

**(2010) 12 MAD CK 0348**  
**In the Madras High Court**  
**Case No : C.P. No. 65 of 2010**

**In Re: Flextronics Technologies (India) P. Ltd.**

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**Date of Decision :** 16-12-2010

**Acts Referred:**

Companies (Court) Rules, 1959 — Rule 80, 81, 82, 83, 85  
Companies Act, 1956 — Section 100, 101, 101(2), 102, 17

**Citation :** (2011) 163 CompCas 289

**Hon'ble Judges :** P. Jyothimani, J

**Bench :** Single Bench

**Advocate :** Karthik Seshadri for M/s. Iyer and Thomas, for the Appellant; M. Gopikrishnan, Additional Central Government Standing Counsel, for Regional Director and A.K. Mysamy for the objector., for the Respondent

**Final Decision :** Allowed

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## **Judgement**

P. Jyothimani, J.—This company petition is filed under sections 391 to 394 of the Companies Act, 1956 (for brevity, "the Act") for sanction of the scheme of arrangement.

2. The three transferor companies, viz., Flextronics Design Consumer Electronics (India) P. Ltd., Solelectron India P. Ltd., and Coldwatt Indian P. Ltd., proposed to merge with the petitioner/transferee company, viz., Flextronics Technologies (India) P. Ltd., as per a scheme.

3. The petitioner/transferee company incorporated on January 12, 2001, with the Registrar of Companies, Delhi and Haryana, was subsequently shifted to Karnataka in the year 2002 after obtaining an order from the Company Law Board, New Delhi and obtaining a fresh certificate of registration from the Registrar of Companies, Karnataka on December 3, 2003. Thereafter, the registered office of the transferee company was shifted to Tamil Nadu in the year 2008 as per the order of the Company Law Board, Chennai and the certificate of registration issued by the Registrar of Companies, Tamil Nadu on February 10, 2009 and the registered office of the petitioner/transferee company is situated at Plot No. 3, Phase II, Sipcot Industrial Park, Sandavellure C Village,

Sriperumbudur Taluk, Kancheepuram District.

4. The petitioner/transferee company, which is a continuing company, has two equity shareholders, viz., Flextronics International Asia Pacific Ltd. and Charlie Rajadurai, with equity shares totalling 5,85,41,908, and it has one preference shareholder, viz., Flextronics International Asia Pacific Ltd., holding 10,56,68,199 preference shares.

5. As on March 31, 2009, the authorised capital of the petitioner/transferee company with 8,50,00,000 equity shares of Rs. 10 each and 11,50,00,000 cumulative redeemable convertible preference shares of Rs. 10 each is Rs. 200,00,00,000. The issued, subscribed and paid-up capital with 3,46,65,660 equity shares of Rs. 10 each and 10,56,68,199 redeemable optionally convertible cumulative preference shares of Rs. 10 each is Rs. 140,33,38,590.

6. The audited account as on March 31, 2009, of the petitioner/transferee company is annexed as annexure D. After the audited accounts, the petitioner/transferee company issued 2,38,76,250 equity shares of Rs. 10 each to Flextronics International Asia Pacific Ltd., on April 17, 2009 and equity shares have been allotted to the said company.

7. The assets and liabilities position of the petitioner/transferee company as on March 31, 2009, is stated as follows, viz., the assets consisting of fixed assets of Rs. 214,59,06,732 investment of Rs. 10 net current assets of Rs. 15,07,94,598 and profit and loss account of Rs. 213,96,12,724 are in all amounting to Rs. 443,63,14,064; and the liabilities in the form of share capital of Rs. 140,33,38,590 share application money of Rs. 71,62,87,500 reserves and surplus of Rs. 231,66,87,974 are in all amounting to Rs. 443,63,14,064.

8. The objects of the petitioner/transferee company, as per the memorandum and articles of association, are to carry on in India or elsewhere the business of providing technologically advanced electronics manufacturing services to original equipment manufacturers and others in the telecommunications, networking, computer, consumer electronics and medical device industries and to provide wide range of integrated services from initial product design to volume production; and to carry on in India or elsewhere in the world the business of human resource process outsourcing, pay roll management service providers, human resource recruitment and executive search service providers, accounts payable operations, including monitoring and follow up services, with reconciliation and record verifications and other kinds of business processes, including but not limited to finance, accounts, management, human resources and other area for customers within India or abroad. At present, the petitioner/transferee company is engaged in the business of providing technologically advanced electronics manufacturing services and information technology related services in the nature of human resource process outsourcing, pay roll management services, etc., and is also a developer of special economic zone.

9. It is stated that the board of directors of the petitioner/transferee company

have approved in the resolution dated January 11, 2010, the proposal of the transferor companies to be merged with the petitioner/transferee company subject to the confirmation of this court.

10. The first transferor company, viz., Flextronics Design Consumer Electronics (India) P. Ltd., was incorporated on April 9, 2003 and registered in Karnataka in the name of Avnisoft Systems P. Ltd., which was changed to the present name on March 14, 2006, vide fresh certificate of incorporation issued by the Registrar of Companies, Karnataka. The registered office of the first transferor company is situated at No. 570/571, 2nd Floor, Sarjapura Main Road, 3rd Block, Koramangala, Bangalore-560 034.

11. The first transferor company has three equity shareholders with total equity shares of 37,79,700. While Flextronics Telecom Systems Ltd., has 37,79,698 equity shares, Flextronics International Asia Pacific Ltd., which is a nominee of Flextronics Telecom Systems Ltd., and Ashish Bhardwaj are holding one share each.

12. The authorised capital of the first transferor company in the form of 2,35,00,000 equity shares of Rs. 10 each is Rs. 23,50,00,000 and the issued, subscribed and paid-up capital in the form of 37,79,700 equity shares of Rs.10 each is Rs. 3,77,97,000. A certified copy of the audited annual account of the first transferor company as on March 31, 2009, has been annexed as annexure H.

13. The first transferor company has the assets in the form of fixed assets at Rs. 59,18,160, net current assets at Rs. 2,37,76,958 and profit and loss account at Rs. 81,01,882 in all amounting to Rs. 3,77,97,000; and liabilities in the form of share capital at Rs. 3,77,97,000.

14. The objects of the first transferor company is to design, develop, sell, import, export, market, hire, license or transfer by any other manner software programmes and programmed products of all description, etc., and at present, the first transferor company is engaged in the business of designing, developing and selling of software programmes and programmed products.

15. The board of directors of the first transferor company have approved the scheme by way of resolution on January 11, 2010, for merger with the petitioner/transferee company, subject to confirmation of the High Court of Karnataka.

16. The second transferor company, viz., Solelectron India P. Ltd., was incorporated on September 13, 2006, with the Registrar of Companies, Karnataka and its registered office is situated at 185, Ground Floor, Cambridge Road, Second Cross, Ulsoor, Bangalore-560 008, Karnataka.

17. The second transferor company has two equity shareholders with total equity shares of 65,97,391. While Flextronics Mauritius Ltd., has 65,97,390 equity shares, Prakash Kuppuswamy has one equity share.

18. The authorised capital of the second transferor company in the form of

2,00,00,000 equity shares of Rs. 10 each is Rs. 20,00,00,000 and the issued, subscribed and paid-up capital in the form of 65,97,391 equity shares of Rs. 10 each is Rs. 6,59,73,910. A certified copy of the audited annual account of the second transferor company as on March 31, 2009, has been annexed as annexure K.

19. As per the latest audited balance-sheet of the second transferor company up to March 31, 2009, the assets in the form of fixed assets at Rs. 4,77,447, net current assets at Rs. 59,31,245 and profit and loss account at Rs. 5,95,65,227 are in all amounting to Rs. 6,59,73,919; and liabilities in the form of share capital at Rs. 6,59,73,910 and share application at Rs. 9, are in all amounting to Rs. 6,59,73,919.

20. The object of the second transferor company is to carry on within and outside India all types of businesses in the information technology sector, including manufacture of electronic products and components, etc., and the second transferor company at present is engaged in the business of manufacturing of electronic products/components and providing related services in information technology sector.

21. The board of directors of the second transferor company by resolution dated January 11, 2010, have adopted the scheme, subject to the confirmation of the High Court of Karnataka.

22. The third transferor company, viz., Coldwatt India P. Ltd., was incorporated on July 27, 2004, with the Registrar of Companies, Karnataka in the name of GTI Power Systems India P. Ltd., which was changed to the present name on April 1, 2005, by obtaining fresh certificate of incorporation from the Registrar of Companies, Karnataka. The registered office of the third transferor company is situated at 28-A, Electronic City, Hosur Road, Bangalore-560 100.

23. The equity shareholders of the third transferor company are Coldwatt Inc. holding 5,04,749 equity shares and Flextronics Technologies (India) P. Ltd., holding one equity share.

24. The authorised capital of the third transferor company in the form of 10,00,000 equity shares of Rs. 10 each is Rs. 1,00,00,000 and the issued, subscribed and paid-up capital in the form of 5,04,750 equity shares of Rs. 10 each is Rs. 50,47,500. A certified copy of the audited annual account of the third transferor company as on March 31, 2009, has been annexed as annexure N.

25. As per the latest audited balance-sheet of the third transferor company up to March 31, 2009, there are no fixed assets and the assets in the form of net current assets are at Rs. 6,89,360; and liabilities in the form of share capital at Rs. 50,47,500 reserves and surplus at Rs. 82,15,641 and loans at Rs. 24,78,781 are in all amounting to Rs. 6,89,360.

26. The object of the third transferor company is to design, develop, engineer, test, manufacture, assemble, trade, contract, sub-contract, license, improve,

maintain, service, supply, buy, sell, market, distribute, import, transport, export, exchange, support, implement or otherwise deal in all types, descriptions, shapes, sizes, capacities, volume, varieties, specification of products involving application of any kind of technology, including but not limited to power systems, etc., and at present the third transferor company is engaged in the business of software development and manufacturing and trading of all types of telecom power systems and industrial power systems.

27. The board of directors of the third transferor company have approved by resolution dated January 11, 2010, the scheme of merger, subject to confirmation of the High Court of Karnataka.

28. It is stated that the board of directors of the transferor companies and the petitioner/transferee company have decided under the scheme of merger as follows :

(i) the marketing facilities available with the petitioner/transferee company and the transferor companies could be pooled together and the petitioner/transferee company will be able to exploit the facilities available for the benefit of the petitioner/transferee company and penetrate into the new markets;

(ii) administration and operational costs would be considerably reduced and the petitioner/transferee company will be able to benefit from the same resulting in better turnover and profits;

(iii) there will be operational synergy in terms of procurement benefits, common licence, reduction of administration work and cost, etc., for the petitioner/transferee company;

(iv) the financial resources, managerial and technical expertise of all the companies could be better utilised by the petitioner/transferee company, which would be beneficial to it; and

(v) better financial structuring of the company could be ensured under the scheme.

29. As per the scheme, with effect from the appointed date, as per the provisions of the Companies Act, 1956, and the income tax Act, 1961, the assets and liabilities of the transferor companies stand transferred to and merge with the assets and liabilities of the petitioner/transferee company. The appointed date has been fixed as April 1, 2009, or such other date as may be fixed by the High Court of Karnataka and this court.

30. The scheme contains salient features and the provision regarding staff and employees states that on the coming into effect of the scheme, the staff and employees of the transferor companies in service are deemed to be the staff and employees of the petitioner/transferee company without any break in their service, etc., apart from transfer of provident fund, gratuity and other benefits. The scheme contains provisions regarding the issue of shares, accounting

treatment, merger of authorised share capital of the transferor companies with the authorised share capital of transferee company and the scheme is subject to the conditions, viz., the scheme is agreed by the majority of shareholders and creditors of the transferor companies and the transferee company; the scheme being approved by the High Court; such order sanctions and approvals required from various authorities; and filing by the transferor companies and the transferee company of the certified copies of the orders of the High Courts sanctioning the scheme as per the provisions of the Companies Act. The scheme also provides for dissolution of transferor companies. It is also stated that the petitioner/transferee company does not have any secured creditors and to that effect the certificate issued by the chartered accountant has been annexed as annexure Q.

31. By order dated February 25, 2010, in C. A. No. 460 of 2010, this court has dispensed with the convening and holding of the meeting of the equity shareholders and preference shareholders of the transferee/company and therefore, the present petition is filed for approval of the scheme with effect from April 1, 2009.

32. In the affidavit of the Regional Director, Ministry of Corporate Affairs, Chennai, it is stated that the petitioner/transferee company is required to comply with the provisions of section 97 of the Act and Form No. 5 is required to be filed with registration fees.

33. As regards the said objection raised by the Regional Director, as rightly submitted by learned counsel for the petitioner, in the light of the decision of this court in Cavin Plastics and Chemicals P. Ltd., In re [2006] 129 Comp Cas 915, the objection is no longer res integra and hence, the objection of the Regional Director does not survive for consideration.

34. In fact, a Division Bench of this court in Regional Director v. Cavin Plastics and Chemicals P. Ltd. (2008) 141 Comp Cas 475, while affirming the view of the single judge in Cavin Plastics and Chemicals P. Ltd., In re [2006] 129 Comp Cas 915 (Mad), has held as follows (page 480) :

In the case of Hotline Hol Celdings P. Ltd., In re [2005] 127 Comp Cas 165, the Delhi High Court followed the decision of the Andhra Pradesh High Court in Saboo Leasing P. Ltd., In re [2003] 117 Comp Cas 728, while considering an objection of the Regional Director to the effect that the authorised share capital of the merged company was being increased as a result of the scheme of amalgamation and this could only be carried out after following the procedure prescribed by the relevant provisions of the Companies Act and held that in the case of such merger no such payment of fee to the Registrar of Companies or stamp duty to the State Government shall be payable.

35. It is also stated in the affidavit filed by the Regional Director that a complaint has been received from a creditor, however the petitioner/transferee company has stated that the complainant is a debtor. The Regional Director has stated that

since the petitioner/transferee company shall be in existence, any dispute of the complainant can be resolved in due course of time.

36. It is also stated that the scheme protects the interest of all the employees of the transferor companies and provides for dissolution of the transferor companies upon amalgamation.

37. Therefore, the only objection is from one of the creditors. The said creditor is stated to be one Tejas Networks Ltd., and it has raised objections in the form of a statement.

38. As per the said objection, it is stated that the objector is an unsecured creditor of the petitioner/transferee company and the petitioner/transferee company owes a sum of Rs. 4,99,57,909.29 inclusive of interest as on June 30, 2009, to the objector and the objector has already filed a company petition in C. P. No. 118 of 2010 for winding up of the petitioner/transferee company.

39. The preliminary objection raised by the objector relates to the alleged serious and wanton violation committed by the petitioner/transferee company in effecting the shifting of its registered office and in this regard, the objector has submitted that :

(i) the shifting of the registered office from Karnataka to Tamil Nadu should have been effected by filing a petition u/s 17 of the Act, after following the procedure required which relates to giving of notice before shifting to every creditor or obtaining consent for alteration of the memorandum and articles of association.

(ii) as per regulation 36 of the Company Law Board Regulations, 1991, the petitioner/transferee company should have served individual notice of the proposed shifting to every creditor of the company not less than one month before the filing of any petition u/s 17(2) of the Act;

(iii) as per the report of the statutory auditors of the petitioner/transferee company as on March 31, 2009, copy of which has been filed as annexure 1, the auditors have qualified that the payables of the petitioner/ transferee company amounting to Rs. 143,65,99,859 are subject to confirmation and as per annexure 2, the statutory auditors have qualified that non receipt of confirmation in respect of sundry creditors amounted to Rs. 39,77,14,308 and in the absence of such confirmation from the debtors and creditors, the auditors have relied on the representation of the petitioner/transferee company and that, according to the objector, shows that the petitioner/transferee company has not taken any steps to obtain confirmations from its creditors, which is sine qua non for a petition u/s 17 of the Act;

(iv) while the balance-sheet that has been filed by the petitioner/ transferee company is as on March 31, 2009, the balance payable by the petitioner/transferee company has not been informed to this court;

(v) the petitioner/transferee company's affairs have been conducted against the

public interest and there have been discrepancies pointed out by the statutory auditors every year;

(vi) apart from the petitioner/transferee company not giving any notice to the objector for shifting of the registered office, for a letter of the objector dated April 14, 2010, marked as annexure 3, asking for certain records to be made available, the petitioner/transferee company has not given any information and in fact, the objector has also written to the Company Law Board on April 14, 2010, for copies of such records.

40. Apart from the above said preliminary objection, the objector has also stated that even as per the company petition, the scheme sets out the conditionalities of the scheme and the first and foremost condition is that the petitioner/transferee company has agreed to get consent of the scheme by the requisite majority of shareholders and creditors of all the companies involved, including the creditors of the petitioner/transferee company and non obtaining of such consent from the creditors, including that of the objector, itself is sufficient for dismissing the petition in limine.

41. Even as per the balance-sheet as on March 31, 2009, of the petitioner/transferee company filed as annexure 1, there are confirmed unsecured creditors to the extent of Rs. 12,65,84,113 and confirmation has not been obtained from the unsecured creditors, which is more than 92 per cent, of its value. Therefore, the substantial amount due to the unsecured creditors makes it mandatory on the part of the petitioner/transferee company to obtain consent before going for scheme of arrangement.

42. The scheme in effect has been made with the objective of reducing the capital reserve and share premium account and in those circumstances, the order dispensing with the meeting of equity shareholders and preference shareholders has been obtained by falsely stating that the scheme will not affect the rights of any creditors of the company.

43. It is also stated that while in C. A. No. 460 of 2010 the petitioner/transferee company has stated that notice of hearing would be given to the creditors at the time of hearing of the petition, such notice has not been given and therefore, it amounts to misrepresentation.

44. That apart, it is also stated that there has been some discrepancy in the application originally filed by the petitioner in C. A. No. 460 of 2010 and certain words and paragraphs have been struck down in the application originally filed and a fresh copy has been filed.

45. In respect of the first transferor company, the company petition states that presently the said company is carrying on business of designing, developing and selling of software programs. However, the statutory auditors of the said first transferor company as on March 31, 2009, have stated that there is substantial doubt about the said company's ability to continue as a going concern and

therefore, the first transferor company has not been carrying on any business and the liabilities of the said company are intended to be mulcted upon the petitioner/transferee company under the scheme.

46. It is also stated that all the three transferor companies have accumulated losses as on March 31, 2009, of Rs. 81 lakhs, Rs. 595 lakhs and Rs. 82 lakhs, respectively, and it is also stated that the accumulated loss of the petitioner/transferee company is Rs. 213 crores and in spite of it, it is stated in the scheme that the scheme would benefit the petitioner/transferee company.

47. It is further stated that the proposed reduction of the share can be ordered u/s 102 of the Act by this court only on satisfaction that in respect of every creditor of the company either consent has been obtained for reduction, or debt or claim has been discharged or has been secured and that the petitioner/transferee company should have filed a petition u/s 101 of the Act and in not filing the same, the petitioner/transferee company has wantonly prevented this court from exercising its powers u/s 101(2) of the Act. It is also stated that rule 85 of the Companies (Court) Rules, 1959, deals with reduction of capital and the petitioner/transferee company has failed to comply with the provisions of the Act in this regard.

48. It is also stated that the objector has issued a legal notice on July 25, 2009, u/s 434 of the Act demanding a sum of Rs. 4,99,57,909.29 and a reply was sent belatedly on December 9, 2009 and in spite of it the petitioner/transferee company has failed to pay the dues despite several reminders, which resulted in filing of a company petition for winding up by the objector.

49. It is stated that efforts were made to reconcile the accounts to arrive at the pending dues between the parties and in spite of the same, the petitioner/transferee company was unable to reconcile their accounts and the purpose is only to delay the payment lawfully due to the objector.

50. It is also stated that the material facts have not been disclosed before this court and the accounting position as on current financial status has not been filed and according to the objector, the petitioner/transferee company has purposely not filed the auditor's report and director's report and also not pointed out that all the companies are loss making companies.

51. It is also stated that the petitioner/transferee company is in the habit of treating amounts as erroneously recoverable from its customers, with some of the instances mentioned in the objection, and that the statutory auditors have raised serious qualifications on the petitioner/transferee company's internal control in respect of various payments and it has been also declared by the statutory auditors that the petitioner/transferee company accumulated loss at the end of the financial year, which is exceeding 50 per cent, of its net worth. The accumulated loss of the petitioner/transferee company for the year ending March 31, 2008, was Rs. 133,77,68,000 and that has been increased as on March 31, 2009, to Rs. 213,96,12,000 and therefore, the company is unable to

pay off its debts and is liable to be wound up.

52. The objection also contains various other aspects of the statutory auditor's report to drive home as to the instability of the petitioner/transferee company and in such circumstances, taking over of the loss making three transferor companies is only detrimental to the interest of the petitioner/ transferee company as such and the objector being one of the unsecured creditors is affected by such scheme.

53. Therefore, in effect, it is the case of the objector that the petitioner/transferee company is not in the State of Tamil Nadu; that the order passed in C. A. No. 460 of 2010 is improper; that the meeting of the creditors has not been effected as per the scheme itself; that no notice of hearing of the petition to the creditors was sent; that the company has not dispensed with the creditors' meeting and therefore, it is bound to hold a meeting of its creditors; that the requirements of sections 100 to 102 have not been complied with; and that the petitioner/transferee company is guilty of misrepresentation. On the said grounds, the objector seeks to reject the scheme.

54. Mr. Karthik Seshadri, learned counsel appearing for the petitioner/transferee company has submitted that by virtue of the scheme the petitioner/ transferee company is going to be a continuing company and therefore, there is no necessity for any apprehension and it is his submission that there is no dilution of rights of creditors. He has also referred to various provisions of the scheme to show that the financial status of the petitioner/ transferee company is not going to be affected.

55. It is also submitted that the objector has no locus standi and that the objector has not even made a proper claim and without any particulars it has filed the objection. It is also submitted that the objector has already approached this court by way of a petition in C. P. No. 118 of 2010 for winding up and it is for it to workout its remedy in the said company petition. It is his submission that the objector is not a creditor, but a debtor and there are no materials to prove that the petitioner/transferee company is bound to pay amount to the objector.

56. It is submitted that the shifting of the registered office of the petitioner/transferee company to Tamil Nadu was effected only after the Company Law Board passed orders and the same was in accordance with law and there is no necessity for the meeting of the unsecured creditors. He would also rely upon the judgment in Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd., In re [1980] 50 Comp Cas 623 (Mad).

57. It is his submission that there has been some mistake in the affidavit and that has been corrected and the objector cannot take advantage of that.

58. It is also his contention that the auditor's statement itself cannot be a proof for coming to a conclusion and that the auditor's statement has not considered about the petitioner/transferee company's net worth and the capital of the

company is Rs. 443 crores, while the loss is Rs. 213 crores.

59. He would further submit that the solvency of the petitioner/transferee company is in no doubt at all and a false impression has been made by the objector as if the company is insolvent. He would also refer to the particulars regarding the three transferor companies to state that it is not as if there is an accumulated loss in respect of the three transferor companies.

60. It is his submission that no creditors have raised any objection and the objector like the unsecured creditor can only be interested in return of money and he cannot object to the scheme when the procedure contemplated under law has been followed and inasmuch as the interest of the creditors is not affected, there cannot be any impediment for the purpose of granting of scheme as long as the scheme is not opposed to public interest or the larger interest of the company, etc.

61. It is further submitted that the qualified account of the auditor's statement cannot be a material fact and that the objector has never stated as to how it is affected by the merger and its interest is only to stall the merger one way or the other.

62. Per contra, Mr. A.K. Mysamy, learned counsel appearing for the objector would submit that the very fact that the company petition for winding up has been admitted shows that prima facie there is a case. He would refer to e-mail correspondence to show that there has been an amount due to the objector and it is his submission that the objector, like the unsecured creditor, is primarily affected by such merger and more so, in cases where the transferor companies are in a bad shape financially. It is his submission that when the transferor and transferee companies are loss making companies, the creditors in particular are having no security. He would also refer to various annexures filed by the petitioner/transferee company itself to show as to how the transferor companies are in a financially bad position.

63. He would also bring to the notice of this court the contents of the scheme to show that the scheme contemplates the consent from the creditors and submit that the non obtaining of such consent itself is a ground for the purpose of rejecting the proposal.

64. He would also refer to the provisions of sections 216 and 217 of the Act which relates to the balance-sheet and profit and loss account to show that the qualifying statement of the auditor is sufficient to prove that the claim of the petitioner/transferee company is not genuine.

65. He would also refer to the provisions of section 391 of the Act to substantiate his contention that furnishing of the latest financial position with auditor's report is a must for the purpose of approval of the scheme.

66. I have heard learned counsel for the petitioner and learned counsel for the objector and given my anxious thought to the issue involved in this case.

67. As stated above, the Regional Director, Ministry of Corporate Affairs, in the affidavit has stated that inasmuch as the petitioner/transferee company continues to be in existence, any dispute of the petitioner/transferee company can be resolved and it is also stated that the clause in the scheme protects the interest of the employees of the transferor companies and also provides for dissolution of the transferor companies by way of amalgamation. Therefore, according to the Regional Director, the requirements of approval of the scheme have been complied with and the same is not opposed to public interest.

68. On facts, without going into any other financial aspect of the transferor companies and the transferee company, it is clear that the petitioner/transferee company, which is seeking approval for the scheme before this court, has got a valid order from the Company Law Board for transfer of its registered office from Karnataka to Tamil Nadu. As long as such order of the Company Law Board passed in accordance with the provisions of the Act remains unchallenged and has thus become final, it is certainly not open to the objector now to raise objection about the jurisdiction of this court. It can never be presumed that such order of the Company Law Board is to be ignored and the petitioner/transferee company should continue to be treated as a company in the State of Karnataka.

69. It is in accordance with section 433 of the Act the objector has already filed C. P. No. 118 of 2010 for winding up of the petitioner/transferee company and the same is pending before this court. The ground on which the winding up petition has been filed against the petitioner/transferee company is that the company is unable to pay its debts. u/s 447 of the Act, an order of winding up is to operate in favour of all the creditors and of all the contributories of the company as if it has been made as a joint petition of a creditor and of a contributory. Such winding up order shall have effect from the date of filing of petition for winding up.

70. On the factual matrix of the case on hand, when by the merger of the transferor companies, the transferee company is going to continue its operations, it cannot be said that the right of the objector to proceed with the winding up will be frustrated if the scheme of amalgamation is approved. Such a situation may arise in cases where the petitioner/transferee company merges with some other company thereby losing its corporate entity, which is not the case on hand.

71. It is also relevant to point out that the objector's case appears to be not with the interest of claiming or making recoveries of the amounts due to protect its interest, but the main opposition is to the scheme. If that is so, certainly it is mandatory on the part of the objector to bring to the notice of this court about the grave situation either by suppression or illegality which may result in public interest or irredeemable consequence to the corporate personality of the petitioner/transferee company.

72. The objector mainly relies upon the remarks made by the statutory auditors about the nature of functioning and financial status and so on, but curiously the

capital structure of the petitioner/transferee company has never been questioned by the objector. On the other hand, there are records to show that the assets of the petitioner/transferee company worth nearly Rs. 433 crores are available as on date. While the claim of the objector is only few lakhs, the same is objected to by the petitioner/transferee company.

73. The contention of learned counsel appearing for the objector by relying upon the provisions of the Act, especially sections 216 and 217, which are relating to profit and loss account to be annexed to the auditors' report and the Board's report, is, in my considered view, misconceived. Even if there is a failure in performing the conduct as per the said provisions of the Act, the consequence cannot be in the normal circumstance either to wind up the company or to stall the proceedings for a scheme, if such scheme is otherwise found to be beneficial to the interest of the transferee company.

74. In any event, even if the objector claims himself to be a creditor, simply because the creditors' meeting is not convened and consent is not obtained even as per the provisions of the scheme, it does not mean that the scheme should be scuttled as a whole.

75. The presumption of the objector as if there is going to be reduction of share capital and therefore, it requires a special resolution of the transferee company as per sections 100 and 101 of the Act are again, in my considered view, artificial. Section 100 of the Act, which is as follows :

100. Special resolution for reduction of share capital.--(1) Subject to confirmation by the court, a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles, by special resolution, reduce its share capital in any way; and in particular and without prejudice to the generality of the foregoing power, may-

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as "a resolution for reducing share capital".

no doubt enables the company limited by shares, etc., by a special resolution to reduce its share capital. But by going through the terms of the scheme, there is nothing to conclude that the petitioner/transferee company is going to reduce its

share capital by virtue of the amalgamation, thereby requiring a special resolution to be passed u/s 100 of the Act. It is only when the company passes a resolution for the purpose of reduction of share capital, the question of objection by any of the creditors of the company comes in as contemplated u/s 101 (2) (a) of the Act, which is as follows :

101. Application to court for confirming order, objections by creditors, and settlement of list of objecting creditors.--...(2) Where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the court so directs, the following provisions shall have effect, subject to the provisions of sub- section (3) :-

(a) every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction;

76. In a scheme for approval u/s 391 of the Act, what is required to be done is the approval of the court, which is provided u/s 391(2) of the Act, which is as follows :

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

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

It is not in dispute that only the objector has raised objection about the proposal.

77. By referring to the statement of Lindley L.J. in *Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re* [1891] 1 Ch. D. 213 (CA) at 238, wherein the following observation was made :

... what the court has to do is to see, first of all, that the provisions of that

statute have been complied with; and, secondly, that the majority has been acting bona fide. The court also has to see that 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. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by businessmen.

78. Padmanabhan J., as his Lordship then was, in *Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd., In re* [1980] 50 Comp Cas 623 (Mad), has considered that the following conditions are to be satisfied before the court approves the scheme for amalgamation (page 630) :

(1) The court should be satisfied that the resolutions are passed by the statutory majority in value and in number in accordance with section 391(2) of the Companies Act at a meeting or meetings duly convened and held. This factor is jurisdictional in the matter of confirmation of the scheme. The court should not usurp the right of the members or creditors to decide whether they approved the scheme or not. Therefore, if a class whose interests are affected by a scheme does not assent to the scheme or approve it at a meeting convened in accordance with the provisions of section 391, the court will have no jurisdiction to confirm the scheme, even if it considers that the class concerned is being fairly dealt with or that it would approve the scheme.

(2) The court should satisfy itself that those who took part in the meeting are fairly representative of the class and that the statutory meeting did not coerce the minority in order to promote the adverse interest of those of the class whom they purport to represent.

(3) Lastly, in exercising its discretion under sections 391 and 394, the court is not merely acting as a rubber stamp. It is the function of the court to see that the scheme as a whole, having regard to the general conditions and background and object of the scheme, is a reasonable one and if the court so finds, it is not for the court to interfere with the collective wisdom of the shareholders of the company. When once the court finds that the scheme is a fair one, then it is for the objector to convincingly show that the scheme is unfair and that, therefore, the court should exercise the discretion to reject the scheme, notwithstanding the views of a very large majority of the shareholders that the scheme is a fair one. If the court is of the opinion that there is such an objection to it as any reasonable man would say that he would not approve of if, then the court may refuse to confirm the scheme. However, if the scheme as a whole is fair and reasonable, it is the duty of the court not to launch on an investigation upon the commercial merits or demerits of the scheme which is the function of those who are interested in the arrangement.

(4) There should not be any lack of good faith on the part of the majority.

79. It is true that while deciding about the approval of a scheme by the court,

mere consent of the shareholders or creditors cannot be a sole criteria and the court has to examine whether the proposal is fair and reasonable taking the entire issue into consideration and while doing so, the decision of the creditors and shareholders may play a vital role for the court to decide. It is also no doubt true that while making an application u/s 391(2) of the Act for the purpose of sanctioning of the arrangement or compromise all material facts are to be disclosed, including the latest financial status of the company and auditor's report.

80. As held by the Supreme Court in *S. K. Gupta v. K. P. Jain* (1979) 49 Comp Cas 342; AIR 1979 SC 734, as per the reading of section 391(1) of the Act, which is as follows :

391. Power to compromise or make arrangements with creditors and members.--  
(1) Where a compromise or arrangement is proposed--

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

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

which uses the term "member or creditor", which includes any such person interested in the affairs of the company also and therefore, the question of locus standi hardly matters for the court in cases of scheme to be approved, since the court independently decides the issue. It was held by the Supreme Court as follows (page 353 of 49 Comp Cas) :

If the court can suo motu act, it is immaterial as to who drew the attention of the court to a situation which necessitated court's intervention. Where the power is conferred on the court to take action on its own motion the information emanating from whatever source which calls for court's attention can as well be obtained from any person without questioning his credentials moving an application drawing attention of the court to a situation where it must act. Undoubtedly, the court may decline to act at the instance of a busybody but if the action proposed to be taken is justified, valid, legal or called for, the capacity or credentials of the person who brought the situation calling for court's intervention is hardly relevant nor would it invalidate the resultant action only on that ground. Therefore, when sub-section (2) confers power on the court to act on its own motion, the question of locus standi hardly arises. The High Court while examining the question of locus standi, after combing the provision contained in sub-section (2), wholly overlooked the important provision therein contained that the High Court can act on its own motion. It was, however, said in passing that sub-section (2) enables the court to wind up the company and, therefore, the court may act on its own motion or on the application of any

person interested in the affairs of the company not for modifying the scheme or for any directions but for winding up the company. But when the court is required to act u/s 392(1), the limitations and restrictions imposed upon the court u/s 391(1) must be read in section 392(1) because the sections are complementary to each other. This submission overlooks the two different stages at which sections 391 and 392 operate though they may be complementary to each other. Two sub-sections of section 392 have to be harmoniously read and sub-section (2) clearly indicates the power of court to take action suo motu while taking action under sub-section (1). Again this approach is inconsistent with the language employed in section 392(2) in that the court can wind up the company u/s 392(2) if and only if it is satisfied that the compromise and/or arrangement sanctioned by it cannot be satisfactorily worked with or without modifications. The court has to reach an affirmative conclusion before acting u/s 392(2) that the compromise and/or arrangement cannot be worked satisfactorily with or without modification (see /. J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, . It follows as a corollary that if the compromise or arrangement can be worked as it is or by making modifications, the court will have no power to wind up the company u/s 392(2). Now, if the arrangement or compromise can be worked with or without modification, the court must undertake the exercise to find out what modifications are necessary to make the compromise or arrangement workable and that it can do so on its own motion or on the application of any person interested in the affairs of the company. If such be the power conferred on the court, it is difficult to entertain the submission that an application for directions or modification cannot be entertained except when made by a member or creditor. It would whittle down the power of the court in that it cannot do so on its own motion.

81. While referring to the said sections 391 to 394 of the Act along with the Companies (Courts) Rules, 1959, in In Re: Teck-men Tools (P.) Ltd., , while referring to the wishes of the creditors, it was held as follows (page 811) :

On a conjoint reading of sections 391 and 394 of the Companies Act, 1956, and rules 80 to 83 of the Companies (Court) Rules, 1959, it is evident that, while no specific provision has been made for ascertaining the wishes of the creditors in a scheme of arrangement between the company and its members, the Legislature, and the Supreme Court, have, necessary implication, entrusted the court with the duty to ascertain whether the scheme affects the interests of the creditors to such an extent that holding of their meeting is essential and, if the court were of the view that the interest of the creditors are adversely affected, it could refuse to sanction the scheme unless their consent has been obtained.

Therefore, the court has to see as to whether the proposed scheme is opposed to the interest of the company or public interest, as to whether the material facts relating to the company have been disclosed and the company is not facing any investigation under sections 235 to 251 of the Act. It is not in dispute that no investigation is pending in respect of the affairs of the petitioner/transferee

company as per the provisions of the Act.

82. The scope and ambit of jurisdiction of the company court regarding the sanction of scheme or amalgamation and various parameters have been explained by the apex court in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, , by referring to the hierarchy of decisions on the issue, as follows (page 818) :

In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the company court has clearly got earmarked. The following broad contours of such jurisdiction have emerged :

- (1) The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391(1) (a) have been held.
- (2) That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391(2).
- (3) That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
- (4) That all necessary material indicated by section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by section 391(1).
- (5) That all the requisite material contemplated by the proviso to sub-section (2) of section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.
- (6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.
- (7) That the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.
- (8) That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.
- (9) Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of

the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

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.

83. In the light of the above said precedents, it is clear that the guiding factor for the court to decide about the sanction is as provided u/s 391(2) of the Act, especially the proviso. Considering the facts of the present case in the light of the above said legal position, the balance sheet of the petitioner/ transferee company as on March 31, 2009, shows that the share capital of the company which was on March 31, 2008, at Rs. 372,00,26,564 has grown up to Rs. 443,63,14,064 as on March 31, 2009 and the fixed assets that have been shown in the form of buildings as on April 1, 2008, at Rs. 107,73,88,215 have been increased to Rs. 108,08,79,857 as at March 31, 2009. Similarly, the plant and machinery which was at Rs. 89,37,67,522 as at April 1, 2008, has grown to Rs. 97,88,59,984 as at March 31, 2009. It is also seen that the cash and bank balances as at March 31, 2009 was Rs. 70,09,62,136 as against the one at March 31, 2008 as Rs. 29,22,57,899. The auditor's report also shows about the cash flow from the financial activities in the form of share capital which has been increased from Rs. 24,29,08,724 as on March 31, 2008 to Rs. 71,62,87,500 as at March 31, 2009. The cash flow statement cannot be said to be either alarming, depicting the financial instability of the petitioner/transferee company, as it is focused by the objector. There is no question of any suppression.

84. The scheme of arrangement on the "accounting treatment" in clause 13 does not oblige the petitioner/transferee company to separately call for the meeting of the shareholders or creditors. Clause 13.9 of the scheme, which is relevant, is as follows :

13.9. The necessary approvals to be obtained by FTIPL from its shareholders and creditors, as required, for the scheme shall always deemed to include the approval/consents required to be obtained u/s 100 and FTIPL shall not nor shall be obliged to call for a separate meeting of its shareholders and creditors for obtaining their approval sanctioning the reduction of share premium account, as the case may be, as contemplated herein.

85. Clause 17.2 of the scheme, which is as follows :

17.2. On the scheme being agreed to by the requisite majorities of the classes of the shareholders and/or creditors, transferor companies and FTIPL shall, with all reasonable dispatch, apply to the High Court for sanctioning the scheme under

sections 391 and 394 of the Act, and for such other order or orders, as the said High Court may deem fit for carrying this scheme into effect.

also contemplates the agreement of the majority of the classes of the shareholders and/or creditors of both transferor and transferee companies for making application u/s 391 of the Act.

86. The conditionality of scheme in clause 18, relied upon by learned counsel for the objector, which is as follows :

18. Conditionality of scheme. The scheme is conditional upon and subject to :

(a) the scheme being agreed to by the respective requisite majority of shareholders and creditors of transferor companies and FTIPL;

(b) the scheme being approved by the High Court;

(c) such other sanctions and approvals including sanctions of any statutory or regulatory authority, as may be required in respect of the scheme, being obtained;

(d) filing by transferor companies and FTIPL of the certified copies of the order of the High Court sanctioning the scheme under sections 391 and 394 of the Act with the Registrar of Companies, Bangalore and Registrar of Companies, Chennai.

no doubt contemplates the scheme to be agreed to by the requisite majority of shareholders and creditors of both the transferor and transferee companies. But in the circumstance that the shareholders have already taken a decision, which is not in dispute, simply because the objector, being the only creditor, is opposing, it does not mean that even if the court comes to a conclusion that the scheme can be approved, it would be against clause 18 of the scheme.

87. The statutory auditor's report dated September 16, 2009, while giving the statement as required by the Companies (Auditors Report) Order, 2003 issued by the Department of Company Affairs u/s 227(4A) of the Act, has nowhere stated about any suppression of any facts and on the other hand, all information has been revealed and examined. Even though in the end there is a statement, which is as follows :

However, we draw attention to company's plan for discontinuation of all business operations and consequently severance package were offered to all the employees by the company wherein all the employees were laid off by the company. The company has no plan to carry out any other business activities. These factors raise substantial doubt about the company's ability to continue as a going concern in the foreseeable future.

in the annexure referred to in the auditor's report in various paragraphs, there is no whisper about the same. It is relevant to point out at this stage that the said information regarding the alleged discontinuance is not relating to the petitioner/ transferee company, but relating to the first transferor company, in respect of

which also the other statutory statements are not against its financial status. In fact, in one of the clauses, especially clause 10, it is stated as follows :

(x) According to the information and explanations given to us and on overall examination of the balance-sheet, the company has not incurred cash losses in the current and previous year and the accumulated losses of the company as at March 31, 2009, does not exceeded 50 per cent, of capital and reserves.

88. The statutory auditor's report dated September 3, 2010, which has been filed before this court after the filing of the above company petition, shows that the objector, viz., Tejas Networks India Ltd., has an amount of Rs. 1,97,91,789 to be paid to the petitioner/transferee company as on August 31, 2010. The certificate is as follows :

We are the statutory auditors of M/s. Flextronics Technologies (India) P. Ltd. ("Flextronics") having its registered office at Plot No. 3, Phase II, SIPCOT Industrial Park, Sandavellure C Village, Sriperumbudur Taluk, Kancheepuram District, Tamil Nadu. At the specific request of Flextronics, we are issuing this certificate for the limited purpose of filing with High Court of Chennai.

In issuing this certificate, we have examined the un-audited books, records and other related documents maintained by Flextronics for the period from April 1, 2009 to August 31, 2010 and related information and explanation provided to us. Based on the said examination, we hereby certify that M/s. Tejas Networks India Ltd., has a net payable amounting to Rs. 19,791,789 to Flextronics as on August 31, 2010.

Of course, that is the issue about which, this court is not concerned in this company petition, since it is for the parties to workout their remedy in the company petition filed by the objector for winding up of the petitioner/transferee company. But for the purpose of the scheme, as it is focused by the objector, it cannot be said to be an alarming situation so as to deprive this court to sanction the scheme. Admittedly, no other creditor has objected to the scheme.

89. The contention of learned counsel for the objector as if the application filed by the petitioner/transferee company for dispensing with the meeting of shareholders and creditors should be held to be invalid, does not hold water on the facts of the present case. The sole unsecured creditor cannot be said to have no remedy available in law, even if the scheme is approved. In the light of the specific stand taken by the petitioner/transferee company that the objector is liable to pay the amount to the petitioner/transferee company, I am of the considered view that instead of going into the locus standi of the objector at this stage, one has to necessarily come to a conclusion that no materials have been placed before this court to show that any of the situations are in existence u/s 391(2) of the Act to doubt about the disclosures of various materials made by the petitioner/ transferee company in this petition.

90. In such view of the matter, there shall be an order approving the scheme of

arrangement, as provided in the scheme of arrangement annexed as annexure A to the company petition with effect from April 1, 2009, as the procedure laid down under sections 391 and 394 of the Act has been duly complied with. However, the said approval is subject to sanction of the scheme of arrangement by the High Court of Karnataka with respect to the transferor companies. It is also made clear that the approval of the scheme shall be without prejudice to the right of the objector in proceeding for winding up petition filed by it, in respect of which no opinion is expressed by this court. This petition is allowed.

91. The learned Additional Central Government Standing Counsel is entitled to a fee of Rs. 2,500 from the petitioner/transferee company.