

(1999) 08 BOM CK 0084

In the Bombay High Court

Case No : Company Petition No. 1083 of 1997 with Company Application No. 570 of 1997

KEC International Ltd.

APPELLANT

Vs

Kamani Employees Union and Others

RESPONDENT

Date of Decision : 06-08-1999

Acts Referred:

Companies Act, 1956 — Section 391, 391(1), 391(2)

Citation : (2000) 1 ALLMR 388 : (2002) 109 CompCas 659 : (1998) 79 FLR 547

Hon'ble Judges : S. Radhakrishnan, J

Bench : Single Bench

Advocate : K.D. Parikh and A. Ghone, instructed by Kanga and Co., M.K. Vardhan, for Regional Director, V.C. Khatri, instructed by Shah Desai Doijode and Phatarphekar, Virendra Tulzapurkar, Milind R. Sathe, Satish Shetye and Ravi Gandhi, instructed by Kanga and Co, for the Appellant; Anand Grover, Rabindra Hazari and Basant Trilokani, instructed by Rabindra Hazari, for Kamani Employees' Union, for the Respondent

Judgement

S. Radhakrishnan, J.—Heard learned counsel for all the respective parties at length. This is a petition filed by the petitioner-company for sanction of a scheme of amalgamation of R.P.G. Transmission Limited with K.E.C. International Ltd. R.P.G. Transmission Ltd. is the transferee-company and K.E.C. International Ltd. is the transferor-company. This petition seeks a relief of amalgamation of R.P.G. Transmission Ltd. transferee-company with the petitioner-company viz., K.E.C. International Ltd. as per the scheme of amalgamation, which is annexed as Exhibit E to the petition.

2. The petitioner-company was originally incorporated on May 7, 1945, in the name of Kamani Engineering Corporation Ltd. Thereafter the name was changed to the present name and a fresh certificate of incorporation consequent on change of name was issued by the Registrar of Companies on June 5, 1984. The transferor-company viz., the petitioner-company has subscribed 3,23,85,854 equity shares of Rs. 10 each. Out of the authorised 7,50,00,000 equity shares of

Rs. 10 each, the aforesaid 3,23,85,854 equity shares of Rs. 10 each have been fully paid-up. Apart from the aforesaid fully paid-up equity shares there are also 35,00,000 equity shares of Rs. 10 each partly paid-up to the extent of Rs. 2.50 per share. Over and above the same, 2,00,000 shares of 16 per cent, redeemable cumulative preference shares of Rs. 100 each are also paid-up.

3. The petition discloses that as per the last audited balance-sheet of the petitioner-company for the year which ended on March 31, 1997, the petitioner-company had reserves and surplus of Rs. 25,442.08 lakhs. It is also mentioned that they have investment of Rs. 12,048.82 lakhs, current assets, loans and advances of Rs. 66,467.23 lakhs. Against these assets the petitioner-company had liabilities of secured loans of Rs. 22,632.80 lakhs, unsecured loans of Rs. 9,604.71 lakhs and current liabilities and provisions of Rs. 31,522.79 lakhs and net current assets of Rs. 34,944.44 lakhs. The petition also discloses the details of paid-up capital etc. of the transferee-company. In para. 11 of the petition all the details with regard to the reserve and surplus, investments, current assets, loans and advances, current liabilities and provisions are set out.

4. The submission of the petitioner-company is that both the transferor-company and transferee-company are engaged in the same business of manufacturing power transmission towers and undertaking turn-key projects. According to the petitioner if both the companies are combined then the amalgamated company could have larger resources at its disposal and will be able to face the competitions in the market etc. It is also contended that the amalgamated company will be able to carry on its business more profitably and efficiently.

5. Under these circumstances the petitioner has approached this court for amalgamation u/s 391 of the Companies Act, 1956. By this petition they are seeking an amalgamation with effect from April 1, 1997, being the commencement date. It is the case of the petitioner that the transferee-company viz., R.P.G. Transmission Limited had already approached the Delhi High Court and had obtained sanction for amalgamation. It is also set out in the affidavit of the petitioner dated June 17, 1999, that the Delhi High Court by its order dated March 23, 1999, has already sanctioned the amalgamation scheme. It is mentioned in the said affidavit that while the Delhi High Court sanctioning the amalgamation scheme by its order dated March 23, 1999, had deleted the second proviso to Sub-clause (a) of Clause 10 of the scheme and in its place the following proviso has been incorporated in the scheme of amalgamation as under :

"Provided further that shares held by the transferor-company and its subsidiary company in the transferee-company and the shares held by the transferee-company and its subsidiary company in the transferor-company shall stand cancelled."

6. The petitioner-company had taken out a company application being judge's summons No. 510 of 1997 seeking necessary directions against separate

meeting for fully paid up and partly paid-up equity shares in consideration of the aforesaid proposed scheme of amalgamation. By an order dated October 3, 1997, this court had directed that the petitioner-company to hold a meeting of fully paid-up as well as partly paid-up shareholders on November 17, 1997, for the purposes of considering approval with or without modifications to the aforesaid proposed scheme of amalgamation. The said order also had directed Shri Harsh Vardhan Goenka to act as a chairman of the said meeting and report the result of the said meeting to this court. The petitioner-company contends that as per the said order dated October 3, 1997, notices of the said meetings were sent individually to all equity shareholders of the petitioner-company along with the scheme of amalgamation.

7. It is also mentioned that as per the aforesaid order dated October 3, 1997, a meeting of the fully paid-up equity shareholders as well as partly paid-up equity shareholders were duly convened and hold on November 17, 1997, in the morning at Patkar Hall, New Marine Lines, Mumbai 400 020. It is also stated that Shri. H.V. Goenka had acted as the chairman of the said meeting. It is further averred in the said petition, in the report of the chairman dated December 1, 1997, submitted to this court the result of the said meeting of fully paid-up equity shareholders was disclosed.

8. In the petition it is mentioned that at the said meeting 9 amendments were moved with regard to the proposed scheme of amalgamation. It is also stated that the chairman of the said meeting had announced in the said meeting an approval of the said scheme by the members subject to an approval by LIC, GIC and UTI as per the letters received from LIC, GIC and UTI.

9. The report mentions that at the said meeting 256 poll papers were cast in respect of poll on the 9 amendments which were moved to the proposed scheme of amalgamation. It is further mentioned in the said report that out of the said 256 poll papers 152 poll papers were found to be in order, 68 poll papers were found to be invalid and 36 poll papers were found to be multiple poll papers. It is also mentioned that in respect of amendments Nos. 1 to 9, 152 members either in person or by proxy or by the authorised representative and holding 1,27,79,001 equity shares of Rs. 10 each and representing in value the sum of Rs. 12,77,90,010 validly cast their votes. Out of which 45 members present in person or by proxy or by the authorised representatives and holding 1,820 equity shares of Rs. 10 each representing in value the sum of Rs. 18,200 voted in favour of amendments Nos. 1 to 9 while 107 members present either in person or by proxy or by the authorised representative and holding 1,27,77,181 equity shares of Rs. 10 each representing in value the sum of Rs. 12,77,71,810 voted against the said amendments Nos. 1 to 9 while 34,143 votes cast under aggregate number of 104 poll papers were declared invalid.

10. It is also mentioned that on November 17, 1997, in the meeting of the partly paid-up equity shareholders, Shri H.V. Goenka had acted as the chairman. The said meeting was with regard to the partly paid-up equity shareholders. At the

said meeting the three shareholders of partly paid-up equity shares of the applicant-company were present-either in person or by proxy or by authorised representatives, holding together 35,00,000 equity shares of Rs. 10 each, Rs. 2.50 partly paid and each representing in value the sum of Rs. 87,50,000.

11. The petitioner-company has also averred that sanctioning of the said scheme of amalgamation will be for the benefit of the petitioner-company and the transferor-company and their respective members and will also enable the petitioner-company to carry on its business activity more economically and profitably and at the same time it will not prejudicially affect the rights and interest of the members of the petitioner-company, as also the rights and interests of the creditors of the petitioners company as also public interest.

12. This scheme of amalgamation is being strongly opposed on behalf of the Kamani Employees Union wherein various employees are also shareholders in the said company. The shareholders and employees of the company have raised various objections with regard to the aforesaid amalgamation scheme contending that the statutory requirements as contemplated under Sections 391 and 394 have not been complied with as well as the requirements as per the Companies (Court) Rules have not been complied with, as such the company petition for amalgamation scheme ought to be rejected.

13. Learned counsel for the petitioner Shri Tulzapurkar states that the proposed amalgamation scheme ought to be approved. He submitted that pursuant to the directions of this court a meeting was held on November 17, 1997, wherein both the fully paid-up shareholders as well as partly paid-up shareholders had taken part and finally had approved the said scheme of amalgamation. He also contended that the chairman of the meeting Mr. H.V. Goenka has filed his report on December 1, 1997 and also filed his affidavit certifying the same. According to Shri Tulzapurkar all necessary notices for the said meeting had been duly served on all the shareholders and accordingly the shareholders had attended the meeting. He also pointed out that there is a compliance as to the holding of the meeting of partly paid-up shareholders. According to learned counsel no prejudice would be caused since all the three shareholders of partly paid-up equity shares were present in the said meeting. According to Shri Tulzapurkar as far as partly paid-up shareholders are concerned there is a confirmation on their behalf that they received the notice and attended the meeting and voted in favour of the scheme. He relied on the affidavit of Shri B.D. Nariman as the authorised representative on behalf of these three partly paid-up shareholders. Shri Tulzapurkar had submitted that various shareholders of the category of fully paid-up shareholders had attended the meeting on November 17, 1997 and chairman of the meeting had also made a report on December 1, 1997, to this court. According to Shri Tulzapurkar the requisite notice dated October 20, 1997, was published in the Free Press Journal. An affidavit to that effect has also been filed. Shri Tulzapurkar has also relied on the said affidavit filed by the petitioner.

14. With regard to the aforesaid submission, the proposed amalgamation

regarding the scheme, 9 modifications were proposed to the scheme and out of 256 poll papers 152 papers were found to be in order, 68 poll papers were found to be invalid and 36 poll papers were found to be multiple poll papers. Out of 152 valid poll papers, according to Shri Tulzapurkar 45 persons were present in person or by proxy or by the authorised representatives and holding 1,820 equity shares of Rs. 10 each representing in value the sum of Rs. 18,200 have voted in favour of the amendments and 107 members present either in person or by proxy or by the authorised representatives and holding 1,27,77,181 equity shares of Rs. 10 each representing in value the sum of Rs. 12,77,71,810 had voted against the said amendments.

15. As far as the scheme is concerned, after the modification proposed which was rejected, 194 members have cast their vote with regard to the scheme. Out of 194, 172 had voted in favour of the scheme and 11 members had cast their vote against. According to Shri Tulzapurkar total number of votes cast with regard to the proposed amalgamation was 194 and out of that 172 members either in person or by proxy or by the authorised representatives and holding 1,28,17,227 equity shares of Rs. 10 each and representing in value the sum of Rs. 12,81,72,270 had voted in favour of the scheme of amalgamation as proposed by the petitioner-company while 11 members either in person or by proxy or by authorised representatives and holding 695 equity shares of Rs. 10 each representing in value the sum of Rs. 1950 had voted against the scheme of amalgamation as proposed by the petitioner-company while votes cast by 11 members holding 81 equity shares of Rs. 10 each and representing in value the sum of Rs. 810 were declared invalid. Therefore, according to Shri Tulzapurkar, the majority of persons had approved the scheme. They are holding 99 per cent, of the value of the shares which is more than three-fourths of the value of the shares. Accordingly learned counsel Shri Tulzapurkar, states that all the statutory requirements have been fully complied with, for the purpose of approval of the amalgamation scheme.

16. In this behalf, learned counsel for the petitioner had relied on a judgment of the apex court dealing with the scope of the court while dealing with amalgamation schemes. The said judgment is reported in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, . The apex court, after considering various judgments has indicated the scope as under (p. 819):

"1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

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

3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the

concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the, dissenting members of that class.

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

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

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

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

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

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

The aforesaid parameters of the scope and ambit of the jurisdiction of the company court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the court's jurisdiction."

17. Shri Tulzapurkar had also relied on another judgment of the Supreme Court in the case of Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others, . In para. 31 of the said judgment the Supreme Court has held as under (page 49) :

"31. The overwhelming majority of the shareholders had approved the scheme at the meeting called for this purpose and had approved the exchange ratio. In fact,

a proposal for amendment of the exchange ratio was also rejected by the overwhelming majority of 99 per cent, shareholders. There is no reason to presume that, the shareholders did not know what they were doing."

18. Shri Tulzapurkar, therefore, contended that in the instant case an overwhelming majority of 99 per cent, shareholders have approved the scheme by casting their votes in the prescribed manner. Under these circumstances this court ought to approve the scheme of amalgamation.

19. Shri Tulzapurkar had also relied on a judgment of this court in the case of Rousell India Ltd., In re [1998] 6 LJ 145. In this case, this court has referred to the judgments of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., , as well as the case of Hindustan Lever Employees" Union Vs. Hindustan Lever Limited and others, , and explained the scope of the court while sanctioning the amalgamation scheme.

20. The Supreme Court in the aforesaid judgment of Hindustan Lever Employees" Union Vs. Hindustan Lever Limited and others, has observed as under (p. 39) :

"What requires, however, a thoughtful consideration is whether the company court has applied its mind to the public interest involved in the merger. In this regard the Indian Law is a departure from the English law and it enjoins a duty on the court to examine objectively and carefully if the merger was not violative of public interest. No such provision exists in the English law. What would be public interest cannot be put in a straitjacket. It is a dynamic concept which keeps on changing. It has been explained in Black's Law Dictionary as, "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity whereas the interest of the particular locality which may be affected by the letters in question. Interest shared by citizens generally in affairs of local, State or national government." It is an expression of wide amplitude. It may have different connotation and understanding when used in service law and yet a different meaning in criminal law or civil law and its shade may be entirely different in company law. Its perspective may change when merger is of two Indian companies. But when it is with a subsidiary of a foreign company the consideration may be entirely different. It is not the interest of the shareholders or the employees only but the interest of the society which may have to be examined. And a scheme valid and good may yet be bad if it is against public interest."

21. The apex court thereafter in para. 6 has observed as under (p. 39) :

"The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered into between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle of, "prudent business management test" or that the scheme should not be a device to evade

law. But when the court is concerned with a scheme of merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximising profits of the shareholders or whether the interest of employees was protected but it has to ensure that the merger shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective."

22. While dealing with various objections of 39 shareholders, the Kamani Employees Union had contended that they have a locus to challenge the scheme by way of personal action as well as by representative action. In view of the same, the petitioners contended that the employees who were shareholders can oppose the scheme. According to learned counsel for the petitioners, the union as such in the capacity of the employees in a representative capacity cannot oppose the scheme. As far as the right of the shareholders of the scheme is concerned, Shri Tulzapurkar stated that a shareholder, an employee is entitled to oppose the scheme in his own right and there is no question of opposition for amalgamation in the representative capacity. As far as derivative action is concerned, Shri Tulzapurkar contended that the shareholders can complain that the company is not acting in its own interest and that the interest of the company is not being protected by the majority of shareholders. In this behalf he relied on a statement contained in Pennington's Company Law, seventh edition. According to Shri Tulzapurkar, the opponent union has no right to derivative action. He also contended that the employees have no right to oppose except in their capacity as a body representing only shareholders.

23. With regard to the second objection raised by the opponents that the latest financial statement has not been disclosed by the petitioner-company, Shri Tulzapurkar contended that the scheme provides that April. 1, 1997, as the appointed date and also the meetings of the shareholders were directed to be held on November 17, 1997 and at any rate in the meeting latest financial position as available was considered by the shareholders and on that day the latest audited financial position on March 31, 1997, was available and was placed before the shareholders present. According to learned counsel the said material has been disclosed to this court and also there is no need to disclose further or later financial position. According to him what is required to be considered by this court is the financial position on the basis of which the shareholders took the decision. According to him this court is not sitting as an appellate authority but is acting in its supervisory jurisdiction.

24. He also relied on the legal maxim *actus curiae neminem gravabit* meaning that an act of the court shall prejudice no man that is to say the court should not vitiate the decision taken by the shareholders after a lapse of time by holding that the subsequent material does not warrant the decision taken at an earlier date. According to him, it is not the parties who are responsible for the gap between the date when the petition for sanction is presented to the court and the

date on which the petition is ultimately heard. According to learned counsel the latest financial position means the actual financial position as on the date when the petition was filed u/s 391(2). In that behalf Shri Tulzapurkar had relied on the following judgments to contend that the latest financial position should be to mean as on the date on which the petition was filed. Learned counsel for the petitioner relied on a judgment of the Gujarat High Court in *Maneck chowk and Ahmedabad Manufacturing Co. Ltd., In re* [1970] 40 Comp Cas 819. In this case the court has held that (headnote) : "the scheme has not got to be scrutinised by the court with that much care with which an expert will scrutinise it, nor will it approach it in a carping spirit with a view to pick holes in it. If the majority is acting in a bona fide and honest manner, and in the interests of the class that it purports to represent, then, if the scheme is such as a fair minded person, reasonably acquainted with the facts of the case as prevailing at the time when the scheme was sponsored and approved, can regard it as beneficial for those whom the majority seeks to represent, then unless there are some strong and cogent grounds to show that the scheme was conceived, designed or calculated to cause injury to others, the court will ordinarily sanction it, rather than reject it. While examining the scheme the court should, keeping in view all the aspects of the matter, prefer a living scheme to compulsory liquidation bringing about an end to a company."

25. Shri Tulzapurkar also relied on another judgment of the Gujarat High Court in the case of *Navjivan Mills Co. Ltd., Kalol, In re* [1972] 42 Comp Cas 265. In this case the Gujarat High Court was dealing with the concept of "latest financial position". In this case the petitioner had annexed the audited statement of accounts up to the end of December 31, 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 was filed. The petition was filed in 1970. The accounts of the petitioners were audited till December 31, 1967. Thereafter the accounts of the petitioners were not audited. However, the profit and loss account of the petitioners up to March 31, 1969, was also filed and were referred to in the affidavit in support of the petition.

26. Shri Tulzapurkar also relied on a judgment of the Delhi High Court in *Aradhana Beverages and Foods Company Ltd., In re* [1998] 93 Comp Cas 899. In this case the Delhi High Court had to deal with the latest auditors report etc. wherein the court has held that the latest auditor's report of the company which is required to be disclosed is the one which would be available as on the date of filing of the application. Since the application was filed on August 8, 1997, the latest auditor's report would be the one relating to the financial year ending on December 31, 1996, which had been filed by the transferee-company.

27. Shri Tulzapurkar also pointed out another judgment of the Delhi High Court in *Bhagwan Singh and Sons P. Ltd. v. Kalawati* [1986] 60 Comp Cas 94. In this

case the Delhi High Court took a categorical view that as per the proviso to Section 391(2) of the Companies Act, which lays down that no order sanctioning any compromise or arrangement shall be made by the court unless the court is satisfied that the company has disclosed to the court all material facts relating to the company such as the latest financial position of the company, the latest auditor's report on the accounts of the company, etc. This has to be up to the stage when the petition becomes due for sanction. According to Shri Tulzapurkar in another judgment of the Delhi High Court viz., *Aradhana Beverages and Foods Company Ltd., In re* [1998] 93 Comp Cas 899, the court was of the opinion that the "latest" means the date when the petition was filed. He also stated that the Gujarat High Court has also taken the same view as such learned counsel contended that the position is identical and this court ought to construe the date as "latest" as on the date of filing of the petition and not subsequent thereto.

28. Learned counsel for the petitioners has submitted that the financial position of the transferee-company or transferor-company has not deteriorated hence he submits that there is no justifiable reason for not sanctioning the amalgamation scheme.

29. Learned counsel Shri Tulzapurkar has submitted that the latest financial position means the date on which the petition is presented and that position is available to the court and there is no need to furnish details of financial position, subsequent thereto.

30. With regard to the third objection learned counsel for the petitioner had submitted that at the meeting, the letters of three financial institutions viz., LIC, UTI and GIC were tendered and the scheme was subject to their approval. According to learned counsel for the petitioner the said three financial institutions were appearing before the Delhi High Court while the transferor-company's petition was being considered and they had expressed their no objection with regard to grant of the scheme. Learned counsel has also relied on an affidavit dated July 22, 1999, filed by the petitioner wherein consent letters of the said financial institutions with regard to the grant of the scheme, are annexed.

31. Learned counsel for the petitioner while dealing with the fourth objection with regard to the non-compliance with the order of this court in respect of the meeting of partly paid-up shareholders on the following grounds :

(i) no meeting was held ;

(ii) no notice was given ;

(iii) no public notice was given ;

(iv) no affidavit of compliance in accordance with the Companies (Court) Rules is filed and the report of the chairman is not in accordance with the form prescribed under the said Rules.

32. According to learned counsel for the petitioner the meeting was attended by

the duly authorised representatives of the partly paid shareholders. According to learned counsel the chairman of the meeting had complied with the prescribed rules and notice was given in accordance with the rules and as far as public notice was concerned they had filed an application for condonation as per affidavit dated November 2, 1987. With regard to the contention that the resolution of authorising the representatives was not available at the relevant time, the contention is that the resolutions were deposited with the petitioner-company at various points of time much before 48 hours of the meeting date and as such there is substantial compliance with regard to all the objections raised.

33. With regard to the fifth objection raised by the opponents that is to say non-compliance with the order of this court dated October 9, 1997, in respect of the fully paid shareholders. According to learned counsel, that 21 days clear notice was given and that there is no lapse on their part. In this behalf it was argued that even if there was little deficiency in the 21 days notice, there is no prejudice to anyone. In support of this contention counsel relied on the judgment of this court in *Shailesh Harilal Shan and Others, etc. Vs. Matushree Textiles Limited and Others etc.,* . In this case 20 days clear notice was given. The court came to the conclusion that the same did not constitute any prejudice and also that the requirement of 21 days notice is only directory and not mandatory. Under those circumstances learned counsel submitted that even assuming that they have failed in giving 21 days clear notice, the notice was directory in nature and not mandatory and as such any default thereof ought not to vitiate the meeting.

34. Learned counsel for the petitioner while dealing with the sixth objection raised by the opponents viz., non-compliance with the order of this court dated January 8, 1998, in respect of service of notice to creditors, he submitted that all creditors were duly served with the notice as per the said order and as set out in the affidavit of Mr. V. R. Barge dated July 23, 1998.

35. Learned counsel for the petitioner while dealing with the seventh objection raised by the opponents viz., that there was no requisite majority for the resolution supporting the scheme of amalgamation, strongly relied on the 19 affidavits which were tendered at a much later stage, during the hearing of this petition. In those affidavits the said companies have confirmed their resolutions and also authorising the representatives to attend the said meeting for approval of the said scheme. According to learned counsel that in view of the said affidavit categorically mentioning of the said fully paid-up share-holders authorising their representatives and also that they had duly approved the proposed scheme and as such this court ought not to construe that the said companies who held almost 98 per cent, of shares did not approve the said scheme. According to learned counsel for the petitioner at the said meeting majority of the members were present and who had voted and also with three-fourths of the total value of shares had approved the said scheme.

36. With regard to the eighth objection of the opponents that there were 1095 + 58 persons present on the basis of attendance slips. This fact is denied on the

basis of the affidavit of Mr. T.N. Balasubramaniam dated July 8, 1999, that although there were 1097 attendance slips it represented only 196 + 125 persons and as such there was absolute majority.

37. According to learned counsel for the petitioner the provisions of Section 391(2) are only directory in nature and as such even if that were to be any violation to the strict compliance thereof it would not be prejudicial so as to refuse the scheme. In that behalf, he relied on the judgment of the Karnataka High Court in the case of S.M. Holding Finance Pvt. Ltd. v. Mysore Machinery Manufacturers Ltd. (In Liquidation) [1993] 78 Comp Cas 432. In that case the Karnataka High Court has taken a view that Section 391(2) is not mandatory but appears to be only directory in nature. Learned counsel for the petitioner also relied upon the judgment of the apex court in Mahanth Ram Das Vs. Ganga Das, and Kamaluddin (deceased by L.R's.) Vs. Chhotelal (deceased by L.R's.), , to show that the rules of procedure are meant to facilitate justice and not hamper justice. According to learned counsel for the petitioners, provisions of law have to be interpreted in such a manner that they facilitate in rendering proper justice and not hamper justice.

38. With regard to the ninth ground of objection regarding amendments to the proposed scheme, learned counsel justified that the same was rightly rejected as indicated in the chairman's report. According to learned counsel the meeting was properly conducted and it did not vitiate the said rejection of amendments.

39. With regard to the tenth ground of objection that there were no proper resolutions/authorisation on behalf of the 19 corporate shareholders, learned counsel relied on the affidavits filed by the corporate shareholders which affidavits confirm that they have passed the resolutions and had authorised representative to attend the meeting and approve the scheme. Therefore, according to learned counsel for the petitioner the said objection has no basis.

40. With regard to the eleventh objection viz., that there are no proper statutory disclosures of the interest of the directors in the explanatory statement, learned counsel contended that what was required to be disclosed is the interest of the directors as per the share. Accordingly learned counsel for the petitioners had submitted that the directors have disclosed their holding in the company. In this behalf he relied on the judgment of the Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others, and the other judgment of the Supreme Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., and the third judgment that is relied upon by counsel for the petitioner is Sidhpur Mills Co. Ltd., In Re: Sidhpur Mills Co. Ltd., , wherein it is held that Clause (a) of Section 393 does not state that the interest of the friends or supporters or relatives of any of the persons mentioned in the said clause should be disclosed. According to learned counsel there is no default on the part of the petitioner in making appropriate disclosure.

41. Learned counsel for the petitioner also while dealing with the twelfth

objection that is to say that the share exchange ratio between the transferee and the transferor-companies is unfair, contended that this court cannot sit in appeal and decide as to what was fair or was not unfair and it is the commercial decision taken by the shareholders. In that behalf Shri Tulzapurkar relied on the observations of the Supreme Court in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, :

"The court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire . . . The propriety and the merits of the compromise or arrangement have to be judged by the parties who are *sui juris* with their eyes open and fully informed about the pros and cons of the "scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties."

42. According to learned counsel for the petitioner the court cannot sit in appeal over the commercial decision taken by the shareholders. According to learned counsel for the petitioner, the opponents have not produced any material before the court or any substantial reasons have been given to substantiate the reason given for contending that the share exchange ratio was unfair. He also relied on the observations of the Supreme Court in the same judgment as under (p. 835) :

"it must at once be stated that the valuation of shares is a technical and complex problem which can. be appropriately left to the consideration of experts in the field of accountancy."

43. It has also observed at page 530 as under (p. 836 of 87 Comp Cas) :

"It has also to be kept in view that which exchange ratio is better is in the realm of commercial decision of well informed equity shareholders. It is not for the court to sit in appeal over this value judgment of equity shareholders who are supposed to be men of the world and reasonable prudence who know their own benefit and interest underlying any proposed scheme . . . They thought it fit in their commercial wisdom to accept the scheme as a whole along with the exchange ratio presumably in expectation of better profits in years to come when amalgamated companies would operate and when there would be, according to the shareholders better prospects of earning greater dividends."

44. With regard to the thirteenth objection of the opponents, i.e. the transferor-company was a loss-making company, learned counsel for the petitioner has disputed the same. In any event, he contends, that even loss-making transferor-company can be merged with the healthy transferee-company in public interest and that the said objection has no relevance to this. He has also relied on the judgment of this court in *Shree Saibaba Castings Ltd.*, In re [1997] 88 Comp Cas 696. In this case, our High Court has taken a view that in a scheme of

amalgamation the transferor-company is not financially sound and in an amalgamation of the company which is sound and healthy no public interest is likely to suffer when the transferee-company agrees to discharge all the liabilities of the transferor-company.

45. Learned counsel for the petitioner has also dealt with the fourteenth objection viz., the scheme of amalgamation is contrary to public interest. According to learned counsel for the petitioner the Delhi High Court has already examined this issue and the Delhi High Court has already sanctioned the scheme after taking into consideration various parameters including public interest. In this context Shri Tulzapurkar has relied on a judgment of this court in Colgate-Palmolive and others Vs. Dr. K.V. Swaminathan and another, . In this case the court, while interpreting Section 49(3) of the Trade and Merchandise Marks Act, 1958, has held that the expression in the public interest does not entitle the Central Government to travel beyond the ambit of the Act and to take into consideration factors de hors the object of the Act and proceed to turn down the application. According to learned counsel for the petitioner the opponents have not produced any material to justify that the scheme was against public interest. Learned counsel for the petitioner also disputes that the petitioner- company had adopted some dubious policies or that they have given the loans which are against public interest. According to learned counsel for the petitioner, the Delhi High Court has already considered in detail with regard to the transferor-company and there was nothing found objectionable. And as far as transferee-company is concerned no shareholder has grievance that the company has mismanaged and therefore the opponents cannot object to the said scheme.

46. Learned counsel therefore has submitted that the amalgamation scheme is fair, reasonable and it is not against public interest and the same cannot be faulted with on any of the above grounds.

47. Learned counsel for the petitioner has contended that the instant case is within the parameters as prescribed by the Supreme Court as well as various other High Courts, the amalgamation scheme ought to be sanctioned. The objections raised by the opponents are frivolous. Shri Tulzapurkar has contended that almost 99 per cent, of the shareholders support the scheme before this court and also the said 99 per cent, shareholders hold much more than three-fourths value of the total shareholding. It is also contended that the majority have approved the said scheme who have more than three-fourths value of the shareholding. In fact, learned counsel for the petitioner has contended that all the notices have been duly served on the shareholders. He contended that as per the share exchange ratio is concerned the same has been duly approved by two well known chartered accountants by their reports. The objection with regard to public interest has no basis as the same was frivolous. Learned counsel submitted that the affidavit of Shri V.R. Barge dated June 17, 1999, mentions that the modified scheme which has been sanctioned by the Delhi High Court and in accordance with the same the petitioners are seeking sanction of the scheme.

Under the aforesaid facts and circumstances, learned counsel for the petitioner prays that the proposed scheme as modified ought to be sanctioned by this court.

48. Learned counsel for the Kamani Employees Union Shri Anand Grover has contended that the employee shareholders in their capacity as shareholders are entitled to raise all objections. According to Shri Grover even as employees they are entitled to be heard. According to Shri Grover the opponents have rights to challenge the aforesaid amalgamation scheme.

49. Shri Grover has pointed out that the petitioners have failed and neglected to produce material to establish the latest financial position by filing the latest audited accounts of both transferee and transferor-companies. According to Shri Grover, Section 391(2) of the Companies Act makes it abundantly clear that the latest financial means the latest auditors report and that the proviso is mandatory. In that behalf, Shri Grover has relied on the case of Maneck chowk and Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819, rendered by the Gujarat High Court. He also relied on another judgment of the Gujarat High Court in Navjivan Mills Co. Ltd., Kalol, In re [1972] 42 Comp Cas 265. According to learned counsel for the opponents, the purpose of disclosure as contemplated under proviso (2) to Section 391 of the Companies Act is to enable the shareholders to come to the proper conclusion with regard to the latest financial status. Shri Grover contended that the ambit of proviso to Section 391 is very wide in the sense that disclosure to the court is of material facts relating to the company and of any investigation proceedings. Shri Grover has also relied on the aforesaid judgment in Navjivan Mills Co. Ltd., Kalol, In re [1972] 42 Comp Cas 265 and contended that the said proviso to Section 391(2) is mandatory and the same will have to be adhered to strictly. According to Shri Grover the wording of the proviso to Section 391(2) is very clear which, in fact, enjoins the court not to sanction any scheme of amalgamation unless the court is satisfied with regard to the latest financial position. According to Shri Grover the final sanction of the amalgamation scheme is at the stage of final hearing of the petition and not at the stage of admission. According to him the "latest financial position" is not with regard to the date of the meeting of the shareholders or on the date of the filing of the petition. Shri Grover has also pointed out that the petitioners have deliberately not presented the latest financial position of the companies to the court though the objection has been taken repeatedly in their affidavit-in-reply as well as in arguments even then the petitioners have not chosen to disclose the latest financial position. .

50. Learned counsel for the opponents has pointed out that the appropriate written consent of the financial institutions viz. LIC, GIC and UTI was not forthcoming and in fact only when hearing started that these objections were repeatedly raised and the petitioners sought to produce an affidavit including letters purportedly stating that they have no objections to the said scheme.

51. As regards the non-compliance with the order dated October 9, 1997, with regard to the holding of the meeting of partly paid-up shareholders, learned

counsel has pointed out that no notice was published so also no application for condonation or dispensation was filed earlier. Shri Grover has also contended that the original ballot papers in respect of the meeting of the three corporate partly paid shareholders were not produced before the court even at the hearing of the petition. Shri Grover has further pointed out that at this belated stage the petitioners have filed an affidavit contending that the meeting was attended by Shri B.D. Nariman as the representative of the said three corporate partly paid-up shareholders.

52. Similarly, learned counsel for the opponents has also pointed out that the petitioner-company had not complied with the order of this court dated October 9, 1997, regarding the full paid-up shareholders. Shri Grover disputes the correctness of the affidavit of compliance with the order of October 9, 1997, regarding despatch of the individual notices, to the shareholders, of not less than twenty one days before holding the meeting. He has also pointed out that with regard to the overwriting on the date of the actual postal certificate, the overwriting is shown on October 25, 1997, whereas the postal authorities bill is dated October 27, 1997. Therefore, according to Shri Grover the postal authorities receipt shows date as October 27, 1997 and it is despatched before that i.e., October 25, 1997 and the court ought not to admit the same. Shri Grover has pointed out that the affidavit of Shri Barge dated July 8, 1999, has disclosed that the notices were ready on November 20, 1997, that were despatched on October 25, 1997. Shri Grover also brought to my notice that many of the resolutions are dated October 23, 1997, and pointed out the notices that were despatched on October 25, 1997, regarding the said meeting, and one fails to understand as to how on October 23, 1997, the shareholders were able to know that the meeting is likely to be held and the notices are likely to be despatched on October 25, 1997. According to Shri Grover very serious manipulations have been adopted on the records to justify proper compliance.

53. According to Shri Grover there is a clear non-compliance with the mandatory provisions to secure requisite three-fourths support to the scheme of amalgamation as contemplated u/s 391(2) of the Companies Act. Shri Grover also pointed out that as per rule 72 of the Companies (Court) Rules, the chairman's report must mention the number of persons who had attended the meeting. This is amply clear from Form 39 which contemplates a report wherein the number of persons who had, either in person or by proxy or by the authorised representatives, attended the meeting together with the total value of their shares which has to be specifically shown. He has also pointed out that names of the persons as per Form 40 which requires mentioning the number of persons who had attended the meeting either in person or by proxy or by their authorised representative together with their total value of shares must be disclosed.

54. Learned counsel for the opponents has also pointed out that the order of this court dated October 9, 1997, in respect of the individual notices for the meeting

to the fully paid-up shareholders and partly paid-up shareholders was not complied with. Learned counsel also submits that at this belated stage the petitioners have filed an affidavit of Mr. Vimal Mehta of Vakil and Co. to substantiate that the notices were served properly. Learned counsel also pointed out that neither the chairman's report nor the affidavit of chairman or various affidavits filed by Shri Barge or any official discloses such posting by Vakil and Co. According to learned counsel, if this was really done this ought to have been disclosed in the affidavits filed earlier in November, 1997. He has also strongly stressed that there is an obvious overwriting on the letter of Vakil and Co. with regard to the date October 25, 1997. The postal authorities have been admittedly paid only on October 27, 1997. Obviously the same could not have been despatched on October 25, 1997. He has also stressed that for the first time the affidavit of Shri T.N. Balasubramaniam dated July 8, 1999, points out that the notices were ready on 20th and that they were despatched only on October 25, 1997. Another important aspect learned counsel brought to my notice is that the shareholders had passed a resolution on October 23, 1997, itself, authorising some representatives to take part in the meeting. It is rather surprising that the notices were despatched only on October 25, 1997 and even prior thereto how most of the shareholders were aware of the meeting that was likely to be held and that they could authorise to represent in the said meeting.

55. Learned counsel also brought to my notice that the chairman's report is not in accordance with Form 39 wherein the number of persons who were proxy together with their total value of the shares ought to have been mentioned, which is not done. Learned counsel also brought to my notice that as per Rule 79, the petition also should be filed in accordance therewith mentioning clearly the number of persons who had attended in person or by proxy or by authorised representative together with their total value of the shares. According to learned counsel, the affidavits filed in this court do not disclose all the details as contemplated under the said rules as well as the said form. According to learned counsel for the opponents, Shri T.N. Balasubramaniam's affidavit dated July 8, 1999, filed after the arguments had commenced and submissions were being made tries to cover up the actual position. According to learned counsel for the opponents the total ballot slips were 1087. Actual number of voter's list there were only 309, whereas there are no details furnished as to what happened to the 788 balance persons.

56. Learned counsel for the opponents has also objected to the procedure adopted by the petitioners with regard to the passing of the two resolutions. According to learned counsel due to the faulty procedure adopted by the petitioners, a large number of ballot papers were declared invalid.

57. Learned counsel for the opponents had also pointed out that after almost three-fourths days of hearing the petitioners had produced various extracts of resolutions purportedly passed by those 19 shareholders companies in the month of October, 1997. It is clear that most of these resolutions purported to have

been passed in October, 1997, have been typed on a fresh letterhead in a fresh condition and on none of these so called extracts of the minutes which were sent to the petitioner-company, neither there is any endorsement of the inward number of the petitioner-company nor a rubber stamp of having received by the company on a particular day. Most of these documents do not even have folding anywhere, if they were sent in a cover, there will be folding.

58. It is very surprising to note that the petitioner-company dealing with a turnover of over Rs. 6 crores and having spread their business over 17 countries in the world and there are no inward or outward stamps on the said letters and the affidavit is being filed after the hearing had commenced, by the petitioners, dated July 8, 1999, by Mr. M.N. Joglekar, Senior Manager (Administration) mentioning therein that all the mail received by their office by post, courier or some private persons is kept in a box of a particular department by a clerk who receives the letters for individual departments. He further states that various mail is delivered by various departments to the despatch Section for the further delivery to the respective destinations. Paragraph 6 of the said affidavit admittedly makes it clear that due to the multiplicity of mail, the volume of all the mail and the centres to whom it is to be served being so large, the designated clerk only sorts out the mail and puts it into various boxes. Several letters, documents, parcels are also sent to the concerned departments by concerned parties/clients without their being routed through the despatch section. It is therefore not possible nor has it been the practice of the petitioner-company at any point of time for recording of all the incoming and outgoing mail. Further paragraph 8 of the said affidavit states that the company does not have any centralised system for recording the incoming and outgoing mail which is a decision taken by the management considering the volume of the mail and the financial cost involved in relation thereto. The above affidavit discloses that this company with a turnover of several of crores and having business spread not only in India but all over the world in almost 17 countries, does not have any record of letters being despatched or any record of receipt of letters. This affidavit is very surprising. Thereafter the opponents through one Mr. D. Thankappan has filed an affidavit on behalf of the objectors dated July 22, 1999, dealing with the aforesaid affidavit of Mr. Joglekar dated July 8, 1999. He has stated that after reading the copy of the affidavit dated July 8, 1999, he had personally taken inspection of the registers and other mail in the office of KEC on July 14, 1999. According to the said affidavit which clearly mentions that the petitioner has a centralised inward/outward Section which receives a large amount of mail through post, courier, speed-post and by hand delivery. It further makes it clear that when the registered office was at Kamani Chambers, the centralised inward register was maintained by Mr. A.B. Shinde, a clerk in the Administration Department there. Now, Satish Biwankar is the concerned clerk who accepts the inward letters and affixes a stamp on the letter and enters the same in a register maintained by him. He has annexed copies of such letters. The said affidavit further discloses that after the inward clerk affixes the inward

stamp along with the date on the incoming letter, the same is kept in a box and he informs the respective department to collect the mail and accordingly the respective department receives the same. The inward stamp is also affixed on the envelope. He has also annexed a copy of such an envelope. The same is the case with the outward mail. I have perused the copy of the inward register which clearly mentions the inward number, date, name from whom received, subject etc. I have also perused a copy of the letter by the petitioner-company from Bank of India which bears the stamp which mentions the seal of the company, date and for whom that letter has been received.

59. Learned counsel for the opponents has submitted that all these purported resolutions of 19 corporate shareholders are concocted and fabricated. It is also pertinent to note that after the said extracts of the resolutions were produced in this court in the midst of hearing when it was pointed that most of them all appear fresh and newly prepared, subsequent thereto 19 affidavits have been filed of the corporate shareholders contending that the company had already passed resolutions authorising the representatives to attend the said meeting in that behalf. It is also mentioned that the company had thereafter held meetings in the months of April and May-June, 1999, confirming and ratifying earlier decisions of appointing representatives to attend the meeting and also vote in favour of the amalgamation scheme. All these affidavits refer to the earlier resolutions of the corporate shareholders and also those attended the same meeting on behalf of the corporate shareholders. This affidavit discloses that suddenly in the months of April-May-June, 1999, these companies had decided to approve and ratify the decision of appointing representatives for obtaining voting in favour of amalgamation scheme in the year 1997.

60. Shri Grover also pointed out that admittedly there was no corporate resolution authorising the representatives to attend were available at the meeting. Shri Grover also pointed out the provisions of Rule 70(2) of the Court Rules which contemplate that in the case of corporate shareholders such resolutions as well as proxies have to be lodged with the registered office not later than 48 hours before the meeting. Shri Grover also pointed out that neither at the meeting nor even subsequent thereto any such resolutions were produced. He contended that for the first time when the hearing started, after repeated questioning the purported resolutions which were also prepared on fresh letterheads without any inward or rubber stamp etc., thereupon, the affidavits of 19 corporate shareholders purportedly claiming that they had ratified such authority and also ratifying the voting in favour such amalgamation scheme were produced.

61. Shri Grover had also raised an objection that even the petitioners did not disclose special interests of directors or the effect of the amalgamation on those interests in the explanatory statement to shareholders of the petitioners as contemplated u/s 393(1)(a) of the Companies Act. According to learned counsel, the provisions of Section 393(1)(a) make it abundantly clear that all the directors

whether in their capacity as members or creditors of the company or otherwise therein, their interests ought to be disclosed. According to learned counsel, the petitioner-company did not disclose the inter se cross holdings of the transferor and transferee-company. Learned counsel has also contended that the transferee-company is acting as a contractor for the transferor-company and that several of the creditors of the petitioner-company include companies in which the directors of the petitioner-company are interested, the names and particulars of the trustees of the debenture holders of the debentures issued by the petitioner-company are not disclosed. Shri Grover has also raised an issue that the petitioner-company has not disclosed the effect of the amalgamation on the interest of the directors.

62. According to learned counsel for the opponent, the directors ought to have disclosed their interest as directors as well as in their capacity as creditors. Shri Grover in that behalf had relied on the judgment of the Gujarat High Court in *In Re: Sidhpur Mills Co. Ltd.*, wherein the Gujarat High Court has held as under (p. 314) :

"Moreover, the expression "whether in their capacity as such or as members or creditors of the company or otherwise" does not fit in with the contention of the learned Solicitor General. That expression makes it clear that the interests which are particularly to be mentioned by the concerned persons are not interests which they hold or possess as such concerned persons in the company, but also "or otherwise". This is a clear indication of the mind of the Legislature that the interests which a director etc., has to mention in the statement is not only the interests which he holds or possesses as such director, but all the interests which he holds or possesses in any other capacity. In my judgment, the Section is cast in the widest possible terms. It states in express terms that the interests which the director possesses not only as a member or a creditor but any other interests which he possesses in any other capacity has got to be mentioned in the statement under Clause (a). In other words, if the director possesses any interest of whatever kind in the scheme, then, that interest must be stated in the statement accompanying the scheme."

63. Learned counsel for the opponents also sought to argue that the share exchange ratio is unfair, unjust and unreasonable and against the interests of KEC, its shareholders, employees, creditors and the interest of the public. In support of the above contention, it was contended that the report of the valuers was not sufficient to indicate the fairness of the share exchange ratio. According to learned counsel both the reports could not disclose that the concerned persons have applied their mind properly.

64. Learned counsel for the opponents had also objected to the scheme on the ground that there is no disclosure to the shareholders that the RPG-T was a loss-making concern.

65. Lastly learned counsel for the opponents had pointed out that the aforesaid

amalgamation scheme was against public interest. According to learned counsel, the court ought to scrutinise the scheme whether the same is in public interest or not. Under the aforesaid facts and circumstances learned counsel for the opponents has strongly contended that the petitioner-company has not complied with the mandatory requirements under Sections 391 and 394 of the Companies Act and also that the scheme was unfair, unjust and unreasonable. It is also contended that the majority of the shareholders appear to be acting in a mala fide manner and against the interests of the minority.

66. Learned counsel appearing, for E. I. D. Parry (India) Ltd., had relied on the affidavit of Shri S. Shamsuddin dated July 14, 1999, that the financial position of the petitioner-company was steadily deteriorating. As set out in para. 9 of the said affidavit, the above position was as on March 31, 1998. It is also mentioned in the said affidavit that the above position was as on March 31, 1998 and the position regarding March 31, 1999, was not known. Learned counsel has referred to eight points in para. 9 of the said affidavit which read as under :

"(i) Market value of quoted investment as on March 31, 1998, was only Rs. 764 lakhs against the book value of Rs. 3,173 lakhs showing a deep erosion. The position regarding March 31, 1999, is yet to be ascertained.

(ii) KEC has invested in its subsidiary Bespoke Finvest Ltd. a large amount as investment of Rs. 5,413 lakhs and the status of the subsidiary is :

(a) Bespoke Finvest Ltd.--Total investment amounts to Rs. 5,955 lakhs as against the market value of quoted investment as on March 31, 1999, of Rs. 3, 191 lakhs.

(b) Position regarding March, 1999 and current period also require review.

(c) This subsidiary practically has no reserves and surplus as on March 31, 1998. It has a nominal positive account balance in profit and loss account of Rs. 10 lakhs only also the same miscellaneous expenditure still to be written off amounts to Rs. 25 lakhs.

(iii) KEC has also given an unsecured loan to the subsidiary amounting to Rs. 738 lakhs. The recovery of this money is also likely to be difficult.

(iv) Guarantees and Counter Guarantees given by KEC amounts to Rs. 16,605 lakhs.

(v) As Contingent Liabilities KEC has disclosed the figure of Rs. 764 lakhs as claims not acknowledged.

(vi) Apart from the above disputed amounts contingent liabilities for various I. T. appeals amounts to Rs. 342 lakhs.

(vii) Sundry Debtors and Loans and Advances include Rs. 586 lakhs and Rs. 131 lakhs respectively which KEC itself states that they are old outstandings. However no provision for the same appears to have been made.

(viii) KEC as on March 31, 1998, has Deferred Revenue Expenditure to be

adjusted of Rs. 4163 lakhs. This relates to voluntary retirement scheme, voluntary separation schemes, pre-operative expenses relating to overseas projects. These amounts require absorption in the account. If these are absorbed the profitability of KEC will be under strain."

67. Learned counsel appearing for the E. I. D. Parry (India) Ltd. who represents the interests of creditors of RPG-T has opposed this grant of amalgamation on the ground that the financial position is steadily, deteriorating and as such the creditors will be drastically affected if the amalgamation was to be granted. It was also mentioned in the said affidavit that on a perusal of the petitioner's audited balance-sheet dated March 31, 1998, the position that emerges is that the profit for the year has come down from Rs. 4,686 lakhs to Rs. 2,655 lakhs. Similarly the amount of dividend that is proposed has also been reduced from Rs. 1,274 lakhs to Rs. 1,103 lakhs. All these figures indicate that the profitability of the petitioner is under a severe threat. Similarly the balance-sheet also reveals that the liability of the petitioner had increased from Rs. 29,991 lakhs to Rs. 40,840 lakhs as mentioned in the said affidavit. In the said affidavit it is also disclosed that various suits are filed against RPG-T for recovery. In various suits decrees have been obtained by the said creditors. If the company is to be amalgamated their rights will be frustrated.

68. Learned counsel for the petitioner-company had also referred to the affidavit of Shri T.N. Balasubramaniam dated July 22, 1999, wherein the xerox copies of letters dated July 12, 1999, of Life Insurance Corporation of India, dated July 16, 1999, of General Insurance Corporation of India and Unit Trust of India are annexed. These letters also admittedly appear to have come on record since repeatedly queries were raised whether the three financial institutions viz., LIC, GIC and UTI have granted the approval for such an amalgamation. Shri Tulzapurkar, learned counsel also referred to the affidavit of Shri Balasubramaniam dated July 8, 1999, which mentions that the notices regarding the meeting with regard to the amalgamation scheme were ready on October 20, 1997 and the same were issued to all the shareholders. Intimation was also given to the Corporate shareholders pursuant to which some corporate shareholders had passed resolution authorising their representatives to attend the meeting to be held on November 17, 1997. According to the said affidavit, these resolutions had duly been received by the company prior to 48 hours holding of the said meeting :

69. Considering all the above submissions, the following issues arise for my consideration :

(a) Whether the opponent union Kamani Employees Union has the right to object to the scheme of amalgamation ?

(b) Whether the petitioner-company ought to disclose the latest financial position that is to say the latest financial position at the time of grant of sanction viz. at the time of hearing of the petition ?

- (c) Whether the petitioner-company has disclosed all the material particulars specifically the interest of their directors and their other interests ?
- (d) Whether the petitioner-company had obtained prior written consent of the three financial institutions, viz., LIC, UTI and GIC ?
- (e) Whether proper notices were given to all the partly paid shareholders ?
- (f) Whether proper individual notices were given to all the fully paid up shareholders ?
- (g) Whether the petitioners have been able to establish that the amalgamation scheme was duly approved by the 3/4ths majority as contemplated u/s 391(2) of the Companies Act ?
- (h) Whether the petitioner-company proves that the proposed amendment resolutions were properly voted ?
- (i) Whether the petitioner-company has been able to establish that the 19 corporate shareholders had validly authorised their representatives prior to the meeting and also that they had duly authorised them to approve the scheme on behalf of the said 19 corporate shareholders ?
- (j) Whether the petitioner-company proves that the share exchange ratio was fair and just ?
- (k) Whether the amalgamation scheme proposed was fair, reasonable, just and fair ?

70. With regard to the first issue the opponents viz., Kamani Employees Union has a locus to oppose the amalgamation, it is pertinent to note that a large number of employees are also shareholders in the petitioner-company, hence even learned counsel for the company has categorically conceded that they as shareholders are entitled to object.

71. As far as the employees are concerned they have a right to object with regard to an amalgamation as the employees are the backbone of the petitioner-company and their interests ought to be protected and in fact it has been held that even in a company winding up petition, employees are entitled to be heard since company if wound up, the employees interest should be directly affected. Applying the same analogy if a particular amalgamation scheme were to be prejudicially affecting the employees, employees' interest ought to be protected. In fact, this court in the judgment *The Industrial Credit and Investment Corporation of India Limited Vs. Financial and Management Services Ltd. and others*, , has observed that a wider interpretation will have to be given with regard to the "voters". In fact, in this context the Supreme Court has held in *National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others*, , has held that the workers should be heard in the proceedings for winding up as they will be vitally affected. Adopting the same analogy, as nowadays, amalgamation schemes are resorted to very frequently, an employee ought to

have locus standi since amalgamation scheme directly affects his rights. If any amalgamation scheme were to prejudicially affect the rights of employees, they have a right to oppose the same. On this count, I hold that the opponents union have a locus standi to object to the amalgamation scheme.

72. The next issue is with regard to non-disclosure of latest financial position. The proviso to Section 391(2) of the Companies Act makes it abundantly clear that no order of sanctioning any compromise or arrangement shall be made by the court unless the court is satisfied with regard to the latest financial position. Admittedly in this case the petitioner has filed an audited financial report as on March 31, 1997 and not subsequent thereto. Learned counsel for the petitioner sought to argue that what is contemplated as latest financial position is as at the time of the meeting and also at the time of filing of the present petition. It would be rather strange in the sense that if the petition were to be heard almost after two years and in that event to say that the petitioner need not disclose the latest financial position would render the whole objective absurd. If one were to look at the provisions regarding amalgamation scheme the time appears to be the essence in approval of such schemes. In fact, within the time prescribed, the meeting has to be held, and within 15 days the chairman has to file his report in this court and within a week thereof the petition has to be presented in this court so as to enable the court to consider amalgamation scheme at the earliest. In a given case the petition may come up for hearing after three or four years and to say that the petitioner need not disclose the latest financial position of the company would render the entire objective meaningless. It is pertinent to note that the words used "court must be satisfied with regard to the latest financial position of the company". In this context as mentioned earlier, the judgment of the Delhi High Court in *Bhagwan Singh and Sons P. Ltd. v. Kalawati* [1986] 60 Comp Cas 94, the meaning of words "latest financial position" has categorically been held as the financial position should be when the matter is due for sanction. Obviously, it means at the time of final hearing of the petition and this requirement is statutory since the Supreme Court in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, , has categorically held that all the statutory requirements have to be strictly complied with before sanctioning amalgamation scheme. Therefore what is required is the latest financial position at the time of final hearing of the application, i.e., at the time of sanctioning.

73. Our High Court in *Bharat Synthetics Ltd. v. Bank of India* [1995] 82 Comp Cas 437, has categorically held that the petitioners have not placed before the court, its authenticated latest financial position and deprecated the manner in which the company had not cared to do the same. In the present case the petitioners have failed to place before the court, the latest financial position of the company which is a mandatory statutory requirement. Therefore, I hold that the petitioner-company has failed to place before the court the "latest financial position" which is a mandatory requirement u/s 392 of the Companies Act.

74. The issue with regard to the prior approval from the financial institutions, at

the belated stage the petitioners have filed an affidavit of Mr. T.N. Balasubramaniam dated July 22/1999, enclosing therewith xerox copies of the letters from the financial institutions, viz., LIC GIC and UTI approving the amalgamation scheme. In view thereof the said objection cannot be sustained that is to say the financial institutions have not given their approval/consent for the amalgamation scheme.

75. With regard to the issue whether the petitioner-company had complied with the requirement of service of proper notices on the partly paid-up shareholders, it is an admitted position that the petitioner-company had not released any public advertisement inviting the notices of partly paid-up shareholders. As rightly pointed out by learned counsel for the opponent Shri Goenka who has been the chairman of the said meeting had not filed any report or affidavit in this court explaining properly regarding the publication of the notice of partly paid-up shareholders. Even the affidavit of Shri B.D, Nariman authorised representative of the three corporate companies does not disclose the resolutions authorising him to vote on their behalf. Apparently even these resolutions were not available and now what is sought to be done is subsequently ratifying the acts of Shri Nariman. I am not satisfied with the explanations tendered.

76. With regard to the issue of non-compliance of sending of individual notices to all the fully paid-up shareholders, it has been contended on behalf of the opponents opposing, that the aforesaid 19 corporate shareholders had not duly authorised any representative to attend on behalf of them and no such resolutions were available for inspection as contemplated under Rule 70(2) of the Companies (Court) Rules and the same ought to have been made available 48 hours before the said meeting dated November 17, 1997. In fact, the opponent has been objecting and contending that the so called 19 corporate shareholders had not validly and properly authorised on their behalf to cast their votes. After the matter was argued for quite some time, quite a few days thereafter a file was produced before this court containing the purported resolutions of these 19 corporate shareholders. A fair perusal of these resolutions clearly indicates that most of them are typed on fresh letterheads without any reference numbers. Another important aspect is that the resolutions have come from various parts of India to the petitioner-company, strangely most of the so called resolutions bear no covering letters to the resolutions, nor any inward registered number, stamp etc. is being given to them. Prima facie, most of them appear to have been prepared subsequently. When questioned as to the authenticity of these purported resolutions, the petitioner-company after a couple of weeks filed affidavits of these 19 corporate shareholders mentioning therein that those resolutions were passed in 1997 and also subsequent thereto in the month of April-May 1999, the said company has held the meetings of the board of directors which confirmed and ratified the decision of approving the proposed scheme of amalgamation. This is to also rather strange that there is no such ratification for almost two years and if this were to be really true then the company could have very well filed this affidavit before the matter commenced

for hearing. One also wonders as to what was the need of such resolutions of ratifications, which are not normally done, when there are proper resolutions giving authority to take part-in the meeting.

77. Again when repeatedly questioned as to why there are no inward register numbers on most of these letters purported to be the resolutions, the petitioner-company filed an affidavit of Mr. M.N. Joglekar on July 8, 1999. Shri Joglekar has taken a very bold stand stating that the petitioner-company though having business connections in over 17 countries in the world with a turnover of several crores, they do not have any inward or outward despatch Section and they only have a despatch Section which keeps all mail received by the company in different boxes pertaining to the company. When questioned as to how the despatch clerk would know as to which letter pertains to whom, learned counsel for the petitioner was unable to explain. Shri Joglekar took a bold stand stating in para. 8 of the affidavit that the company does not have a centralised system for recording the incoming and outgoing mail which is a decision taken by the management considering the volume of the mail and the financial cost involved in relation thereto. This is a very astonishing and shocking state of affairs, Luckily an employee working for the union Mr. D. Thankappan on July 22, 1999, filed an affidavit explaining in detail as to the procedure of the inward and outward section. He has explained as to how an inward and outward stamp is affixed even on the envelopes as well as on the letters and how the inward and outward registers are maintained etc. He has also annexed to the said affidavit the documents received with the stamp of the petitioners, mentioning the date and department stamp. From the aforesaid documentary evidence and all the records, it is clear that most of these so called resolutions of 19 corporate shareholders are ex facie concocted and fabricated as set out hereinabove. It is pertinent to note that 19 corporate shareholders hold almost 98-99 per cent, of the share value of the company. If this were to be state of affairs, obviously the meeting held on November 17, 1997, was a sham and obviously there was no question of any valid approval being granted. I am fully satisfied that most of the purported resolutions on behalf of the 19 corporate shareholders which have now been produced are totally concocted and fabricated and the same cannot relied upon. Even the affidavit of Shri Joglekar is full of falsehood as it is clearly borne out that the petitioner-company still has an inward and outward Section with appropriate inward and outward registers, from the affidavit of Shri Thankappan.

78. The next objection is whether there is requisite majority to support the scheme of amalgamation. The chairman's report unfortunately is not in accordance with the format prescribed as well as in accordance with the rules. Shri Grover also pointed out that from the number of attendance slips and the number of the votes cast, there is no explanation whatsoever as to why such a large number of persons were not present at the time of voting. There are a number of discrepancies in the voting procedure and the manner in which the voting and counting had taken place.

79. With regard to the improper passing of the resolutions it is an admitted position that only one vote was cast by the respective representatives on behalf of 19 shareholders, and these authorisations are prima facie fabricated and concocted as stated hereinabove.

80. With reference to the objections of non-disclosure of any interest of directors as mentioned hereinabove, as held in the judgment of the court in *In Re: Sidhpur Mills Co. Ltd.*, , the interests of directors ought to have been disclosed that is to say the shareholder is entitled to know as to the director's direct and indirect interest; if that is not to be so, the Legislature would not have specifically provided the word "otherwise" in the proviso to Section 391(1)(a) of the Companies Act, which makes it abundantly clear that such a disclosure ought to have been made when the said scheme of amalgamation was being considered, hence the said objection is upheld.

81. With reference to objection that the share exchange ratio was unfair and unreasonable etc. I had perused the reports of the chartered accountants. There is no case made out that the exchange ratio is unfair and unjust. In any event it is not for the court at all to decide as to whether the share exchange ratio was unfair and unjust unless there is something patently wrong to hold otherwise, this ought to be left to the commercial wisdom of the shareholders. This objection cannot be sustained.

82. With reference to the objection that the amalgamation scheme was not in public interest, there is no clear and concrete material to hold that the same was against public interest. Only the manner in which the meeting was held and the manner in which the purported approval on behalf of the 19 corporate shareholders was obtained were apparently bogus and concocted, holding of the very meeting on November 17, 1997 and the approval thereon cannot be sustained. In view of the aforesaid facts and circumstances as set out hereinabove, I am not inclined to approve the scheme of amalgamation as sought by the petitioner-company. The petition stands dismissed with costs.

83. Prothonotary and senior master, High Court, Bombay is hereby directed to keep the file containing those purported resolutions of 19 corporate shareholders authorising representatives to attend the meeting, in a sealed cover, under his careful custody.

84. The prothonotary and senior master is hereby directed to issue the show-cause notices to the following persons :

(A) Shri Harsh Vardhan Goenka, Chairman of KEC International Ltd.

(B) Shri T.N. Balsubramaniam, Executive Director of KEC International Ltd.

(C) Shri M.N. Joglekar, Senior Manager (Administration) of KEC International Ltd.

to show cause as to why the criminal prosecution should not be launched against them for the offences of fabricating false evidence and giving false evidence

punishable u/s 193 of the Indian Penal Code, 1860, by fabricating and concocting various documents purportedly showing that 19 corporate shareholders had authorised their representatives to appear to attend the scheduled meeting on November 17, 1997.

85. Personal assistant to issue an ordinary copy of the order to the parties.