for promoting the development as well as orderly regulation of the security market. By way of elaboration under Section 11(2)(a) to (e) it is stipulated that the duty of SEBI would include regulating the business in the stock exchanges and any other securities market which would include the working of stock brokers, share transfer agents and similarly placed other functionaries associated with securities market in any manner, registering and regulating the working of the depositories, participants of securities including foreign institutional investors in particular to ensure that fraudulent and unfair trade practices relating to securities markets are prohibited and also prohibiting insider trading in securities."

17. It is difficult to see how there is any element of 'market abuse' in the Scheme or the consideration proposed therein or how any 'creation of

3 **2015 SCC OnLine SC 626**

artificiality' results therefrom. There is no fraud or deceit. There is no unfair trade practice. It cannot be said that the scheme route is deliberately chosen over the preferential allotment route, in the present case, to enable the preferential allottees of shares of the transferor company to make an illegal or even undue gain at the cost of the shareholders of the transferee company. There is no manipulation of the securities market or hoodwinking of the applicable provisions of law here.

18. Mr.Rustomjee submitted that the ostensible purpose of the scheme in the present case appears to be different from the real purpose. He relies upon the rationale of the scheme mentioned in Clause 2 of the scheme. The rationale mentioned in the scheme was that the merger of the two companies was envisaged for the following objectives:

2.1 Consolidation of business, synergize operational advantages and achieve economies of scale of operations;
2.2 Optimum and efficient utilization of capital, resources, assets and facilities;
2.3 Removal of intercompany transfers, removing taxation at multiple stages and increasing product margin.
2.4 Enhancement of competitive strengths including financial resources;
2.5 Better management and focus on growing the businesses.

Mr.Rustomjee submits that considering the facts that the transferor company has hardly carried on business of providing consultancy or engineering services to infrastructure or construction etc., that the company had hardly made any business after its incorporation, and that even funds received by the company from the allottees of preferential shares had been by and large invested in equity shares and short term loans and advances, there is hardly any consolidation of business, synergizing of operational advantages or achieving of economies of scale to be achieved by amalgamating the two companies. Whilst this may be so, the purpose of efficient optimum utilization of capital, resources, assets, etc,. so also of removal of inter-company transfers, and better management and focus on growing businesses may well be an objective to be achieved by merging of the companies which are under the same management. Be that as it may, even if everything mentioned in the avowed rationale behind the amalgamation is not correct, such purpose, as it sought to be achieved, so long as the same cannot be shown as an illegitimate purpose, cannot be questioned by SEBI whilst opposing the scheme. The amalgamation in the present case cannot be shown as a device seeking to achieve any illegitimate purpose or design.

19. As mentioned in the case of **Miheer H. Mafatlal vs. Mafatlal Industries Ltd**[4], the jurisdiction of the company court under Sections 391 to 394 of the Act is a limited jurisdiction. The Supreme Court explained the contours of that jurisdiction in the following words :

> "29. However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 Sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. 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 certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."

The Supreme Court also quoted in this behalf a passage from Buckley on

4 **(1997) 1 SCC 579**

Companies Act, which is to the following effect :

> "In exercising its power of sanction the Court will see, first that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
>
> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the Scheme."

Finally, whilst culling out the broad contours of such jurisdiction, the Court noted the following as such broad contours:

> "1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
>
> 2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 Sub-Section (2).
>
> 3. That the meetings concerned 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 of Sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

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

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising 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 requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there 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."

These principles were reiterated by the Supreme Court in the case of **Meghal Homes (P) Ltd. vs. Shree Niwas Girni K.K. Samiti**[5]**.** At the same time, the Court in **Meghal Homes (P) Ltd.** noted as follows :

"We may straightaway notice that this Court did not have occasion to consider whether any additional tests have to be satisfied when the Company concerned is in liquidation and a compromise or arrangement in respect of it is proposed. Therefore, it cannot be said that this would be the final word on any Scheme put forward under Section 391 of the Act, whatever be the position of the company concerned. Even then, this decision lays down the need to conform to the statutory formalities, the power of the Court to ascertain the real purpose underlying the Scheme, the bona fides of the scheme, the good faith in propounding it and that as a whole, it is just, fair and reasonable, at the same time emphasizing that it is not for the Court to examine the Scheme as if it were an appellate authority over the commercial wisdom of the majority."

5 **(2007) 7 SCC 753**

20. The real questions, which, on the basis of the above analysis, arise in the matter are :

(a) Whether the scheme is designed to violate any provision of law or contravene any public policy;

(b) Whether the scheme displays any bad faith *vis-a-vis* any of the stakeholders including the minority shareholders or creditors who have not voted on the scheme;

(c) Whether the scheme is, on the whole, just, fair and reasonable; and

(d) Whether the scheme prejudicially affects public interest in any way.

21. The Scheme does not falter on any of the above touchstones. As I have observed above, there is no merit in SEBI's contention that the Scheme violates the provisions of ICDR or the public policy behind ICDR or the related regulatory machinery. There is, as I have noted above, no bad faith *vis-a-vis* any stakeholder. On the whole, the scheme is not such as a prudent man of business would not accept as just, fair or reasonable. And lastly, there is no market abuse, wrongful artificiality or fraud, deceit or unfair trade practice, injuring public interest. If that is so, the Court cannot scrutinize the Scheme with the focus of a man of commerce to see if the consideration provided for therein is truly correct. That is for the businessman in the shareholder to decide. The Court merely preserves the sanctity of the laws, the commercial morality and public interest. And on these, the Scheme does pass muster.

22. Company Scheme Petition Nos.854 of 2014 is accordingly made absolute in terms of prayer clauses (a), (b) and (d) and Company Scheme Petition No.855 of 2014 is made absolute in terms of prayer clauses (a) and (c).

23. The Petitioner Companies to file a copy of this order and the Scheme duly authenticated by the Company Registrar, High Court (O.S.), Bombay, with

the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of the Order.

24. The Petitioners are directed to file a certified copy of the order along with a copy of the Scheme of Amalgamation with the concerned Registrar of Companies, electronically, along with E Form INC-28 in addition to physical copy as per the relevant provisions of the Companies Act, 1956/2013 whichever is applicable.

25. The Petitioner Companies to pay costs of Rs.10,000/- each to the Regional Director, Western Region, Mumbai and the Petitioners in the Company Scheme Petition No.854 of 2014 to pay costs of Rs.10,000/- to the Official Liquidator, High Court, Bombay. Cost to be paid within fourteen weeks from the date of the Order.

26. Filing and issuance of the drawn up order is dispensed with.

27. All concerned regulatory authorities to act on a copy of this order along with Scheme duly authenticated by the Company Registrar, High Court (O.S.)., Bombay.

28. On the application of SEBI, this order is stayed till 10 November 2015.

.

(S. C. GUPTE, J.)