

(1970) 09 GUJ CK 0001

In the Gujarat High Court

Case No : Company Petition No. 12 of 1970 with Company Application No's. 136 of 1969, 38 of 1970 and 37 of 1971

**In Re: Navjivan Mills Co. Ltd., Kalol
 In Re: Kohinoor Mills Co. Ltd.,
Bombay**

Date of Decision : 11-09-1970

Acts Referred:

Capital Issues (Control) Act, 1947 — Section 3, 4, 5
Companies (Court) Rules, 1959 — Rule 79
Companies Act, 1956 — Section 100, 120, 235, 236, 237
Monopolies and Restrictive Trade Practices Act, 1969 — Section 2, 20, 23

Citation : (1972) 42 CompCas 265

Hon'ble Judges : D.A. Desai, J

Bench : Single Bench

Advocate : I.M. Nanavati and G.T. Nanavati, for the Appellant;

Judgement

D.A. Desai, J.—By an order made by the company judge on 30th April, 1970, a scheme of compromise and arrangement proposed between the Navjivan Mills Ltd., Kalol, and its creditors and members in Company Application No. 136 of 1969 was sanctioned with a reservation that the Central Government should file its representation by 31st May, 1970, and the court will consider the objections, if any, raised therein and pursuant thereto, if any directions became necessary, they would be given after hearing Mr. I. M. Nanavati, learned advocate for the petitioner. It was further made clear in the order that detailed reasons which weighed with the court to accord its sanction to the scheme of compromise and arrangement will be given after taking into consideration the representation that the Central Government may choose to make u/s 394A of the Companies Act. Subsequently, the Central Government submitted its first representation dated 28th May, 1970 (at page 159 of the record) and the second representation dated 31st August, 1970 (at page 313 of the record). After these representations were filed on behalf of the Central Government, the present petition was set down for hearing. After hearing Mr. L. T. Shah for the Central Government, I now proceed to consider the various objections raised by the Central Government to my according sanction to the scheme of compromise and arrangement and also

detailed reasons why the court has accorded its sanction to the said scheme of compromise and arrangement.

2. Navjivan Mills Company Ltd. (hereinafter referred to as "Navjivan") was incorporated as a private limited company under the Companies Act, 1913, having its registered office at Kalol, District Mehsana, in this State. It was a composite textile undertaking having spinning machinery, weaving machinery and full fledged processing house. When Navjivan commenced business its paid up capital was Rs. 7 lakhs, which was subsequently increased to Rs. 52 lakhs. The issued, subscribed and paid up capital was Rs. 52 lakhs made up of 45,000 ordinary shares each of Rs. 100 fully paid and 7,000 4 1/2 per cent. redeemable preference shares each of Rs. 100 fully paid. Navjivan was converted into a public limited company in the year 1967. Navjivan was in embarrassed financial circumstances since the year 1965 and its carried forward loss as on 31st December, 1967, was Rs. 86.75 lakhs. M. J. & Company were the managing Agents of Navjivan but the managing agency agreement expired by efflux of time on 31st December, 1966, and was not renewed. Since then Subodh Mangaldas and Gunvant Mangaldas were managing directors of Navjivan and they along with other friends and relations had deposits worth Rs. 22.68 lakhs with the Navjivan. As the loss mounted up by working the mill the management was forced to close the mills with effect from 30th August, 1968. At the relevant time 1,700 workers were working in the mills. Navjivan proposed a scheme of compromise and arrangement with its creditors in Company Petition No. 27 of 1969 which was presented on July 17, 1969. In the meantime three petitions being Company Petitions Nos. 37 of 1968, 40 of 1968 and 41 of 1968 were filed by difference creditors of the Navjivan praying for winding up the company. Subsequently, Company Petition No. 27 of 1969 proposing a scheme of compromise and arrangement between Navjivan and its members was withdrawn on 6th October, 1968. Petitions for winding up Navjivan were pending in this court but the order for winding up Navjivan was not made till Kohinoor Mills Company Ltd. (hereinafter referred to as "Kohinoor") - a public limited company incorporated under the Companies Act filed Company Application No. 136 of 1969 on 24th October, 1969, u/s 391(1) of the Companies Act praying for directions that the meetings of the creditors and members of Navjivan be convened to consider a scheme of compromise and arrangement proposed by Kohinoor between the creditors and members of Navjivan and Navjivan. The court gave directions for convening different meeting and appointed Mr. M. A. Syed, Deputy Registrar of this High Court, to preside over the meetings. After the meetings were held, the Deputy Registrar in his capacity as chairman of the meetings filed his report on 24th December, 1969, which disclosed that the proposed scheme with certain modifications was approved by different classes of creditors and members of the Navjivan by more than the statutory majority. Kohinoor thereafter obtained leave of the court in Company Application No. 38 of 1970 on April 8, 1970, under rule 79 of the Companies (Court) Rules, enabling it to file a substantive petition u/s 391(2) for obtaining sanction to the scheme of

compromise and arrangement as approved by the members and creditors of Navjivan. As the scheme envisaged issue of equity shares of the Kohinoor to the members and creditors of Navjivan, it was necessary that issue of fresh shares to persons other than the equity shareholders of Kohinoor should be approved by the shareholders of Kohinoor by a special resolution as envisaged by section 81(1A) of the Companies Act. Accordingly, Kohinoor convened an extraordinary general meeting of its members on 20th April, 1970, for passing a special resolution. The scheme of compromise and arrangement as proposed by Kohinoor between Navjivan on the one hand and its creditors and members on the other and the allotment of shares of Kohinoor to the shareholders of Navjivan in exchange for their shares of Navjivan in a certain ratio as approved in this meeting by adopting a special resolution to that effect. Kohinoor filed a substantive petition being Company Petition No. 12 of 1970, u/s 391(2) of the Companies Act on 16th April, 1970. This petition was advertised in various newspapers and the date of hearing was fixed on 30th April, 1970. A direction was given that a notice of the petition be served upon the Central Government as provided in section 394A of the companies Act. When the petition was taken up for hearing on 30th April, 1970, it transpired that no creditor or member of Navjivan appeared to oppose the scheme. On that day Mr. J. G. Gatha, Registrar of Companies, appeared and requested the court to adjourn the hearing of the petition on the ground that the Central Government to whom notice had been served u/s 394A desires to make a representation but it had not had sufficient time to apply its mind to the proposed scheme of compromise and arrangement and was, therefore, not able to make its representation. This motion for adjournment was opposed by Mr. I. M. Nanavati, learned advocate who appeared for the petitioner, specifically on the ground that the scheme of compromise and arrangement has been approved by the members of the Kohinoor as well as by the members and creditors of Navjivan and that no one from amongst the members or creditors of Navjivan has appeared to oppose the scheme and that, therefore, the court should not adjourn the hearing of the petition because the court was closing for summer vacation on the next day. Mr. Nanavati specifically urged that the petitioner was keen to re-start the mill as soon as the scheme is sanctioned and that it is in the interest of all including the workmen that Navjivan should re-start as early as possible because the interest liability was mounting from day to day. A little curious situation arose where the adjournment could not have been for less than six weeks. The Central Government u/s 394A was certainly entitled to a notice and any representation that the Central Government may desire to make in view of the power conferred upon it u/s 394A, the court will have certainly to take into consideration before sanctioning or refusing to sanction the scheme. In fact very often these scheme petitions are usually ex parte in nature and therefore any assistance coming from an independent source in examining merits and demerits of the scheme would always be welcome. But, on the other hand, the court had to weigh the mounting liability of the sponsors of the scheme and the more important fact that the adjournment would necessitate more than six weeks of delay. Faced with this

situation, the court, after examining the case minutely and in its various aspects, proceeded to sanction the scheme on that day giving liberty to the Central Government to make its representation and making a reservation in the order that if any further directions are necessary after considering the representation of the Central Government that it might desire to make, the court would give further directions, undoubtedly for the proper working and implementation of the scheme. It was least expected and there was not even the slightest apprehension that the Central Government would come out with a contentious attitude. Whatever that may be, the nature and effect of the order made by this court is itself in serious dispute and I would not dilate upon this aspect at this stage. Suffice it to say that on 30th April, 1970, this scheme was sanctioned with a reservation in favour of the Central Government giving liberty to it to submit its representation latest by 31st May, 1970. In fact notice of sufficient duration was already served upon the Central Government and the adjournment sought for could have been legitimately refused. A representation was submitted on behalf of the Central Government within the time granted to it and hardly any serious question was raised in that representation. Before the Central Government could be heard in support of its first representation, another representation was submitted on its behalf on 31st August, 1970, raising a number of contentions. It was strenuously contended on behalf of the petitioner that the Central Government was given time to make its representation up to 31st May, 1970, which opportunity was availed of, and, therefore, any further affidavit filed on their behalf, therefore, should not be taken into consideration. There is substance in this submission. But actuated by a keen desire to have an independent non-partisan body assisting the court in examining the merits and demerits of the scheme and in order to do full justice to the matter I overruled the objection of the petitioner and would examine the contentions raised in both the affidavits filed on behalf of the Central Government, though, strictly speaking, the second one would not be admissible.

3. Next thing that I should notice is the broad outlines of the scheme as also the various stages through which it has moved and the final scheme which is submitted to the court for its sanction. The scheme proposed by Kohinoor is contained in a brochure, annexure "A", at page 40 of the record. The postulates or assumptions on the basis of which the scheme is proposed are set out in the first three paragraphs and I need not refer to them because it was in terms conceded that all of them have been carried out and the sponsors cannot retrace from the scheme on the ground that the postulates or assumptions on which the scheme is founded are incorrect. The scheme is undoubtedly a scheme of compromise and arrangement though whether it is in fact a scheme of compromise alone or scheme of arrangement alone or it is a composite scheme, falls to be determined in view of the contentions of the Central Government. For the present, I should like to refer to it as the scheme of compromise and arrangement and the scheme is between all classes of creditors and all classes of members of the Navjivan on one the hand and Navjivan on the other sponsored

by Kohinoor. Initially, the compromise offered to the holders of 4 1/2 per cent. redeemable cumulative preference shares of Navjivan was that in exchange of 12 preference shares of Navjivan, the Kohinoor will allot one equity share of the Kohinoor and arrangement for working out fractional shares was also drawn up. A provision was also made for the transfer of shares by appointing constituted attorneys to work on behalf of Kohinoor. Subsequently, this proposal was modified at the meeting of preference shareholders to the effect that instead of 12 preference shares being exchanged for one equity share of Kohinoor the ratio would be 10 : 1. In other words, the scheme finally approved by the holders of the preference shares of Navjivan was that in exchange for 10 preference shares of Navjivan, the holder would be entitled to one equity share of Kohinoor and the system of working out fraction was retained. Initially the compromise offered to the holders of ordinary shares of Navjivan was that in exchange for 20 ordinary shares of Navjivan, the holder would be entitled to one equity share of Kohinoor and system for working of fraction was provided for as also arrangement for the transfer by constituted attorneys of Kohinoor was also provided therein. This provision in the scheme had a chequered history. When it was moved in a meeting of ordinary shareholders of Navjivan the shareholders proposed that instead of the ratio of 30 : 1, it should be reduced to 26 : 1. In other words, it was proposed and finally adopted that in exchange of 26 ordinary shares of Navjivan the holder would be entitled to one equity share of the kohinoor. Now, allotment of the shares was to be made by Kohinoor and, therefore, this arrangement worked out by shareholders of Navjivan will have to be passed or adopted by the Shareholders of Kohinoor. It appears that the Life Insurance Corporation of India and the Unit Trust of India - two wholly Central Government controlled bodies - have large holdings of equity shares of Kohinoor and vigilant as they were for their own interest and having a dominant voice in the management of Kohinoor they almost asserted a right of veto by changing the proportion radically from 26 : 1 to 40 : 1, the shareholders of Navjivan being beggars were no choosers and, forced as they were under the circumstances, meekly and timidly submitted. This aspect need examination because in the first affidavit of the Central Government a poser was made that in the scheme the interest of shareholders of Kohinoor was not taken care of or looked after. I will examine that aspect on merits as to who had exploited whom in this case and the result is not going to be very flattering to the shareholders of Kohinoor. Be that as it may, ultimately as the shareholders of Kohinoor radically altered the ratio to the utter disadvantage of the shareholders of Navjivan this court was forced to direct a fresh meeting of the shareholders of Navjivan. I accordingly gave a direction on 9th July, 1970, that a fresh meeting of ordinary shareholders of Navjivan be convened to be presided over by the same chairman at which the shareholders of Navjivan should consider whether they would approve the scheme with the radically altered ratio of 40 : 1. As stated earlier, they were at the sweet mercy of the Kohinoor and, therefore, again to my mind very meekly and timidly submitted to the altered ratio with the result that the veto of Kohinoor has prevailed unchallenged. The final scheme in this behalf now

submitted to the court for sanction is that in exchange for 40 ordinary shares of Navjivan, the holder would be entitled to one equity share of the Kohinoor. Initially the compromise offered to the unsecured creditors who were depositors and holders of loan accounts was that the claim of the depositors and the holders of loan account shall stand reduced to 31% of the amount standing to their credit together with the interest accrued thereon up to 23rd August, 1968, and the reduced claim shall stand assigned to the Kohinoor and that Kohinoor in consideration thereof shall allot to the said depositors and holders of loan accounts the equity shares of Kohinoor, each of Rs. 100 fully paid at a premium of Rs. 200. When this proposal was moved at the meeting of the unsecured creditors who were depositors and holders of loan accounts, an amendment was moved that the premium, instead of being Rs. 200 shall be Rs. 160, and this was approved and was also accepted by the petitioner. However, some marginal adjustments had to be made again to persuade the Life Insurance Corporation and Unit Trust of India and other equity shareholders of Kohinoor to which a reference will be made when I would point out that two managing directors, viz., Subodh Mangaldas and Gunvant Mangaldas had to forgo 234 shares to which they would have been otherwise entitled if the proportion herein mentioned was retained in respect of their deposits. The compromise finally offered for sanction of the court in respect of the unsecured creditors who are depositors and holders of loan accounts was the same as it was approved at the meeting of unsecured creditors. Initially the compromise offered to the unsecured creditors who were suppliers of cotton, stores, colours, chemicals, etc., was that their claim would stand reduced to 31 per cent. of the face value of the goods supplied by them and they would not be entitled to interest on the value of the goods supplied by them and the reduced claim shall stand assigned to Kohinoor and in consideration thereof Kohinoor shall allot to these unsecured creditors equity shares of Kohinoor of the face value of Rs. 100 fully paid at the premium of Rs. 200. This initial compromise was modified so as to reduce the premium from Rs. 200 to Rs. 160 and that has been finally approved and the court is requested to accord sanction to it. Arrangements were made that while doing so if there is a balance left over which is less than Rs. 300 it shall be paid in cash by Kohinoor. Separate agreement was worked with the labour and workmen employed by the company and it is to be found at annexure F/2 (page 109 of the record). It has not undergone any change and the court is requested to accord sanction. In respect of three specified creditors such as Central Board of Trustees of the Provident Fund, Employees State Insurance Corporation and Employee's Credit Co-operative Society, a separate agreement was worked out with each of them and the court is requested to afford sanction to the same. The agreement with the Central Board of Trustees of the Provident Fund, Employees State Insurance Corporation and Employees' Credit Co-operative Society are the same as have been set out in the order made by me on 30th April, 1970. I have been informed that the parties adhere to the same.

4. Approach of the court to the scheme of compromise and arrangement

submitted to the court for its sanction now appears to be well settled. The court undoubtedly has a discretion whether to accord sanction to a scheme of compromise and arrangement or not and in exercising its discretion one way or the other, the court should like to examine the scheme from certain definite standpoints. The court will normally need to be satisfied of three matters :

- (i) that the statutory provisions have been fully complied with;
- (ii) that the class or classes must have been fairly represented; and
- (iii) that the arrangement must be such as a man of business would reasonably approve.

5. Buckley on the Companies Acts, 13th edition, page 409, has in this connection observed as under :

"In exercising its powers of sanction the court will see, first, that the provisions of the statute have been complied with, secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and, thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."

6. There are certain well recognised limitations on the court's power to sanction the scheme. First limitation is that the court would not sanction a scheme which would be invalid without the court's sanction if every creditor or member concerned agreed to it. In other words, the court has no power to sanction something which the parties could not do by agreement. The second fetter on the court's power is that the court cannot sanction an act being done if the law permits it only subject to conditions and the agreement seeks to dispense with those conditions such as where the scheme of compromise and arrangement also includes within its ambit reduction in share capital in respect of which special procedure provided in the Act and the rules has not been carried out. Third known fetter on the court's power is that the court would not ordinarily sanction a scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. Within the limitations set out above, the court will allow the companies the greatest freedom in devising schemes to suit their requirements and will approve those schemes if they are fair to all whose interests are affected. It has now been established that the "compromise and

arrangements" covered by section 391(1) which is in pari material with section 206 of the Companies Act, 1948 (United Kingdom) are of the widest character, ranging from a simple composition or moratorium to an amalgamation of various companies, with a complete reorganisation of their share and loan capital. The discretion of the court as spelt out above is within these limitations and, therefore, even though I have sanctioned the scheme, I would re-examine it in the light of the objections put forth on behalf of the Central Government to find out whether there is anything in this scheme which is firstly detrimental either to the interest of shareholders and creditors of Kohinoor or to the interest of the creditors and shareholders of Navjivan or from a broader aspect of purity of administration of private sector and commercial morality and also to find out whether by sanctioning such a scheme the wealth and power flowing from wealth would be concentrated in the hands of few to the detriment of many. All these aspects will be examined while initially analysing the contentions raised by Mr. L. T. Shah, learned counsel who appeared on behalf of the Central Government. I would, therefore, now examine the contentions canvassed by Mr. Shah at the resumed hearing of this petition.

7. Mr. Shah formulated the following propositions for my consideration :

(1) The proposed scheme envisages issue of fresh capital which cannot be done in the absence of prior permission of the Controller of Capital Issues as provided by the Capital Issues (Control) Act, 1947, and it being an integral and inseverable part of a comprehensive scheme of compromise and arrangement, it would be futile to sanction the scheme as the same could be rendered nugatory and infractions if the permission is not granted or withheld.

(2) On the introduction of the Monopolies and Restrictive Trade Practices Act, 1969, the proposed scheme of compromise and arrangement at the instance of Kohinoor Mills Company Ltd., cannot be given effect to as Kohinoor is an undertaking to which Part A of Chapter III of the Act applies.

(3) The petitioner having not complied with the requirements contained in sections 372 395, 391 to 394 and 393(1) of the Companies Act, 1956, it being condition precedent to the court exercising jurisdiction u/s 391(2), the court cannot accord is sanction to the scheme of compromise and arrangement.

(4) The petitioner-company appears to have purchased shares of the Navjivan Mills only a few days prior to the filing of the petition u/s 391(1) presumably for the sole purpose of filing the petition, it is an abuse of process of law and the court should not encourage it by sanctioning the scheme proposed by such a petitioner.

(5) The petitioner-company has proposed a scheme of compromise and arrangement totally ignoring the interests of its shareholders.

(6) It would be open to the court to reject the scheme as the order of the company judge dated 30th April, 1970, is an interlocutory order passed without

taking into consideration the representation of the Central Government as envisaged by section 394A of the Companies Act.

(7) The petitioner has not satisfied the requirements contained in the proviso to section 391(2) of the Companies Act by not making necessary disclosures and it being a condition precedent to the court exercising jurisdiction u/s 391(2), the present petition must fail.

8. I shall deal with these contentions in the order in which they are set out.

9. First contention of Mr. Shah is that the proposed scheme envisages issue of fresh capital which cannot be done in the absence of prior permission of the Controller of Capital Issues as provided by the Capital Issues (Control) Act, 1947, and this being an integral and inseverable part of a comprehensive scheme of compromise and arrangement, sanctioning of the scheme would be an exercise in futility as the scheme could be rendered nugatory and infructuous, the moment the permission is not forthcoming. The Capital Issues (Control) Act, 1947, is certainly in force and section 3 thereof prohibits a company from making an issue of capital without the consent of the Central Government. In implementation of this scheme, if sanctioned, Kohinoor will have to issue fresh shares. These shares will have to be allotted to the holders of ordinary shares of Navjivan and unsecured creditors of Navjivan in the proportion adumbrated in the scheme. These shares will have to be issued by Kohinoor from its aniseed capital. Therefore, it cannot be gainsaid that the scheme envisages issue of fresh capital by Kohinoor and this cannot be done in view of the provisions contained in section 3 of the Capital Issues (Control) Act, 1947, without the consent of the Central Government. Section 6 of the Act confers powers on the Central Government for granting exemption from all or any of the provisions of sections 3, 4 and 5 of the Act. Armed with these powers, the Central Government has issued the Capital Issues (Exemption) Order, 1969, dated 1st February, 1969. Clause 4 of the Capital Issues (Exemption) Order, 1969, provides that the issue of securities by a public limited company and all transactions relating to such securities issued by any such company, if the value of the consideration involved in such issue together with the value of the consideration involved in any previous issue of securities made by such company within the twelve months immediately preceding such issue, does not exceed twenty five lakhs of rupees, the issue would be exempt from the operation of the Act. This availability of the exemption is, however, subject to an important condition contained in clause 9 of the Order. Clause 9 of the Exemption Order provides that if the shares are issued at a premium or at a discount the exemption from the operation of sections 3, 4 and 5 granted under the Exemption Order will not be available. If the scheme as is now offered for the sanction of the court is implemented, Kohinoor will have to issue 8,151 equity shares of the face value of Rs. 8,15,100 to unsecured creditors and shareholders of Navjivan in the proportion set out in the scheme. If the issue was not to be either at a premium or at a discount, the permission of the Controller of Capital Issues would not be necessary because the value of the

consideration involved in the issue was less than Rs. 25 lakhs. The scheme provides that in consideration of the reduced claim of the unsecured creditors of Navjivan, Kohinoor will issue equity shares of Kohinoor at the premium of Rs. 160 per share. At page 148 of the record, a table has been submitted which shows that under the scheme 1,125 equity shares of Kohinoor will have to be issued to the ordinary shareholders of Navjivan; 700 equity shares of Kohinoor will have to be issued to the preference shareholders of Navjivan. Thus, in all, 1,825 shares will have to be issued to the ordinary and preference shareholders of Navjivan but as the issue is neither at a premium nor at a discount, no permission will be necessary for the same. Even Mr. Shah did not dispute that such would be the case. But it was urged that under the scheme 6,326 equity shares of Kohinoor will have to be issued to the unsecured creditors of Navjivan in satisfaction of their reduced claim and that each share will have to be issued at a premium of Rs. 160 as provided in the scheme and as the issue is at a premium even though the total value of the consideration involved in the issue does not exceed Rs. 25 lakhs, the exemption would not be available. Mr. Nanavati for the petitioner also did not dispute that in respect of 6,326 shares which Kohinoor will have to issue to the unsecured creditors of Navjivan, under the scheme permission of the Controller of Capital Issues would be necessary. It is thus satisfactorily established that in respect of a part of the issue, Kohinoor will have to obtain permission of the Controller of Capital Issues u/s 3 of the Capital Issues (Control) Act, 1947. It is common ground that such a permission is not sought and obtained.

10. Mr. L. T. Shah urged that the whole scheme is based on the postulate that permission of the Controller would be forthcoming and if the permission is not granted the scheme would be knocked out from the bottom. It was urged that the court should not undertake examination of the scheme depending upon such nebular state of affairs or on the whim and fancy of the Controller of Capital Issues who can set at naught the scheme by refusing the permission. Sanctioning of such a scheme which for its very existence and implementation depends upon the absolute discretion of an officer, would be, it was urged, an exercise in futility. It must be confessed that the issue of shares by Kohinoor is an integral and inseverable part of the scheme and in fact, in my opinion, it is pivot round which the entire scheme revolves. The ordinary and preference shares of Navjivan have to be exchanged for the equity shares of Kohinoor. The claim of the unsecured creditors of Navjivan are to be satisfied by issue of equity shares of Kohinoor. The whole scheme, therefore, hangs in balance on the question of issue of fresh shares. If the permission is not forthcoming, undoubtedly the scheme would be mutilated almost beyond repair. Undoubtedly there is substance in the contention of Mr. Shah but, in my opinion, the question is one of priorities and adjustments. The court can today refuse to accord sanction to the scheme on the ground that permission of the Controller of Capital Issues has not been obtained. If the petitioner were to approach the Controller of Capital Issues, he may refuse to consider an application for a permission on the

ground that it is premature because unless the scheme is sanctioned, the permission would be worthless, or of no consequence. Action of one undoubtedly depends upon the action of another. It both were to suggest that unless the other acts, he would not act, there would be a statement and such an ambivalent position is not conducive to the proper adjudication of the issues raised herein. The Controller of Capital Issues has merely to consider the justification or propriety for a further issue of capital. This court has to consider the very fate of a big undertaking in which various interests are involved. Therefore, this court can proceed to accord sanction to the scheme leaving it to the petitioner to obtain permission which, it is hoped, would not ordinarily be refused more so because the issue is very small. Even if the Controller has a discretion in the matter he would have to exercise it in a judicious manner. It must weigh with him that the value of the consideration of the issue is very small and that it is for reconstructing, resuscitating and rejuvenating a company whose future otherwise would be a civil death. The stake is very high and one would shudder at the idea of some one refusing such a permission. Undoubtedly, that office might question the propriety of the issue at a premium of Rs. 160 or what premium should be allowed may need examination. It would be for him to come to a conclusion on this point. However, I may also examine this aspect not critically but generally. In this respect, the criteria and indicia are well known. If the price of a share is to be determined, apart from complicated calculations that may have to be made in the case of a non-functioning or defunct company, in the case of a living or working company whose shares are quoted on the stock exchange, the price fluctuations would indicate commercial judgment of the community above the value of the share which would ordinarily be respected. This, in my opinion, is the correct approach. Pennington in his Company Law, second edition at page 59, has stated as under :

"If the transferor or transfer company's shares have a stock exchange quotation, dealing prices over a period shortly before the transfer company's offer was announced will usually be taken as the measure of their value." (vide *In re Press Caps Ltd.*).

11. It appears that when the sponsors of the scheme initially proposed that equity shares of Kohinoor will be issued to the unsecured creditors of Navjivan at a premium of Rs. 200 a question was raised whether the premium is on the higher side and after taking into consideration the prevailing market price on the exchange, premium of Rs. 160 was agreed upon. The premium appears to have been fixed by reference to ruling price of the equity shares of Kohinoor on the stock exchange at the relevant time, which in ordinary circumstances would be a good measure of its price. I was also told yesterday afternoon that at present the ruling market price of the equity shares of Kohinoor fluctuates between Rs. 285 and Rs. 290. If all these aspects are taken into consideration, in my opinion, the premium of Rs. 160 is not on the higher side and I have no doubt that permission to issue shares of Kohinoor at a premium of Rs. 160 in satisfaction of the reduced claim of the unsecured creditors of Navjivan would not be withheld.

12. Looking at the matter from a slightly different angle, assuming that such a permission is withheld, the scheme, in my opinion, would not come to a dead end. It would be open to the sponsors if they so desire to come to the court for modification of the scheme whereby the court can be invited to consider a scheme of payment by a different mode. As stated earlier, no permission of the Controller of Capital Issues for issue of equity shares in exchange for the ordinary and preference shares of Navjivan would be necessary. Therefore, it would not be fair or even legitimate to await such permission before according sanction to the scheme of compromise and arrangement. It would be worthwhile to notice the past experience of this court in this respect. An exactly identical situation arose in the case of *In re New Commercial Mills Co. Ltd.* when I was hearing a petition for sanctioning the scheme of compromise and arrangement between the creditors and members of New Commercial Mills Co. Ltd. on the one hand and the company which envisaged issue of fresh shares and in respect of which permission of the Controller of Capital Issues was necessary. I proceeded to accord sanction to the scheme by observing as under :

"The next hurdle that was put forth was with regard to the increase and issue of fresh capital and it was contended that unless the permission of the Controller of Capital Issues is obtained, it is not open to the company to increase and issue fresh capital. The scheme envisages increase of capital by Rs. 32 lakhs by issuing 64,000 equity shares of Rs. 50 each and the same have to be offered to Jagdish J. Kapadia. That part of the scheme can come into operation after obtaining permission of the Controller of Capital Issues. But that would not deter the court from considering and sanctioning the scheme."

13. An exactly identical question had also arisen in the case of *In re Manekchowk and Ahmedabad Manufacturing Co. Ltd.* and the contention was disposed of in the same manner by a judgment delivered by me on 10th December, 1969. Nothing exceptional was pointed out to me which would persuade me to take a different view of the matter. I may also incidentally mention that necessary permission in the case of *New Commercial Mills Co. Ltd.* was obtained after the scheme was sanctioned. In sanctioning the scheme at this stage without permission, there is neither any contravention of any provision of law or any rule or even on the ground of propriety, I see nothing improper in doing it because unless a tendentious attitude is disclosed permission of this nature can always be reasonably expected to be granted.

14. Second contention of Mr. Shah was that on the introduction of the Monopolies and Restrictive Trade Practice Act, 1969, the proposed scheme of compromise and arrangement at the instance of *Kohinoor Mills Co. Ltd.* cannot be given effect to as *Kohinoor* is an undertaking to which Part A of Chapter III of the Act applies. The Monopolies and Restrictive Trade Practices Act, 1969, came into force with effect from 1st June, 1970. It is a revolutionary measure and was almost long overdue. Part IV of our Constitution lays down the "Directive principles of State policy". In other words, they state the goal which the State will strive to achieve.

Article 39 which finds its place in this Part provides that-the State shall, in particular, direct its policy towards securing -

(a) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;

(b) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

15. In order to achieve this principle, which has been considered as one of the goals, which the State should strive to achieve, the Monopolies and Restrictive Trade Practice Act, 1969, has been enacted. As it is a benevolent measure vitally necessary for arresting growth of monopolies and cartels which would prevent concentration of power flowing from it to the detriment of the common weal, it should not only be an attempt but a special endeavor of every one and specifically the court to see that by ingenious and intelligent device or by devious way resorted to under the Companies Act, the provisions of the Monopolies and Restrictive Trade Practices Act, 1969, shall not be defeated. Therefore, even though it was debatable whether to the present proceeding this Act would apply because if the scheme was sanctioned on 30th April, 1970, the provisions of the Act which came into force on 1st June, 1970, would ordinarily not apply if they are not shown to be retrospective, I invited Mr. Shah to fully discuss the various provisions of this Act in order to find out whether by sanctioning the scheme this court would indirectly assist in concentration of wealth and power in the hands of a few to the detriment of many. If at any stage I had any apprehension that such would be the case, I would have unhesitatingly declined to accord sanction to this scheme. But, as would be presently pointed out, even if I proceed on the assumption that the Act does apply and that my order dated 30th April, 1970, was interlocutory order, yet, in my opinion, the scheme in no way is affected by any of the provisions of this Act.

16. Mr. Shah in terms stated that Kohinoor is an undertaking to which Part A of Chapter III of the Act would apply. Mr. Shah in no uncertain terms stated that Kohinoor is an undertaking to which section 20(a) would apply. Section 20(a) reads as under :

"20. Undertakings to which this Part applies. - This Part shall apply to - (a) an undertaking if the total value of -

(i) its own assets, or

(ii) its own assets together with the assets of its interconnected undertakings, is not less than twenty crores of rupees."

17. In order to attract the application of section 20(a), it must be shown that Kohinoor is an undertaking the total value of whose assets is not less than 20 crores of rupees or is an undertaking the total value of whose own assets together with the assets of its interconnected undertaking is not less than twenty crores of rupees. If it was shown by cogent, convincing and reliable evidence

that Kohinoor is an undertaking whose own assets are more than twenty crores of rupees or there are certain interconnected undertakings with Kohinoor and the total value of their assets exceed twenty crores of rupees then the scheme could not have been sanctioned without obtaining the approval of the Central Government as required by section 23 of this Act. But in order to attract the application of the Act as stated earlier, certain factual averments were absolutely necessary. Firstly, it should have been shown to the court that Kohinoor is an undertaking whose assets are not less than twenty crores of rupees. The assets of the Kohinoor as are evident from the record do not exceed Rs. 7 crores. Therefore, if Kohinoor is an undertaking by itself and if its assets do not exceed Rs. 7 crores, it is not an undertaking to which Part A of Chapter III of the Act would apply. If it was shown that there are interconnected undertakings with the Kohinoor and the total assets of both are not less than twenty crores of rupees, certainly Part A of Chapter III would apply to Kohinoor and to all the interconnected undertakings also. In order to substantiate this contention, certain factual averments are necessary such as which undertakings are interconnected with Kohinoor or that Kohinoor is an interconnected undertaking with some other undertaking. The expression "interconnected undertakings" is defined in section 2(g). At one stage Mr. Shah submitted that the case of Kohinoor with some other undertaking to which reference would be made presently would be covered by the definition of the expression "interconnected undertakings" as set out in section 2(g)(iii)(c), 2(g)(vi) and 2(g)(vii). Section 2(g)(iii)(c) provides that two or more undertakings could be said to be interconnected with each other if they are under the same management within the meaning of section 370 of the Companies Act, 1956. Section 2(g)(vi) provides that two or more undertakings could be said to be interconnected with each other if the undertakings are owned or controlled by the same person or group of persons. Section 2(g)(vii) provides that two or more undertakings could be said to be interconnected with each other if one is connected with the other either directly or through any number of undertakings which are interconnected undertakings within the meaning of one or more of the foregoing sub-clauses. Before two undertakings could be said to be interconnected, it must be shown that they are under the same management within the meaning of section 370 of the Companies Act, or they are owned or controlled by the same person or group of persons, or one or the other is either directly or indirectly connected through any number of undertakings which are interconnected undertakings within the meaning of one or more of the foregoing sub-clauses of section 2(g). In order to substantiate this contention, factual averments should have been made which would have unmistakably shown that some other undertaking is under the same management as is Kohinoor or that the owners and controllers of Kohinoor are also the owners or controllers of the other undertaking or that through the chain of other undertakings they are interconnected. This allegation was not put forth when the first affidavit was filed on behalf of the Central Government because at that time the Act itself was not on the statute book. In paragraph 6 of the second affidavit was filed on behalf of the Central Government because at that time the

Act itself was not on the statute book. In paragraph 6 of the second affidavit filed by Shri Trimbak Jagannath Gonchalekar, Regional Director, Company Law Board, Bombay, the averments in this connection is as under :

"The Kohinoor Mills Co. Ltd. is an undertaking to which the provisions of the Monopolies and Restrictive Trade Practices Act, 1969, applies. The petitioner is, therefore, not entitled to proceed with the implementation of the scheme without the necessary sanction, etc., under the said Act."

18. This is all the averments in this behalf. In fact it was very candidly stated that factual averments in support of the allegations are not made in the affidavit. Nowhere in the affidavit either in express terms or in implied manner it was suggested how Kohinoor is an undertaking to which the Act applies or whether there are any other interconnected undertakings and on account of the value of their total assets the Act would be attracted. But having made this very fair statement, it was urged that the duty was on the petitioner to disclose all material facts which would have satisfied the court that the Act would not apply. It was urged that the affidavit filed by Shri Babubhai Laljibhai Kapadia, a director of the Kohinoor, does not disclose all the necessary facts which would have convinced the court that the Act would not apply. To say the least, that would be a curious approach to the problem. If the allegation is that the Act applies to an undertaking, the party affirming must prove it. It may be that in a given situation that party may not be able to muster all the materials to establish the allegation to the hilt. But it must not be forgotten that the party making the allegation is none other than the Central Government which must have within the control all the necessary information on which the allegation must have been founded. Yet no such information is forthcoming. In fairness to Mr. Shah it must be stated that even though the Central Government could collect all this information from the Registrar of Companies, it would be a time consuming thing and may require very long time before such information could be collected. Whatever that may be, at any rate, it is difficult to subscribe to the proposition that the director of Kohinoor should have made disclosures to reach a negative conclusion that not only the Act does not apply to the Kohinoor but there are no interconnected undertakings with the Kohinoor. It was frankly conceded that the factual averments substantiating the allegations are not to be found in the record. The only grievance was that the affidavit in reply of Shri Kapadia is vague. One can conclude it by saying that as against a vague allegation there is a vague reply and there ends the matter.

19. However, I must notice one submission of Mr. Shah. Mr. Shah referred to the statement u/s 393(1) which was annexed to the notice convening the meeting of creditors and shareholders of Navjivan. In the penultimate paragraph of this statement which is to be found in a booklet at page 40, it has been stated that the Kohinoor Mills Ltd. which has sponsored the scheme is being managed by the managing agents, Killick Industries Ltd., Bombay. The Killick Industries Ltd. are also the managing agents of various other companies, some of them being :

1. Ahmedabad Electricity Co. Ltd.
2. Surat Electricity Co. Ltd.
3. Bombay Suburban Electricity Co. Ltd.
4. Thana Electricity Co. Ltd.
5. Shivrajpur Syndicate Ltd.
6. C.P. Railway Ltd.

20. Relying on this statement, Mr. Shah urged that if Killick Industries Ltd., a public limited company, was the managing agents of the aforementioned six companies, all the six companies would be under the same management and, therefore, section 2(g)(iii)(c) and section 2(g)(vi) would be attracted as all these concerns are under the same management and would be interconnected undertakings of the Kohinoor Mills Ltd. If the position in law as it stood on the date on which the statement u/s 393(1) was issued had continued to remain unaltered till to-day, Mr. Shah's contention would have become unanswerable. But again there is a radical change in law of which notice must be taken. But the Companies (Amendment) Act, 1969, section 324A was added to the Companies Act, 1956. It reads as under :

"324A. Abolition of managing agencies and secretaries and treasurers. - (1) Notwithstanding anything contained in any other provision of this Act or in the memorandum or articles of association or in any contract to the contrary, where any company has, on the 3rd day of April, 1970, a managing agent or, secretaries and treasurers, the term of office of such managing agent or, as the case may be, the secretaries and treasurers shall expire, if it does not expire earlier, on that date.

(2) No company shall appoint or re-appoint any managing agent or secretaries and treasures on or after the 3rd day of April, 1970."

21. Now, if there was a company which was managing agents of various other different companies, then the moment the managing agency disappeared all the companies become free and independent from each other unless a new link binding them was established between them. If Killick Industrial Ltd. had continued to be managing agent of the aforementioned six companies including Kohinoor Mills Co. Ltd., all the companies could be said to be interconnected undertakings but when the link disappeared with the abolition of the managing agency each became separate and independent undertaking unless a new link binding them to each other was established and was effective within the four corners of the Companies Act. Such a link can be established if it was shown that there were common directors, managing director or the right of appointing board of directors of one vested in the other or one was a subsidiary or wholly owned subsidiary company of the other but unless some such link is established which could show a connection by common management between two otherwise

independent public limited companies, it cannot be said that because in the past they had common managing agents they still continue to be interconnected undertakings being under the same management notwithstanding the historical fact that the managing agents became a relic of the past and ceased to exist. Therefore, since the disappearance of Killick Industries Ltd. as managing agent of the aforementioned six companies on 3rd April, 1970, before the substantive petition u/s 391(2) was filed on 16th April, 1970, there is nothing to show that some new link was established between the aforementioned six companies so as to make them interconnected undertakings either on 16th April, 1970, or on June 1, 1970, when the Act came into force. In my opinion, therefore, the aforementioned six or any one or more of the companies could not be said to be interconnected six or any one or more of the companies could not be said to be so interconnected undertakings with Kohinoor.

22. Now, if kohinoor is not shown to be an undertaking - the total value of whose assets exceed twenty crores of rupees - and if it is also not shown that there were some other interconnected undertakings along with Kohinoor whose total assets exceed twenty crores of rupees, obviously section 20(a) of the Monopolies and Restrictive Trade Practices Act, 1969, would not apply to the Kohinoor and if it does not apply to the Kohinoor, then even if by sanctioning the scheme Navjivan is being made a wholly owned subsidiary company of the Kohinoor, its total assets would still not exceed Rs. 20 crores and, therefore, by sanctioning the scheme, no provision of the Monopolies and Restrictive Trade Practices Act, 1969, would be contravened and the Act would not stand in the way of the court sanctioning the scheme. The second contention of Mr. Shah, therefore, cannot be accepted.

23. The third contention of Mr. Shah was that the petitioner having not complied with the requirements contained in sections 372, 395, 391 to 394 and 393(1) of the Companies Act, 1956, it being a condition precedent to the exercise of jurisdiction u/s 391(2), the court cannot accord its sanction to the scheme. Mr. Shah urged the before the court can proceed to accord its sanction to a scheme various other provision of the Act which prescribe special or specific procedure for doing certain things, if the very thing is sought to be done in a scheme of compromise and arrangement it would be incumbent upon the sponsors of the scheme to carry out the procedure set out in other provisions of the Act and it would not be open to the sponsors to circumvent other provisions of the Act by camouflaging that thing as a part of the scheme of compromise and arrangement. This would necessitate examining of one submission of Mr. I. M. Nanavati that section 391 is a complete code exhaustive in all respects while considering the scheme of compromise and arrangement. For the present, I will keep apart that submission and examine whether there are any mandatory provisions contained in the other provisions of the Act which have not been complied with even though the result is sought to be achieved by a scheme of compromise and arrangement is the same which could have been achieved by following the procedure prescribed in those other provisions. Mr. Shah sub-

divided his argument and each submission would be examined separately.

24. As a first limb of the argument, it was urged that by the proposed scheme, Kohinoor is trying to purchase the shares of the Navjivan in contravention of section 372 of the Companies Act. Relevant portion of section 372 reads as under :

"372. (1) A company (hereinafter in this section and section 373 referred to as the investing company) shall not be entitled to subscribe for, or purchase (whether by itself, or by any individual or association of individuals in trust for it or for its benefit or no its account) the shares of any other body corporate except to the extent and except in accordance with the restrictions and conditions specified in this section.

(2) The board of directors of the investing company shall be entitled to invest in any shares of any other body corporate up to ten per cent. of the subscribed capital of such other body corporate :

Provided that the aggregate of the investments so made by the board in all other bodies corporate shall not exceed thirty per cent. of the subscribed capital of the investing company."

25. It was urged that the scheme shorn of all its embellishments is an attempt at circumventing the provisions contained in section 372(1). In other words, it was contended that if all the relevant aspects of the scheme are considered together in terms, Kohinoor purchases all the shares both ordinary and preference of the Navjivan and this is being done in violation or contravention of the statutory limit and prohibition contained in subsection (2). Section 372 prohibits a company from subscribing or purchasing by itself or through other modes the shares of another body corporate except to the extent and except in accordance with the restrictions and conditions specified in the other sub-section of section 372. Sub-section (2) provides that the company which purchases shares and which would hereinafter be referred to as investing company would not be entitled to invest in shares of any other body corporate more than 10 per cent. of the subscribed capital of such other body corporate. The first proviso to sub-section (2) provides that the aggregate investment made by the investing company in all other bodies corporate shall not exceed thirty per cent. of the subscribed capital of the investing company. It would thus appear that there are two restrictions enacted in section 372 - one being to the effect that any investing company shall not be entitled purchase more than 10 per cent. of the subscribed capital of the company whose shares are being purchased; and the other being that the investing company shall not be entitled to purchase shares exceeding thirty per cent. of its own subscribed capital. The subscribed capital of the Kohinoor is Rs. 1.04 crores and thirty per cent. of it would be a little more than Rs. 30 lakhs. If the Kohinoor is purchasing shares worth Rs. 3,15,800 under the scheme, obviously, the bar created by the proviso is not contravened. But Mr. Shah urged that when all the shares of the Navjivan, both ordinary and preference, are being

purchased, the prohibition contained in sub-section (2) would be violated inasmuch as the investing company, that is, Kohinoor, would be purchasing the shares of the Navjivan to the extent of more than 10 per cent. of the subscribed capital of Navjivan. The question in terms raised would be whether in implementing the scheme, if the shares of Navjivan are being exchanged by Kohinoor for its own shares is it a transaction of purchase and sale of share ? If the transaction is one of purchase of shares of Navjivan, the prohibition enacted in sub-section (2) will have to be given full effect. But the question is whether when the shares of one company are being exchanged with the shares of other company, is the transaction a transaction of purchase and sale of share ? Mr. Nanavati had a two-fold answer to this contention. It was, firstly, urged that the prohibition contained in section 372 is against investment in the other company if the funds of the investing company are utilised in subscribing or purchasing the shares of another company. It was urged that issue of fresh capital is not investment by the company issuing the capital. It was urged that the intention of the legislature is clearly discernible from the language employed in the proviso to sub-section (2) and sub-section (4) of section 372 which indicate that the investment therein contemplated is investment of capital or funds of the investing company. As a second string to the bow, it was urged section 81 and its various sub-sections have enacted all the restrictions on the issue of fresh capital and the court should not read any further restriction on the issue of fresh capital anywhere outside section 81. For the purpose of section 372, the company purchasing or subscribing to the shares of the other company is to be designated an investing company. The question would be whether where a fresh capital is issued by the company could the company be said to be investing its funds by issue of fresh capital ? When the shares are issued against cash, the share capital is the liability of the company. Investment would be out of the assets of the company. When could one be said to be investing fund ? In Stroud's Judicial Dictionary, third edition, page 1507, the second meaning of "invest" is set out as under :

""Invest" in the investment clause in a will means, inter alia, to apply money in the purchase of some property from which interest or profit is expected, and which property is purchased in order to be held for the sake of the income which it will yield."

26. Investment implies purchase of property in which money has been applied to purchase the property. In *Surat People's Co-operative Bank v. Commissioner of Income Tax*, while considering the meaning of investment in securities under the Income Tax Act, 1922, the word "investment" was construed to mean nothing more or less than to lay out money. In *Shorter Oxford English Dictionary*, third edition, at page 1040, the second meaning of the word "invest" is given as under :

"To employ (money) in the purchase of anything from which interest or profit is expected."

27. If the ordinary connotation of the word "invest" or "investment" is to be taken into consideration, it would mean employment of one's funds, surplus or otherwise, in purchasing or acquiring property. The question is whether the word "invest" has been so used in that sense in sub-section (2) of section 372. In this connection reference was also made to the proviso to sub-section (4) in which it is stated that the investing company may at any time invest up to any amount in shares offered to it under clause (a) of sub-section (1) of section 81. The word "amount" was emphasised to indicate that it can only mean payment of money. Mr. L. T. Shah repelled this contention by saying that one need not restrict the scope of section 372 to purchase against cash. It was urged that one may pay in cash or by cheque or some other negotiable instrument and though it would not be purchase by cash, yet it would none-the-less be purchase of shares. The word "invest" in sub-section (2) of section 372 need not be given such a narrow connotation. If the share is in fact purchased by way of investment by the investing company, the prohibition contained in section 372 would come into play. The question is : whether the provision under the scheme by which shares of Navjivan would be exchanged against the shares of Kohinoor would be a transaction of purchase of shares. If the strict and narrow interpretation is to be put, it would. It may indicate that the transaction is also a transaction of purchase of shares. If can be argued that, when one share of Kohinoor is issued, it would mean that Kohinoor is purchasing 40 shares of Navjivan for a price of Rs. 100. It can be said with certain amount of confidence that Kohinoor could have issued its own shares to some other persons and would have been entitled to recover Rs. 100 per shares. If the allotment was to other than the shareholders of Navjivan, Kohinoor would have raised capital which it could have used in purchasing the shares of Navjivan. Instead of going through this circuitous procedure, Kohinoor is exchanging its own shares for the shares of Navjivan in a certain ratio. If the transaction is viewed from this angle, the transaction is certainly one of purchase of shares. Mr. Shah urged that whether the transaction is one of purchase of shares must be examined from this angle only. He referred to the definition of the word "goods" in section 2(7) of the Sale of Goods Act, 1930. The word "goods" is defined to mean "every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." He also referred to the opinion in Reference by Board of Revenue, North Western Provinces, wherein an observation was made as to what "money" legally meant, that is, what is included in the word and it seemed to be thought that in law "money" only meant coin in gold, silver, or copper. That, however, is not the legal meaning of the term; it means and includes not only coin, but also bank notes, Government promissory notes, bank deposits and otherwise and generally any paper obligation or security that is immediately and certainly convertible into cash, so that nothing can interfere with or prevent such conversion. Reference was also made to *Amir Khan v. Hakumat Bibi*, where it is observed that where a gift is a made by a Muhammadan in lieu of something which has a monetary

value the transaction may be considered by way of sale, and in such a case, services of a professional character rendered by the donee to the donor may be considered as a consideration of monetary value. Relying on this it was urged that even if the shares are allotted in exchange of shares, the transaction is none-the-less a transaction of purchase of shares which would fall within the purview of section 372. The question is whether Kohinoor was investing its funds in the purchase of shares of Navjivan. This would necessitate examination of the value of unissued share capital of a company. The company has to prescribe to itself its authorised capital. It would mean that it is authorised to raise capital to that extent. Within the limit of authorised capital, the company may issue a part of the authorised capital and part of it may be subscribed and paid up capital may be only again part of the subscribed capital. The difference between the issued capital and authorised capital would be unused capital of the company. Is it an asset of the company? A mere right to issue a certain capital and that too under certain restrictions such as the one imposed by the Capital Issues (Control) Act, 1947, could never be said to be an asset of the company. It is at best a right which may be exercised at some future date. By itself the right would have hardly any value. Now, if the unissued capital is not the asset of the company then as and when it is issued and that too in exchange of a share of another company, it could never be said that the transaction is investment of funds of one company into the funds of another company. That would be giving very wide meaning to the word "invest" as used in section 372. Prohibition enacted in section 372 has a wholesome purpose behind it. It is to put a restriction on the powers of a company to utilise its surplus funds to buy over the other company and it also has a second laudable object, namely, prohibition to the effect that more than 10 per cent. of the subscribed capital of the company whose shares are sought to be purchased cannot be purchased by the investing company, so as to bring about a merger or amalgamation without going through the procedure as contemplated by section 371 onwards. Section 372, therefore, operates in a different field and in different circumstances. If, therefore, the shares of a certain company are being taken over by another company by way of scheme of compromise and arrangement, certainly, this scheme of compromise and arrangement cannot be made subservient to the provisions contained in section 372. The generality of provisions contained in section 391 cannot be restricted in its operation by reading therein the restriction placed on the bar of purchasing of shares u/s 372. Section 372 would be confined to such a transaction where the shares are purchased by the investing company as and by way of investment out of its funds, consideration being money or money's worth. Where by way of a scheme of compromise and arrangement the shares of one company are exchanged for the share of another company, the transaction has not the semblance of purchase of share as contemplated by section 372 unless a very narrow interpretation is put upon such transaction and, therefore, section 372 would not come in the way of a scheme of compromise and arrangement which contemplates exchange of shares by way of compromise and arrangement. Viewed from this angle, the exchange of shares contemplated by the scheme

would not fall within section 372 and the bar created by section 372 would not stand in the way of the court considering the scheme.

28. The same conclusion can be reached by a slightly different line of reasoning. Section 81 provides conditions governing further issue of capital. Issue of shares of Kohinoor in exchange of ordinary and preference shares of Navjivan would be a further issue of capital by the Kohinoor. Apart from the restriction placed on the further issue of capital by section 81, one more restriction is to be found in the Capital Issues (Control) Act, 1947. That aspect has been examined by me hereinbefore. But if that objection for the time being is out of the way, it is only necessary to examine the provisions contained in section 81 to find out whether any condition prescribed by section 81 would be contravened by issue of further capital by Kohinoor. Section 81(1) provides that, whenever it is proposed to increase the subscribed capital of the company by allotment of further shares, then allotment shall be made as provided in various clauses of sub-section (1) of section 81. Undoubtedly, issue and allotment of further shares of Kohinoor to the ordinary and preference shareholders of Navjivan would not fall within any of the sub-clauses of sub-section (1) of section 81. But sub-section (1A) of section 81 starts with a non-obstante clause which reads that "notwithstanding anything contained in sub-section (1), further shares may be offered to any person whether or not those persons include the persons referred to in various sub-clauses of section 81(1) if the conditions set out in various sub-clauses of sub-section (1A) of section 81 are specifically carried out." These conditions are that the company should adopt a special resolution to the effect that the further shares will be allotted to the persons other than those mentioned in section 81(1). Such resolution should be passed in a general meeting of which notice should be given in the manner provided therein. The members of the Kohinoor have adopted such a special resolution. Therefore, the condition prescribed in section 81(1A)(a) has been satisfactorily complied with and, therefore, further issue of shares to the persons other than those mentioned in section 81(1) would be legal and valid. Now, unless section 372 is read as a proviso to section 81, the bar created in section 81 would not come into play for the issue of further shares. There is no warrant for reading section 372 as a proviso to section 81 nor is there any warrant for reading section 81 as a proviso to section 372. Therefore, viewed from either angle, the issue of further shares under the terms and conditions set out in the scheme would not contravene section 372 and, therefore, the first limb of the argument cannot be accepted.

29. As a second limb of the argument, Mr. Shah contended that the proposed scheme in terms is not a scheme of compromise and arrangement but it is a take-over bid and would be a scheme or contract as envisaged by section 395 of the Companies Act and unless the petitioners have strictly complied with the provisions contained in section 395, this court cannot accord sanction to the scheme. If the proposed scheme is not a scheme u/s 391 but is a scheme or contract involving transfer of shares as envisaged by section 395, no question of court accord sanction to such a scheme arises because a scheme or contract

involving transfer of shares as contemplated in section 395 does not require sanction on the court. Only dissenting shareholders can move the court against compulsory acquisition on the allegation that the whole attempt of take-over is unfair. It is, therefore, necessary to find out whether this is a scheme of compromise and arrangement which would fall squarely and fairly within section 391. If it falls u/s 391, it would be presently pointed out that even if it achieve the same result which would be achieved u/s 395, it would none-the-less be a scheme u/s 391 and can be sanctioned as a scheme of compromise and arrangement u/s 391. Section 391 provides for sanction of a scheme of compromise and arrangement. Such a scheme may provide an exceptional procedure to modify or abrogate the rights so shareholders, debenture-holders and creditors. They are variously described as reconstruction, reorganisation, schemes of arrangement, amalgamation, mergers or takeovers; but none of these terms is clearly defined and connote a distinguishable legal meaning. As Gower in the Principles of Modern Company Law, third edition, observed in general, the expression "reconstruction, reorganisation or scheme of arrangement" is employed when only one company is involved and the rights of its investors and occasionally of its general creditors are varied, the last expression being more commonly employed when creditor's rights are affected. Under an amalgamation, merger or take-over, two or more companies are merged either de jure by a consolidation of their undertaking, or de facto by the acquisition of a controlling interest in the share capital of one by the other or of the capital of both by a new company. It has now been established that the compromise and arrangement covered by section 391 are of the widest character ranging from a simple composition or moratorium to an amalgamation of various companies with a complete reorganisation of their shares and loan capital. The next question is : what do the words "compromise" and "arrangement" connote ? Pennington on Company Law has observed as under :

"A compromise has been described as an agreement terminating a dispute between parties as to the rights of one or both of them, or modifying the undoubted rights of a party which he has difficulty in enforcing. An arrangement, as the expression is used in the Companies Act, 1948, embraces a far wider classes of agreement, and it need be in no way analogous to a compromise, so that it will include agreements which modify rights about which there is no dispute, and which can be enforced without difficulty."

30. If such is the wide meaning of the word "arrangement", the fact that the scheme of compromise and arrangement for transfer of control of a company by acquisition of all its shares can be effected by an offer to acquire shares coupled with the power to compel dissenting shareholders to transfer their shares u/s 395 it does not prevent the court from approving the scheme u/s 391. Amalgamation or merger or take-over may be brought about in various ways. In fact there are different provisions in the Companies Act by which the same result can be achieved. A scheme of arrangement may also enable the company to acquire shares of the other company. This would be by way of arrangement

between the company and its own shareholders. A rank outsider can also take over the other company by following the procedure prescribed in section 395. The same result can be achieved by proceeding u/s 484. The question, therefore, is whether a particular scheme is one which falls u/s 391 or section 395 or section 484 must be examined in the background of its own facts. It may be that the ultimate result may be the same but that would not mean that it is a scheme not under one but other sections. The principal question is whether such a scheme by which one company is converted from independent public limited company into a wholly owned subsidiary company of the other public limited company could be sanctioned u/s 391. Mr. Shah may be right in saying that such a thing can be done u/s 395. That is not the test. The test is whether it could be done u/s 391.

31. Now before referring to a decision on this point, I should like to notice that sections 391, 393, 394 and 395 are in pari materia with sections 206, 207, 208 and 209 of the Companies Act, 1948 (United Kingdom). In fact we have almost bodily incorporated those provisions. The interpretation of identical provisions of the Companies Act, 1948 (United Kingdom) would undoubtedly assist in finding out the true scope and ambit of the identical provisions included in our Companies Act, 1956. The question in terms raised is whether the scheme of compromise and arrangement by which one company takes over the other company can be brought about by way of scheme of compromise and arrangement. If it is done u/s 391, it could not be done without the company which is being taken over being a party to it. It could be done ignoring the company if the procedure prescribed in section 395 is followed. Any scheme of compromise and arrangement u/s 391 must indisputably be between the company and its creditors and members or any class of them. But u/s 395 an individual or a company may directly by making offer to the shareholders of the other company and completely ignoring the company buy over the shares and if they are in a position to buy or acquire nine-tenths of the total shares they can force the dissenting minority to compulsorily sell its shares to the purchaser. This result can be brought about by sidetracking the first company. The contention, however, is whether such a thing can at all be said to be a scheme of compromise and arrangement between the company and its shareholders and creditors. In other words, Mr. Shah specifically contended that where by a scheme of compromise so called attempt is made to take over one public limited company by another public limited company, it can never be said to be a scheme of compromise and arrangement between the company and its shareholders and members. There is no compromise between the company and its shareholders and it was urged that this can hardly be said to be an arrangement. The word "arrangement" may not be so narrowly construed. The word "arrangement" is such that where even there is no dispute, arrangement can be brought in. "Compromise" postulates existence of a dispute and giving and taking on either side. "Arrangement", on the other hand, is something by which parties agree to do a certain thing notwithstanding the fact that there was no dispute

between the parties. If such is the wide connotation of the word "arrangement" as used in section 391, obviously, the arrangement by which shares of one company are taken over by the other company would not be outside the scope of the word "arrangement". In this connection, I should first like to refer to *In re Guardian Assurance Co.* In that case the Guardian Assurance Company wanted to take over Reliance Marine Insurance Company Ltd. by proposing a scheme of compromise and arrangement u/s 120 of the Companies (Consolidation) Act, 1908, which again is in pari material with section 391 of our Companies Act. The proposed scheme was an extreme case to which the word "arrangement" could be stretched to cover. By the proposed scheme, the capital of the Guardian was to be consolidated and redivided and such redivided shares were to be issued to the shareholders of Reliance Marine Insurance Company Ltd. (hereinafter referred to as "Reliance") in proportion of 2 : 1. Now, the Guardian was not in a position to issue fresh capital. It was, therefore, provided that that portion of the shares held by shareholders of Guardian shall be compulsorily acquired for allotment to the shareholders of Reliance. The scheme in a nutshell was that for one share of Reliance two shares of Guardian would be issued and Guardian shall acquire such number of shares for allotting it to the shareholders of Reliance by acquiring the same from its shareholders. Therefore, the shareholders of Guardian had to compulsorily part with a portion of its shares for being allotted to shareholders of Reliance in return for taking over shares of Reliance. In my opinion this is an extreme case of arrangement and when the scheme came up for sanction before Younger J. he was of the opinion that as the shareholder of a company cannot by any device escape from his liability to pay in full the nominal amount unpaid upon his shares, so he cannot be called upon to pay to the company's funds more than his agreed contribution in respect of his shares. It was, therefore, felt that it would be a remarkable thing to find that any section of the Act authorised a majority of his fellow shareholders to require, even with the approval of the court that same shareholder to return to the company a part of what he had received from it in respect of his statutory obligations, such return being for a purpose which the company could quite conveniently achieve and if so ought assuredly to provide for out of its own corporate funds. Justice Younger further felt that there is attached to the section throughout its history the idea of some difficulty to be resolved by a compromise or arrangement of rights on one side or the other - a situation which prior to the enactment of the section only necessitated winding up of the company. He was, therefore, not inclined to extend section 120 to cover up a scheme of arrangement which compelled a shareholder to part with his own shares in return for shares of some other company. He rejected the scheme on the ground that the scheme itself could not be said to be either compromise or a disputed claim or an arrangement between shareholders of Guardian and the Guardian. In the opinion of Younger J., the word "arrangement" was applicable only where there was some controversy or some difficulty. The matter was carried in appeal and Lord Cozens-Hardy M.R. did not accept the interpretation of the word "arrangement" made by Younger J. Negating the contention that the shareholders of Reliance would be getting two

shares of Guardian and the shareholders of Guardian would be receiving one share of Reliance, could not be said to be an arrangement between the shareholders of Guardian and Guardian, it was observed as under :

"Then it is suggested that the proposition which the Reliance shareholders said they were willing to accept should be given effect to by an order sanctioning an arrangement between the Guardian Company and its shareholders which would make it obligatory upon a few dissentient shareholders in the Guardian Company if there be any dissentients, to contribute out of their own shares a certain proportion, and that proportion is made more workable by sub-dividing the shares of the Guardian into fully paid preference and ordinary shares not fully paid up. The details seem to me to be worked out with great care and great accuracy in the agreement, but it is not necessary in any way for me to discuss them here. I think what is proposed to be done in perfect good faith, and for very good business reasons, is not compromise, but is an arrangement proposed between a company and its members, using the words of section 120, and that there is no necessity to put such limitation upon those words as Younger J. felt bound to do."

32. Warrington L.J. and A. T. Lawrence J. concurred and the scheme was sanctioned. I would also refer to *In Re National Bank Ltd.* The scheme which was submitted to the court for its sanction u/s 206 of the Companies Act. 1948 (U.K.) (Which is in pari materia with section 391 of our Companies (Act), was as under :

"The proposals involve the division of the National Bank's business into two parts, the assets and liabilities attributable to the Irish business being transferred to a new Irish company, the National Bank of Ireland Ltd., ("N.B.I."), while the assets and liabilities attributable to the English business will remain with the National Bank N.B.I. will then be acquired by the Irish bank." - that is to say, the Bank of Ireland - "and the National Bank will become a wholly-owned subsidiary of the Scottish bank."

33. I have taken pains to set out the broad outlines of the scheme to show that the scheme which I am now considering is almost identical though not as complicated as one in the aforementioned case, the very effect of the scheme if sanctioned being to make National Bank which had proposed the scheme wholly-owned subsidiary company of the Scottish bank. In the case before me, the scheme is between Navjivan and its shareholders and creditors, sponsored by Kohinoor and the scheme if sanctioned would have the effect of making Navjivan a wholly-owned subsidiary company of the Kohinoor, The question in terms raised is; can such a thing be said to be a scheme of arrangement between Navjivan and its creditors and shareholder ? and, secondly, whether it can be sanctioned u/s 391 ? Second question raised by Mr. Shah will also stand answered by this decision that such a scheme would be covered by section 395 and the procedure contemplated therein should have been carried out. When the scheme in the National Bank case was being considered in the Chancery Division, a contention was in terms raised that the scheme was not one u/s 206 (section

391 of our Companies Act) but one u/s 209 (Section 395 of our Companies Act). Both the contentions are answered in favour of the company proposing the scheme. Such a scheme can be said to be a scheme of arrangement between the company whose shares are being taken over and its creditors and shareholders and that such a scheme can be sanctioned u/s 391 and it is not obligatory to carry out the procedure prescribed u/s 395. The scheme has in fact been sanctioned. It, therefore, appears both on principle as well as on authority well settled that where by a scheme partially of compromise and partially of arrangement the shares of one company are being taken over by another company converting the first mentioned company into a wholly-owned subsidiary company of the second mentioned company, it can none-the-less be a scheme of compromise and arrangement which if found to be just, fair, legal and workable and if properly approved can be sanctioned u/s 391. Even if the effect of sanctioning the scheme is take-over of the first company by the second company, it would be no answer to say that it can only be done u/s 395.

34. In the aforementioned case, the contention raised was that where arrangement u/s 206, is in essence a scheme or contract for the purchase by an outsider of all the issued shares of the company, the court should not approve the arrangement unless both (1) the petitioner proves on full disclosure that the price is fair, and (2) the arrangement is approved by the 90 per cent. majority referred to in section 209. It was urged that arrangement brought before the court was one of section 209 character and was not approved by the appropriate majority. Repelling this contention, it was observed as under :

"As regards Mr. Suenson-Taylor's second objection, namely, that the scheme really ought to be treated as a section 209 case needing a 90 per cent. majority. I cannot accede to that proposition. In the first place, it seems to me to involve imposing a limitation or qualification either on the generality of the word "arrangement" in section 206 or else on the discretion of the court under that section. The legislature has not seen fit to impose any such limitation in terms and I see no reason for implying any. Moreover, the two sections, section 206 and 209, involve quite different consideration and different approaches. u/s 206 and arrangement can only be sanctioned if the question of its fairness has first of all been submitted to the court. u/s 209, on the other hand, the matter may never come to the court at all. If it does come to the court, then the onus is cast on the dissenting minority to demonstrate the unfairness of the scheme. There are, therefore, good reasons for requiring a smaller majority in favour of a scheme u/s 206 than the majority which is required u/s 209 if the minority is to be expropriated."

35. It would thus appear that even if the scheme of compromise and arrangement is essence involves acquisition by one company of the whole of the share capital of another company notwithstanding the fact that 90 per cent, of the shareholders do not agree as envisaged by section 395, the same cant still be sanctioned u/s 391 and it is not answer to the problem that such a scheme

can only be considered u/s 395.

36. At this stage, one submission of Mr. Shah may be noticed. It was urged that section 209 of the English Companies Act differs in one respect from section 395 of our Companies Act inasmuch as there is no provision analogous to sub-section (4A) of section 395 in section 209 the English Companies Act. That hardly makes any difference. Sub-section (4A) was introduced to protect the interests of the shareholders. If, therefore, anyone takes resort to section 395, she is bound to carry out the procedure prescribed under sub-section (4A). If the scheme is in terms a scheme u/s 391, it could not be rejected on the ground that the procedure prescribed in sub-section (4A) of section 395 is not carried out. In fact the consenting majority required in section 391 is advisedly kept lower than the consenting majority required u/s 395. When a scheme u/s 391 is sponsored, at the outset, it must come before the court and the court has supervision over it at every state. When it is proposed, the court can prima facie examine it while giving directions u/s 391(1) for convening meetings and the scheme cannot finally go through unless sanctioned u/s 39(2) and the court, apart from various legal technicalities, can refuse to exercise discretion in favour of the scheme if it is shown to be oppressive to the dissenting members or if it is shown that the majority has almost imposed itself upon the minority. The scheme or contract of transfer of shares as contemplated in section 395 may not even come to the court. It can only come to the court if the dissenting minority challenges the proposed offer as unfair and the burden will be on them to show that the proposed offer is unfair. In a scheme u/s 391 the fact that the scheme is fair and reasonable and is such that honest men guided by best of commercial instinct would approve, has to be established by the sponsors and the dissenting minority has only to show that the court should not exercise discretion in favour of such a scheme. But in scheme u/s 395, it can only come to the court at the instance of dissenting minority and burden will be on them to show that the price offered is unfair. This is clearly a distinguishable feature between the scheme under sections 391 and 395; and in my opinion both operate in different fields and one has no impact on the other even though the ultimate result that may be achieved by the one or the other scheme may be the same. The present scheme is in my opinion being one u/s 391(1) it is immaterial and irrelevant whether any procedure prescribed in section 395 had or has not been carried out.

37. The third limb of the submission under ahead was that the scheme is in fact a scheme of amalgamation of the Navjivan with the Kohinoor and, therefore, the procedure prescribed u/s 394 ought to have been carried out. This point may be disposed of briefly by merely saying that the scheme does not envisage amalgamation of Navjivan with the Kohinoor. The effect of the scheme as and when implemented would be that Navjivan would be a wholly-owned subsidiary company of Kohinoor. It will still retain its own independent identity with this difference that all its shares will be owned by Kohinoor. This is not amalgamation of two companies in the sense in which the word is understood in section 394. It

is, therefore, not necessary to carry out the particular procedure prescribed u/s 394 before the scheme is sanctioned.

38. Before parting with this point, I should like to consider one more submission of Mr. I. M. Navavati that section 391 is a complete code by itself while considering the scheme of compromise and arrangement. It was urged that once it is shown that the scheme submitted for the sanction of the court would be one which would be covered by section 392 and is not shown to be ultra vires, then unless a specific provision is made which necessitates carrying out the specified procedure prescribed in other provisions of the Act, the same can be brought about by way of a scheme of compromise and arrangement. As an illustration, it was urged that the scheme of compromise and arrangement may include reorganisation of the share capital of a company.; but if reorganisation includes reduction of share capital, then rule 85 of the Companies (Court) Rules would require that, before sanctioning reduction of capital as part of the scheme of compromise and arrangement, the court should satisfy itself that the special procedure prescribed in section 100 onwards of the companies act is specifically carried out. It was, therefore, urged that, in the absence of any guideline, if the scheme of compromise and arrangement includes within its ambit either consolidation or revision of shares or issue of fresh shares, the same can be brought about as the part of the scheme of compromise and arrangement and it is not incumbent upon the party proposing the scheme or on the company to follow special procedure for achieving the same prescribed in other provisions of the Companies Act. The submission in short was that section 391 is a complete code by itself and once a scheme of compromise and arrangement falls fairly and squarely within the four corners of section 391. The same can be sanctioned notwithstanding the fact that it includes within its scope certain things which can be done by following the specified procedure in other provisions of the Act. It was also urged that, if section 391 is a complete code by itself and if the scheme proposed by the petitioner is indisputably a scheme of compromise and arrangement, it was not incumbent upon the petitioner or, for that matter, the Navjivan, to go through the whole gamut of procedure prescribed in section 372 or section 395. As stated earlier, it appears well established that "compromise and arrangement" covered by section 391 of the Act are of the widest character, ranging from a simple a composition or moratorium to an amalgamation of various companies, with a complete reorganisation of their Share and loan capital. If this is the scope of section 391, it does appear that section 391 is a complete code by itself. There is inherent evidence which would support this conclusion. Whenever it was found necessary to provide that a particular thing such as reduction of share capital cannot be brought about by way of a scheme of compromise and arrangement unless special procedure prescribed for the same in section 100 onwards is carried out, a specific provision such as rule 85 was enacted for the purpose. Section 206 of the companies Act, 1948 (united kingdom), is in pari materia with section 390(b) provides that that expression "arrangement" used in that section includes reorganisation of share capital of the

company by consolidation of shares of different class or by division of shares into shares of different class. In interpreting section 206 (6) in the case of *In re Cooper, Cocoper and Johnoson*, it was observed that when the arrangement involves a reduction of capital the requirements of the Act with regard to such reduction of capital must also be complied with. This aspect has been recognised in rule 85 of the companies (court) Rules and specific provision to that effect would inculcate that but for the specific provision, the entire reorganization of share capital excluding reduction of share capital could have been brought about by way of a scheme of compromise and arrangement. The question whether section 391 is a complete code in itself except where other provisions to the country are made was exhaustively dealt with by me in the case of *In re Manekchowk and Ahemedabad Manufacturing Co. Ltd.* decided on 10th December, 1969. I would like to bodily import some of the observations made in that case which would in my opinion, clinch the issue;

"On the other hand, it was urged by Mr. Gandhi that section 391 provides a completes code for the reconstruction of the company which may include reorganisation of its capital as part of the scheme of compromise and arrangement. In other words, it was urged that if the scheme of compromise and arrangement includes in its ambit reorganisation of the share capital then it can be carried out as part of the scheme of compromise and arrangement and it is not at all necessary to go through the whole gamut of the procedure prescribed for the reduction of share capital and of the issue of fresh capital. There seems to be considerable force in the contention of Mr. Gandhi that section 391 is a complete code. It provides for a scene of reconstruction and amalgamation of companies. The scheme of reconstruction of a company may also include a compromise and arrangement between the company and its creditors for any class of them or between the company and its members or any class of them. Section 390(b) provides that the expression "arrangement" as used in section 391 and 393 includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods. It is an inclusive definition. It was attempted to be urged that the arrangement herein defined does of include increase of share capital, so also it does not include reduction of share capital even though a specific provision is made as to what procedure should be gone through when the scheme of compromise and arrangement provides for reduction of share capital. Rule 85 of the Companies (Court) Rules, 1959, provides that where a proposed compromise or arrangement involves a reduction of capital of the company, the procedure prescribed by the Act and the rules relating to the reduction of capital and the requirements of the Act and these Rules in relation thereto shall be complied with, before the compromise or arrangement, so far as it relates to reduction of capital, is sanctioned. If section 391 were not to be treated as a complete code and if it is intended that various thins that can be done by way of a scheme of compromise and arrangement, if they were to fall under different provisions of the Companies Act which prescribe

certain procedure for doing the same and that procedure has to be gone through, it was not necessary to provide specifically that if the scheme of compromise and arrangement includes reduction of capital special procedure in respect of reduction of capital must be gone through before it could be sanctioned as part of the scheme of compromise and arrangement. There seems to be a reason for making such a provision in rule 85. A scheme of compromise and arrangement may be between company and creditors or between the company and members. If the proposed scheme offers compromise or arrangement between the company and its members only and it envisages reduction of share capital which can be carried out as part of the scheme u/s 391 without going through the procedure prescribed u/s 100 onwards, it may be that reduction of share capital in a given case may adversely affect the creditors and the creditors would have no chance to object to the same. It is manifestly clear that reduction of share capital in certain circumstances may adversely affect the creditors but if reduction of share capital is brought about as part of the scheme of compromise and arrangement between the company and its members yet as this prescribed procedure for effecting reduction of share capital has to be gone through even though it forms part of a scheme of compromise and arrangement, the creditors will have a chance to object to the same if it adversely affects them. Such would not be the case where the capital is increased or the rights of various classes of shareholders are altered or changed. The reorganisation of capital as envisaged in section 390 would certainly include increase and reduction of share capital, but reduction of share capital can be brought about by arrangement between the company and members yet it will have direct impact on the creditors and, therefore, a specific provision is made in rule 85 that even if reduction of share capital is to be effected as part of the scheme of compromise and arrangement, the procedure prescribed for reduction of share capital in the Companies Act and the Rules must be gone through before the scheme is sanctioned. This specific provision would indicate that other things such as increase of share capital simpliciter when sought to be carried out must be an increase of share capital simpliciter when sought to be carried out must be done according to procedure prescribed for the same. It can also be done as part of a scheme of compromise and arrangement and the result can be achieved by following the procedure prescribed in section 391. Section 391 provides a complete code for putting through a scheme of compromise and arrangement which may even include reorganisation of share capital subject to the well recognised exception that if reorganisation of share capital includes reduction of share capital, the prescribed procedure for effecting the same must be gone through in view of rule 85 before the scheme could be sanctioned. If rule 85 were not enacted, obviously, reduction of share capital could have been effected as part of the scheme of compromise and arrangement without going through the procedure prescribed in section 100 onwards. The very fact that a specific rule had to be enacted for this purpose indicates that section 391 is a complete code providing for all those things which can be included in a scheme of compromise and arrangement and all those things can be brought about by the procedure prescribed in section 391.

onwards. The nature of compromise that can be entered into u/s 391 is not defined. The definition of reorganisation of capital is an inclusive definition which would not exclude reduction of share capital or increase of share capital which would also be a kind of reorganisation of the share capital of a company. If section 391 was subject to other provisions of the Act every time the scheme of compromise and arrangement is put forth for the sanction of the court, if it includes things for which specific provisions are made and that will have to be gone through before the scheme is sanctioned, it would result in unnecessary duplication of procedure and would be cumbersome. On the contrary, it appears that if the creditors and members of the company arrive at a certain compromise which the court considers fair, it can be sanctioned u/s 391 despite the fact that for some of those things included in the compromise another procedure is prescribed in the Companies act and which has not been carried out. It, therefore, appears that section 391 is a complete code which provides for sanctioning of the scheme of compromise and arrangement. If such a scheme of compromise and arrangement includes increase of share capital, it can be done as a part of the reorganisation of the share capital, which would be part of the arrangement that would be brought about between the company and its members. In case of reduction of the share capital, in view of rule 85, the procedure prescribed u/s 100 and onwards will have to be gone through."

39. If this section 391 is a complete code in itself, in my opinion, while considering the scheme of compromise and arrangement which in turn includes purchase of the shares of another company, the bar of section 372 would not come in the way. Similarly, take-over which could be effected by following the procedure u/s 395 would also not come in the way when the same result is achieved by a scheme of compromise and arrangement submitted for sanction of the court u/s 391, viewed from either angle, section 372 or even section 395 would not stand in the way of the court sanctioning the scheme of compromise and arrangement now before the court.

40. The last limb of the argument under this head was that as the sponsors of the scheme did not annex the statement in terms as required by section 393(1) of the companies Act, the court cannot accord sanction to the scheme. The grievance is not that no such statement is sent but the grievance is that the statement annexed to the notice convening meetings is not in conformity with section 393(1)(a) of the Act. Relevant portion of section 393 reads as under :

"393. (1) Where a meeting of creditors or any class of creditors, of members or any class of members, is called u/s 391, -

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise for arrangement and explaining its effect; and in particular, stating any material interests of the directors, managing director, managing agent, secretaries and treasurers or manager of the company, whether in their and the effect on these interests, of the compromise or arrangement, if, and in so far as it is different

from the effect on the like interests of other persons; and

(b) In every notice calling the meeting which is given by advertisement, there shall be included neither such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid."

41. The court, while giving directions in company Application No. 136 of 1969 filed u/s 391(1) of the companies Act seeking directions for convening meetings of creditors and members and if thought fit to approve with or without modifications the proposed scheme of compromise and arrangement, has by the said order dated 29 the October, 1969, given direction that the advocate for the petitioner-company, i.e., Kohinoor, shall within three days from the date of the order file in the court the form of advertisement, the notice and the statement accompanying the notice and the same shall be settled by the Registrar of the court. The statement so required in order to conform with section 393 must set out therein :

(i) the terms of the compromise and arrangement and its effect;

(ii) the material interest of the directors, managing director, managing agent secretaries do treasurers or manager of the company whether in their capacity as such or as members or creditors of the company of other wise; and

(iii) the effect on those interests of the compromise and arrangement if, and in so far as it is different from the effect on the like interests of other persons.

42. Section 393 is mandatory in terms. Before the court can proceed to apply its mind to a scheme of compromise and arrangement it must be satisfied that annexed to the notice convening meeting there is a statement drawn up in conformity with requirement of section 393(1)(a) (vide in re Sidhpur Mills Co. Ltd.) It cannot be gainsaid that the statement in strict conformity with section 393(1) must be annexed to the notice conveying the meeting and sent to the members or creditors. Such a notice was sent is not in dispute. Let me then examine in what respect the statement annexed to the notice does no conform to the requirement of section 393(i)(a). The whole of the scheme of compromise and arrangement as proposed by the petitioner was annexed to the notice. This will be clear form the printed brochure at page 40 of the record. In this printed brochure, there is notice, there is statement u/s 393 which is annexed to the notice as an appendix to the statement, the whole of the scheme of compromise and arrangement as proposed has been printed, and the existing financial position of the company showing assets and liabilities were also set out in the last annexure. The whole brochure was served upon each individual creditor and member pursuant to the direction of the court. Now, if the whole of the scheme of compromise and arrangement is annexed to the notice, the requirement of section 393(1)(a) that the statement setting forth the them of the compromise or arrangement shall be annexed to the notice is fully satisfied. Its effect is also explained. At page 5 in paragraph 10 of the printed brochure the effect of the

terms of the compromise and arrangement has been set out in or so outlines. It is specifically stated that in the event the scheme is sanctioned, the Navjivan will become a wholly owned subscribing company of the Kohinoor. That will in my opinion, be a very far reaching effect of the scheme of compromise and arrangement on the status of the Navjivan. Therefore, the first condition of section 393(1)(a), in my opinion, is fully satisfied,. The next condition is that the statement must contain the material interests of the directors, managing directors, managing director, managing agent, secretaries and treasurers or manager of the company whether in their capacity as such or as members or creditors of the company or otherwise. At the relevant time when the scheme was proposed and notice convening the meeting was sent there was on managing agent of the Navjivan. So in order to conform with the second condition of section 393(1) the material interests of directors and managing director alone were required to be stated. It is stated in the statement that the present directors of the company are interested in the proposed scheme of compromise and arrangement to the extent of their shareholdings and deposits in the company. In the earlier part of the statement it is mentioned that the present deposits of the managing director and their relations in the company are to the tune of Rs. 22.68 lakhs. Therefore, their interest in the company and the scheme has been set out. Mr. Shah seriously contended that the third condition of section 393(1) that the effect of the scheme on the interest or material interest of the directors or managing director has not been specifically set out in the statement. Section 393(1)(a) does not require that the statement should contain the effect of the compromise and arrangement on the material interests of the directors if it is not different from the effect on the like interest of other persons (vide City Properly Investment Trust Corporation). Once the material interests are set out, the effect on those interest if it is not different from the effect of the scheme on the like interest as of other depositors and shareholders, that effect is not specifically required to be set out. An identical contention was raised in the case *In re Manekchowk and Ahmedabad Manufacturing Co. Ltd.* wherein, while disposing of the contention, I have observed as under :

"It is undoubtedly true that the company is under an obligation to set out the interest of the directors and managing director in the company and the effect on their interest by the scheme - more particularly when the effect is likely to be different from the effect not the interest of like nature on over creditors and shareholders. The question then is whether the interest of the directors and managing director in the company and the effect of the scheme on such interest has been set out in the statement or not."

43. The same thing was also considered by Miabhoy J. (as he then was) in *In re Sidhpur Mills Co. Ltd.*, wherein it is observed as under :

44. In my judgment, therefore, the true construction of clause (a) to section 393 of the Indian Companies Act is that it requires the material interests which every person concerned possesses, not only in the company, but also in the scheme,

to be stated by all the other persons concerned and if the latter part of clause (a) applies, then the effect thereof must also be mentioned."

45. In this case, the compromise afford to the unsecured creditors who were depositors and holders of loan account and the one offered to the managing directors and directors so far as their deposits in the company are concerned is the same or identical. They are put on par or are treated alike with no difference. Similarly, the compromise and arrangement offered to the managing director and directors as shareholders is entirely identical with the compromise and arrangement offered to other shareholders of Navjivan. The effect of the scheme of compromise and arrangement on the interests of directors and managing director as shareholders and creditors will be entirely the same as the effect on the interests of other shareholders and creditors. If the effect is not different it was absolutely not necessary to comply with the latter portion of section 393(1) (a). The latter portion does not come into play unless the condition governing its application exists. The very condition does not exist in this case. In my opinion, therefor, the stated nude section 393(1)(a) annexed to the notice convening the meetings fully conform with the requirements of section 393(1)(a) and, therefor, the submission of Mr. Shah that the statement as required bus action 393 (1) (a) was not sent and, therefore, the scheme cannot be sanctioned cannot be accepted.

46. The next contention is that Kohinoor purchased 10 ordinary shares of the Navjivan only a few days prior to the sponsoring of the scheme and that this must have a few stays prior to the sponsoring of the scheme and that this must have been done conveniently for the purpose of enabling the Kohinoor as a member of the Navjivan to sponsor and propose the scheme. Mr. Shah urged that this is an abuse of process of law and the court should not sanction the scheme of compromise and arrangement at the instance of such a petitioner who has not come with clears hands. Frankly speaking this argument beats me completely. I do not see that there is even the slightest abuse of process of law. It is undoubtedly true that Kohinoor purchased 10 ordinary shares of Navjivan only a few days prior to the proposing of the scheme and, to quote the words of Mr. Nanavati, it was avowedly done for the very purpose of proposing the scheme and then if possible to persuade the members to see the reasonableness and fairness of the scheme. It was urged that this was done with a view to rejuvenate, resuscitate or to put back the company on its own feet which otherwise was on its way to doom. Three petitions for winding up Navjivan were pending in this court and if I rightly recollect there was hardly any answer to it. The company in fact was breathing its last before being consigned to limbo the oblivion. It was in respect of such a company that Kohinoor, a leading textile unit in this country, came forward to take it over, and undoubtedly to restart the mill and to pay its creditors and shareholders part of their dues. Assuming that Mr. L. T. Shah is right that the motive and purpose behind purchase of ten shares of Navjivan by Kohinoor are relevant and admittedly kohinoor purchased the said shares for the avowed object of proposing and sponsoring a scheme of

compromise and arrangement with the most laudable object of putting Navjivan back on its feet albeit under its own stranglehold, how it is an abuse of process of law? Navjivan, undoubtedly a big textile unit, though in a small place like Kalol, will have the benefit of stream administrative experiences, financial resources and technical know-how of Kohinoor, if Navjivan under the scheme becomes wholly owned subsidiary company of Kohinoor. It is too late in the day to controvert that Kohinoor is a leading modernised unit in the textile industry of this country. If such a company came forward to take over a sick mill like Navjivan, the motive need not be inquired into though of course the court should be careful to see that before Kohinoor takes over the Navjivan it has strictly complied with the requirements of law. But beyond that, in my opinion, no question of motive in such a case is relevant and no abuse of process of law can even be conceived in the circumstances of the case.

47. But, as a second limb of the argument, it was urged that this very petition, which the court is considering for sanctioning the scheme, could not have been filed by Kohinoor and therein lies the abuse of process of law. It was urged that under rule 79 of the Companies (Court) Rules, unless a substantive petition u/s 391(2) is filed by the company or its liquidator as the case may be within seven days of the filing of the report by the chairman, the same can be filed with the leave of the court by the creditor or contributory as the case may be. It was urged that as the substantive partition is not filed by the company, i.e., Navjivan, and as there was no liquidator because it was not ordered to be wound up, the petition could have been filed only by the creditor and there would be no contributory because there was no order for winding up and Kohinoor is neither a company meaning thereby the Navjivan nor is it creditor and, therefore, the present petition filed by Kohinoor cannot be entertained by the court. It was urged that before the company is wound up the shareholder is a member and once the company is ordered to be wound up the nomenclature changes and shareholder in winding up becomes a contributory. It was, therefore, contended that wherever the word "contributory" is used either in the Act or in the Rules, it postulates the existence of a winding-up order. Says Mr. Shah that if there was no order for winding up, there was no contributory of Navjivan, and, therefore, in the absence of the company, only its creditor could have filed the petition u/s 391(2). Mr. Shah urged that this position has been advisedly brought about by the framers of the Act and Rules, the underlying motive being that on an unwilling company, no scheme shall be imposed except at the instance of its creditors. Apparently, the argument appears to be persuasive but a detailed examination shows that there is no merit in it. Section 381(1) provides that 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 of class of creditors, or of the member or class of members, as the case may be, to consider and, if thought fit, to approve with or without modification the scheme of compromise that may have been proposed between the company and its creditors or any class of creditors and between the

company and its members or any class of them. Mr. Shah did not dispute that a petition u/s 391(1) can be filed either by the company or by its creditor or by its member and if the company is wound up, also by its liquidator. Therefore, according to Mr. Shah at section 391(1) stage, petition can be filed by the member of the company. Rule 68 provides that where the company is not the applicant, a copy of the summons and of the affidavit shall be served on the company, or, where the company is being wound up, on its liquidator. Reading section 391(1) and rule 68 together, it becomes crystal clear that a member of a company apart from those others mentioned in section 391(1) can move by ex parte judge's summons the court to give directions for convening meetings to consider and if thought fit to approve with or without modification the scheme of compromise and arrangement proposed between the company and its creditors or members. Mr. Shah however urged that that is a preliminary stage where it would be open to the company to come and oppose the scheme if the company does not approve the scheme. Mr. Shah urged that for this very reason rule 68 was enacted so as to enable the company to come to the court and contest the petition at the preliminary stage. If Mr. Shah is right in his submission, it would mean that the moment the company appears where petition is filed by someone other than the company and the company contest the petition, the court cannot proceed further. If Mr. Shah is further right in his submission that no scheme can be imposed upon an unwilling company, the moment the company showed its unwillingness to any proposed scheme, the court becomes powerless and has to stay its hands. I must say that there is no warrant for this construction of section 391(1). Rule 68 appears to have been enacted for a limited purpose of apprising the company that a scheme of compromise and arrangement is proposed as between itself and its creditors and/or members. The company having its independent juristic personality, independent of its members, where a member puts forth a scheme which in the ultimate analysis would bind the company, it is just and fair that the company must be informed of such a proposal. But giving up of the information does not tantamount to granting of veto to the company so as to repudiate the scheme by its very dissent. The court is not powerless to consider and, if satisfied, to sanction the scheme even in the teeth of opposition by the company. In fact the scheme of section 391 and especially of section 391(2) is that once a scheme of compromise and arrangement is approved by a statutory majority, it not only binds the dissenting minority but it also binds the company. This is manifest from the language of sub-section (2) which provides that the compromise and arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, all members or the class of members 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 contributors of the company. The effect of the sanction of the scheme is not merely that it binds the dissenting minority but it simultaneously and to the same extent binds the company and also the liquidator if the company is being wound up. Therefore, if I have to accept the construction as canvassed for by Mr. Shah it would lead to an impasse. Assuming that a scheme proposed by someone other than the company

is accepted and approved by all the members and creditors of the company, the company which has an independent personality has merely to appear through its principal executive officer and inform the court that it is not in a mood to accept it and the scheme must fail. Mr. Shah further urged that such a situation would never arise because the majority of members of the company can always remove the directors and the principal executive officer. Now, therefore, if in a given case the statutory majority of creditors and shareholders approve the scheme of compromise and arrangement but the company opposes it until these members go to the extent of removing the directors and the principal executive officer, the scheme cannot proceed an inch further. I am afraid that that will render the entire provision contained in section 391 nugatory and fruitless. This can never be the intention of the framers of section 391.

48. There is inherent evidence in section 391 itself to find out who can move the court to consider a scheme of compromise and arrangement. Sub-section (1) in now certain terms provides that an application can be made by the company or a creditor of the company or a member of the company or, in the case of winding up, by the liquidator. Now, it is not possible to accede to the submission of Mr. Nanvati that the court can proceed suo motu to sanction the scheme by merely perusing the report of the chairman without a petition because section 391(2) does not envisage any substantive petition being filed. I would on the contrary proceed on the assumption that a petition is necessary and must be filed. Section 391 must be read as a whole notwithstanding the fact that it provides for different and distinct stages through which a scheme must be processed. In section 391(1) the legislature specifically provided that the court must be moved by an application and proceeded to set out persons competent to approach the court. Once a scheme is proposed and the court is invited to process it by an application made by a person competent to make it, it is inconceivable that at the subsequent stage of processing the scheme under sub-section (2), that person becomes incompetent to invite the court to proceed further. Sub-section (2) does not in terms state in contradistinction to sub-section (1) which specifically provides making of an application and the persons competent to make it. It is, therefore, proper to assume that since the court's jurisdiction is invoked under sub-section (1) by a person competent to do so the legislature by not making a contrary or different provision in sub-section (2) indicated its mind that the person who can act under sub-section (1) can continue and would be qualified to act under sub-section (2). One has to read the mind of the legislature by the scheme of the section itself and that is one of the canons of construction. Having provided in sub-section (1) that the company, its creditor, its members or a liquidator in the case of winding up can move the court u/s 391(1) to order a meeting, ipso facto that provision by necessary incorporation must be read as having been incorporated and reproduced by pen and ink in sub-section (2). If the legislature wanted some person other than those mentioned in sub-section (1) to move the court u/s 391(2), or if the legislature wanted to disqualify some of those mentioned in section 391(1) from invoking the court's

jurisdiction u/s 391(2), I would have expected clear exposition of legislative intent in section 391(2). But the legislature having carefully enacted section 391(1) conferred power on specified persons to move the court and omitted any reference to person in sub-section (2) where again jurisdiction of the court was to be invoked for the obvious reason that this very person would be entitled to invoke the jurisdiction of the court. No other construction of sections 391(1) and 391(2) is possible.

49. But Mr. Shah contended that in rule 79, it is made distinctly clear that even though initially the petition may have been filed by some one other than the company, the company or the liquidator alone can file a substantive petition and with the leave of the court, the creditor or contributory alone can file it and that shows that all those who come to the court u/s 391(1) cannot invoke the jurisdiction of the court u/s 391(2). In other words, according to Mr. Shah, rule 79 restricts or whittles down the scope of section 391(1). Any rule framed under a statute and even having force of law cannot restrict or narrow down the scope of the section. If there would be a conflict between a section and rule or between the statute and a rule enacted under it, obviously the statute must prevail over the rule. But I would presently point out that there is no conflict between rule 79 and section 391. In paragraph (1) of rule 79 undoubtedly it is provided that the company or the liquidator can file the substantive petition u/s 391(2) failing which the creditor or contributory can file the petition. The word "contributory" is defined in section 428 to mean every person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid up. The persons liable to contribute to the assets of the company are those set out in section 426(1) which includes every present and past member subject to the qualifications set out therein. In given circumstances, even a past member would be a contributory. In paragraph 3 of rule 79 the word used is "contributory". It appears that even a past member was given a right to move a substantive petition u/s 391(2). The submission of Mr. Shah that the word "contributory" in paragraph 3 of rule 79 postulates the stage where the company is being wound up does not carry conviction. If any restricted meaning is given to the word "contributory", as urged by Mr. Shah, it would mean that where there is a scheme of compromise and arrangement between the company and its members which has been approved by a statutory majority and the company is unwilling to file the petition for sanction, the petition must fail on the only ground that there is no one who is competent to move the court. The creditor cannot move the court and in the words of Mr. Shah, the member cannot move the court because, in the absence of winding-up order, he has not become a contributory. In my opinion, putting such a narrow construction on the word "contributory" would lead to a startling result which could not have been anticipated by the framers of the rule. The use of the word "contributory", on the contrary, indicates that the right to move the court was sought to be conferred not only on the present member but on a past member who might in a given case be affected if the scheme is not sanctioned and consequently winding-up

order is made. Now, if the word "contributory" is read to include even the past member, obviously, there would be no conflict between section 391(2) and the rules, because if the company is not prepared to move the court after the chairman submits the report, any creditor or member, and if the company is being wound up, the liquidator, would be entitled to move the court and this construction would be in conformity with the provision contained in section 391(1). In my opinion, therefore, there is no substance in the contention that the present petition could not have been filed by Kohinoor because, in the absence of winding up order, Kohinoor cannot be said to be a contributory and if the company, i.e., Navjivan, did not file the substantive petition, no member of the Navjivan can file the same. The contention ought to be negatived.

50. It was next contended that in the scheme the Kohinoor has not looked after or taken care of the interest of its small shareholders. There is a short answer to the question in that this court is hardly concerned with the members of Kohinoor. However, even on the merits there is no substance in this contention. Out of the issued equity shares of the Kohinoor 1,04,909 are subscribed. The extraordinary general meeting of the Kohinoor to consider the scheme of compromise and arrangement was attended by 76 shareholders in person and 98 by proxy having total shareholding of 6,691 shares. 39,632 shares are held by Killick group and their nominees attended the meeting. The Life Insurance Corporation - a Government of India undertaking - holds 14,941 shares of Kohinoor and the Unit Trust of India - another Government of India undertaking - holds 1,132 shares of the Kohinoor. Both the Life Insurance Corporation and the Unit Trust of India after very minutely examining the scheme have assented to the scheme. One has to examine the veto which the Life Insurance Corporation and the Unit Trust of India exercises over the management of Kohinoor. It is necessary to recall at this stage that at the meeting of the ordinary shareholders of Navjivan a resolution was adopted that in exchange of 26 shares of Navjivan one equity share of Kohinoor should be allotted. It was this proposal which was to be considered by the equity shareholders of Kohinoor. The Life Insurance Corporation and Unit Trust of India stood back and refused to budge an inch till the ratio was altered apparently to the utter disadvantage of the shareholders of Navjivan, namely, 40 : 1. But, as stated earlier, they were unfortunately no choosers and were at the sweet will and mercy of Kohinoor and, therefore, submitted to the same. In the light of this fact, I have to examine the submission of Mr. Shah that in this scheme, Kohinoor has not cared to look after the interests of small shareholders of Kohinoor. What is stated above is eloquent enough and would provide a complete answer to the contention of Mr. Shah. In fact, I posed a question in the background of aforementioned facts as to how the Central Government can assert with equanimity that the interest of shareholders of Kohinoor is not properly looked after in this scheme and waited in vain for the answer. In my opinion, there is no answer to it. Therefore, there is no merit in the contention that in the proposed scheme the interest of small shareholders of Kohinoor is not properly protected and safeguarded.

51. Next contention was that the order of this court sanctioning the scheme of compromise and arrangement dated 30th April, 1970, was an interlocutory order and, therefore, it would be open to this court to reject the scheme even at this stage if the court feels looking to the representation of the Government of India that the scheme is not worths sanctioning. Having examined all the objections of the Central Government on merits this contention has become academic. However, at this stage I recall some of the events that happened leading to the order of this court dated 30th April, 1970. The substantive petition u/s 391(2) was filed for according sanction to the scheme of compromise and arrangement which was approved by more than the statutory majority of the creditors and shareholders of Navjivan and members of Kohinoor which included none other than the Life Insurance Corporation and the Unit Trust of India, two Government of India undertakings who had so minutely and thoroughly examined the scheme and had successfully altered it so radically as to give an impression that one has to be careful to find out whether the interest of the shareholders and creditors of Navjivan are properly taken care of. Now, undoubtedly, it is true that when a petition u/s 391(2) is filed, a statutory notice is to be served upon the Central Government as provided by section 394A. The Central Government is entitled to make representation which the court must take into consideration before passing any order u/s 391(2). It so happened that the notice issued by this court was served on 7th April, 1970, upon the Regional Director of Company Law Board to whom powers u/s 394A are delegated. Mr. J. C. Gatha, Registrar of Companies, appeared before the court on 30th April 1970, when the petition was set down for hearing. Mr. Gatha requested the court on behalf of the Regional Director of Company Law Board to adjourn the petition so as to enable the Central Government to make its representation. The motion for adjournment rested on the ground that the Central Government had not time enough to apply its mind to the scheme. Undoubtedly, this work is being done by the Regional Director at Bombay and he had about 13 days" time at his disposal and prima facie there was no merit in the motion for the adjournment. However, I have had always an apprehension about ex parte schemes and as no creditor or member had appeared to contest the petition, I believed that the representation of the Central Government would assist me in examining the scheme on its merits and that too with the assistance of an independent body who would examine the scheme in its various aspects and that too objectively. On the other hand, Mr. Nanavati strongly urged that if the scheme is sanctioned, the petitioner is prepared to re-start the mills which would necessarily provide employment to a large body of unemployed workers to whom any adjournment would result in prolonged starvation. That was equally a weighty consideration. I, therefore, accorded my sanction to the scheme with this little reservation that the Central Government should file its representation by 31st May, 1970. The court will consider thereafter the objections if any raised in the representation and if any directions are necessary they would be given after hearing Mr. Nanavati, learned advocate for the petitioner; but subject to this reservation the scheme was sanctioned. The detailed reasons for sanctioning the scheme were to be given after hearing

the Central Government. The order, in my opinion, speaks for itself. There is no ambiguity in it. Nothing more can be read in it than what is stated therein. Any attempt at mutilating it would be doing violence to the language of it. In on uncertain terms, the scheme was sanctioned. The Central Government was given time to make representation and if anything was shown by that representation which necessitated any modifications or any further directions in the implementation of the scheme, the right was reserved only to that limited extent. The right was reserved only to give direction and it is difficult to conceive that there could have been directions to throw the scheme overboard. It is inconceivable and I am not even prepared to accept it as a remote construction of my order and I believed that the Central Government would come out with some constructive suggestion so as to enable this court to give proper directions and to exercise proper control on the sponsors of the scheme. I never believed that the Central Government would come out with objections of a partisan character. But whatever that may be, it is open to the Central Government to raise any contention which it thinks first to put forth. The fact, however, remains that the scheme was unreservedly sanctioned and could be said to have come into operation from that date. To say that order is interlocutory is to beg the issue. There was nothing interlocutory about it as far as sanctioning of the scheme was concerned. It was final and binding unless revised, set aside or modified by the appellate court. Therefore, I am not prepared to accept the submission of Mr. Shah that the order dated 30th April, 1970, was interlocutory. However, that is neither here nor there as I have examined every submission of Mr. Shah on merits and found no merit in any of them.

52. That takes me to the last contention of Mr. Shah. It was urged that the petitioner has not satisfied the requirements contained in the proviso to section 391(2) by not making necessary disclosures and it being a condition precedent to the court exercising jurisdiction u/s 391(2) the present petition must fail. The proviso to sub-section (2) of section 391 provides that on 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 the material facts relating to the company, such as the latest financial position of the company, the latest auditors' report on the accounts of the company, pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like. For the reasons given by me in my judgment in *In re Mankchowk and Ahmedabad Manufacturing Co. Ltd.*, I would hold that, as the proviso is cast in a negative form, it is mandatory and making of the disclosures as required by the proviso being condition precedent to the court exercising jurisdiction for sanctioning the scheme, unless this condition precedent is fully satisfied the court will have no jurisdiction to sanction the scheme. The question is whether the disclosures as required by the proviso have been made or not. When the substantive petition u/s 391(2) was filed, the petitioner annexed audited statement of accounts of Navjivan up to the end of

31st December, 1967. That was the latest audited statement of account. The word "latest" is always a relative term and it has to be understood in relation to the date on which the petition is filed. The word "latest" means latest in point of time in relation to the date on which the petition is filed. The petition was filed in 1970. The accounts of Navjivan were audited till 31st December, 1967. Thereafter the accounts of Navjivan were not audited. However, the profit and loss account of Navjivan up to 31st March, 1969, was also filed and were referred to in the affidavit in support of the petition. Its balance-sheet and audited statement of accounts are found at page 113 onwards on the record. The grievance was that as a substantive petition was filed in April, 1970, the accounts after 31st March 1969, should have been filed. It may be recalled at this stage that the mills of the company were closed down from August 30, 1968. At any rate these disclosures should be made in order to enable the court to judge the scheme on its merits vis-a-vis the financial position of the company. No doubt, the proviso being mandatory, strict compliance with it should be insisted upon and is necessary. But it will be a question of fact in each case whether the disclosures as required by the proviso have been made or not. I am satisfied that the disclosures are made and further the statement of accounts after the mills were closed would have hardly assisted the court in judging the scheme on its own merits. I would reject this contention for the reasons which the scheme on its own merits. I would reject this contention for the reasons which I have given in detail in the aforementioned case of *In re Mankchowk and Ahmedabad Mfg. Co. Ltd.*

53. Finally, one submission of Mr. Shah may be noticed. However, I really fail to see how Mr. Shah could have ever raised that contention. It was urged that in the statement annexed to the petition it has been stated that investigation was being made by the Central Government u/s 235 to 251 and Kohinoor had at no stage disclosed as to what happened to that investigation. I need not refer to detail to sections 235 to 251. They confer power upon the Central Government to make investigation into the affairs of the company. I will assume that such an investigation was made. Who would be in the know as to what happened to that investigation ? The contention is raised by none other than the Central Government that the Kohinoor did not disclose to what happened to the investigation conducted by the Government of India into the affairs to Navjivan. It does not lie in the mouth of the Central Government in whose possession the report, if any, would be to contend that Kohinoor has not disclosed the outcome of the investigation. The report as and when prepared would be submitted to the Central Government. The Central Government should be the last person to contend that the other side has not disclosed the report and when I asked Mr. Shah as to what happened to that investigation, again, I waited for an answer in vain. If such be the position, no importance can be attached to the contention that Kohinoor did not disclose as to what was the outcome of the investigation. It was not even clear whether there was any such investigation and if so under what provisions of law. Some reliance was also placed in this respect on a letter

addressed to the Minister of the Central Government by one Shri Gangaram Raval, M.L.A., of the Gujarat State. I need hardly refer to the letter because whatever is stated therein throws no light on the alleged investigation under sections 235 to 251. In my opinion, the matter need not be pursued any further and should be left at that.

54. These were all the contentions raised by Mr. Shah and I am not impressed by any of them.

55. I should now like to give my reasons why I had accorded sanction to the scheme. As stated at the outset, the court, before according its sanction to the scheme of compromise and arrangement, must be satisfied that the provisions of the statute have been complied with; that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. That is the well recognised approach of the court to a scheme of compromise and arrangement. The scheme should not be examined in the way a carping critic, a hairsplitting expert, a meticulous accountant or a fastidious counsel would do it. It must be tested from the point of view of an ordinary reasonable shareholder acting in a businesslike manner taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question (vide *In re Sidhpur Mills Co. Ltd.*). At no stage a dispute was raised that the provisions of the statute have not been complied with by the petitioner before coming to the court u/s 391(1) and after the meetings were convened and the scheme was approved u/s 391(2). At no stage a dispute has been raised before me, now that the scheme has been very meticulously examined by the officer of the Central Government that even by a remote chance any provision of the statute was not complied with. The next question is whether the class was fairly represented. I should like to point out that because of the radical change made by Kohinoor in the ratio of ordinary shares, the meeting of the ordinary shareholders of Navjivan had to be called twice. At the first meeting of the ordinary shareholders, out of a total 45,000 equity shares, 41,710 shares were represented and the holders of the same voted in favour of the scheme. At the second meeting of ordinary shareholders, out of 45,000 shares, 40,132 shares were represented and the altered ratio was also unanimously voted upon, the reasons for which are not far to seek and to which I would presently advert. At the meeting of preference shareholders, out of the total of 7,000 preference shares, 4,144 shares were represented and the scheme was approved unanimously. At the meeting of unsecured creditors who were depositors and holders of loan accounts, out of a total debt under this head of Rs. 25,72,374, creditors, the value of those deposits was Rs. 24,92,280 attended and unanimously approved the scheme. At the meeting of unsecured creditors who were suppliers of stores, etc., out of the total value of debt of Rs. 29,75,556

affirmative voting represented debt worth Rs. 18,18,370 and the negative voting represented the debt in the value of Rs. 1,22,575. These figures would at a glance show that the classes were fairly represented and the scheme has been approved by an overwhelming majority far above the statutory majority. The last question is whether the scheme is fair and reasonable one which a man protecting his commercial interest and guided by reasonable expectation would approve. I need not dwell upon this aspect because the creditors and shareholders of Navjivan had hardly any choice. If one can say that between getting nothing and getting something there was a choice then there was of course a choice to get something. The position of the shareholders and especially the shareholders of Navjivan becomes apparently discernible from two important events that occurred during the progress of the scheme when the ball passed from the court of Navjivan to Kohinoor and was hit back with altered ratio. Initially the sponsors of the scheme, the Kohinoor company, suggested that the fair ratio looking to the financial evaluation of the structure of Kohinoor whose shares will be allotted in exchange for the shares of Navjivan compared with the evaluation of the assets and liabilities of Navjivan would be 1 : 30. Kohinoor being hard bargainers must have reached this conclusion after checking and re-checking the financial evaluation of the assets and liabilities of Navjivan and the benefits the shareholders of Navjivan would derive by allotment of one share of Kohinoor by surrendering thirty shares of Navjivan and the resultant benefit the Kohinoor will derive in converting the Navjivan into a wholly-owned subsidiary company of Kohinoor. Somehow or other, the shareholders of Navjivan could persuade the sponsors to alter the ratio from 30 : 1 to 26 : 1. That to my mind represents the sound commercial judgment of the shareholders of Navjivan with regard to the value of their own shares. That would be a good starting point to assess the fairness and reasonableness of the scheme. When the matter went back to Kohinoor the ratio was altered from 26 : 1 not to 30 : 1 which was the initial proposition but to 40 : 1 and this evaluation of assets and liabilities of Navjivan was made by the shareholders of Kohinoor. The matter had to go back to Navjivan and on a direction of this court, a fresh meeting of the shareholders of Navjivan was convened. At this meeting nearly 90 per cent. of the total shares were represented and unanimously voted in favour of this modification. If there is a choice as I would presently point out such as the workers have to choose between starvation and meager employment the same was the position of shareholders of Navjivan. I must also remember that, much though I may detest this imposition by the Kohinoor shareholders on the Navjivan shareholders leaving them little choice and freedom for manoeuvre, ultimately, the shareholders of Navjivan are the sound judges of their own interest and the support that they have extended to the scheme would indisputably indicate that they are people who have properly considered the whole thing and possibly reached a conclusion which represents their best judgment. Presumably, they must have honestly acted. There is no allegation of coercing the minority. There was not even a single dissenting vote. Therefore, despite my intense feeling that Kohinoor has almost dictated its terms to Navjivan I would accept the scheme as

reasonable and fair one. At any rate, this narration by itself would effectively repel the contention of the Central Government that the interest of Kohinoor is jeopardised in the scheme. That, in my opinion, is begging the issue. Be that as it may, in the circumstances disclosed in the case, I would accept the judgment of the shareholders evidenced by the votes cast by the shareholders, both preference and ordinary, and unsecured creditors of Navjivan and would hold, keeping in view the huge majority the scheme has received, that the scheme is a reasonable and fair one and it is not oppressive of minority by majority. Then the question is whether the scheme is commercially sound. No question is raised doubting the same and as stated in this judgment at one stage the benefit of the assistance of Kohinoor and its technical know-how would now be available to Navjivan and I should think that this scheme can be worked. This mill can be rejuvenated and resuscitated. Finance is forthcoming as is evident from the arrangement made by Kohinoor with the Bank of India as per letter dated 21st August, 1970, at page 255 of the record.

56. The last question is why should the scheme be sanctioned. In this connection, the approach of the court has been rather very exhaustively set out in my judgment in *In re Manekchowk and Ahmedabad Manufacturing Co. Ltd.* Those very considerations would weigh with me and impel me to sanction the scheme. The experience further dictates one additional reason which I would give. If the scheme of compromise and arrangement is primarily directed at injecting health into a sick industrial undertaking, the court should examine the scheme from an additional angle, namely, what is the role of such an undertaking in the economic and industrial life of this country. That is also an aspect which can never be overlooked. The humanitarian aspect has been considered in my earlier judgment and I would not dwell upon it but I would certainly dwell upon one aspect as to what role a big industrial undertaking should play in the economic life of this country and in rapid expansion of the process of industrialisation so as to ameliorate the living condition of a section of the society who primarily need help and succour in the form of employment.

57. When examining the scheme of compromise and arrangement which aims at re-starting of closed industrial undertaking this is also, in my opinion, a relevant consideration. If those who oppose the scheme emphasising the rights of creditors of an insolvent company to obtain an order for winding up *ex debito justitiae* and insist that the company shall be wound up meaning thereby that it should reach its civil death, throwing workers out of their employment by putting an end to the existence of the company and if, on the other hand, by the sacrifices made on all sides such as by shareholders, creditors and such as even by the workers, an industrial undertaking can be rejuvenated, resuscitated or re-started it should be a serious endeavor of the court to help in the process within the provisions of law and by harmonising and reconciling varied and variegated interests having conflicting claims against the company. When a big industrial unit is close down one would stand aghast apart from the shocking chain of reactions in the personal life of individuals connected with the undertaking and

in the civic and economic life of the society. This Navjivan, I am told, has its mills at a small place like Kalol, a taluka town in Mehsana district, and at the hearing of this petition I was told that it has a population of 40,000. 1,700 workers are employed in this mills. If the mills re-start, the unemployment problem in a small town could be considerably solved. The dependents at the rate of a family of four would be able to maintain themselves. The effect of about 6,800 persons out of 40,000 getting maintenance would have a definite impact in a small town. It could start a chain of reaction giving tempo to economic activity. When a big textile mills start operation large ancillary industries would flourish providing employment to still large numbers and the tempo of economic activity would go up in a rising crescendo. In the present state of our society, a victim of a vicious phenomena of rising prices and depleting employment, the court cannot remain oblivious to this aspect. Therefore, after considering all the possible legal contentions and other considerations which the court should seriously bring to bear upon a scheme of compromise and arrangement, and this additional consideration, I have no hesitation in confirming my order dated 30th April, 1970. The scheme was then sanctioned and having considered and given my anxious thought to all conceivable objections of the Central Government, the order sanctioning the scheme of compromise and arrangement made on 30th April, 1970, must be confirmed and treated as effective from that very day. Accordingly, the scheme of compromise and arrangement as finally modified and subject to the directions hereunder given stands sanctioned with effect from 30th April, 1970.

58. As some time has elapsed in disposing of the objections of the Central Government some marginal adjustments will have to be made in this scheme. Accordingly, following directions are given :

- (1) The paragraph referring to the basis of the scheme shall stand deleted from the scheme as the basis is fully satisfied.
- (2) In paragraph 2 of the order made by me on 30th April, 1970, so far as it affects the holders of 4 1/2 per cent. redeemable cumulative preference shares, instead of the words "six months", the words "ten months" shall be substituted.
- (3) There will be a similar change in the scheme affecting the holders of ordinary shares.
- (4) There will be similar change of substituting "ten months" for "six months" in the clauses concerning the unsecured creditors, depositors and holders of loan account.
- (5) Similar change shall be made in the scheme so far as it relates to unsecured creditors, suppliers of cotton, stores, colours, chemicals, etc.
- (6) In the scheme so far as it affects the dues of the Regional Provident Fund Commissioner and Employees" State Insurance Corporation, the words "after the expiry of the period provided for filing the appeal and in case no appeal is filed

after sanction of the scheme by the highest court" shall be added after the words in clause (d) so far as it relates to the Regional Provident Fund Commissioner and clause (a) so far as it affects the Employees" State Insurance Corporation.

(7) The arrangement with the Labour Union Majur Mahajan Sangh, Kalol, dated 14th December, 1969, shall form part of the scheme subject to this modification that the date of re-starting shall be as per the directions in this order.

(8) Clause VIII of the scheme shall read as under :

"The petitioner shall re-start Navjivan Mills on and with effect from 10th October, 1970, and statement shall be made to the court that this condition has been fully complied with on 12th October, 1970."

59. There is one apprehension of Mr. I. M. Nanavati in respect of which some clarification ought to be made. It is apprehended that now when the Central Government has appeared and filed its representation it may be that the Central Government may prefer appeal against the order of this court. In that event, it would be very difficult for the sponsors to go on investing funds for re-starting the mills and discharging its obligations under the scheme, and some protection was sought for the petitioner to meet with this possible but not expected eventuality. The only way the petitioner can be protected, in my opinion, is to make a provision in this scheme itself, that any amount spent by Kohinoor in implementation of this scheme and as expenses ancillary to the re-starting of the mill such as cleaning, re-connecting electricity supply, buying of stores, repairs necessary for the re-starting of the mills only shall be a first charge on the assets of the company in the event the scheme is, as finally sanctioned and fails, subject of course to any prior charge of the secured creditors.

60. Now, that brings me to the last question as to costs. Ordinarily, as the representation of the Central Government is being rejected, there should have been an order as to costs but the Central Government has a statutory right of appearing and making its representation. The representation is made with a view to assist the court and Mr. I. M. Nanavati also fairly conceded that I should award costs to the Central Government. The petitioner shall pay the costs to the Central Government quantified at Rs. 400 and to the Central Board of Trustees of the Provident Fund and Employees" State Insurance Corporation in one set quantified at Rs. 400 and shall also pay the costs of the petitioning creditors who had filed the petitions for winding up the company.

61. Mr. R. M. Desai, who appeared for the petitioner in Company Petition No. 37 of 1968 filed by Gill & Co. Pvt. Ltd. praying for an order for winding up the company, prays for permission to withdraw the petition as the scheme of compromise and arrangement in respect of the company is being sanctioned by the court. Under the scheme the mills of the company is to re-started and obviously, therefore, the petition for winding up has become infructuous and, therefor, permission is given to Mr. Desai to withdraw the petition and the petition stands disposed of as withdrawn. The company - Navjivan Mills - to pay

the costs of the petitioner including out of pocket expenses incurred for advertising and prosecuting the petition. The costs excluding expenses are quantified at Rs. 400. Similarly, Mr. A. C. Gandhi, who appeared for petitioners in Company Petitions Nos. 40 and 41 of 1968 filed by Messrs. Chika Ltd. and Messrs. Universal Chemical Agencies, respectively, for winding up company, prays for leave to withdraw both the petitions and for the reasons hereinbefore stated leave to withdraw is granted and the petitions stand disposed of as withdrawn with costs. The costs awarded herein shall come out of the assets of Navjivan. The costs of the petitioner to come out of the assets of Kohinoor.

62. Orders accordingly.