

(2016) 03 KL CK 0162

In the High Court Of Kerala

Case No : Co. Pet. No. 30/2014 and MCA 12, 13, 14 and 15/2014

In Re: Manjilas Agro Foods Private Limited and Others

Date of Decision : 29-03-2016

Acts Referred:

Partnership Act, 1932 — Section 40, Section 44

Citation : (2016) 03 KL CK 0162

Hon'ble Judges : C.T. Ravi Kumar, J.

Bench : Single Bench

Final Decision : Allowed

Judgement

C.T. Ravi Kumar, J.—1. This petition has been filed under Sections 390 to 394 and 582 of the Companies Act, 1956 and Sections 40 and 44 of the Indian Partnership Act, 1932 for sanctioning of a Composite Scheme of Amalgamation of two Transferor Companies and one Transferor Firm with the Transferee Company, named thereunder and with the following prayers:-

"1. Sanction the Composite Scheme of Amalgamation shown in ANNEXURE-1 so as to be binding on the Members, Secured and Unsecured Creditors of the First Petitioner/First Transferor Company; Members, Secured and Unsecured Creditors of the - Second Petitioner/Second Transferor Company; Partners, Secured and Unsecured Creditors of the Third Petitioner/Transferor Firm and Members, Secured and Unsecured Creditors of the Fourth Petitioner/Transferee Company.

2. Direct that a certified copy of this Hon'ble Court Order, including the Composite Scheme of Amalgamation as approved at the Meeting of the Shareholders/Partners of the Petitioners be delivered to the Registrar of Companies, Kerala, within such period from the date of the Order in that regard is passed; and a certified copy is received as ordered in that regard by this Honourable Court.

3. Order the dissolution without winding-up of the First Petitioner/First Transferor Company; Second Petitioner/Second Transferor Company and Third Petitioner/Transferor Firm.

4. Pass such other and further Orders that this Honourable Court may deem fit and proper to pass on the facts and in the circumstances of the case."

For the sake of convenience hereinafter in this judgment the Composite Scheme of Amalgamation is referred to as "the Scheme", Manjilas Agro Foods Private Limited and Q One Foods and Ingredients Private Limited/the first and second petitioners are respectively referred to as "the First and Second Transferor Companies"; M.O. John & Sons (Exports)/the 3rd petitioner which is a partnership firm is referred to as "Transferor Firm" and they are collectively referred to as "Transferor Entities" and Manjilas Food Tech Private Limited/the 4th petitioner is referred to as "Transferee Company".

2. An encapsulation of the facts necessary for the disposal of this petition is as follows:-

"The first petitioner/First Transferor Company was incorporated on 17.7.1995 in the State of Kerala under the Companies Act, 1956 (for short "the Act") as "Manjilas Agro Foods Limited". Its shares are held by members of the family of Late M.O. John who hold shares in the second petitioner/Second Transferor Company, in the third petitioner/Transferor Firm and also in the fourth petitioner/Transferee Company. Later, the name of the First Transferor Company was changed to "Manjilas Agra Foods Private Limited". Annexure-3 is its Memorandum of Association and Articles of Association and the main object of the First Transferor Company as incorporated in the Memorandum of Association has been summarised in the petition, is as follows:-

"To carry on the business of dealers in rice/paddy, cereals, pulses and food grains of all kinds and other allied produce; to carry on the business of commission agent, consultants, brokers, stockists, warehouse keepers, importers, exporters, whole sellers or retailers of all kinds of food items; to treat, cure, submit to any process of manufacture and prepare for the market, paddy and agricultural products of all kinds."

Its authorised share capital as on 31.3.2014 was Rs. 14,00,00,000 (Rupees Fourteen Crores only). Its accounts were audited up to 31.3.2013 and Annexure-5 is its latest audited balance sheet as on 31.3.2013 along with the report of the auditors. Annexure-6 is the true copy of its unaudited balance sheet and the profit and loss account. It is stated that subsequent to the date of the aforesaid accounts there was no other substantial change in the financial position of the First Transferor Company except those arising or resulting from the usual course of business. The second petitioner/Second Transferor Company was incorporated on 5.4.2005 in the State of Kerala under the Act as "Q One Foods and Ingredients Private Limited". Its shares are held by the members of the family of Late M.O. John and they also hold shares in the First Transferor Company, in the Transferor Firm and also in the Transferee Company. Annexure-8 is the Memorandum of Association and Articles of Association and its main object going by Annexure-8 is incorporated in the petition as follows:-

"To carry on the business of manufacturing, producing, buying, selling, importing, exporting in any manner or dealing in foods, food ingredients, food supplements and other products made from meat, fish, poultry, vegetables and fruits and to deal in spices, pulses, cereals, essence, extracts and oils."

The authorised share capital of the Second Transferor Company as on 31.3.2014 was Rs. 3,00,00,000/- (Rupees Three Crores only). Its accounts were audited up to 31.3.2013 and Annexure-10 is its latest audited balance sheet as on 31.3.2013 along with the report of the auditors. Annexure-11 is the true copy of its unaudited balance sheet and the profit and loss account for the year 2013-2014. It is stated that subsequent to the date of aforesaid accounts there was no other substantial change in the financial position of the Second Transferor Company except those arising or resulting from the usual course of business. The third petitioner/Transferor Firm M.O. John (Exports) was constituted on 1.4.1990 with registration No. 1434/1990. The partnership deed was amended afresh on 1.4.1999 and later, the firm was reconstituted with effect from 22.11.2000 on the demise of M.O. John. Thereafter, it was again reconstituted from 20.3.2014. Annexure-12 is the supplemental deed of partnership. The main object of the Transferor Firm is incorporated in the petition as hereunder:-

"To engage in the export of rice and other food products; to establish warehouses and cold storages; and also an efficient transport network; and to engage in such other businesses as may be mutually agreed upon by the partners from time to time."

Its authorised share capital which was Rs. 4,00,000/- (Rupees Four Lakhs only) as on 31.3.2014 has been increased to Rs. 8,00,000/- (Rupees Eight Lakhs only) in accordance with the decision of the partners at their meeting held on 1.3.2014 and the Supplemental Deed of Partnership dated 20.03.2014. The new partners were given time till 31.7.2014 to subscribe their respective shares. Its accounts were audited up to 31.3.2013 and Annexure-13 is its latest audited balance sheet as on 31.3.2013 along with the report of the auditors. Annexure-14 is the true copy of its unaudited balance sheet and the profit and loss account for the year 2013-2014. It is stated that subsequent to the date of the aforesaid accounts there was no other substantial change in the financial position of the Transferor Firm except those arising or resulting from the usual course of business. The 4th petitioner/Transferee Company was incorporated on 28.6.1999 in the State of Kerala under "the Act". Its authorised share capital as on 31.3.2014 was Rs. 3,00,00,000/- (Rupees Three Crores only). Annexure-16 is the true copy of its Memorandum of Association and Articles of Association. Going by the Memorandum of Association its main object is as follows:-

"To carry on the business of dealers in rice/paddy, cereals, pulses and food grains of all kinds and other allied produce; to carry on the business of commission agents, consultants, brokers, stockists, warehouse-keepers, importers, exporters, wholesalers and retailers of all kinds of food items; to treat, cure submit to any process of manufacture and prepare for the market paddy an

agricultural produce of all kinds."

The Board of Directors of the Transferee Company, four in number, are also Directors/partners in the "Transferor Entities". The accounts of the Transferee Company were audited up to 31.3.2013. Annexure-18 is its latest audited balance sheet as on 31.3.2013 along with the report of the auditors. Annexure-19 is its unaudited balance sheet and profit and loss account for the year 2013-2014. It is stated and affirmed that the unaudited results disclose an increase in profits over the previous year. It is stated that subsequent to the date of aforesaid accounts there was no other substantial change in the financial position of the Transferee Company except those arising or resulting from the usual course of business."

3. The Board of Directors of the Transferor Entities and the Transferee Company have passed Annexure-21 resolution dated 6.6.2014 and unanimously approved the Scheme of amalgamation in respect of which sanction is sought for carrying the proposal for amalgamation of the Transferor Entities with the Transferee Company and evidently, going by the same the main object of the Memorandum of Association of the Transferor Entities would be included in the Memorandum of Association of the Transferee Company. In this context, the decision in EITA India Ltd., Re, reported in , AIR 1997 Cal 208 will not be inapposite. It was held therein that the transferor and transferee companies are not carrying on similar businesses could not be a ground for refusing sanction to their amalgamation. Going by the relevant provisions incorporated in Chapter V of Part VI of the Act dealing with "Arbitration, Compromises, Arrangements and Reconstructions", more particularly Sections 391 and 393 of the Act a compromise or arrangement can be proposed between a company and its creditors or any class of them or between a company and its members or any class of them and such compromise would also take in its compass a Scheme of Amalgamation or merger of one company with another. Annexure-22 is the approval of the secured creditors to the Scheme and therefore, this Court dispensed with the meeting of secured creditors and appointed Adv. P.B. Krishnan as Chairman to convene meeting of the shareholders/partners to consider the Composite Scheme of Amalgamation of the Transferor Entities with Transferee Company. After complying with the statutory formalities such a meeting was conducted "on 18.10.2014 after due publication of notice in Thrissur editions of "The Hindu" and "Mathrubhumi" dailies dated 20.9.2014. Going by Annexure-26 report of the Chairman of meeting the resolution obtained unanimous approval. The captioned Company Petition has been filed in the said circumstances jointly by the Transferor Entities and Transferee Company seeking sanction of this Court for the Composite Scheme of Amalgamation and for consequential orders.

4. On 5.11.2014 this Court passed an order to serve copy of the application on the Official Liquidator, High Court of Kerala and notice was issued to the Central Government through the Regional Director, Department of Company Affairs, It was also directed to publish notice in Thrissur editions of "the Hindu" and

"Mathrubhoomi" dailies. The directions have been complied with. Pursuant to the receipt of copy of the application the Official Liquidator filed Report No. 1 seeking permission to engage the service of a Chartered Accountant empanelled with him to scrutinise the statutory books of accounts, statutory registers and other relevant records of the Transferor Companies. Evidently, it was so prayed with a view to discharge the claimed statutory duty cast under the second proviso to Section 394(1) of the Act. The petitioners filed objection to Report No. 1 contending, inter alia, as hereunder:-

"i. The Scheme had obtained the approval of the secured Creditors as shown in Annexure-22 to the Company Petition; and this Honourable Court was accordingly pleased to dispense with the meeting of the Secured/Unsecured Creditors at its hearing on 18.08.2014;

ii. The Shareholders/Partners of the Transferor Entities and Transferee Company have unanimously approved the Scheme at the meeting convened on 18.10.2014 under the supervision of Adv. P.B. Krishnan, Chairman appointed by this Honourable Court as required under Section 393 (3) of the Companies Act (hereinafter referred to as the "Act");

iii. The Transferor Entities and the Transferee Company have furnished all documents including latest financial statements prescribed under Section 391 of the Act in the Company Petition;

iv. The Scheme is not prejudicial to the interest of the Shareholders, Creditors and Public. On the contrary it is entirely beneficial to the Shareholders, Creditors and the Public;

v. The Registrar of Companies (ROC) has not initiated any scrutiny of the petitioners under Section 209A and 234 of the Act.

vi. The Central Government is not contemplating any investigation into the affairs of the Petitioners under Section 235 of the Act;

vii. The Central Government is not contemplating a special audit of the Petitioners under Section 233A of the Act;

viii. The Prayer of the OL is beyond the scope of Section 391 of the Act.

ix. The role of the OL is envisaged only in cases of winding-up of the Companies under Section 443, 448 and 509 of the Act;"

5. In order to substantiate the contentions especially, that the prayer of the Official Liquidator is beyond the scope of Section 391 of the Act and that the role of the Official Liquidator is envisaged only in cases of winding-up of the companies under Sections 443, 448 and 509 of the Act the petitioners mainly relied on a decision of the High Court of Calcutta In Re: Marvbonq And Kyel Tea Estate v. Unknown reported in 1997 (47) Company Cases 802 (Cal). Relying on the same it is contended that the second proviso to Section 394(1) of the Act would apply only in cases where there is commencement of winding up either by

presentation of a winding-up petition or any resolution of voluntary winding up of a company has been passed. In short, for the purpose of considering the question whether this application could be sanctioned or not a report of the Official Liquidator is absolutely uncalled for, it is submitted. The learned counsel for the petitioners also submitted that the decision in Marybong's case (*supra*) has been found as a sturdy and quite appropriate decision in the context in which the second proviso is placed, by a Full Bench of this Court in *Mathew Philip v. Malayalam Plantations Indian Ltd.* reported in , 1994-81 Comp. Cases 38 (Ker.). It is also contended that the decision of the Calcutta High Court which was found sturdy and quite appropriate by this Court was then followed by High Courts of Madras and Madhya Pradesh in the decisions in *Sugarcane Growers & Sakthi Shareholders' Association v. Sakthi Sugars Ltd.* [, (1995) 6 SCL 144 (Mad)] and *In Re: Garima Automobiles P. Ltd..... v. Unknown* [, 2008-141 Com. Cases 13(MP)], respectively. True that, an alternative contention is also taken up by them to the effect that even if the Official Liquidator is to file a report in the matter of sanctioning of a Scheme of Amalgamation the Official Liquidator is not entitled to the records and papers relating the Transferor company from the date of its incorporation as it is beyond the scope of Section 391 of the Act in view of its proviso. In other words, it is contended that at best the Official Liquidator is entitled only to call for production of records only in tune with the proviso to Section 391 of the Act. Per contra, the learned counsel appearing for the Official Liquidator submitted that it is the statutorily bounden duty of the Official Liquidator to submit a report to the Company Court in terms of the second proviso to Section 394(1) for the purpose of enabling the court to pass an order under clause (iv) of Section 394(1) of the Act. It is submitted that the companies which sought for amalgamation cannot withhold books of accounts or statutory records and papers and the Official Liquidator is entitled to scrutinise such records and papers relating the companies from their inception for the purpose of submitting a report to the court before passing order for dissolution of any Transferor company, in terms of Clause (iv) of Section 394(1) of the Act to facilitate the Company Court to arrive at a finding as to whether or not the affairs of the company have been conducted in a manner prejudicial to the interests of its members or to the public interest. In support of the said contention the Official Liquidator relied on a decision of the Hon'ble Apex Court in *Sesa Industries Limited v. Krishna H. Bajai and Others* (, (2011) 3 SCC 218). Curiously, the petitioners also rely on the said decision.

6. Heard Adv. Sri. Sukumar Nainan Oommen, the learned counsel for the petitioners, Adv. Sri. K. Moni, the learned counsel appearing for the Official Liquidator and Adv. Nagaresh, the learned Assistant Solicitor General of India.

7. Before dealing with the rival contentions it would only be proper and profitable to consider the position of law regarding the extent of jurisdiction of this Court in the light of the provisions of law as also authorities on the subject. In *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* (, AIR 1997 SC 506) the Hon'ble Apex Court considered the scope of jurisdiction of a Company Court when being called upon

to sanction a Scheme of Amalgamation as per the provisions of Section 391 read with Section 393 of the Act. It was held therein that when a Scheme is put forth by a company for the sanction of a Court, at the first instance, the Court has to direct holding of a meeting of the creditors or class of creditors, or of the members or class of members, who are concerned with such a scheme. Once the majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or by proxy at such a meeting, accorded their approval to any compromise or arrangement thus put to vote, and once such a compromise is sanctioned by the Court, it would be binding on all creditors or class of creditors, or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme would remain binding. At the same time, the Hon''ble Apex Court held that before sanctioning such a scheme though it was approved by a majority of the concerned creditors or members the Court has to be satisfied that the company or any other person moving such an application for sanction under Section 391(2) of the Act had disclosed all the relevant matters mentioned in the proviso to Section 391(2) of the Act and also that the requisite information as contemplated under the proviso was also placed for consideration of the concerned voters so as to enable them to take an objective decision whether to vote for the scheme or against it. The Hon''ble Apex Court held further as follows:-

"On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a Court of law. No Court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the concerned scheme placed for its

sanction."

At the same time, the Hon"ble Apex Court further went on to consider the question whether the court got jurisdiction like an appellate authority to minutely scrutinise 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 sub-section (2) of Section 391. In respect of the said matter the Hon"ble Apex Court held thus:-

"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 judgement over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. 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 supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act."

After referring to Section 392 of the Act the Apex Court went on to hold as follows:-

"Of course this Section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement."

8. A careful scanning of the decision in *Miheer H. Mafatlal's* case (supra) would reveal that even while holding that courts do not sit merely to see that the majority are acting bona fide and thereupon to register decision of the meetings, it was held that the Courts have to be slow to interfere with the informed view of the parties concerned taken at 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, In the said decision an earlier decision of the Hon"ble Apex Court in Hindustan Lever Employees" Union v. Hindustan Lever Ltd. (, 1995 Supp (1) SCC 499) was referred to while dealing with the jurisdiction of the Court in the matter of sanctioning the Scheme. The quoted observation reads thus:-

"An argument was also made that as a result of the amalgamation, a large share of the market will be captured by HLL. But there is nothing unlawful or illegal about this. The Court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved. But that is not the case here. A company may, on its own, grow up to capture a large share of the market. But unless it is shown that there is some illegality of fraud involved in the scheme, the Court cannot decline to sanction a scheme, of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO, Dr. Dhavan has argued that TOMCO is not yet a sick Company."

(emphasis supplied)

After referring to various authorities the Hon"ble Apex Court in Miheer H. Mafatlal's case (supra) laid down broadly the following contours of the jurisdiction of the Company Court:-

- "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 (I)(a) have been held.
2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391, sub-section(2).
3. That the concerned 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, sub-section (1).
5. That all the requisite material contemplated by the proviso to sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.
6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

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

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

9. It is to be noted that even after laying down such broad contours of the jurisdiction of the Company Court the Hon''ble Apex Court categorically held that the aforesaid parameters of scope and ambit of the jurisdiction of the Company Court in respect of which such contours of jurisdiction have been laid, are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction. Virtually, the contours of jurisdiction thus laid down in *Miheer H. Mafatlal's* case (supra) were quoted with agreement in the decision in *Sesa Industries Limited's* case (supra). In the light of those decisions it can be safely said that merely because a scheme is mooted by a Company and the same was approved by a majority of the concerned creditors or members, the Court cannot merely act as a rubber stamp and automatically give its seal of approval on such a scheme. In other words, still the Company Court has to ensure that the Scheme is fair, just and reasonable and it is not contrary to any provisions of law and it does not violate any public law. At the same time, while considering such aspects it has to be borne in mind that 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 and also that the Court is not exercising appellate power. In other words, the Court has a valuable bounden duty to ascertain that all the conditions under the statutory provisions have been complied with and the shareholders or the members are carefully informed of the Scheme sought to be sanctioned and it can decline to sanction a Scheme also if any bogus or any other illegality is involved in the Scheme. In short, once the court gets ascertained that the broad parameters about the requirements of a Scheme for getting sanction are made the Court got no further jurisdiction to sit in appeal over a commercial wisdom of majority of the class of persons who with their open eyes gave their

approval to the Scheme even in a case where the court is of the view that there could be a better Scheme for the Company. This is because the courts are not exercising appellate jurisdiction over the Scheme and courts are exercising only supervisory jurisdiction. However, solely the court is to exercise only the supervisory jurisdiction, the court cannot merely go by the ipse dixit of the majority of the shareholders or creditors or from representatives or classes who might have showered the scheme with requisite majority. This position is very much clear from second proviso to section 394. Section 394(1) (iv) deals with the dissolution without winding up of any transferor company. Section 394 deals with the provisions for facilitating reconstruction and amalgamation of companies. The term reconstruction or amalgamation" has no precise legal meaning. In the decision in *Saraswati Industrial Syndicate Ltd. v. C.I.T. Haruana*, Himachal Pradesh, Delhi-III, New Delhi [, AIR 1991 SC 70], the Apex Court held that amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially shareholders in the company which is to carry on the blended undertakings. There will be amalgamation either by a transfer of two or more undertakings to a new company or by a transfer of one or more undertakings to an existing company and strictly "amalgamation" does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition, it was further held. The true effect and character of the amalgamation was also considered thereunder by the Hon"ble Apex Court in the aforesaid case and it was held that it would largely depend on the terms of the scheme of merger. But, then it is to be understood under law that mergers/amalgamations are generically referred to as "business combinations" in accounting parlance and in common parlance they can be distinguished as in the former the blending being equals merged to form another and in the latter, obviously one will be acquired by the other company. But at the same time, it was held that there could be no doubt that when two companies amalgamate and merged into one, the transferor company would lose its entity as it ceased to have its business. However, their rights and liabilities would be determined under the scheme of amalgamation. But the corporate entity of the transferor company would cease to exist with effect from the date on which amalgamation was made effective. This position has to be borne in mind while considering the question whether a scheme sought to be sanctioned is fair, just and reasonable or whether it is contrary to any provisions of law or violates any public policy. The fairness of the scheme has to be gone into by the Company Court before putting its seal of approval on the concerned scheme placed for its approval. Whether the requisite information"s as contemplated by the provisions under section 391(2) are provided to shareholders or members or class of members so as to enable them to take an objective decision to vote for the scheme or against it, has also to be ascertained before doing so.

10. Another question also crops up for consideration in the light of the rival

contentions and based on the provisions under second proviso to section 394, The said proviso reads thus:-

"Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Tribunal unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Tribunal that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest."

11. As noticed hereinbefore, the point of dispute is whether in a case of dissolution without winding up, of any transferor company, as in the case of amalgamation of companies, there is any role for the Official Liquidator to play. I have already adverted to the rival contentions.

12. The question is whether the contention of the petitioners regarding the absence of any role for the Official Liquidator is a cavil. Going by the second proviso to section 394(1) of the Act no order for the dissolution of any transferor company under clause (iv) therein shall be passed unless the Official Liquidator has made a report that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. I have also noted that the learned counsel for the Official Liquidator relied on a decision of the Hon'ble Apex Court in *Sesa Industries Ltd. v. Krishna H. Bajaj* (, (2011) 3 SCC 218) and the decision of the Rajasthan High Court in *Re [1969-39 Comp. Cases 663 (Raj.)]*- In the decision in *Sesa Industries Ltd.*'s case virtually the Hon'ble Apex Court, taking note of the provisions under section 394 of the Act, deprecated the failure on the part of the Official Liquidator in discharging the duties. Virtually, it was held therein that Official Liquidator got a duty to discharge in view of the statutory provisions under second proviso to section 394(1) of the Act. The Apex Court held that an Official Liquidator has to act as watchdog of the Company Court, reposed with the duty of satisfying the Court that the affairs of the company, being dissolved have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large. In the light of the rival contentions, the position to be ascertained is whether second proviso to section 394 of the Act is mandatory and the Company Court is bound to call for a report from the Official Liquidator before passing an order on the question of dissolution, without winding up of a transferor company under section 394(I)(iv) of the Act. Relying on the words "shall be made" employed in the second proviso to section 394(1) and the decision in *Sesa Industries Ltd.*'s case (*supra*), the learned counsel for the Official Liquidator contended that the Company Court could make no order for the dissolution of any transferor company under clause (iv) of section 394(I)(b) unless the Official Liquidator makes a report to the Company Court that affairs of the company have not been conducted in a manner prejudicial to the interests of its members or public interest. It is also evident from the said provision that a report on that aspect has to be filed by the Official Liquidator after scrutiny of the books and papers of the company. Thus, going by the said provision, on scrutiny of the

books and papers of the transferor company the Official Liquidator is statutorily bound to make a report to the Company Court as to whether the affairs of the company have been conducted in a manner prejudicial to the interests of its members or to public interest or not. Thus, a bare reading of the second proviso to section 394 would reveal that such a report has to be submitted by the Official Liquidator and it has to be filed after scrutiny of the books and papers of the company. True that in the decision in Marybong's case (supra), it was held that the second proviso to section 394(1) would apply only in cases where there is commencement of winding up either by presentation of a winding-up petition or resolution of voluntarily winding up of a company was passed- In short, going by the said decision, second proviso to section 394(1) is inapplicable in a case where sanction of a scheme of amalgamation is applied for as in such a case dissolution is to be effected without winding up. According to the learned Judge, a contra interpretation would lead to inconsistency and absurdity of a court appointing the Official Liquidator in case of a "going concern" where no winding-up petition has been presented or resolution of winding up has been passed. As noticed hereinbefore, the learned counsel for the petitioners also relied on the decision of a Full Bench of this Court in Mathew Philip v. Malayalam Plantations India Ltd. [1994-81 Comp.Cases 38 (Ker)]. The reasoning of the High Court of Calcutta in Marybong's case (supra) was quoted thereunder and this Court observed that the said decision of the learned Judge of the Calcutta High Court appears to be sturdy and quite appropriate in the context in which the second proviso is placed. Evidently, the Full Bench proceeded to consider whether the second proviso under section 394(1) is intended to apply in all cases of amalgamation or arrangement. The second proviso itself makes it very clear that it applies only to a case where "dissolution without winding up" takes place. The Full Bench posed a question "does not dissolution take place in all cases of amalgamation. It is further held therein thus:-

"amalgamation" is not defined in the Companies Act.

Evidently, paragraph 11 of the said decision would reveal that the Full Bench held that the legal process of dissolution could take place after commencement of the steps for winding up. It was held that "dissolution without winding up" only means "dissolution without completely winding up" the company" and therefore, what is envisaged under clause (iv) of section 394 is dissolution without winding up need not be the consequence of amalgamation of two companies. Thus it is evident that in the decision in Malayalam Plantations" case (supra), the Full Bench observed that the reasoning of the learned Single Judge of the High Court of Calcutta in the decision in Marybong's case (supra) case is sturdy and quite appropriate in the context in which the second proviso is placed. Ultimately, it is evident that the Full Bench held that dissolution without winding up need not be consequent to amalgamation of two companies and ultimately in that case on the facts and circumstances, the Full Bench found that amalgamation envisaged under the scheme could be sanctioned even without ordering dissolution. In this context, it is relevant to note clause (iv) of Section 394(1) of the Act which reads

thus:-

394. Provisions for facilitating reconstruction and amalgamation of companies.-

(1) Where an application is made to the Tribunal under Section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal -

(a) xx xx xx

(b) xx xx xx

the Tribunal may, either by the order sanctioning, the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:-

(i) xx xx xx

(ii) xx xx xx

(iii) xx xx xx

(iv) the dissolution, without winding up, of any transferor company;"

But, the High Courts of Gujarat and Karnataka did not share the view of this Court. The case of "In re Wood Polymer Ltd., [, (1977) 47 Com Cases 597 (Guj) shows that clause (iv) of Section 394(1) is applicable to the transferor company in all cases of amalgamation. It was further held therein that the Court is precluded from making an order for dissolution unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of the members or to public interest.

13. The decision in Webb's Farm Mechanization P. Ltd. v. Official Liquidator [, 1996) 85 Com. Cases 146] reveals the view taken by the High Court of Karnataka. Evidently, the opinion, going by the said decision, is that an amalgamation is not possible without dissolution of the transferor company and therefore, the report of the Official Liquidator becomes necessary in all cases of amalgamation. It is to be noted that it is subsequent to the said decisions that the Hon"ble Apex Court rendered the decision in Sesa Industries" case (supra). As is evident from clause (iv) of Section 394(1) the power thereunder is to order sanctioning of the compromise or arrangement or by a subsequent order, making provision for the dissolution, without winding-up, of any transferor company. A perusal of the decision in Sesa Industries" case (supra) would reveal that it arose from decision of a Division Bench of the High Court of Bombay setting aside an order of a learned Single Judge sanctioning a scheme of amalgamation between two companies. In the contextual situation, it is relevant to refer to paragraphs 40 and 41 of the said decision. Evidently, in paragraph 40, the Apex Court held thus:

"While it is true that it was not within the domain of the Official Liquidator to determine the relevancy or otherwise of the said report, yet he was obliged to incorporate in his affidavit the contents of the inspection report. We are convinced that the Official Liquidator had failed to discharge the statutory burden placed on him under the second proviso to section 394(1) of the Act."

(emphasis supplied)

After making such an observation, the Hon''ble Apex Court went on to consider the question regarding importance of the report of the Official Liquidator. Paragraph 41 of the said decision reads thus:-

"An Official Liquidator act as a watchdog of the Company Court, reposed with the duty of satisfying the court that the affairs of the company, being dissolved, have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large. In essence, the Official Liquidator assists the court in appreciating the other side of the picture before it, and it is only upon consideration of the "amalgamation scheme, together with the report of the Official Liquidator, that the court can arrive at a final conclusion that the scheme is in keeping with the mandate of the Act and that of public interest in general. It, therefore, follows that for examining the questions as to why the transferor company came into existence; for what purpose it was set up; who were its promoters; who were controlling it; what object was sought to be achieved by dissolving it and merging with another company, by way of a scheme of amalgamation, the report of an Official Liquidator is of seminal importance and in fact facilitates the Company Judge to record its satisfaction as to whether or not the affairs of the transferor company had been carried on in a manner prejudicial to the interest of the minority and to the public interest.

(emphasis supplied)

Paragraphs 40 and 41 as extracted above would reveal that the Hon''ble Apex Court has not only held in unambiguous terms that second proviso to section 394(1) of the Act cast a statutory burden on the Official Liquidator to discharge by providing a report to the Company Court as to whether the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. The Apex Court went on to hold that such report would facilitate the Court to record satisfaction whether or not the affairs of the transferor company had been carried out in a manner prejudicial to the interests of the minority of its members or to public interest. It is very relevant to note that the Hon''ble Apex Court made such findings and observations in case where the legality of the appellate interference by a Division Bench of the High Court of Bombay in respect of sanction of a scheme of amalgamation granted by a learned Single Judge, was the subject matter. Thus, in the light of the decision in Sesa Industries" case it is evident that for consideration of a scheme of amalgamation, the Official Liquidator has to make a report to the Company Court so as to facilitate the Court to record its satisfaction as to whether or not the

affairs of the transferor company had been carried on in a manner prejudicial to the interests of its members or to public interest. The corollary of the Full Bench decision of this Court in Malayalam Plantations" case (supra) is that if sanction for amalgamation of a scheme could be granted only with dissolution of a company it could not be ordered without complying with second proviso to section 394(1). Thus it is evident that the application or otherwise of second proviso to section 394(1) would depend upon the question whether amalgamation could be sanctioned with or without dissolution of the transferor company. As noticed hereinbefore, if clause (iv) of Section 394(1) is invoked there must be an order for dissolution and such dissolution thereunder is bound to be ordered without winding-up, of any transferor company. In this case, the very prayers of the petitioners would reveal that what they seek for is dissolution of the Transferor Companies and Transferor Firm. Whenever and wherever dissolution without winding up of any transferor company is to take place merely because there is no winding up it cannot be said that the Official Liquidator has no role to play and he has no statutory burden to discharge by making a report to the Company Court regarding whether or not the affairs of the transferor company were carried on in a manner prejudicial to the interests of its members or to public interest. In the second proviso to Section 394(1) of the Act what is provided is that no order for dissolution of any transferor company under clause (iv) shall be made without a report on the aforesaid aspect by the Official Liquidator and obviously clause (iv) thereunder deals with dissolution, without winding up, of any transferor company. In this context it is to be noted that the Full Bench held in Malayalam Plantations" case (supra) that if an amalgamation is possible without any dissolution, clause (iv) would not be applicable. True that the Full Bench has also observed that the decision of the Calcutta High Court in Marybong's case (supra) is sturdy and quite appropriate in the context in which the second proviso is placed. The learned counsel for the petitioners contended that a strict interpretation of the second proviso to Section 394(1)(b) of the Act would lead to an absurd position that an Official Liquidator would have to probe into the affairs of a sound and "going company". The contention is that those provisions were correctly analysed by the High Court of Calcutta in Marybong's case (supra). According to the petitioners, the learned counsel for the Official Liquidator is placing reliance on an obiter dictum of the Hon'ble Apex Court in paragraph 41 of the decision in Sesa Industries Ltd.'s case (supra). According to them, the said obiter dictum would mitigate against the principles of interpretation laid down by the Apex Court in a catena of cases and therefore, those observations in paragraph 41 of the said decision need to be interpreted. A careful scanning of the decision in Sesa Industries Ltd.'s case (supra) would reveal that as regards the role of Official Liquidator in the light of the second proviso to Section 394(1) of the Act the Apex Court had in an unambiguous terms made it clear that the Official Liquidator has a statutory duty to be performed thereunder. As noticed hereinbefore, the Hon'ble Apex Court held specifically as follows:-

"We are convinced that the Official Liquidator had failed to discharge the statutory burden placed on him under the second proviso to Section 394(1) of the Act."

(emphasis added)

It is after holding as above that the Hon''ble Apex Court went on to state about the duty of the Official Liquidator in the matter of consideration of an amalgamation scheme in the succeeding paragraph. It was held that in essence, the Official Liquidator assists the court in appreciating the other side of the picture before it, and it is only upon consideration of the amalgamation scheme, together with the report of the Official Liquidator that the court could arrive at a final conclusion as to whether the scheme is one keeping with the mandate of the Act and that of public interest in general. It is thus evident from the aforesaid decision that the Hon''ble Apex Court has in categorical terms held that in the case of consideration of sanction of an Amalgamation Scheme the report of an Official Liquidator is of seminal importance and it would facilitate the Company Judge to record his satisfaction as to whether or not the affairs of the transferor company have been carried on in a manner prejudicial to the interests of its members and to the public interest. When that be so, how could it be said that paragraph 41 of the said decision has to be taken only as an obiter dictum. In fact, paragraph 41 as extracted above is only an illustration of the important role of the Official Liquidator keeping in tune with the mandate of the Act and that of public interest in general after making a positive finding that the Official Liquidator had failed to discharge the statutory burden placed on him under the second proviso to Section 394(1) of the Act. It is to be noted that on the question of the role to be played by an Official Liquidator in terms of the second proviso to Section 394(1) of the Act no other binding precedent of the Apex Court carrying a contra view was brought to my notice, by the petitioners. In such circumstances, in the light of the aforesaid finding it has to be said that the decision in Sesa Industries Ltd.'s case (supra) is a binding precedent with respect to the question whether the Official Liquidator has a role to play by virtue of the second proviso to Section 394(1) of the Act. I may hasten to add, even if it is taken that it is only an obiter, even then, since no other binding precedent on the subject was brought to my notice I am bound to follow the same while dealing with the aforesaid question. I may also approach the said issue in a different angle. Interpretation of a provision in any Statute means and includes determination of the true sense of the words used in the text. In practice, "construction" includes "interpretation" and both the terms are frequently used synonymously. In *Anandi Haridas & Co. Pvt. Ltd. v. Engineering Mazdoor Sangh* (, AIR 1975 SC 946) the Hon''ble Apex Court held that it is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible to more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the legislature had in view in using the

words in question. In the decision in *Assessing Authority-Cum-Excise and Taxation Officer v. East India Cotton Mfg. Co. Ltd.* (, AIR 1981 SC 1610) it was held by the Hon''ble Apex Court that a statute must be construed according to its plain language and neither should anything be added nor subtracted unless there are adequate grounds to justify the inference that the legislature clearly so intended. In short, while considering a provision of a statute if the language employed thereunder is plain, unambiguous and precise then there is no reason to infer anything and it should be understood and applied according to the plain language employed thereunder. A perusal of the provisions under the second proviso to Section 394(1) of the Act, as-extracted hereinbefore, would reveal that there is absolute absence of any kind of ambiguity and what is plainly provided thereunder is that no order for dissolution of any transferor company under clause (iv) shall be made unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. The language used in the proviso is plain, unambiguous and virtually, left no room or need for any inference. But, as already stated the contention of the petitioners is that the question of appointment of an Official Liquidator would arise only in case where winding-up proceedings are involved and in such circumstances, in the absence of proceeding for winding-up, in the matter of dissolution without winding-up, of any transferor company, the Official Liquidator got no obligation to make a report on the aforementioned aspect, under the second proviso to Section 394(1), of the Act. According to them, Sections 448, 449, 450 and 451 of the Act deal with the appointment and position of the Official Liquidator. Section 457 deals with the powers of the Official Liquidator. It is their contention that all such provisions point out to the fact that the Official Liquidator's role is confined only to proceedings involving winding-up. The question is whether existence of such provisions can be a ground for interpretation to the effect that under no other circumstances the Official Liquidator got a statutory burden to file a report. It is to be noted that the Legislature after incorporating provisions dealing with the appointment and the duties of the Official Liquidator obviously in cases where winding-up proceedings are involved thought it fit to assign a different role to the Official Liquidator under the second proviso to Section 394(1) of the Act. The said fact is very much evident from a conjoint reading of the second proviso to Section 394(1) and clause (iv) of Section 394(1) of the Act. As noticed hereinbefore, going by clause (iv) of Section 394(1) what could be ordered by the Company Court is dissolution, without winding-up, of a transferor company. It is after incorporating such a provision under clause (iv) in Section 394(1) and the other provisions referred hereinbefore, that the second proviso to Section 394(1) was incorporated under the Act. Thus, it is evident that the legislature was fully aware of the fact that the second proviso is relating issuance of an order of dissolution without winding-up, of any transferor company and still, specifically incorporated the provision casting a duty to the Official Liquidator to make a report to the Company Court, on scrutiny of the books and papers of the

company as to whether or not the affairs of the company have been conducted in a manner prejudicial to the interests of its members or to public interest. Thus, it can be seen that purposefully the legislature thought it fit to assign a different role to the Official Liquidator that is, to submit a report to the Company Court regarding the conduct of the affairs of a transferor company that the affairs of a transferor company on scrutiny of the books and papers of the company concerned to facilitate the Company Court to arrive at a finding with respect to the position as to whether or not the affairs of a transferor company have been conducted in a manner prejudicial to the interests of its members or to public interest, for the purpose of passing an order for dissolution of a transferor company without winding-up. In such circumstances, merely because such a duty was assigned to the Official Liquidator as per the second proviso to Section 394(1) it cannot be said that the Official Liquidator got roles to play only in matters involving winding-up and the Official Liquidator got absolutely no role to play in the matter of passing of an order under Section 394(1)(iv) in the light of the second proviso thereunder. It can be taken that the legislature thought it fit to cast a duty on the Official Liquidator to assist the Company Court in the aforesaid matter. It is in this context that the observation of the Hon'ble Apex Court that "an Official Liquidator acts as a watchdog of the Company Court, reposed with the duty of satisfying the court that the affairs of the company, being dissolved have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large" assumes relevance. In the said circumstances, in the light of the decision of the Hon'ble Apex Court in Sesa Industries Ltd.'s case (supra) and going by the rule of interpretation I do not find any reason to uphold the contention of the petitioners that the Official Liquidator got no role to play in the matter of dissolution of a transferor company without winding-up under the second proviso to Section 394(1) of the Act. The said provision as also proviso to Section 391(2) would indicate that such 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, pendency of any investigation proceedings in relation to the company under Sections 235 to 251 of the Act and the like could be scrutinised by the Official Liquidator in terms of the proviso to Section 391(2) for the purpose of making a report as contemplated under the second proviso to Section 394(1). Merely because the words "and the like" are there in the proviso to Section 391(2) it cannot make the Official Liquidator entitled to seek for and obtain all statutory documents and papers pertaining to the transferor company from its inception. In Reserve Bank of India v. Integrated Finance Co. Ltd. (, (2008)145 Com. Cases 87 the Madras High Court explained the meaning of the expression "and the like" as words which would include all relevant investigations and enquiries. In this context, it is to be noted that going by the proviso to Section 391(2) the Company concerned is under a duty to disclose pending investigations, if any, under Sections 235 to 251 "and the like". In such circumstances, the meaning ascribed to the said expression therein, by the Madras High Court is very much befitting and I do not find any reason to construe them differently. If it is construed in such a manner

to make the Official Liquidator entitled to seek for such documents as well, it definitely would amount to making the Official Liquidator as an authority to re-check the scrutinies and the inspection conducted by other authorities under the Companies Act who are competent and bound to conduct audit of the accounts. It cannot be said that the second proviso to Section 394(1) contemplated to confer such a position to the Official Liquidator as a scanning of the scheme of the Act would reveal absolute absence of any such contemplation. In other words, the statute does not intend to make the Official Liquidator to re-audit or check the audit. In fact, the purpose is very clear from the very provision itself. By giving a role which is otherwise different from the usual role of the Official Liquidator the legislature wanted the Official Liquidator only to facilitate the Company Court to arrive at a decision regarding the question whether or not the affairs of a transferor company have been conducted in a manner prejudicial to the interests of its members or to public interest for passing an order under Clause (iv) therein, after scrutiny of the books and papers of the company. In the said circumstances, the petitioners are justified in contending that the Official Liquidator cannot seek for all papers and records relating to the companies for scrutiny for the purpose of filing a report in terms of the second proviso to Section 394(1) of the Act and that he is entitled only to such documents which would fall under the proviso to Section 391(2) of the Act. In this case, such papers were already furnished to the Official Liquidator. However, it is thereafter that report No. 1 was filed by the Official Liquidator. True that, thereunder, the Official Liquidator sought for permission to engage the service of a Chartered Accountant empanelled with him to scrutinise the statutory books of accounts, statutory registers and other relevant papers of the Transferor Companies. At the same time, it is evident that even after perusing the papers which were already furnished to the Official Liquidator in terms of the proviso to Section 391 the Official Liquidator had not stated in the report that they would reveal that the affairs of the Transferor Companies involved in this case have been conducted in a manner prejudicial to the interests of their members or to public interest. True that, there cannot be any legal impediment in granting permission to engage the service of a Chartered Accountant to the Official Liquidator in appropriate cases taking into account the very avowed purpose of requiring the Official Liquidator to file a report in terms of the second proviso to Section 394(1). I am of the considered view that what is to be reported in terms of the said proviso is only whether or not the affairs of the company have been conducted in a manner prejudicial to the interests of the members of the transferor company concerned or to the public interest and for that purpose scrutiny of only records which would fall under the proviso to Section 391(2) of the Act may be looked into. When such documents were already furnished to the Official Liquidator and when a report has been filed thereafter in the absence of any reporting thereunder to the effect that the affairs of the transferor companies are being conducted in a manner prejudicial to the interests of their members or to public interest it can only be taken that the affairs of the companies concerned were not being conducted in a manner prejudicial to them. Now, the question to be looked into is

whether the objections filed on behalf of the Central Government pursuant to the issuance of notice under Section 394A of the Act contains any sustainable objection for opposing the Scheme of Amalgamation. A perusal of the objections filed by the Registrar of Companies on behalf of the Central Government would reveal that it contains certain contentions regarding failure to follow certain Accounting Standards. The amalgamating companies filed an affidavit in reply to the said objections. From the statement in the affidavit and also the arguments advanced on behalf of the amalgamating companies by the learned counsel, it is evident that such objections had been properly explained by the amalgamating companies. In fact, the objections filed by the Registrar of Companies, in paragraph 2(I)(1) of the said report is with respect to the valuation of the land and issue of "bonus shares" from Revaluation Reserve, in respect of the first petitioner namely, M/s. Manjilas Agro Foods Private Limited. The petitioners in the affidavit filed in reply to the objections stated that the value of the land was determined by a registered valuer after taking into consideration the "fair value" fixed by the Government of Kerala. That apart, they stated that they acted on the legal advice tendered by their legal advisor on the issue of "bonus shares" from the Revaluation Reserve to the effect that the issue of "bonus shares" from the Revaluation Reserve is permissible in terms of the provisions under Section 205(3) of the Act. In support of the said contention they relied on a decision of the Hon'ble Apex Court in *Bhagawati Developers v. Peerless General Finance and Others* (, (2005) 62 SCL 574 (SC)). They have also stated to the effect that the share holders and creditors were satisfied with the opinion of the legal advisor. In the light of the decision in *Bhagawati Developers*" case (supra) and also in the light of the provisions under Section 205(3) of the Act the issue of "bonus shares" from Revaluation Reserve cannot be said to be illegal and at any rate, that cannot be a stumbling block in the matter of sanction of the Scheme. The other objection is with respect to the failure to follow the Accounting Standards. In the case of the first petitioner, non-compliance of the Accounting Standard 15 (AS. 15) in the balance sheet was attributed. Similarly, in the case of the 2nd and 3rd petitioners also non-compliance of the said Accounting Standard 15 (AS. 15) in their balance sheets was raised as objection. In the affidavit the petitioners have admitted the fact that in the balance sheet the auditors have made a qualification in their report regarding the non-compliance of AS-15. The contention of the petitioners is that the non-compliance could not be treated as misrepresentation of the financial position of the Company in the respective balance sheets and as such they could not be construed as violations of Sections 211 and 217 of the Act. "In respect of the non-compliance of Accounting Standards it is specifically stated in the affidavit that the practice of the company was to settle the gratuity when an employee leaves the organization and as such it was treated as payment of gratuity as "Retrenchment Expense". They have also explained the same in the affidavit to the effect that the statutory authorities were satisfied with the settlement of gratuity dues and therefore, there was no litigation against the merging entities on the said account. That apart, it is evident from the affidavit that the Transferee Company undertakes to

quantify the gratuity liability through LIC or an approved actuarial valuator as on the effective date of merger in compliance with the Accounting Standard (AS. 15), It is also stated therein that the amalgamating companies have adequate funds to meet possible employees liabilities and to substantiate the said contention they have given the facts as Table-2. That apart, it is stated in the affidavit that the shareholders and creditors were also satisfied with the explanations of the management on the above said treatment of payment of gratuity mentioned in the affidavit and consequently approved the merger as they are fully confident of the fact that the Transferee Company would comply with AS-15 in the preparation of its balance sheet for the next accounting year. In the said circumstances, it is stated that the comments of the Registrar of Companies are not prejudicial to the interests of the shareholders, creditors or the public. A similar qualification was also there in respect of non-compliance of Accounting Standard 2 (AS-2) in the balance sheet of the Transferor Entities. The petitioners again took up the contention that such non-compliance-could not be construed as misrepresentation of the financial position of the company in the respective balance sheets and also to the effect that they constitute violation of Sections 211 and 217 of the Act. Again it is stated in the affidavit that the shareholders and creditors were fully aware and appreciated the practical difficulties encountered by the Transferor Entities in the matter of requirements to comply with AS-2. The variations in valuation through non-compliance of AS-2 was negligible and it is stated therein that they had already invested considerable amount in the up gradation of the software to be used post-merger by the Transferee Company. It is virtually undertaken thereunder that by making such software up gradation they would be in a position to comply with the requirements of AS-2 with effect from 1.4.2014. With respect to the objection that the Transferor and Transferee Companies had entered into transactions with related parties it is stated that the companies had initially obtained approval of the Government of India for the said proposes under Section 297 of the Act. It is also submitted that the failure to renew the sanction of Government of India was an unintentional procedural lapse and that the auditors had not found any illegality in the transactions with the related parties. It is further stated therein that the auditors had been satisfied that the transactions with the related parties were within "Arm's Length" as required under the Taxation Laws to the satisfaction of the Income Tax authorities concerned. Above all, it is stated that the said transactions are not under any investigation or scrutiny by the tax authorities or the Government of India. With respect to the objection in 2(IV)(4) it is explained that the Registrar of Companies admitted that the company is required to submit report in GNL-1 only under the Companies Act, 2013 and that the relevant provision is yet to be notified by the Government of India. In short, after giving such explanation through the affidavit filed in reply to the objections filed by the Central Government the learned counsel for the petitioners contended that the aforesaid objections from the Central Government would not reveal that the affairs of the Transferor Entities were conducted in a manner prejudicial to the interests of the members/partners or creditors or public

interest. In the contextual situation, it is relevant to note that the objections as noted above, would not actually reveal anything to suggest that the petitioners had committed any fraud on tax or that the scheme had any unconscionable or unfair terms. A careful scrutiny of the relevant provisions under the Act would go to show that while considering the question of sanction of a scheme the court has to satisfy itself of the following:-

"The meeting was duly held and conducted; that the compromise was real and it was accepted by a competent majority; that majority was acting in good faith and for common advantage of the whole class; that what they did was reasonable, prudent and proper. Besides the aforesaid, the court also has to get satisfied that the provisions of the statute have been complied with and the creditors acted honestly and in good faith and had sufficient information and further that the scheme is not against the public interest. It is also to be noted that in this case, with respect to the failure to comply with the Accounting Standards the transferee company virtually, undertook to comply with all such standards. At any rate, it is evident that going by the scheme which is sought to be sanctioned no injury to public interest would be caused in view of the aforesaid aspects as the healthy and sound transferee company had undertaken to discharge the liability, if any, and also to ensure compliance with the Accounting Standards. Pursuant to the public notice one A.R. Sivarajan, Aruketty House, Kundaliyur P.O., Thrissur, responded to the same through a letter to the Registrar (Judicial) of this Court. The pith of the objection thereunder is to the effect that going by Section 394 of the Act amalgamation is permissible only between companies and therefore, according to him, what could be done at the most with respect to the transferor firm is to convert the said partnership firm into a company and then amalgamate it with transferee company. It is stated thereunder that there is absolutely no precedence or law enabling amalgamation of a partnership firm with companies. In the light of the position of law as also the provisions of law I do not find any reason to sustain such an objection as a reason for not granting the sanction as sought for. It is true that the 3rd petitioner is a partnership firm. While considering the objection raised through the said letter, the provisions under Section 582(b) of the Act has to be looked into. The term "Unregistered company" has been defined under section 582 of the Act as hereunder:-

"S.582. Meaning of "Unregistered company".-

For the purpose of this Part, the expression "unregistered company"-

(a).....

(b) save as aforesaid, shall include any partnership, association or company consisting of more than seven members at the time when the petition for winding up the partnership, association or company, as the case may be, is presented before the Tribunal."

It is thus obvious that the term "unregistered company" would include any

partnership, association or company consisting of more than seven members at the time when the petition for winding-up the partnership, association or company, as the case may be, is presented. In this case, the supplemental partnership deed dated 20.3.2014 would reveal that the number of partners of the 3rd petitioner was "8" at the time of presentation of this petition. The report of the Chairman of the meeting would reveal that all of them had consented to the proposed Scheme of Amalgamation. In *Re: Kirtilal Kalidas Diamonds Exports P. Ltd.* (, (2009) 148 Comp Cas 607 (Bom)) a learned Judge of the High Court of Bombay held that the scheme for amalgamation of a partnership firm with a company could be sanctioned under Section 394 treating the partnership firm as an unregistered company under Section 582(b) of the Act. In the contextual situation the decision of the High Court of Gujarat In *Re: Nirmay Properties P. Ltd.* (, (2010) 97 SCL 207 (Guj)) also assumes relevance. The High Court of Gujarat in that decision held that simply because the Company Court granted its sanction to a scheme of amalgamation it would not absolve the Transferor and Transferee Companies from any liability that may arise in future on violation of any statutory provisions or the scheme would not affect the pending proceedings either before the Civil or Criminal Courts and the liability may be inflicted upon the petitioners, or their directors, would not be affected simply by virtue of the scheme of amalgamation. In the light of the provisions of law and position of law as discussed hereinbefore, I wean strongly that a scheme of amalgamation could be granted when affairs conducted by the company were not prejudicial to the interests of the shareholders or the public interest and when it was approved by overwhelming majority of shareholders. Having gone through the scheme of amalgamation I do not find any reason to hold that the scheme in question is unfair or prejudicial to the interests of the shareholders or creditors or that it is infected with any reason warranting rejection of the sanction sought for. I am also of the view that the amalgamation of the above companies would enable the transferee company to have better productivity and efficiency and also for the benefit of all concerned. In the light of the undertaking with respect to the compliance with the Accounting Standards by the Transferee Company I am of the view that, the Scheme could be sanctioned. Consequently, the Scheme is sanctioned. The Scheme sanctioned by this Court shall be produced before the Registrar of Companies by the petitioners-companies within the statutorily stipulated time. The Registry will issue necessary orders in Form 42 in terms of Rule 84 of the Company (Court) Rules, 1959.

This Company Petition is allowed as above.