IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2743 OF 2014

63, Moons Technologies Limited
(formerly Financial Technologies
(India) Ltd. & Ors. .. Petitioners

Vs.

The Union of India & Ors. .. Respondents

WITH

WRIT PETITION NOS. 2985 OF 2014, 387 OF 2015, 1785 OF 2016 AND 1922 OF 2016

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63, Moons Technologies Limited
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Vs.

The Union of India & Ors. .. Respondents

WITH
WRIT PETITION NO. 2985 OF 2014

Ravi Sheth & Anr. .. Petitioners

Vs.

The Union of India & Ors. .. Respondents

WITH
WRIT PETITION NO. 387 OF 2015

Jignesh Shah & Ors. .. Petitioners

Vs.

The Union of India & Ors. .. Respondents

WITH
WRIT PETITION NO. 1785 OF 2016

Standard Chartered Bank, UK .. Petitioners

Vs.

The Union of India & Ors. .. Respondents

WITH
WRIT PETITION NO. 1922 OF 2016

Shareholders Association of
Financial Technology India
Welfare Association (SHAFT) & Anr. .. Petitioners

Vs.

The Union of India & Ors. .. Respondents

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Mr. Harish Salve and Mr. Janak Dwarkadas – Senior Advocates with Mr. Sharan Jagtiani, Mr. Nooruddin Dhilla, Mr. Kunal Dwarkadas, Ms Shaneen Parikh, Ms Namita Shetty and Mr. Mohit Advani i/b. M/s. Cyril Amarchand Mangaldas for Petitioners in WP No. 2743 of 2014.

Mr. Rohan Shah with Mr. Naresh Thacker, Mr. Dinesh Pednekar, Ms A. A. Mujawar and Mr. Srisabari Rajan i/b. M/s. Economic Laws Practice for Petitioners in WP No. 2985 of 2014.

Mr. S. N. Mookherjee and Mr. Vineet Naik – Senior Advocates with Mr. Mr. Arvind Lakhawat and Mr. Nooruddin Dhilla i/b. M/s. Cyril Amarchand Mangaldas for Petitioners in WP No. 387 of 2015.

Mr. Navroz Seervai – Senior Advocate with Mr. Suraj Iyer and Debashree Mandpe i/b. M/s. Ganesh & Co. for Petitioners in WP No. 1922 of 2016.

Ms Rajani Iyer – Senior Advocate and Mr. Subhrata Chakraborty i/b. Juris Corp for Petitioner in WP 1785 of 2016 and for Respondent Nos. 7, 8, 9, 10 and 11 in WP No. 2743 of 2014.
Mr. D. J. Khambata – Senior Advocate with Mr. J. P. Sen – Senior Advocate, Mr. Aditya Mehta, Mr. Pheroze Mehta, Ms Devika Deshmukh Ms Rashna Dastur, Ms Sharmila S. Deshmukh, Ms Yugandhara Khanwilkar, Ms Namrata Jani, Mr. Parag Vyas, Mr. G. R. Sharma and D. P. Singh i/b Mr. Jay Bhatia and Mr. Dushyant Kumar for Respondent No.1 - Union of India in all the matters.

Mr. Iqbal Chagla and Mr. Shiraz Rustomjee – Senior Advocates with Mr. Mihir Mody, Mr. Nishant Upadhyay, Mr. Nirav Parmar and Mr. Jayesh Ashar i/b. M/s. K. Ashar & Co. for SEBI.

Mr. Aspi Chinoy and Mr. S. U. Kamdar – Senior Advocates with Mr. Ameet Naik and Mr. Abhishek Kale i/b. M/s. Naik Naik & Associates for Respondent No. 3 in WP No. 2743 of 2014 and for Respondent No. 2 in WP No. 1785 of 2016 and for Respondent No. 2 in WP No. 1922 of 2016.

Mr. Zubin Behramkamdin with Mr. Murari Madekar i/b. Madekar & Co. for the intervening employees in WP 2743 of 2014.

Ms Namrata Vinod i/b. M/s. Federal & Rashmikant for Intervenors (Modern India Ltd. & Ors.)
Mr. M. P. S. Rao - Senior Advocate with Mr. Sandeep Parikh, Ms Bijal Mehta i/b. Deven Dwarkadas & Partners for Respondent No. 6 (NAARA) in WP No. 2743 of 2014.

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Mr. Gaurav Joshi – Senior Advocate with Mr. Piyush Raheja, Ms Tanvi Gandhi and Mr. Nupur Desai i/b. M/s. Markand Gandhi & Co. for Respondent No.4 in WP No. 2743 of 2014.

CORAM: DR. MANJULA CHELLUR, CJ. &
M.S. SONAK, J.

DATE OF RESERVING
THE JUDGMENT : 24 OCTOBER 2017

DATE OF PRONOUNCING
THE JUDGMENT : 04 DECEMBER2017

JUDGMENT : *(PER M.S. SONAK, J.)*

ABOUT THE PETITIONS AND THE PARTIES:

1] The main challenge in all these petitions is to the final amalgamation order dated 12th February 2016 (impugned order) made by the Central Government under Section 396 of the Companies Act, 1956 (Companies Act), amalgamating the National Spot Exchange Limited (NSEL) and 63 Moons Technologies Limited, formerly known as Financial Technologies (India) Limited (FTIL).

2] The lead petition in this batch is Writ Petition No. 2743 of 2014 instituted by FTIL and its 3 shareholders. Jignesh Shah, who, directly or indirectly has stake of almost 46% in FTIL and who is also the Vice Chairman of NSEL and some other promoters/shareholders of FTIL have instituted Writ Petition Nos. 387 of 2015 and 2985 of 2014. The shareholders' association of FTIL (SHAFT) purporting to represent the retail shareholders of FTIL has instituted Writ Petition No. 1922 of 2016. The Standard

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Chartered Bank, an unsecured creditor to FTIL has instituted Writ Petition No. 1785 of 2016. The Syndicate Bank, the Union Bank of India and the DBS Bank Ltd., unsecured creditors to FTIL had instituted Writ Petition Nos. 793 of 2017, 790 of 2017 and 35 of 2017. However, these petitions, have since been withdrawn unconditionally on 24th July 2017. NSEL and some employees of FTIL, as respondents/intervenors have supported the petitioners' challenge to the impugned order.

3] The Central Government, the Securities and Exchange Board of India (SEBI) formerly Forward Markets Commission (FMC) and some associations representing the interest of investors, who claim to have lost an amount of Rs.5600 crores by trading on the platform provided by NSEL, have defended the impugned order.

BRIEF INTRODUCTION TO SUBJECT MATTER

4] FTIL is a Public Limited and listed company which holds 99.9998% shareholding in NSEL. Based upon certain representations held out, NSEL, vide notification dated 5th June 2007, secured conditional exemption from the applicability of the Forward Contracts (Regulation) Act, 1952 (FCRA). The exemption was in respect of contracts of one day's duration for sale and purchase of commodities traded on the spot exchange established by NSEL. The conditions, *inter alia,* placed an absolute bar on *short sales* and stipulated that all outstanding positions at the end of the day, must result in delivery of commodities.

5] In 2009 or thereabouts, NSEL offered contracts with long term settlement periods including T+18, T+25 and T+36, where,

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"*T*" represents the trade day and the numbers 18, 25 and 36 represent the period within which the deliveries of commodities will be completed and the transactions squared off. Further, in 2009 itself, NSEL offered *paired contracts*, comprising short term buy contract and a long term sell contract, i.e., T+2 and T+25. In some instances assured interest returns were offered. By the year 2013, 99% of the turnover of the spot exchange comprised *paired contracts,* almost unconnected with genuine spot transactions in commodities. All this was, at least *prima facie,* in breach of the conditions subject to which NSEL had been granted exemption from the applicability of FCRA.

6] In 2012, the Regulatory Authorities, including FMC issued notices to NSEL to explain its position. Since the explanation was not found to be satisfactory, NSEL on 12th July 2013, was directed to furnish undertakings that no further/fresh contracts would be launched by exchange until further instructions and all existing contracts would be settled on the due dates. NSEL did furnish undertakings on 22nd July 2013, though not in the precise terms in which they were sought. On 31st July 2013, however, NSEL, notified its members that trading in all contracts (except E-series) stood suspended until further notice. As a result, all the trading/activities at the NSEL exchange, came to a grinding halt on 31st July 2013.

7] As on the said date, around 24 identified commodity sellers who were due and payable an amount estimated at Rs.5600 crores to around 13000 commodity purchasers (investors), defaulted in making payments. NSEL, which had otherwise held itself out as a counter party for such payments, backed out claiming that the

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guarantee was only in respect of certain specified commodities under its bye-laws and since no commodities had in fact been specified, NSEL was not liable. The settlement guarantee fund, which, according to NSEL, was represented as having Rs.738.55 crores as on 1st August 2013, was found to have hardly Rs.62 crores as on 4th August 2013. Above all, though, transactions on the exchange were to result in actual deliveries of commodities, it was found that there were no commodities or in any case, there were no adequate commodities in the warehouses owned and controlled by NSEL, for effecting such deliveries. This was despite the fact that NSEL had repeatedly held out that all the transactions were duly backed by the commodities duly checked, verified and deposited in such warehouses. As a result of all this, over 13000 investors, with claims of over 5600 crores, neither received the amounts due to them from the defaulters, from the settlement guarantee fund nor were there any commodities in the warehouses owned and controlled by NSEL for taking any deliveries. The entire operations at the spot exchange completely collapsed and over 13000 investors with claims of over Rs.5600 crores, were left in a complete lurch.

8] Reacting to the unprecedented crisis, the FMC ordered forensic audit and approved the names of *Grant Thornton* and M/s. SGS India Pvt. Ltd. as proposed by NSEL itself, to undertake audit. The audit reports, indicated serious breaches in operations. The Central Government ordered inspection of books and accounts of both NSEL and FTIL under Section 209A. The Economic Offences Wing (EOW) registered cases against the directors, key personnel of NSEL, FTIL and some of the defaulters under the Maharashtra Protection of Interests of Depositors (in Financial

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Establishments) Act, 1999 (MPID Act).

9] The FMC, after issuance of show cause notice, made an order dated 17th December 2013 declaring FTIL and certain key personnel to be *not fit and proper* to hold more than 2% of the paid up equity capital of Multi Commodities Exchanges (MCXS) and other exchanges. This was challenged by instituting Writ Petition No. 337 of 2014, which came to be admitted. However, by order dated 28th February 2014, interim relief was declined. The special leave petition against the order dated 28th February 2014, was dismissed as withdrawn.

10] Section 396 of the Companies Act empowers the Central Government to order compulsory amalgamation of two or more companies where it is satisfied that it is *essential in public interest* to do so. No order can be made under this section unless a copy of the proposed order has been sent in draft to each of the companies concerned; the Central Government or the prescribed authority has determined whether every member or creditor (including the debenture holder) of each of the companies before amalgamation shall have, as nearly as may be, the same interest in or the rights against the company resulting from the amalgamation as he had in the company of which he was originally a member or a creditor; and to the extent to which the interest or rights of such member or creditor in or against the resultant company are less than his rights or interests in the original company, compensation is assessed as payable by the resultant company; the time for preferring an appeal or where any such appeal has been preferred, has been finally disposed of; and the Central Government has considered and made such modifications, if any, in the draft order as may

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seem to it desirable in the light of any suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or from any class of creditors thereof. The copies of every order under Section 396 shall, as soon as may be after it has been made, be laid before both Houses of Parliament.

11] The Central Government proposed action under Section 396 to amalgamate NSEL with FTIL and sent the proposed order dated 21st October 2014 (in draft) to the companies concerned as required under Section 396 (4) (a) . FTIL instituted Writ Petition No. 2743 of 2014 to question the draft order dated 21st October 2014 and *status quo* was made order therein. On 4th February 2015, the *status quo* order was vacated and the Central Government was permitted to make such orders in accordance with law as it deems fit. Some directions were also issued to afford opportunity of hearing to the affected parties and it was clarified that if any adverse order is made, the same was not to be given effect for a period of two weeks from the date of communication.

12] The Central Government, on 1st April 2015 made an assessment order in terms of Section 396 (3). Since no appeals were instituted against the same, the Central Government, proceeded to make the impugned order amalgamating NSEL and FTIL. The petitioners, in all these petitions, have challenged this impugned order on various grounds.

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SUBMISSIONS ON BEHALF OF FTIL, JIGNESH SHAH, RAVI SHETH, SHAFT , STANDARD CHARTERED BANK, AND INTERVENOR

13] Mr. Harish Salve, the learned Senior Advocate for the FTIL and most of the other learned counsel for the petitioners and intervenors, submit that the impugned order is in gross breach of the principles of natural justice and fair play for at least four reasons. Firstly, no opportunity of personal hearing was granted to any of the affected parties except FTIL and NSEL, despite specific directions issued by this Court in its order dated 4th February 2015. Secondly, the Central Government has not even properly considered the objections and suggestions made by the affected parties and such non-consideration constitutes breach of the principles of natural justice and fair play. Thirdly, the Central Government has relied upon adverse material in the form of proposals *inter alia* from FMC, without granting the affected parties any opportunity to explain why such proposals were flawed. Fourthly, they submit that there is a variation between the grounds stated in the draft order and the final order. They submit that considering the drastic nature of the impugned order, prejudice is inherent, particularly to NSEL whose corporate existence stands wiped out and to the shareholders of FTIL the economic value of whose shares, stands drastically diminished. They submit that any action which visits the parties with such serious civil consequences, if taken in violation of principle of natural justice and fair play, is a nullity and must be declared as such. They rely on ***Swadeshi Cotton Mills vs. Union of India[1], Nawabkhan Abbaskhan vs. State of Gujarat[2], Yashwant Gajanan Joshi & Ors. vs.***

1 (1981) 1 SCC 664
2 1974 (2) SCC 121

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The Hindustan Petroleum Corporation Ltd. & Anr.[3] and ***State of Orrisa vs. Binapani Dei***[4]**,** in support of such propositions**.**

14] Mr. Salve and most of the other learned counsel for the petitioners and intervenors submit that Section 396, upon proper construction neither contemplates nor permits amalgamation of healthy company with an unhealthy company. They submit that this is clear from reference to Section 396(3) which mandates the retention of shareholders and creditors interest in or rights against the resultant company as held in or against the original companies. This is possible only if the amalgamation involves two or more healthy companies. Mr. Salve submits that if power to amalgamate under Section 396 is to be used to mulct the members or creditors of FTIL having net worth of Rs.2800 crores with NSEL having putative liability of Rs.5600 crores, then the resultant company will never be in a position to compensate members or creditors of FTIL, even though, their interests in or rights against the original companies might stand considerably diminished. Such an interpretation will render the provision or at least the action under the provision violative of Articles 14, 19 and 300A of the Constitution. They submit that even though none of the petitioners have challenged the constitutional validity of Section 396 primarily on account of immunity in Article 31A (1) (c) of the Constitution, that does not mean that the impugned order, which is based upon a clear misconstruction of the provisions of Section 396 can be saved under some derivative immunity. They submit that there is no derivative immunity, particularly where the impugned order is

3 1998 Mah.L.J. 455
4 (1967) 2 SCR 625

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ultra vires Section 396. They rely on ***Prag Ice and Oil Mills vs. Union of India***[5], ***Balmadies Plantations vs. State of Tamil Nadu***[6], ***Express News Papers vs. Union of India***[7], ***State of Punjab vs. Gurudial Singh***[8] and ***Collector vs. Rajaram Jaiswal***[9], in support of these propositions.

15] Mr. Salve and most of the other learned counsel for the petitioners and intervenors, submit that the Central Government has misconstrued the scope of the expression '*interests of member*' in Section 396 so as to altogether exclude the economic value of the shareholding. They submit that the expression, in the context of listed companies like FTIL would include the entire package of rights and interests associated with such shares. They submit that the compulsory amalgamation of FTIL having net worth of Rs.2800 crores with NSEL having putative liabilities of Rs.5600 crores is bound to drastically reduce the book value of FTIL's shares. The resultant company will never be in a position to compensate shareholders of FTIL for such losses. Therefore, the only reasonable construction of Section 396 is to permit compulsory amalgamation of two or more healthy companies. To explain the scope of the expression '*interests of member*' in Section 396, they rely on ***Life Insurance Corporation of India vs. Escorts & Ors.***[10], ***Hindustan Lever Employee's Union vs. Hindustan Lever Ltd. & Ors***.[11] and ***Dwarkadas Shrinivas vs. The Sholapur Spinning and Weaving Co Ltd.***[12].

5 (1978) 3 SCC 459
6 (1972) 2 SCC 133
7 1986 (1) SCC 133
8 1980 (2) SCC 471
9 1985 (3) SCC 1
10 (1986) 1 SCC 264
11 1995 Supp (1) SCC 499
12 AIR 1954 SC 119

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16] Mr. Seervai, who appears for SHAFT, submits that the Central Government has failed to assess compensation payable to shareholders or creditors of FTIL. He submits that this constitutes non-compliance of a mandatory pre-condition to the making of an order of compulsory amalgamation under Section 396. He submits that the Central Government by misconstruing Section 396(3) has proceeded on the basis that no compensation is payable to shareholders of FTIL. He submits that even in such a case, the Central Government was obliged to make '*nil compensation order*'. He relies on ***K.T. Plantations (P) Ltd. vs. State of Karnataka***[13]**,** in support of this proposition. He submits that, absent such order, the shareholders and creditors were deprived of their statutory right of appeal as guaranteed by Section 396(3)(a) to challenge the said order. Further, absent such order, no final order can ever be made by the Central Government as mandated by Section 396(4)(a). He submits that it is well settled that if a statute mandates that the thing has to be done in a certain manner, it can be done only in that manner or not at all. He relies on ***Nazir Ahmed Vs. King Emperor***[14]. For all these reasons, Mr. Seervai submits that the impugned order is *ultra vires* Section 396(3)(a) and 396(4)(a).

17] Mr. Rohan Shah for the petitioners in Writ Petition No. 387 of 2015 adopted the submissions of Mr. Seervai, but submitted in the alternate that this Court should examine the validity of the assessment order dated 1st April 2015 and award compensation to the shareholders of FTIL. He submits that the bar of alternate remedy of appeal under Section 396(3A) ought not to apply in the

13 2011 (9) SCC 1
14 63 I.A. 372

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present case for at least two reasons. Firstly, the assessment order makes no specific reference to shareholders of FTIL. Secondly, there was no compliance with principles of natural justice before the assessment order was made and therefore, the assessment order is a nullity. He relies on ***State of Orissa vs. Brundaban Sharma & Anr.***[15] and ***A.V. Venkateswaran vs. Ramchand Wadhwani & Anr.***[16], in support of the proposition that even the availability of alternate remedy by way of appeal is no bar to assail an appealable order in writ jurisdiction.

18] Mr. Seervai, Mr. Shah and Mr. Zubin Behramkamdin submit that there is violation of Article 14 of the Constitution since the Central Government has practised hostile and invidious discrimination in the matter. They submit that this is for the first time that the provisions of Section 396 have been invoked to compulsorily amalgamate two non-government companies. They rely on a list of instances where the provisions of Section 396 came to be invoked in the past. They point out that each and every instance concerns Government companies. They rely on Circular dated 20th April 2011 issued by the Ministry of Corporate Affairs to suggest that the Section 396 applies only to amalgamation of Government companies. They also rely upon the very same circular to submit that even in matters of amalgamation of Government companies by resort to Section 396, the procedure prescribed in Section 391 is required to be followed and is invariably followed. They point out that this procedure, ensures that amalgamation is by and large consensual and not compulsory or forced. They submit that the Central Government, by not following its own

15 1995 Supp (3) SCC 249
16 (1962)2 SCR 753

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Circular dated 20th April 2011 when it comes to amalgamation of two or more non-government companies, is arbitrarily deviating from its own policy and in any case, practising hostile and invidious discrimination against NSEL, FTIL and its shareholders, creditors and employees. This, they submit, constitutes arbitrariness which is antithetic to Article 14 of the Constitution. They rely on ***E. P. Royappa vs. State of Tamil Nadu***[17]***, Maneka Gandhi vs. Union of India***[18]***, Secretary, Ministry of Chemicals and Fertilizers, Government of India vs. Cipla Ltd. & Ors.***[19]**,** in support of these propositions**.**

19] Mr. Seervai, Mr. Shah and Mr. Zubin Behramkamdin submit that whenever there has been a payment crisis, the Central Government, has ensured that the healthy unit is kept secure and the unhealthy unit is quarantined. They cite the example of Unit Trust of India – UTI, where according to them, even though, millions of genuine investors in US - 64 Scheme were duped, the Central Government, hived off the "*scam ridden unit*" into a separate entity, so that other units of UTI, remained healthy. They also made reference to some other groups of companies (without naming them), who are alleged to have borrowed heavily from public sector banks and financial institutions, but failed to honour their commitments, thereby, provoking a payment crisis. They point out that such group of companies have been accorded the status of "*non-performing assets*" but no action of compulsory amalgamation by resort to Section 396 was ever taken against them. They submit that the action in the present case, is therefore,

17 (1974) 4 SCC 3
18 1978 (1) SCC 248
19 (2003) 7 SCC 1

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arbitrary and discriminatory and thereby violating Article 14 of the Constitution.

20] Mr. Mookherjee and Mr. Dwarkadas submit that mere *public interest* is not sufficient and the Central Government must be satisfied that it is essential in *national interest* to compulsorily amalgamate two or more companies in order to exercise the draconian powers under Section 396. They submit that the national interest is different and distinct from mere *public interest* and since, the Central Government, in making the impugned order, has not even adverted to the aspect of *national interest,* the impugned order, is vitiated and liable to be struck down. They rely mainly on the legislative history, the statement of objects and reasons to the Bill which preceded the Constitution (Fourth Amendment) Act, 1955 and the Companies (Amendment) Bill 1959. They also make reference to Notes on Clauses mainly to submit that amendment to substitute the expression *national interest* with *public interest i*n Section 396, was an amendment of merely "*drafting nature"*. They rely on ***Uttam Das vs. Shiromani Gurdwara Prabhandak Committee, Amritsar***[20]***, Chagan Bhujbal vs. Union of India***[21]***, Wood Polymer Limited vs. Bengal Hotels Pvt. Ltd.***[22] and ***Union of India vs. Ambalal Sarabhai Enterprises Ltd.***[23]***,*** in support of their submissions.

21] Mr. Salve and most of the other counsel for the petitioners and intervenors submit that there was no *public interest* involved in the matter without which the power under Section 396 can never

20 AIR 1996 SC 2133
21 Writ Petition No. 3931 of 2016 decided on 14th December 2016
22 1977 (109) ITR 177
23 1984 (55) Company Cases 623

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be legitimately exercised. They submit that in this case, the interests of 781 high net worth individuals has been equated with *public interest*. Alternatively, they submit that even the interests of almost 70000 shareholders of FTIL and the creditors or employees of FTIL also constitutes *public interest,* and since the Central Government has totally ignored the same, the impugned order is contrary to *public interest*. They rely on *Wood Polymer Limited (supra)* and *Ambalal Sarabhai Enterprises Ltd. (supra)* to explain the concept of *public interest* in such matters.

22] Mr. Chinoy, both at the stage of reply as well as rejoinder, submits that the only reason discernible from the impugned order is that such forced amalgamation will facilitate the speedy recovery of dues from the defaulters at NSEL. He submits that this is upon the premise that NSEL lacks necessary finances and wherewithal to effect recoveries from the defaulters. He submits that there is no material on record to sustain any such premise. In any case, the exercise of such draconian powers, which have the effect of wiping out the very corporate existence of NSEL upon such a flimsy premise amounts to irrationality and defies the doctrine of proportionality. Mr. Chinoy submits that since the impugned order is based upon a solitary but untenable ground, the Central Government, cannot be permitted to add or supplement grounds by filing affidavits or otherwise. He relies on ***Mohinder Singh Gill vs. Chief Election Commissioner***[24]***, State of Punjab vs. Bandeep Singh & Ors***.[25] ***, T.P. Senkumar vs. Union of India***[26]***, Barium Chemicals vs. CLB***[27]***, Rohtas Industries***

24 (1978) 1 SCC 405
25 (2016) 1 SCC 724
26 (2017) 6 SCC 801
27 AIR 1967 SC 295

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vs. S.D. Agarwal[28],C.I.T. vs. Mahindra and Mahindra Limited[29] and ***Bhikubhai Patel vs. State of Gujarat[30] .***

23] Mr. Salve and most of the other counsel for the petitioners and intervenors submit that the Central Government, in making the impugned order, has placed excessive reliance upon FMC's not fit and proper order dated 17th December 2013. They submit that the challenge to FMC's order is *sub-judice*. They submit that the FMC's order is to operate only for some determinate period. They submit that such an order had to be ignored. In any case, they submit that the placement of such excessive emphasis upon an order made by some other authority, virtually amounts to abdication or acting under dictation. They submit that both these vices are sufficient to vitiate the exercise of subjective satisfaction. They rely on ***Anirudhsinhji K. Jadega & Anr. Vs. State of Gujarat[31], Commissioner of Income Tax, Shimla vs. Greenworld Corporation, Parwanoo[32] and Tarlochan Dev Sharma vs. State of Punjab & Ors[33],*** in support of these propositions.

24] Mr. Salve and most of other counsel for the petitioners and intervenors submit that the impugned order, tacitly proceeds on the basis that NSEL, FTIL, its directors and key personnel have indulged into *fraud* or are liable to make good any amounts to the alleged investors. They submit that up to now, not a single adjudicatory authority has determined the issue of fraud or liability

28 (1969) 1 SCC 325
29 (1983) 4 SCC 392
30 (2008) 4 SCC 144
31 (1995) 5 SCC 302
32 (2009) 7 SCC 69
33 (2001) 6 SCC 260

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of NSEL, much less FTIL or its directors. They submit that the powers under Section 396 could never have been exercised merely on *suspicion of fraud* as against *proven fraud*. They point out that even in civil proceedings, allegations of fraud are required to be proved beyond reasonable doubt and not merely by applying the test of preponderance of probabilities. They submit that the Central Government is aware of this legal position, but has sidelined the issue by merely observing in the impugned order that the allegations of fraud or liability are not being gone into. They submit that this is a clear instance of legal *mala fides*. They rely on ***ALN Narayanan Chettyar Vs. Official Assignee***[34]***; Union of India Vs. Chaturbhai M. Patel and Co***[35]**.** and ***Svenska Handelsbanken vs. M/s. Indian Charge Chrome & Ors.***[36]**,**in support of such contentions.

25] Mr. Salve and most of other counsel for the petitioners and intervenors submit that the Central Government, in making the impugned order, has ignored the corporate identity and lifted the corporate veil of NSEL and FTIL. They submit that the Central Government is well aware that none of the circumstances requisite for lifting the corporate veil even remotely exist in the facts and circumstances of the present case. They submit that a parent company can never be held liable for any alleged liabilities of its subsidiary. They submit that even the *Grant Thornton* forensic audit report very clearly states that no significant amounts have travelled from NSEL to FTIL. They submit that the circumstance that FTIL holds over 99% shareholding of NSEL, is not a circumstance enough for lifting of corporate veil. Accordingly, the

34 AIR 1941 PC 93
35 (1976) 1 SCC 747
36 (1994) 1 SCC 502

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Central Government, by merely saying in the impugned order that the corporate veil is not being lifted, cannot, indirectly achieve, that which is directly prohibited in law. They submit that this is also yet another instance of legal *mala fides ,* which vitiates the impugned order. They rely on ***Saloman vs. Saloman & Co.[37], Electronic Corporation of India Ltd. vs. Secretary Revenue Department, Govt. of A.P.[38], Shipping Corporation of India Ltd. vs. Evelomon Corporation & Anr.[39], Adams vs. Cape Industries PLC.[40], Life Insurance Corporation of India vs. Escorts Limited & Ors.[41], Vodafone International Holdings B.V. vs. Union of India[42], Balwant Rai Saluja & Anr. vs. Air India & Ors.[43]*** and ***Needle Industries (India) Ltd. vs. Needle Industries Newey (India) Holding Ltd. & Os.[44],*** in support of these propositions.

26] Mr. Mookherjee and Mr. Dwarkadas submit that the use of the expression '*essential in public interest'* in Section 396 suggest that the draconian powers cannot be exercised unless the Central Government is satisfied that there is no other option to salvage the situation other than to order compulsory amalgamation of two or more companies. They submit that in the present case, no such exercise has been undertaken by the Central Government to determine whether other less drastic options were available. They submit that there is a difference between cases where the

37 (1897) Appeal Cases 22
38 1999 (4) SCC 458
39 1993 ZA SCA 167
40 1990 (1) ChD 433
41 (1986) 1 SCC 364
42 2012(6) SCC 613
43 (2014) 9 SCC 407
44 AIR 1981 SC 1298

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Government or the statutory authorities are merely required to form an opinion and cases where the exercise of power is predicated upon record of *essentiality* and *satisfaction*. They rely on ***Peerless General Finance and Investment Co. Ltd. vs. Union of India***[45]**,** in support of these propositions.

27] Initially, Mr. Salve and most of the other counsel for the petitioners and intervenors, submitted that the impugned order must be judicially reviewed applying the test in ***Associated Provincial Picture Houses Limited vs. Wednesbury Corporation***[46]**.** They submitted that the Central Government has ignored the relevant considerations but taken into account the irrelevant considerations. They submitted that the impugned order proceeds on basis of certain assumptions, which are themselves, entirely misplaced and misconceived. They submitted that the impugned order proceeds on the basis that the NSEL is liable to make good the alleged losses incurred by the alleged investors who may have traded on the NSEL exchange. They however, pointed out that in terms of bye-laws of the exchange, no liability can ever be foisted on NSEL. They submitted that the impugned order proceeds on the basis of legal misconception that the liabilities of a subsidiary attach to a holding company by vicarious liability. They submitted that the impugned order has relied on FMC's order dated 17th December 2013 declaring FTIL and others as not fit and proper persons, which order is itself, *sub-judice*. They submitted that the Central Government by relying upon such extraneous and irrelevant material, has in fact, placed the proverbial cart before the horse. They submitted that the impugned order is vitiated by

45 (1991) 71 Company Cases 300
46 1947 (2) ALL E.R. 682

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illegality arising out of misconstruction of the provisions of Section 396, procedural impropriety arising out of breach of mandatory procedures set out in Section 396 and breach of principles of natural justice and fair play. They submitted that there are no objective facts to sustain the so called subjective satisfaction. They submitted that the impugned order is irrational because no person instructed in law could have ever proposed such a drastic action under Section 396. They submitted that these are sufficient grounds to strike down the impugned order even by applying the *Wednesbury* test.

28] Mr. Salve and most of other counsel for the petitioners and intervenors submit that the Central Government in making the impugned order, has ignored the vital and relevant considerations, which again, go to vitiate the impugned order. They submit that there is material on record which establishes that NSEL has made and is making vigorous efforts to recover dues from 24 identified defaulters. They submit that NSEL has already recovered and paid to the investors an amount of Rs.558.83 crores, which includes contribution of Rs.179.26 crores from FTIL. They point out that almost 608 investors having claims up to Rs.2 lakhs have already been settled. They point out that almost 6445 investors with claims between Rs.2 lakhs to Rs.10 lakhs have also been settled to the extent of fifty percent. They point out that this implies that claims of almost 7000 out of 13000 investors stand substantially settled. They point out that the investors have themselves obtained decrees against defaulters to the extent of Rs.1233.02 crores. They point out that the investors have also obtained injunctions or attachment orders against the defaulters' assets conservatively quantified at Rs.4,400 crores. They point out that even the EOW has attached

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the assets of the defaulters to the extent of Rs.6,330 crores. They submit that all these are vital and relevant considerations, which have been totally ignored by the Central Government in making the impugned order.

29] Ms Rajani Iyer, appearing for Standard Chartered Bank, an unsecured creditor of FTIL submits that the interests of the Bank as well as other similarly placed creditors have been completely ignored by the Central Government in making the impugned order. She submits that as a result of the impugned order , the capacity of FTIL to service the loans extended by the bank might be severely affected. This is a relevant consideration which ought to have been addressed by the Central Government. Failure, to do so vitiates subjective satisfaction and consequently the impugned order itself. Mr. Zubin Behramkamdin submits that the interest of employees of FTIL have been completely ignored by the Central Government. He submits that this is a clear case where the Central Government has ignored the relevant considerations but taken into account irrelevant considerations. He submits that the Central Government had not applied its mind to the range of options available to it to deal with the situation. For all these reasons, learned counsel submit that the impugned order is required to the struck down as unreasonable.

30] In the course of the rejoinder, Mr. Salve and most of other counsel for the petitioners however, sought to rely on the *doctrine* of *proportionality* to attack the impugned order. They submitted that the *Wednesbury* test is now substantially replaced by the *proportionality* test. This test of judicial review is substantially

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wider than the *Wednesbury* test and requires the Court to judge whether the action was proportionate, balanced, least injurious, caused minimal impairment and within the range of courses of action which could be reasonably adopted by the decision maker. They submit that the consequences ensuing from the impugned order are drastic and disproportionate. They submit that the Central Government, before making the impugned order, has not at all applied its mind to the range of options available to it, in order to deal with the situation. They submit that the Central Government has not at all balanced the interests of shareholders and creditors of FTIL and the interests of so called investors. They rely on ***Om Kumar & Ors. vs. Union of India***[47], ***Chairman, All India Railway Recruitment Board vs. K. Shyam Kumar***[48], ***Maharashtra Land Development Corporation & Ors. vs. State of Maharashtra & Anr***.[49] ***Modern Dental College and Research Centre & Ors. vs. State of Madhya Pradesh & Ors***.[50], and ***Gohil Vishvaraj Hanubhai & Ors vs. State of Gujarat & Ors.***[51]**.** to explain the contours of the principle of proportionality.

31] For all these reasons, the learned counsel for the petitioners, intervenors and NSEL submit that the impugned order may be set aside.

47 (2001) 2 SCC 386
48 (2010) 6 SCC 614
49 (2011) 15 SCC 616
50 (2016) 7 SCC 353
51 2017 SCC Online SC 506

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RESPONSE ON BEHALF OF CENTRAL GOVERNMENT, FMC AND INVESTORS

32] Mr. Darius Khambata and Mr. J.P. Sen, learned Senior Advocates for the Central Government, submit that the impugned order is in the nature of delegated or subordinate legislation and therefore, the principles of natural justice can have no application, except to the extent indicated in the parent statute. They submit that the impugned order in the present case, answers all the *indicia* of a delegated or sub-ordinate legislation. They submit that this is evident from the fact that the impugned order of amalgamation operates *in rem;* looks to the future by creating new rights and liabilities; is conceived in public interest; is required to be and is published in the Official Gazette; and is required to be laid before the Parliament for exercise of Parliamentary scrutiny. They submit that all these factors make it clear that the impugned order is nothing but a *delegated legislation / subordinate legislation*. They rely on ***Prentis vs. Atlantic Coast Line Co. Ltd.***[52]***, Australian Boot Trade Employee's Federation vs. Whybrow & Co.,***[53] ***Express Newspaper (Private) Ltd. vs. Union of India***[54]***, Union of India vs. Cynamide India Ltd.***[55] and ***Dhariwal Industries Ltd. vs. State of Maharashtra***[56] in support of their submission that the impugned order partakes the character of *delegated legislation / subordinate legislation*.

52 211 US 210, Page 226
53 (1910) 10 CLR 266, Page 318
54 AIR 1958 SC 578, Paras 96, 103, 105 and 111
55 (1987) 2 SCC 720, Para 7
56 2013 (1) Mh.L.J. 461, Para 48

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33] Mr. Khambata and Mr. Sen submit that in the present case, both NSEL and FTIL were furnished with the copy of proposed order of amalgamation, the objections and suggestions made by NSEL, FTIL, their shareholders, creditors, employees were duly considered by the Central Government before the impugned order was made. In addition, personal hearing was granted to NSEL and FTIL. They submit that no adverse material was relied upon of which the affected parties had no notice or opportunity to explain. They submit that there was no requirement of hearing before FMC made proposal for exercise of powers under Section 396. They submit that full opportunity was granted before FMC made its order dated 17th December 2013. They submit that all objections were duly considered and there is no variation as such between the draft order and the impugned order. They submit that the directions in order dated 4th February 2015 have to be construed consistent with the statutory provisions. Grant of personal hearing to 50389 objectors would have unreasonably delayed or even frustrated the proposed action. The objections were stereotype and almost 96% had originated from FTIL e-mail id. The objections were not significantly different from the objections raised by NSEL or FTIL. All such objections were considered in substantial detail. None of the objectors have pointed out that any significant objections of theirs, remained to be considered. None of the objectors have pleaded or established any prejudice. They rely on ***Union of India vs. Jyoti P. Mitter***[57] ***, Trimbak Tripathi vs. Board of High School and Intermediate Education, U.P., Allahabad***[58], ***Sundarjas Bhatija vs. Collector, Thane, Maharashtra***[59]***, State Bank of Patiala & Ors vs. S.K.***

57 (1971) 1 SCC 396
58 AIR 1973 ALL 1(F.B.)
59 (1989) 3 SCC 396

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Sharma[60]***, City Montessori School vs. State of Uttar Pradesh***[61]***, Haryana Financial Corporation & Anr. vs. Kailash Chandra Ahuja***[62] and ***Managing Director, ECIL vs. B. Karunakar***[63]***,*** in support of these propositions.

34] Mr. Khambata joins issue with the interpretation suggested by the petitioners that Section 396 permits only the compulsory amalgamation of two or more healthy companies. He submits that in the first place, the petitioners must make up their mind as to whether NSEL is indeed an unhealthy company or not. He submits that the petitioners have repeatedly pointed out that NSEL or FTIL are not at all liable to the investors. In any case, investors have already obtained decrees in excess of Rs.1200 crores against the defaulters and assets of the defaulters, in excess of Rs.6000 crores stand attached or injuncted from alienation. Secondly, there is absolutely nothing in the text of Section 396 to suggest that it applies only to the amalgamation of two or more healthy companies. He submits that when the provisions of a Statute are clear and unambiguous, the effect of such provision cannot be avoided on basis of actual or perceived consequences. He submits that the provisions of Section 396 constitute a complete Code empowering the Central Government to amalgamate two or more companies where it is satisfied that it is essential in *public interest* to do so. He submits that Section 396 is a social welfare legislation. He refers to legislative history and relies on ***Nelson Motis vs. Union of India***[64] and ***Hutti Gold Mines Co.Ltd. vs.***

60 (1996) 3 SCC 364
61 (2009) 14 SCC
62 (2008) 9 SCC 31
63 (1993) 4 SCC 727
64 (1992) 4 SCC 711

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H.G.M.L. Copper Units Officers Association[65]***,*** in support of such submissions.

35] Mr. Khambata submits that in the present case, neither the interest nor the rights of the shareholders of FTIL have been affected by the impugned order. He submits that the expression '*interest in or rights against*' in Section 396(3) should be construed in the light of the statutory provisions in the Companies Act as explained by the Supreme Court in several cases. He submits that the expression does not include the *economic value* of the shares. He submits that in the present case, neither the interest of the shareholders of FTIL in or their rights against the company resulting from amalgamation were to be affected, there was no question of payment of any compensation to such shareholders. He submits that since the position of creditors was also in no manner affected by the impugned order, there was no question of payment of any compensation to the creditors. He relies on ***Charanjit Lal Chowdhury vs. Union of India***[66]***, R.C. Cooper vs. Union of India***[67]***, LIC vs. Escorts (supra), Hindustan Lever Employees Union (supra), S. Vishwanath vs. The East India Distilleries and Sugar Factories Ltd.***[68]***, Bacha F. Guzdar vs. C.I.T. Bombay***[69] and ***In Re Nebula Motors Ltd.***[70].

36] Mr. Khambata submits that in the present case, the Central Government has scrupulously followed the procedure prescribed in

65 (2012) 1 Kant LJ 679 (DB)
66 AIR 1951 SC 41
67 AIR 1970 SC 564
68 70 L.W. 157 (Madras)
69 1955 (25) Company Cases 1 (SC)
70 2003 SCC Online AP 451

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Section 396. He submits that as provided in Section 396 (3), the Central Government did make an assessment order dated 1st April 2015. The mere circumstance that the assessment order makes no specific reference to the shareholders or creditors of FTIL does not mean that there is no assessment order made or any breach of Section 396 (3). He submits that in none of the petitions there exists any pleadings or grounds to suggest that there is no assessment order in terms of Section 396(3). The pleadings proceed on the basis that assessment order has been made, but, is legally infirm for one reason or the other. Some of the petitioners have even attempted to challenge the assessment order on merits and others have applied for leave to challenge the assessment order. The contention that there is no assessment order as contemplated by Section 396(3) is in the nature of an afterthought and contrary to the pleadings in the petition.

37] Mr. Khambata submits that there are no pleadings or grounds complaining of denial of opportunity to institute appeal under Section 396 (3A). Even factually, no such denial is demonstrated. Section 396 (3A) entitles "*any person aggrieved by any assessment of compensation .....*" to institute an appeal. Relying on ***Babua Ram vs. State of U.P.***[71]**,** he submits that the expression is a wide import and would mean a person who has suffered legal injury or one who has been unjustly deprived or denied of some benefit, advantage or compensation, which he would be interested to obtain in the usual course.

38] Mr. Khambata submits that since this was an extra-ordinary case and the Central Government was satisfied that it was essential

71 1995 (2) SCC 689

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in *public interest* to do so, the provisions of Section 396 were invoked. He submits that there is no question of any hostile or invidious discrimination involved merely because the power may have been exercised perhaps for the first time to compulsorily amalgamate two non-government companies. He submits that there is no comparison between the instances cited by the petitioners and the present case. He submits that the example in case of UTI is also misconceived and in any case, no party can claim negative equality.

39] Mr. Khambata submits that the circular dated 20th April 2011 neither spells out any policy of the Central Government nor can the same supplant the statutory provisions of Section 396. He submits that the circular itself states that the same is to be applied "*without prejudice to the generality of Section 396 ....*" . He submits that Section 396 was enacted to avoid prolonged delay and cumbersome procedures, where, *public interest* was in issue. He therefore, submits that there is no merit in the contention based upon hostile or invidious discrimination raised by some of the petitioners.

40] Mr. Khambata submits that that there is no difference between *public interest* and *national interest* in the context of Section 396. He submits, however, that assuming there is any difference, then, after the substitution of the expression *national interest* with *public interest* by the Companies (Amendment) Bill 1959, what is relevant is *public interest* and not *national interest*. He submits that marginal notes or notes on clauses are not useful guides to interpretation when the statutory provision is clear and admits of no ambiguities. He relies on ***D.R. Fraser & Co. Ltd.***

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vs. The Minister of National Revenue[72]***, Wood Polymer Limited*** *(*supra*)* and ***Ambalal Sarabai Enterprises Ltd.*** (supra), in support of his submissions.

41] Mr. Khambata submits that the impugned order is based on at least the following three distinct grounds, which are discernible from the impugned order :

(a) Restoring / safeguarding public confidence in forward contracts and exchanges which are an integral and essential part of Indian economy and financial system, by consolidating the businesses of NSEL and FTIL;

(b) Giving effect to business realities of the case by consolidating the businesses of FTIL and NSEL and preventing FTIL from distancing itself from NSEL, which is, even otherwise, its *alter ego;*

(c) Facilitating NSEL in recovering dues from defaulters by pooling human and financial resources of FTIL and NSEL.

42] Mr. Khambata submits that there is absolutely no merit in Mr. Chinoy's contention that the impugned order is based on the solitary ground, i.e., facilitating NSEL in recovering dues from defaulters by pooling human and financial resources of FTIL and NSEL. He submits that none of the petitioners have read or understood the impugned order to mean that the same is based on the solitary ground as aforesaid. He points out that even FTIL, in paragraph 82 of its petition , has listed the several grounds upon which the impugned order is based, though, no doubt, FTIL, has contested the validity of such grounds.

72 AIR 1949 PC 120, para 15

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43] Without prejudice, Mr. Khambata submits that where *public interest* is involved, the *Mohinder Singh Gill* principle is inapplicable. He submits that there is ample material on record in support of the ground, which, NSEL concedes, the order is premised on. He submits that even the solitary ground was sufficient in *public interest* to make the impugned order. He however, reiterates that the impugned order is based on at least three distinct grounds which are discernible from the impugned order. He relies on ***Chairman, All India Railway Recruitment Board*** (supra)***, and PRP Exports vs. State of Tamil Nadu***[73]**,** in support of his submissions.

44] Mr. Khambata submits that the impugned order does not adjudicate on the issue of fraud or liability. He submits that the impugned order, no doubt, refers to the FMC's fit and proper order dated 17th December 2013 or to the proposals forwarded by FMC on 18th August 2014 and 17th October 2014. However, this does not mean that the impugned order is entirely based only upon the said material or that the Central Government has abdicated its functions to the dictates of FMC or any other authority. He submits that in the present case circumstances justifying the lifting of corporate veil very much exist. However, the Central Government, far from lifting the corporate veil has, in deference to the corporate veil amalgamated the two companies.

45] Mr. Khambata submits that there is no difference between *opinion cases* and *satisfaction cases* as contended. Mr. Khambata submits that the Central Government undoubtedly has the right to chose between difference courses of action available and judicial

73 2014 (13) SCC 692

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review in such matters is extremely limited. He submits that none of the petitioners have even suggested which different courses of action, according to them, were available to the Central Government in the present fact situation. Mr. Khambata relies on ***Haryana Financial Corp. vs. Jagdamba Oil Mills***[74]***, i***n support of his submissions.

46] Mr. Khambata submits that the Central Government, in making the impugned order, has no doubt, considered the FMC's order dated 17th December 2013 or the Inspection Reports under Section 209A. However, it is entirely wrong to urge that the impugned order is based entirely on such material alone or that, there is no independent application of mind on the part of the Central Government in making the impugned order. Mr.Khambata submits that there is no question of any non application of mind or abdication of discretion involved in the present case. Mr.Khambata submits that the contentions raised by the petitioners as well as other objectors have been taken into consideration. The Central Government has also relied upon the observations in *Grant Thornton* Forensic Audit Report, which audit was commissioned by NSEL itself. Mr. Khambata points out that both FTIL and NSEL were offered opportunity of cross-examining the makers of *Grant Thornton* Audit Report before FMC made its order dated 17th December 2013. However, FTIL and NSEL chose not to avail such opportunity. Mr. Khambata further submits that certain findings from the *Grant Thornton* Report which have been adverted to in the impugned order were not even disputed by FTIL and NSEL. Rather, there is sufficient material on record to suggest that these findings were admitted by

74 2002 (3) SCC 496

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FTIL and NSEL. In such circumstances, the *Grant Thornton* Report was valid and relevant material taken into consideration by the Central Government for making the impugned order.

47] Mr. Khambata submits that there is contradiction in the submissions of FTIL and some of its major shareholders on one hand and other shareholders of FTIL. He submits that on one hand, FTIL and its major shareholders including Jignesh Shah contend that decrees for amounts in excess of Rs.1,200 crores have already been obtained against defaulters, assets to the extent of Rs.4,000 to Rs.5,000 crores have already been attached and the financial position of NSEL is such as would enable it to satisfy any decrees, if made against it. No doubt, they submit that NSEL is not at all liable and therefore there is no possibility of any decrees being made against NSEL. On the other hand, some shareholders of FTIL represented by Mr. Seervai contend that the amalgamation of FTIL which has net worth of Rs.2,800 crores with NSEL which has putative liabilities of Rs.5,600 crores will completely wipe out the net worth of FTIL. Mr. Khambata submits that there is no consistency in the contentions of the petitioners. He submits that if FTIL and its major shareholders are to be taken at the face value, then, on their own say, the possibility of obtaining decrees against NSEL is remote and further, even if such decrees are, obtained, NSEL, is very much in a position to honour the same. He submits that the apprehensions expressed by other shareholders are quite irrelevant and in any case, lack legal basis. Mr. Khambata submits that in such a situation, FTIL, cannot be permitted to distance itself from NSEL.

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48] Mr. Khambata submits that in the present case, the Central Government has rightly, not gone into the issue of liability of either NSEL or FTIL or adjudicated on the issue of fraud. Mr. Khambata submits that had the Central Government attempted to do this, both, FTIL and NSEL would contend such an exercise is *ultra vires* the powers of the Central Government, particularly because such matters are pending adjudication before various forums.

49] Mr. Khambata submits that the impugned order however, does proceed on the basis of objective fact that NSEL was nothing but an *alter ego* of FTIL. The business realities demonstrate obvious linkage between FTIL, which holds and controls 99.9998% shares of NSEL and NSEL itself. Mr. Khambata points out that there is ample material on record which establishes that NSEL had held out to the investors that it guarantees the payments, *inter alia* through a settlement guarantee fund specially created for the purposes. Further, there is ample material on record which establishes that the transactions at the spot exchange established by NSEL were to be backed by the physical commodities, which were supposed to have been verified, tested and stored by NSEL in warehouses owned or controlled by it. There is ample material on record which establishes that in fact, no such commodities were found in warehouses, thereby, leaving the investors in a lurch to bear losses estimated of Rs.5,600 crores.

50] Mr. Khambata submits that most of the objective facts borne on record were not even seriously disputed by the parties. In any case, there is ample material on record in support of such objective facts. This is clearly not a case where no reasonable authority, well acquainted with the facts could have ever made the impugned

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order. Mr. Khambata submits that the impugned order clearly passes the *Wednesbury's muster* and warrants no interference. Mr.Khambata relies on ***Barium Chemicals vs. CLB*** (supra), ***Rohtas Industries*** (supra), ***M. Jhangir Bhatushah vs. Union of India***[75], ***Re: Jayantilal N. Parekh***[76], ***Vinod Kumar vs. State of Haryana***[77], ***G.B. Mahajan vs. Jalgaon Municipal Council***[78] and ***Ganga Bhishnu Swaika vs. Calcutta Pinjrapole Society***[79].

51] Mr. Rustomjee, learned counsel for SEBI (formerly FMC), submits that the promoters of NSEL held out several representations and made several commitments in order to secure permissions to set up a spot exchange. Based upon the same, DCA issued exemption notification dated 5th June 2007, which was conditional. The condition stipulated that no short sale would be permitted and all outstanding position at the end of the day must result in delivery.

52] Mr. Rustomjee submits that after securing exemption from the applicability of FCRA, however, the NSEL, undertook operations in breach of conditions subject to which exemption was secured. He submits that NSEL offered T+18, T+25 and T+36 contracts, which were in clear breach of the conditions. Further, from 2009 onwards NSEL launched *paired contracts* comprising short term buy and long term sell contracts. By adoption of such *modus operandi,* the entire complexion of the exchange was converted from a spot exchange, which it was meant to be, to a

75 1989 Supp (2) SCC 201
76 ILR 1949 Bom 508
77 2013 (16) SCC 293
78 1991 (3) SCC 91
79 1968 (2) SCR 117

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platform for undertaking financing transactions, unconnected with sale and purchase of commodities. He points out that by the year 2013, almost 99% of the turn over of the exchange comprised such paired contracts and financial transactions underlying the same. He points out that this was obviously, in gross breach of the conditions subject to which NSEL was exempted from the application of FCRA.

53] Mr. Rustomjee submits that FTIL cannot disclaim knowledge of the transactions promoted by NSEL. The records indicate that some of the contract proposals were expressly approved and ratified by the Management of FTIL, which, in any case, has a stake of 99.9998% in NSEL. Mr. Rustomjee pointed out that Jignesh Shah and his family members directly or indirectly held about 46% shares holding in FTIL. He pointed out that Jignesh Shah always held himself to be out the Founder-Chairman and Group CEO of FTIL. Jignesh Shah also held himself out as Vice Chairman of the NSEL. Mr. Rustomjee points out that feeble attempt on the part of NSEL and FTIL to state that they were unaware of the paired contracts or that they were victims of some fraud at the level of warehouses, is plainly misconceived and there is voluminous material on record, which establishes otherwise. Mr. Rustomjee, relies on ***Sunil Bharti Mittal vs. Central Bureau of Investigation***[80] to submit that Jignesh Shah had knowledge of and participated in activities of NSEL and given the position held by Jignesh Shah in both NSEL as well as FTIL, there is no legal infirmity in ordering amalgamation of NSEL and FTIL.

80 (2015) 4 SCC 609

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54] Mr. Rustomjee submits that when the defaults came to the notice of regulatory authorities, show cause notices were issued to NSEL. In response, NSEL, including in particular, Mr. Jignesh Shah representing NSEL stated that there was no problem whatsoever in the functioning of spot exchange and transactions undertaken, were not only consistent with the conditions imposed in the exemption notification, but further, the transactions were fully secured. Mr.Rustomjee, made reference to presentation made by Jignesh Shah to DCA and FMC, in which, it was asserted by Mr.Jignesh Shah that there was no breach and in any case, there were 120 warehouses holding inventory valued at Rs.6000 crores, which is more than sufficient for effecting deliveries for the next 12 to 18 months.

55] Mr. Rustomjee points out that NSEL on 22nd July 2013 furnished undertakings that no further/fresh contracts would be launched till further orders, and further, all existing contracts would be settled on the due dates. However, NSEL, on 31st July 2013, suspended trading in all contracts, (except E-series) until further orders. On 14th August 2013, NSEL presented a settlement plan extending over 30 weeks, within, which, NSEL proposed to settle all pending obligation, assessed conservatively at Rs.5600 crores. Even a payment/settlement schedule was proposed. However, NSEL, defaulted from the stage of first week itself.

56] Mr. Rustomjee submits that Grant Thornton and SGS India (Limited), both agencies, proposed by NSEL itself were appointed to audit the affairs of NSEL and FTIL, in the context of operations on the exchange. Based upon report submitted by these two agencies and after due compliance with principles of natural justice

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and fair play orders were made to declare FTIL, Jignesh Shah and others to be not fit and proper persons to be shareholders or directors in exchanges. FMC, also made recommendations to salvage the situation, including, amalgamation of FTIL and NSEL, so that, the investors, are not left in a total lurch. Mr. Rustomjee submits that the Central Government, upon due compliance with the procedure prescribed under Section 396 and upon taking into consideration the overwhelming material on record has made the impugned order. He submits that there is absolutely no unreasonableness or arbitrariness or dis-proportionality involved.

57] Mr. Rustomjee also relies on ***MCX Stock Exchange Ltd. vs. Securities and Exchange Board of India***[81]***,*** and ***Coimbatore Stock Exchange Ltd. vs. Securities and Exchange Board of India***[82] to emphasize upon importance of stock exchanges to the national economy. He submits that since both NSEL and FTIL, virtually subverted the operations at spot exchange, the Central Government, was entirely justified in *public interest* as well as in *national interest* to make the impugned order.

58] Mr. G.R. Joshi and Mr. M.P.S. Rao, learned senior advocates for respondent Nos. 4 and 6 in Writ Petition No. 2743 of 2014 instituted by FTIL, representing the investors, who have claims in excess of Rs.5600 crores, submit that the impugned order is the very minimum that the Central Government and other regulatory authorities could do, considering unprecedented crisis resulting

81 (2012) BomLR 1002
82 (2007) 74 SCL 1 (Madras)

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from acts of omission and commission on the part of NSEL and FTIL and its promoters and key personnel.

59] Mr. Joshi and Mr. Rao submit that several assurances were held out by NSEL its promoters and key personnel as to nature of transactions and securities. They point out that NSEL was responsible to ensure that goods/commodities are indeed deposited securely in the warehouses owned and controlled by them, even before, proposing any contracts. They point out that NSEL spot exchange has breached its own bye-laws by awarding arbitrary waivers in matters of margin money. They point out that settlement guarantee fund was ultimately not found in place. They point out that most of the 24 defaulters were in fact controlled by or related to key personnel of NSEL and despite repeated default on their part, no action was taken against them. Instead, NSEL, not only awarded arbitrary waivers, but also, guaranteed the loans taken by such defaulters.

60] For all these reasons, the respondents submit that there is no legal infirmity in the impugned order and all these petitions may be dismissed.

ISSUES FOR DETERMINATION

61] Based upon the submissions made by learned counsel for the parties, the following issues, broadly arise for determination in all these matters :

(A) Whether the impugned order was made in violation of the principles of natural justice and fair play?

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(B) Whether, taking into consideration the provisions in Section 396(3) of the Companies Act, the Central Government was at all empowered to order compulsory amalgamation of loss making wholly owned subsidiary (NSEL) with its profit making holding company (FTIL) under Section 396 of the Companies Act?

(C) Whether the impugned order is *ultra vires* Section 396 (3) and Section 396(4) of the Companies Act, since, according to the petitioners in Writ Petition No.1922 of 2016 and Writ Petition No. 387 of 2015, the Central Government has failed to make any order assessing compensation to shareholders of FTIL?

(D) Whether the Central Government, in making the impugned order, has practised hostile and invidious discrimination, thereby infringing Article 14 of the Constitution of India?

(E) Whether the impugned order is *ultra vires* Section 396 of the Companies Act because the Central Government has failed to address itself to the issue of *national interest ?*

(F) Whether the impugned order is *ultra vires S*ection 396 of the Companies Act because there was no *public interest* whatsoever involved in ordering amalgamation of NSEL with FTIL ?

(G)(i) Whether, as contended by Mr. Chinoy, the impugned order is based on only one ground or reason, i.e., facilitating

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NSEL in recovering dues from defaulters, and therefore, applying *Mohinder Singh Gill* principle, the Central Government is barred from adding or supplementing reasons by way of affidavits ?

(G)(ii) Whether, as contended by Mr. Chinoy, the impugned order stands vitiated because there is no material whatsoever on record in support of the aforesaid solitary ground or reason ?

(H) Whether the impugned order can be said to be *unreasonable* , applying *Wednesbury* principles ?

(I) Whether the impugned order defies the doctrine of proportionality ?

62] In addition to the aforesaid, the learned senior counsel for the petitioners have attacked the impugned order on the following further grounds :

(i) The Central Government, in making the impugned order, has lifted the corporate veil of the two companies without the existence of circumstances justifying such an exercise;

(ii) The Central Government, without independent application of mind, has blindly relied upon the FMC's fit and proper order dated 17th December 2013 to make the impugned order;

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(iii) The impugned order tacitly proceeds on the basis that FTIL and NSEL have committed some fraud or in any case, are themselves liable to the investors. They submit that such assumptions are baseless and vitiate subjective satisfaction;

(iv) That none of the purposes referred to in the impugned order can at all be achieved by making the impugned order. Thus, the entire exercise is futile and therefore, liable to be struck down.

63] Mr. Khambata and Mr. Sen, learned senior counsel for Central Government, in defence, submitted that the impugned order is in the nature of delegated or subordinate legislation and therefore, the issue of natural justice and judicial review be addressed on the said basis. Mr. Khambata also submitted that the compensation assessment order dated 1st April 2015 has attained finality for want of appeal and therefore, challenge to the same as raised by only some of the shareholders of FTIL may not be entertained.

64] Since, most of the issues referred to in the preceding two paragraphs are proposed to be dealt with in the course of consideration of the aforesaid broad based issues, there is no separate reference made to them. We also make it clear that the aforesaid were the only issues argued before us by the learned counsel for the parties. This clarification is necessary because in some cases the written submissions submitted later travel beyond the arguments made before us.

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OBJECTIVE FACTS & CIRCUMSTANCES, FCRA REGIME

65] FTIL, which was incorporated in 1988 is a Public Limited and Listed Company. It carries on business of developing technology products to facilitate trading on exchanges, such as stock exchanges or commodity exchanges. Jignesh Shah, the petitioner in Writ Petition No. 387 of 2015, either directly or indirectly holds and controls almost 46% of its shareholding. Ravi Sheth and another, petitioners in Writ Petition No. 2985 of 2014 together hold 8.10% of its shareholding. Foreign Institutional Investors (FIIs) hold about 17.90% of its shareholding. The balance shareholding is held by retail shareholders.

66] In May 2005, Multi Commodities Exchange (MCX) promoted and founded by FTIL, incorporated NSEL for carrying on, *inter alia,* the business of a spot trading exchange for commodities. Jignesh Shah was one of the promoters. Initially FTIL held 26% stake. By September 2005, 99.9998% of the shareholding of NSEL was transferred by MCX to FTIL. Accordingly, there is no dispute that FTIL holds 99.9998% shareholding of NSEL, the balance being held by NAFED. Mr.Jignesh Shah was designated as Vice Chairman and Director on the Board of NSEL. Besides, Mr. Jignesh Shah was also on the Audit Committee of NSEL. As noted earlier, NSEL was incorporated to carry on the business of establishing *spot exchange* and matters connected therewith.

67] In strict legal parlance, there is no term like *spot exchange*. The correct legal term being *ready delivery contract* , which is now

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statutorily defined in Section 2(i) of the FCRA. This term is usually used in contradistinction to *forward contract,* now statutorily defined in Section 2(c) of FCRA. The FCRA entered into force in 1952 and was enacted to provide for regulation of forward trading and prohibition of options in goods and for matters connected therewith. Initially, the transactions on stock exchanges were excluded, since, the problem of regulating stock exchanges have some special features of their own which can be best treated separately.

68] The main principle underlying the regulatory provisions of FCRA is that forward contracts should be allowed to be entered into only in accordance with rules and byelaws of a recognized association, which, in turn, will be subject to approval of the Central Government. The Central Government will also have the power to order enquiry into affairs of recognized associations, its member and direct the regulatory agency Forward Markets Association (FMC) to inspect accounts and other documents of the Association. In emergencies, the Central Government will also have the powers to suspend the business of recognized associations and in certain extreme cases, to withdraw recognition or to supercede the governing body of recognized associations for specified period. The FCRA constitutes the FMC and defines its duties and functions.

69] The FCRA was amended in 1960. The Statement of Objects and Reasons to the Amendment Act 62 of 1960 makes reference to experience gained in the last six years which revealed that the provisions were inadequate to deal with excessive speculation and other malpractices prevalent in some forward markets. It was

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noted that persons indulging in illegal forward trading could not be prosecuted for want of adequate documentary evidence and even persons found guilty, often got away with light punishment. There were no provisions to stop trading beyond official hours. The object of the Amendment Act was therefore stated to be the removal of these and other difficulties and to enable the Central Government and the FMC to *exercise a stricter control over forward trading activities*.

70] The FCRA was once again amended in 1971. The Statement of Objects and Reasons to Amendment Act 53 of 1971 is very important for the present matters and is therefore reproduced verbatim for reference of convenience:

> ***"Amendment Act 53 of 1971-Statement of objects and Reasons.–*** *The Forward Contracts (Regulation) Act, 1952 was enacted with a view to regulate matters relating to forward contracts, the prohibition of options in goods and matters connected therewith. Under this Act, Government have regulated or banned forward trading in several commodities in order to check undue speculations in the prices of those commodities. Lately, it has been observed that the speculative elements have taken resort to the ready market itself and conducted their business in forward contracts in banned and regulated commodities under the guise of ready delivery contract.* ***A ready delivery contract is intended to result in actual delivery of goods and payment of full price therefor within a period of eleven days. The method employed by the parties is to enter into an apparently ready delivery contract for a week or ten days thus keeping themselves strictly within the law and then to square it up by entering into an opposite contract. The next day or a day thereafter a seemingly new contract for the same quantity and variety of goods and with the same party is entered into afresh and so squared up at the end of the next period of seven or ten days by an opposite***

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contract and so on. Thus, a contract is carried on with the same party for the same quantity and quality of goods for so long as both parties desire. This method corresponds remarkably with the mechanics of future trading where a contract having been entered into, lay, for three months is usually cleared every week or ten days or fortnight when the differences between the contract rate and prevailing rate are duly cleared.

(2) The misuse of ready delivery contracts has been indulged in by the parties because of certain lacuna in the definitions of the expressions "forward contract" and "ready delivery contract" in section 2(c) and section 2(i) respectively of the Forward Contracts (Regulation) Act, 1952. Government have been advised to the effect that the fact that there was no actual delivery of goods within the stipulated period of eleven days but there was settlement, by payment of differences or set off does not convert a ready delivery contract into a forward contract. The Government was, therefore, unable to check the misuse of ready delivery contracts under the existing Act.

(3) *In order to eradicate the misuse of ready delivery contracts, it was considered necessary to emend suitably the definitions of the expressions, "forward contract" and "ready delivery contract" contained in the Act. Since immediate action has to be taken in this behalf, the Forward Contracts (Regulation) Amendment Ordinance, 1971 was promulgated by the President on 11th October, 1971.*

(4) The present Bill is intended to replace the Ordinance."

[Emphasis supplied]

71] In furtherance of Objects and Reasons, FCRA provides for establishment and constitution of FMC, which is now substituted by Securities and Exchange Board of India (SEBI). The powers and functions of FMC have been defined. Chapter III is concerned with grant and withdrawal of recognition to recognized associations, which have to operate within the regime of FCRA. There are

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provisions empowering the Central Government to call for returns, annual reports and direct enquiries, framing of rules, byelaws, suspension of members or prohibiting them from trading, supercede governing bodies of associations or even to suspend businesses of recognized associations. Chapter III-A is concerned with registered associations and matters connected therewith. Chapter IV of the FCRA is concerned with forward contracts and options in goods. Section 15 of FCRA declares that forward contracts in notified goods shall be illegal or void in notified cases shall be illegal or void in certain circumstances. Section 16 provides for the consequences of notification under Section 15. Section 17 empowers the Central Government to prohibit forward contracts in certain cases. Section 18 is concerned with special provisions respecting certain kinds of forward contracts and Section 19 prohibits options in goods. Chapter V of the FCRA provides for penalties and procedures.

72] Chapter VI of FCRA makes miscellaneous provisions, including Section 27 entitled "*Power to Exempt*". The same reads as follows :

> "***27. Power to exempt***—*The Central Government may, by notification in the Official Gazette, exempt, subject to such conditions and in such circumstances and in such areas as may be specified in the notification, any contract or class of contracts from the operation of all or any of the provisions of this Act.*"

73] In order to persuade the Central Government to permit NSEL to establish a commodity exchange, several representations, including the following were held out by NSEL and Jignesh Shah :

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(i) No short sales would be permitted and all outstanding positions at the end of the day would result in delivery of the commodities;

(ii) In order to ensure delivery of commodities, the NSEL would establish designated warehouses, in which the commodities would be verified, checked and stored;

(iii) NSEL would counter guarantee performance of the contracts at the spot exchange;

(iv) NSEL would maintain a settlement guarantee fund so as to eliminate any risk to the traders at the spot exchange.

74] Since no forward trading was contemplated, in the normal course, there was no question of applicability of FCRA. However, NSEL has itself explained that since its model involved netting or setting off transactions at the end of the day, the Central Government may consider amending or deleting provisos to Section 2(i) of FCRA or to grant exemptions under Section 27 of the FCRA.

75] Section 2 (c) of FCRA defines *'forward contract'* in the following terms :

"2(c) "forward contract" means a contract for the delivery of goods and which is not a ready delivery contract;"

76] Section 2 (i) of FCRA defines '*ready delivery contract*' in the following terms :

"2(i) "ready delivery contract" means a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract and subject to such conditions as the Central Government may, by notification in the Official Gazette, specify in respect of

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any goods, the period under such contract not being capable of extension by the mutual consent of the parties thereto or otherwise."

[Provided that where any such contract is performed either wholly or in part,—
(1) by tendering of the documents of title to the goods covered by the contract by any party thereto (not being a commission agent or a bank) who has acquired ownership of the said documents by purchase, exchange or otherwise, to any other person (including a commission agent but not including a bank); or

(2) by the realisation of any sum of money, being the difference between the contract rate and the settlement rate or clearing rate or the rate of any offsetting contract; or

(3) by any other means whatsoever," and as a result of which the actual tendering of the goods covered by the contract or the payment of the full price therefor is dispensed with, then, such contract shall not be deemed to be a ready delivery contract.

Explanation.—For the purposes of this clause,—

(i) "bank includes any banking company as defined in the Banking Regulation Act, 1949 (10 of 1949), a co-oporative bank as defined in the Reserve Bank of India Act, 1934 (2 of 1934) the State Bank of India and any of its subsidiaries and any corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970);

(ii) "commission agent" means a person who, in the ordinary course of business, makes contract for the sale or purchase of goods for others for a remuneration (whether known as commissioner or otherwise) which is determined in the contract itself or determinable from the terms of the contract, in either case, only with reference to the quantity of goods or to the price therefor as stipulated in the contract."

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77] As noted earlier, the aforesaid definitions were amended by Amendment Act 53 of 1971 because under the unamended provisions several abuses were noticed, including the abuses specifically referred to in the Statement of Objects and Reasons transcribed above. One of the abuses noticed was that speculative elements had taken resort to ready market and conducted business in forward contracts in banned and regulated commodities under the guises of ready delivery contracts. The other abuse noticed was that the parties entered into apparently ready delivery contracts for a week or ten days thus keeping themselves strictly within the law and then to square it up by entering into an opposite contract. The next day or the day thereafter a seemingly new contract for the same quantity and variety of goods and with the same party is entered into afresh and so squared up at the end of the next period of seven or ten days by an opposite contract and so on. Thus, a contract is carried on with the same party for the same quantity and quality of goods for so long as both parties desire. These methods corresponds remarkably with the mechanics of future trading where a contract having been entered into, say for three months is usually cleared every week or ten days or fortnight when the differences between the contract rate and the prevailing rate are duly cleared.

78] The Statement of Objects and Reasons further notes that this was possible because of the lacuna in the unamended definitions of expressions *'forward contract'* and '*ready delivery contract*'. The Government was therefore advised that the fact that there was no actual delivery of goods within the stipulated period of eleven days but there was a settlement, by payment of differences or set off does not convert a ready delivery contract into a forward contract.

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Since, the Government was unable to check the misuse of the ready delivery contracts under the unamended Act, by Amendment Act 53 of 1971 the definitions came to be amended in the aforesaid terms.

79] In terms of the amended definitions of the expressions '*ready delivery contract*' in Section 2(i) of the FCRA, even a contract which complies with the main ingredients of a *ready delivery contract* as specified in Section 2(i) but if the performance of such contract involves realization of any sum of money, being the difference between the contract rate and the settlement rate or the clearing rate or the rate of any offsetting contract, then, such contract shall not be deemed to be a *ready delivery contract*. Since the module proposed by NSEL was to involve netting or setting of transactions at the end of the trading day, and in order that the transactions, as per the amended definition are not classified as *'forward contract'* as per amended definitions, as matter of abundant caution, exemption from the very applicability of FCRA and consequently, the regulatory regime of FCRA, was applied for.

80] The Central Government, taking into consideration the representations held out by NSEL and in exercise of its powers under Section 27 of FCRA, by Notification No. S.O. 906(E) dated 5th June 2007, exempted all forward contracts of one day's duration for the sale and purchase of commodities traded on NSEL exchange from the operations of FCRA subject to the following conditions, namely:-

(i) no short sale by members of the Exchange shall be allowed.

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(ii) all outstanding positions of trade at the end of the day shall result in delivery.

(iii) the National Sport Exchange Ltd., shall organize sport trading subject to regulation by the authorities regulating spot trade in the areas where such trading takes place.

(iv) all information or returns relating to the trade and when asked for shall be provided to the Central Government of its designated agency.

(v) the Central Government reserve the right to impose additional conditions from time to time as it may deem necessary; and

(vi) in case of exigencies the exemption will be withdrawn without assigning any reason to public interest.

81] In the list of dates and events submitted on behalf of FTIL, the FTIL has itself explained the manner in which operations at the NSEL exchange had to be carried out, if, such operations were to be consistent with the conditions of the exemption notification dated 5th June 2007. This is set out in Note 2 against entry dated 18.05.2005 (sic), which reads as follows:

*"**Note 2** :*

In practice the transaction in commodities which were executed on the Exchange, were to be transacted in the following manner:

i. When a Commodity Seller wished to sell commodities, NSEL would launch contracts by way of circulars specifying the commodities intended to be sold on the exchange. The Commodity Seller was required to deposit the requisite commodities at a designated warehouse, for which NSEL would issue a Warehouse Receipt;

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ii. These contracts enabled trading on the Exchange. Various contracts like "T+2" and "T+25" were offered by NSEL;

iii. 'T' day i.e. Trade day in the contracts launched by NSEL implied the day on which the trade takes place, i.e. the Commodity Seller sells the commodity and the Purchaser buys the commodity at the market price on that day;

iv. On 'T' day, the Commodity Seller would place an order for sale of specified commodities on the Exchange through the Commodity Seller's Broker;

v. This sell order would be matched / consummated against a buy order placed by a Trading Client through the Trading Client's Broker;

vi. The '+2 / +25' refers to the days after the Trade day ('T'), at which time the transaction was required to be settled by payment against delivery of documents of title to the commodities traded;

vii. When the commodities were sold on the Exchange, a Delivery Allocation Report was issued to the Trading Client's Broker for the benefit of the Trading Client which represented the allocation of commodities to the Trading Client. These Delivery Allocation Reports also referred to the Warehouse Receipts and were conclusive proof of ownership of Trading Client's goods;

viii. The Trading Client could then sell the same commodities on the Exchange on the basis of these Delivery Allocation Reports;

ix. *NSEL's Warehouse team was required to look into the Delivery Allocation Reports tendered by the person intending to sell the commodities and to reallocate the commodities accordingly.*"

82] The respondents have joined issue with the aforesaid by submitting that the exemption applied only in respect of contracts of one day's duration and therefore the spot delivery contracts or

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the ready delivery contracts at the NSEL exchange ought to have resulted in actual delivery of commodities and payment of full price thereof within a period of 11 days from the 'T' day. On this basis, the respondents submit that even the practice described in Note 2 by FTIL may not be consistent with the conditions of exemption notification dated 5th June 2007 and consequently the FCRA itself.

83] For the present, we may, keep aside the objections raised by the respondents to practice described in Note 2. This is because, FTIL, in clear terms acknowledges that even the practice as set out in Note 2 was, in fact, never followed at the NSEL exchange. The practice which was actually followed at the NSEL exchange, has been set out by FTIL in Note 3 to the list of dates and events furnished by FTIL. The Note 3, is required to be read along with another note against entry 8 (November 2011 onwards) in the list of dates and events submitted by FTIL, which sets out the actual mechanism of operations at the NSEL exchange. The two notes read as follows: :

> *"**Note 3** :*
>
> ***In actual fact however, certain Trading Clients abused the aforesaid trading mechanism and platform provided by the Exchange in the manner more particularly explained below; and this resulted in a payment fraud to the extent of approximately Rs.5,600 crores."***
>
> ***"Note :***
>
> ***As stated earlier, in actual fact, a default owing to fraud, to the extent of Rs.5,600 crores took place on NSEL's Exchange on account of the fact that certain Trading Clients and Commodity Sellers abused the trading mechanism and platform provided by***

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***NSEL in the following manner**:*

i. Certain Trading Clients and Commodity Sellers entered into what are called "pairded contracts" - meaning thereby 2 simultaneous transactions would be entered into on the same date (i.e. 'T' day) where a Trading Client purchased commodities from a Commodity Seller under a T+2 contract, and then sold the same commodities to the same Commodity Seller under a T+25 contract at a higher price;

ii. Though both T+2 and T+25 contracts were independent contracts offered by NSEL through separate circulars, it seems that the Commodity Sellers, Commodity Seller's Brokers, Trading Clients and Trading Client's Brokers, paired the contracts, so that :

a) both the T+2 and the T+25 contracts were entered into at the same time, on the same day, between the same Trading Client and Commodity Seller;

b) upon settlement of the T+2 Contract, the Trading Client received a Delivery Allocation Report from NSEL, indicating that the commodities were deposited in the warehouse (under a Warehouse Receipt), and the Commodity Seller received the purchase consideration;

c) the T+25 Contract (i.e. where the Commodity Seller bought back the commodities earlier purchased by the Trading Client), was thereafter settled by the Trading Client delivering the Delivery Allocation Report to NSEL so that the Warehouse Receipt representing the underlying commodities, could be handed over to the Commodity Seller, and the Commodity Seller paid the T+25 purchase consideration for the commodities purchased.

iii. ***The entering into the paired contracts / structured trades as aforesaid, was a breach by certain Trading Clients, Commodity Sellers and their Brokers, of the conditions of NSEL's bye-laws and circulars (including NSEL's Circular of February 7, 2012), which prohibited paired trades / structured contracts and also any promise or guarantee of an assured return. The aforesaid***

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mechanism itself would not have resulted in any default and there would have been no problem if the commodities were available to discharge the Commodity Sellers' liabilities.

iv. *However, as a result of entering into these "paired contracts" and rolling over these trades, the Trading Clients,* ***in collusion with the warehouse keepers, stopped depositing physical stocks in the warehouse either fully or partially and nevertheless obtained Warehouse Receipts suggesting that physical quantity of commodities traded were available in the warehouses****;*

v. *Later (i.e. on 12.7.2013), when DCA directed NSEL to submit an undertaking to stop fresh contracts and settle all outstanding contracts and the Trading Clients sought payment of the purchase price for the commodities sold by them (in the T+25 sale contract), to the Commodity Sellers, that the Commodity Sellers not only defaulted in making the payment and honoring the T+25 leg, but by reason of not having deposited the physical commodities in the warehouses, left the Trading Clients without any recourse of taking physical delivery of the commodity purchase under the T+2 leg, thereby committing a default and causing a loss of approximately Rs.5,600 crores to the Trading Clients*."

[emphasis supplied]

84] If, for the present, we keep aside the rhetoric and the comments to apportioning blame on '*certain trading clients'* who are stated to have abused the mechanism and even *'in collusion with the warehouse keeper stopped depositing physical stocks in warehouse',* then, at least as a matter of fact, it is more than apparent that the operations at the NSEL Exchange were in gross violation of the conditions of the exemption notification dated 5th June 2007 and consequently in gross violation of the FCRA.

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85] The very offer of T+18, T+25 or T+36 contracts by NSEL *prima facie* constituted breach of the condition that the exemption from applicability of FCRA was only in respect of contracts of one day's duration. There is really no dispute, either in facts or in law on this aspect because even FTIL in its list of dates and events at entry 4 against date 05.06.2007, accepts this position. The entry and the note read as follows:

> *"Notification No. S.O. 906(E) (the "Exemption Notification"), was issued by the Department of Consumer Affairs ("DCA"), which exempted all forward contracts of one day's duration for the sale and purchase of commodities on NSEL from the provisions of the Forward Contracts (Regulation) Act, 1952 ("FCRA"), subject to certain conditions.*
>
> ***"Note:***
> *The effect of this Exemption Notification according to NSEL is that although buy and sale orders in respect of commodities traded on the exchange could take place in the course of the day, the settlement of the transactions by delivery of goods or documents of title against payment could not take place beyond 11 days, which period i.e. 11 days was regarded as 'ready delivery' or 'spot delivery'.*

86] Further, apart from the note against entry 8 (November 2011 onwards) in the list of dates and events of FTIL, there is ample material on record which establishes that NSEL offered '*paired contracts'* at its exchange from 2009 itself. Further, the record indicates and it has not been disputed that by the year 2013 the volume of paired contracts constituted almost 99% of the turn over at the NSEL exchange. In monetary terms, this turn over from 2009 to 2013 was in the region of Rs.1,34,000/- crores. Therefore, to say that all this was without the involvement or even knowledge of FTIL and NSEL and to attempt to blame 'certain trading clients, commodities sellers or brokers' is just not *prima facie* acceptable.

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87] The mechanism of *paired contracts* adopted at the NSEL exchange between 2009 and until the collapse of operations in 2013 was very similar to the *abuse* referred to in Statement of Objects and Reasons to the Amendment Act 53 of 1971 which prompted the Central Government to take legislative measures to plug the *lacuna* and amend the definition of the expressions '*forward contract'* and *'ready delivery contract*' in Section s 2(c) and 2(i) respectively of FCRA. By resort to such a *modus operandi* the transactions at the NSEL Exchange no longer remained any genuine spot delivery transactions or ready delivery transactions or even forward transactions of one day's duration, in sales and purchases of commodities. Rather, the transactions assumed the character of pure and simple financing transactions, which was never the purpose for which NSEL was exempted from the application of the FCRA.

88] The material on record, including in particular the presentations made by and on behalf of NSEL and the *Grant Thornton Report* establish that this *modus operandi* of paired contracts, was in reality, nothing but financing transactions. These contracts were invariably at predetermined prices and the long terms sell contract, was always at a profit, the difference effectively being the cost of lending. These paired contracts were obviously in breach of the conditions of the exemption notification and consequently the FCRA itself. Under the guise of offering spot delivery or ready delivery contracts, the NSEL Exchange indulged not just in forward trading but in financing unhindered by any regulatory checks which would, but for the exemption notification dated 5th June 2007 have applied to such operations.

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89] The record indicates and it has not been disputed that by the year 2013, the volumes of paired contracts constituted almost 99% of the turnover of the NSEL Exchange. In monetary terms, this turnover of paired contracts was in the region of Rs.1,34,000 crores between the years 2009 to 2013. This means that the entire operations at the NSEL Exchange, which was meant to be a commodities stock exchange, were entirely subverted in gross disregard of the conditions of the exemption notification dated 5th June 2007 and consequently, the FCRA itself.

90] The FTIL in its pleadings as well as the list of dates, is really in no position to factually dispute the manner in which the operations were held at the NSEL Exchange. The NSEL itself has not even instituted any petition to question the impugned order, which takes cognizance of such facts. The learned counsel for NSEL when requested to comment on the operations at NSEL Exchange simply chose to submit that since the impugned order is based only on one ground or reason, namely, facilitating NSEL in recovering dues from the defaulters, there is no point in offering any comments or explanations about the operations at the NSEL Exchange. Even otherwise, there is extensive material on record in the form of Grant Thornton Report etc. which establishes that the operations at the NSEL Exchange were inconsistent with the conditions of the exemption notification dated 5th June 2007 and consequently the FCRA itself.

91] The FTIL as noted earlier, whilst not disputing the factual position of the operations at NSEL Exchange chooses to vaguely blame certain trading clients who are stated to have abused the trading mechanism and platform provided by the Exchange which

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ultimately resulted in a '*payment fraud to the extent of approximately of Rs.5,600 crores'* (this is the expression used on behalf of FTIL itself). In its list of dates and events, FTIL, whilst acknowledging *paired contracts* states that "*certain trading clients (who) abused the aforesaid trading mechanism and platform.....*" At another place, in the context of commodities in the warehouses, FTIL states that *"the Trading Clients, in collusion with the warehouse keepers, stopped depositing physical stocks in the warehouse either fully or partially and nevertheless obtained Warehouse Receipts suggesting that physical quantity of commodities traded were available in the warehouses"*.

92] On 10th April 2012, the FMC wrote to the Department of Corporate Affairs (DCA) that the operations at NSEL Exchange appear to be *prima facie* in breach of the conditions of exemption notification dated 5th June 2007.

93] On 27th April 2012, DCA issued a show cause notice to NSEL alleging that contracts involving delivery period in excess of 11 days and lack of any mechanism to prevent short sales which were taking place constituted *prima facie* breach of the conditions of the exemption notification dated 5th June 2007.

94] By responses dated 29th May 2012 and 11th August 2012, NSEL denied the allegations. NSEL stated that their staff invariably carries out weighing and quality grading of the commodities when they are deposited in the warehouses. The commodities are mostly stored with NSEL warehouses *where proper upkeep and safety is guaranteed by NSEL.* All contracts traded at NSEL *are compulsory delivery contracts.* In all

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contracts traded as NSEL, *seller is forced to give delivery*. NSEL does not allow short sales. However, it was contended that *there is no condition that goods must be deposited in the warehouse prior to the execution of the sale transactions*. Since the contracts offered at NSEL were totally linked with delivery, *buyers could be 100% sure that they would get delivery*. A person *could not avoid delivery by squaring of its position through an offsetting contract the next day*.

95] The italicized portions in the preceding paragraph represent the precise expressions used by NSEL in its response dated 29th May 2012 to DCA's show cause notice dated 27th April 2012. This is important, because, later on, it turned out that most of such assertions or assurances were found to be false.

96] On 10th July 2013, Jignesh Shah made a detailed and comprehensive presentation to DCA and FMC, in terms, holding out the following :

> *"(i) NSEL has 120 warehouses, holding inventory valued at Rs.6,000 crores approximately which are good for delivery for processors' consumption upto next 1 to 1.5 years.*
>
> *(ii) NSEL strictly prohibits short sales through its circulars, notifications, practices in letter and spirit.*
>
> *(iii) In agricultural commodities, more than 99% trades result into delivery on daily basis.*
>
> *(iv) As per empirical data, short delivery has not happened even in 0.0001% cases during last 5 years.*
>
> *(v) NSEL model has full stock as collateral, 10-20% of open position as margin fee with complete purchase commitment of the processors.*

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(vi) This is full proof risk management system compared to any other financial market structure.

(vii) The value of stocks held by NSEL is around Rs.6,000 crores."

97] On 12th July 2013, the DCA, not totally satisfied with the NSEL's response, directed NSEL to furnish undertakings to the following effect:

(i) No further or fresh contracts will be launched by NSEL until further instructions from the concerned authorities;

(ii) All existing contracts will be settled on their due dates;

98] On 22nd July 2013, NSEL did furnish undertakings, though, not in the precise terms as required by DCA. The undertakings furnished by NSEL, were to the following effect:

Undertaking 1 :

We undertake not to launch any further / fresh contracts in *new commodities* and/or at *new places* till further instructions from concerned authority.

Undertaking 2 :

We undertake that we shall settle all the contracts traded on the exchange on their respective '*settlement due dates*' as per contract specifications notified by the exchange.

99] The aforesaid undertakings were contained in letter dated 22nd July 2013, addressed by NSEL to DCA. In addition, reference is necessary to clause 4.1 of the letter dated 22nd July 2013, in which NSEL once again made a commitment that every sale order shall result in 100% delivery. Clause 4.1 reads as follows :

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"4.1 Though we are of the bonafide view that we have not violated provisions of FCRA or the said notificaiton, we have now for the first time received a direction in this regard, that is, to submit an undertaking. Therefore, as a bonafide and compliant corporate, pending your decision on the issues, we have done the following with immediate effect in the interest of smooth and non disruptive functioning of the market and also to protect interest of all market participants :

1. To reduce delivery, payment and settlement period of all contracts traded on the Exchange to less than 11 days (T+10 or less),

2. All the trades that take place in all one day forward contract will be settled "trade for trade".

Even though short sale is completely prevented on NSEL through its risk, management and settlement system as per empirical data of turnover and delivery showing 99.9999% of outstanding position at end of the day resulting into delivery, still we are converting all these contracts into "Trade for Trade", which will also eliminate any element of interpretation issue on short sale, thereby ensuring that every sale order results into 100% delivery only. *The objective is to ensure that market equilibrium is not disturbed, which we are sure that you will appreciate."*

(emphasis supplied)

100] This means that even as on 22nd July 2013, NSEL held out to the regulatory authorities that there was no serious problem regards the operations at the NSEL Exchange, that short sales may have resulted from misinterpretation, that amends will be made to ensure that contracts shall be T+10 or less and most importantly NSEL will ensure that every sale order results into 100% delivery only. To back this, NSEL once again asserted that as per its *empirical data,* 99.9999% of outstanding position at end of the day has resulted into delivery.

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101] On 31st July 2013, without there being any order or direction from any of the regulatory authorities either withdrawing the exemption notification dated 5th June 2007 or otherwise directing NSEL to suspend operations at its exchange, the NSEL issued a circular by which it suspended trading in all contracts (except E series contracts) and merged the delivery and settlement of all pending contracts asking its members to settle them by way of delivery and payment after a period of 15 days.

102] FTIL, NSEL, their shareholders, employees project that it is the regulatory authorities like FMC and DCA which ordered the suspension of operations at the NSEL Exchange or at least that it is these regulatory authorities which '*forced*' NSEL to suspend the operations at the NSEL Exchange. In the pleadings, FTIL purports to lay blame on the media. At this stage, the regulatory authorities had merely issued show cause notices or required the NSEL to furnish undertakings so that the operations proceed in accordance with the conditions of the exemption notification. To suggest that the regulatory authorities by seeking information and explanation or by requiring NSEL to undertake operations consistent with the conditions of the exemption notification dated 5th June 2007, had either directed or forced the NSEL to suspend the operations at NSEL, is clearly unacceptable.

103] Besides, Jignesh Shah had made a detailed presentation to FMC and DCA on 10th July 2013 ,i.e. hardly 20 days earlier that there was no serious problem regards operations at NSEL Exchange and had in fact asserted that NSEL was in control of 120 warehouses holding inventory valued at approximately Rs.6,000 crores, sufficient to make deliveries for 1 to 1.5 years. Jignesh Shah

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had also asserted that the NSEL model had full stock as collateral and 10 to 20% of open positions as margin money to complete purchase commitment of the processors. If this was the correct position on 10th July 2013 and further even on 22nd July 2013, when undertakings were furnished on behalf of the NSEL, though, in slightly twisted terms, then, certainly, there was no reason for NSEL to take the precipitate action of suspending the action at its exchange in such an abrupt manner. Jignesh Shah in his presentation to FMC and DCA on 10th July 2013, had himself stated that *huge chaos* will ensue, if the regulatory authority withdraws the exemption notification.

104] Jignesh Shah, NSEL and even FTIL, in such circumstances, should have offered at least some credible explanation as to what transpired between 10th July 2013 and 31st July 2013. Jignesh Shah, and FTIL have instituted petitions to challenge the impugned order and NSEL has filed an affidavit to support the petitioners in their challenge to the impugned order. There is no credible explanation as to the circumstances in which Jignesh Shah held out such representations to FMC and DCA on 10th July 2013. If, the representations held out on 10th July 2013 had any iota of truth on the date when they were made by Jignesh Shah, then, some credible explanation was necessary as to what transpired between 10th July 2013 and 31st July 2013, to prompt the NSEL to suspend operations on its exchange, when, hardly 20 days earlier, there was no serious problem regards the functioning of the exchange, the position of inventory in the warehouses, the position of margin monies and the position of settlement guarantee fund. No such explanation was forthcoming.

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105] The only explanation attempted by FTIL was to state that some trading clients abused the trading mechanism at the exchange and entered into *paired contracts* and some of the trading clients, in collusion with the warehouse keepers stopped depositing the physical stocks in the warehouses either fully or partially and nevertheless obtained warehouse receipts. At another stage, FTIL casually states that there was some *fraud* at the warehouse level. The material on record establishes that it was NSEL, with full knowledge of FTIL which offered the paired contracts on its exchange. In any case, in 2013, almost 99% of the turn over of the exchange comprised such paired contracts. In monetary terms, the turn over of the paired contracts between 2009 and 2013, was not some negligible figure, which might have legitimately escaped the attention of FTIL, but, this figure was Rs.1,34,000 crores. The same is the position with inventory valued at Rs.6,000 crores in the 120 warehouses as stated by Jignesh Shah in the presentation made hardly 20 days before the collapse of operation at the exchange.

106] Jignesh Shah, as noted earlier, was the Founder and CMD of FTIL Group of Companies. Jignesh Shah is the Managing Director of FTIL holding directly or indirectly 46% of its shareholding. The material on record establishes that the accounts of NSEL each year were being approved by the Board of FTIL, which holds 99.9998% of the shareholding of NSEL. In such circumstances at least, a better and the more credible explanation was expected , as against the vague and casual apportion of blame upon *certain trading clients*. The explanations offered, are hardly credible explanations considering the impact of suspension of operations on 31st July 2013.

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107] On 31st July 2013, when NSEL suspended operations at its exchange, this is what ensued :

(i) The commodity sellers (referred to as defaulters by FTIL) defaulted on their outstanding obligations to trading clients to the extent of approximately Rs.5,500 crores (as per FTIL list of dates and events);

(ii) Hardly, 20 days earlier, Jignesh Shah had solemnly informed FMC and DCA that NSEL in its 120 warehouses had inventory / commodities valued at Rs.6000 crores. If this was correct, deliveries could have been made to the trading clients. However, the FTIL list of dates and events admits that there were no stocks of commodities in NSEL's accredited warehouses, with which deliveries of commodities could have been effected;

(iii) *Hardly, 20 days earlier, Jignesh Shah had solemnly informed FMC and DCA that over the past five years, 99.9999% of the trades in agricultural commodities had resulted in deliveries on daily basis and short deliveries had not taken place even in 0.0001% cases. In fact, hardly 8 days earlier, NSEL had assured the FMC and DCA that it will ensure that every sale order results into 100% delivery only. Despite all this, on 31st July 2013, no stocks of commodities were to be found in the warehouses, to effect deliveries to the trading clients;*

(iv) *Hardly, 20 days earlier, Jignesh Shah had solemnly informed FMC and DCA that NSEL has a full proof risk management system compared to any other financial market structure and that NSEL model has full stock as collateral and 10-20% of open position as margin fee. However, on 31st July 2013, there was no significant margin fee available with NSEL in order to make at least partial payments to the trading clients;*

(v) The settlement guarantee fund maintained by NSEL, which was supposed to have Rs.700/- to Rs.800 cores , was again, found to have no significant amounts, for payment to the trading clients;

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> *(vi) Thus, trading clients with dues of approximately Rs.5600 crores or thereabouts were left in a complete lurch. They neither received the amounts due to them nor were they given deliveries of the commodities.*

108] On the very next day, i.e. on 1st August 2013, the Managing Director and CEO of NSEL, in a meeting with the FMC, solemnly stated that settlement guarantee fund of Rs.850 crores is in place. This was followed by email communication on the same date i.e. 1st August 2013, in which, NSEL stated that amount of Rs.738.55 crores is available in the settlement guarantee fund. However, on 4th August 2013, the very same MD and CEO of NSEL went on to state that the amount available in the settlement guarantee fund is only Rs.62 crores.

109] The FTIL in its petition as well as the list of dates and events merely states that '*the fraud at the warehouse level went undetected until the default occurred*' . FTIL relies on order dated 22nd August 2014 by which bail was granted by this Court to Jignesh Shah in which it is observed that though the case has been projected as scam of Rs.5,600 crores, it needs to be kept in mind that these amounts have not been received by the NSEL but has gone to the borrowers i.e. bogus sellers. It is the borrowers who have been benefited by the transactions and the money of investors have gone to them. Reliance is placed on yet another bail order granted by the Sessions Court in which it is observed that *prima facie* it appears that the only persons responsible for the entire fiasco are these defaulters.

110] Rather than rely on observations in bail orders or the defence that the fraud at the warehouse level went undetected until the

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defaults occurred, FTIL and NSEL were expected to come up with some better explanation. This is because, hardly three weeks earlier, Jignesh Shah, in his detailed presentation to FMC and DCA had solemnly asserted that there were 120 warehouses holding inventory valued at Rs.6,000 crores, which was good for deliveries upto 1 to 1.5 years.

111] FTIL then advanced a loan of Rs.179 crores to NSEL without prejudice to its rights and liabilities. It was submitted that from out of this loan, 608 trading clients with dues upto Rs.2 lakhs have been paid in full. About 6445 trading clients, with dues between Rs.2 lakhs to Rs.10 lakhs, were paid 50% of their dues. Dues towards 7300 trading clients remain and it is submitted that 66% of the outstanding amounts i.e. approximately Rs. 3696 crores are due to about 781 high net worth trading clients. On this basis, it is submitted that the impugned order has been made only keeping in mind the interests of such 781 high net worth trading clients, ignoring thereby, almost entirely the dues of 6445 trading clients, whose dues, even according to FTIL, have been settled only to the extent of 50%.

112] On 14th August 2013 NSEL wrote to FMC stating that it had proposed a settlement plan to pay investors through equated weekly disbursements of Rs.174.72 crores extending over 30 weeks within which the dues to the trading clients (investors) would be settled. Even a payment schedule was indicated. However, this was to be subject to *realization of funds from the payable members*. In reality, NSEL defaulted from the first week

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itself, no doubt on the specious plea that funds could not be recovered from the payable members.

113] Faced with such an unprecedented payment crisis and the manner in which a National Level Commodities Exchange just collapsed, FMC directed forensic audit and approved the names of Grant Thornton and SGS India Pvt. Ltd. as proposed by NSEL itself. FTIL, in its petition and list of dates seeks to down play the Grant Thornton Forensic Audit Report by stating that '*The report found various lapses. There is no suggestion in the report that any part of the funds that were mislaid found their way either to FTIL or its shareholders.*'

114] On 21st September 2013, Grant Thornton, the Forensic Auditor proposed by NSEL itself submitted its report. The executive summary reads as follows :

> *"B. Executive Summary*
>
> *This executive summary is to be read in conjunction with the whole report and should not be teated as a standalone document.*
> *Financing Business*
>
> *1.1 The NSEL exchange platform was being used to conduct a financing business.*
>
> *Indian Bullion Market Association (IBMA) enabled large volumes of trading by a related party on FTIL group exchanges (NSEL and Multi-Commodity Exchange of India Limited ('MCX').*

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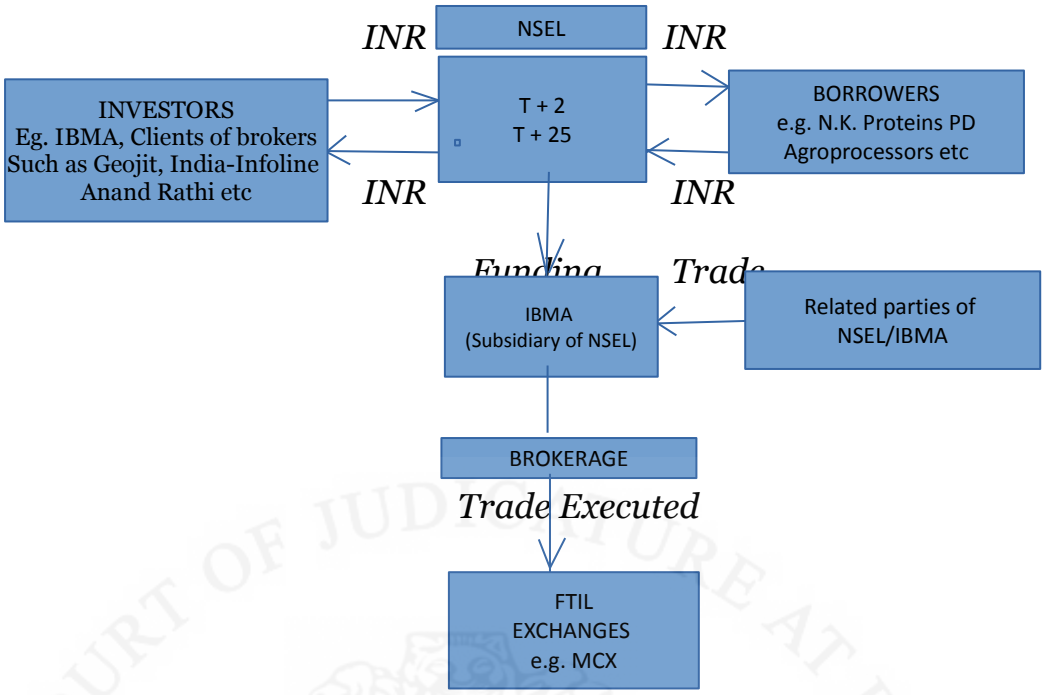
This is illustrated as per the diagram below :-



1.2 Grant Thornton observed that a large volume of NSEL exchange trades were carried out with paired back-to-back contracts. Investors simultaneously entered into a short term buy contract (e.g. T+2-i.e 2 day settlement) and a longterm sell contract (e.g. T+25 – i.e. 25 day settlement). The contracts were taken by the same parties at a pre-determined price and always registering a profit on the long term positions as illustrated below :

Trade Date	Deal No	Buy/ Sell	Member ID	Name of Member		Contract Code	Sub Broker No.	Terminal ID	Trade Price	Trade Value
02 April 2012	87	S	13790	P D AGROPROCES-SORS PVT LTD	DLF002	PDY1121HR2	474	13791	2400.00	360,000
02 April 2012	87	B	10570	ANAND RATHI COMMODITIES LTD	HNR320	PDY1121HR2	232	10575	2400.00	360,000
02 April 2012	88	S	10570	ANAND RATHI COMMODITIES LTD	HNR320	PY1121HR25	232	10575	2450.70	367,605
02 April 2012	88	B	13790	P D AGROPROCES-ORS PVT LTD	DLC001	PY1121HR25	474	13791	2450.70	367,605

1.3 These long term contracts (e.g. T+25) were first traded on the NSEL exchange in September 2009. The Board of NSEL ratified the circulars introducing such long term contracts over a period beginning November 2009.

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1.4 Further evidence was obtained with regards the existence of a financing business, such as presentations which stated that a fixed rate of return was guaranteed on investing in certain products on the NSEL exchange.

Several internal (NSEL) presentations were found, upon a review of e-mail databases, setting out a yield (e.g. 16%) as an opportunity for investors for trading in certain products on the NSEL exchange.

An external presentation was also obtained which had been made by a brokerage house (Geojit Comtrade Ltd.) for their clients claiming a fixed return on investments made on the NSEL exchange. Further, this presentation, declared that actual delivery of stocks in such transactions would not be required.

1.5 Grant Thornton also obtained evidence of repeated contraventions of NSEL exchange rules and bye-laws which facilitated such financing transactions to continue and grow in size as below :

Repeated Defaults : As per the NSEL exchange rules a member who does not have sufficient collateral/monies etc to discharge his obligations would be allowed to trade further. This rule was overridden on a recurring basis. Further despite repeated defaults members were allowed to trade and increase their expenses. For example, Lotus Refineries had defaulted, as per the Rules of the Exchange, on 198 days between the fifteen month period of 1 April 2012 and 30 July 2013.

Exemptions from Margin Requirements: Members who were in a default position or whom had exhausted their margin limits on trading were granted an exemption from margin requirements and thus allowed them to increase their exposure by engaging in new trades. More than 1,800 margin limit exemptions were granted between 2009 through to 2013.

Inadequate monitoring of member collateral: NSEL did not carry out any diligence to establish the existence of stock at member managed warehouses, upon which trades were being executed. Grant Thornton carried out a stock verification exercise and found significant shortages vis-a-vis expected collateral.

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Related Party Transactions

1.6 IBMA is registered as a client with Karvy Comtrade limited for executing trades on futures commodity exchange like MCX and NCDEX.

SNP Designs Private Limited (SNP) is a client of IBMA and the manging director of SNP is Mrs.Shalini Sinha, the wife of Mr.Anjani Sinha (CEO and MD of NSEL as well as IBMA).

Grant Thornton found evidence of a large volume of trades executed on MCX exchange on behalf of SNP, through Karvy Comtrade Limited. Since April 2012 the total nominal value/volume traded on MCX is approximately Rs.40,000 crore.

In spite of heavy losses over the period, trading on behalf of SNP was allowed to continue. No margin money was ever taken from SNP. As at 20 September 2013, IBMA is due to receive Rs.77 crore on account of losses arising from trades executed on behalf of SNP. No monies have been received from SNP despite substantial amounts due.

Further, evidence was obtained that Rs.10 crore was received from Mohan India which was credited to an IBMA Bank account. This was to be adjusted against the SNP receivable balance as per an instruction made by Mr.Anjani Sinha.

IBMA is a subsidiary of NSEL and has received funding for operational needs on several occasions (including a loan of Rs.5 crore on 5 August 2013). IBMA is also a member on the NSEL exchange and executes trades on behalf of clients. Margin limit exemptions have been granted to IBMA on a daily basis since February 2010.

Corporate Governance & Risk Management

1.8 While the Bye-laws and Rules of the Exchange mandated the formation of various Committees to effectively manage the operations of the Exchange; the Board failed to constitute 9 out of the 10 such committees. Further, there is no documentary evidence to demonstrate whether the only committee formed (Membership Committee) was ever

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convened and hence, met its objectives.

1.9 The Board Meeting minutes regularly (eg. 11 June 2008, 15 June 2009, 25 May 2011) stated that the audit committee had detailed discussions on the Annual Financial Statements, the Internal Control Systems, reviewing the scope of Internal Audit functions, the performance of the statutory and internal auditors, the scope of work for the internal auditors, the planning of the statutory audit for the current financial year, the payment of audit fees, the observations by the auditors in the draft Auditor Report etc.

Upon review of the corresponding Audit Committee minutes we noted no reference to discussions on Internal Control Systems, reviewing the scope of Internal Audit Functions, performance of internal auditors and scope of work for the internal auditors.

Common members of the Board and the Audit Committee were :
Mr.Jignesh Shah
Mr.Joseph Massey
Mr.V. Hariharan
Mr.Shreekant Javalekar

1.10 The Board Meeting minutes of 31 March 2010 and 11 August 2010 stated that the Company (NSEL) approached Karvy Financial Services Limited (KFSL) to extend credit facilities to a member, specifically N.K. Proteins. Further the Board granted and approved for issue of a guarantee to KFSL, to the extent of Rs.14 crores, in respect of credit facilities extended to N.K. Proteins.

1.11 Our review of the Information technology identified several independent standalone systems wherein the flow of business transactions and related information between different systems required manual intervention. Given the complexity and nature of trading transaction such systems including warehouse (eWDMS), CNS, Delivery System (EMI) and trading should have been integrated.

Further, these systems did not produce/have any form of MIS operational. All reporting and analysis was done on

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manual worksheets. Our review of the Board minutes did not indicate any form of MIS reporting or review.

These points collectively indicate significant gaps in IT, Risk & Corporate Governance.

Misutilistation of client monies :

1.12 Misutilisation of client monies/settlement fund : As per the rules and bye-laws of the NSEL exchange "Margin deposits received by clearing members from their constituent members and clients in any forms shall be accounted for and maintained separately in segregated accounts and shall be used solely for the benefit of the respective constituent member's and client position."

Grant Thornton found evidence (including e-mails) that client monies/settlement fund, was used regularly for fulfilling the obligations of defaulting members.
Further, NSEL utilised client monies/ settlement fund for its own business purposes on a regular basis. For example, on 28 March, 2013, Rs.236.5 crore was withdrawn from the Settlement Fund in order to fund NSEL's own business overdraft account.

There was a running deficit in the client monies/settlement fund balance from April 2012 to June 2013. The finance team of FTIL had raised this as an area of concern on several occasions.

Misrepresentations to the Regulator

1.13 Regulatory Contraventions:
As per a Gazette Notification issued on 5 June 2007 by the Ministry of Consumer Affairs, the Government of India under Section 27 of the Forward Contracts (Regulation) Act, 1951("FCRA") exempted all forward contracts of one day duration for the sale and purchase of commodities traded on NSEL from the operations of the said Act. Grant Thornton's review of the type of trades executed on the NSEL, exchange indicates contravention to the exemption conditions granted.

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During the period January 2011 to July 2013, FMC sought several clarifications from NSEL on a number of complaints received from the public alleging forward trading and running a financing scheme. All these allegations were refuted by NSEL. Our analysis of such trades indicates misrepresentation by NSEL to FMC on several occasions."

115] The Grant Thornton Report makes observations on the position of commodities in the warehouses. These observations are important, since, Jignesh Shah, in his detailed presentation dated 10th July 2013 to FMC and DCA had stated that NSEL has 120 warehouses, holding inventory valued at Rs.6,000 crores approximately which are good for delivery for processors' consumption upto next 1 to 1.5 years. The key observations in this regard read as follows:

(i) There was no documentation in relation to warehouse activities for long term trades indicating that such contracts were not secured by warehouse stocks. The warehouses were customer managed warehouses and the underlying collateral were not in custody of NSEL. NSEL did not have control over these warehouses and Grant Thornton was denied access to number of warehouses.

(ii) *The Warehouse Development and Regulatory Authority had in fact rejected NSEL's application for registration of its warehouses way back on 16th May 2011. Notwithstanding such rejection, NSEL's website represented that its warehouses were registered with the Authority.*

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(iii) No verification or due diligence was ever undertaken by NSEL to ensure compliance by its members of the conditions outlined in its rules and byelaws even though in terms of NSEL byelaws, warehouse receipt issued by NSEL were meant to evidence a commodity being held in an approved warehouse.

(iv) NSEL did not insist upon deposit of commodities in the warehouses prior to executing sale transactions. Instead NSEL resorted to issuing Delivery Allocation Reports (DAR) representing to genuine investors that each transaction was delivery based and backed at the time of sale by the required quantity of commodities in its warehouses.

116] In the context of position of commodities and warehouses even SGS India Pvt. Ltd. appointed by NSEL itself documents that the physical inspection of 16 warehouses revealed that as against stock of a value of Rs.2389.36 crores, stock worth only Rs.358 crores was available. The SGS also reported that they were physically prevented from inspecting 22 warehouses although they had been engaged by NSEL to inspect its own stock supposed to have been lying in its own warehouses.

117] The *Grant Thornton* report makes reference to *related party transactions,* margin exemptions to certain members and condonation of repeated defaults on the part of certain members at the NSEL's exchange. IBMA executes trades on futures commodities exchange like MCX and NCDEX. SNP Designs Private Limited (SNP) was a client of IBMA. The Managing Director of SNP was Mrs. Shalini Sinha, wife of Mr. Anjani Sinha. Mr. Anjani

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Sinha, in turn, was the CEO and MD of NSEL as well as IBMA. No margin money was ever insisted from SNP. As at 20th September 2013, IBMA is due to receive Rs.77 crores on account of trades executed on behalf of SNP. No substantial recoveries have been made from SNP. IBMA is a subsidiary of NSEL and has received funding for operational needs on several occasion. IBMA is also a member on NSEL exchange and beneficiary of margin limit exemptions on daily basis since February 2010.

118] *Grant Thornton* quotes the NSEL Rules and Bye-laws in the context of maintenance of adequate margin by members who wish to trade at the exchange. Thereafter, the report points out 1800 waiver notes between April 2009 to July 2013 condoning the requirement for maintenance of adequate margins. Maximum waiver notes were favouring five of the 24 identified defaulters, who are due and payable amounts in excess of Rs.5600 crores to the trading clients. This includes N.K. Proteins Limited, which is due and payable an amount of Rs.950 crores. In the past, N.K. Proteins Limited committed several defaults. However, in breach of its own bye-laws and rules, NSEL permitted such repeated defaulter to continue trading and retain membership. Similarly, Lotus Refinery Private Limited is stated to have committed no less than 198 defaults and still, was permitted to continue trading and retain membership. Lotus Refinery Private Limited was also granted margin waivers and unlimited trade limit waiver notes. Mr. Joshi pointed out that Lotus Refinery Privae Limited was controlled by the son-in-law of the Chairman of NSEL Mr. Anjani Sinha.

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119] On 4th October 2013, FMC issued notice to Jignesh Shah and FTIL and certain other key personnel to show cause as to why they should not be declared as fit and proper persons to be shareholders or directors of MCX in view of the events that had transpired at NSEL. In the proceedings that ensued, FTIL and Jignesh Shah were offered opportunity to cross-examine Grant Thornton in the context of its report. This opportunity was however not availed. Ultimately FMC made order on 17th December 2013 declaring FTIL, Jignesh Shah, Srikant Javalgekar and Joseph Messy as not fit and proper persons to be shareholders of any association / exchange recognised by the Government or registered by the FMC in excess of the prescribed threshold limits and/or to hold positions in the management and the board of such association / exchange. The order, makes reference to internal audit reports, Grant Thornton Report, SGS Report, minutes of board's meetings and correspondence. This order also holds that on the basis of the material on record, Jignesh Shah and FTIL were effectively controlling and directing the affairs of NSEL.

120] FTIL, Jignesh Shah and Srikant Javalgekar instituted writ petition nos. 337, 363 and 370 of 2014 to impugn FMC's fit and proper order dated 17th December 2013, which came to be admitted. However, by order dated 28th February 2014 interim reliefs came to be declined. The special leave petitions against the order dated 28th February 2014, were dismissed as withdrawn on 6th February 2015.

121] This Court, in its order dated 28th February 2014, declining interim reliefs in the aforesaid three petitions questioning FMC's fit and proper order dated 17th December 2013, has made the

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following *prima facie* observations:

> "*We must note that in the impugned order, the Commission has recorded elaborate and detailed findings of fact after considering the evidence on record. A finding of fact has been recorded by the Commission that M/s.Grant Thornton finalised its forensic audit report after Shri Jignesh Shah, Shri Joseph Massey and other officers of FTIL reviewed forensic audit report. One of the findings recorded is that the FTIL which has promoted NSEL, sought exemption from the said Act of 1952 even before it had not started any trading or operation. It is held that it misinterpreted the conditions stipulated in exemption notification in collusion with handful of members, which ultimately culminated in a massive fraud involving Rs.5,500 Crores.*
>
> *As regards the grievance of the Petitioners regarding failure to grant opportunity to cross-examine the auditors, the said aspect has been dealt with by the Commission in the impugned order. In paragraphs 14.6 and its sub-paragraphs, this aspect has been dealt with. After discussing the manner in which the enquiry before the Commissioner proceeded, a finding of fact has been recorded by the Tribunal in paragraphs 14.6.9 that despite the Commission granting opportunity to the Petitioners in the present Petitions to question the auditors in the manner they liked, except for Shri Joseph Massey, no other notice remained present when entire team of auditors was available for questioning.*
>
> *After having perused the impugned order, we find that elaborate enquiry has been made by the Commission. Findings of fact of serious nature have been recorded against the Petitioners. The fraud perpetrated is to the tune of Rs.5,500 Crores. Criminal investigations are in progress. Considering the gravity of the allegations which have been found to be established against the Petitioners, this is not a fit case where prayer for stay can be granted in exercise of writ jurisdiction under Article 226 of the Constitution of India.*"

122] We are conscious that the aforesaid observations are only *prima facie* and the challenge to FMC's fit and proper order is

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pending. However, learned counsel for the respondents are right in their submissions that the aforesaid observations are not altogether irrelevant particularly when the petitioners insist upon relying upon observations in some bail orders to urge that they are in no manner responsible for the unprecedented crisis at NSEL Exchange. In the written submissions at the stage of rejoinder, FTIL has submitted that since Rule has been issued in the writ petitions challenging FMC's fit and proper order dated 17th December 2013, no reference whatsoever can be made to FMC's order and to the extent such reference is made, the impugned order stands vitiated.

123] The fact that Rule has been granted in the aforesaid three petitions does not mean that the Central Government was dis-entitled to look to or even refer to the FMC's order dated 17th December 2013. By a detailed order, interim relief was declined by this Court and even the special leave petitions were dismissed as withdrawn. In yet another writ petition (l) No. 1516 of 2014 instituted by FTIL against the FMC, this Court, by order dated 13th June 2014, once again declined interim relief to FTIL restraining voting on a resolution to amend Articles of Association by noting that stay on FMC's order dated 17th December 2013 had been declined and therefore, the Court must proceed on the basis that the order dated 17th December 2013 is as on date valid. In any case, there can be no bar to refer to the objective facts as reflected in the FMC's order dated 17th December 2013, particularly the observations from various audit reports. Despite opportunity of cross-examination, FTIL and Jignesh Shah failed to avail the same.

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124] On 18th August 2014 FMC recommended to the Central Government that powers under be invoked in public interest to amalgamate NSEL with FTIL. This was followed by further communication dated 17th October 2014 on the matter of proposed amalgamation of NSEL with FTIL. Along with this communication, FMC forwarded representations received from the investors groups.

125] On 21st October 2014, the Central Government, issued draft order proposing amalgamation of NSEL with FTIL in public interest by invoking the provisions of Section 396.

126] In November 2014, FTIL filed the present petition challenging the draft order dated 21st October 2014 itself. Initially, *status quo* order was granted by this Court. However, by order dated 4th February 2015, the *status quo* was lifted and the Central Government was permitted to take further proceedings in the matter. Certain directions were also issued in the matter of hearing the affected parties. NSEL and FTIL were granted personal hearing. Objections, no less than 50389 made by shareholders of the companies, creditors and employees were considered. On 1st April 2015, an order assessing compensation as contemplated by Section 396(3) of the Companies Act was made and published in the official gazette. After the time limit for institution of appeals expired and since, no appeals had been instituted by any parties against the assessment order, the Central Government, proceeded to make the impugned order dated 12th February 2016 ordering the amalgamation of NSEL with FTIL in public interest.

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127] In March 2016, FTIL amended its writ petition so as to incorporate challenge to the impugned order dated 12th February 2016.

128] On 8th March 2017, when the final hearing of the petitions was on, FTIL filed an affidavit along with resolution that FTIL had resolved to infuse funds upto Rs.50 crores in NSEL for FY 2016-17 to FY 2018-19. The affidavit also states that FTIL, up to then, had already infused an amount of Rs.109 crores in NSEL. The affidavit states that all such amounts are to assist NSEL in effecting recoveries from defaulters and also for its day to day administrative operational legal and recovery expenses.

129] There is ample material on record which constitutes more than *prima facie* evidence in support of the aforesaid objective facts upon which the subjective satisfaction of the Central Government was based. In regard to several instances, we have, referred to the pleadings of the petitioners or the list of dates and events submitted on their behalf. Several facts are backed by documents emanating from the petitioners. Several facts emerge from the Audit Report of *Grant Thornton*, which again, is backed by documentary evidence. Besides, we find that FTIL or NSEL has not seriously disputed most of these facts, but has only attempted to suggest different interpretations or offer some explanations by apportioning blame on some traders or by alleging that there was some fraud at the warehouse level which went undetected until 31st July 2013.

130] It is in backdrop of such facts and circumstances and the scheme of FCRA that we have to consider and evaluate the

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submissions made by the learned counsel for the parties and to determine the issues which arise in these petitions.

ISSUE -A

(A) Whether the impugned order is in violation of the principles of natural justice and fair play ?

131] The contention that the impugned order is made in violation of principles of natural justice and fair play has to be examined keeping in mind the statutory scheme of Section 396, the directions in our order dated 4th February 2015 and the very nature of the principles upon which reliance is placed.

132] Section 396 enables the Central Government to amalgamate two or more companies, where it is satisfied that it is essential in public interest to do so. The provision broadly comprises a substantive element and a procedural element. The substantive element is the subjective satisfaction of the Central Government that such amalgamation is *essential in public interest*. The procedural element deals with the procedure to be adopted by the Central Government in making an order under Section 396. The extent to which the principles of natural justice apply, have been set out in the provision itself.

133] Section 396 of the Companies Act reads as follows:

> *396. Power of Central Government to provide for amalgamation of companies in public interest. -*
>
> *(1) Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, then, notwithstanding anything*

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contained in sections 394 and 395 but subject to the provisions of this section, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution ; with such property, powers, rights, interests, authorities and privileges ; and with such liabilities, duties, and obligations; as may be specified in the order.

(2) The order aforesaid may provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and may also contain such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

(3) Every member or creditor (including a debenture holder) of each of the companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the company resulting from the amalgamation as he had in the company of which he was originally a member or creditor; and to the extent to which the interest or rights of such member or creditor in or against the company resulting from the amalgamation are less than his interest in or rights against the original company, he shall be entitled to compensation which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette.

The compensation so assessed shall be paid to the member, or creditor concerned by the company resulting from the amalgamation.

(3A) Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

(4) No order shall be made under this section, unless-

(a) a copy of the proposed order has been sent in draft to each of the companies concerned;

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(aa) the time for preferring an appeal under sub-section (3A) has expired, or where any such appeal has been preferred, the appeal has been finally disposed of; and

(b) the Central Government has considered, and made such modifications, if any, in the draft order as may seem to it desirable in the light of any suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

(5) Copies of every order made under this section shall, as soon as may be after it has been made, be laid before both Houses of Parliament."

134] From the analysis of the provision in Section 396 it is clear that the Central Government is not empowered to make an order of compulsory amalgamation unless a copy of the proposed order in draft has been sent to each of the companies concerned. The draft order is naturally expected to contain the gist of the objective facts and the *prima facie* reasons or grounds on which the final order is proposed to be made. The Central Government is then required to consider and make such modifications, if any, in the draft order as may seem to it desirable in the light of any suggestions or objections which may be received by it from such company, or any class of shareholders therein or any creditors or class of creditors thereof. The period of not less than two months is required to be offered for making suggestions and objections. This is the extent to which the principles of natural justice have been incorporated in Section 396.

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135] There is no statutory exclusion of the principles of natural justice and fair play when it comes to the exercise of powers under Section 396. However, the scope and extent to which such principles shall apply have also been set out in the provision itself. The principles would stand complied with, where the companies which are proposed to be amalgamated are furnished copies of the proposed order in draft, so that the said companies as well as other parties likely to be affected may make suggestions or objections to the proposed order. Thereafter, the Central Government has to *consider* such suggestions and objections and make such modifications, if any, in the draft order. There is nothing in the statutory provision to suggest any hearing or personal hearing before making any order under Section 396.

136] In the facts of the present case, the procedural requirements set out in Section 396 have been complied with. Copy of the proposed order in draft was sent to the concerned companies. The companies, their shareholders, creditors and even employees have made suggestions and raised objections. Such suggestions and objections have been duly considered by the Central Government before making the impugned order. There is an assessment order made on 1st April 2015 and since no appeals were preferred against the same, the impugned order has been made after the expiry of the period prescribed in sub-section (3A) of Section 396. This means that the principles of natural justice as have been statutorily incorporated in Section 396 have been complied with before making the impugned order.

137] In addition to the aforesaid, there is no dispute that the Central Government, afforded an opportunity of personal hearing

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to FTIL and NSEL. The petitioners however, contend that since no opportunity of personal hearing was afforded to 50389 objectors, there is breach in compliance with principles of natural justice and fair play. None of the petitioners contended that the statutory scheme of Section 396 contemplates any such personal hearing. However, the petitioners rely on the directions in paragraph 5 of our order dated 4th February 2015, which read as follows:

> *"5. In our view, taking into consideration the submissions made by the learned Solicitor General appearing on behalf of the Respondent – Union of India and Mr. Chagla, the learned Senior Counsel appearing on behalf of Forward Market Commission, the Central Government may consider passing a final order after hearing contentions of Petitioners and Respondent – National Spot Exchange Limited and all other interested parties. Petitioners and all other interested parties may file their objections within thirty days and within four weeks thereafter Central Government may pass appropriate order after giving brief hearing to all the interested parties. It is, however, clarified that all contentions raised by the Petitioners – Financial Technologies ((India) Limited in this Petition and by the shareholders of NSEL and all other parties regarding jurisdiction of the Central Government to issue the said order as also regarding challenge to the validity of the said sections are kept open and, therefore, we propose to keep these Petitions pending. It is further clarified that if any adverse order is passed, the same shall not be notified for a period of two weeks after the order is communicated to the Petitioner. It is clarified that Central Government may give brief hearing to the parties mentioned in section 396 of the Companies Act."*

138] No doubt, the aforesaid order, did permit shareholders, creditors and employees to file their objections and the Central Government was then permitted to pass appropriate order after giving brief hearing to all interested parties. However, such direction, has to be construed in the light of statutory scheme of as well as circumstantial flexibility, which is well accepted in dealing

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with challenges based upon failure of natural justice. The principles of natural justice, though universal have to be realistically and pragmatically employed.[83] As held by the House of Lords in ***Lloyd vs. Mc Mahon***,[84] the rules of natural justice are not engraved on tablets of stone. The scope and extent of principles of natural justice depends upon the nature of right which is proposed to be affected, character of decision maker, the nature of the decision itself and the statutory or other frame work in which it operates.

139] The *Mc Mahon* principle is accepted by our Supreme Court in several of its decisions. The Supreme Court has repeatedly held that principles of natural justice are not embodied rules and therefore, the expression *natural justice* is not capable of any precise definition. The principles are evolved to check arbitrary exercise of power by any authority, irrespective of whether the exercise is administrative or *quasi judicial*. The aim of the natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. *These principles can never be put in a straitjacket formula*. In such matters, regard must be had to the expressed language of the statute, the basic scheme of the provision conferring the power, the nature of power conferred, the final effect of the exercise of that power on the rights of the parties affected and such other factors. It is only upon consideration of all these matters that the question of application of principles of natural justice can be properly determined. (See : ***Ashwin S. Mehta & Anr. vs. Union of India and ors.***[85] and ***Sahara***

83 Manohar Lal Sharma vs. Principal Secretary & Ors. (2014) 9 SCC 614
84 (1987) All ER 1118 (HL)
85 (2012) 1 SCC 83

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India (Firm), Lucknow vs. Commissioner of Income Tax, Central – I & Anr.[86]).

140] In ***Dharampal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati & Ors.***[87], the Supreme Court has held that principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. In some cases, even affording post decisional hearing is held to be sufficient compliance with principles of natural justice.

141] In ***Board of Mining Examination vs. Ramjee***[88]***,*** the Supreme Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the

86 (2008) 14 SCC 151
87 (2015) 8 SCC 519
88 (1977) 2 SCC 256

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administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as mere artefact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

142] The insistence on the part of the petitioners, that all the 50389 objectors ought to have been afforded opportunity of personal hearing, sounds more in the arena of unnatural expansion of the principles of natural justice. The aim of principles of natural justice is not to create undue or uncontemplated obstacles in the discharge of statutory powers, particularly when public interest is involved in the exercise of such powers. Acceptance of such a contention might have rendered the entire exercise extremely cumbersome and time consuming, if not impossible. In ***Nidhi Kaim vs. State of Madhya Pradesh & Ors***.[89], and ***Union of India & Ors vs. O.Chakradhar***[90], the Supreme Court turned down the similar contentions by observing that insistence on individual notice and holding of enquiry before cancellation of the entire examination would *hold up* the functioning of educational institutions which are responsible for maintenance of the standards of education, and encourage indiscipline, if not also perjury.

143] The directions in our order dated 4th February 2015 have been correctly construed by the Central Government. The import

89 (2016) 7 SCC 615
90 (2002) 3 SCC 146

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of such directions was neither to re-write the provisions of Section 396 nor to boggle down the Central Government in discharge of its statutory powers under Section 396. FTIL and NSEL were personally heard. The objections and suggestions made by 50389 parties, comprising shareholders, creditors and employees of the companies, have also been duly considered by the Central Government before making the impugned order. There is no significant difference between the objections raised by all these objectors and the objections raised by NSEL and FTIL. The impugned order quite correctly notes that most of these 50389 objections or suggestions were stereotyped. The impugned order also correctly notes that most of these objections and suggestions appeared to have originated from FTIL e-mail ID *shareholder@ftindia.com*.. From out of 50389 objectors, 1203 claim to be employees of FTIL and about 48422, shareholders of FTIL. All these objections stand suitably addressed in the impugned order. All this constitutes not only substantial compliance with the principles of natural justice and fair play but also of our directions in the order dated 4th February 2015.

144] The petitioners seem to allege some technical breach in compliance with principles of natural justice. On such basis, the impugned order cannot be set aside, particularly when none of the petitioners before us have pointed out that any particular or significant objection of theirs, escaped consideration. None of the petitioners even attempted to point out any significant prejudice because no personal hearing was afforded to the 50389 objectors. None of the petitioners have pleaded and established any prejudice because the 50389 objectors were not afforded opportunity of personal hearing. Merely, submitting that the impugned order has

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occasioned prejudice, is not sufficient in such matters. We are unable to accept Mr.Seervai's submission that any action in violation of principles of natural justice is invariably void.

145] The Constitution Bench of the Supreme Court in *Managing Director, ECIL, Hyderabad & Ors. vs. B. Karunakar & Ors.* (supra) has held that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of denial to him of the report, has to be considered on facts and circumstances of each case. Where, therefore, even after furnish of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of the natural justice to illogical and exasperating limits. It amounts to an unnatural expansion of natural justice which in itself antithetical to justice.

146] In *State Bank of Patiala vs. S. K. Sharma (supra)*, the Supreme Court, restricted its earlier rulings in ***Chintapalli Agency Taluk Sales Coop. Society Ltd. vs. Secy. (Food and Agriculture) Govt. of A.P.***[91] *and* ***S. L. Kapoor vs. Jagmohan***[92] to the facts of the said cases and, of course, subject to the dicta of the Constitution Bench in *Managing Director, ECIL* (supra). The Supreme Court also made a distinction between cases

91 (1977) 4 SCC 337
92 (1980) 4 SCC 379

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involving '*no opportunity*' and '*no adequate opportunity*'. In the later cases, the violation of natural justice must be examined on the touchstone of prejudice. There may be situations where the interests of the State or public interest may call for a curtailing of the rule of *audi alteram partem*. In such situations, the court may have to balance the public / state interest with the requirement of natural justice and arrive at an appropriate decision. The same principle is reiterated in *Dharampal Satyapal Limited* (supra).

147] In ***K. L. Tripathi vs. State Bank of India & Ors***[93], the Supreme Court has quoted with approval *Wade* in his Administrative Law, Fifth Edition (at pages 472 to 475), when he says that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. Everything depends on the subject matter, the application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth.

148] From the nature of the objections and suggestions, it is apparent that the same were not significantly different from those made by NSEL and FTIL. No prejudice has been pleaded or

93 (1984) 1 SCC 43

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demonstrated. The petitioners, it appears, allege technical breach in compliance with directions in the order dated 4th February 2015. The directions have been quite correctly construed by the Central Government. In matters of compliance with principles of natural justice, circumstantial flexibility, is permissible. In fact, the principles have to be realistically and pragmatically employed. The entire process leading to the making of the impugned order cannot be said to have occasioned any miscarriage of justice. Therefore, taking into consideration the totality of the circumstances, we are unable to fault the impugned order on the ground of failure of natural justice or fair play.

149] This is also not a case where there is failure of natural justice because the objections and suggestions made by FTIL, NSEL, and several other interested parties have not at all been considered by the Central Government before making the impugned order. The record indicates that the Central Government, in this case, constituted a Committee headed by the Additional Secretary assisted by the Legal Adviser to facilitate the consideration of such objections and suggestions. This Committee with the help of specially created computer software, tabulated and collated various objections and suggestions, as received. Such objections and suggestions were then analyzed and addressed to. Such analysis and address is reflected to a substantial extent in the impugned order. Merely because the suggestions or objection, may not have been accepted by the Central Government, does not mean or imply that the same have not at all been considered before making the impugned order.

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150] In paragraph 7.1 of the impugned order, the Central Government, has analysed the nature of objections and suggestions received from various categories of stakeholders numbering 50389. The objections, it appears, were collated and tabulated with the assistance of specially designed computer software. The profiles of objectors together with their dispositions in respect of proposal for amalgamation is spelt out in a chart at paragraph 7.1.1 (ii). The objections, it appears, were further analysed on the basis of key issues raised by the objectors. The methodology adopted is reflected in paragraphs 7.1.1 (iii) and (iv) of the impugned order. The analysis indicates that over 96% of the objectors were shareholders of FTIL (48422 objectors from out of 50,389). The impugned order not without any reason, records that most of the objectors "*are almost ditto*".

151] The impugned order further records that most of the objections have originated from one and the same e-mail Id, seemingly created by FTIL shareholder@ftindia.com. The impugned order records that the e-mails were sent in bulk resulting in bouncing back of few e-mail. Later the physical copies have received and the same were also considered. The impugned order, quite rightly records at least *prima facie* most of such bulk objections were "*orchestrated and concerted*". About 1203 objections, i.e., about 2.38% of the objections were from the employees of FTIL. Again, the same were repetitive and the impugned order records that *prima facie* even these objections were "*orchestrated and concerted*". 81 representations were received from the creditors of FTIL opposing the proposed amalgamation. 484 suggestions were received from investors of NSEL, out of which, 479 supported the proposed amalgamation

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and 5 opposed the same. Similarly, 40 suggestions were received from the creditors of NSEL, out of which 39 supported the proposal for amalgamation and only one opposed the same. About 141 representations were received from others, out of which about 66 supported the proposal for amalgamation, 69 opposed. There were 9 representations from investors forum supporting the proposal for amalgamation. This is in addition to the objections from NSEL and FTIL.

152] The impugned order, records and considers in substantial details, the objections and suggestions received from various parties. In paragraph 7.2 and 7.3 of the impugned order, the Central Government, considered and dealt with the various objections and suggestions raised by and on behalf of FTIL and NSEL. As noted earlier, both FTIL and NSEL were even afforded an opportunity of personal hearing. Paras 7.4, 7.5 and 7.6 of the impugned order, the Central Government has considered and dealt with the objections and suggestions on behalf of shareholders, creditors and investors group. In paragraph 7.7, the submissions made by industry chambers have been considered. In paragraph 8.1 and 8.2 suggestions or in piece provided by EOW and Enforcement Directorate have also been considered. Therefore, it is not possible to accept the contention that there has been failure of natural justice on account of any non-consideration of objections and suggestions made by FTIL, NSEL, its shareholders, creditors and other interested persons.

153] From the record, we are also satisfied that this is not a case where the Central Government has placed reliance upon certain adverse material in the impugned order, without afford of

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opportunity to FTIL, NSEL and other interested party to refute or submit their explanation to the same. The material which the Central Government proposed to rely upon was substantially reflected in the draft order, which was furnished in compliance with the statutory scheme of Section 396. All the parties had more than ample opportunity to submit their objections and suggestions to the draft amalgamation order. NSEL, FTIL, several of its shareholders, creditors and even employees did in fact, submit their objections and suggestions to the draft order. No specific case has been made out in the context of the contention of any alleged failure of natural justice for taking into consideration adverse material, not made known to the parties. On basis of vague allegations and oral submissions, it is not possible to fault the impugned order on the ground of failure of natural justice.

154] There was a complaint that principles of natural justice were not followed before FMC or other regulatory agencies recommended action under Section 396. This complaint, is quite misconceived. There is no requirement of compliance with principles of natural justice before FMC or any other regulatory authority proposes or recommends action under Section 396. In this case, the record bears out that such proposals/recommendations were made known to the parties likely to be affected and such parties made their detailed submissions why such proposals and recommendations be not acted upon. As noted earlier, the principles of natural justice cannot be placed in some straitjacket formula. Upon consideration of totality of circumstances, it is quite clear that the affected parties were treated fairly and consistent with the principles of natural justice.

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155] This is also not a case of there being any variation between the grounds set out in the proposed order and in the impugned order. Such a ground was therefore rightly not raised in the pleadings or argued in the first instance. The petitioners themselves contend that the impugned order is quasi judicial in nature. The impugned order does address objections and suggestions made by the petitioners themselves. Section 396(4)(b), itself contemplates that the Central Government, upon consideration of suggestions and objections as received, makes such modifications, if any, in the draft order as may seem to it desirable in the light of such suggestions and objections. The fact that exhaustive suggestions and objections were made by the petitioners upon virtually all facets of the draft order, itself suggests that full opportunity was afforded to the parties to put forth their suggestions and objections. There is no case of failure of natural justice or fair play, therefore made out by the petitioners in the facts and circumstances of the present case.

156] Extensive submissions were made to urge that the impugned order in the present case was in the nature of delegated or subordinate legislation. On this basis, it was urged that the principles of natural justice were inapplicable, except perhaps to the extent indicated in the parent statute. In this case, proceeding on the basis that the impugned order is an administrative or at the highest a quasi judicial order as urged by the petitioners, we find that there was no breach in compliance with the principles of natural justice and fair play. Therefore, we do not deem it necessary to address the issue as to whether the impugned order is in the nature of delegated or subordinate legislation. Even independent of any decision upon such issue, in the facts and

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circumstances of the present case, we are satisfied that no case has been made out to interfere with the impugned order on the ground of any failure in compliance with the principles of natural justice and fair play.

157] Accordingly, for all the aforesaid reasons, we are unable to fault the impugned order on the ground of non compliance with the principles of natural justice and fair play or on the ground of any breach of our directions in order dated 4th February 2015.

ISSUE - B

(B) Whether, taking into consideration the provisions in Section 396(3) of the Companies Act, the Central Government was at all empowered to order compulsory amalgamation of loss making wholly owned subsidiary (NSEL) with its profit making holding company (FTIL) under Section 396 of the Companies Act ?

158] In order to determine the aforesaid issue, reference to the legislative history of Section 396 will be appropriate.

159] In Companies Act, 1913 there was no provision similar to Section 396 of the Companies Act, 1956. Similarly, in the Constitution of India as originally enacted there was no provision for saving of laws providing for acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights on the ground that such laws may be inconsistent with or take away or abridge any of the rights

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conferred by the provisions of Part - III of the Constitution of India (fundamental rights). However, by the Constitution (First Amendment) Act, 1951, Article 31A of the Constitution of India was introduced so as to confer immunity upon such laws.

160] Article 31A of the Constitution, as originally introduced by the Constitution (First Amendment) Act, 1951 conferred immunity on law providing for acquisition by the State of any estate or any rights therein or for the extinguishment of modification of any such rights from challenge on the ground that such law may be inconsistent with, or takes away or abridges any of the rights conferred by Part-III of the Constitution.

161] Thereafter, by the Constitution (Fourth Amendment) Act, 1955, Article 31A of the Constitution was amended by substitution of its clause (1). Article 31A (1) (c) conferred immunity upon law to provide for the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations from challenge on the ground that such law may be inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31 of the Constitution.

162] The Statement of Objects and Reasons to the Constitution (Fourth Amendment) Act, 1955, insofar as it relates to Article 31A (1)(c) of the Constitution of India, reads as follows:

> *"3. It will be recalled that the zamindari abolition laws which came first in our programme of social welfare legislation were attacked by the interests affected mainly with reference to articles 14,19 and 31, and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, articles 31A and 31B and the Ninth Schedule were enacted by the*

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> *Constitution (First Amendment) Act.* ***Subsequent judicial decision interpreting articles 14,19 and 31 have raised serious difficulties in the way of the Union and the States putting through other and equally important social welfare legislation on the desired lines, e.g., the following:***
> *(i)* ...
> *(ii)* ..
> *(iii)* ..
> *(iv)* ...
> (v) ***The reforms in company law now under contemplation, like the progressive elimination of the managing agency system, provision for the compulsory amalgamation of two or more companies in the national interest****, the transfer of an undertaking from one company to another, etc., require to be placed above challenge.*
>
> *It is accordingly pressed in clause 3 of the Bill to extend the scope of* ***Article 31A of the Companies Act so as to cover these categories of essential welfare legislation****".*
>
> (*emphasis supplied*).

163] In the Companies Act, 1956 for the first time, Section 396 was introduced to empower the Central Government to provide for amalgamation of companies in *national interest*. By Companies (Amendment) Act, 1960 the expression *national interest* was substituted with *public interest* possibly because this is the expression used in Article 31A (1)(c) of the Constitution.

164] The legislative history therefore indicates that the legal provision in Section 396 to provide for amalgamation of two or more companies *in public interest* was regarded as a social welfare or essential welfare legislation. It is on this basis that Article 31A(1)(c) of the Constitution affords immunity to such provision from challenge on the ground that it might infringe the rights guaranteed by Articles 14 or 19 of the Constitution.

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165] In all these petitions, the learned counsel for the petitioners have made it clear that they do not challenge the constitutional validity of Section 396. In fact, since the written submissions on behalf of the petitioners in Writ Petition No. 2985 of 2014 contained reference to challenge to the constitutional validity of Section 396, we made a specific query as to whether such challenge was being pressed, since, no oral submissions were ever made on this aspect.

166] Mr. Rohan Shah, the learned counsel for the petitioners then clarified that no such challenge was being pressed and further, on 21st March 2017, tendered a praecipe specifically omitting the contents of paragraph 21(ii) of the written submissions dated 8th March 2017, which contained some challenges to the constitutional validity. Similarly, by the same praecipe dated 21st March 2017, it was clarified that Chamber Summons No.204 of 2016 was not being pressed and all references to the chamber summons in the written submissions dated 8th March 2017 were being omitted.

167] The determination of the issue raised will necessarily involve the examination of the scope and content of the expression "*.... the same interest in or the rights against the company resulting from amalgamation ....*" in Section 396 (3). This is because the main contention of the petitioners is that the "*interest*" of a shareholder in a company necessarily means the package of rights associated with shares which includes the *economic value* of the shareholding.

168] In the written submissions tendered by the petitioners in Writ Petition No. 2985 of 2014, the expression *"interest"* in section

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396 was sought to be explained in the following manner :

> *"16. c. ii. .....The determination of the interest of a shareholder especially in the context of a listed company would require a determination of the individual and cumulative impact of the entire package of rights and interests associated with the shares including:*
> *a. The voting rights emanating from the shares;*
> *b. The rights to enjoy profits of the company in the shape of dividends;*
> *c. The right to elect Directors and to thus participate in the management;*
> *d. The right to apply for appropriate relief in case of oppression;*
> *e. The right to apply for relief in the case of mismanagement;*
> *f. The right to apply to the Court for winding up and the right to share the surplus on winding up.*
> *In support of this submission, the petitioners rely upon inter alia the ratio in Life Insurance Corporation of India vs. Escorts and Ors. (1986) 1 SCC 264 and Hindustan Level Employees' Union v. Hindustan Lever Ltd. and Ors. 1995 Supp. (1) SCC 499)*
>
> *iii. In addition as regards shares of a listed company there would also be the right to earn profit through any capital appreciation in the listed value of the shares.*"

169] Further, at page 9 of the written submissions tendered by the petitioners in Writ Petition No. 2985 of 2014, the expression *"interest"* is sought to be explained in the following manner :

> *"The term "interest" is a term wider than merely the number of shares and includes the rights of the particular shareholder to receive dividends, to receive payments in winding up and in listed companies also includes the interest co-related to the profit or loss that a shareholder would suffer based on the listed value of the shares. It is submitted that in the facts of the present case, the amalgamation that has been made to facilitate the payment of liability of Rs.5,600/- Crores would effectively (a) wipe out the cash reserves of FTIL of Rs.2,800/- Crores; (b) the book value of the shares which was at Rs.600/- per share would also as a result of the company*

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> *being foisted with a potential liability of Rs.5,600 Crore, come to zero; (c) the proposed amalgamation order which has now culminated into the impugned Final Order dated 12.02.2016 has also seen that the listed share value of the shares of FTIL has decreased by 75% from Rs.211.10 per share on 21.10.2014 to Rs.79.29 per share as today. Given the very significant changes in the economic strength and potential of the company it would be fallacious to say that if you have the same numbers of shares in a company with a net worth of Rs.2,800/- Crores and in a company with a net worth of Zero the interest that you have as a shareholder, is the same interest."*

170] In so far as the first part of the written submission (excluding the portion iii) is concerned, there is no difficulty in accepting the same. This means that the expression *"interest"* will include entire package of rights and interests associated with the shares including voting rights, right to enjoy profits in form of dividends, right to elect directors and thus participate in management, right to apply for appropriate relief in case of operation or mismanagement, right to apply to the court for winding up and the right to share the surplus on winding up. However, the later part of the written submission which suggests that even the economic value of the shareholding is to be included in the expression *"interest"*, there may be some difficulty in accepting the same. Neither the text nor the context supports any such construction. The precedents cited by the petitioners did not support such construction. Mr.Salve did make reference to accounting standard (AS 23), in support of such construction. However, upon due consideration of the same, we find that the accounting standards cited are of no assistance in interpretation of the Statute in question.

171] In order to evaluate the contention, reference is necessarily required to be made to the very nature of a *"share"* and the

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'*interests of a shareholders*' in the context of the Indian law as incorporated in the Companies Act 1956.

172] In ***Borland's Trustees vs. Steel Brothers & Co***.[94], the Chancery Division speaking through Farwell J. explained the nature of a *share* in a company, in the following terms :-

> *"A share in a company cannot properly be likened to a sum of money settled upon and subject to executory limitations to arise in the future; it is rather to be regarded as the interest of the shareholder in the company, measured, for the purposes of liability and dividend, by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862, and made up of various rights and liabilities contained in the contract, including the right to a certain sum of money."*

173] In *Charanjit Lal Chowdhury* (supra), the Supreme Court held that the petitioner shareholder undoubtedly has an *interest* in the company. His interest is represented by the share he holds. The share is movable property according to the Indian Companies Act with all incidence of such property attached to it. Ordinarily, the shareholder is entitled to enjoy the income arising from the share in shape of dividends. The share like any other marketable commodity can be sold or transferred by way of mortgage or pledge. The holding of the share in his name, gives the shareholder right to vote at the election of the directors and thereby take a part, though indirectly, in the management of the company's affairs. If the majority of the shareholders side with him, he can have a resolution passed which would bind the company. Lastly, he can institute proceedings for winding up of the company which may result in a distribution of the net assets among the shareholders. All these observations were made in the context of a petition by

94 (1901) 1 Ch. 279

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Charanjit Lal Chowdhury, holder of one ordinary share in Sholapur Spinning and Weaving Co. Ltd. to challenge the constitutional validity of an Ordinance which purported to make special provisions for the proper management and administration of the said company.

174] The Supreme Court, after explaining the nature of a *share* in a company and the consequent *interests of a shareholder in a company and rights against a company* observed that the impugned Ordinance had not dispossessed in any sense of the term, the shares held by the petitioner. The Court noted: *"nobody has taken the shares away from him. His legal and beneficial interest in respect of the shares he holds is left intact. If the company declares dividends, he would be entitled to the same. He can sell or otherwise dispose of the shares at any time at his option. ..... The State has not usurped the shareholders right to vote or vested it in any other authority. The State appoints directors of its own choice but that it does not by the impugned act. Thus there has been no dispossession of the shareholders from their right of voting at all. The same reasoning applies to the other rights of the shareholders spoken about, namely, their right of passing resolution and of presenting winding up petition. These rights have been restricted undoubtedly and may not be capable of exercised to the fullest extent as long as the management by the State continues. Whether the restrictions are such as would bring the case within the mischief of Article 19(1)(f) of the Constitution, I will examine presently; but I have no hesitation in holding that they do not amount to dispossession of the shareholders from these rights in the sense that the rights*

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have been usurped by other people who are exercising them in place of displaced shareholders."

175] In *Bacha Guzdar* (supra), the Supreme Court, in no uncertain terms held that a shareholder has got no interests in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The Supreme Court held that the interest of a shareholder vis-a-vis the company was explained in the Sholapur Mill's Case (Charanjit Lal Chowdhury) by specifically negativing the position that a shareholder has got a right in the property of the company. It was held that the interest of a shareholder either individually or collectively does not amount to more than a right to participate in profits of the company. *There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole.*

176] Then, in *R. C. Cooper* (supra) the Constitution Bench of the Supreme Court, in the context of nationalization of banks explained the nature of a share and the rights and interests of a shareholder in a company. The Supreme Court held that a

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company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association measured by a sum of money for the purpose of liability, and by a share in the profit.

177] Most of the petitioners have correctly relied upon *LIC vs. Escorts Ltd.* (supra), where in paragraph 84, the Supreme Court has spelt out the rights and interests of a shareholder in a company, in the following terms:

> *"84. On an overall view of the several statutory provisions and judicial precedents to which we have referred we find* ***that a shareholder has an undoubted interest in a Company, an interest which is represented by his shareholding. Share is movable property, with all the attributes of such property. The rights of a shareholder are (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company in the shape of dividends; (iv) to apply to the court for relief in the case of oppression; (v) to apply to the court for relief in the case of mismanagement; (vi) to apply to the court for winding up of the company; (vii) to share in the surplus on winding up……"***
>
> *(emphasis supplied)*

178] In the context of amalgamation itself, the Supreme Court in *Hindustan Lever Employees' Union* (supra) has held that t*he shareholder has no interest in the assets of the company while the company is in existence. It is only at the stage of liquidation of the company that the shareholders become interested in the assets of the company. The share of any member in a company is movable*

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property and transferable in the manner provided by the Articles of the company. This is provided by Section 82 of the Companies Act. The definition of 'goods' in the Sale of Goods Act, 1930 specifically includes stocks and shares. A share represents a bundle of rights which includes, inter alia, the rights (i) to elect directors; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company, if and when dividend is declared and distributed; and (iv) to share in the surplus, if any, on liquidation.

179] The precedents therefore explain the nature of a *share* and the interests and rights of a shareholder in or against a company. The shareholder undoubtedly has an interest in or rights against the company of which he is the shareholder. His interest is represented by the share he holds. The share is a moveable property which can be sold or transferred by the shareholder. The shareholder is entitled to the income arising from the shares in the form of dividends. The shareholder has a right to vote at the election of the Director and thereby take part in the management of the companies affairs. He has right to apply for appropriate relief in case of oppression or mismanagement. He has a right to institute a petition for winding up a company which may result in the distribution of net assets amongst the shareholders. The shareholder has no right in the property of the company which is a juristic person entirely distinct from its shareholders. The property of the company is not the property of the shareholders. A shareholder has merely an interest in the company arising out of the article of association measured by a sum of money for purpose of liability and by a share, for the profit. A shareholder may not even be entitled to move a petition for infringement of rights of the

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company, unless by the action impugned by him, his rights are also infringed. The precedents, do not therefore support the contention of the petitioners.

180] Mr. Salve, in his rejoinder, did rely upon the Accounting Standard (AS) 23 which concerns accounting for investments in associates in consolidated financial statements, to submit that the aforesaid expression will also include the *economic value* of the shares held by a shareholder in the companies proposed to be amalgamated. He made reference to clauses (4) and (7) of the Accounting Standard.

181] Clause (4) of AS 23 reads as follows:

> *"4. For the purpose of this Standard significant influence does not extend to power to govern the financial and/or operating policies of an enterprise. Significant influence may be gained by share ownership, statute or agreement. As regards share ownership, if an investor holds, directly or indirectly through subsidiary(ies), 20% or more of the voting power of the investee, it is presumed that the investor has significant influence, unless it can be clearly demonstrated that this is not the case. Conversely, if the investor holds, directly or indirectly through subsidiary(ies), less than 20% of the voting power of the investee, it is presumed that the investor does not have significant influence, unless such influence can be clearly demonstrated. A substantial or majority ownership by another investor does not necessarily preclude an investor from having significant influence."*

182] Clause (7) of AS 23 reads as follows.

> *"7. An investment in an associate should be accounted for in consolidated financial statements under the equity method except when:*
>
> *(a) the investment is acquired and held exclusively with a view to its subsequent disposal in the near future; or*

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(b) the associate operates under severe long-term restrictions that significantly impair its ability to transfer funds to the investor.

Investments in such associates should be accounted for in accordance with Accounting Standard (AS) 13, Accounting for Investments. The reasons for not applying the equity method in accounting for investments in an associate should be disclosed in the consolidated financial statements.

Explanation:
The period of time, which is considered as near future for the purpose of this Standard, primarily depends on the facts and circumstances of each case. However, ordinarily, the meaning of the words 'near future' is considered as not more than twelve months from acquisition of relevant investments unless a longer period can be justified on the basis of facts and circumstances of the case. The intention with regard to disposal of the relevant investment is considered at the time of acquisition of the investment. Accordingly, if the relevant investment is acquired without an intention to its subsequent disposal in near future, and subsequently, it is decided to dispose off the investment, such an investment is not excluded form application of the equity method, until the investment is actually disposed off. Conversely, if the relevant investment is acquired with an intention to its subsequent disposal in near future, however, due to some valid reasons, it could not be disposed of within that period, the same will continue to be excluded from application of the equity method, provided there is no change in the intention."

183] The aforesaid clauses of AS 23 *inter alia* provide that if an investor holds directly or indirectly through subsidiary (ies), 20% or more of the voting power of the investee, it is to be presumed that such investors had significant influence unless it can be clearly demonstrated that this is not the case. Clause (7), again, is concerned with accounting for investments (equity method). In the first place, it is not at all clear as to how these accounting

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standards lead to any inference that the interests of a shareholder in a company or his rights against a company will extend to the economic value of such shareholding. Secondly, the Companies Act itself determines the interests and rights of a shareholder in or against a company. The Supreme Court in its decisions referred to earlier, has also explained the scope and import of such interests and rights of a shareholder in or against the company. Therefore, based upon the aforesaid accounting standards, which are clearly in the context of maintenance of accounts, it is not possible to accept the petitioners contention that economic value of the shareholding or some right to earn profits through any capital appreciation of listed value of shares is also required to be taken into consideration for purposes of Section 396(3).

184] In the rejoinder, it was submitted that since the Central Government has assessed compensation to shareholders of NSEL on the basis of *economic value,* the same yardstick has to be applied when it comes to assessing compensation payable to shareholders of FTIL.

185] In order to reach to the stage of assessment of compensation, the Central Government or the prescribed authority is required to determine whether the interests of the shareholders in or rights against have been altered. Only then the issue of assessment of compensation arises. The position of shareholders of NSEL and FTIL is substantially different. In case of NSEL, the entire shareholding stands wiped out since, under the impugned order, NSEL is to stand dissolved without being wound up. The interest of shareholders of NSEL in or the rights against the resultant company are obviously not the same as held in the original

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company which is to stand dissolved without being wound up. In contrast, the interest of the shareholders of FTIL in or against the resultant company are the same as held by them in the original company. The principle of equality or adoption of equal yardsticks can apply only amongst equals. Therefore, the Central Government, by assessment order dated 1st April 2015, has assessed the compensation payable to the shareholders of NSEL, which, in the present case are FTIL and NAFED. The FTIL as shareholder of NSEL has not appealed against the assessment order dated 1st April 2015.

186] Since, the shareholding of the shareholders of FTIL in the resultant company is the same as their shareholding in the original company, it cannot be said that the interest of the shareholders in or their rights against the resultant company stand diminished. It is not possible to accept the construction suggested by the petitioners expressed by them. The amalgamation does not impair the interest of the shareholders in or the right against the resultant company to receive dividends or receive a share in the surplus on winding up. The petitioners were unable to point out any provision in the Companies Act or any precedent which entitles a shareholder to any specific quantum of dividend or surplus on winding up.

187] Section 396, neither makes any reference to the market value or the economic value of the shares when it comes to the determination of the interests of a shareholder in or rights of a shareholder against a company. The provision also suggests no statutory prohibition to the amalgamation of a wholly owned loss making subsidiary with its profit making holding company,

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provided of course, the test of public interest is satisfied. If, as suggested by the petitioners, Section 396 were to contemplate only the amalgamation of two or more healthy companies, the legislature, could have said so in clear terms. Further, if this is what was in contemplation, then, there was perhaps no necessity for the immunity in Article 31A(1)(c) of the Constitution to any law providing for amalgamation of two or more companies in public interest. Therefore, it is not possible to rewrite the provision in Section 396 so as to restrict its scope to the compulsory amalgamation of two or more healthy companies as is suggested by the petitioners.

188] The contention based on the so-called *draconian consequences* of compulsory amalgamation cannot impact statutory interpretation particularly where the statute is clear, plain and unambiguous. Normally, in such a situation, the courts are bound to give effect to the meaning, irrespective of the consequences. This is not to say that the petitioners have established any *draconian consequences*. On one hand, the petitioners suggest that there is no possibility of NSEL being adjudged liable to the investors. The petitioners also suggest that there are sufficient assets already attached to satisfy decrees against defaulters. On the other hand, the petitioners, expressed apprehensions of *draconian consequences* on the premise that liability may be foisted on NSEL for making good the amount of over Rs.5600 crores to the investors. The statutory construction of a provision which is clear, plain and unambiguous cannot sway on the basis of such inconsistent apprehensions.

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189] In *Principles of Statutory Interpretations* (Justice G. P. Singh, Thirteen Edition) there is reference made to the *Sussex Peerage case*[95] in the following form: *"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver*." In ***Rananjaya Singh vs. Baijnath Singh***[96], S. R. Das, J. observed: *"The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly not be given effect to in opposition to the plain language of the sections of the Act."*

190] The rule of statutory interpretation which states that regard must be had to the consequences applies where the language used in a statute is capable of bearing more than one construction. Even such a rule must be applied with great care and caution lest it degenerates into a mere judicial criticism of the propriety of the legal provisions. The inconvenience warranting departure should be *"absurd inconvenience*.[97] Even the *absurdity* warranting departure according to WILLES, J., should be understood "in the same sense as repugnance that is to say something which would be so absurd with reference to other words of the statute as to amount to a repugnance".[98] Therefore, the argument of *ab inconvenienti* must not be used to re-write the language in a way different from that in which it was originally framed.[99] The alternative construction must be such which does not put undue strain on the words used and does not require

95 (1844) 11 CL & F 85
96 AIR 1954 SC 749
97 R. v. Townbridge Overseers (1884) 13 QBD 339
98 Christopherson v. Lotinga (1864) 33 LJ CP 121
99 Grundt v. Great Boulder Proprietary Gold Mines Ltd. (1948) 1 ALL ER 21

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recasting of the Act or any part of it.

191] Not that it would seriously matter, but the learned counsel for the petitioners are not right in submitting that there is no instance where Section 396 has been invoked to amalgamate loss making companies with profit making companies or unhealthy companies with healthy companies. The *Hutti Gold Mines Co. Ltd. (supra),* is an instance where the Central Government by invoking the provisions of Section 396 ordered the amalgamation of Chitradurga Copper Co. Ltd. and Karnataka Copper Consortium Limited, loss making companies heading towards closure with the profit making company *Hutti Gold Mines Co. Ltd.. T*he circumstance that Section 396 is a social welfare or essential welfare legislation is also not an irrelevant circumstance, in this context.

192] Apart from the issue of construction, it is necessary to note that none of the petitioners have placed any substantial material on record, either in their pleadings or otherwise to suggest that there is any serious diminution of the interests of the shareholders in or their rights against the company, as a result of the impugned order. Mere reference to *putative liability* of NSEL is hardly sufficient. Besides, this reference to *putative liability* has to be balanced with reference to the repeated assertion by FTIL, NSEL and even the major shareholders of FTIL like Jignesh Shah (46% stake in FTIL) or Ravi Sheth and Bharat Sheth (5.34% and 2.76% stake in FTIL) that, in reality, there is no problem at NSEL; that NSEL, in terms of its byelaws and rules can never be held liable; that in any case decrees in an amount of Rs.1233.02 crores have already been secured; that total value of properties of the

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defaulters attached is in the range of Rs.6,329.63 crores and there are injunctions restraining the defaulters from dealing with their property valued at Rs.4400.10 crores. In fact, Jignesh Shah, who holds the maximum stake in FTIL, in his written submissions, states that *'the claims of the 'investors' are more than adequately secured.....'*

193] This means that major shareholders holding almost 52% stake in FTIL see no reasonable possibility of FTIL being mulcted with NSEL's *putative liabilities*. The Foreign Institution Investors, which are stated to hold about 17.90% shareholding in FTIL are not before us and further, there is no material on record to indicate they having raised any objections to the proposed draft order.

194] The SHAFT, which has instituted Writ Petition No.1922 of 2016, claims that it is a *'charitable institution'* registered under the Bombay Public Trusts Act, 1950. SHAFT claims to have approximately 3000 members, spread all over India and also includes '*some NRI's from USA and UAE*'. This is all quite vague. The petition does not even disclose whether all the 3000 members are indeed the shareholders of FTIL, the date of purchase of the shares, the number of shares held and such other relevant details. This was relevant for at least two reasons. Firstly, Mr. Gaurav Joshi and Mr. M. P. S. Rao, the learned senior counsel representing the investors contended that most of such shareholders have purchased shares even after the publication of draft order proposing amalgamation. Secondly, they contend that most of the retail shareholders of FTIL, whom SHAFT purports to represent hold shares valued at less than Rs.5,000/- per shareholder.

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195] As regards the first contention, we do not have before us any credible material and therefore, we do not propose to proceed on the said basis. However, as regards the second contention, reference may be appropriate to the pleadings in paragraph 83 of Writ Petition No. 387 of 2015 instituted by none other than Jignesh Shah, in which he has stated that the bulk of shareholders i.e. 63,300 from out of the total of 63,873 are small investors holding shares valued at less than Rs.5,000/- per shareholder.

196] There are no pleadings in any petitions to demonstrate the diminution of economic value of shares as a result of the impugned order or even the draft order. All that is stated in paragraph 83 of Writ Petition No. 387 of 2015 instituted by Jignesh Shah is that since the publication of the draft order on 21st October 2014, the share value which was Rs.211.10 (opening price) reduced to Rs.174.55 on 31st October 2014. Then it is stated that upon the news of the impugned order becoming available in the public domain, the price of FTIL shares *in the long run will be adversely affected*. On basis of such material or such pleadings, it is not possible to even hold that any case of serious erosion in economic value of the shares, has at all been made out. It is necessary to note that by 21st October 2014 when the draft order of amalgamation was made available to the companies, the news of collapse of NSEL's Exchange was already in public domain. By that time, FMC's fit and proper order dated 17th December 2013, was also in the public domain. Therefore, to suggest that the fall in the price of the FTIL shares between 21st October 2014 to 31st October 2014 was solely attributable to the proposed action under Section 396 and to claim compensation on such basis, is unacceptable.

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197] The impugned order does not take away rights or interests of FTIL. It also does not take away rights or interests of the shareholders of FTIL. FTIL, having held 99.9998% shares in NSEL was entitled to and did exercise all the statutory rights as a shareholder. As a result of the impugned order, the shares held by FTIL in NSEL stand extinguished and instead, the entire business and undertaking of the NSEL vests in FTIL. The rights and interests of FTIL, or for that matter, the shareholders of FTIL cannot, under such circumstances, be said to be significantly different from the position which prevailed prior to the impugned order of amalgamation. There is thus substantial compliance with the provisions of Section 396 (3).

198] In *re Nebula Motors Ltd (supra)*, it is held that the scheme involving amalgamation of a subsidiary with its holding company does not involve any reorganization or restructuring of the shares of the members of the holding company and therefore does not affect or in any manner touch upon the rights of the members of the holding company.

199] None of the interests or rights of the creditors have really been affected. Two of the banks – creditors, in fact withdrew their writ petitions challenging the impugned order, unconditionally. The Standard Chartered Bank, apart from contending that the repayment of its loans by the resultant company might be compromised, neither explained this by placing any cogent material on record nor explained how this can be a ground to interfere with the impugned order. The rights of the creditors in such a situation are mainly contractual. The impugned order takes care of such rights. There is in fact, nothing in the impugned order

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which suggests that any contractual or statutory rights available to the creditors have been taken away or extinguished. Quite rightly, therefore, none of the creditors have even bothered to appeal against the assessment order, which has not awarded any compensation to them.

200] In this case, since FTIL, NSEL and in particular their shareholders have failed to demonstrate that they have been deprived of their *property*, there is no question of any infringement of Article 300A of the Constitution. The shareholders cannot confuse between the property of the companies and the interest which they hold by virtue of their shareholding. Further, none of the petitioners have demonstrated any infringement of their rights under Articles 14 and 19 of the Constitution. Accordingly, there is no necessity to go into the issue of any *derivative immunity,* which might or might not attach to the impugned order made under Section 396. Only if the petitioners had made out a case that the impugned order infringes the rights guaranteed to them under Articles 14, 19 or 300A of the Constitution, could the issue of *derivative immunity* have assumed importance. Since, this is not the case, we do not deem it necessary to go into the issue of *derivative immunity*.

201] Therefore, upon cumulative consideration of the aforesaid, we are unable to accept the contention that the Central Government was dis-entitled in law or on facts to order the compulsory amalgamation of allegedly loss making wholly owned subsidiary (NSEL) with its profit making holding company (FTIL) in public interest by resort to Section 396.

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ISSUE -C

(C) Whether the impugned order is *ultra vires* Section 396 (3) and Section 396(4) of the Companies Act, since, according to the petitioners in Writ Petition No. 1922 of 2016 and Writ Petition No. 387 of 2015, the Central Government has failed to make any order assessing compensation to shareholders of FTIL ?

202] The contention that the Central Government, in this case, has failed to even make an assessment order as contemplated by Section 396(3) was raised mainly by Mr. Seervai on behalf of SHAFT. In the rejoinder though, Mr. Salve and Mr. Mookherjee also made submissions to the similar effect. In the written submissions on behalf of FTIL and Jignesh Shah at the stage of rejoinder it was urged that there would be erosion in the value of shares of FTIL due to the impugned amalgamation *in the event* NSEL is held liable in the civil suits for the dues of the so called *"investors"*.

203] Mr. Khambata is right in his submission that there are hardly any pleadings in any of the petitions in support of the contention as raised. Writ Petition No. 2743 of 2014 instituted by FTIL, in fact, accepts that the assessment order proceeds on the basis that there is no requirement of assessment of compensation to FTIL's shareholders. No doubt, FTIL, has contested the correctness of this position. But, this is quite different from the contention at the stage of rejoinder that in the present case there is no assessment order and consequently, there is no compliance with the provisions of Section 396 (3). FTIL may not even be the proper relator to raise

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the grievance that there is no assessment of compensation to its shareholders.

204] There is no material difference in the pleadings in FTIL petition and Writ Petition No. 387 of 2015 instituted by its shareholders Jignesh Shah and others insofar as the issue of assessment order is concerned. After the assessment order dated 1st April 2015 was published in the Official Gazette, Writ Petition No. 387 of 2015 was specifically amended to challenge the assessment order on various grounds. It was pleaded that the very making and publication of the assessment order constituted contempt of this Court's order dated 4th February 2015. It was pleaded that assessment order can never precede final order of amalgamation since this would amount to prejudging the issue. The assessment order was even challenged on merits. In any case, liberty was applied to challenge the assessment order on merits in case the challenge to the impugned order of amalgamation fails. Significantly, there are neither any pleadings nor any ground to suggest that there was no assessment order ever made or that the assessment order dated 1st April 2015 is not some assessment order as contemplated by Section 396(3).

205] In Writ Petition No. 2985 of 2014 instituted by Ravi Sheth and another, together holding 8.10% shareholding of FTIL, there are no pleadings as regards the assessment order dated 1st April 2015. However, in the written submissions filed on 8th March 2017 at paragraphs 2,3,4,6, 20(b), 20(c), 21(ii) and 35, quite surprisingly, challenges were raised to the assessment order dated 1st April 2015 on merits and even a prayer was made in the written submissions that the assessment order dated 1st April 2015 be set

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aside or in the alternative, the prescribed authority be directed to award appropriate compensation to the petitioners after granting them a hearing. There was reference to Chamber Summons No.204 of 2016, which was possibly a chamber summons seeking leave to amend the petition, at the stage when the final hearing in the matter had advanced substantially.

206] As noted earlier, Mr. Shah, the learned counsel for the petitioners however, handed in a preacipe on 21st March 2017 stating that Chamber Summons No. 204 of 2016 was not being pressed and all references to the said chamber summons in paragraphs 2,3,4,6, 20(b), 20(c), 21(ii) and 35 of the written submissions dated 8th March 2017 are omitted. This means that Writ Petition No. 2985 of 2014 contains no pleadings whatsoever in support of the ground now projected.

207] The pleadings in Writ Petition No. 1922 of 2016 instituted by the Association of Retail Shareholders of FTIL (SHAFT) do not even contain the ground that the impugned order is required to be set aside because the Central Government or the prescribed authority has failed to make any order assessing compensation to the shareholders of FTIL. Rather, the pleadings in the petition suggest that the petitioners are aggrieved by the order of assessment dated 1st April 2015 because the said order of assessment does not suitably compensate the shareholders of FTIL. This is clear from paragraphs 12 and 13 of the petition, which read as follows :

> *"12. The Petitioner further submit that the order of assessment is ineffective and inoperative in as much as the same was passed even prior to the Impugned order being passed.*

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> *13. The Petitioner further submits that the notification and order of assessment is passed in an mechanical manner and without application of mind and is contrary to the principles of law and rule of natural justice in as much as the order and notification in relation to Assessment merely refer to the expert reports on valuation and adopts the same mechanically."*

208] Realising that the aforesaid pleadings fall woefully short in supporting the ground now projected, in the written submissions in rejoinder, reference is made to paragraph 10 in Writ Petition No. 1922 of 2016, which reads as follows:

> *"10. The Petitioner further submits that section 396 provides for certain procedure which is not followed by the Respondent No. 1, which is also contrary to the settled law and judgments wherein if a procedure is stipulated the same must be followed strictly and any action done without following the same would be void-abinitio."*

209] Even the most liberal construction of the aforesaid pleadings cannot lead to the inference that no assessment order as contemplated by Section 396(3) was made and in the absence of the same the Central Government could not have proceeded to make the impugned order. Rather, the pleadings seem to object to the assessment order made on the ground that '*same was passed even prior to the impugned order being passed*'. In paragraph 13 the assessment order is actually challenged because it was passed '*in a mechanical manner and without application of mind*' by mere reference to the reports of experts on valuation.

210] From all this, it is quite clear that there are no pleadings in the petitions instituted by the shareholders in support of the ground now projected. The pleadings in the petition tacitly

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acknowledge that assessment order dated 1st April 2015 has been made by the prescribed authority. Further, in the pleadings, such assessment order dated 1st April 2015 has been challenged by at least some of the petitioners and liberty to challenge has been applied by others on the ground that they are aggrieved by the same. Several challenges have been raised to the assessment order, including that such assessment order was made and notified in breach of our earlier order dated 4th February 2015, or that the assessment order was made in breach of principles of natural justice, or that the assessment order is vitiated by non-application of mind because valuation reports of experts were mechanically accepted and so on.

211] In this case, there is no dispute that the prescribed authority has made an assessment order dated 1st April 2015 determining that the value of NSEL's shares is Rs.77/- per share on the basis that may not be liable for the default taken place on its exchange. In the present case, FTIL holds 99.9998% shares of NSEL, the balance being held by NAFED. Upon amalgamation, FTIL ceases to hold shares in NSEL which stands dissolved without being wound up, but the entire business and undertaking of NSEL stands vested in FTIL. NAFED, now stands allotted 38 shares in the resultant company (FTIL). The rights and interests of the shareholders of FTIL, prior to amalgamation remain unaffected and therefore, there is no provision made for award of any compensation to the shareholders of FTIL.

212] In *K.T. Plantations Private Limited (supra)*, the Supreme Court was considering the constitutional validity of the Roerich and Devikarani Roerich Estate (Acquisition and Transfer) Act,

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1996 and Section 110 of Karnataka Land Reforms Act, 1961 on the anvil of the scope and content of Article 300-A of the Constitution. In that regard, it was held that requirement of public purpose, for deprivation of a person of his property under Article 300-A is a pre-condition, but no compensation or nil compensation or its illusiveness has to be justified by the State on judicially justiciable standards. Measures designed to achieve greater social justice may call for lesser compensation and such a limitation by itself, will not make the legislation invalid, unconstitutional or confiscatory. In other words, the right to claim compensation or the obligation to pay, though not expressly included in Article 300-A , it can be inferred in that article and it is for the State to justify on its stand on justifiable ground which may depend upon legislative policy, object, purpose of the statute and host of other factors. It is in this context that the Supreme Court, at paragraph 192 clarified that there is a difference between "*no compensation*" and "*nil compensation*". A law seeking to acquire private property for a public purpose cannot say that "*no compensation shall be paid*". However, there could be a law awarding "*nil compensation*" in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and the onus is on the Government to establish the validity of such a law. In later case, the Court in exercise of judicial review will test such a law keeping in mind the above parameters.

213] The observations of the Supreme Court are required to be considered in the context in which they are made. In the present case, we are not concerned with any law or for that matter executive order providing for acquisition of any property of the shareholders. In the context of Issue – B, we have already

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attempted to define the scope of the expression "*interest of a shareholder in or rights against of a company"*. In *Charanjit Lal Chowdhury (*supra*)* the Supreme Court, after explaining the nature of a share and the consequent interest of a shareholder in a company had noted that the impugned Ordinance had not dispossessed the shareholder, in any sense of the term, of the shares held by him in the company. Nobody had taken away the shares from him. His legal and beneficial interest in respect of the shares he held was left intact. If the company declares dividends, he would be entitled to the same. He can sell or otherwise dispose of the shares at his option. Accordingly, the impugned Ordinance was held valid, even though, at the relevant time, Article 19(1)(f) was a part of the Constitution. In the present case, since the shares of the shareholders of FTIL have remained intact, there is no variation in the interests of the shareholders in FTIL or in their rights against FTIL. This is not a case of acquisition by offering no compensation or nil compensation. The observations in *K.T. Plantation Private Limited (supra)* cannot be read out of context, particularly, when the pleadings clearly establish that SHAFT has construed the assessment order to mean that no compensation is payable to the shareholders of FTIL because their interest in or rights against the company have remained unaffected post amalgamation.

214] Some of the petitioners have urged that this Court examines the validity of the assessment order on merits by pleading at least four reasons as to why they should not be relegated to avail the alternate remedy of appeal before the Tribunal under Section 396 (3A). With all such pleadings, it is too much for these petitioners to now urge that there is no assessment order at all made by the

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Central Government or the prescribed authority merely because the assessment order dated 1st April 2015 makes no specific reference to the shareholders of FTIL. This cannot be said to be a case where the Central Government or the prescribed authority has not at all made any assessment order as contemplated by Section 396 (3). At least in the pleadings , this is not even the case of the petitioners. Their case, however, is that the assessment order dated 1st April 2015 is illegal or even void on the several grounds which they have pleaded in their petitions. In such circumstances, therefore, the principle in *Nazir Ahmed (supra)* cannot come to the aid of such petitioners.

215] The submission, again, backed by no pleadings whatsoever that the petitioners were deprived opportunity of instituting an appeal under Section 396 (3A), because the assessment order dated 1st April 2015 makes no reference to the shareholders of FTIL and therefore, they could not have been held to be covered under the expression "*any person aggrieved*" in Section 396(3A), in the facts of the present case, is untenable. The circumstance that the assessment order dated 1st April 2015 made no specific reference to the shareholders of FTIL did not preclude or deter the petitioners from attacking the assessment order dated 1st April 2015 *inter alia* on merits. Besides, Section 396 (3A) is quite widely worded, in the sense that it uses the expressions "*<u>any</u> person aggrieved*" and "*<u>any</u> assessment of compensation made*".

216] In *Babua Ram (supra)* , the Supreme Court has interpreted the expression "*person aggrieved*" to mean a person who has suffered legal injury or who has been unjustly deprived or denied of some benefits, advantage or compensation, which he would be

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interested to obtain in the usual course. Nothing therefore, prevented the petitioners from instituting appeals under Section 396(3A) within the period of limitation as prescribed therein.

217] The matter can be viewed from yet another perspective. In the context of Issue-B, we have already examined the scope of Section 396(3) and held that the interest of the shareholder referred to therein does not include the *economic value* of their shareholding or some right to earn profits through any capital appreciation of listed value of shares. Further, we have held that the question of assessment of compensation arises only where the shareholder's interest in or rights against the resultant company are not, as nearly as may be, the same as the shareholder's interest in or rights against the original company. We have also held that in so far as the shareholders of FTIL are concerned there is no diminution in their interest in or rights against the resultant company as compared to their interest in or rights against the original company.

218] This means that even on merits, there is no infirmity in the assessment order dated 1st April 2015 to the extent, it denies compensation to the shareholders of FTIL. The same is the position of the creditors of FTIL. There is nothing in the provisions of Section 396(3) which suggest that prior hearing has to be afforded to members or creditors before assessment order is made. Nothing prevented the shareholders from raising their objections in response to the draft order. Several shareholders, including perhaps the petitioners, did in fact, raise objections. If the shareholders were aggrieved by the assessment order dated 1st April 2015 because it awarded them no compensation, nothing

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prevented them from instituting appeal under Section 396(3A) within period of 30 days from the date of publication of the assessment in the Official Gazette. At best, the contention now raised by the petitioners, which again, is not at all backed by any pleadings, is some hyper technical objection based upon the form of assessment order dated 1st April 2015. In the facts and circumstances of the present case, we are not inclined to exercise our extra-ordinary and equitable jurisdiction under Articles 226 and 227 of the Constitution and upset the impugned order on the ground urged.

219] For all the aforesaid reasons, we are satisfied that this is not a case where the Central Government or the prescribed authority has failed to make any order as contemplated by Section 396(3) or that the shareholders or creditors of FTIL were deprived of opportunity of appeal under Section 396(3A) and therefore there is any breach of the procedure prescribed in Section 396(4) in making the impugned order. Accordingly, we see no merit in the contention that the impugned order is *ultra vires* Section 396.

ISSUE - D

(D) Whether the Central Government, in making the impugned order, has practised hostile and invidious discrimination, thereby infringing Article 14 of the Constitution of India ?

220] Mr. Seervai, Mr. Shah and Mr. Behramkamdin forcefully contended that the Central Government, by first time invoking Section 396 to amalgamate two non government companies has

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practiced hostile or invidious discrimination. They have referred to several instances in the past where the Central Government invoked the provisions of Section 396, but pointed out that all these are instances involving Government Companies or Public Sector Undertakings, where, the amalgamation was consensual.

221] Further, by citing the instance of Unit Trust of India (UTI), they submit that the payment crisis in the context of US 64 Scheme, was handled by the Central Government quite differently i.e. the *scam ridden unit* was hived off or quarantined, so that the other units of UTI remained healthy. They submit that since the Central Government has not adopted similar approach in the present situation, there is hostile and invidious discrimination involved. Submissions were also made to the effect that some other group of companies (which were not named), who had borrowed heavily from public sector banks and financial institutions but had failed to honour their commitments, were let off by the Central Government or its agencies by according them the status of *non performing assets (NPAs).* Since, in the present case, drastic action of compulsory amalgamation has been taken, there is hostile and invidious discrimination involved.

222] We see no merit in any of the aforesaid contentions. There is nothing in either the text or the context of Section 396 to suggest that the same can be invoked only in respect of government companies. Even assuming that the provisions of Section 396 have been invoked for the first time to amalgamate two non government companies, such a circumstance neither vitiates the exercise of such power nor can the same be struck down as involving any hostile or invidious discrimination.

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223] The argument of novelty, can perhaps be best answered, in the words of Lord Denning in ***Packer vs. Packer***[100]

> *"What is the argument on the other side ? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything, which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both".*

224] The charge of breach of equality is easier made than made out. In this case, there are no proper pleadings in any of the petitions in support of the plea that the UTI – *Payment Crisis* (this is the expression used by the petitioners) was similar to or comparable with the situation which has arisen at the NSEL Exchange. Similarly, there are no pleadings to draw a comparison between some group of companies who are said to have been *let off* by the Central Government or its agencies even though they are alleged to have defaulted in repaying their loans and the position of FTIL and NSEL. Equality, which is no doubt, a dynamic concept, is to be evaluated necessarily amongst equals. In the absence of any proper pleadings or particulars and merely on the basis of arguments or notes of arguments, it is not possible to accept the challenge based upon any hostile or invidious discrimination infringing Article 14 of the Constitution. The challenge, it appears, has been raised in quite a casual and cavalier manner.

225] The challenge, in any case, seems to proceed on the basis that the Central Government, in invoking the provisions of Section 396 in this particular situation has acted quite sternly but the very same Central Government failed to take stern measures to deal with '*scam ridden unit*' of UTI or the group of companies which

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have borrowed heavily from banks and financial institutions but failed to repay the loans. Such a contention does not appeal to us, in the least. In fact, such a contention sounds in the arena of insistence upon some sort of equality in illegalities. It is trite that the equality contemplated by Article 14 of the Constitution is not such *negative equality*.

226] In ***Union of India and anr. vs. International Trading Co. and anr.***[101]**,** similar contention was rejected by the Supreme Court. In the said case, the contention was that permissions had been granted to thirty two vessels and denial of permission to the respondents, (International Trading Company) vessel amounted to breach of guarantee of equality in Article 14 of the Constitution of India. The Supreme Court, held that even if it is accepted that there were any permissions improperly granted, that might render those permissions vulnerable, but such improper permissions cannot come to the aid of the respondents. The Supreme Court held that two wrongs do not make one right. *A party cannot claim that since some thing wrong has been done in another case directions should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong*. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance, repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other case by introducing a concept of negative equality the respondents

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cannot strengthen their case. They have to establish the strength of their case on some other basis and not by claiming negative equality.

227] Mr. Seervai, Mr. Shah and Mr. Behramkamdin then placed strong reliance on circular dated 20th April 2011 issued by Ministry of Corporate Affairs, which deals with amalgamation of government companies by adoption of simplified procedure under Section 396. They, no doubt, hesitatingly suggested that the circular suggests that the provisions of Section 396 are to be invoked only for amalgamation of government companies. They however pointed out that the circular, even when it comes to amalgamation of government companies provides that the procedure as contemplated by Section 391 be followed, not by applying to the court but by securing resolutions from the shareholders and the creditors in support of the proposed amalgamation. They submit that since this procedure was never followed by the Central Government before it proposed amalgamation of NSEL and FTIL, issue of hostile and invidious discrimination was involved. They submit that the circular dated 20th April 2011 embodies a policy of the Central Government in such matters and since such policy has been deviated from, quite arbitrarily, there is infringement of Article 14 of the Constitution. They rely on *E. P. Royappa* (supra), *Maneka Gandhi* (supra) and *Cipla Ltd.* (supra) in support of all these contentions.

228] There is nothing either in the text or in the context of Section 396 to suggest that the same is restricted in its applicability only to government companies. The circular dated 20th April 2011 cannot, obviously, add or detract from the statutory provision in Section

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396. Besides, the circular itself states that the same is '*without prejudice to the generality of section 396.....*' . Therefore, on the basis of circular dated 20th April 2011, we are unable to accept the contention that Section 396 can be invoked only to amalgamate two or more government companies or to put it conversely, Section 396 is inapplicable for amalgamation of two or more non government companies.

229] The circular dated 20th April 2011, which is applicable only to amalgamation of government companies by resort to Section 396, no doubt, makes reference to securing resolutions of shareholders and creditors in support of the amalgamation. However, on the basis of such circular, there is no question of any of the petitioners insisting upon compliance with such procedures, when, Section 396, expressly excludes the application of such procedures where amalgamation is proposed in public interest. There is no question of any hostile or invidious discrimination involved in the non compliance of such procedures.

230] The circumstance that the circular dated 20th April 2011 proposes such procedures when it comes to amalgamation of two or more government companies or the circumstance that in the instances referred to by the petitioners such procedures may have been followed, does not, denude the Central Government from exercising powers under Section 396, without being bogged down by the cumbersome procedures prescribed in Sections 391 or 394 of the Companies Act, 1956.

231] In fact, Section 396 contains a non *obstante* clause in the context of application of Sections 394 and 395. Section 396, it

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must be noted, is undoubtedly a legislation to provide for amalgamation of two or more corporations in public interest. Article 31A (1)(c) of the Constitution provides that notwithstanding anything contained in Article 13, no law providing for the amalgamation of two or more corporations either in public interest or in order to secure the proper management of the corporations shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any rights conferred by Article 14 or Article 19 of the Constitution. The legislative provision in Section 396, cannot, therefore, be whittled down on the basis of petitioners' interpretation of the circular dated 20th April 2011.

232] If the petitioners' contention based upon the circular dated 20th April 2011 is to be accepted, then, the same will perhaps frustrate the very purpose for enactment of Section 396, leave alone the immunity granted to the said provision by Article 31A (1) (c) of the Constitution of India. The notes on clauses to the Companies Bill 1953, which was a precursor to the Companies Act 1956 suggests that one of the objectives for enactment of Section 396 was to obviate the observance of the usual procedures, which lead to prolonged delays and which would be detrimental to national interest, when, amalgamation was proposed, in national interest.

233] The relevant note to the Companies Bill 1953, reads as follows:

> *"Clause 366 – This is a new provision and it is intended to provide, at the instance of the Government, for the amalgamation of two or more companies in the national interest. Occasionally, cases arise where such an amalgamation in the national interest is clearly a necessity.*

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> ***The observance of the usual procedure prescribed by the existing Act in such cases will lead to prolonged delays which will be detrimental to the national interest****. It has been made clear that any order made by the Government should provide for the old share holders, and the old debenture holders and other creditors, having the same interest in the company resulting from the amalgamation as they had in the original companies. Any order made by the Government under this clause will be laid on the table of both Houses of Parliament and will therefore be subject to the Parliamentary scrutiny.*"
>
> [*emphasis supplied*]

234] The circular dated 20th April 2011 cannot be stated to be or construed as *policy* of the Central Government in matters of amalgamation of companies by resort to Section 396. In *Cipla Limited (supra) ,* the Supreme Court was dealing with the Drug Policy document issued by the Central Government with regard to price fixation under the Drugs (Prices) Control Order 1995 , which was a delegated legislation. In this context, the Supreme Court, held that though the contents of a policy document cannot be read and interpreted as statutory provisions, at the same time, the Central Government which combines the dual role of policy maker and the delegate of legislative power, cannot at its sweet will and pleasure give a go by to policy guideline evolved by itself in the matter of selection of drugs for price control. The delegated legislations that follow the policy formulation should be broadly and substantially in conformity with that policy , otherwise it would be vulnerable to attack on the ground of arbitrariness resulting in violation of Article 14 of the Constitution.

235] In the present case, the Central Government was required to deal with an unprecedented situation which led to the collapse of

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the commodities stock exchange. None of the petitioners have placed any material on record to even remotely suggest that the previous instances of amalgamations by resort to Section 396 where in circumstances even remotely comparable to the facts and circumstances of the present case. The circular dated 20th April 2011 cannot be said to embody any policy decision of the Central Government in such matters. The decision in *Cipla Ltd. (supra)* can therefore, afford no assistance to the petitioners in the present case. Further, since the petitioners have failed to establish any arbitrariness or discrimination on the part of the Central Government in making the impugned order, the principles in *E.P. Royappa (supra)* and *Maneka Gandhi (supra)* can also have no application to the present case.

236] Mr. Shah then contended that since Section 396 does not exclude Section 391, the procedures in Section 391 have to be followed. Mr. Shah submitted that the circular dated 20th April 2011 supports this construction of Section 396. The plain reading of the provision in Section 396 is sufficient to reject this contention. Section 391, *inter alia*, provides that where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court or the Tribunal may, on the application of the company or of any creditor or member of the company order a meeting of creditors, class of creditors or of members or class of members as the case may be called for the purposes of ascertaining their wishes. Action under Section 396, admittedly, does not contemplate any involvement of the Court or the Tribunal. Even the circular dated 20th April 2011, does not contemplate any involvement of the Court or the Tribunal.

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Besides, as noted earlier, circulars can obviously not operate to amend or vary the statutory provisions and the statutory scheme in Section 396.

237] Section 396 provides that where the Central Government is satisfied that it is essential in public interest that two or more companies should amalgamate, then, *notwithstanding anything contained in sections 394 and 395* but subject to the provision of this section, the Central Government may provide for amalgamation of the two or more companies. Section 394, which stands expressly excluded from the scheme of Section 396, *inter alia* provides for the parameters to be considered by a court or a tribunal when an application is made to such Court or Tribunal under Section 391 for sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section.

238] Since, Section 396 contemplates no application to the Court or Tribunal under Section 391 or otherwise, there was no necessity of expressly excluding the application of Section 391 from the scheme of Section 396. In order to obviate any contention that the Central Government, in the exercise of its powers under Section 396, is nevertheless required to apply the same parameters as are prescribed to the courts or tribunals in Section 394, the legislature may have deemed it appropriate to provide for a *non obstante* clause to override the effect of Sections 394 and 395.

239] Besides, if the provision in Section 396 is analyzed, it is apparent it represents a complete Code in so far as amalgamation of two or more companies by the Central Government in public

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interest, is concerned. Therefore, on the basis of circular dated 20th April 2011, it is not possible to read into Section 396 the provisions of Section 391.

240] Since, the petitioners have failed to establish that the impugned order made by the Central Government is in violation of Article 14 of the Constitution, there is really no reason to go into the issue as to whether the impugned order enjoys any derivative immunity under Article 31A (1)(c) of the Constitution. The issue of immunity, whether derivative or otherwise would have arisen, had, the petitioners been able to establish that the impugned order was in violation of Articles 14 of 19 of the Constitution. Since, the petitioners have failed to establish any violation of Article 14 or 19 of the Constitution, there is no necessity to go into the issue of immunity, whether derivative or otherwise.

241] Accordingly, we are unable to fault the impugned order on the ground of violation of Article 14 of the Constitution or on the basis of the petitioners' reading of the Central Government's circular dated 20th April 2011.

ISSUE -E

(E) Whether the impugned order is *ultra vires* Section 396 of the Companies Act because the Central Government has failed to address itself to the issue of *national interest ?*

242] The contention that the Central Government before making the impugned order, was required to address itself to the issue of

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national interest and not merely *public interest* is not borne out by the text of Section 396.

243] No doubt, Section 396, as originally enacted, did make reference to *'national interest'*. However, the Parliament by Companies (Amendment) Bill, 1959, Section 396 was amended and the expression '*national interest'* was substituted with the expression *'public interest'*. In such a situation, it would be too far fetched to urge that the Parliament, nevertheless intended to retain *"national interest"* as the only ground on which the Central Government could order compulsory amalgamation of two or more companies. When an Amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. Despite the conscious alteration, it is not open to interpret the statute in its original form. This would virtually amount to rendering the statutory amendment redundant or otiose. This is clearly not the accepted manner for the interpretation of the statutes.

244] In *D.R. Fraser & Co. Ltd. (supra),* the Privy Council speaking through Lord Macmillan has held that when an amending Act alters the language of the principal Statute, the alteration must be taken to have been made deliberately.

245] Mr. Mookherjee and Mr. Dwarkadas however rely on Notes on Clauses to the Companies (Amendment) Bill 1959 and to the Statements of Objects and Reasons to the Constitution (Fourth Amendment) Act 1955 to submit that in all such matters the guiding star must be *"national interest"* and not merely *"public interest"*. This submission cannot be accepted for several reasons.

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246] Firstly, when the words of a statute are clear, plain and unambiguous the courts are bound to give effect to that meaning. In such a situation there is no question of adopting any other hypothetical construction on the ground that such construction is more consistent with the alleged object or policy of the statute. The primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. (See ***Kanailal Sur vs. Paramnidhi Sadhu Khan)***[102]

247] Secondly, even if we were to advert to the notes on clauses, all that they state is that the amendment in Section 396 to substitute the expression *"national interest"* with *"public interest"* is of a *"drafting nature"*. Now if this is so, it is legitimate to proceed on the basis that at least the draftsman who prepared the notes on clauses noticed no difference or distinction between the two expressions. If Mr. Mookherjee and Mr. Dwarkadas subscribe to this line, then, obviously, the circumstance that the impugned order makes no specific reference to *"national interest"* in no manner vitiates the impugned order.

248] Thirdly, if the legislative history referred to by Mr. Mookherjee and Mr. Dwarkadas is analyzed, it does appear the expressions *"national interest"* and *"public interest"* have been employed interchangeably in the context of Section 396 and Article 31A of the Constitution.

249] Article 31A(1)(c) of the Constitution confers immunity on law providing for the amalgamation of two or more corporations either in the public interest or in order to secure the proper management

102AIR 1957 SC 907

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of any of the corporations from the challenge that such law is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 and 19 of the Constitution. The expression used in the Article is '*public interest*'. However, in the Statement of Objects and Reasons to the Constitution (Fourth Amendment) Act, 1955 by which Article 31A(1)(c) was introduced in the Constitution, the reference is to *'national interest'*.

250] Similarly, Section 396, as originally introduced in the Companies Act, 1956 used the expression *"national interest"* consistent with Notes on Clauses incorporated in Statement of Objects and Reasons to the Companies Bill, 1953. However, Companies (Amendment) Bill, 1959, which preceded the Companies (Amendment) Act, 1960 provided for the following :

> *"150. Amendment of section 396 :- In section 396, in sub section (1), for the words "national interest", the words "public interest" shall be substituted."*

251] The Notes on Clauses to the Companies (Amendment) Bill, 1959, with reference to the aforesaid proposed amendment, provided as follows :

> *"Clause 150--- The amendment is of a drafting nature. Compare clause 66 (c).*"

252] From the aforesaid legislative history, it does appear that the expressions *"national interest"* and *"public interest"* have been used interchangeably or in the same sense in the context of Article 31A(1)(c) of the Constitution of India and Section 396.

253] Significantly, neither Mr. Mookherjee nor Mr. Dwarkadas chose to elaborate upon the distinction, if any, between *"national*

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interest" and "*public interest"* in the context of Section 396. They merely suggested that some test more stringent than what might apply to "*public interest"* will have to be applied, in determining *"national interest*". Since, the learned counsel mainly rely upon Notes on Clauses to the 1959 Bill which states that the amendment to substitute "*national interest"* with *"public interest*" in Section 396 is of a *"drafting nature"* , there is no reason to accept their contention that nevertheless there is some distinction between the two expressions in the context of Section 396. If at all, there is any distinction between the two expressions, then, the circumstance that the Parliament, in terms, has chosen to amend Section 396 so as to substitute the expression *"national interest"* with *"public interest",* will have to be respected and not ignored.

254] In fact, even the decision of the Gujarat High Court in *Wood Polymer Limited (supra)* relied on by Mr. Mookherjee expressly states that the expression *"public interest"* is sometimes used as an expression inter-changeable for the *national interest*. This is a term very often used in contradistinction to "*private interest*" or "*personal interest*". It is 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 (vide Black's Dictionary, 4th edition, p. 1393). The word "public" has a very wide connotation, and though the word "public" has a very wide connotation, the perspective in which it is used will determine its ambit. The expression "interest of the general public" came in for construction in ***Emperor v. Jesingbhai***[103]**,** wherein it was held that it is an expression of wide connotation and has got several implications. As the expression will take its colour from the context

103 (1948) 50 Bom LR 544

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in which it is used, the object behind the legislative intendment within which it is used and the mischief it seeks to suppress, all these factors will enter into the verdict in deciding what constitutes 'public interest' in the context of the legislation in which it is used. In the very nature of the case, modern conditions and the increasing inter-dependence of the different human factors in the progressive complexity of a community make it necessary for the Government to touch upon and limit individual activities at more points than formerly. (***Vide State of Bihar v. Maharajdhiraj Sir Kameshwar Singh of Darbhanga (1952)[104])***".

255] In any case, taking into consideration the importance of stock and commodity exchanges to the national economy and the unprecedented situation which the Central Government was required to deal with in the wake of collapse of the entire commodities exchange, we are unable to hold that the impugned order was not made in *"national interest"*.

256] The decisions in *MCX Stock Exchange (supra)* and *Coimbatore Stock exchange (supra),* highlight on the importance of stock and commodity exchanges to the national economy. These decisions hold that the perception of the Indian economy, both locally and abroad, depends, to a large extent, on the functioning and health of its stock and commodity exchanges. The Central Government, in this case, having taken measures to deal with an unprecedented situation arising out of the failure of a national level commodity exchange leaving investors with claims of over Rs.5600 crores, in a lurch, is certainly a matter involving *"national interest"*.

104 AIR1952 SC 252

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257] For all the aforesaid reasons, we are unable to fault the impugned order on the ground that it makes no specific reference to "*national interest*" but focuses merely on *"public interest"*.

ISSUE -F

(F) Whether the impugned order is *ultra vires* section 396 of the Companies Act because there was no *public interest* whatsoever involved in ordering amalgamation of NSEL with FTIL ?

258] In order to evaluate the petitioners contentions, we need to first analyse the scope and import of the expression *public interest* employed in Section 396.

259] In ***Bihar Public Service Commission vs. Saiyed Hussain Abbas Rizwi***[105]**,** the Supreme Court has held that the expression "*public interest*" has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression "*public interest*" must be viewed in its strict sense with all its exception so as to justify denial of as statutory exemption in terms of the Act. In its common parlance, the expression "*public interest" , like* "*public purpose"* , is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes colour from the Statute in which it occurs, the concept varying with time and state of society and its needs. Thus what is '*public interest*' today, may not be so considered a decade later. In any case, the expression cannot be considered in *vacuo* but must be decided on the facts and

105(2012) 13 SCC 61, para 22

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circumstances. (***State of Bihar v. Kameshwar Singh)***[106]**.** It also means the general welfare of the public that warrants recognition and protection; something in which the public as a whole has a stake. {***Black's Law Dictionary, (8th Edition)}***

260] At least in four reported cases, the expression "*public interest"* has been interpreted in the context of amalgamation of companies under the Companies Act. Therefore, it will be appropriate to make reference to these reported cases.

261] In *Hindustan Lever Employees Union (supra),* the Supreme Court has held that concept of *public interest* in matters of amalgamation of companies, 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 than 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 subsidiary of foreign company the consideration may be entirely different. *It is not the interest of the shareholders or the employees only but the interest of society which may have to be examined*. And a scheme valid

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and good may yet be bad if it is against *public interest*.

262] *Wood Polymer* (*supra*), relied on by Mr. Mookherjee, holds that in determining "*public interest",* sole attention cannot be confined to the interest of creditors and members of the Companies in question. The interests of other important consumers of the industry-cum-commercial service cannot be ignored since, "*public interest",* is a positive check on unhindered exercise of private right whether by management or stock holders. In the fields where "*public interest*" is recognized as a relevant consideration, such consideration, must override other considerations like freedom of management or rights of stock holders to carry on the business of the company as they desire. The concept of *"public* interest" takes its own colour in providing its own inherent yardstick by reference to the context in which it is used the expression is used, the Statute in which it is used and purpose sought to be achieved by the use of the expression.

263] *Wood Polymer (supra)* refers to the recommendations of Vivian Bose Commission (enquiry into affairs of companies controlled by Dalmia and Jains). It is in pursuance of these recommendations that Section 394 (1) was introduced in Companies Act, 1956 requiring the Court which is called upon to sanction the amalgamation of two or more companies, to ensure that the scheme is not contrary to the "*public interest*". The Vivian Bose Commission, which was constituted to enquire into and the on the report of certain companies owned by Dalmia and Jains and two others and especially about the irregularities, fraud or breaches of trust or action in disregard of honest commercial practices and breaches of provisions of Companies Act. The terms

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of reference required the Commission to suggest action, which could be taken to prevent such situation in future, so that, there is due and proper administration of funds and assets of the company and firms in the interest of investing public. *Interest of the investing public is interest of general public which expression, would be covered by "public interest"*. The Commission, in its report, recommended introduction of a provision by which the Court which is called upon to examine scheme or amalgamation, would have an opportunity to ascertain whether the affairs of the transferor-company, which is to be dissolved without winding up of were carried on in a manner prejudicial to its member or "*public interest"*. This is the recommendation which finds echo in the second proviso to section 394(1).

264] *Wood Polymer (supra),* proceeds to hold that the expression "*public interest*" must take its colour and content from the context in which it is used. The context in which the expression *"public interest"* is used, should permit the Court to find out why the transferor-company came into existence, for what purpose it was set up, who were its promoters, who were controlling it, what object was sought to be achieved through creation of the transferor-company and why it is now being dissolved by merging it with another company. All these aspects require examination in the context of satisfaction of the Court as to whether its affairs have or have not been carried out in a manner prejudicial to "*public interest"*. There is really no reason to construe the expression "*public interest"* in any different manner when it comes to Section 396.

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265] *Union of India and ors. vs. Ambalal Sarabhai Enterprises Ltd. (supra),* again relied on by Mr. Mookherjee, the Division Bench of the Gujarat High Court has held that the Central Government has to be satisfied that it is essential in the "*public interest*" that two or more companies should amalgamate and only then such amalgamation can be directed or sanctioned. *The amalgamation must accordingly fulfill some felt need, some purpose, some object and that must have some co-relation with the "public interest".* If the only purpose discernible behind amalgamation is defeating certain tax and prior to the amalgamation a situation is brought about by creating a paper company and transferring an asset to such company which can, without further consequence, be amalgamated with another company to whom the capital asset was to be transferred so that, on amalgamation, it can pass on to the amalgamated company, then, it would distinctly appear that the provision for such scheme of amalgamation was utilised for the object of defeating tax. The Court which is charged with the duty, before it finally permits dissolution of the transferor-company without winding up, to ascertain whether its affairs have been carried not only in a manner not prejudicial to its members, but also to "*public interest"*. The expression *"public interest"* must therefore, take its colour and content from the context in which it is used and if proposed amalgamation is not in "*public interest"*, the Court has power to refuse to sanction the scheme.

266] In the Guide to Companies Act by *A. Ramaiya, 17th Edition 2010*, various facets of the expression *public interest* have been discussed. *E.Pendleton Herring*, in Public Administration and the Public Interest is quoted to define the expression as '*an elusive*

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abstraction' meaning general social welfare or '*regard for social good'* and predicating *'interest of the general public in matters where regard for social good is of the first moment'*. To be meaningful, it must relate to the good life of those with reference to whom it is used. In the words of *Justice Felix Frankfurter* of the Unites States Supreme Court, "*the idea of public interest is a vague, impalpable, but all controlling consideration".*

267] *Ramaiya* has referred to the Dictionary of Sociology (para 161) to state that a thing is said to be in *public interest* where it is or can be made to appear to be contributive to the general welfare rather than to the special privileges of a class, group or individual. It is essentially a majoritarian ethic measured rather in terms of results or consequences than of interest or motive. Any decision as to public interest should be based on the results or consequences that will follow.

268] In ***N.R. Murty v. Industrial Development Corporation of Orissa***[107]**,** it is held that in case of a company, the concept of *public interest* takes the company outside the conventional sphere of being a concern in which the shareholders alone are interested. It emphasizes the idea of the company functioning for the public good or general welfare of the company at any rate not in a manner detrimental to the public good.

269] In the facts and circumstances of the present case, we are not prepared to accept that the impugned order has been made looking only to the interest of the investors or 781 high net worth individuals as claimed by the petitioners. We are satisfied from the

1071977 (47) Com. Cas. 389

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material on record that the impugned order has been made on at least three distinct and discernible grounds or reasons namely ; (a) Restoring / safeguarding public confidence in forward contracts and exchanges which are an integral and essential part of Indian economy and financial system, by consolidating the businesses of NSEL and FTIL; (b) Giving effect to business realities of the case by consolidating the businesses of FTIL and NSEL and preventing FTIL from distancing itself from NSEL, which is, even otherwise, its *alter ego; and* (c) Facilitating NSEL in recovering dues from defaulters by pooling human and financial resources of FTIL and NSEL. Further, we are also satisfied that each of these three grounds constitute a facet of *public interest* in the context of the provisions in Section 396. Therefore, we are unable to accept the petitioners contention that the impugned order is vitiated by legal *mala fide* because the Central Government has exercised powers under Section 396 for purposes alien to which Section 396 came to be enacted.

270] The expression *public interest* means general welfare of the public that warrants recognition and protection; something in which the public as a whole has a stake. This expression has to take colour from the statute in which it occurs. In the precise context of amalgamation under the Companies Act, 1956, this expression would mean 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. The expression can never be narrowly construed to restrict the same to the interest of shareholders or employees only, but, the interest of the society as a whole may have to be examined as held by the Supreme Court in *Hindustan Lever Employees Union (supra)*. Similarly, in

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determining the import of such expression in the context of amalgamation of companies, sole attention cannot be confined to the interest of creditors or members of the companies in question. The interest of other important consumers of industry-cum-commercial service can never be ignored. The expression *public interest* constitutes a positive check on unhindered exercise of private right whether by management or by stockholders. Where public interest is a relevant consideration, such consideration must override other considerations like freedom of management or right of stockholders to carry on the business of the company as they desire. The interest of investing public is the interest of the general public which expression would be covered by *public interest* (*Wood Polymer Limited*). The expression, when used in the case of Company Law, may take the company outside the conventional sphere of being concerned in which the shareholders alone are interested. It emphasizes the idea of the company functioning for the public good or general welfare of the company at any rate not in a manner detrimental to the public good (*N.R. Murty).*

271] In the facts of the present case, NSEL, on basis of certain representations secured exemption from application of FCRA. One of the representation was that the NSEL was a part of the FTIL group controlled by Jignesh Shah and the FTIL group operates and has experience in operating several exchanges at the national and international level. Representations were held out that NSEL would never engage in forward trading but restrict itself to spot trading or ready delivery contracts. Representations were held out that secure warehousing facility will be maintained by NSEL in which commodities will be checked, verified and stored so that the transactions at the spot exchange will invariably result in delivery

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of goods or payment of price therefor. Representations were held out that transactions would be counter guaranteed by NSEL and a settlement guarantee fund will be in place. On basis of such representations NSEL secured exemptions from application of FCRA and regulatory regime under FCRA. In practice however, NSEL reneged on most of its representations and in fact undertook operations in breach of condition subject to which the exemption came to be granted.

272] NSEL offered contracts in excess of one day's duration, although one of the conditions subject to which exemption was secured by NSEL was that this is barred. Then NSEL offered *paired contracts* with assured returns so as to virtually subvert the commodities exchange into a scheme for financing free of all statutory safeguards. By the year 2013, almost 99% of the transactions on NSEL spot exchange comprised such *paired contracts,* which, in practise, had no significant nexus with the transactions to be legitimately undertaken on a commodities exchange.

273] In response to show cause notices issued by FMC (SEBI), NSEL, on 10th July 2013, i.e., hardly 21 days prior to NSEL bringing its operations to a grinding halt , painted a picture that there was nothing amiss. NSEL , through Jignesh Shah and other key personnel presented that there were 120 warehouses full of stocks valued at Rs.6000 crores, margin amount and settlement guarantee fund is in place and that over the last four years 99% of the trade had resulted in delivery on daily basis. NSEL, however, failed to furnish the undertakings in terms demanded by FMC. Further, on 31st July 2013, despite presenting a picture hardly 21

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days earlier that nothing was amiss, brought the operations on the exchange to a grinding halt.

274] As on 31st July 2013, the commodity sellers defaulted on their outstanding payment obligations to the trading clients to the extent of almost Rs.5600 crores. NSEL, relying upon some clause in its bye-laws refused to honour any counter guarantee. Neither was there any sufficient amount in form of margin nor in the settlement guarantee fund. Above all, there were hardly any commodities in the warehouses owned and controlled by NSEL. The investors with claims of over Rs.5600 crores were left in a complete lurch and the operations at the commodities exchange, which represented almost 99% of the operations at national level, completely collapsed.

275] In *MSX Stock Exchange Ltd*. (supra) and *Coimbatore Stock Exchange Ltd*. (supra), Courts have recognized that stock exchanges have a vital place in ensuring stability of financial and economic system of India. Conversely, loss of trust and confidence in exchanges and financial markets is bound to have a negative impact on the economy and financial stability of the country as a whole. One of the grounds for making the impugned order is restoring / safeguarding public confidence in forward contracts and exchanges which are an integral and essential part of an Indian economy and financial system by consolidating the businesses of NSEL and FTIL. There is material on record to suggest that NSEL is not only a fully owned subsidiary of FTIL which holds 99.9998% stake therein, but further, FTIL, was quite intricately concerned with the operations and the functioning of NSEL and its spot exchange. If therefore, the Central Government

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by consolidating the businesses of NSEL and FTIL to restore confidence in commodity exchanges by sending a clear signal to all investors, current or potential, that in case of defaults of such magnitude at exchanges operated by subsidiaries, holding companies may have to take responsibility for the exchange or at least not take shelter behind its wholly owned subsidiaries, we can, in the exercise of judicial review see no reason to upset such a decision or hold that such a decision is not in *public interest*.

276] This is not a case of compulsory amalgamation of two unrelated companies. NSEL, is admittedly a wholly owned subsidiary of FTIL in which FTIL holds 99.9998% stake. Since FTIL is effectively the only shareholder of NSEL, the constitution of the Board of Directors of NSEL is naturally controlled by FTIL. There is material on record to suggest that minutes of board meetings of NSEL were regularly tabled at the board meetings of FTIL. Jignesh Shah, directly or indirectly has a stake of 46% in FTIL. At the relevant time, Jignesh Shah was described as Founder Chairman and Group CEO of FTIL, apart from being of Managing Director of FTIL. Jignesh Shah at the relevant time was described as a Vice Chairman of NSEL and also the Head of the Audit Committee of NSEL. As per the accounting standards, the balance sheets and other accounts of NSEL were required to be and were routinely placed before the Board of FTIL.

277] There is material to indicate that both NSEL and FTIL had common key personnel. There is material to indicate that software for the operations at the NSEL Exchange had in fact been provided by FTIL. The FTIL, loaned an amount of Rs.179 crores or thereabouts to NSEL to enable NSEL to at least settle the investors

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with claims upto Rs.2 lakhs. The FTIL, in the course of these proceedings has filed an affidavit to state that it has, till date, infused an amount of Rs.109 Lakhs in NSEL towards working capital and to assist NSEL in recovery proceedings against defaulters. The affidavit states that FTIL has committed further amount of Rs.50 crores per year for the next 3 years. There is material on record that from July 2013, at NSEL there is hardly any commercial activity or returns. NSEL is confronted with several litigations and the strength of its employees which was 193 in July 2013 has come down to 33 by July 2014. On basis of all such objective facts, if the Central Government, forms the subjective satisfaction that it is essential in *public interest* to amalgamate NSEL with FTIL so as to give effect to business realities of the case by consolidating the two businesses and preventing FTIL, from distancing itself from NSEL, we can, in the exercise of judicial review see no reason to upset such a decision or hold that such a decision is not in *public interest*.

278] There is sufficient material on record on basis of which the Central Government has subjectively satisfied itself that the amalgamation is essential in *public interest* to facilitate recoveries of dues from defaulters from pooling human and financial resources of FTIL and NSEL. Despite claims by NSEL that it has the means to and it has been rigorously pursuing recoveries, the fact remains that the position of recoveries is not very promising and may further deteriorate if only NSEL has to fend for itself. In such matters, it is not sufficient that some decrees or attachment orders are obtained. This is also not an issue of mere recoveries but this is an issue of investor confidence in the very functioning of stock and commodity exchanges. If the Central Government,

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were not to act in a situation of this nature, investor confidence would certainly be a casualty. Such a situation then, has a cascading effect, which is by no means conducive to the national economy.

279] The Central Government, in making the impugned order has balanced the interests of the two companies, its shareholders, creditors and employees on one hand and the interests, not only of the investors who may have claims, but also, of the investing public, which is required to be given the confidence that the Central Government will act to see that a holding company does not take shelter behind its wholly owned subsidiary and thereby shirk responsibility in the wake of such an unprecedented payment crisis. The three grounds or reasons stated in the impugned order, in our opinion, were sufficient to arrive at the subjective satisfaction that it was essential in public interest to order the amalgamation of the two companies. This is not a case of exercise of powers for any extraneous considerations or alien purposes.

ISSUE -G

(G)(i) Whether the impugned order is based on only one ground or reason, i.e., facilitating NSEL in recovering dues from defaulters, and therefore, applying *Mohinder Singh Gill* principle, the Central Government is barred from adding or supplementing reasons by way of affidavits ?

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(G)(ii) Whether the impugned order stands vitiated because there is no material whatsoever on record in support of the aforesaid solitary ground or reason ?

280] Upon careful perusal and analysis of the impugned order, we are unable to accept Mr. Chinoy's submission that the impugned order is based upon a solitary ground or reason. Rather, we agree with the submission of Mr. Khambatta that the same is based on at least three discernible grounds or reasons, namely :

(a) Restoring / safeguarding public confidence in forward contracts and exchanges which are an integral and essential part of Indian economy and financial system, by consolidating the businesses of NSEL and FTIL;

(b) Giving effect to business realities of the case by consolidating the businesses of FTIL and NSEL and preventing FTIL from distancing itself from NSEL, which is, even otherwise, its *alter ego;* and

(c) Facilitating NSEL in recovering dues from defaulters by pooling human and financial resources of FTIL and NSEL.

281] It is true that the aforesaid three grounds or reasons may not have been stated in seriatum or artistically in the impugned order. However, that by itself, is not sufficient to ignore the three distinct grounds or reasons which are very much discernible in the impugned order. It is not possible to read the impugned order in the manner suggested by Mr. Chinoy. He seemed to suggest that large portions of impugned order which seek to answer or deal

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with the objections and suggestions must be excluded from consideration. He also seemed to suggest that the portions of the impugned order which deal with the proposals from FMC or FMC's fit and proper order dated 17th December 2013, must also be excluded from consideration. This will be a quite peculiar manner of reading an administrative or *quasi judicial* order. The impugned order will have to be read in its entirety and there is no scope to read a sentence or two or a paragraph or two in the impugned order and then to urge that the same is based upon a solitary ground or reason. Upon careful and meaningful reading and analysis of the impugned order in its entirety, it is quite clear that the same is based upon at least three distinct grounds or reasons as aforesaid.

282] At this stage, it is necessary to note that none of the petitioners, including, in particular the FTIL , in whose petition NSEL is but one of the respondents, choose to read the impugned order in the manner in which Mr. Chinoy does. In fact, even Mr.Santosh Dhuri who has sworn the affidavit on behalf of NSEL does not choose to read the impugned order to mean that the same is based on a solitary ground or reason as urged by Mr. Chinoy . The affidavit proceeds on the basis that the impugned order is based on several grounds or reasons but urges that such grounds or reasons are untenable. This is far cry from saying that the impugned order is based on a solitary ground or reason. Even FTIL, in paragraph 82 of its petition, has listed as many as 11 grounds or reasons, which, in its opinion, the draft order and thereafter the impugned order discloses. No doubt, FTIL, has vehemently contested the veracity or the relevance of such grounds. But the fact remains that even FTIL does not regard the

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impugned order as being based on solitary ground or reason as urged by Mr. Chinoy on behalf of the NSEL.

283] Mr. Chinoy, at the stage of rejoinder, however, contended that though the facts and circumstances recorded in FMC's fit and proper order dated 17th December 2013 and extracts from FMC's proposal as reflected in the said order may have been referred to in the impugned order, it is clear that FMC's fit and proper order was not the reason/basis for the Government's decision that it was essential in *public interest* to merge NSEL with FTIL. This contention is paraphrased in the written note submitted by Mr.Chinoy on 23rd October 2017.

284] The aforesaid contention, coming as it does from NSEL, is in direct conflict with the averment in NSEL's affidavit dated 15th April 2016 sworn by Santosh Dhuri, which reads thus:

> "*10. It is submitted that the bedrock of the impugned draft order is a proposal dated 18 August 2014 sent by Forward Markets Commission ("FMC"), to the Central Government thereby asking Central Government to invoke section 396 for amalgamation of NSEL with FTIL. It is submitted that said FMC's proposal itself based on erroneous and non-appreciation of facts which were not laid out before the Central Government in its right and correct perspective and which in our opinion misled the Central Government in passing the impugned draft order. It is submitted that the Central Government has blindly relied upon the said FMC proposal in the impugned final order without applying its mind independently and objectively to the material placed on record by the Respondent No.3 vide its objections, oral hearing and written submissions filed before the Ld Committee.*"

285] The contention raised by counsel for NSEL is directly contrary to even NSEL's understanding of the impugned order.

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None of the petitioners or the intervenors read the impugned order in the manner suggested by the counsel for NSEL. In any case, bare perusal of the impugned order indicates that the same is based upon three distinct and discernible grounds or reasons, each of which represents a facet of *public interest* which is *sine qua non* for exercise of powers under Section 396.

286] Mr. Khambata had in fact contended that the principle in *Mohinder Singh Gill (supra)* namely that the validity of a statutory order is required to be tested on the basis of reasons set out in the impugned order itself is applicable to an order which affects only private rights and therefore, such a rule is not applicable where action is taken in larger *public interest,* as in the present case. In support, of this propositions, he had placed reliance upon *Chairman, All India Railway Recruitment Board and anr (supra)* and *PRP Exports vs. State of Tamil Nadu (supra).* Since, in this case we are quite satisfied that the impugned order is not based on the solitary ground as stated by Mr. Chinoy, but rather, is based upon three grounds /reasons referred to by Mr. Khambata, there is no need to go into the issue as to whether the *Mohinder Singh Gill* principle is at all attracted in a matter of this nature, where action has been taken upon record of satisfaction by the Central Government that it is essential in *public interest* to do so.

287] Again, we are satisfied that there is ample material on record, on basis of which, the Central Government could have and has arrived at the satisfaction that the NSEL lacked necessary financial and infrastructural wherewithal to make recoveries from the defaulters, who may have traded on the spot exchange platform of NSEL. Therefore, it is not possible to accept Mr.Chinoy's

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contention that there exist no objective facts on which the Central Government could have been subjectively satisfied.

288] There is material on record, which is in fact undisputed that NSEL was loaned an amount of Rs.179.26 crores by FTIL for distribution to the small investors, who, suffered losses by trading the platform and spot exchange of NSEL. There is material on record that NSEL, after it closed the operations at the spot exchange on 31st July 2013 had assured the investors/traders that revised settlement calender would be announced after 15 days period. On 14th August 2013, NSEL, informed FMC that it would calculate the net obligation of the members and proposed a settlement plan extending over 30 weeks. Again, this assurance was made subject to realisation of funds from the concerned members. NSEL, however, defaulted on its own settlement plan from the 1st week itself. As of 22nd September 2014, NSEL, could disburse only an amount of Rs.541.69 crores as against net obligations of over Rs.5600 crores.

289] The FMC, in its proposal submitted to the Central Government in 2014, had clearly stated that despite FMC support, NSEL, was unable to effect any significant recoveries from the defaulters. Even the settlement plan proposed by NSEL failed to take off and no substantial payments were made to the investors. The FMC stated that NSEL, despite having the responsibility to take all possible coercive measure as per their rules/bye-laws was able to make payments of only Rs.362.43 crores to its members (investors), as against the dues of approximately Rs. 5689.95 crores involving almost 13000 investors. FMC stated that this constitutes hardly 6.7% of the total amount due. All this, has not

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even been seriously disputed by NSEL and yet, the NSEL contends that there is no material whatsoever on record to suggest that NSEL is in no position to or is not making any efforts to recover the amounts from the defaulters.

290] The FMC, in its proposal also stated that the employee attrition in NSEL has been extremely high and it is learnt that the staff strength of NSEL has reduced considerably, thereby affecting the recovery process. FMC has stated that as per the information received from NSEL itself, the employee strength which was 193 as on 31st July 2013, has come down to 33 as on 31st July 2014. NSEL is also confronted with number of cases in several Courts and is therefore, left with hardly any financial resources to defray staff salaries and legal costs. FMC has also stated that it has received feed back from representative of investors/member bodies on the erstwhile monitoring and auction committees constituted by it reporting loss of credibility, weak organisational structure, depletion of man power strength and lack of financial resources.

291] There is material on record, which indicates that post 31st July 2013, there is hardly any activity undertaken by NSEL, from which, it can earn any substantial income so as to facilitate the recovery of dues. There is material on record that NSEL had hardly 33 employees and considering the rate of attrition, NSEL cannot be said to have the necessary wherewithal to effect any recoveries from the defaulters.

292] NSEL, in its affidavit in reply to the petition instituted by FTIL has merely stated that the position reflected in the FMC proposal or for that matter in the impugned order is not acceptable

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or that the same is factually incorrect. However, NSEL has not specifically disputed the position in relation to drastic reduction in the strength of employees, virtual closure of any business activity and the fact that NSEL has to mainly rely upon contributions from FTIL, even, for its functioning or for its so called efforts to effect recoveries.

293] At the stage, when the final hearing in these petitions had considerably advanced, FTIL, tendered an affidavit dated 4th July 2017 to place on record its resolution dated 28th March 2016 to infuse a sum up to Rs.50 crores for each of the financial years, i.e., FY 2016-17 to FY 2018-19, to support NSEL to recover dues from defaulters ; to defend various legal cases ; to continue taking necessary legal actions against various parties to recover amounts from defaulters; and for working capital. The affidavit states that such resolution was passed and such finances are proposed to be infused at the request of NSEL.

294] The affidavit dated 4th July 2017 also confirms that the activities of NSEL have come to *a grinding halt,* though, the affidavit purports to blame the FMC for such a situation. The affidavit also states that up to now FTIL has infused approximately Rs. 109 crores with NSEL, mainly to prosecute and defend legal proceedings. There is reference to NSEL having obtained decrees worth more than Rs.1200 crores and injunctions against assets of defaulters valued at Rs.5444.31 crores. The affidavit further states that FTIL is committed to funding NSEL for purposes of recovery from defaulters since the occurrence of payment crisis on the exchange platform of NSEL.

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295] If the contention of Mr. Chinoy to the effect that there is absolutely no problem in the functioning of NSEL or that NSEL has the necessary wherewithal, both financial as well as infrastructural, to effect recoveries from the defaulters, is to be accepted, then, there was no reason to rely upon contribution from FTIL, made or proposed to be made at a belated stage. The FTIL resolution dated 28th March 2016, far from affording any cause to interfere with the impugned order, in fact, lends support to the reasoning in the impugned order that the NSEL, on its own, lacks financial as well as infrastructural capacity to effect any recoveries from the defaulters. The affidavit dated 4th July 2017 and the resolution dated 28th March 2016 is also indicative of the business realities of the situation, which is incidentally yet another ground in the impugned order.

296] There is further material in the form of *Grant Thornton* report of which cognizance is taken in the impugned order. This is because the report has been relied upon by the FMC in its order dated 17th December 2013 and in the proposals the FMC submitted to the Central Government recommending action under Section 396. This report makes scathing observations on the functioning of NSEL.

297] The *Grant Thornton* report states that the NSEL exchange platform was used for conducting financing transactions, as opposed to a genuine commodity exchange. In fact, by the year 2013, almost 99% of the turn over at the NSEL exchange comprised *paired contracts* , which were nothing but financing transactions undertaken in breach of the conditions set out in exemption notification dated 5th June 2007. The report makes

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reference to related party transactions, misutilisation of settlement guarantee fund, waivers from margin requirements to key defaulters, failure to ensure existence of stocks in the designated warehouses. The report also records failure at corporate governance and risk management. The report states that 9 out of the 10 committees mandated under the bye-laws and rules of the NSEL exchange were either not constituted or not functioning. It is pertinent to mention that the FMC, before it made its not fit and proper order dated 17th December 2013, had in fact, given an opportunity to the parties to cross examine *Grant Thornton* on its report. However, such opportunity, was not availed.

298] In the present case, we are unable to accept Mr. Chinoy's contention that the impugned order could never have been made by any reasonable man or authority on the ground that the amalgamation would facilitate NSEL in recovering dues from defaulters by pooling human and financial resources of FTIL and NSEL and that such a reason is extraneous.

299] In ***Ion Exchange (India) Limited***[108] **,** the learned Single Judge of this Court Dr. D.Y. Chandrachud, J. (as His Lordship then was), has held that the pooling of human, material and financial resources between a holding company and its loss making wholly owned subsidiary cannot be regarded as an extraneous or an irrelevant factor in their amalgamation. Viewed in the context of business realities, this is a permissible object and nothing militates against *public interest* or commercial morality. No doubt, that was a case involving consensual amalgamation between a holding company and its loss making wholly owned subsidiary. However,

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the observations therein answer the contention that pooling of human material and financial resources between a holding company and its loss making wholly owned subsidiary, viewed from the context of business realities, is neither any extraneous, irrelevant consideration nor is such a consideration contrary to public interest or commercial morality.

300] In *Ion Exchange (India) Ltd. (supra),* this Court has held that though, as a matter of law, the transferee companies are independent corporate entities, equally, as a matter of business reality, the Court cannot ignore the plea of the Transferee Company that the that the health and the well being of its wholly owned subsidiaries was a matter which was legitimately entitled to be taken into account by the Transferee Company in coming out with the decision to amalgamate its wholly owned subsidiaries with itself. In the circumstances, the plea that the scheme of Amalgamation is an attempt to reduce the business and operational losses, inclusive of manpower and machinery costs ought to be accepted. Similarly the foundation of the scheme for Amalgamation is that the amalgamation will enable the three Companies to pool together human, material and financial resources. This consideration particularly in a case where the two Transferor Companies are wholly owned subsidiaries cannot be regarded as extraneous or irrelevant. This Court, taking into consideration the business reality noted that the holding company seeks to emerge from the economic difficulty which face its subsidiaries which have become loss making entities. The effort is to pool together human, financial and material resources and to deploy them, upon amalgamation in a manner that would enhance profitability. This is a permissible object and nothing in the

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proposed scheme in the present case militates against commercial morality, the public interest or a view which a reasonable body or shareholders or creditors would adopt. The impugned order cannot, in such circumstances, be held to be irrational or based on any extraneous or irrelevant considerations.

301] For all the aforesaid reasons, we are unable to accept Mr.Chinoy's contention that the impugned order is based on only one ground or reason. We are also unable to accept Mr. Chinoy's contention that there was no material on record in support of such ground or reason and further, such ground or reason was not sufficient to prompt any reasonable man or authority to order the compulsory amalgamation of NSEL with FTIL.

ISSUE - H

(H) Whether the impugned order can be said to be *unreasonable*, applying *Wednesbury* principles ?

302] Initially, almost all the learned counsel for the parties relied on *Barium Chemicals Ltd. (supra)* accepting that the tests set out therein are the most appropriate when it comes to review of administrative action based upon subjective satisfaction. However, at the stage of rejoinder they sought to make a distinction between *'opinion cases'* and *'satisfaction cases',* by suggesting that the test in the later is more intense. They submit that in '*satisfaction cases',* the authority must be satisfied to the hilt that the proposed action is almost imperative and therefore, the authority, must eliminate all other options to deal with the situation. They rely on

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Peerless General Finance and Investment Co. Ltd. (supra) in support of this contention.

303] At the stage of rejoinder, some of the learned counsel for the petitioners also attempted to distinguish *Barium Chemicals Ltd. (supra),* by pointing out that in *Barium Chemicals Ltd.* (supra), the Supreme Court was concerned with Section 237(b), which merely required the Central Government for form an *'opinion'* that there existed circumstances *'suggesting'* the predicates prescribed in clauses (i), (ii) and (iii) of Section 237(b). They point out that the phraseology in Section 396 is quite different and the Central Government before it orders amalgamation of two or more companies in public interest, must be '*satisfied*' that it is essential in public interest to do so. On basis of such phraseology they submit that the Central Government cannot simply rest by stating some objective facts in the order, but further, when the action of the Central Government is challenged, the Central Government should satisfy the Court that there is at least *prima facie* proof in support of such objective facts.

304] As to the alleged difference between *opinion cases* and *satisfaction cases*, we find that the Supreme Court, in paragraph 63 of *Barium Chemicals Ltd. (supra)* has itself clarified that the concepts are not substantially different. In fact, in *Bhikubhai Patel (supra)* the Supreme Court, after quoting paragraph 63 of *Barium Chemicals Ltd. (supra)* has held that the construction placed on the expression '*reason to believe'* will equally apply to the expression '*is of the opinion'*. Even *Peerless General Finance and Investment Co. Ltd.* (supra) does not state anything substantially different than what is stated in *Barium Chemicals Ltd.* (supra) or

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Bhikubhai Patel (supra). All that it states is that in any subjective satisfaction cases, there must be some evidence on the basis of which the authorities concerned can make a positive finding that they were indeed satisfied.

305] The second contention regards difference in phraseology of Section 237(b) and Section 396 is no doubt required to be borne in mind while exercising judicial review. However, it is also necessary to note that Section 237(b) requires the Central Government to form opinion as to the existence of certain specific circumstances set out in Clauses (i),(ii) and (iii) of Section 237(b). In contrast, Section 396 does not restrict the exercise of powers only to any specific circumstances but permits exercise of power upon satisfaction that the same is essential in *public interest*. There is accordingly, no difficulty in proceeding on the basis that the subjective satisfaction in such matters must be based upon objective facts, with regard to which there is at least prima facie proof.

306] In *Barium Chemicals Ltd. (supra), Vinod Kumar* (*supra*) and *Rohtas Industries (supra),* the Supreme Court has set out the parameters of judicial review in cases where the order is based on subjective satisfaction of the authority. It is held that the opinion or satisfaction recorded in the order may not normally be challenged on the grounds of propriety or sufficiency. However, this does not mean that the Court exercising judicial review is precluded from examining whether or not the subjective satisfaction was based on any objective facts. This means that the existence of circumstances or the objective facts is open to judicial review though, sufficiency or propriety thereof may not be. Even if

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certain objective facts are found to exists, if on the basis of such facts, no sensible person could have legitimately formed or arrived at such a satisfaction, then, the Court will strike down such a decision in the exercise of judicial review. Further, the Courts exercising judicial review are also entitled to examine whether the record of subjective satisfaction is vitiated by *mala fide* correction, abuse of power, non-application of mind or perversity. Subjective satisfaction also stand vitiated, if the authority fails to take into account relevant considerations or takes into account irrelevant considerations. This is the manner in which the *Wednesbury* principle applies to judicial review of discretion.

307] In the present case, we have already noted that there are several objective facts on record, on basis of which the Central Government was quite justified in arriving at the satisfaction that it was essential in public interest to order the amalgamation of NSEL with FTIL. There is more than *prima facie* proof in support of such objective facts. In fact, most of such objective facts have not even been seriously disputed by FTIL or NSEL. At the highest, some dispute is attempted to be raised as to the interpretation of such objective facts or the inferences which can be legitimately drawn from such objective facts.

308] Mr. Khambata, in his written submissions has enumerated some of the objective facts and circumstances, which read as follows:

> "*(i) FTIL held 99.9998% of NSEL's share and the balance 0.0002% of NSEL's shares were held by NAFED [Petition – Vol I – Ex. A/Pg.97S]*

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NSEL, was promoted by and is part of the FTIL Group. [FTIL Affidavit in Rejoinder to Respondent No.4 dated 23rd September, 2016 – Vol. 30, Paras 35 and 38/Pg.3030-3031]

Since FTIL is effectively the only shareholder of NSEL, the constitution of the Board of Directors of NSEL is entirely under FTIL's control [Petition – Para 2.11(iii)/Pg.97R]
FTIL, through the Board of Directors of NSEL constituted by it, possesses effective and absolute control over its subsidiary i.e. NSEL. [Petition – Para 2.11 (iv)/Pg. 97S] In fact, FTIL held out and represented that it controlled NSEL. (FTIL Annual Report 2013-14 – Petition – Vol.II – Ex.F/Pg. 203 at Pg.306]

NSEL's exchange was treated and held out and represented by FTIL to be its own and part of its "Exchange Verticals". (FTIL Annual Report 2013 – 14 – Petition – Vol.II – Ex. F/Pg.203 at Pgs. 211 and 239]

Jignesh Shah, the founder and promoter of FTIL, directly/indirectly owns over 45% of its shares. (FTIL Annual Report 2013-14-Petition – Vol.II- Ex. F/Pg. 203 at Pg. 260/Para 11.11] He served as Vice Chairman on the Board of NSEL, as Chairman-cum-Managing Director of FTIL and as the 'Founder – Chairman and Group CEO of FTIL'. (FMC Order – Petition- Vol.III – Ex. J/ Pg. 804 at Pgs. 878-879]

Jignesh Shah was a member of both, the Board, as well as the Audit Committee, of the NSEL and was shown as one of the key management personnel of NSEL for the period from Financial Year 2005-06 to 2011-12. (FMC Order – Petition – Vol. III – Ex.J/Pg. 804 at Pgs. 827, Pgs. 847-848 and 871]

Each of the minutes of the Board meetings of NSEL were regularly tabled at the Board meetings of FTIL. Thus, FTIL had full knowledge of the unsatisfactory affairs of NSEL. [Petition – Para 2.11 (v)/Pg. 97S]

As a wholly - owned subsidiary, NSEL is completely under the control of FTIL, including financial control over the affairs of NSEL. [Petition – Para 2.11 (vi)/Pg.97S-T]

NSEL's outward e-mails were routed through an outbox

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called 'FT-Outbox' through which e-mails of all FTIL Group companies were routed. (FTIL Affidavit in Rejoinder to Respondent No.4 dated 23rd September, 2016 – Vol.30, Para 35/Pg.3030]

Human Resources services were undertaken in common by the FTIL Group for FTIL, MCX and NSEL. (FTIL Affidavit in Rejoinder to Respondent No.4 dated 23rd September, 2016 – Vol. 30, Pg. 3031/Para 38]

FTIL's finance team was running the finances of NSEL and members of FTIL's Finance and Accounts team undertook detailed consideration of the financial operations of NSEL on a regular basis. (GT Report – Part III – Para 1.12/Pgs. 9-10 read with Email from Devendra Agarwal (of FTIL) dated 15th October, 2010 – Ex. 23/Pg.285]

FTIL exerted a dominant influence on the management of NSEL and directed, controlled and supervised its governance [Petition – Para 2.11 (x)/Pg.97T]

NSEL issued presentations to attract trading on its exchange, in which it made several representations regarding its warehousing facilities and safeguards, including that it "guarantees all trades and maintains settlement guarantee fund for this purpose". [R1 Comp. - Part I – Pg.3]

NSEL circulated various presentations and return calculator worksheets for attracting "investors" to its platform. These presentations set out guaranteed fixed rates of return/yields of about 16% as an opportunity for investors for trading in the paired contracts. [GT Report – R1 Comp. - Part III – Paras 1.2-1.4/Pgs. 7-8, Paras 1.2-1.7/Pgs. 12-16, Ex.14A (NSEL Presentation)/Pgs. 120-122]

By April – July 2013, 99% of NSEL's turnover was made up of such paired contracts. (GT Report – R1 Comp. - Part III – Para 1.5/Pg.14] Sometime in 2013 NSEL instructed its Business Development Team not to officially commit to fixed returns but to communicate the daily trade rates and returns telephonically or from their personal email ids and with utmost caution. [GT Report – R1 Comp. - Part III – Ex.14/Pg.118]

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In spite of being aware that there was no condition requiring the deposit of goods in the warehouse prior to execution of a sale transaction on its exchange, NSEL made several misrepresentations to the FMC and others that the contracts were totally linked with delivery and that it was 100% sure that a person who bought a commodity on its exchange would get delivery.[R1 Comp – Part I – Pg. 37 at Pgs.40,41, and 44; R1 Comp- Part I – Pg. 61 at Pg.106]

Similarly, Jignesh Shah made representations to the DCA and FMC in July 2013 when he stated NSEL had full stock as collateral and had 10-20% of open position as margin money. He also stated that the stock currently held in NSEL's warehouses was valued at around Rs.6,000 crores. [R1 Comp – Part I – Pg. 126 at Pg.142]

NSEL itself equated the interest of its trading members with the "public interest" and admitted that any disruption in the smooth functioning of its exchange would create a "huge crises and chaos". (R1 Comp – Part I- Para 4(b)/Pg.148]

In July 2013 a payment crisis of approximately Rs.5,600 crores arose on NSEL. [Petition – Vol. I – Ex.A – Pg. 97P] FTIL has admitted that this was a result of a fraud, but alleges that this was "a fraud at the Warehouse level" which "went undetected" (Item 15 Note (a) – FTIL LoD]"

309] In the course of rejoinder, Mr. Salve and Mr. Mookherjee submitted a counter chart, not to seriously dispute any of the objective facts stated by Mr. Khambata but to submit that at least some of the circumstances referred to by Mr. Khambata, find no reference in the impugned order. On this basis, the *Mohinder Singh Gill* principle was pressed into service to urge that such objective facts cannot be relied upon to sustain the impugned order.

310] The counter chart submitted in the course of rejoinder contains some glaring inaccuracies. That apart the counter chart

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and the submission based thereon proceed upon misinterpretation or at least a very pedantic construction of the impugned order. In order to some how or the other attract the *Mohinder Singh Gill* principle, it is impermissible to read or construe the impugned order in such a pedantic or restrictive manner.

311] In response to obvious inaccuracies in the counter chart, the learned counsel for the petitioners contend that the objective facts have not been directly referred to in the impugned order and the reference to such facts in the FMC order cannot be construed as reference in the impugned order. Learned counsel for the petitioners contend that the portion of the impugned order which deals with the objections raised by the objectors, is to be excluded from consideration and reference to any objective facts therein, is not required to be treated as reference to objective facts in the impugned order.

312] Again, we are unable to read the impugned order in such a peculiar manner. We find that the impugned order makes reference to most of the objective facts directly. In any case, the impugned order makes reference to the FMC order, which in turn, makes reference to the objective facts. The objective facts in the FMC order, in turn, make reference to the Grant Thornton Audit Report. All this material was available before the Central Government and from the impugned order, there is nothing to infer that the Central Government has not independently applied its mind to all such material which was very much available on record. Above all, it is most important to note that there was no serious dispute raised as regards most of the objective facts referred to in the impugned order, whether directly or indirectly.

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313] For example, the petitioners submit that the circumstance that NSEL was promoted by and is a part of the FTIL group, finds no reference in the draft order or the impugned order or even the FMC order. Apart from such contention being incorrect, it is pertinent to note that the FTIL in its affidavit in rejoinder has itself admitted this position. Even otherwise, there is voluminous material, in the form of annual reports of the FTIL itself, which establishes this position. The petitioners submit that the objective fact that FTIL is the only shareholder of NSEL and the constitution of the Board of Directors of the NSEL is entirely controlled by FTIL, finds no reflection in the draft order or the impugned order but finds reflection in the FMC order, which in turn, is referred to in the impugned order. As noted earlier, this is not the appropriate manner to read the impugned order. In any case, this position is even otherwise borne out from the other material on record.

314] There is no dispute that FTIL owns 99.9998% of NSEL's shares. There is material in the form of FTIL Annual reports itself which establishes that the FTIL, through the Board of Directors of NSEL constituted by it, possesses effective control over its subsidiary i.e. NSEL. In the FTIL, Annual Report 2013, FTIL itself held out NSEL's exchange as a part of its "*exchange verticals*". Again, there is no dispute that Jignesh Shah, founder and promoter of FTIL, directly/indirectly holds and control over 45% of its shares. There is also no dispute that he served as Vice-Chairman through on the Board of NSEL, as Chairman-cum-Managing Director of FTIL and as the Founder-Chairman and Group CEO of FTIL. There is material on record which establishes that Jignesh Shah was a member of both, the Board, as well as the Audit

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Committee, of the NSEL and was shown as one of the key management personnel of NSEL for the period from Financial Year 2005-06 to 2011-12. There is material on record which establishes that each of the minutes of the Board meetings of NSEL were regularly tabled at the Board meetings of FTIL. In such circumstances, the Central Government cannot be faulted for proceeding on the basis that FTIL had full knowledge of the affairs at NSEL. FTIL, in its affidavit-in-rejoinder has accepted that NSEL's outward e-mails were routed through an outbox called 'FT-Outbox' through which e-mails of all FTIL Group companies were routed. FTIL in its affidavit in rejoinder has admitted that Human Resources services were undertaken by FTIL Group for FTIL, MCX and NSEL.

315] The objective fact that FTIL's Finance and Accounts Team undertook detailed consideration of NSEL's finances and accounts on regular basis is borne out by the *Grant Thornton* report as also certain e-mails, which are part of the record. At a belated stage, to merely suggest some different interpretation to such material is not the same thing as seriously disputing the very existence of such material. In such circumstances, the Central Government cannot be faulted for observing that the FTIL exerted a dominant influence on the management of NSEL and and directed, controlled and supervised its governance.

316] In the presentations made on behalf of NSEL, including the presentations made by Jignesh Shah on behalf of NSEL on 10th July 2013 hardly three weeks before the collapse of operations at the NSEL exchange, it was held out that NSEL had 120 warehouses with inventory valued at Rs.6000 crores sufficient to effect

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deliveries for 1 to 1.5 years. It was also stated that NSEL strictly prohibits short sales, both in letter as well as spirit and that more than 99% of the trades in agricultural commodities result in deliveries on daily basis. It was also stated that NSEL model has full stock as collateral and 10 to 20% of open position as margin fee. It was held out that this is full proof of risk management system. As noted earlier, neither is there any serious dispute that such presentation was indeed made to the FMC and DCA nor is any explanation forthcoming as to the circumstances in which such a presentation was made because post 31st July 2013, it was very clear that the statements made in the presentation were completely contrary to the actual position at NSEL.

317] There is other material in the form of NSEL's presentations and return calculator worksheets for attracting investors to its platform. These presentations almost proceed to guarantee return/yield of about 16% to investors involved in *paired contracts*. There is material in the form of e-mails in which NSEL instructed its own Business Development Team not to officially commit to fixed returns but to communicate the daily trade rates and returns telephonically or from their personal email ids. Neither FTIL nor NSEL has really denied all this. No doubt, the facts are sought to interpreted differently. Suffice to note that such presentation or e-mails are a matter of record.

318] The *Grant Thornton* report points out that by April – July 2013, 99% of the turnover of NSEL was made up of such *paired contracts*. There is material which establishes that in monetary terms, this translates to a turn over of Rs.1,34,000 crores. The mechanism of *paired contracts* virtually converted the operation at

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the NSEL exchange from a commodities exchange, which it was meant to be , to a platform for engaging in financing transactions, which it was never meant to be. The mechanism of *paired contracts* at least *prima facie* , was in breach of the conditions of the exemption notification dated 5th June 2007. The mechanism of *paired contracts,* at least *prima facie* , was in breach of provisions of FCRA.

319] The NSEL, in answer to the charge that short sales were undertaken at the exchange , came up with its own peculiar interpretation as to the meaning of *short sales*. NSEL stated that there was no condition requiring that goods must be deposited in the warehouses prior to execution of sale transactions or prior to trade at the NSEL exchange. The interpretation runs counter to the definition provided by National Stock Exchange which states that short sales means selling of stock that the seller does not own at the time of trade.

320] The question today, is really not whether the interpretation suggested by NSEL is correct, though, we must say that we are at least *prima facie* inclined to go by the National Stock Exchange definition. The question is, despite such interpretation and despite the boast that in the last five years 99.99% of the trades in agricultural commodities have resulted in deliveries, on 31st July 2013, when the operations at NSEL collapsed, there were no commodities in the warehouses to make deliveries with. The stock or inventory which was stated to be valued at Rs.6000 crores spread over 120 warehouses, was simply not to be found. The 10-20% margin fees, were not to be found. The settlement guarantee fund, which was stated to be Rs.738.55 crores on 1st August 2013

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quite inexplicably reduced to Rs.62 crores on 4th August 2013. Despite all this, FTIL, NSEL, Jignesh Shah and shareholders and employees of FTIL maintain that there are no objective facts whatsoever, on basis of which, the Central Government could have arrived at the subjective satisfaction for exercise of powers under Section 396.

321] As noted earlier, neither FTIL nor NSEL dispute or can dispute the payment crisis at the NSEL exchange, which, in monetary terms amounts to Rs. 5600 crores. Most of the objective facts referred to in the impugned order and form a part of material on record have not been seriously disputed. To merely state that all this is a result of abuse by some traders or to state that there was a fraud at the warehouse level which went undetected until the date of default, are hardly, explanations or defences that deserve any serious credence. Therefore, keeping in mind the difference in phraseology employed in Section 237 (b) and Section 396 and also, having due regard to the essentiality element in Section 396, we are quite satisfied that the impugned order is based upon objective facts for which, there is, more than *prima facie* proof.

322] There is yet another facet of judicial review when the impugned decision is based on subjective satisfaction. Such decision can be set aside where it is found that the decision maker has acted *unreasonably*. This is usually determined applying the *Wednesbury* principle.

323] In ***R. vs. Secretary of State for the Environment Ex p. Nottinghamshire CC***[109]***,*** Lord Scarman explained that

109(1986) AC 240 at 249

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"*Wednesbury principle"* is a convenient legal shorthand used by lawyers to refer to the classical review by Lord Greene MR in the *Wednesbury Corporation (supra)***,** in which the Courts will intervene to quash as being illegal, exercise of administrative discretion.

324] Lord Greene MR, expounded the principle as follows:

> "*It is true that discretion must be exercised reasonably. Now what does that mean ? Lawyers familiar with the phraseology used in relation to exercise of statutory discretion often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often said, to be acting 'unreasonably'. Similarly, there may be something so abjured that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous maters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

325] In *Administrative Law (H.W.R. Wade and C.F. Forsyth, Tenth Edition*), relying upon several English decisions, it is observed that the doctrine that powers must be exercised reasonably has to be reconciled with no less important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding

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authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The Court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion.

326] In ***R. vs. Boundary Commission ex p. Foot*** [110]**,** it was held that the Court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the Court's function to look further into its merits. As Lord *Hailsham LC* has said, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable [***Re W. (an infant)***[111]***].***

327] The rule of reason is not therefore the standard of '*the man on the Clapham omnibus*' . It is standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is essence of what is most commonly called '*Wednesbury unreasonableness*'.

328] The principle is not understood in any different manner in India. In fact, *G. B. Mahajan (supra)*, the Supreme Court pointed out the distinction between the test of reasonableness in

110(1983) QB 600
111(1971) AC 682 at 700

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administrative law and law of Torts. By reference to observations in "*Legal Control of Government*" *(Bernard Schwartz and H.W.R. Wade at page 253),* it was held that in law of Torts, the Judge merely enforces what he thinks is reasonable. But in condemning unreasonable administrative action, the Judge must ask himself whether the decision is one which a reasonable body could have reached. In other words, he allows some latitude for the range of difference opinion which may fall within the bounds of reasonableness. The *"reasonableness"* as contemplated in administrative law must, therefore, distinguish between proper use and improper abuse of power. The test in such matters, is not the Courts own standard of reasonableness as it might have conceived in a given situation. The Supreme Court has held that this is in essence, the *'Wednesbury unreasonableness'*. The point to note, therefore, is that a decision is not unreasonable in the legal sense merely because the Court may think it unwise or that the Court may on the basis of objective facts, might not itself have arrived at. The test is whether the decision is of such nature that no person or no reasonable body of persons, instructed on law and facts might have arrived at.

329] This is not a case where the Central Government can be said to have excluded relevant considerations in making the impugned order. As the impugned order discloses the Central Government has considered various objections raised by no less than 50389 objectors. The Central Government has taken into consideration the circumstance that most of the objectors , most of the shareholders, most of the employees objected to the amalgamation. The Central Government has also taken into consideration the circumstance that decrees to the extent of Rs.1233 crores or

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thereabouts have already been obtained against the defaulters or that the assets of the defaulters to the extent of Rs.6000 crores or thereabouts may have been attached or injuncted from alienation. The Central Government has also taken into consideration the numerical strength of the shareholders as well as numerical strength of the investors. However, even after taking into consideration all such factors, the Central Government has made the impugned order broadly on the three earlier indicated reasons or grounds each of which constitute facet of *public interest*.

330] Again, there is no question of accepting the petitioners contentions that several relevant considerations have been excluded and several irrelevant considerations have been taken into account by the Central Government in making the impugned order. The petitioners have to demonstrate that the consideration, which they claim has been omitted, was indeed relevant consideration and further, if such relevant consideration were taken into account, the decision maker might have, reasonably reached a different conclusion. In a decision, which involves weighing of many complex factors, it is always possible to point out to some factors which should arguably have been taken into account or some factors which should arguably have been excluded from consideration. Therefore, merely enumerating several factors and styling the same as relevant or irrelevant is not sufficient to apply the *Wednesbury* test and interfere with the impugned decision.

331] Then again, we have to be conscious that we are exercising powers of judicial review and not exercising any appellate jurisdiction in the matter. In exercise of such a jurisdiction, we

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have to strike a critical balance between the vigilance expected of us when restrictions are imposed on fundamental rights or statutory rights and the restraint expected of us when the statutory authorities, having due regard to relevant considerations and disregarding irrelevancies, reach a subjective satisfaction on the basis of the objective facts before them in order to give effect to the legislative provision. Then, normally, we would not be inclined to judicially review the decision, unless, the decision is so absurd that no reasonable person who had applied his mind to the question to be decided, could have ever arrived at it. In this jurisdiction we are more concerned with the decision making process than the decision itself. In this jurisdiction, we do not substitute our opinion in place of the opinion of the decision maker. Therefore, in such a jurisdiction, we do not second guess the satisfaction recorded by the the decision maker, we do not normally go into the issue of sufficiency of material. In this particular case, in the context of plea of proportionality, we have subjected the impugned order to intense review in order to examine whether the response of the Central Government to the situation it was dealing with, was proportionate or not.

332] The impugned order, on the basis of objective facts, states that the same is required to be made to safeguard the interest of all the stakeholders and the public interest driving the merger are set out in business realities of the case. The impugned order, by reference to the recommendations of the FMC and FMC's order dated 17th December 2013 speaks about the *grave shattering of public confidence* and of the defeat of the very purpose of establishment of commodity stock exchange. The impugned order, by reference to FMC's order accepts that the probity and

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competence of the board officials of a nationwide commodity exchange are quite critical to achievement of the objectives of FCRA. The impugned order, quite correctly notes that this is not matter of mere recoveries and the aspect of public interest is much wider than the aspect of mere recoveries. The impugned order then refers to the objective factors that FTIL, as per its own submissions, has floated number of regulated exchanges both for securities and commodity derivatives in India as well as abroad. NSEL, 99.9998% of whose shareholding is held by FTIL was incorporated to provide a trading platform of commodity spot exchange on Pan Indian basis and exemptions was applied for and obtained from the application of FCRA on such basis. Very clearly, it was held out that the business model did not contemplate venturing into trading in forward contracts.

333] NSEL, after securing such exemption, in fact, traded in forward contracts through the mechanism of *paired contracts* thereby breaching the conditions stipulated in the exemption notification. The impugned order notes that NSEL platform was used to trade in forward contracts in a circuitous manner even though NSEL was neither recognized nor registered under FCRA. The impugned order notes that this indicates *mala fide* intention on the part of promoter FTIL to use the trading platform of its subsidiary for illicit gains, which were kept away from the eyes of regulator. The impugned order notes that by misinterpreting the conditions of exemption notification and in collusion with handful of members, massive fraud involving Rs.5500 crores has taken place, *which has the potential effect of eroding trust and confidence in exchanges and financial markets*. The impugned

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order states that amalgamation of the two companies is necessary *to build confidence in the system.*

334] The reference to *"fraud involving Rs.5500 crores"* is to be read in the context. The reference is not to be construed as determination of any such fraud by the Central Government. The phrase, obviously refers to the undisputed fact that the trading client with dues of over Rs.5500 crores remained to be paid by the defaulting commodity sellers and further, notwithstanding the positive assertions and representations held out by NSEL through Jignesh Shah that there was inventory valued at Rs.6000 crores in the warehouses or that there was settlement guarantee fund of Rs.738.55 crores, ultimately, there were neither any commodities to effect deliveries nor was there any fund to settle even a respectable portion of the dues. Even the FTIL in its list of dates and events has made reference to '*Payment Fraud to the extent of Rs.5600 crores*' There is accordingly, no merit in the submission that the Central Government, in a matter of this nature, has determined the issue of fraud or was required to prove beyond reasonable doubt any issue of fraud before it could made the impugned order.

335] NSEL at the stage of seeking exemption from applicability of FCRA had itself highlighted the importance of spot exchange to the national economy. They had pointed out that spot exchanges ensure better prices to farmers as well as consumers in agricultural commodities. They had pointed out that spot exchange would reduce cartelization, assist price discovery and price risk management. Spot exchanges could usher best practices in commodity trading such as system for grading for quality, creation

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of network of warehouses with assaying facilities and so on. They pointed out that bank finance could be availed easily by farmers against goods in warehouses. They pointed out that all these factors will have a significant bearing on the nation's financial and economic system. All this was substantially repeated by NSEL in its presentations to FMC and DCA in response to show cause notices issued by the regulators. Now that the objective facts on record establish that there were hardly any genuine spot transactions in commodities but by 2013 99% of the business at the exchange was in paired contracts, which were nothing but financing transactions, it is hardly open to the petitioners to contend that the collapse of NSEL exchange has nothing to do with shattering of public confidence in the commodities exchanges. The measure taken by the Central Government in the impugned order, in such circumstances, is certainly a measure in public interest intended to restore and safeguard public confidence for forward contracts and exchanges, which are integral and essential part of the Indian economy and financial system.

336] The second reason or the ground set out in the impugned order is that the amalgamation is for the purposes of giving effect to business realities of the case by consolidating the businesses of FTIL and NSEL and preventing FTIL from distancing itself from NSEL, which is nothing but its *alter ego*. The impugned order records that by all intents and purposes the way in which the both companies were managed, owned and controlled, NSEL was nothing but the *alter ego* of FTIL and the two companies were practically a single entity. It is pointed out that even all the stakeholders look to both as one entity. The amalgamation order only formalizes this practical reality in public interest.

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337] In the aforesaid regard, the impugned order itself makes reference to several objective facts, whether directly or indirectly. The impugned order notes that FTIL owns 99.9998% of the shareholding of the NSEL and the constitution of the Board of Directors of NSEL is entirely under the control of FTIL. The impugned order records that even factually it is the FTIL, through the Board of Directors of NSEL constituted by it, which possesses effective and absolute control over the functioning of NSEL. There is reference to regular tabling of NSEL Board Meeting Minutes at the Board Meetings of the FTIL. There is material in support of dominant influence exerted by the Board of Directors of FTIL on the management of NSEL. There is reference to FTIL infusing Rs.179.26 crores in NSEL to tide over minimum difficulties. The impugned order notes that NSEL's recovery efforts are presently depending upon *ex gratia* and without prejudice loans and payments from FTIL. Again, this is a case where the reason stated is not extraneous. The reason stated is backed by objective facts, in support of which there is more than *prima facie* evidence.

338] The inferences drawn by the Central Government from out of the objective facts on record cannot be said to be perverse or extraneous. In this case, the position of Jignesh Shah in relation to FTIL and NSEL is not in serious dispute. Jignesh Shah, directly or indirectly controls over 46% of the shareholding in FTIL. 99.9998% of the shareholding of NSEL is held by FTIL. Jignesh Shah is styled as *Founder and CEO of FTIL Group Companies*. Jignesh Shah is the Chairman cum Managing Director of FTIL. Jignesh Shah is also the Vice Chairman and Member of Audit Board of NSEL. Jignesh Shah made representations not only on behalf of FTIL but also on behalf of NSEL. In fact, on 10th July

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2013, it was Jignesh Shah, who made a very detailed representation to the FMC and DCA on behalf of NSEL. On basis of such objective facts, the Central Government, cannot be faulted for treating Jignesh Shah as the face of both FTIL as well as NSEL. On basis of the objective facts on record, the Central Government was quite justified in referring to the business realities of the case. On basis of objective facts on record, the Central Government was justified in treating the NSEL as the *alter ego* of FTIL. On basis of the objective facts on record, the Central Government, quite justified in treating Jignesh Shah as *alter ego* for the two companies. On basis of such objective facts, the Central Government, was justified in recording the satisfaction that it was essential in public interest to amalgamate the two companies, so that, FTIL, at this crucial juncture does not disassociate itself from its fully owned subsidiary, by taking the shelter of corporate veil.

339] In *Sunil Mittal* (supra), the Supreme Court has discussed the principle of *alter ego* in the context of companies. The Supreme Court has quoted MacNagthen, J. in ***Director of Public Prosecutions vs. Kent and Sussex Contractors Ltd***.[112], in which it is held that : *A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention—indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate.*

1121944 KB 146 : (1944) 1 All ER 119 (DC)

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340] In *Sunil Mittal* (supra), the Supreme Court has also referred to the reiteration of the aforesaid principle by Lord Denning in ***Bolton (H.L.) (Engg.) Co. Ltd. v. T. J. Graham & Sons Ltd***.[113] in the following words :

> *"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. (AC at pp. 713 & 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company themselves guilty."*

341] In *Sunil Mittal* (supra), the Supreme Court has held that the aforesaid principle has been firmly established in England since the decision of the House of Lords in ***Tesco Supermarkets Ltd. v. Nattrass***.[114] In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law: (AC p. 170 E-G)

> *"I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same*

113(1957) 1 QB 159 : (1956) 3 WLR 804 : (1956) 3 All ER 624 (CA)
114(1971) 2 ALL ER 127 (HL)

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person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.'

342] In *Sunil Mittal* (supra), the Supreme Court has held that the corporation is in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring *mens rea*. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of *'alter ego'* of the company.

343] In *Sunil Mittal* (supra), the Supreme Court clarified that the position of law in India has been clearly stated by the Constitution Bench in ***Standard Chartered Bank vs. Directorate of Enforcement***.[115] and on detailed consideration of entire body of case laws in this country as well as other jurisdictions, it has been

115(2005) 4 SCC 530

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observed as follows :

> *'6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.'"*

344] Finally, in *Sunil Mittal* (supra), the Supreme Court has held that it is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the person or group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment in Iridium India case is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are *"alter ego"* of the company.

345] We are conscious that the observations in *Sunil Mittal* (supra) were in the context of the Special Judge summoning the two appellants, who were not named in the charge sheet concerning the "*2G Spectrum Scam Case*". The issues involved were whether the appellants were in control of the affairs of the respective companies alleged to be involved in the scam; whether because of their controlling position, they represent the directing mind and will of each company; and whether the state of mind of these persons is the state of mind of the companies, so as to describe them as *'alter ego'* of their respective companies. The decision, is not irrelevant to the present case, particularly in the

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context of the role played by Mr. Jignesh Shah. The decision is also not irrelevant, in the context of the relative positions of FTIL and NSEL and the second reason in the impugned order in the context of business realities and *alter ego*.

346] The petitioners contend that the impugned order has been made to only favour the investors or to deprive FTIL and NSEL the defences which they have already raised in the civil suits instituted by the investors. There is nothing in the impugned order or the circumstances in which it was made to suggest that it was made only to favour the investors or to deprive the FTIL and NSEL of any of the defences raised by it in the suits instituted by the investors. Even assuming that this might be one of the consequences of the impugned order, it cannot be said that the impugned order was made only for this purpose and therefore, there is some issue of legal *mala fides* involved. The impugned order in this case, has been made for at least three distinct and discernible reasons. The reasons are restoration, of confidence in exchanges, which are an integral and essential part of Indian economy and financial system. The confidence was required to be restoring in the wake of collapse of national level of commodities of exchange. One of the methods of restoring the confidence was to hold FTIL and NSEL to their representations repeatedly made and asserted.

347] The third reason or ground set out in the impugned order is that the same will facilitate NSEL in recovering dues from defaulters by using the human and financial resources of FTIL. In the context of discussion on issue 'G' and the contention of Mr. Chinoy for NSEL that the impugned order is based only on this ground or reason, we have pointed out that there is ample material

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on record in support of such reason or ground. We have also held that in the facts of the present case, such reason or ground cannot be said to be irrelevant or extraneous so as to suggest that no sensible person, instructed in law and on facts, could have ever regarded such a reason for making the impugned order. Suffice to note that the reason or ground is conceived in public interest and the subjective satisfaction is based upon the objective facts, in support of which there is more than prima facie proof. The reason or ground is neither irrelevant nor extraneous so as to attract the *Wednesbury* principle.

348] There is no merit in the submission that the Central Government should have waited for adjudication of liability or fraud to make the impugned order. Time and again, the Central Government has clarified that it is not going into the issue of liability or fraud. The Central Government has addressed itself to the objective facts on record and may have drawn certain inference from such objective facts. The inference drawn cannot be said to be unreasonable in the facts and circumstances of the present case.

349] Quite recently, the Supreme Court, in the case of *Gohil Hanubhai (supra)*, was concerned with the decision for cancellation of examination for recruitment to the post of Revenue Talathis on the ground of illegalities and malpractices in connection with the examination. The Supreme Court noted that there were allegations of large scale tampering with the examination process. The scrutiny of answersheet revealed that there were glaring aberrations which provide *prima facie proof of large scale tampering of examination process*. The Supreme Court, in such circumstances observed as follows:

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"Denying power to the State to take appropriate remedial action in such circumstances on the ground that the State did not establish the truth of those allegations in accordance with the rule of evidence relevant for the proof of facts in a Court of law (either in criminal or civil proceeding), would neither be consistent with the demand of larger public interest nor would be conducive to the efficiency of administration. The No binding precedent is brought to our notice which compels us to hold otherwise. Therefore, the 1st submission is rejected".

350] In ***Council of Civil Service Union vs. Minister of Civil Service*** [116]**,** Lord Diplock summarised the principles of judicial review by conveniently classifying under three heads the grounds upon which administrative action may be judicially reviewed. They are "*illegality, irrationality and procedural impropriety"*. Illegality means that the decision maker must correctly understand the law that regulates its decision making power and give effect to it. Whether he has or not is a justiciable question to be decided, in the event of dispute, by a court exercising powers of judicial review. Irrationality refers to "*Wednesbury unreasonableness"*. It applies to a decision which is *so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* Finally, procedural impropriety means the failure to observe basic rule of natural justice or to act with procedural fairness towards the person who will be affected by the decision. This will also cover the failure to observe procedural rule that are expressly laid down in the legislative instrument by which its jurisdiction is conferred.

116 1984 (3) ALL ER 935 (HL)

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351] In making the impugned order, the Central Government, has quite correctly appreciated the scope and import of the provisions of FCRA and the Companies Act. Thus, there is no question of any *illegality* involved in the making of the impugned order.

352] Applying the test of *Wednesbury unreasonableness,* there is no case made out to interfere with the impugned order. The Central Government, in this case, has taken into account relevant considerations, ignored irrelevant considerations. The view taken by the Central Government is quite balanced and rational. We are unable to accept the petitioners contentions that the impugned decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. This means that there is no *irrationality* involved in the impugned order.

353] On basis of the material on record, we are satisfied that the Central Government, in making the impugned order has not breached the principles of natural justice and fair play. The procedural requirements of Section 396 have been duly adhered to in making the impugned order. Thus, there is no case of any *procedural impropriety* made out.

354] Therefore, even applying the triple test formulated by Lord Diplock for judicial review, we are satisfied that there is no illegality involved in the making of the impugned order. So also, we are satisfied that there is no procedural impropriety since the impugned order was made after due compliance with principles of natural justice and fair play. The procedural element in Section 396 was also followed by the Central Government in making the

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impugned order. There is no irrationality involved because in the facts of the present case there is no basis to even suggest that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. There is material in this case to hold that the subjective satisfaction recorded by the Central Government is based on objective facts its stand more than *prima facie* established. This is also not a case where relevant considerations have been ignored or irrelevant considerations taken into account by the Central Government in making the impugned order.

355] This is also not a case where the Central Government has in fact lifted corporate veil despite the alleged non-existence of the circumstances justifying the lifting of such corporate veil. The provisions of Section 396 are based upon the premise that each of the companies proposed to be amalgamated are companies having their independent corporate existence and corporate personalty. This is not a case where the Central Government, has lifted the corporate veil and sought to apportion any liability upon either NSEL or FTIL. This is also not a case where the Central Government has sought to apportion any liability of NSEL upon FTIL. Rather, the Central Government, in *public interest,* has chosen to amalgamate the two companies, thereby acknowledging their corporate veil. Besides, Mr. Khambata may not be entirely incorrect in his submission that the facts and circumstances of the present case may have justified the lifting of corporate veil. Accordingly, we are unable to fault the impugned order on the ground that the same involves lifting of corporate veil without existence of any circumstances warranting such lifting.

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356] Most of the petitioners have contended that the Central Government in making the impugned order has placed excessive reliance on FMC's fit and proper order dated 17th December 2013 and this circumstance is indicative of surrender or abdication of discretion by the Central Government. Several decisions were cited to point out that adoption of such a course of action by the Central Government might amount to acting under dictation, thereby vitiating subjective satisfaction. In particular, strong reliance was placed on *Anirudhsinhji Jadega* (supra).

357] There is and there can be no dispute in so far as the principle is concerned. Where power is conferred upon one authority and in substance such power is exercised by some other authority, then, the decision may be assailed as *ultra vires*. In *Administrative Law* (H.W.R. Wade & C. F. Forsyth, Tenth Edition) instances of surrender, abdication or dictation have been discussed. Clear cut cases of unlawful dictation take place where Ministers have attempted to interfere for political reasons and where the statutory authority has surrendered or abdicated its own discretion but acted on the dictates of Minister's Directives. In one of the cases, the Prime Minister of Quebec gave instructions for cancellation of a liquor license because the licensee was seen supporting an unpopular section of the community (***Roncarelli vs. Duplessis***[117]). In another case, an Indian Minister was alleged to have procured the taking over by the State of the business belonging to his political opponent. (***Rowjee vs. Andhra Pradesh***[118]). If the Minister's intervention is in fact the effective cause, the action taken is invalid on the ground of external

117(1959) 16 DLR (2d) 689
118AIR 1964 SC 962

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dictation as well as on the obvious grounds of bad faith and abuse of power.

358] *Wade*, however proceeds to point out that the aforesaid rule ought not to be carried to the length of preventing one government department from consulting another, or from preventing government agencies from acting in accordance with government policy. There must always be a difference between seeking advice and then genuinely exercising one's own discretion, on the one hand, and, on the other hand, acting obediently or automatically under someone's else advice or directions. A licensing authority, for instance, may quite properly take account of government policy in its decisions, provided that it genuinely decides each case itself. The majority of the High Court of Australia held that the Director General of Civil Aviation might refuse import licenses for air crafts following the government policy of not allowing new operators to enter the inter State air freight business. (***R. v. Anderson ex p. Ipec-Air Pty. Ltd.***[119]). Similarly, the Audit Commission did not abdicate its discretionary powers when, in assessing the performance of local authorities across the range of their functions, it accepted the rating accorded to councils by the Commission for Social Care Inspection (CSCI) in respect of their social services performance. (***Audit Commission for England and Wales vs. Ealing London Borough Council***[120]).

359] In the facts of the present case, we find though the Central Government has referred to the FMC's order as one of the relevant materials, the emphasis on the FMC's order is not so excessive as

119(1965) 113 CLR 177
120(2005) EWCA Civ 556

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to suggest any surrender or abdication of discretion or to attract the vice of acting under dictation. This is also not a case where the FMC's order is the sole basis for making the impugned order. In this regard, it is pertinent to note that there is no unity even amongst the petitioners like FTIL and Jignesh Shah on one hand and NSEL on the other as to the impact of FMC's order on the Central Government making the impugned order. Both, appear to have taken extreme positions, neither of which appear to us, to be correct.

360] FTIL and Jignesh Shah maintain that the Central Government has abdicated its discretion to that of FMC and has virtually acted under the dictation of FMC since according to them the impugned order lays excessive emphasis upon the FMC's order. On the other hand, NSEL, as noted earlier, contends that the reasons or the grounds in the FMC order are not the basis for the impugned order. Such a situation, is sufficient to reject the contention based upon surrender, abdication or dictation. We however, do not propose to base our decision only on such contradictory contentions urged by FTIL and Jignesh Shah on one hand and NSEL on the other. This is because, upon the perusal and analysis of the impugned order, we are satisfied that the Central Government in making the impugned order has neither laid any excessive emphasis on the FMC's order nor can it be said that the Central Government has surrendered or abdicated its discretion or acted under dictation. The reference to the FMC's order cannot lead to any such inference.

361] Besides, in this case, it is necessary to note that both FMC as well as the Central Government have referred to Grant Thornton

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report and the objective facts which emanate from the audit report. Merely because some of the inferences flowing from the common objective facts are similar, that by itself, does not suggest surrender, abdication or dictation. FMC, in making its order dated 17th December 2013 was concerned with the issue of declaring FTIL, Jignesh Shah and others as not fit and proper persons in the context of operations at the exchanges considering *inter alia* the objective facts as borne out by the Grant Thornton report and other relevant material before it. The Central Government, in making the impugned order was concerned with the issue of amalgamation of NSEL with FTIL in public interest, again, on the basis of objective facts, *inter alia* in the Grant Thornton report and the other material before it. The overlap of some material, is by no means sufficient to vitiate the exercise of subjective satisfaction.

362] Once we are satisfied that the Central Government has not made the impugned order solely relying upon FMC's order or by surrendering, abdicating or acting to the dictates of FMC, the circumstance that challenge to the FMC's order is *sub judice* is not of much significance. The extreme submission in the course of rejoinder that since this court has issued Rule in the petition challenging FMC's order dated 17th December 2013, the Central Government was precluded from even referring to the FMC's order cannot be accepted. As noted earlier, this court, whilst issuing Rule in Writ Petition Nos. 337, 363 and 370 of 2014 challenging FMC's order, proceeded to reject interim relief by order dated 28th February 2014. The special leave petitions against the order dated 28th February 2014, were dismissed as withdrawn. In the order refusing interim relief, this court has noted that FMC has recorded elaborate and detailed findings of fact after

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considering the evidence on record. The order further notes that such findings have been recorded after compliance with principles of natural justice and the same disclose serious non compliances. No doubt, such observations are only *prima facie.* The petitioners have themselves contended that in a matter of this nature, it is not sufficient for the Central Government to merely allude to the circumstances but further, there should be at least *prima facie proof* with regard to such circumstances.

363] The material on record, however, indicates that NSEL, offered and promoted contracts which were in breach of the conditions in exemption notification dated 5th June 2007. Further, NSEL offered and promoted *paired contracts,* which were found to be nothing but financing transactions distinct from genuine sale and purchase transactions in commodities. There is material on record which indicates that NSEL went to the extent of assuring fixed returns to the investors and by the year 2013, almost 99% of the turnover of the exchange comprised such *paired contracts*. Ultimately, on 31st July 2013, NSEL, suspended the operations at the exchange. At this stage, the commodities sellers defaulted on their outstanding payments obligations to the Trading Clients to the extent of almost Rs.5600 crores. The NSEL also sought to wriggle itself out of its obligations by contending that the counter guarantee was to apply only in relation to specified commodities and since none had been specified, the counter guarantee was in effective. The settlement guarantee fund to be maintained by NSEL and which was stated to be Rs.738.55 crores as on 1st August 2013, was, on 4th August 2013 found to be only Rs.62 crores. Even though the transactions at the spot exchange were to be backed by commodities supposedly checked and stored in warehouses owned

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and controlled by NSEL, SGS India Limited, which was appointed to inspect and audit the position, reported that stock worth only Rs.358 crores was available, even though, NSEL, had solemnly stated that it has stocked valued at Rs.2389.36 crores. This means that there was hardly any stock in the warehouses with which deliveries could be effected. All this, left the Trading Clients in a lurch. The impugned order details the nexus between NSEL and FTIL, in the context of the crisis, which led to the collapse of the spot exchange.

364] For all these reasons, we are unable to fault the impugned order applying the test of *Wednesbury* unreasonableness.

ISSUE -I

(I) Whether the impugned order defies the doctrine of proportionality ?

365] The doctrine of proportionality has been explained by the Supreme Court in several decided cases referred to by the petitioners in the course of their rejoinder.

366] In *Om Kumar (supra),* the Supreme Court clarified that by *'proportionality'* it means the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of administrative order as the case may be. Under the principle the court will see that the legislature and the administrative authority '*maintain a proper balance between the*

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adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve.' The legislature and the administrative authority, are, however, given an *area of discretion* or a *range of choices* but as to whether the choice made infringes the rights excessively or not is for the court. That is what meant by proportionality.

367] In the context of Article 14 of the Constitution and administrative action, *Om Kumar* (supra) explains the position by reference to the *classification test* and the *arbitrariness test*. If, under Article 14 of the Constitution, administrative action is to be struck down as discriminatory applying the classification test, then, it is a case of primary review and the test of proportionality will apply in matters of judicial review. However, if under Article 14 of the Constitution, administrative action is to be struck down as *arbitrary,* as explained in *E.P. Royappa (supra),* it is a case of secondary review and the test of *Wednesbury unreasonableness* will apply in matters of judicial review. This position was reiterated in *Gohil Vishwaraj Hanubhai and ors. (supra).*

368] In the context of Issue - D, considering the reliance placed on *E.P. Royappa (supra)* and *Maneka Gandhi (supra)* what was alleged was arbitrariness and consequently the invitation was for exercise of secondary review. Therefore, applying *Om Kumar (supra)* and *Gohil Vishvaraj Hanubhai & Ors*. (*supra*), the *Wednesbury* test will apply. We have, already considered this aspect in details and held that the impugned order passes the muster of *Wednesbury* test.

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369] The contention at the stage of rejoinder that the *Wednesbury test* now stands replaced by the proportionality test came up for consideration in *All India Railway Recruitment Board (supra)*. In this case, the Supreme Court explained the difference between *Wednesbury unreasonableness* and *proportionality* and pointed out that though the current trend seems to favour proportionality test, *Wednesbury* has not met with its judicial burial and the State burial, with full honours is surely not to happen in near future.

370] The Supreme Court further pointed out that *Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to "*assess the balance or equation*" struck by the decision-maker. Proportionality test in some jurisdictions is also described as the "*least injurious means*" or "*minimal impairment*" test so as to safeguard the fundamental rights of citizens and to ensure a fair balance between individual rights and public interest.

371] In *Maharashtra Land Development Corporation & Ors*. (*supra*), the Supreme Court explained that the principle of proportionality envisages that a public authority ought to maintain a sense of proportion between particular goals and means employed to achieve those goals, so that administrative action impinges on the individual rights to the minimum extent to preserve public interest. This means that the court has to go into

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advantages and disadvantages of the administration action called in question. The administrative authority, while exercising discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred. The test of proportionality is therefore concerned with the way in which the decision maker has ordered his priorities i.e. the attribution of relative importance to the factors in the case. Thus, it is not much the correctness of the dispute that is called into question, but the *method* to reach the same.

372] In *Modern Dental College (supra),* the Supreme Court quotes *Aharon Barak* (former Chief Justice, Supreme Court of Israel), when he says that there are four sub components of proportionality which need to be satisfied to sustain the restriction imposed. They are as follows:

> *(i) it is designated for a proper purpose;*
>
> *(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose;*
>
> *(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally*
>
> *(iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.*

373] The Supreme Court proceeds to observe that the exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an

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exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests. At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations. In examining reasonableness, the Court has to keep in mind factors like the directive principles of State policy, prevailing social values and social needs which are intended to be satisfied by the restrictions, the excessiveness of the restrictions. However, no abstract or general pattern or fixed principles of universal application can be applied in such matters. The court will have to examine the matter from case to case basis as also with regard to changing conditions, values of human lives, social philosophy of the Constitution, prevailing conditions and surrounding circumstances. Ultimately, a just balance has to be struck between the restrictions imposed and the social control envisaged.

374] Even applying the proportionality test, we are quite satisfied that the impugned order warrants no interference in the facts and circumstances of the present case. The impugned order amalgamates NSEL with FTIL for the three broad reasons set out in the impugned order. In the context of the three reasons, we have already held that neither of them could be regarded as extraneous or irrelevant to the purpose for enactment of Section 396. Thus, it is clear that the action taken was in furtherance of the legitimate aim or the proper purpose, namely, public interest. The measures taken by the impugned order are rationally connected with the fulfillment of the purpose. This means that the

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means adopted by the Central Government are quite suited to achieve public interest in the facts of the present case.

375] There is no merit in the submission that the impugned order may not achieve the stated purpose. Considering the magnitude of the crisis, there is nothing unreasonable if the regulatory authorities propose to tackle the situation by initiating series of actions. The combined effect of these actions may yield results even assuming that actions considered in isolation, may not. The measures taken, in the present case, were necessary and even the petitioners did not suggest any alternative measures that might have achieved the same purpose, with lesser degree of limitation. Mr. Zubin Behramkamdin, who appeared for the employees of FTIL came closest to suggesting some alternative measure. In his notes of arguments, Mr. Behramkamdin suggested that if a dedicated bench were to be constituted by this court to take up matters concerning the NSEL Spot Exchange, then, there may have been no necessity to make the impugned order amalgamating NSEL with FTIL. Such contention is only required to be noted to be rejected. If, the impugned order has the additional effect of sparing a Bench of this Court to devote valuable judicial time to other pressing matters, then, surely, Mr. Khambata would add that the cause of public interest is further promoted, though, quite unwittingly.

376] In this case, we find that the Central Government has adopted quite a balanced approach in making the impugned order. The impugned order is certainly not comparable to *using a sledge hammer to crack a nut,* to borrow the phrase from Leyland and Anthony (Textbook on Administrative Law, 5th Edition). The

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Central Government in this case, advisedly refrained from making any determination of liability or going into the issue of any alleged fraud. This was in order not to prejudice NSEL or FTIL in the pending litigations. In fact, FTIL, in its petition, had expressed apprehensions that the Central Government might initiate action to supercede the Boards of the Companies thereby assuming full control over the management of the companies. At least, at the stage of making the impugned order, no such option was exercised by the Central Government.

377] In this case, the Central Government, amongst other factors was required to consider the competing interests of investors, who, even according to NSEL and FTIL are due and payable an amount of over Rs.5,600 crores by the defaulters and the interests of NSEL, FTIL, its shareholders, creditors and employees. Now the later class, repeatedly maintains that they are themselves not liable for such payments; that the rules and byelaws of the exchange rule out any liability being foisted upon them; that in any case decrees have already been secured against defaulters and substantial assets of the defaulters have already been attached or injuncted from alienation. This means that the petitioners themselves regard the possibility of any liability being foisted upon them as quite remote.

378] The Central Government therefore, has assessed the competing interests between the two classes. Besides, in the facts of the present case, the issue was not restricted only to the two classes. In terms of the scheme of Section 396, the Central Government was required to, and has focused upon the larger public interest involved in the matter. This naturally includes the issue of investor confidence. This also includes the position and

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functioning of the financial or trading institutions like stock or commodities exchanges which assume a very significant role in the national economy. The impugned order also addresses the issue of holding the promoters of such exchanges liable to the legal regime under which they were governed. The impugned order also addresses the issue of holding the promoters of such exchanges to account for the repeated and solemn representations held out by them both, at the stage of securing exemptions and thereafter, in the operation of the exchange itself. All these are relevant factors, which, in the present case, have gone into the decision making process and consequently the decision itself. Thus construed, we are unable to detect any dis-proportionality in the impugned order.

379] The petitioners choose to assess the impact or the so-called restrictions, almost entirely from their own limited perspective and not from the perspective of public interest. No doubt, even the interests of the companies in question, their shareholders, creditors and employees are relevant. However, the petitioners, choose to regard such interests as the only interests which the Central Government was expected to focus on. This is obviously not the correct perspective expected of the Central Government, which has to necessarily focus on *public interest*. The concept of public interest, specially in the context of amalgamation of companies includes not merely the interests of shareholders or employees of the company, but would also include the interests of the investing public, the general public and the national economy. The concept of *public interest* takes the company outside the conventional sphere of being a concern in which the shareholders alone are interested. It emphasizes the idea of a company

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functioning for the public good or general welfare and at any rate not in a manner, detrimental to the public good. The expression public interest constitutes a positive check on unhindered exercise of private right whether by management or by stockholders. Where therefore, *public interest* is a relevant consideration, the same must override other considerations like freedom of management or the right of stockholders to carry on the business of the company as they desire. The Central Government, in the present case, has balanced the interests of all the stakeholders and there is nothing disproportionate in the exercise undertaken.

380] The petitioners, who now urge review on basis of doctrine of proportionality also owe some responsibility to at least suggest the range of options, which according to them, were available to the Central Government to deal with an unprecedented situation of this nature. The petitioners, including in particular, FTIL, NSEL and the shareholders of FTIL have operated in a denial mode, even when it comes to acknowledging the undeniable fact that the crisis of very serious proportion has arisen at the NSEL's exchange. The regulators, in the present case, have exhibited substantial restraint. In response to the show cause notices issued, Jignesh Shah, whose position vis-a-vis FTIL as well as NSEL has been discussed earlier, rather than admitting that there was a problem at the NSEL exchange and suggesting options to deal with such problem, proceeded to inform the regulators like FMC and DCA that there was no problem at the exchange and in any case, NSEL had 120 warehouses with stocks /inventory valued at Rs.6000 crores to take care of any eventuality. All this was hardly 21 days prior to 31st July 2013, on which date, NSEL, suspended operations at its exchange and created an unprecedented payment crisis of the

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magnitude of over Rs.5600 crores. The subsequent Forensic Audits by Auditors appointed by NSEL itself disclosed, not only the falsities of the representations but also the manner in which the entire operations at a national level stock exchange came to be subverted. Even before this Court, none of the petitioners or shareholders even suggested any serious options or range of options, which were open to the Central Government to adopt in a situation of this nature. In such circumstances, it is really not possible to interfere with the impugned order, applying the test of proportionality.

381] In this case, there is material on record that NSEL established the commodities spot exchange on basis of representations that the same would provide a platform for farmers and other traders to sell their produce to buyers without intervention of middlemen or agents in an efficient and transparent manner. NSEL represented that there would be no forward trading and NSEL would counter guarantee performance of contracts at the exchange. NSEL was permitted to establish the exchange by exempting its operations from the regulatory regime established by FCRA subject to the condition that no short sales would be permitted and all outstanding positions at the end of the day would result in delivery. Even the NSEL held out that all transactions at the spot exchange would be backed by commodities checked and stored at warehouses owned and controlled by NSEL. NSEL even held out that it would maintain a settlement guarantee fund, so as to eliminate any risk to the traders at the spot exchange.

382] The material on record further indicates that NSEL, in spite the aforesaid, offered and promoted contracts which were in

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breach of the conditions in exemption notification dated 5th June 2007, further, NSEL offered and promoted *paired contracts,* which were found to be nothing but financing transactions distinct from genuine sale and purchase transactions in commodities. There is material on record to indicate that NSEL went to the extent of assuring fixed returns to the investors and by the year 2013, almost 99% of the turnover of the exchange comprised such *paired contracts.*

383] Ultimately, on 31st July 2013, NSEL, suspended the operations at the exchange. At this stage, the commodities sellers defaulted on their outstanding payments obligations to the Trading Clients to the extent of almost Rs.5600 crores. The NSEL also sought to wriggle itself out of its obligations by contending that the counter guarantee was to apply only in relation to specified commodities and since none had been specified, the counter guarantee was in effective. The settlement guarantee fund to be maintained by NSEL and which was stated to be Rs.738.55 crores as on 1st August 2013, was, on 4th August 2013 found to be only Rs.62 crores.

384] Even though the transactions at the spot exchange were to be backed by commodities supposedly checked and stored in warehouses owned and controlled by NSEL, SGS India Limited, which was appointed to inspect and audit the position, reported that stock worth only Rs.358 crores was available, even though, NSEL, had solemnly stated that it has stocked valued at Rs.2389.36 crores. This means that there was hardly any stock in the warehouses with which deliveries could be effected. All this, left the Trading Clients in a lurch. The impugned order details the

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nexus between NSEL and FTIL, in the context of the crisis, which led to the collapse of the spot exchange.

385] In *MCX Stock Exchange India Limited (supra)*, the Division Bench of this Court (Dr. D.Y. Chandrachud, J. as His Lordship then was and A.V. Mohta, J.) has held that stock exchanges provide what is described as "*the first layer of oversight*". In many areas, stock exchanges are self regulators. As self regulatory organizations, stock exchanges have a frontline responsibility for regulation of their markets and for controlling compliance by members of rules to which they are subject. They ensure in that capacity, compliance of the requirements established the statutory regulator. Apart from the regulation of members, market surveillance carried on by stock exchanges in certain jurisdictions regulates issuers. They do so by ensuring that the stocks of issuers are reliably traded and that issuers meet standards of corporate governance. In exercising these powers, stock exchanges may face issues involving a conflict of interest. Such conflicts of interest have to be handled and addressed effectively within the regulatory framework. Stock exchanges as institutional mechanisms have an important role to play in ensuring the stability of the financial and economic system.

386] The Division Bench notes that the orderly functioning of the market for securities is no longer a matter of a private concern, for those who transact on the market. The market for securities can be volatile. Transactions in the securities' market and the transparency of institutional mechanisms have a significant bearing on the wealth of investors. Inflows and outflows of capital from the stock market have an immediate and, often serious,

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impact on financial stability in the country. The orderly functioning of stock exchanges as institutions through which transactions in securities take place is a matter of public interest. The regulatory powers which have been conferred upon SEBI to recognise stock exchanges must be understood in the context of ensuring the protection of investors on one hand and the public interest that is involved on the other. SEBI is an expert regulatory body which is vested with the power to direct and regulate the functioning of stock exchanges. SEBI, as a regulatory authority, is vested with wide powers to ensure the protection of the interest of investors and the orderly development of the securities market. Ensuring the proper management of stock exchanges is a matter which falls within the regulatory framework which SEBI directs. Where the affairs of a recognized stock exchange are conducted in a manner detrimental to the interest of the investors or the securities market, it has consequences not just for the stock holders in the market, but for the financial stability of the nation. Stock exchanges are the first frontiers of regulation, for it is their duty to ensure, in the first instance, that transactions are conducted in a transparent manner and in accordance with the rules and regulations and bye laws that have been approved. Their duty to report to SEBI is an adjunct of the power conferred upon SEBI to regulate.

387] In *Coimbatore Stock Exchange Limited (supra)* **,** the Madras High Court has observed that as is known, the National Stock Exchange, the Bombay Stock Exchange and the Regional Stock Exchanges in India play the role of a Barometer in the development of Indian economy and in such view of the matter, any action which is detrimental to the interest of the investing public at large and contrary to the provisions of SCRA and SEBI

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Act, will certainly have a negative impact on the economic system of the country as a whole.

388] The distinction made by the petitioners in the course of rejoinder that the decisions in *MCX (supra)* or *Coimbatore Stock Exchange (supra)* are concerned with "*Stock Exchanges"* and not "*Commodity Exchanges"* is really, a distinction without any difference. The observations in the two decisions regards the importance of exchanges to the economic health of the country, apply with full vigor to commodities exchange, particularly, a national level commodities exchange having turnover of thousands of crores.

389] The conduct of the affairs of stock and commodity exchanges is of vital importance to the national economy. Stock and commodity exchanges provide vital hubs for investors and traders to trade in share and commodities. Commerce in modern economy is inconceivable without them. The perception of Indian economy, both locally and abroad, depends to a large extent on the functioning and the health of its stock and commodity exchanges. The failure of a national level commodity exchange under circumstances as stated in the impugned order, is clearly, a matter of serious concern. It is reported that almost 99.99% of the ostensible spot trading in commodities in the entire country was taking place on the NSEL spot exchange. The paired contracts offered by NSEL, which were in breach of the conditions of exemption notification, alone accounted for a turn over of Rs.1,34,000 crores between the years 2009 to 2013.

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390] If exchanges such as these are permitted to be subverted or fail without honouring their obligations and commitments, the confidence in national economic institutions is bound to suffer and the repercussion to the national economy will be severe. In such situations, a negative perception about the business environment of the country is created, which has grave repercussions on the national economy. The Central Government, quite conscious of all such factors, has taken a balanced decision in the facts and circumstances of the present case.

391] Therefore, in the facts and circumstances of the present case, even upon exercise of intensive review and the application of the test of proportionality, we see no reason to interfere with the impugned order.

CONCLUSION:

392] For all the aforesaid reasons, we dismiss these petitions. There shall however be no order as to costs. The interim orders, are hereby vacated.

(M.S. SONAK, J.) **(CHIEF JUSTICE)**

393] At this stage, learned counsel for the petitioners pray for extension of interim order by period of 12 weeks. The interim order is extended by a period of 12 weeks from today.

(M.S. SONAK, J.) **(CHIEF JUSTICE)**

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