(1987) 08 CAL CK 0002

In the Calcutta High Court

Case No : Appeal No. 418 of 1986

Bengal Tea Industries Ltd. and Others — APPELLANT

Vs

Union of India and Another — RESPONDENT

Date of Decision : 25-08-1987

Acts Referred:

Companies Act, 1956 — Section 173, 235, 236, 237, 238
Transfer of Property Act, 1882 — Section 6(c)

Citation : 93 CWN 542

Hon'ble Judges : Shyamal Kumar Sen, J;Dipak Kumar Sen, J

Bench : Division Bench

Advocate : S.B. Mukherjee and P.C. Sen for the Appellant Company, for the Appellant;Sibaji Mitra for the Regiuonal Director, Company Law Board and Indrajit Sarker for the Creditor Bank, for the Respondent

Final Decision : Allowed

Judgement

Dipak Kumar Sen, J.—Bengal Tea & Industries Limited, the appellant no. 1, incorporated on the 29th May 1950 in the name Bengal Tea Co. Limited is an existing company within the meaning of the Companies Act, 1956. The authorised share capital of the appellant no. 1 is Rs. 1 crore divided into 1,00,000 equity shares of Rs. 100/- each. The issued, subscribed and paid up capital of the appellant no. 1 is Rs.75,46,800/- divided into 75,468 fully paid up equity shares of Rs. 100/- each. The objects for which the appellant no. 1 was incorporated as appearing from its Memorandum of Association are, inter alia, to carry on the business of growers, cultivators, producers, planters, blenders, buyers, sellers, exporters, importers of and dealers in Tea, Coffee and other specified products.

2. Presently the appellant no. 1 is engaged in the business of cultivating, manufacturing and processing tea and manufacturing textiles.

3. Bengal Tea & Fabrics Limited, the appellant no. 2 was incorporated on the 16th July 1983 under the Companies Act, 1956. The authorised share capital of the

appellant no. 2 is Rs.5o lakhs divided into 5,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid up capital of the appellant no. 2 is Rs. 20,00,000/- divided into 2,00,000 fully paid up equity shares of Rs. 10/- each.

4. The objets for which the appellant no. 2 was incorporated as appearing in its Memorandum of Association are, inter alia,

(a) To carry on the business as traders, dealers, wholesellers, retailers, makers, designers, combers, scorers, scourers, spinners, weavers, finishers dyers and manufacturers of ready made garments, yarns and fabrics of wool, cotton jute, silk, rayon, nylon terylene and other natural, synthetic fabrics.

(b) To own, purchase, take on lease, hire or exchange or otherwise acquire any estate, land, tea garden, orchards groves, plantations and farms and to carry on business as cultivators, growers, producers, planters, manufacturers buyers, sellers, dealers, importers, exporters, agents, brokers traders or stockists of tea, coffee and other similar products and also agricultural grains, food or beverage.

5. The appellants nos. 1 and 2 mooted a scheme of amalgamation and on or about the 25th September 1985 moved this Court u/s 391(1) and 393 of the Companies Act 1956 for inter alia an order that separate meetings of the holders of equity shares of the appellants be convened and held for considering and approving with or without modification the proposed scheme.

6. The material provisions'' of the scheme are, inter alia, as follows:

(a) On and from the transfer date being the 1st April 1985 the undertaking of the appellant No. 1 would, without any further act or deed be transferred to and be vested in the appellant No. 2.

(b) The undertaking of the appellant No. 1 would mean and include all properties, assets and liabilities of the appellant No. 1 immediately before the amalgamation.

(c) The transfer and vesting of the undertaking of the appellant No.1 in the appellant No. 2 would be subject to all charges, liens, mortgages, encumbrances, if any, then affecting the said properties and assets or any part thereof.

(d) Upon the scheme being sanctioned and upon transfer pursuant thereto, the appellant No. 2 would without further application, issue and allot to every shareholder of the appellant No.1. 10 fully paid up equity shares of Rs. 10/- each of the appellant No.2 for every one fully paid up equity share of Rs.100/- each of the appellant No.1 who would accept the same in lieu of their shareholdings in the appellant No.1.

(e) All employees of the appellant No.1 would become or deemed to have become the employees of the appellant No.2 with effect from the transfer date without interruption in their service and on the existing terms of their service.

7. It was contended in support of the said scheme, inter alia, as follows:-

(a) One of the main objects of the appellant No.2 was to carry on business in tea which it had not been able to establish due to lack of infrastructural and other essentia facilities.

(b) The appellant no. 1 had been engaged in the business of manufacturing tea since 1950 and had tremendous goodwill and reputation in the tea industry in India.

(c) The scheme would enable the appellant No. 2 to establish itself in tea business.

(d) The appellant No. 2 had surplus funds which could be profitably utilized.

(e) The appellants Nos. 1 and 2 were under common management and control. The registered office of both appellants Nos. 1 and 2 were situate at the same premises.

(f) The amalgamation will result in economics of a centralised and a larger concern including reduction in over-heads, better and more productive utilisation of labour and other resources and a reduction in procedural and administrative work.

(g) The scheme would enable the establishment of a larger company with larger resources and a larger capital base enabling further expansion and development.

8. An order was made on the 25th September 1985 in the said application whereby separate meetings of the equity shareholders of the appellants Nos.1 and 2 were directed to be convened and held for the purpose as aforesaid.

9. Notices of the said meetings were sent individually to each equity shareholder of the appellants as directed by the said order enclosing copies of the said scheme, as statement as required u/s 393 of the Companies Act, 1956 and a form of proxy. Notices of the said meetings were also published in the newspapers viz. ''The Economic Times'' and ''Jugantar''.

10. Separate meetings of the shareholders of the appellants were held on the 16th November 1985 as directed, At the meeting of the shareholders of the appellant no. 1 the attending shareholders representing 70,338 equity shares unanimously approved the said scheme without any modification.

At the meeting of the shareholders of the appellant No.2 shareholders representing 1,15,000/- equity shares attended and unanimously approved the said scheme without modification.

11. On or about the 29th November 1985, the appellants filed a petition under sections 391(2) and 394 of the Companies Act 1956 for, inter alia, an order that the scheme of amalgamation be sanctioned by this Court.

Other consequential orders were also prayed for.

12. It was alleged in the said petition, inter alia, as follows :

(a) The assets of the appellants were sufficient to meet all their liabilities and the scheme would not affect the rights of any of the crditors adversely.

(b) Due provisions had been made for payment of all liabilities.

(c) The exchange ratio for determining the number of shares of the appellant no. 2 to be allotted to the shareholders of the appellant no. 1 under the said scheme had been arrived at after careful consideration and taking into account all relevant factors.

(d) No proceedings under sections 235 to 251 of the Companies Act, 1956 were pending against any of the appellants.

(e) None of the appellants were registered or required to be registered under the Monopolies and Restrictive Trade Practices Act, 1969.

Audited balance sheets of the appellants as at 31st March 1985 were annexed to the petition.

13. The said petition was admitted. Notice thereof were directed to be advertised and also served on the Central Government through The Regional Director, Company Law Board, Eastern Region. The said directions were complied with.

14. At the hearing, the said petition was opposed by the Union of India, the respondent No. 1 and the Punjab National Bank, the respondent No.2.

15. Tadanki Sree Venkate Panduranga Sharma, the Regional Director, Company Law Board, Calcutta, affirmed an affidavit on the 17th February 1986 which was filed in opposition to the said petition. It was contended in the said affidavit, inter alia, that the exchange ratio proposed in the said scheme was highly unfavourable to the members of the appellant No.1. It was contended that the break up value of the equity shares of the appellant No. 1 computed from its audited books of accounts would be Rs.976/-per share of the face value of Rs.100/-. the break up value of the equity shares of the appellant No. 2 computed similarly would be Rs.10.12 per share of the face value of Rs.10/-. On amalgamation, if shares of the appellant no. 1 in the proposed exchange ratio, the value per share of the appellant No.1 would come down to Rs.791/- per share.

16. It was further contended, that it appeared from records that the appellant No. 2 had not carried on any business in tea or textile in the year ending on the 31st March 1985 and had earned only Rs.2.11 lakhs by way of interest. The appellant No.2 came within the mischief of section 434(c) of the Companies Act, 1956.

17. It was contended further that the appellant no. 1 was a highly profitable and prosperous company whereas the appellant No.2 was not a viable concern, not carrying on any business and, therefore, the proposed scheme of amalgamation of the appellants was not fair or reasonable and evinced lack of good faith.

18. Anil Kumar Goswami, the principal officer of the Punjab National Bank, the respondent no. 2, affirmed an affidavit on the 3rd february 1986 which was also filed in opposition to the said petition. It was alleged in this affidavit, inter alia, that the respondent no. 2 had sanctioned and granted divers loans and advances to the appellant no. 1 under various schemes in consideration of which, the appellant no. I had executed divers security documents in favour of the respondent no. 2. At the relevant time a total of Rs.3 crores inclusive of interest upto the 31st December 1985 stood due and payable by the appellant No. 1 to the respondent no. 2.

19. It was contended that under the proposed scheme the undertaking of the appellant no. 1 sought to be transferred to the appellant no. 2 did not include, inter alia, cash balances, reserve fund, investment, other rights and interests arising out of assets and properties in ownership, power or control, books of accounts, register and records and all liabilities and obligations of the appellant No. 1.

20. It was contended further that the said scheme did not provide that upon transfer the liabilities, dues and engagements of the appellant no. 1 would in terms of section 394(2) become the liabilities, obligations and dues of the appellant no. 2.

21. It was also contended that the scheme did not cover instruments like the covenants of personal service which were not transferable.

22. No provision for liquidation and discharge of the dues of the respondent no. 2 had been made in the scheme and the dues of the respondent no. 2 should be secured before the scheme was sanctioned.

The said application for sanction of the scheme was disposed of by a judgment and order of the company court dated the 11th July 1986. It was held that there being a substantial opposition to the scheme the Court will not sanction the same. The application was dismissed.

23. The present appeal is from the said judgment and order dated the 11th July 1986.

24. At the hearing, it was contended on behalf of the appellants that the objections to the scheme raised by the respondent no. 2 were not tenable. The scheme provided specifically that the liabilities of the transfer company would stand transferred to the transferee company and that the assets transferred would be subject to all charges, liens, mortages and encumbrances, if any, affecting the same. The scheme, in fact, provided for a total merger of the appellant No. 1 with the appellant no. 2.

25. The appellant no. 1,it was submitted had not made any default in meeting the claims of the'' respondent no. 2. The securities of the respondent no. 2 were not alleged to be in jeopardy. The respondent no. 2 would be benefited by the amalgamation as the assets of the appellant no. 2 would also be available to

meet the claims of the former.

26. It was submitted that as the scheme did not contemplate any arrangement with the creditors nor adversely affected the interest of such creditors, calling of any meeting of the creditors was not required in law.

27. On the objections raised by the Central Government in the affidavit filed on its behalf and also during the hearing of this appeal it was submitted that in the statement u/s 393 of the Companies Act annexed to the notices issued to the shareholders of the appellants sufficient particulars of the scheme had been furnished including the proposed ratio of exchange. Over 90% of the shareholders of the appellant no. i attended the meeting where the scheme was unanimously approved and passed.

28. It was submitted that even after the advertisements of the present petition for sanction of the scheme by the Court, no shareholder of the appellant no. 1 came forward objecting. to the proposed ratio of exchange. The shareholders of the appellant no. 1, it was submitted, should be deemed to be prudent men of business, who having regard to the entire facts and circumstances and their larger interest, had agreed to accept the proposed ratio of exchange. The shareholders were the best judge of their own interest and after they had accepted the proposed ratio of exchange, it was not open to the Central Government to object to the same. No public interest was involved in the question.

29. It was not required by the statute that a valuation of the shares of the companies involved must be made by a Chartered Accountant or an auditor before a scheme of amalgamation could be sanctioned. Valuatior was ultimately a matter of opinion and valuers invariably differed in their opinion. There were different methods of valuation which would yield different values of the same shown.

30. It was submitted that there was no charge that the majority of shareholders of the appellant no. 1 had coerced the minority to accept the ratio of exchange. There was also no charge of any fraud or malafides. In the proposed ratio of exchange there was no total lack of consideration so far as the shareholders of the appellant no. 1 were concerned though on a different method of valuation a different ratio could be determined. If the shareholders, who are personally and individually concerned, had not made any grievance on the proposed ratio of exchange and if the same had been fully accepted by them after deliberation at their meeting, the sante should be accepted.

31. It was next submitted that the allegation that the proposed schema was a device for evasion of tax was equally untenable. There was no allegation to that effect in the affidavit filed on behalf of the Central Government.

32. It was submitted that the contention of the Central Government that on the amalgamation there would be no automatic transfer of the services of the

workmen of the appellant no. 1 to the appellant no. 2 as the contracts of service were personal and not transferable was also not tenable.

33. The scheme specifically provided that all the workers of the appellant no. 1 would become the workers of the appellant no. 2 without any interruption in their services and on the same terms and conditions. The interest of the workmen was, therefore, fully protected. Their existing rights and future employment on the same terms and conditions were guaranteed. The scheme had been publicized widely and. there was no opposition from the workmen.

34. Learned Advocate for the Central Government reiterated the contentions raised in the affidavit filed on behalf of the respondent No. 1. He submitted further that the appellants have violated mandatory provisions of sections 391, 392, 393 and also section. 173 of the Companies Act, 1956 by failing and neglecting to disclose material facts relating to the affairs of the appellants and by not preparing or disclosing any valuation report by an independent chartered accountant at any stage showing the basis of the valuation of the shares of the appellants and to establish the fairness and reasonableness of the proposed exchange ratio. Material facts and a valuation report, if produced before the shareholders, might have influenced their mind in not approving the proposed scheme. It was submitted that such suppression of. facts relating to the valuation of the shares, from the shareholders, amounted to a fraud and the scheme was vitiated by the same. It was submitted that the Court had no authority to sanction any scheme in the absence of such valuation report. It was submitted that the Central Government had locus standi to bring to the notice of the Court such wrongful and illegal acts in furtherance of public interest.

35. Apart from the aforesaid, there had been other misstatements or suppression of material facts in the petition and in the statement u/s 393 of the Companies Act, 19 56 circulated to the shareholders, inter alia, as follows :

(a) It had been incorrectly stated in the application that the appellant no. 1 apart from the business in tea was also engaged in the business of manufacturing textile.

(b) In the application it had been incorrectly stated that the appellant no. 2 was engaged, inter alia, in the business of trading in textile. This was patently incorrect as the only business of the appellant no. 2 in the past year consisted solely of earning interest of loans.

36. It was next submitted that the scheme was detrimental to the interest of the workman of the appellant. It was alleged in support of the scheme that by reason of the amalgamation, economies of centralised and a larger concern including reduction in over-heads will'' result and there would be better and more productive utilisation of labour. This indicated that there was a possibility of retrenchment of the workmen.

37. On the implementation of the scheme, the appellant No. 1 would be

dissolved without winding up. The workers, who were vitally interested in the appellant no. 1, should be heard before the scheme was sanctioned. Law stood settled that the workmen had locus standi to appeal in Court and make representations in all proceedings for winding up.

38. It was next submitted that the appellant No. 2 was a paper or a sham company. The appellant no. 2 had not carried on any significant business since its incorporation. The scheme providing for take-over of the appellant No. 1 a substantial company by the appellant no. 2 was unusual and had to be scrutinised carefully.

39. The appellant no. 2 had not carried any business for at least one year and was therefore, liable to be wound up u/s 434(c) of the Companies Act. 1956. It was also not in the public interest that the appellant No. 2 should be allowed to take over the assets of the appellant No. I. It was submitted further that the appellant no. 2 could not carry on its existing business of money lending without complying with the mandatory provisions of sections 370 and 372 of the Companies Act, 1956 and its activities in such business had been illegal, arbitrary and void.

40. It was submitted last that in view of the objection raised by the respondent No. 2 a secured creditor, to the proposed scheme, the views of the creditors of the appellants should be ascertained before the proposed scheme was sanctioned.

41. Learned Advocate for the respondent no. 2 adopted the contentions raised on behalf of the respondent no. 1 and submitted further that the terest of the respondent no. 2 should be protected before any scheme was sanctioned.

42. In support of the respective contentions of the parties a large number of decisions were cited at the Bar which are considered hereafter as follows :

(a) Bengal Bank Ltd. v. Suresh Chakravarty & Ors., reported in AIR 1952 Cal. 133. In this case, a scheme of arrangement propounded by the appellant and approved by the majority u/s 153(2) of the Indian Companies Act, 1913 was sanctioned by the Reserve Bank with substantial modification.

The Company Court refused to sanction the said modified scheme. On an appeal a Division bench of this Court upheld the order of refusal, inter alia, on the grounds that the schemes modified by the Reserve Bank had not been sanctioned by the majority, that under the scheme the debts due to the company by the Directors and officers were not likely to be repaid and that the scheme was neither reasonable nor practicable. The Division Bench observed as follows :

" The Court does not sanction, a scheme merely because it has been approved by the requisite majority. The Court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting. But, at the same time, the Court would be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme. If the company is solvent, it does not follow that the creditors ought not to make concessions.

It must be noticed that Section 153(2) allows the decision of the majority to bind the minority and therefore it is incumbent on the Court to see that decision does not act oppressively on the minority. ***** The net result of the cases, a I understand them, is that it is a sanctionable scheme and it is a practicable scheme."

(b) J. S. Davar & Anr. v. Dr. Shankar Vishnu Marathe & Ors., reported in AIR 1967 Bombay 456. In this case a scheme for re-construction of a'' private limited company which had been directed to be wound up long ago was approved by all the shareolders and a substantial majority of the depositors and creditors and was sanctioned by the District Judge. On an appeal from the said order by the Official Liquidators, a Division Bench of the Bombay High Court found, inter alia, that even if scheme was accepted the company will not be viable. It was also found that one of the objects of the scheme was to cover up the misdemeanours of delinquent Directors of the company as the pending misfeasance proceedings against the Directors will not be prosecuted effectively if the winding up order was set aside.

It was also found that other provisions of the scheme were improper, unreasonable and arbitrary. The High Court set aside the order sanctioning the scheme and observed as follows :

" On a review of these authorities and from the provisions in section 153(2) of the Indian Companies Act, 1913, it seems to us clear that the consent of the majority of creditors or shareholders to a scheme does not conclude the issue whether the scheme should be sanctioned. The jurisdiction of the Court which is called upon to sanction a scheme transcends the mere consideration that a majority of those affected by the scheme is willing to submit to the scheme. The creditors of a company may agree to accept a fraction of the amount due to them from the company and yet, on considerations of more lasting importance, like public or commercial morality, the Court may refuse to accept the verdict of the majority. It may also refuse to accept, the scheme on the ground that it is not reasonable or that it is not feasible or that there is no chance that it will yield to a smooth and satisfactory exceution. By ''reasonable'' is generally meant that the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of the class which they represent. The Court will also not sanction the scheme if the facts which would have influenced decision of the majority were not known or disclosed to the majority, or if the sponsors of the scheme have misrepresented the true position of the company. Considerations such as those mentioned above must be taken into account by a Court before a scheme is sanctioned but in the very nature of things, it is not possible to enumerate exhaustively the circumstances which a Court is entitled to take into consideration. *****

As we have however, stated earlier, the view of the majority is but one element in the case, though a very important one, which must be taken into account in sanctioning the scheme. The view of the majority is not decisive."

(c) Nokes v. Doncaster Amalgamated Collieries Limited, reported in 1940 AC 1014. In this case an order was passed u/s 154 of the English Companies Act, 1929 whereby the property, rights and liabilities of a colliery company were transferred to another'' company. The colliery company was dissolved u/s 153 of the said Act. The appellant was in the service of the colliery company under a written contract of service. No notice was served on the appellant to terminate his contract of service and he did not enter into any ether contract of service. After the order was passed u/s 154 of the said Act, the appellant continued to work in the same colliery and the order u/s 154 though published and did not come to the notice of the appellant. Subsequently, the appellant absented himself without cause from his work at the colliery and the transferee company proceeded against the appellant under the Employers'' and Workmen Act, 1S75 and claimed damages for breach of contract. On these facts it was held by majority by the House of Lords that where an order was made u/s 154 of the said Act of 1929 for amalgamation of two companies, a contract of service existing at the date of the amalgamation between the workmen and the transfer company did not automatically become a contract of service between the workmen and the transferee company.

(d) New Central Jute Mills Co. Ltd. v. Rivers Steam Navigation Co. Ltd. & Ors., reported in AIR 1959 Cal. 352. In this case the point for determination before a Division bench of this Court was whether a right to sue for damages for breach of contract appurtaining to the business of the transferor company was transferred to the transferee company by vesting order passed u/s 153A of the Indian Companies Act, 1913. Prior to the said order of vesting, a suit had been filed by the transferor company against a third party where damages were claimed for breach of a contract of carriage. Subsequent to the passing of the vesting order, the transferee company applied for an order that its name should be brought on record as the plaintiff in the pending suit in place and stead of the transferor company. The said application was dismissed on the ground that what was transferred under the said order of vesting was a mere right to sue for damages for breach of contract and the same was ineffective u/s 6(c) of the Transfer of Property Act. The decision of the House of Lords in Nokes (supra) was applied.

On an appeal, it was held by a Division Bench of this Court that the transfer having been made by an order of Court of competent jurisdiction, section 6(c) of the Transfer of Property Act had no application. The order of vesting read with section 153A of the Indian Companies Act, 1913, entitled the transferee company to continue the suit independently of Order XXI Rule 10 of the Code of Civil Procedure. It was held further that the derision in the case of Nokes (supra) had no application in the facts. It was held that a right to sue for damages appurtaining to the business of the transferor company could be transferred with other property to which it was incidental without infringing any rule or law.

(e) National Textile Workers'' Union v. P. P. Ramkrishnan & Ors., reported in AIR 1983 SC 75. This decision was cited for the following observations of the Supreme Court in its Majority judgment :

" The workers of a company are entitled to appear at the hearing of the winding up petition whether to support or to oppose it so long as no winding up order is made by the Court. The workers have a locus to appear and be heard in the winding up petition both before the winding up petition is admitted and an order for advertisement is made as also after the admission and advertisement of the winding up petition until an order is made for winding on the company. If a winding up order is made and the workers are aggrieved by it, they would also be entitled to prefer an appeal and contend in the appeal that no winding up order should nave been made by the Company judge. But when a winding up order is made and it has become final, the workers ordinarily would not have any right to participate in any proceeding in the course of winding up the company though there may be rare cases where in a proceeding in the course of winding up, the interest of the workers may be involved and in such a case it may be possible to contend that the workers must be heard before an order is made by the Court. Even when an application for appointment of a provisional liquidator is made by the petitioner in a winding up petition, the workers would nave a right to be heard if they so wish because the appointment of a provisional liquidator may adversely affect the interest of the workers. But neither the petitioner nor the Court would be under any obligation to give notice of such application to the workers, It would be for the workers to apply for being heard and if they do so, they would be entitled to appear and be heard on the application for appointment of provisional liquiditor."

(f) Mc Dowell & Company Limited v. Commercial Tax Officer, reported in AIR 1986 SC 649. This decision was cited for the following rervations in the judgment of Chinnappa Reddy, j. :

" In our view, the proper way to construe a taxing statute while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, whether the transaction is such that the judicial process may accord its approval to it. * * * *

It is neither fair not desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation, It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of ''emerging'' technique of interpretation to expose the devices for what they realty are and :o refuse to give judicial benediction."

(g) In re Sussex Brike Co. Ltd. reported in (1961)1 Ch. 239. In this case in a scheme of amalgamation of two English companies it was provided that against three shares of the transferor company, two shares of he transferee company would be issued in lieu. A particular member of the transferor company was unwilling to accept the ratio and made an application u/s 209 of the English Companies Act, 1948. A learned Judge in the Chancery Division accepted the contentions of the applicant that a better scheme could be formulated and that there might be grounds of criticism of the scheme which was being challenged, the learned Judge however noted that there was no allegation of bad faith against the pro-ponder of the scheme Or that the shareholder had been intentionally misled. The learned Judge held that it was not established that the scheme was unfair nor obviously or patently unfair. The learned Judge held further that no scheme Could be held to be ineffective or not binding on a dissenting shareholder unless the same conformed 100% with the highest possible standards of fairness, equity and reason. On the basis of stock exchange quotation, the learned judge found that the shares of the transferee company Which were being given in exchange of the transferor company were higher in value though in the circular issued to the shareholder, sufficient details of the financial position of the transferee company had not been furnished. The learned Judge noted that as 90% of the shareholders had accepted the scheme it was necessary for the applicant to establish affirmatively that notwithstanding the view of the majority the scheme was obviously and patently" unfair. The application was rejected.

(h) Bank of Baroda Ltd. v. Mahindra Ugine Steel Co. Ltd., reported in 46 Comp. Cas. 227. In this case after the nationalization of banks, the Bank of Baroda Ltd. applied for sanction of the Court to a scheme of arrangement for its amalgamation with the respondent Mahindra Ugine Steel Co. Ltd. At the meeting of the shareholders, a minority opposed the scheme but did not come up before the High Court to oppose the sanction of the scheme. The learned Judge, however, examined the scheme to ascertain whether a fair ratio of exchange of the respective shares of the transferor and transferee company had been provided. As there was no material on record to show how the ratio had been worked out, the learned judge directed the transfere company to record in an affidavit an explanation of the basis of the ratio which was filed in the proceedings. After examining the same, the learned Judge of the Gujarat High Court was pleased to sanction the scheme, It was held that the ratio of exchange provided in the scheme was neither unfair nor unreasonable and particularly as the same had been approved by substantial majority of the shareholders.

(i) In re Wood Polymer Ltd. reported in 47 Comp. Cas. 597. In this case, the Court refused to sanction an arrangement whereby properties were sought to be transferred through a company set up for the purpose, which was found to be a paper company, with the object of evading capital gains tax.

(j) Kumarapura Gopal Krishna Ananthakrishnan v. Burdwan-Cutwa Railway Co. Ltd. reported in 48 Comp. Cas. 611. In this case, the respondent Company was incorporated with the object of constructing and running a railway between Burdwan and Cutwa. The. entire business undertaking of the company with all its assets were taken over by the Government of India on and from the 1st April, 1966 on payment of compensation. The. company, therefore, made loans and advances out of the amounts of compensation received. The Registrar of Companies made an application u/s 433 of the Companies Act on, inter alia, the grounds that substratum of the company had gone on the acquisition of its undertaking by the Government, that the money lending business carried on by the company was illegal, void and ultra vires its memorandum and articles of association and that it habitually defaulted in filing the statutory returns. It was alleged that there had been compliants from the shareholders for non-distribution of the amounts of compensation to the shareholders. The application was opposed by the company and was rejected by the Company Court. On an appeal by the Registrar, it was held by a Division Bench of this Court that though the shareholders had passed a special resolution for alteration of the memo randum of association so that the company could carry on the business of money lending the same had not been confirmed by the Court and was not effective and the company could not carry on its business in money lending. The contention that the company was carrying on business of carriage of goods by inland navigation was also ultra vires its memorandum. The main object of the the company was to run the railway as a public transport between Burdwan and Cutwa and the other businesses mentioned in the memorandum were ancillary to the said business. There was no likelihood of the company to carry on any other business in railway which have been all taken over by the Government, ft was held that the substratum of the company had gone and it was just and equitable to wind up the same.

(k) In re Piramal Spinning and Weaving Mills Ltd., reported in 50 Com p. Cas. 514. In this case, a scheme was promulgated for amalgamation of two companies. The transferor company was a public company with only 12 Shareholders and having an authorised capital of two crores and paid up capital of 98 lakhs. The transferee company was small with paid up capital of only five lakhs. Shares of the transferee company were quoted in the stock exchange. It was provided in the scheme that for every four shares of the transferor company, seven shares of the transferee company would be issued, All the shareholders of both the companies unanimously approved the scheme. At the time of sactioning the scheme of amalgamation, it was contended on behalf of the Regional Director of the Company Law Board that the shares of the transferor company had been undervalued in determining the ratio of exchange. The transferor company contended that the valuation adopted by the Regional Director was incorrect and that fundamental principles had been ignored in such valuation. It was held by a learned Judge of the Bombay High Court that the valuation of shares of a company was a technical matter requiring considerable skill and expertise. There were bound to be differences of opinion as to the correct value of the shares of a company and simply because it may be possible to value the shares of the transferor company in a manner different from one which has been adopted, it could not be said that the valuation adopted was unfair. What was important that the shareholders had unanimously accepted the adopted valuation and there has been no complaint from the shareholders. It was held further that the Court should not examine the question of fairness or unfairness of valuation of shares at the instance of the regional Director of the Company Law Board. u/s 394A of the Companies Act, notice was given to the Regional Director so that while sanctioning a scheme public interest may be safeguarded. in the facts of this case it was held that the under valuation, if any, did not affect any public interest as the shareholders of the transferee company who were more numerous than the shareholders of the transferor company who were only 12 would benefit by the under-valuation, if any.

(l) In re Coimbatore Cotton Mills Ltd. reported in 50 Comp. Cas. 623. in this case an application for sanction of a scheme of amalgamation proposed between two companies was opposed on behalf of the Central Government, inter alia, on the ground that the ratio of exchange was not fair or proper and that notice to the creditors had not been given and their approval had not been obtained.

It was found that the ratio of exchange had been arrived at by three independent chartered accountants and had been approved by overwhelming majority of shareholders and without any objection from any shareholder, ft was held that in the absence of any allegation of fraud or mala-fides, the exchange ratio had to be considered as fair and reasonable. It was held further that as all the creditors of the transferor company apparently became the creditors of the transferee company which happened to be stronger financially and as no creditor had come forward to oppose the scheme inspite of the same being advertised, no meeting of the creditors would be necessary for sanctioning the scheme. The Court observed further as follows :-

" It is impossible to calculate the real value of any share with mathematical accuracy. The value of a share is the price which a buyer will pay for it, that price will depend on the number of shares offered by sellers and sought by buyers at any particular time. The amounts so sought and offered will change from day to day, and so in consequence will the ruling price. If the shares are dealt in on a stock exchange, the value of" the shares may be said to be the price at which they are quoted by that exchange."

(m) In re. Vijay Durga Cotton Trading Ltd,, reported in 50 Comp. Cas. 785. In this case an application for sanction of a scheme of amalgamation of two companies was opposed by the Regional Director, Company Law Board on, inter alia, the grounds that the exchange ratio provided for in the scheme being 1 : 4 was not fair and the proper exchange ratio on the basis of corect valuation of the assets of the companies would be 1:320. It was also contended that no meeting of the creditors of the companies had been held for approval of the scheme. It vas held by a learned Judge of the Andhra Pradesh High Court that on the facts the principal creditors of the transferor company had consented to the proposed scheme and that the creditors of the transferee Company would not be in any way prejudicially affected by the amalgamation which amply protected their interest. The learned Judge held that in a scheme proposed between the company and its members, it was not mandatory to direct ''the holding of the meeting of the creditors and in the facts holding of meeting of the creditors of the two companies were not Called for.

The learned Judge further held that the shareholders of both the companies had unanimously agreed to the ratio of exchange and that no public interest was involved. The learned Judge quoted with approval the observation of the Gujarat High court In re Sidhpur Mills Co. Ltd. reported in AIR 1962 Guj 305 and In re Maneckchowk and Ahmedabad Mfg. Co. Ltd. reported in 40 Comp. Cas. 819, where it was laid down that a scheme should not be scrutinised by the Court too critically and with a view to find faults and the same had to be looked at in its entirety and if it is found to be fair and equitable, the Court should not proceed to judge on the commercial merits of the scheme which were to be weighed by the creditors and the members.

(n) In re Kamala Sugar Mills Ltd. reported in 55 Comp. Cas. 308. In this case an application for sanction of a scheme of amalgamation of two companies before the Madras High Court was opposed by the Regional'' Director of Company Law Board, inter alia, on the ground that the exchange ratio of the shares of the two companies as provided for in the scheme was not fair and reasonable and would prejudice the shareholders of the transferor company. In support of the exchange ratio, the company filed a valuation report from a registered chartered accountant. The Court held that no mistake in the valuation report of the auditors could be pinpointed on behalf of the Regional Director. The Court observed as follows :-

" Besides, the exchange ratio has been accepted without demur by the overwhelming majority of the shareholders of the two companies. No shareholder has come forward and objected before me that the ratio fixed in the scheme of amalgamation is neither fair nor reasonable. It cannot be disputed; that the shareholders are the best judges on the rate of exchange ratio to be fixed in a scheme of amalgamation and once they have accepted it, it is not for the court to say that the shareholders of both the companies in their collective wisdom should not have accepted the exchange ratio arrived at in the scheme of amalgamation on the ground that it was detrimental to their interest.

(o) In re Carron Tea Co. Ltd., reported in 1966(2) Comp. Law Journal, 278. In this case in an application for sanction of a scheme for amalgamation of two companies, the shareholders of one of the companies opposed the sanction on the ground that the ratio of exchange provided for in the scheme was not proper or fair. The ratio of exchange had been fixed on the basis of a valuation report prepared, by a reputed firm of chartered accountants. It was found that the valuatiort had been made without proper valuation or re-valuation of the assets and the goodwill of the companies. The market price of the shares or the quotations in the stock exchange were not considered. It was held by the Court that the chartered accountant had proceeded mechanically only on the basis of information furnished by the management of the company. On this ground, a learned Judge of this Court refused to sanction the scheme. It was observed in the judgment that the approval of the shareholders to the scheme recorded at the meeting of the shareholders as directed might be often illusory as only few shareholders take active interest in the affairs of the company and some shareholders who considered themselves to be in a minority might not attend such a meeting as they may feel that the majority of the shareholders would control the meeting. Other shareholders might think that Court will look after their interest. Therefore, it was the duty of the Court to probe and find out whether the scheme was reasonable or not.

(p) In re Associated Hotels of India Ltd., reported in 1968(2) Comp. Law Journal, 292. In this case a scheme for amalgamation of two companies was sanctioned subject to the filing of an affidavit by a senior partner of the firm of chartered accountants who were the auditors indicating the basis of valuation.

(q) Union of India & Ors. v. Ambalal Sarabhai Enterprises Ltd., reported in 55 Camp. Cas. 623. This decision of a Division bench of the Gujarat High Court was cited for the proposition that where the interest of the creditors was in no way affected by a scheme of amalgamation it was neither obligatory nor desirable to call a meeting of the creditors to obtain their views on the proposed scheme.

(r) An unreported judgment dated the 29th April, 1982 of a learned Judge of this Court in Comp. Petition No. 7 of 1982 in connection with Comp. Application No. 255 of 1981 entitled In re Associated Packaging Industries Ltd., was also cited. In this case an application was. made for sanction of a scheme for amalgamation of two companies. The shareholders of both the companies had. unanimously approved the said application was opposed on behalf of the Central Government, inter alia, on the ground that the ratio of exchange provided for in the scheme was not proper and that the said ratio of exchange was not supported by a report of any chartered accountant or auditor. It was contended on behalf of the companies that the said ratio of exchange was supported by producing records of the Calcutta Stock Exchange Association where the shares of one of the companies was quoted and on the basis of such quotation, the ratio of exchange was sought to be supported. The learned Judge held following the decision of the Bombay High Court in the case of Piramal Spinning and Weaving Mills Ltd. (supra) and held that the fact that the shareholders of both the companies had unanimously accepted the exchange ratio this would be an important factor in deciding the question whether the Court should lend its approval to the scheme or not. On the facts of the case, it was held that the exchange ratio was fair having regard to the quoted price of the shares of one of the companies and it was held further that the Central Government or the Company Law Board had no interest as such in the ratio of exchange which was a matter concerning only the shareholders. It was held further construing section 391 of the Companies Act.

1956 that there was no statutory obligation that every scheme of amalgamation must be supported by a report of a chartered accountant before the same was confirmed by the Court. The absence of such a report would not stand in the way of the Court to sanction the scheme.

43. The following decisions were also cited :

(a) Mansukhlal v. M. V. Shah, Official Liquidator, reported in 46 Comp. Cas. 279.

(b) Panchmahals Steel Ltd. v. Universal Steel Traders, reported in 46 Comp. Cas. 706.

(c) In re Bhavnagar Vegetable Products Ltd. (In liquidation) reported in 55 Comp. Cas, 107.

(d) In re Auto Steering Ltd. reported in 47 Comp. Cas. 247.

The principles laid down in the said decisions do not advance the case of the parties any further and the said decisions need not be considered in detail.

44. We first take up for consideration the objections raised by the respondent No. 2, the secured creditor. It is contended that in the scheme, provision had not been made for transfer of cash balances. reserve funds, investment and other rights and interests in the assets and properties of the respondent No. 1. The scheme further did not provide that on transfer of the undertaking of the transferor company, the liabilities of the transferor company would become the liabilities and obligations of the transferee. company. Lastly, it was contended that the scheme did not provide for liquidation and discharge of the dues of the respondent No.2. The respondent No.2 submitted that its interest should be protected by the Court before the scheme was sanctioned.

45. The objections raised by the respondent No. 2,in our view, are of little substance. The scheme specifically provides that the undertaking of the transferor company which would be transferred to the transferee company would include all properties, assets and liabilities of the transferor company immediately before the amalgamation and would include in particular all properties and assets moveable and immoveable, real and personal, corporeal or incorporeal, in possession or reversion, present or contingent of whatsoever nature including all stock, book debts, cash in hand, remittances in transit, postage in hand and deposits. It is further provided that the transfer and vesting of the undertaking of the transferor company in the transferee company would be subject to all charges, liens, mortagages, and encumbrances affecting the same or any part thereof.

46. It is quite clear from the aforesaid that all the assets and liabilities of the transferor company will stand transferred to the transferree company under the scheme and it would be open to the creditors of the transferor company to proceed against the transferee company in the same manner as they could have proceeded against the transferor company,

47. It is not the case of the respondent No.2 that after the transfer the assets of the transferor company together with the assets of the transferee company would be insufficient to meet its claim. It is also not alleged that the transferee company is an insolvent company. The assets of the transferor company which have been secured to meet the claims of the respondent No.2 will reach the transferee company subject to the same liabilities and will be available to the respondent No.2 for being proceeded against. On the other hand, the assets of the transferee company would also become available to meet the claims of the respondent No.2. In out view, the respondent No.2 is not entitled to ask for further security against its claim apart from the security which is already there.

For the reasons as above, the objection of the respondent No.2, in our view, cannot stand in the way of our sanction to the scheme.

48. It this context, we next take up for consideration the objection raised on behalf of the Regional Director, Company Law Board that the scheme should not be sanctioned without ascertaining the views of the creditors of the appellants. The scheme which is before us concerns only the two appellants and their members. The scheme does not provide for any arrangement with the creditors of the appellants. It has not been shown that the scheme adversely affects the interest of the creditors of the appellants in any manner. In that view, we hold that it is not necessary in Law to call a meeting of the creditors and obtain their views on the scheme. Our view is supported by the decisions, In re Coimbatore Cotton Mills Ltd. (supra); Vijay Durga Cotton Trading Co. Ltd. (supra) and Ambalal Sarabhai Enterprises Ltd. (supra).

49. we next consider whether sanction to the proposed scheme should be refused as the transferee company has not carried on any significant business for the past one year and is liable to be wound up u/s 434 of the Companies Act, 1956 and also on the ground that the transferee company had carried on business in money lending in violation of the provisions of sections 370 and 372 of the Companies Act, 1956. We. note that these allegations were not made in the affidavit filed on behalf of the Central Government but were made from the Bar by the learned Advocate appearing for the Central Government. It is nobody''s case that any proceeding for winding'' up of the transferee company has been initiated by the Registrar of Companies. Section 370 of the Companies Act prohibits loans to other companies under the same management. Section 372 restricts a company for purchasing shares of other companies by itself directly or through others for its benefit or on its account. No specific instance was brought to our notice of violation of either of the said two sections. Violation of section 370 is punishable by penalty u/s 371. Violation of section 372 is also punishable u/s 374. Sections 372 and 374 of the Companies Act, 1956, provide for penalty which is imposeable on the offending company. It has not been brought to our notice that any such penal proceeding has been initiated against the transferee company.

50. For the reasons as aforesaid, we arc unable to entertain such objection raised

on behalf of the Regional Director, Company Law Board. If the transferee company has not been carrying on any particular business recently, there is no reason why it should be prevented from amalgamating with some other company for carrying on other business,

51. We next consider whether the proposed scheme is detrimental to the interest of the workmen of the appellants. It has been recorded in support of the scheme that the amalgamation of the appellants would result in economies of a centralised and larger concern including reduction in over-heads. This would result in more productive utilisation of labour as also the reduction in procedural and administrative work. Relying on this, it has been contended on behalf of the Regional Director, Company Law Board that the scheme should result in a possible retrenchment of the workmen. In this context, it is also necessary to consider whether the workers and employees of the appellants should be heard before the scheme was sanctioned. On an implementation of the scheme, the appellant No. 1 would stand dissolved for winding up and it was contended that its workmen had locus standi to make their representation before the appellant No. 1 was directed to be dissolved.

52. Such objections are, in our view, without any substance. In the scheme it has been specifically provided that the employees of the appellant No.1 would become or be deemed to have become the employees of the appellant No.2 on transfer without any interruption of their services and on the existing terms of their services. There is no scope for retrenchment of any workmen under the said scheme and on the other hand the economies which were expected to be effected through the amalgamation with more productive utilisation of labour ensure that the workmen would have nothing to lose and would have a better chance of participation in a more efficiently run concern.

53. It is the usual practice and procedure that a scheme for amalgamation of companies require that the members of the companies should consider and approve the scheme at a meeting. Where a scheme of arrangement is sought to be made with the creditors it is also required that the creditors also hold a meeting and'' express their views on the proposed arrangement. It is not a legal requirement that prior to the sanction of the scheme of amalgamation, the workers of the concern involved should also hold a meeting and express their views of the scheme. No case was cited on behalf of the Central Government nor are we aware of any instance where the Court directed a meeting of the workers of the companies to record the views on a proposed scheme. No doubt before a company is wound up, it is open to the workmen of the company to appear and participate in the proceedings as a winding up of the company would necessarily affect their interest. No workman of the appellants nor any union of such workmen have come up before us to oppose the scheme. Law has been laid down by the Supreme Court in National Textile Workers Union (supra) that even where a company was being wound up, neither the petitioning creditor nor the Court would be under any obligation to give notice of the proceedings to the

workers.

54. The contentions raised on behalf of the Regional Director that under the scheme there would be no automatic transfer of the services of the workmen of the appellant No. 1 to the appellant No.2 as such con-tracts were of personal services is also to be considered in this context. Learned Advocate for the Regional Director has relied on the English decision in Nokes (supra). From the facts of that case as recorded in the judgment, it does not appear that under the scheme in that case it was provided that the services of the workmen of the transferor company were being transferred to the transferee company. Further the employee concerned in that case contended that his earlier services had not been terminated nor did he enter into any contract of service with the transferee company. In the instant case, the transferee company is bound by the scheme and, therefore, is also bound to treat the workmen of the transferor company as its workmen. The provisions for transfer of services of the workmen of the transferor company to the transferee company so far as the workmen as concerned are binding on the transferee company. At most, fresh agreements may be required to be entered into by and between the transferee company and the employees of the transferor company after the transfer. Such objection may be raised in every case where the scheme is propounded for amalgamation of one company with another and on this ground a scheme of amalgamation cannot be rejected. No decision has been cited on behalf of the Regional Director where a scheme of amalgamation has been rejected on this ground. We note that in New Central Jute Mills Co. Ltd. (supra) a Division Bench of this Court has considered and distinguished the decision in Nokes.

55. It has been faintly argued on behalf of the Regional Director that the scheme has been promulgated by the appellants for the purpose of evasion of payment of tax and that the scheme is a mere device which has been adopted to facilitate such evasion. There is no allegation in the affidavit filed on behalf of the Regional Director, Company Law Board that the scheme has been mooted for the purpose of evasion of any tax. Further, it has not been brought to our notice that any particular tax is being sought to be evaded by any particular provision in the scheme. The decisions cited on benalf of the Regional Director in this connection viz. In re Wood Polymer Ltd. (supra) and Mc Dowell & Co. Ltd. (supra) have no application in the facts and circumstances of the instant case. In every case of amalgamation of two companies, transfer of ail assets and liabilities of one to the other is involved and unless it is specifically established that the scheme was a device for evasion of payment of any tax it can not be rejected on this gound.

56. Last, we come to the objection raised by the Regional Director that the ratio of exchange of the shares between the transferor company and the transferee company as provided in the scheme was unfair to the shareholders of the transferor company. We note that at the meeting of the members of the transferor company 93.8% of the shareholders attended and unanimously voted in favour of the scheme which provided for the ratio of exchange. There was no

objection from any shareholders present at the meeting. Even after advertisement of the application for sanction of The scheme, no shareholder of the transferor company has come forward and raised any objection to the scheme. The transteror company, it appears, is a closely held company as the six shareholders who attended the meeting to consider the scheme heid between themselves 93.3% of the shares.

57. In view of the aforesaid when no compliant is raised on behalf of the shareholders, it is to be considered whether the Regional Director, Company Law Board is entitled to object to the ranio of exchange which; concerns only the shareholders of the transferor company. It is well settled that before a scheme is sanctioned by the Court, it is open to the Central Government through the Regional Director, Company Law board to object to the sanctioning of the said scheme on general gounds viz. that the same is against public interest, e.g. that the amalgamation violates seme statutory provision like the Monopolies & Restrictive Trade Practices'' Act or that the object of the scheme is to cover the misfeasances of delinquent directors or that the scheme is against public policy. It appears to us that fairness or unfairness of a proposed ratio of exchange in an amalgamation of two companies is a matter which concernd only the shareholders of the companies involved. This is not a matrer which affects the public interest in any manner and particularly so where the ratio of exchange is alleged to be adverse against the limited number of members in a closely held company. The shareholders of the transferee company in the instant case are more numerous than the transferor company and they would benefit by the ratio of exchange by reason of the under-valuation of the shares of the transferor company, if at all.

58. The proposed ratio of exchange was specifically placed before the members of the transferor company and was accepted. It is nobody''s case that the majority of the shareholders of the transferor company has coerced the minority in any manner in accepting the said ratio of exchange. It is also not the case that the shareholders of the transferor company would not get anything in lieu of their shares of the transferor company. If the contention of the regional Director is accepted, the shareholders of the transferor company would no doubt get a little more on. the basis of a more favourable ratio. Valuation is ultimately a matter of expert opinion. There are more than one method of valuation and a valuation would vary if different methods are adopted. The shares are the properties of the shareholders and they are the ultimate and the-best judge of the value which they would put on their shares. There is no requirement in the Companies Act in such'' a case. The ratio of exchange has to be determined on a valuation made by a chartered accountant or an auditor though we feel that in the best interest of all concerned and to prevent controversy a proper basis of valuation should be recorded.

59. We make it clear that in the event any shareholder of the transferor company had. appeared before us and objected to the valuation on the basis of the ratio of

exchange, the matter would have taken an entirely different complexion and we would have been inclined to probe further into the question of ratio of exchange to satisfy ourselves that the shareholders of the transferor company have not been treated unfairly. In the absence of any challenge from the shareholders of the transferor company who are primarily and exclusively interested on the question of the ratio of exchange, we are not inclined to interfere in the matter at the instance of the Regional Director. On the facts, it cannot be said that there is any illegality or that any fraud has been committed on the shareholders of the transferor company.

60. For the reasons as aforesaid, we are unable to entertain the objection raised by the Regional Director that the proposed ratio of exchange of the shares of the appellants is so unfair that even without any complaint from the shareholders we should reject the scheme on the ground.

61. For the reasons as aforesaid, the appeal succeeds. The judgment and order dated the 11th July 1986 are set aside. The application of the appellant''s for sanction under sections 391(2) and 394 of the Companies Act is allowed. There will be an order in terms of prayers (a), (b), (c), (d), (e) (f) and (g) of the petition, made before the first Court. There will be a further order in terms of prayers (h) and (i) of the said petition. The Official Liquidator is directed to file his return in terms of prayer (h) within 3 months from the date this judgment and order is effective and serve copies of the report in terms of prayer (i) within 2 weeks form the date of filing of the return in Court. There will be an interim order in terms of prayers (j) and (k). On the oral application of the Advocate-on-record appearing for the Regional Director, Company Law Board, there will be a stay of the operation of the judgment for a period of 4 weeks from date. The parties and the Officer Liquidator to act on a signed copy of the operative portion of the judgment.

Shyamal Kumar Sen, J.

I agree.

