

(1996) 12 CAL CK 0018

In the Calcutta High Court

Case No : Company Petition No. 288 of 1996 connected with Company Application No. 285 of 1996

In Re: Brooke Bond Lipton India Ltd.

Date of Decision : 09-12-1996

Acts Referred:

Companies Act, 1956 — Section 391, 48

Citation : (1999) 98 CompCas 496

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Advocate : Sarkar, for the Appellant; Mukherjee, for the Respondent

Judgement

Shyamal Kumar Sen, J.—This is an application for approval of the scheme of amalgamation between Brooke Bond Lipton India Ltd., the transferor-company and Hindustan Lever Ltd., the transferee-company. Both the transferor and the transferee are subsidiaries of Unilever plc., a very large multi-national corporation. Both the transferor and the transferee are under a common management and have several common directors.

2. The registered office of the transferor is in Calcutta and the registered office of the transferee is in Bombay. In pursuance of orders passed by the Calcutta and Bombay High Courts respectively, meetings have been held of the shareholders of the transferor and the transferee-company.

3. The contention of Mr. Sarkar, the learned advocate for the petitioner is that after the holding of such meetings on the application of the transferee for sanction by the Bombay High Court, the scheme of amalgamation has already been approved by the Bombay High Court which has also recorded no objection on the part of the Regional Director.

4. So far as the meeting of the transferor is concerned 6,939 members attended the meeting comprising a total number of 6,38,68,390 shares. Out of the said members present at the meeting, 5,173 members holding 6,36,01,518 shares comprising 99.5 per cent, of the members present and voting, voted in favour of

the amalgamation. 105 members holding 15,933 shares (0.02 per cent.) voted against the amalgamation and 1,661 members holding 2,50,939 shares (0.40 per cent.) did not vote. In the circumstances at the meeting, the amalgamation was approved by an overwhelming majority both in number as well as in voting strength.

5. It has further been submitted by Mr. Sarkar that none of the five objectors, three of whom clearly belong to one family have shown any interest in the matter till their sudden appearance in this court at a belated stage. None of them has had any correspondence with the company on the subject seeking clarifications on any queries or doubts they may have had on any aspect of the proposed amalgamation. This is evident from their own pleadings. None of them inspected the valuation report when the same was offered for public inspection prior to the court convened meeting. None of them attended the court convened meeting to present their point of view and in the event of their having a difference of opinion, moving an appropriate amendment resolution for consideration by other members so that a decision on their objections was taken by the totality of shareholders in the meeting in keeping with the spirit of shareholders' democracy. Their appearance before this court at this stage is an abuse of the process of the court and is clearly for ulterior purposes. The total paid-up equity capital of the transferor is Rs. 120.48 crores with over 2 lakhs members. The financial institutions hold approximately 22 per cent, shares. The persons originally opposing the scheme were two members holding 109 and 9 shares respectively and subsequently 3 others holding 60 shares each from the same family have sought to join the objectors. Accordingly the total shareholding of the opposers is 298 shares of the value of Rs. 2,980.

6. None of the objectors attended the meeting or for the inspection of the valuation report which shows a total lack of interest in the scheme. In fact no shareholder asked for inspection of the report.

7. The scheme has been enumerated in paragraphs 13 and 14 of the petition which are set out below :

"13. The benefits of the scheme, inter alia, will be :

(a) It will make available to the parties the benefit of financial resources, managerial, technical, distribution and marketing expertise of each other.

(b) Both the companies are subsidiaries of Unilever plc. and it would be advantageous to combine the activities in a single company. The amalgamation would provide synergistic linkages besides economies in costs by combining the total business functions and the related activities and thus, contribute to the profitability of the amalgamated company.

(c) The amalgamated company will have the benefit of the combined reserves, manufacturing and other assets, manpower and cash flows of the two companies. The combined resources of the amalgamated company will be

conducive to enhance its capability to face competition in the market place more effectively.

(d) It will be conducive to better and more efficient and economical control and conduct of the companies.

(e) The amalgamated company will be able to source and absorb new technology and its capacity to spend on research and development will be enhanced.

(f) With the enhanced capabilities and resources at its disposal, the amalgamated company will have greater flexibility to market and meet customer needs, and will be able to compete more effectively thus further strengthening its market position in domestic and export markets.

(g) A larger and growing company will mean enhanced financial and growth prospects for the people and organisations connected with the company, and will be in public interest.

(h) The amalgamation will enable the two companies to pool their financial, managerial and technical and other resources in order to meet the challenges of the new industrial policy. In particular, with the major schemes of modernisation, expansion and the capital expenditure required therefor, it will be necessary that the financial resources be pooled together, as the magnitude of the investments contemplated will be better met by the two companies merged together and considerable synergy of operations will be achieved.

(i) The amalgamation will provide the two companies with resources to appropriately invest in capital intensive industries such as food processing and allied industries and cold-chain distribution which will provide long-term profitable growth to the shareholders and is in keeping with the Government policy of providing a fillip to agro-based industries servicing domestic and export markets,

(j) The amalgamated company will have a far balanced portfolio of businesses in soaps, detergents, personal products, speciality chemicals, beverages, edible fats and dairy products, culinary products, ice creams and frozen desserts and exports thereby insulating the business from excessive dependence on just one or two businesses.

14. The salient features of the scheme are as follows :

(a) With effect from the appointed date, i.e., January 1, 1996, or such other date as may be fixed by the High Courts of Judicature at Bombay and Calcutta, the undertaking including all the assets, rights and property of the transferor-company shall without any further act or deed be and the same shall stand transferred to and vested in or deemed to have been transferred to or vested in the transferee-company pursuant to the provisions of Section 394 and other applicable provisions of the said Act.

(b) With effect from the effective date, and subject to any corrections and

adjustments as may, in the opinion of the board of directors of the transferee-company be required, the reserves of the transferor-company will be merged with those of the transferee-company in the same form as they appeared in the financial statements of the transferor-company. In other words, the identity of the reserves of the transferor-company will be preserved at the hands of the transferee-company, The difference between the amount recorded as fresh share capital issued by the transferee-company on amalgamation and the amount of share capital of the transferor-company will be reflected in the revenue reserve of the transferee-company.

Further, in the case of any differences in accounting policy between the companies, the impact of the same till the amalgamation will be quantified and adjusted in the same revenue reserve mentioned earlier to ensure that the financial statements of the transferee-company reflect the financial position on the basis of consistent accounting policy.

(c) With effect from the appointed date, all the debts, liabilities, duties and obligations of the transferor-company shall be and stand transferred, without any further act or deed, to the transferee-company, so as to become as from the appointed date the debts, liabilities, duties and obligations of the transferee-company.

(d) The scheme, although operative from the appointed date shall become effective from the effective date. "The effective date" means the later of the dates on which certified copy of the order of the High Court of Bombay and/or the High Court of Calcutta vesting the assets, property, liabilities, rights, duties, obligations and the like of the transferor-company in the transferee-company is filed with the Registrar of Companies, Maha-rashtra and/or the Registrar of Companies, West Bengal, after obtaining all consents, approvals, permissions, resolutions, agreements, sanctions and orders necessary thereto.

(e) All contracts, deeds, bonds, agreements and other instruments of whatsoever nature to which the transferor-company is a party, subsisting or having effect immediately before the effective date shall remain in full force and effect against or in favour of the transferee-company.

(f) All legal and other proceedings by or against the transferor-company, if any, pending on the appointed date and relating to the said undertaking, its liabilities, obligations, duties and covenants shall be continued and enforced by or against the transferee-company, as the case may be.

(g) All the staff, workmen and other employees in the service of the transferor-company immediately preceding the effective date shall become the staff, workmen and employees of the transferee-company on the basis that their services shall be deemed to have been continuous and not have been interrupted by reason of the said transfer and the terms and conditions of service applicable to such staff, workmen or employees after such transfer shall not in any way be less favourable to them than those applicable to them immediately preceding the

transfer.

As far as the provident fund, gratuity fund, superannuation fund or any other special fund created for the benefit of the staff, workmen and employees of the transferor-company are concerned, upon the scheme becoming finally effective, the transferee-company shall stand substituted for the transferor-company for all purposes whatsoever related to the administration or operation of such schemes or funds.

(h) With effect from the appointed date and up to the effective date, the transferor-company shall carry on and be deemed to carry on all its business and activities and stand possessed of its properties and assets and property for and on account of and in trust for the transferee-company and all the profits accruing to the transferor-company or losses arising or incurred by it shall for all purposes be treated as the profits or losses of the transferee-company as the case may be, and shall carry on its business until the effective date with reasonable diligence and shall not without the written consent of the transferee-company alienate, charge or otherwise deal with the said undertaking or any part thereof except, (i) in the ordinary course of its business, and (ii) as provided in the scheme, shall not vary the terms and conditions of the employment of its employees except in the ordinary course of business and shall not without the written consent of the transferee-company undertake any new business.

(i) Upon the scheme becoming finally effective, in consideration of the transfer and vesting of the undertaking of the transferor-company in the transferee-company, the transferee-company shall issue and allot at par 9 (nine) equity shares of the face value of Rs. 10, credited as fully paid in the capital of the transferee-company, to the shareholders of the transferor-company whose names are recorded in its register of members, on a date (record date) to be fixed by the board of directors of the transferee-company for every 20 (twenty) equity shares of the face value of Rs. 10 each held by the said shareholders in the transferor-company. However, no such allotment shall be made in respect of any equity shares held by the transferee-company or its subsidiary company/ies in the share capital of the transferor-company which shall be cancelled. No fractional coupons shall be issued in respect of the fractional entitlement, if any, to which the shareholders of the transferor-company may be entitled on issue and allotment of the equity shares of the transferee-company. The directors of the transferee-company shall instead consolidate all such fractional entitlements to which the members of the transferee-company may be entitled and issue and allot equity shares in lieu thereof to a director or an officer of the transferee-company with the understanding that he shall sell the same in the market at the best available price and pay to the transferee-company, the net sale proceeds thereof and whereupon the transferee-company shall distribute such net sale proceeds to the members of the transferor-company in proportion to their fractional entitlement. Holders of less than three equity shares in the transferor-company shall not be entitled to issue or allotment of any share in the transferee-

company, but shall receive the sale proceeds in respect of their fractional entitlement.

(j) The transferee-company shall, if and to the extent required, apply for and obtain the required consent and approval of the Reserve Bank of India and other appropriate authorities concerned, for the issue and allotment of the equity share's in the said reorganised share capital of the transferee-company.

(k) The transferee-company shall before allotment of the equity shares increase its authorised share capital by the creation of at least such number of equity shares of Rs. 10 each as may be necessary to satisfy its obligations under the provisions of the scheme.

(l) The transferor-company shall not declare any dividend for the period commencing from and after January 1, 1996, without the written consent of the transferee-company.

(m) The profits of the transferor-company for the period beginning from January 1, 1996, shall belong to and be the profits of the transferee-company and will be available to the transferee-company for being used or disposed of in any manner, including declaration of dividend and the transferor-company shall not issue or allot any rights shares or bonus shares out of its authorised or unissued share capital for the time being.

(n) The transferor-company and the transferee-company through their directors may consent on behalf of all persons concerned to any modifications or amendments of the scheme or to any conditions which the court and/or any other authorities under any law may deem fit to impose or which may otherwise be considered necessary or desirable to give effect to the scheme.

(o) The scheme is conditional on and subject to :

(i) the sanction or approval of the appropriate authorities concerned being obtained and granted in respect of any of the matters in respect of which such sanction or approval is required.

(ii) the approval to the scheme by the requisite majorities of the members of the transferor-company and of the transferee-company and debenture holders and creditors (secured and unsecured) of the transferee-company.

(iii) the requisite resolution(s) under the applicable provisions of the said Act being passed by the shareholders of the transferee-company as provided in the scheme.

(iv) the sanction of the High Court of Judicature at Calcutta under Sections 391 and 394 of the said Act, in favour of the transferor-company and the sanction of the High Court of Judicature at Bombay under the said provisions in favour of the transferee-company and the necessary order or orders u/s 394 of the said Act, being obtained.

(v) the requisite approval of the Reserve Bank of India under the provisions of the Foreign Exchange Regulation Act, 1973, for the issue of shares in the transferee-company to the non-resident shareholders of the transferor-company.

(vi) the issue and allotment of equity shares in the transferee-company to the members of the transferor-company.

(p) In the event of any of the said sanctions and approvals not being obtained and/or the scheme not being sanctioned by the High Court and/or the order or orders not being passed as aforesaid on or before June 30, 1997, or within such further period or periods as may be agreed upon between the transferor-company and the transferee-company through their respective board of directors the scheme shall become null and void, and each party shall bear and pay its respective costs, charges and expenses.

(q) The transferor-company shall be dissolved without winding up, subject to an order to be made by the High Court at Calcutta u/s 394 of the Companies Act, 1956."

8. The main objections urged/raised by the objectors are as follows :

(a) In view of the overwhelming shareholding majority of Unilever they should be placed in a different class and accordingly the shareholders as a class, have not been properly represented.

(b) Since without the consent of the landlord tenancies cannot be transferred, the scheme is prejudicial.

(c) The exchange ratio has not been properly or fairly determined.

9. The valuation report does not value the assets of the company properly in that the value of the brands has not been taken into account.

10. The sanction of the scheme is being opposed by several small shareholders, viz., Kamala Prasad Agarwal holding 109 shares, Rajesh Agarwal, holding nine shares and M. A. Rangaswamy and his two daughters each holding 60 shares and each one of them has filed affidavit in these proceedings for opposing the scheme.

11. It has been submitted on behalf of the petitioner that an insignificant minority group of shareholders is opposing the sanction of the scheme and their opposition should not be accepted. It has been submitted that irrespective of the number of shareholders who are opposing the sanction of the scheme a duty is cast upon the court to see that not only have the statutory formalities been complied with but also that the scheme is fair and reasonable and is not a mala fide attempt on the part of the majority shareholders to obtain advantage in their favour by propounding a scheme of amalgamation.

12. Mr. Mukherjee, the learned advocate for the respondent, has made elaborate submissions on the question of non-representation of the shareholders as a class

in the meeting held in pursuance of the order passed by this court by considering the scheme. His main submissions on that ground are inter alia as follows :

(a) According to the petitioner-company the total number of shareholders of Brooke Bond Lipton India Ltd., is over 2 lakhs.

(b) Unilever plc. and its subsidiaries held more than 50 per cent, shares in the petitioner-company Brooke Bond Lipton India Ltd., the value whereof is over Rs. 6 crores.

(c) (i) The total number of shareholders is claimed at over 2 lakhs whereas it appears from the chairman's report that only 6,900 odd members were present in person or by proxy at the said meeting.

(ii) It also appears from the chairman's report that the votes cast at the meeting in favour of the scheme are valued at just over Rs. 6 crores.

(d) It will appear from a schedule annexed hereto and marked "A" that apart from the Unilever plc. and its subsidiaries, an insignificant number of shareholders attended the meeting and voted in favour of the scheme. Thus, in the instant case, it cannot be said that those who attended the meeting are fairly representative of the equity shareholders of the petitioner and as such the scheme ought not to be sanctioned. It is also significant to note that although it is claimed that financial institutions are shareholders of Brooke Bond Lipton India they did not attend the meeting nor voted in favour of the scheme.

(e) Although technically the scheme might have been approved by the requisite statutory majority, it is still necessary for the court to be satisfied that those who attended the meeting are fairly representative of the shareholders, which test in the instant case, has not been satisfied.

13. In support of his contention Mr. Mukherjee learned advocate for the objector has relied upon a passage in Palmer's Company Law, 24th edition paras. 79.15 to 79.18 pages 1144-1149. The relevant extracts are as follows :

"79.17 (page 1146).--However, it is not the whole requirement, because in addition the court requires to be satisfied that the class is fairly represented. If, for instance, there were altogether 1,000 shareholders holding 10,000 shares in all, the court would be unlikely to be satisfied by the statutory majorities at a meeting at which ten members holding 100 shares in all were present and voted ...

The fact that the scheme is approved by the statutory majority is a strong indication that it is fair one. But this indication is reversed if a substantial proportion of that majority are in a position to gain more from the scheme than other members of the class by reason of their interest in some other capacity e.g., where creditors are to give up something in favour of shareholders, and some of the creditors are also shareholders, the interests of those persons as shareholders may be sufficient to obtain for them a greater benefit in that

capacity than they sacrifice as creditors. In such a case the court will scrutinise the scheme with additional vigilance, and if a minority of the creditors object the court will consider whether or not it is proper to count the votes of the persons with the conflicting interests.

79.18 (page 1147).--"If a holder of a substantial block of the class concerned is offered some inducement to support the scheme, this may well be sufficient to render nugatory the purported approval, unless it is disclosed to the members of the class. If full disclosure is made, the court will, in appropriate circumstances, approve the scheme and will even allow the votes of the person treated preferentially.

However, in *Hellenic and General Trust Ltd., In re* [1975] 3 All ER 382, the scheme for the sale of all the shares to an outside purchaser was not sanctioned even though it was held to be fair "or more than fair" to the ordinary shareholders as a class. The objector did not wish to sell its shares as it would thereby incur a capital gains tax assessment in Greece and Templeman, J. held that this individual loss should be borne in mind even though each shareholders" must put himself in the impossible position of deciding what is in the best interest of the class". But the scheme failed on other grounds and these would seem to have been the dominant reasons for refusing approval."

14. Mr. Mukherjee has also relied upon the said judgment and decision in *Hellenic and General Trust Ltd., In re* [1975] 3 All ER 382.

15. It has also been pointed out on behalf of the objector that in the Bombay High Court the transferee petitioner, Hindustan Lever Ltd. obtained an order for holding a meeting of the members as well as the creditors and also debenture holders on identical grounds but in this court, the petitioner-company obtained an order u/s 391(1) only for holding a meeting of its members.

16. Mr. Mukherjee, the learned advocate for the said objector has referred to Clause 9 of the scheme which provides that the equity shares held by the transferee-company or its subsidiary companies in the share capital of the transferor-company Brooke Bond Lipton India Ltd. shall stand cancelled.

17. It has been argued that there is no mention in the petition that shares are held by Brooke Bond Lipton India Ltd. in Hindustan Lever Ltd. but it appears from the balance sheet of Brooke Bond Lipton India Ltd. that it holds 2,36,910 equity shares of Rs. 10 each worth over Rs. 4 crores in Hindustan Lever Ltd. It has been pointed by Mr. Mukherjee that there is no provision in the scheme as to what would happen to these shares upon amalgamation because a company cannot hold its own shares which would be the result upon the amalgamation of the petitioner-company with Hindustan Lever Ltd.

18. Specific objection has been taken in the affidavit in opposition of Kamala Prasad Agarwalla affirmed on August 12, 1996. The petitioner however in the affidavit in reply to the said affidavit stated that before the scheme becomes

effective the shares should be disposed of by the Brooke Bond Lipton India Ltd. Such a contention on behalf of the petitioner has been argued to be an afterthought and vague, since the scheme itself does not mention the same. It has been further argued by Mr. Mukherjee that no indication has been given as to the price at which or the person to whom such shares should be disposed of, and therefore is a gross infirmity in the scheme itself.

19. Mr. Mukherjee has also referred to Clause 1.6(c) of the scheme which provides for transfer of all the assets and liabilities of the petitioner-company Brooke Bond Lipton India Ltd. to Hindustan Lever Ltd. He has submitted that the assets include tenancy rights apart from leasehold rights.

20. It has been further submitted by Mr. Mukherjee that the petitioner-company has monthly tenancies which cannot be transferred without the landlord's consent in terms of Section 14(b) of the West Bengal Premises Tenancy Act, 1956. The scheme to this extent cannot be sanctioned. It has been further argued that if the scheme is sanctioned with this Clause it would provide ground for ejectment to the landlords and would be prejudicial to the interest of the company. Such a sanction would also be contrary to law laid down by the Supreme Court in the case of General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., . It has been pointed out that the Supreme Court in the aforesaid decision held inter alia that if there is a transfer of tenancy interest in utter contravention of the provisions of the Rent Act then the landlord is entitled to a decree for ejectment.

21. Mr. Mukherjee has also referred to the chairman's statement made at a meeting held in pursuance of the order of the court and has submitted that the grounds for merger as stated in paragraph 13 of the petition are not consistent with the chairman's statement. It has also been argued that the valuation of the shares and the ratio of exchange of shares is unreasonable and unfair to the shareholders of Brooke Bond Lipton India Ltd. for the following reasons :

(a) The valuation of shares is alleged to have been made by S. B. Billimoria and Co, and N. M. Raiji and Co., chartered accountants. The valuation report has not been annexed to the petition and in course of hearing a copy thereof was handed up to the opposing shareholders.

(b) The valuation report is not correct and should not be accepted by the court.

(c) In the valuation report no details have been given by the valuers. It appears from Clause 3.02 of the said report that the valuers have not carried out any independent audit or test to verify the accuracy of the information supplied by the management of the companies.

22. In fact, the objectors have filed an application for appointment of an independent valuer by judge's summons dated September 9, 1996, and have inter alia taken the following points to challenge the valuation report :

(i) The valuation report of S. B. Billimoria and Co. and N, M. Raiji and Co. though

it purports to record that for determining the exchange ratio it will first be needed to determine the value per share of both the companies and Hindustan Lever Ltd. the said report does not disclose the value per share of either the company or Hindustan Lever Ltd. and as such the basis of arriving at the exchange ratio referred to in the said valuation report and in the scheme has not been disclosed. From the purported report it does not appear whether any such valuation was at all made.

(ii) The valuation report of S. B. Billimoria and Co. and N. M. Raiji and Co. purported to record that the value per share of both the companies and Hindustan Lever Ltd. has been determined by an amalgamation of three conventional methods of valuation referred to in the said reports. However neither the said report nor the scheme of which the sanction has been sought from this court disclosed the value of per share of either the company or Hindustan Lever Ltd. either on book value basis or yield value basis or stock exchange quoted value basis and as such the basis for arriving at the exchange ratio has not been disclosed.

(iii) The valuation report of S. B. Billimoria and Co. and N. M. Raiji and Co. also records that for the purposes of valuation of shares of the company and Hindustan Lever Ltd. the said valuers have not carried out any audit or other tests to verify the accuracy of the audited financial statements of both the said companies and information and explanations given by the said valuer which clearly shows that no independent exercise was undertaken by the said valuers.

(iv) The said valuation report clearly shows that no valuation has been conducted "on assets basis". The company is the owner of a large number of well-known and popular trade marks and brand names which are valuable assets. Such brand names are Kissan, Kwality, Dalda, Anikspray, Brooke Bond, Lipton, Red Label Tea, Yellow Label Tea, Green Label Tea, Bru, Cafe, Milkana, etc. The market value of the said trade marks and brand names will be running into several hundred crores of rupees. In fact, some brands like Kwality, Anikspray etc. have been acquired by the company from third parties upon payment of massive sums of money. The value of such trade marks and brand names are not reflected in the audited accounts of the company. The value of the said trade marks and brand names has not been taken into account by the said valuers while recommending the exchange ratio. Such omission totally vitiates the purported valuation reports. Had the value of the said brand names and trade marks been taken into account the value of the shares of the company would have gone up considerably resulting in an exchange ratio far more favourable to the shareholders of the company and that the value of the said brand names and trade marks was not taken into account deliberately to manipulate the share exchange ratio.

(v) No provision has been made in the scheme with regard to the shareholding of the company in Hindustan Lever Ltd. However in an affidavit filed in the instant proceeding it has been sought to be contended by and/or on behalf of the company that prior to the scheme becoming effective the shareholding of the

company in Hindustan Lever Ltd. will be sold. The valuation reports of S. B. Billimoria and Co. and N. M. Raiji and Co. do not take into account the consequences of such sale and as such the said valuation report fails to take into account relevant consideration. The purported valuation report alleges to take into account only book value of the said shares which is much below the market price.

(vi) Further in the valuation reports of S. B. Billimoria and Co. and N. M. Raiji and Co. irrelevant matters have also been taken into account. As on December 31, 1995, the disputed premium of Rs. 595 per share amounting to Rs. 17,758 lakhs cannot be said to belong to Hindustan Lever Ltd. As the same is lying in an "escrow" account yet the same has been taken into consideration in arriving at the exchange ratio which has caused prejudice to the shareholders of the company in spite of the fact that both Hindustan Lever Ltd. and Unilever plc. of U. K. have challenged the said premium by filing a writ petition in the High Court of Judicature at Bombay.

(vii) The scheme of which sanction has been sought provides that the shareholding of Hindustan Lever Ltd. and its subsidiaries in the company are to be cancelled. Yet the value of such shares had been taken into consideration in arriving at the exchange ratio in the valuation report of S. B. Billimoria and Co. and N.M. Raiji and Co. for the sole purpose of causing prejudice to shareholders of the company, though the same ought to have been ignored. Such shareholding is substantial and clearly shows that in making the said valuation report the said valuers have taken into consideration matters which they ought not to have.

(viii) The valuation reports of ANZ Grindlays bank and ICICI Securities and Financial Company Ltd. merely adopted the valuation of S. B. Billimoria and Co. and N. M. Raiji and Co. and no independent exercise has been undertaken by the said entities nor has any independent verification been conducted with regard to the accurateness and completeness of data provided by the management of the two companies.

(ix) The appraisal report of ANZ Grindlays bank records that the exchange ratio arrived at in the valuation report of S. B. Billimoria and Co. and N. M. Raiji and Co, are fair and reasonable to the shareholders of Hindustan Lever Ltd. but no such opinion is found with regard to the shareholders of the company i.e. Brooke Bond Lipton India Ltd.

(x) The appraisal report of ICICI Securities and Finance Co. Ltd, should be totally ignored because of the fact that one of the joint valuers i.e. N. M. Raiji and Co. are statutory auditors not only of ICICI Securities and Finance Co. Ltd. but also of its holding company i.e. the Industrial Credit and Investment Corporation of India Ltd. (ICICI) and a host of its other subsidiaries.

23. The brand names of Brooke Bond Lipton India Ltd. are very valuable intellectual properties of this company. It is not known what valuation has been

put on the brand names in arriving at the exchange ratio. Mr. Sarkar cited a case in *William Currie and Co. v. James Curie*, 15 RPC 339 at page 343, in support of his contention that brand names are part of the goodwill of the business and cannot be valued separately. It is submitted that this case is of no assistance to the petitioner. Under the scheme the entire business assets and liabilities are being transferred to the transferee-company. Schedule VI to the Companies Act, 1956, also requires the cost of the brand names or trade marks to be mentioned. It has not been so done in the instant case. It has been submitted that in arriving at the exchange ratio the value of the brand names and trade marks should have been taken into consideration even in spite of the fact that a challenge has been thrown to the correctness of the valuation report, the valuers have not chosen to contradict this contention by filing any affidavit before this court.

(e) It appears from Clause 2.01 of the valuation report that for determining the exchange ratio according to the valuers it would first be required to determine the value per share of each of the two companies under reference. No such valuation has been made by them under Clause 2.02. It has been stated that both the companies being listed companies the value per share has been determined by an amalgam of the three conventional methods viz., book value, yield value and stock exchange value but no such valuation has been disclosed.

(f) It appears from Clause 5 of the valuation report that the exchange ratio has been determined by suitably merging values under the aforesaid three methods but the report goes on to say that what is relevant is the relative values of the shares of the two companies and not the absolute value of the shares. It is not quite clear what is meant by this expression nor what bearing it has in arriving at the exchange ratio.

(g) The opposing shareholders made a separate application for a direction for appointment of an independent valuer to value the shares to arrive at a fair exchange ratio. Alternatively they prayed for a direction on the valuers to file affidavits furnishing explanation in respect of the objections taken regarding the valuation of shares and the exchange ratio.

24. It has been argued that similar objection was taken in the merger of Tata Oil Mills Co. Ltd. with Hindustan Lever Co. Ltd. and although no order might have been made on such application independent valuation reports were obtained to show that the exchange ratio was fair and reasonable.

25. It has been submitted that in the instant case, no such independent valuation has been obtained nor has any application been filed by the valuers, The petitioners have relied upon a letter dated April 16, 1996, from ANZ Grindlays Bank inter alia certifying that the recommendation of the valuer is fair and reasonable to the shareholders of Hindustan Lever Ltd. Similarly, ICICI Securities and Finance Co. Ltd. by their letter dated April 17, 1996, certified that they assumed without independent verification of the accuracy and completeness of

the data provided by the management and that recommendation of the accountants seemed to be reasonable and fair.

26. The petitioners have filed an affidavit-in-opposition to the application for independent valuation wherein another certificate was annexed from Lovelock and Lewes dated September 10, 1995, who, inter alia, certified that they have reviewed the "methodology" used by S. B. Billimoria and Co. and N. M. Raiji and Co. in determining the fair exchange ratio and confirmed that the methodology used is appropriate and the share exchange ratio arrived at appeared to be fair and reasonable. It has been submitted by Mr. Mukherjee that the said certificate is vague and does not provide any details whatsoever and no reliance can be placed thereon.

27. Mr. Mukherjee has relied upon the judgment and decision in *Associated Hotels of India Ltd., In re* [1968] 2 Comp LJ 292 (Cal). It has been argued by him that K. L. Ray J. as he then was, could not be satisfied with regard to the valuation and insisted upon the affidavits being filed by the senior partner of Ray and Ray, chartered accountants to justify the valuation and the ratio of exchange and the sanction of the scheme was deferred until such affidavit has been filed giving the details of the valuation report. Accordingly, he has submitted that the court, in the instant case, should insist upon affidavit to be filed and/or on behalf of the valuers even if the independent valuer is not appointed. On behalf of the opposing shareholders, the valuation report has also been challenged on the ground that the valuers took matters into account which they ought not to have taken into account and failed to take into account matters which they ought to have done and such a challenge was a valid challenge even in the absence of any fraud.

28. Mr. Mukherjee has also urged that there are certain inconsistencies in the valuation report if compared with the balance-sheet and profit and loss account. He has also referred to page 9 of the valuation report wherein it has been stated that the amount lying in "escrow" account will be remitted to Unilever plc. and share premium suspense account would disappear, and that the same would not have any effect on profits since the company has not taken any credit in its earning from the funds lying in "escrow" account. This fact, however, is not corroborated by the statement in the balance-sheet and profit and loss account of Hindustan Lever Ltd. The learned advocate has referred to internal page 29 wherein it has been stated "in escrow account (Schedule III) excluding surplus (net) earned thereon up to December 31, 1995, Rs. 1,488.05 lakhs has been taken into account." According to Mr. Mukherjee the figures appearing in the balance-sheet and profit and loss account of Hindustan Lever Ltd. for the year ended March 31, 1995, also corroborated the same. The contention of Mr. Mukherjee is that in order to bring the shareholding of Unilever plc. in Hindustan Lever above 50 per cent, about 30 lakhs shares of Rs. 10 each were purported to be allotted to Unilever plc. at a token premium of around Rs. 95 per share ; whereas at the relevant time the market price of the shares of Hindustan Lever

was around Rs. 600 per share. It has been further contended that the said preferential allotment of shares was made with the only object of conferring exclusive benefit and advantages to Unilever plc. The Government of India, however, refused to permit such preferential issue at such small premium. It has been further pointed out that the said question is now pending adjudication before the Bombay High Court in a separate proceedings being Writ Petition No. 1666 of 1994 in the case of Hindustan Lever Ltd. v. Reserve Bank of India.

29. Mr. Mukherjee has further submitted that the instant scheme also provides vide Clause 13.5 that it is conditional upon the approval of the Reserve Bank of India. Therefore, such approval should be obtained first before the scheme is sanctioned by this court.

30. It has been contended that the bonus track record of Brooke Bond Lipton India Ltd. is far superior to that of Hindustan Lever Ltd. In the past ten years Hindustan Lever Ltd. had made only two bonus issues in the ratio of 1 : 1 in 1987 and 1 : 2 in 1990 ; whereas during the same period Brooke Bond Lipton India Ltd. made a bonus issue of 3 : 5 in August 1986, 4 : 5 in July 1989 and 1 : 3 in August 1991. It has been submitted that the proposed merger is not bona fide but only to strengthen the position of Unilever plc. as the holding company of Hindustan Lever and Brooke Bond Lipton India Ltd. In this connection, Mr. Mukherjee has relied upon the judgment and decision in Hindustan Lever Employees' Union v. Hindustan Lever Ltd. [1995] 83 Comp Cas 30 (SC).

31. It has been contended by Mr. Mukherjee that in the aforesaid case the Supreme Court being dissatisfied with the valuation and an independent valuer who had valued shares came to conclusion that the ratio of exchange of 15 : 2 was correctly determined by the valuer. It has been contended that in the instant case also valuation report has been challenged but the valuation has not been made by the independent valuers nor any details have been furnished. Moreover, in TOMCO's case details were also furnished with regard to the equity shares data which are furnished in respect of both the companies. Although it has been argued that TOMCO's case is distinguishable from the instant case.

32. It has also been submitted on behalf of the objectors that the merger of joint companies which are controlled from a foreign country takes place without any concern for development of India. Neither the companies are engaged in any infrastructural industry or any heavy industry where foreign investment will enure to the benefit of the public interest. The merger of the petitioner-company and Hindustan Lever Ltd. will bring into being a larger multi-national company dealing in consumer goods which can well be looked after by the indigenous industry.

33. It has further been submitted on behalf of the opposing shareholders that the proposed merger will be against the public interest and crush the indigenous small companies which are not financially matched with the petitioner-company. The domestic indigenous will be formed out of market. Thus, the aspect of public

interest looms large in the instant case and having regard to the infirmities pointed out the scheme should not be sanctioned by this court.

34. Mr. Kundu, the learned advocate for the Central Government has also raised objection for the sanction of the scheme on the ground that the scheme of amalgamation goes against public interest.

35. I have considered the respective submissions of the learned advocates for the parties. The objection raised by Mr. Mukherjee for the respondent/ objectors that the class of shareholders has not been properly represented does not appear to be of much significance in view of the fact that, it does not appear from the scheme also that the position of Unilever in any way changed as a result of the scheme of amalgamation. It appears from the facts on record that the proposal would have been passed even without the voting by Unilever by overwhelming majority. The judgment and decision in *Hellenic and General Trust Ltd. In re* [1975] 3 All ER 382, relied upon by Mr. Mukherjee on behalf of the objectors does not, in my view, assist the objectors in any way. In the said decision, by reason of proposal of amalgamation, the company was going to become a subsidiary of the holding-company of the shareholder, whereas in the instant case, both the transferor and the transferee are already subsidiaries of Unilever and there is no change whatsoever. Moreover, the said decision has been doubted in the case of *Mafatlal Industries Ltd., In re* [1995] 84 Comp Cas 230 (Guj). Mr. Mukherjee has raised objection on the ground that the transfer of assets would also include monthly tenancies and monthly tenancies cannot be transferred without the consent of the landlord. In support of the said contention he has relied upon the judgment and decision in *General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs.*,

36. It may be noted that the question of transfer only takes place after the scheme becomes effective. The court cannot assume that the consent will not be granted. It is only after the scheme is sanctioned that the consent of the landlord has to be obtained. In any event, the said decision is not an authority for the proposition. If such a proposition is accepted that will amount to the fact that no scheme of amalgamation by the transferor-company with monthly tenancies can be sanctioned. The said objection therefore cannot be accepted.

37. Mr. Mukherjee has also raised objection with regard to the exchange ratio proposed in the scheme which is already noted. It however appears that the company has produced the valuation report which was submitted by the valuers and which was tendered for inspection to the members. Both ANZ Grindlays Bank and ICICI Securities and Finance Co. Ltd. have considered the valuation report independently and found the same to be fair and reasonable. The method followed by the valuer has been specifically approved by the Supreme Court in the merger of the transferee and TOMCO where the same valuers have submitted a valuation report and had followed exactly the same procedure. It may be noted that Lovelock and Lewes the reputed firm of, chartered accountants have also certified the valuation report, and their opinion cannot be ignored. In this

connection, judgment and decision in *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.* [1995] 85 Comp Cas 30 [1994] 4 Comp LJ 267 (SC), relied upon by both the parties may be taken note of. The aforesaid decision appears to be apposite on the point. In the aforesaid decision it has been observed by the Supreme Court at page 275 that where more than 95 per cent, of the shareholders who are the judge of their interest and are better conversant with the market trend agreed to the valuation determined, it could not be interfered with by courts and it is not part of the judicial process to examine such activities to ferret out flaws. The court is least equipped with such things nor is it a judge's function to do so. Such an exercise would amount to inspection of internal management which is incompetent, improper and out of bounds for the court.

38. In the Instant case, the valuation has been made by Lovelock and Lewes, a reputed firm of chartered accountants. It has been repeatedly held in several decisions that if the ratio of exchange has been fixed by an experienced and reputed firm of chartered accountants, then in the absence of any charge of fraud against them the court will accept such valuation and ratio of exchange. A mere allegation of fraud is not enough, it must be a proper charge of fraud with full particulars. In the instant case, there is no charge made or established.

39. The judgment and decision in *Dean v. Prince* [1954] 1 All ER 749, does not apply in the instant case which is relied upon by Mr. Mukherjee as that is not a case of amalgamation. The other decision in *Associated Hotels of India Ltd., In re* [1968] 2 Comp LJ 292 (Cal), relied upon by Mr. Mukherjee where the valuer failed to disclose the grounds does not also appear to have any application in the instant case in view of the judgment and the observation of the Supreme Court as already recorded.

40. The objection with regard to exchange ratio of shares cannot be accepted in the instant case. It may also be noted that the valuer was asked to provide an exchange ratio and not to provide the value of the shares. The report is similar to the one upheld by the Supreme Court. The auditor of the transferor-company Lovelock and Lewes has also certified that the valuation is fair and reasonable.

41. It has been strongly contended on behalf of the objectors that the valuation report has not taken into consideration various well known brands of the transferor-company and as such the same suffers from gross infirmity. The said submission of Mr. Mukherjee, however, does not appear to be correct. It appears from the affidavit of Shyamal Sen affirmed on September 11, 1996, filed on behalf of the transferor-company that the transferee-company owns many more valuable brands than the transferor-company. Moreover, it is well-recognised that the brands are part of the goodwill of the business and cannot be valued separately.

42. It is also well settled that if a business is closed or transferred the brand goes with it. Separate mention of the mark in Schedule VI only takes place when a

brand is acquired in which case the cost is mentioned. It may also be noted that even then once acquired it becomes part of the goodwill of the business and is valued accordingly.

43. The learned advocate for the petitioner has relied upon the judgment and decision in *William Currie and Co. v. James Currie* 15 RPC 339. In the aforesaid decision it was held that with the transfer of assets of the business including its goodwill is also transferred.

44. It may be noted that the objectors hold a very small percentage of the share of the transferor-company. As already noted the persons who originally opposed the scheme are two members holding 109 and nine shares respectively and subsequently three others holding 60 shares each from the same family and the total shareholding of the opposers is 298 shares of value of Rs. 2,980 only. The said objectors also did not attend the meeting. They also did not ask for inspection of the valuation report. Most of the points sought to be urged by the objectors were raised at the meeting but were rejected by overwhelming majority.

45. The stake of the objectors being very small, it is difficult to appreciate what benefit, they would derive by opposing the scheme when the large majority of shareholders have approved the scheme at the meeting held pursuant to the order of this court, In fact, the petitioner-companies have offered to purchase the said shares at the price which the objectors paid for them or at any other price that may be fixed by the court. In the circumstances, the court cannot ignore the wishes of the large majority of the shareholders.

46. Mr. Mukherjee has further raised objection that there is no mention in the petition that shares are held by Brooke Bond Lipton India Ltd. in Hindustan Lever Ltd. It appears from the balance-sheet of the transferor-company that it holds 2,36,910 equity shares of Rs. 10 each worth Rs. 4 crores in Hindustan Lever Ltd.

47. It has been submitted by Mr. Mukherjee that under the proposed scheme the said shares will become the property of Hindustan Lever Ltd. which would be in violation of law since no company can hold its own shares. The company secretary of the petitioner, however, affirmed an affidavit on April 13, 1996, being the affidavit-in-reply filed on behalf of the petitioner-company specifically mentioned that "the company proposes to sell the said shares in Hindustan Lever Ltd. before the scheme becomes effective".

48. To clarify the exact position the matter was placed in the list "to be mentioned" and on December 6, 1996, Mr. Sarkar, learned advocate for the petitioner produced copy of the certified true copy of the resolution passed by the directors of Brooke Bond Lipton India Ltd., dated August 28, 1996. The said resolution is as follows :

"Resolved that 2,36,910 equity shares of Rs. 10 each held by the company in Hindustan Lever Ltd. be disposed of at the best available market price.

Resolved further that Mrs. K. B. Dadiseth, Chairman, Mr. R. Gopalakrishnan, Vice-Chairman and Managing Director, Mr. J. C. Pinto, Divisional Vice President-commercial, Mr. V. Sudan, Controller Accounts, Mr. Ananda Ghosal, Treasurer and Mr. Shyamal Sen, Company Secretary, be and they are hereby authorised jointly and severally to sign all documents including transfer deeds etc. to give effect to the sale of shares held by the company in Hindustan Lever Ltd."

49. It has also been submitted by Mr. Sarkar that the said shares will be sold by the company by December 31, 1996.

50. Mr. Sarkar has also relied upon the judgment and decision in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 87 Comp Cas 792 [1996] 4 Comp LJ 124 (SC). In the aforesaid decision, the Supreme Court held, inter alia, as follows (page 819) :

"(1) The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) of the Companies Act, 1956, have been held.

(2) That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by Section 391, Sub-section (2) of the Companies Act, 1956,

(3) That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

(4) That all necessary material indicated by Section 393(1)(a) of the Companies Act, 1956, is placed before the voters at the concerned meetings as contemplated by Section 391, Sub-section (1) of the Act.

(5) That all the requisite material contemplated by the proviso to subsection (2) of Section 391 of the Companies Act, 1956, is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

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

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

whom they purported to represent.

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

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

51. On the question of exchange ratio of the shares the Supreme Court *inter alia* held as follows (page 838) :

"Once the exchange ratio of the shares of the transferee-company to be allotted to the shareholders of the transferor-company has been worked out by a recognised firm of chartered accountants who are experts in the field of valuation and if no mistake can be pointed out in the said valuation, it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it will be detrimental to their interest."

52. In this connection judgment and decision in *E. I. T. A. (India) Ltd., In re* [1996] 4 Comp LJ 346 (Cal), may also be taken note of. In the aforesaid decision it was held by me, *inter alia*, that (headnote) "while considering an application for sanction u/s 391(2) of the Companies Act, 1956, it has to be considered if the statutory requirements have been complied with. While considering the relevant provisions of the statute, it has to be seen whether meetings have been duly convened and held and if the scheme has been approved by the requisite majority. It is only when the scheme has been so sanctioned that the petitioners (here the companies) can apply for confirmation of the scheme u/s 391(2). In the instant case, there cannot be any dispute that all these formalities under the statutes have been complied with and the petition has been properly made u/s 391(2) of the Companies Act. It is well-settled that if the statutory formalities have been complied with and the scheme is fair, and reasonable and there is no fraud involved, then the court would proceed to give effect to the business of the decision of the shareholders of the company, In other words, unless the court finds that the scheme is fraudulent or unreasonable, the court would proceed to sanction the scheme. The power to amalgamate is a statutory power and this power may be exercised notwithstanding the fact that the memorandum of

association of a particular company may not contain express power to amalgamate with another company."

53. It was further held that "if the ratio of exchange has been fixed by an experienced and reputed firm of chartered accountants, then in the absence of any charge of fraud against them, the court will accept such valuation and ratio of exchange,"

54 In the instant case, the said decisions are clearly applicable,

55. Considering the facts and circumstances of the case, I do not find any impediment in passing the order sanctioning the scheme. It is, however, made clear that the said scheme is sanctioned on the basis of the submissions made on behalf of the petitioner that the shares to the extent of 2,36,910 held by Brooke Bond Lipton India Ltd. will be sold in accordance with law within December 31, 1996.

56. There will, accordingly, be an order in terms of prayers (a), (b), (c), (d), (e), (f) and (g) of the petition. The official liquidator will file his report within eight weeks from the date of communication of this order. There will also be an order in terms of prayers (h), (i) and (j) of the petition.

56. The petitioner will pay costs assessed at 250 gms. to the Central Government.

57. All parties and the official liquidator are to act on a signed copy of the operative part of this judgment and order on the usual undertaking.