

(1980) 02 MAD CK 0014

In the Madras High Court

Case No : Company Petition No's. 21 and 22 of 1978

In Re: Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd.

Date of Decision : 08-02-1980

Acts Referred:

Companies Act, 1956 — Section 20, 391, 391(2), 394

Income Tax Act, 1961 — Section 72A

Monopolies and Restrictive Trade Practices Act, 1969 — Section 2, 20, 23, 23(1), 23(2)

Citation : (1980) 02 MAD CK 0014

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Advocate : S.V. Subramaniam and T.S. Raghavendran, for the Appellant; K. Swamidurai, for the Respondent

Judgement

Padmanabhan, J.—C.P. No. 21 of 1978 has been filed by the Coimbatore Cotton Mills Ltd., Coimbatore (hereinafter referred to as the

transferor company""), and C.P. No. 22 of 1978 has been filed by the Lakshmi Mills Co. Ltd. (hereinafter referred to as the ""transferee-

company"") under ss. 391 and 394 of the Companies Act, 1956, for sanction being accorded to the scheme of arrangement and amalgamation of

the said two companies.

2. The transferor-company was incorporated under the Indian Companies Act, 1913, on December 16, 1929, at Coimbatore with the liability of

the members limited by shares. Its present authorised capital is rupees one crore divided into 95,000 equity shares of Rs. 100 each and 5,000

shares of Rs. 100 each with preferential rights to cumulative dividend at 7% (tax-free). Its present issued, subscribed and paid up capital is 36,000

equity shares of Rs. 100 amounting in all to Rs. 36,00,000. All the issued shares are fully paid up. The objects of the company are ginning, spinning

and whenever thought fit making arrangements in connection with weaving, dyeing and printing cotton, wool, silk and such other articles and

undertaking such processes at Coimbatore and at other places in the Madras Presidency which the company may decide from time to time.

3. The transferee-company was incorporated under the Indian Companies Act, 1882, on April 1, 1910, at Coimbatore with the liability of the

members limited by shares. Its present authorised capital is rupees two crores divided into 2 lakhs equity shares of Rs. 50 each and 5 lakhs equity

shares of Rs. 25 each. The present issued, subscribed and paid-up capital is 1,42,000 equity shares of Rs. 50 each and 3,55,000 equity shares of

Rs. 25 each amounting in all to Rs. 1,59,75,000. The objects for which the transferee-company was formed are to carry on all or any of the

businesses of cotton spinners and doublers, wool, flax, jute and hemp and wool merchants, wool combers, worsted spinners, woollen spinners,

yarn merchants, worsted stuff manufacturers, bleachers and dyers and makers of vitriol, bleaching and dyeing materials to purchase, sell, comb,

prepare, spin, dye and deal in flax, hemp, jute, wool, cotton, silk and other fibrous substances and to weave or otherwise manufacture, buy and

sell and deal in linen, yarn, cloth and other goods and fabrics, whether textile, felted, netted or looped and to supply power.

4. Since the last three or four years, the transferor-company had been facing adverse conditions due to high cost of production. Further, the plant

and machinery were old and required modernisation to achieve economic production. As a matter of fact, 40% of the plant and machinery have to

be replaced. The transferor-company has been finding it difficult to secure the necessary credit facilities to launch an effective scheme of

modernisation. On the other hand, the transferee company has an established reputation with highly sophisticated modern machinery and a well knit

selling organisation throughout India. On November 2, 1977, the board of directors of the transferor-company in consultation with the board of

directors of the transferee-company considered that it would be in the interest of both the companies, the shareholders as well as the workers and

the public, if the transferor-company was amalgamated with the transferee-company so as to form one single unit under a scheme of amalgamation,

the transferor-company ultimately being dissolved without being wound up. Accordingly, a scheme of amalgamation of the two companies was

drawn up. C.A. Nos. 322 of 1978 were filed before this court for permission to convene a meeting of the shareholders for the purpose of

considering and if thought fit, to pass with or without modification the scheme of amalgamation. These applications were disposed of by

Ramaprasada Rao J. (as he then was) by his order dated February 20, 1978. The learned judge directed that a meeting of the equity shareholders

of the transferor-company should be held on 27th March, 1978, at 10 a.m. at the registered office of the Lakshmi Mills Co. Ltd., at No. 348,

Avanashi Road, Coimbatore. The learned judge appointed Mr. K. Sundaram, managing director of the transferor-company, as the chairman of the

said meeting, with directions that the chairman should report to the court about the proceedings of the meeting on or before 3rd April, 1978.

Similarly, the learned judge directed that a meeting of the equity shareholders of the transferee-company should be held on the 27th March, 1978,

at 3 p.m. at its registered office at No. 348, Avanashi Road, Coimbatore, and Mr. K. Sundaram, managing director of the transferor-company,

was appointed chairman of the said meeting with directions to report to the court about the proceedings of the meeting on or before 3rd April,

1978. Similarly, the learned judge directed that a meeting of the debenture-holders should be held on the 27th March, 1978, to consider a scheme

of amalgamation as proposed at 12 noon on 27th March, 1978, under the chairmanship of Mr. K. Sundaram.

5. Pursuant to the order of this court dated February 20, 1978, a meeting of the equity shareholders of the transferor-company was held at 10

a.m. March 27, 1978. The meeting was attended by 424 members either in person or by proxy. The value of the shares held by the number of

members who attended the meeting came to Rs. 30,08,400. Out of 424 members, 423 members holding 27,277 shares of the value of Rs.

27,27,700, voted in favour of the proposed scheme of amalgamation being adopted and carried into effect. One member, holding 2,807 shares of

the value of Rs. 2,80,700 voted against the acceptance of the scheme of amalgamation.

6. A meeting of the debenture-holders of the transferee-company was held at Coimbatore at 12 noon on March 27, 1978, by Mr. K. Sundaram.

The meeting was attended by two debenture-holders together entitled to 5,103 debentures of the value of Rs. 5,10,300. One debenture-holder,

holding 2,427 debentures of the value of Rs. 2,42,700 voted in favour of the acceptance of the scheme of amalgamation, while the other

debenture-holder, holding 2,676 debentures of the value of Rs. 2,67,600 voted against the acceptance of the scheme of amalgamation. It was

stated at the Bar by Mr. S. V. Subramaniam on behalf of the petitioners that both the debenture-holders have been since paid off and, therefore,

the fact that at the meeting of the debenture-holders one of them opposed the scheme of amalgamation is no longer of any significance.

7. A meeting of the equity shareholders of the transferee-company was held at Coimbatore on March 27, 1978, under the chairmanship of Mr. K.

Sundaram. The meeting was attended by 1,228 members either in person or by proxy. They held 1,13,939 shares of Rs. 50 each and 2,90,496

shares of Rs. 25 each, the total value of the shares being Rs. 1,29,59,350. 1,225 shareholders, holding shares of the value of Rs. 1,13,56,175,

voted in favour of the scheme of amalgamation. Three shareholders, holding shares of the value of Rs. 16,02,300, voted against the scheme of

amalgamation. The Chairman, Mr. K. Sundaram, has filed separate reports regarding the proceedings of the three meetings referred to above.

8. Consequently, the above company petitions have now been filed for sanction being accorded to the said scheme of arrangement and

amalgamation.

9. Under the proposed scheme of amalgamation the assets and liabilities of the transferor-company will be transferred to the transferee-company in

exchange for fully paid up equity shares in the transferee-company. Members of the transferor-company will be allotted shares in the transferee-

company. Every member of the transferor-company holding a fully paid up equity share of Rs. 100 in the transferor-company will be allotted one

fully paid up equity share of Rs. 50 and one "A" class equity share of Rs. 25 of the transferee-company in exchange for the property and assets of

the transferee-company. It is stated that the debts, liabilities and obligations of the transferor-company, present or contingent, shall be transferred

to and undertaken by the transferee-company. It is stated that the assets of the transferor-company and the transferee-company are more than

sufficient to meet their liabilities and that the proposed scheme of amalgamation will not in any way effect the rights or interests of the creditors of

either of the two companies and that the scheme would not result in any personal gain to the directors of any of the companies. It is further asserted that the proposed merger of the two companies is in public interest. By the merger of the transferor-company with the transferee-company, the transferor-company would get the advantage of setting off losses and unabsorbed depreciation. The merger would enable the transferor-company to enjoy the benefits of centralised bulk purchases of quality material, spares, stores, etc., at competitive prices and also the resources of the transferee-company could be effectively utilised to modernise the machinery of the transferor-company. It is overed that there are common shareholders in the two companies and the amalgamation would benefit them and also will be in the interest of nearly 1,750 employees.

10. The Regional Director, Company Law Board, has filed a counter-affidavit opposing the acceptance of the scheme of amalgamation. The main objections raised by the Regional Director, Company Law Board, are : (1) That the exchange ratio on the basis of which the scheme provides for allotment of one fully paid up equity share of Rs. 50 each and one "A" class equity share of Rs. 25 each in the transferee-company to every holder of a share of Rs. 100 each in the transferor company does not represent a proportionate value and that, therefore, the scheme is not in the interest of the members of the transferee-company. According to the counter-affidavit, the exchange ratio results in the payment of Rs. 169 worth of shares (Rs. 113 and Rs. 56 being the fair value of one share of Rs. 50 and "A" class share of Rs. 25) in the transferee-company for every share of the transferor-company the value of which is Rs. 4 only. The Regional Director has also stated that the stock exchange quotation should not be taken into account in finding out the average value of the shares. (2) Both the transferor-company and the transferee-company are registered under s. 26 of the Monopolies and Restrictive Trade Practices Act, 1969, and that the companies have not sought the approval of the Central Govt. for the proposed scheme of amalgamation under s. 23 of the Monopolies and Restrictive Trade Practices Act. In the circumstances, the court should not grant its seal of approval to the proposed scheme of amalgamation. (3) Notice should be given to the creditors of the two companies.

11. A reply affidavit has been filed in which, apart from sustaining the exchange ratio fixed under the scheme, it is stated that the Central Govt. have

no locus standi to oppose the amalgamation on the ground that the exchange ratio arrived at was not fair or reasonable to the shareholders of the

two companies. The shareholders who are vitally interested in the matter have, after due consideration, accepted the ratio. As regards the prior

approval of the Central Govt. under the provisions of the Monopolies and Restrictive Trade Practices Act, it is stated that since both the

companies are producing the same goods, no approval of the Central Govt. is required. Further, it is pointed out that the scheme of amalgamation

had been approved by the appropriate authority under s. 72A of the Income tax Act, 1961, by its order No. 2(16)/78-CVS/Ministry of Industry

dated January 1, 1979. It is further stated that almost all the creditors of both the companies have been paid of except some minor creditors.

Further, as per the proposed scheme all the creditors of the transferor-company will become automatically creditors of the transferee-company.

12. An additional reply affidavit has also been filed on behalf of the two companies.

13. The question for consideration is whether the necessary sanction of the court should be accorded to the proposed scheme of amalgamation.

14. It is settled law that before the court sanctions a scheme under ss. 391 and 394 of the Companies Act, it should normally be satisfied of three

matters :

(1) The court should be satisfied that the resolutions are passed by the statutory majority in value and in number in accordance with s. 391(2) of

the Companies Act at a meeting or meetings duly convened and held. This factor is jurisdictional in the matter of confirmation of the scheme. The

court should not usurp the right of the members or creditors to decide whether they approved the scheme or not. Therefore, if a class whose

interests are affected by a scheme does not assent to the scheme or approve it at a meeting convened in accordance with the provisions of s. 391,

the court will have no jurisdiction to confirm the scheme, even if it considers that the class concerned is being fairly dealt with or that it would

approve the scheme.

(2) The court should satisfy itself that those who took part in the meeting are fairly representative of the class and that the statutory meeting did not

coerce the minority in order to promote the minority in order to promote the

adverse interest of those of the class whom they purport to represent.

(3) Lastly, in exercising its discretion under ss. 391 and 394, the court is not merely acting as a rubber stamp. It is the function of the court to see

that the scheme as a whole, having regard to the general conditions and background and object of the scheme, is a reasonable one and if the court

so finds, it is not for the court to interfere with the collective wisdom of the shareholders of the company. When once the court finds that the

scheme is a fair one, then it is for the objector to convincingly show that the scheme is unfair and that, therefore, the court should exercise the

discretion to reject the scheme, notwithstanding the views of a very large majority of the shareholders that the scheme is a fair one. If the court is of

the opinion that there is such an objection to it as any reasonable man would say that he would not approve of it, then the court may refuse to

confirm the scheme. However, if the scheme as whole is fair and reasonable, it is the duty of the court not to launch on an investigation upon the

commercial merits or demerits of the scheme which is the function of those who are interested in the arrangement.

(4) There should not be any lack of good faith on the part of the majority.

15. The position has been succinctly stated by Lindley L.J. In *re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* [1891] 1 Ch

213 thus :

..... what the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has

been acting bona fide. The court also has to see that the minority is not being overridden by a majority having interests of its own clashing with

those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which

persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be

reasonably taken by businessmen.

16. In the present case, from the figures already given, which gave the analysis of the members present and actually voted, it is seen that the

proposed scheme of amalgamation has been approved by an overwhelming majority, both in number and value, of the shareholders of both the

companies. Thus, the statutory requirement has been fully satisfied. There is no

averment that there has been no fair representation of the shareholders at the meetings of both the companies. Of the two debenture-holders of the transferee-company, one debenture-holder voted in favour of the scheme of amalgamation while the other voted against. It is not disputed by the learned counsel for the Regional Director, Company Law Board, that the dissentient debenture-holder has been paid off. There is no allegation of any undue influence or coercion exercised by the majority on the minority shareholders. Further, the petitions have been widely advertised. It is significant that even the minority of the shareholders, who voted against the acceptance of the scheme of amalgamation at the meetings held under orders of this court, did not appear before me and put forward their objections.

17. It is in this backdrop of the above facts, that the contentions against the approval of the scheme advanced by Mr. Swamidurai have to be considered. As already stated, the first contention is that the exchange ratio adopted in the scheme is unfair to the shareholders of the transferee-company. Under the scheme every shareholder in the transferor-company holding an equity share of the value of Rs. 100 will be given one share of the value of Rs. 50 and one "A" class share of the value of Rs. 25 of the transferee-company. The objection on behalf of the Regional Director, Company Law Board, is that the break-up value of the equity shares of Cotton Mills as on March 31, 1977, works out to about Rs. 7.90 per share. Since the transferor-company had incurred very heavy losses during the period from January 1, 1975, to March 31, 1977, the yield value of the shares is nil. It is, therefore, submitted that the fair value of one share of Rs. 100 of the transferor-company should be taken as the average of the break-up value and yield value and if so done it will work out at Rs. 4. On this basis, it is stated, the exchange ratio as given in the scheme results in payment of Rs. 169 worth of shares in the transferee-company for every share of the transferor-company, the value of which is Rs. 4. Admittedly, the exchange ratio adopted in the scheme has been arrived at on the basis of the valuation of the chartered accountants of the transferor and transferee-companies and after obtaining a further valuation report from a third firm of chartered accountants, M/s. Venkatram and Company, Madras. M/s. Subbchar and Srinivasan, auditors of the transferee-

company, have given their opinion on 17th October, 1977, that every shareholder of the transferor-company can be allotted one share of Rs. 50 each and one "A" class share of Rs. 25 each in the transferee-company. They have reiterated their opinion under Ex. P-5 dated 27th September, 1979, with reference to the situation as on April 1, 1979. M/s. Jagannathan and Viswanathan, chartered accountants, auditors of the transferor-company, by their report dated 27th October, 1977, have stated that the proposal of exchange of one Rs. 50 share and one "A" class share of Rs. 25 in the transferee-company for every share of Rs. 100 in the transferor-company is fair and reasonable so far as the members of the transferor-company are concerned. M/s. Venkatram and Company, a firm of independent chartered accountants, have also after careful consideration of the financial position of the two companies as well as the value on the basis of yield and break-up value of the shares of the respective companies have come to the conclusion that if one share of Rs. 100 each in the transferor-company is exchanged for one share of Rs. 50 each and one "A" class share of Rs. 25 each in the transferee-company, the exchange will be fair and equitable. The opinion of M/s. Venkatram and Company shows that they have taken into account the break-up value of the shares and also the average market value as quoted on the Madras Stock Exchange. The reports of M/s. Venkatram and Company have been accepted as correct by M/s. Subbachar and Srinivasan, chartered accountants of the transferee-company, and M/s. Jagannathan and Viswanathan, chartered accountants of the transferor-company, by their respective opinions dated October 18, 1979. Mr. Swamidurai was not in a position to explain to me how the concurrent opinions of these three reputed firms of chartered accountants should not be accepted as correct in arriving at the conclusion that the exchange ratio adopted in the scheme of amalgamation is fair and reasonable, except to contend that the stock exchange price should not be taken into consideration. The learned counsel did not suggest that the books of account of the companies are unreliable or a different or discriminating method of valuation have been adopted in respect of the shares of the two companies. There is no merit in the contention of Mr. Swamidurai that the value of the shares as quoted in the Madras Stock Exchange should not have been taken note of at all. 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, and

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. It has been held in *Perpetual Trustee Co. Ltd. v. Federal Commissioner of*

Taxation (65 CLR 572) thus (p. 579) :

When shares in a company are bought and sold on the Stock Exchange the price at which the shares are changing hands in the ordinary

course of business is usually their true value ...

18. This position was accepted by the Calcutta High Court in *In the matter of Carron Tea Co. Ltd.* [1966] 2 Comp LJ 278, where the ratio has

been stated as follows (per headnote at p. 278) :

The ordinary law would suggest that the market price of the shares of the amalgamating companies would be the proper basis for determining the

ratio of exchange. So the quotation of the stock exchange would be a safe and proper basis for fixing the ratio, unless it is demonstrated that the

stock exchange quotation is not reliable and does not represent the true value. The absence of a valuation on the basis of quotation on the stock

exchange and the absence of any explanation why the quotations should be disregarded vitiates the auditor's report fixing the ratio.

19. In *Cotton Agents (Rajasthan) Ltd., In re* [1969] 39 Comp Cas 663, the law has been stated as follows (headnote) :

Valuation of shares in an amalgamation is made on a consideration of some or all of a number of relevant factors. Thus, the stock exchange prices

of the shares of the two companies, the dividends paid on the shares, the relevant growth prospects of the companies, the ratio of distributable

earnings to dividends paid during the year, the value of the net assets of the two companies, etc., are factors on which the valuation is often rested.

The answer to the question whether some or all of these factors can be applied in the case of a given scheme of amalgamation depends on the

circumstances of each case. It is necessary, however, that the same factors should be taken into account in assessing the two sets of shares.

20. Pennington in his Principles of Company Law, 1959 Edn., p. 103, mentions four factors which had to be kept in mind in the valuation of

shares. They are : (1) Capital cover, (2) Yield, (3) Earning capacity, (4) Marketability.

21. The valuation report of the three firms of chartered accountants go to prove that the exchange ratio has not been fixed merely on the basis of

the stock exchange quotation but on the basis of the various factors which had to be necessarily taken into consideration. In this context, it is

necessary to refer to the decision of Denning L.J. in *Dean v. Prince* [1954] 1 Ch 409; 24 Comp Cas 198 . In that case, the auditor, in making the

valuation of the shares of a company, certified that for the purpose of his valuation he had not regarded the company as a going concern, but that

he had valued on a break-up basis, because, in his opinion, the shares have no value on any other basis, having regard to the losses made by the

company. Harman J. Held that the valuation was invalid as the auditor had failed to take into consideration the various factors necessary for that

purpose. The Court of Appeal unanimously reversed the decision of the lower court. Denning L.J. observed (p. 426) (See also 24 Comp Cas at

pp. 212-13) :

The task of the auditor here was to act as an expert and not as an arbitrator; and, as an expert, he was to certify what, in his opinion, was the fair

value of the shares The reason is because it is so much a matter of opinion that it is very difficult to say it was wrong. But difficult as it is,

nevertheless if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties For

instance, if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely :

or interpreted the agreement wrongly : or proceeded on some erroneous principle. In all these cases the court will interfere On matters of

opinion, the courts will not interfere; but for mistake of jurisdiction or of principle, and for mistake of law, including interpretation of documents,

and for miscarriage of justice, the courts will interfere.

22. In *M. G. Investment and Industrial Co. v. New Shorrock Spg. & Mfg. Co. Ltd.* [1972] 42 Comp Cas 145, Nain J. has held thus (headnote) :

Two reputable firms of chartered accountants had, after careful consideration,

come to the conclusion that the ratio of 5.2 for allotment of shares was fair and equitable. A scheme of amalgamation may be open to criticism, but unless it was affirmatively shown that the scheme was unfair, the court would not interfere. There was no reason to doubt the bona fide recommendation made by the board of directors of the two companies as well as by the two firms of chartered accountants.

23. Mr. Swamidurai has not been able to point out any defect or deficiency in the valuation by the chartered accountants. He also does not impute

mala fides on the part of the chartered accountants. Therefore, the opinions of the chartered accountants are accepted, as fair and reasonable.

24. In this connection, it is relevant to extract the observation of Maugham J. In re Hoare & Co. Ltd. [1933] 150 LT 374 :

One conclusion which I draw from that fact is that the mere circumstance that the sale or exchange is compulsory is one which ought not to

influence the court. It has been an expropriation, but I do not regard that phrase as being very apt in the circumstances of the case. The other

conclusion I draw is this, that again prima facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to

suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to

so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may

be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is

affirmatively established that notwithstanding the views of a very large majority of shareholders, the scheme is unfair.

25. Maugham J.'s opinion has been upheld in In re Evertite Locknuts (1938) Ltd. [1945] 1 All ER 401; 15 Comp Cas 138 (Ch D) and In re

Press Caps Ltd. [1949] 1 All ER 1013; 19 Comp Cas 327. In In re Sussex Brick & Co. Ltd. [1960] 30 Comp Cas 536 following the decision of

Maugham J., Vaisey J. was of the opinion that even though the scheme was open to criticism, that was not enough and that unless it was

affirmatively shown that the scheme was unfair, he would not interfere. To quote the learned judge (p. 540) :

This is a difficult case, and if it goes to a higher court I would like to express my

apologies for having dealt with it on somewhat vague and not very

detailed lines : but, after all, if it has to be affirmatively established that the scheme is unfair, it is largely a matter of the onus of proof and whether

the evidence has satisfied me.

I am not satisfied that this scheme is unfair in the sense in which Maugham J. used the words and the application ought not to succeed.

26. I am, therefore, satisfied that the exchange ratio adopted in the scheme is fair reasonable.

27. The next ground of objection projected on behalf of the Regional Director, Company Law Board, was that the sanction of the Central Govt.

under s. 23 of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the "MRTP Act"), has not been obtained. It is

admitted that both the transferor and the transferee-companies have been registered under s. 26 of the MRTP Act. On the other hand, it is the

contention of Mr. S. V. Subramaniam that both the transferor and transferee-companies are engaged in the production of the same goods and that

consequently by virtue of sub-s. (3) of s. 23 of the MRTP Act it is not necessary for the companies to obtain the permission of the Central Govt.

under s. 23 of the MRTP Act. It is further submitted by Mr. S. V. Subramaniam on behalf of the petitioner that the scheme of amalgamation has

been approved by the appropriate authority under s. 72A of the I.T. Act, 1961, by its order dated January 9, 1979, and that consequently when

one wing of the Central Govt. had approved the scheme, it is not fair and reasonable for another wing of the Central Govt. to oppose the same.

28. Section 23 of the MRTP Act, so far as it is relevant for our present purpose, runs thus :

23. (1) Notwithstanding anything contained in any other law for the time being in force, -

(a) no scheme of merger or amalgamation of an undertaking to which this Part applies with any other undertaking,

(b) no scheme of merger or amalgamation of two or more undertakings which would have the effect of bringing into existence an undertaking to

which clause (a) or clause (b) of section 20 would apply,

shall be sanctioned by any court or be recognised for any purpose or be given effect to unless the scheme for such merger or amalgamation has

been approved by the Central Government under this Act.

(2) If any undertaking to which this Part applies frames a scheme of merger or amalgamation with any other undertaking, or a scheme of merger or

amalgamation is proposed between two or more undertakings, and, if as a result of such merger or amalgamation, an undertaking would come into

existence to which clause (a) or clause (b) of section 20 would apply, it shall, before taking any action to give effect to the proposed scheme, make

an application to the Central Government in the prescribed form with a copy of the scheme annexed thereto, for the approval of the scheme.

(3) Nothing in sub-section (1) or sub-section (2) shall apply to the scheme of merger or amalgamation of such inter-connected undertakings as are

not dominant undertakings and as produce the same goods

29. It will be seen that s. 23(3) is an exception to s. 23(1) and (2). In other words, if the undertakings in respect of which a scheme of

amalgamation satisfy the conditions laid down under s. 23(3) prior approval of the Central Govt. as provided for under s. 23(1) and (2) will not be

necessary. For the applicability of s. 23(3) three conditions have to be satisfied. The learned counsel agree as regards the first two conditions, but

differ as regards the third condition to be satisfied. The first two conditions are : (a) the proposed scheme of amalgamation should be in relation to

interconnected undertakings. Inter-connected undertakings have been defined in s. 2(g) of the MRTP Act thus :

2. (g) "inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manner,

namely :-

(iii) where the undertakings are owned by bodies corporate, -

(c) if they are under the same management

Explanation I. - For purposes of this Act, the undertakings owned by bodies corporate shall be deemed to be under the same management, -

(ii) if the managing director or manager of one such body corporate is the managing director or manager of the other; or

(iv) If one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day

when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together

with the relatives of such directors) one-third of the directors of the other

30. Admittedly, Mr. K. Sundaram is the managing director of both the transferor and transferee companies. Both the companies have 14 directors

of which 8 directors are common. In the circumstances, it is rightly conceded by Mr. Swamidurai that the first requirement under s. 23(3) of the

M RTP Act is satisfied.

31. The second condition to be satisfied under s. 23(3) of the M RTP Act, is such inter-connected undertakings should not be dominant

undertakings ? A dominant undertaking is defined in s. 2(d) thus :

"Dominant undertaking" means an undertaking which either by itself or along with inter-connected undertakings, -

(i) produces, supplies, distributes or otherwise controls not less than one-third of the total goods of any description that are produced, supplied or

distributed in India or any substantial part thereof, or

(ii) provides or otherwise controls not less than one-third of any services that are rendered in India or any substantial part thereof;

Explanation VI. - For the purposes of this clause, "relevant year" means any one year of the three calendar years immediately preceding the

preceding calendar year in which the question whether an undertaking is or is not a dominant undertaking is determined.

32. The petitioner have filed a statement containing the total production figures of both the companies separately as well as their production along

with the production of their inter-connected undertakings for the last four years ending 31st March, 1976, 31st March, 1977, 31st March, 1978,

and 31st March, 1979. It is seen from the statement that the production of the transferor and the transferee-companies together with their

undertakings will be less than one-third of the total production of not only the total goods of the description produced or distributed in the whole of

India but also in South India. It is, therefore, clear that the two companies are not dominant undertakings within the meaning of s. 23(3) read with

s. 2(d) of the M RTP Act and this fact is not disputed by Mr. Swamiduarai.

33. The counsel for the petitioners and the counsel for the Regional Director, Company Law Board, do not agree as regards the nature of the third

condition to be satisfied for the applicability of s. 23(3) of the M RTP Act. According to Mr. S. V. Subramaniam, if both the companies produce

the same goods, prior sanction of the Central Govt. is not required under s. 23(3) of the MRTTP Act. But according to Mr. Swamidurai, only if

both the companies do not produce the same goods prior sanction will not be necessary and if they produce same goods prior sanction will be

required under s. 23(3) of the MRTTP Act. On a reading of s. 23(3), I am inclined to agree with the submissions of the learned counsel for the

petitioners. To repeat sub-s. (3) of s. 23 reads :

Nothing in sub-section (1) or sub-section (2) shall apply to the scheme of merger or amalgamation of such inter-connected undertakings as are

not dominant undertakings and as produce the same goods." If the legislature had intended that sub-ss. (1) and (2) shall not apply to undertakings

which produce different goods then the language of s. 23(3) should have been "as are not dominant undertakings and as do not produce the same

goods". In my opinion, the language of s. 23(3) as it now stands does not warrant an interpretation being put so as to mean that the provision will

not be applicable to undertakings which produce the same goods. In this connection, two cases have been cited before me.

34. In *Tata Iron and Steel Co. Ltd., In re* [1975] 45 Comp Cas 355, the interpretation of the words "as produce the same goods" in s. 23(3) of

the MRTTP Act came up for consideration. Tulzapurkar J., as he then was, observed thus (pp. 367, 368) :

... section 23(3) carves out an exception to the general rule which has been enunciated in sub-sections (1) and (2) of section 23. Having regard to

the language used in sub-section (3) of section 23 quoted above, it seems to us very clear that in order that the proposed scheme of amalgamation

or merger should fall within the ambit of that exception, three conditions are required to be satisfied : (a) the amalgamation or merger must relate to

or be of inter-connected undertakings; (b) that such inter-connected undertakings should not be dominant undertakings; and (c) that these

undertakings should be such as produce the same goods. If all these aforesaid three conditions are satisfied, then the proposed scheme of

amalgamation or merger between such inter-connected undertakings is taken out of the purview of sub-section (1) or sub-section (2) of section

23. In other words, to such a scheme of merger or amalgamation, no prior approval of the Central Government will be necessary and no

application for obtaining for obtaining such approval of the Central Government need be made before the court is called upon to accord its

sanction thereto. We would also like to observe that in each of the three conditions specified in sub-section (3), certain expressions have been

used. For instance, the first condition requires that the amalgamation or merger must be of "inter-connected undertakings". The second condition

requires that such inter-connected undertakings should not be "dominant undertakings" and that these must be such as produce the same "goods".

35. In that particular case, the transferor-company undoubtedly produced coal. In fact, it was not argued before the Bench of the Bombay High

Court on behalf of the Regional Director of Company Law Board that to satisfy the third condition under s. 23(3) of the MRTP Act the two

companies which were sought to be amalgamated into one should not produce the same goods, but should produce different goods. On the other

hand, the argument that was sought to be advanced, which was not accepted, was that the word ""goods"" meant and was referable to production of

any product and that the expression could not be considered so as to include production of any intermediate product like raw material intended to

be used for producing the products or marketable products. Therefore, since the undertaking of the petitioner-company as well as the undertaking

of the transferor-company were engaged in the production of coal, the two undertakings were regarded as producing the same goods and it was

held that the third condition was satisfied.

36. Mr. Swamidurai heavily learned on the decision of Desai J. of the Gujarat High Court in *Kril Standard Products P. Ltd., In re* [1976] 46

Comp Cas 203. In that case, *Kril Standard Products Private Ltd.* was sought to be merged with *Art Leather Private Ltd.* The directors of the two

companies had passed resolutions proposing a scheme of arrangement for amalgamation of the two companies and the scheme was approved at

the meetings of the creditors of the transferor-company. Thereafter, a petition under s. 391(2) of the Companies Act was filed before the company

court for approval of the scheme of amalgamation. Admittedly, the transferor-company and the transferee-company were not engaged in the

production of the same goods. The transferor-company, *Kril Standard Products Private Ltd.*, was producing blow moulding machines and

injection moulding machines and the transferee-company, Art Leather Private Ltd., was engaged in the manufacture of tracing cloth and processing

of book binding cloth. Before the company court the only objector was the Regional Director, Company Law Board, Western Region, Bombay.

One of the various contentions advanced on behalf of the Regional Director, Company Law Board, was that it was incumbent upon the petitioner-

company to have obtained the previous approval of the Central Govt. for the proposed scheme of amalgamation under s. 23 of the MRTP Act as

the two companies which were proposed to be amalgamated did not fall within the exception contained in s. 23(3) of the MRTP Act. There was

no controversy that both the transferor-company and the transferee-company were inter-connected undertakings and neither of them was a

dominant undertaking and that consequently conditions 1 and 2 of s. 23(3) of the MRTP Act had been satisfied. The controversy between the

petitioner-company and the Regional Director, Company Law Board, centered round the third condition. Unlike in this case, the counterpart of

Mr. Swamidurai in the Gujarat High Court, Mr. Vakharia on behalf of the Regional Director, Company Law Board, advanced the contention that

in order to attract the applicability of s. 23(3) the two undertakings must be inter-connected, must not be dominant and must also be producing the

same goods. On behalf of the petitioner-company, Mr. Nanavati argued that the two undertakings must not be producing the same goods and in

that event alone the third condition provided for in s. 23(3) of the MRTP Act would be satisfied. Desai J. of the Gujarat High Court accepted the

contention advanced by Mr. Nanavati on behalf of the petitioner-company and held that to attract the third condition provided for in s. 23(3) of the

MRTP Act both the undertakings should not be producing the same goods. In dealing with the contention, the learned judge has observed as

follows (p. 223) :

On a plain grammatical meaning of the language employed in sub-section (3) it appears that the third condition must be that both the undertakings

must not be producing the same goods. The word "not" need not have been used twice over. The expression "as are not dominant undertakings

and as produce the same goods" would, on a plain grammatical reading of the language employed in the expression, mean that none of the

undertakings is a dominant undertaking and undertakings sought to be amalgamated are not producing the same goods.

37. Even the policy underlying the Act would support the construction I am inclined to put on the language of the sub-section. If definition of

"dominant undertaking" is recalled at this stage, it has reference to the production, supply and distribution of goods. Now, an undertaking would be

a dominant undertaking, if it produces, supplies, distributes or controls not less than one-third of the total goods of any description that are

produced, supplied, etc., in India. If the last condition were to mean that they must be producing the same goods, then it is quite possible that, on

amalgamation, a composite unit may become a dominant undertaking. The exception sought to be carved out would lose all meaning. The

legislature never wanted to allow more and more dominant undertakings to come into existence by merger or amalgamation. Therefore, the

legislature permitted the scheme of merger or amalgamation in respect of undertakings, none of which is a dominant undertaking and a composite

undertaking would not become dominant undertaking. The last condition can only be satisfied if the undertakings sought to be amalgamated are not

producing the same goods. If they are producing the same goods, the composite undertaking may as well become a dominant undertaking and by

the very exception what is sought to be prohibited by the substantive section would be achieved. Therefore, both from the point of view of plain

grammatical meaning of the language employed in sub-section (3) as well as the object sought to be achieved by the provisions contained in Part A

of Chap. II, the meaning that can be assigned to the expression "as are not dominant undertakings and as produce the same goods" would be that

none of the undertakings sought to be amalgamated is dominant undertaking, and they are not producing the same goods. In order, therefore, to

attract sub-section (3), three conditions which must be satisfied are that : (i) the scheme of amalgamation is in respect of inter-connected

undertakings; (ii) that none of them is a dominant undertaking; and (iii) the undertakings sought to be amalgamated are not producing the same

goods. If these three conditions are satisfied, sub-section (3) will be attracted.

38. On a careful reading of s. 23(3) of the MRTP Act and on an anxious consideration of the decisions in *Tata Iron and Steel Co. Ltd.*, *In re*

[1975] 45 Comp Cas 355 and in Kril Standard Products P. Ltd., In re [1976] 46 Comp Cas 203, I am unable to agree with the view expressed

by Desai J. in Kril Standard Products P. Ltd., In re. I am of the view that the only conclusion that can be reached on a plain grammatical meaning

of the language employed in s. 23(3) of the MRTP Act is that the undertaking should be producing the same goods. It is not a case where the

word "not" in the sentence is omitted on the ground that it need not be used twice over. It is one of the fundamental rules of interpretation of statutes

that the intention of the legislature is primarily to be gathered from the language used. In construing a statute the language of the statute should be

read as it is and any addition or substitution of words should be avoided. It is not for courts to aid the legislature's defective phrasing of an Act or

add or mend and by construction make up deficiencies which are left there. It is contrary to all rules of construction to read words into an Act

unless it is absolutely necessary to do so. Therefore, I am inclined to agree with Tulzapurkar J. in Tata Iron and Steel Co. Ltd., In re [1975] 45

Comp Cas 355 and hold that in order to attract the applicability of s. 23(3) of the MRTP Act the scheme of arrangement must be between

companies which are inter-connected and which are not dominant and which produce the same goods. In this case, both the companies are

engaged in the production of same kind of goods, viz., yarn and cloth. In the circumstances, all the three conditions mentioned in s. 23(3) of the

MRTP Act are satisfied and, therefore, as rightly pointed out by the learned counsel for the petitioner in the present case, it is not necessary for the

transferor and transferee-companies to get the prior approval of the Central Govt. for the proposed scheme of amalgamation under s. 23(3) of the

MRTP Act.

39. In this connection, it is significant to refer to the fact that the scheme of amalgamation has been approved by the specified authority under s.

72A of the I.T. Act, 1961, by its order No. 2(16)/78-CVS/Ministry of Industry dated January 9, 1979. Section 72A has been introduced in the

I.T. Act, 1961, by the Finance (No. 2) Act of 1977. Section 72A so far as it is relevant for our present purpose reads as follows :

72A. (1) "Where there has been an amalgamation of a company owning an industrial undertaking or a ship with another company and the Central

Government, on the recommendation of the specified authority, is satisfied that the following conditions are fulfilled, namely :-

(a) the amalgamating company was not, immediately before such amalgamation, financially viable by reason of its liabilities, losses and other

relevant factors;

(b) the amalgamation was in the public interest; and

(c) such other conditions as the Central Government may, by notification in the Official Gazette, specify, to ensure that the benefit under this section

is restricted to amalgamations which would facilitate the rehabilitation or revival of the business of the amalgamating company,

then, the Central Government may make a declaration to that effect, and, thereupon, notwithstanding anything contained in any other provision of

this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may

be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and the other

provisions of this Act relating to set-off and carry forward of loss and allowance for depreciation shall apply accordingly ...

40. Explanation (b) defines specified authority as meaning such authority as the Central Govt. may, by notification in the Official Gazette, specify

for the purposes of the section. The following five persons have been appointed as specified authority for the purpose of s. 72A of the I.T. Act,

1961, as per notification No. S.O. 710(E) dated October 11, 1977, published in the Gazette of India, Extry., Pt. II, section 3(ii), p. 2669, dated

October 11, 1977 ([1977] 110 ITR 14. : (1) Secretary, Dept. of Industrial Development, Ministry of Industry, Govt. of India, (2) Secretary,

Dept. of Company Affairs, Ministry of Law, Justice and Company Affairs, (3) Secretary, Ministry of Labour, Govt. of India, (4) Secretary, Dept.

of Economic Affairs, Ministry of Finance, Govt. of India and (5) Chairman, Central Board of Direct Taxes, Dept. of Revenue, Ministry of Finance,

Govt. of India. Rule 3 of the MRTP Rules, 1970, provides that every notice given or application made to the Central Govt. under any of the

provisions of the MRTP Act shall be sent to the Department of Company Affairs of that Government. It is significant that the Secretary of the

Department of Company Affairs, which department has to arrive at a decision

whether the companies in respect of which a scheme of amalgamation is proposed come within the exception provided under s. 23(3) of the MRTP Act, is one of the five persons constituting the specified authority, for the purpose of s. 72A of the I.T. Act, 1961. It is, therefore, reasonable to assume that if really the two undertakings in the present case do not come within the ambit of s. 23(3) of the MRTP Act on the ground that they are engaged in the production of the same goods and not different goods, the approval of the proposed scheme under s. 72A of the I.T. Act, 1961, would not have been granted. The assumption is strengthened by a perusal of para. 6A of the guidelines issued for the purpose of approval of amalgamation under s. 72A of the I.T. Act by the specified authority. The said paragraph reads as follows :

If either the amalgamating company or the amalgamated company owns an industrial undertaking which is registered under the MRTP Act, 1969, the scheme of amalgamation will be recommended by the specified authority after the requirements of the MRTP Act are met.

41. These guidelines postulate that the specified authority before approving the proposed scheme of amalgamation under s. 72A of the I.T. Act, 1961, is expected to satisfy itself that the requirements of the MRTP Act are satisfied if the amalgamating companies happen to be industrial undertakings registered under the provisions of the MRTP Act. In this connection, my attention has been drawn to question No. 4(c) of the application dated February 24, 1978, submitted by the petitioners to the specified authority under s. 72A of the I.T. Act, 1961, and the reply thereto.

Question :

Please indicate whether the scheme of amalgamation would come under the exemption provided u/s 23(3) of the MRTP Act from seeking permission under that Act for amalgamation ?

Answer :

The scheme comes under the exemption provided u/s 23(3) read with sub-section (9) of the MRTP Act as the undertakings are not dominant undertakings and produce the same goods.

42. The petitioners have, therefore, brought to the notice of the specified

authority under s. 72A of the I.T. Act, 1961, that the amalgamating companies come within the exception adumbrated under s. 23(3) of the MRTP Act on the ground that they are not dominant undertakings and that they produce the same goods and that the same has been accepted by the said specified authority. I am conscious of the fact that the sanction accorded to the proposed scheme of amalgamation by the specified authority under s. 72A of the I.T. Act, 1961, is not a factor on which will depend the interpretation to be put on s. 23(3) of the MRTP Act. On an independent consideration of the language of s. 23(3) of the MRTP Act, I have come to the conclusion that to be eligible for exemption under s. 23(3) apart from being not dominant undertakings, the amalgamating companies should be engaged in the production of the same goods and not different goods. I have referred to the fact of the petitioners' filing an application for approval under s. 72A of the I.T. Act, 1961, and the necessary sanction being accorded by the specified authority only for the purpose of showing that the conclusion of mine is justified by the manner in which the specified authority has dealt with the application for approval of the sanction under s. 72A of the I.T. Act, 1961.

43. Yet another ground of objection raised by Mr. Swamidurai, though feebly, was that notice should have been given to the creditors of the two

companies. It is not disputed by the learned standing counsel for the Central Govt. that the petitions had been widely advertised in the Fort St.

George Gazette on May 3, 1978, in Nava India on May 4, 1978, and in The Hindu on May 5, 1978. Despite the fact that the petitions have been

widely advertised no shareholder or creditor of the company had come and objected to the sanction being accorded to the proposed scheme of

amalgamation. It is stated on behalf of the petitioners that the Central Bank of India is a major creditor of the transferee-company. It is significant

that this bank has not come forward to oppose the application. It is further stated in the additional reply affidavit and that is not controverted by the

learned standing counsel for the Central Govt., that persons to whom moneys are due under deferred payment have consented to the scheme.

Further, all the creditors, secured and unsecured, become creditors of the transferee-company which is admittedly a stronger company from the

financial point of view. The learned counsel was not able to convince the court in

what manner the scheme of amalgamation will be prejudicial to the creditors of the company. Rightly, therefore, Mr. Swamidurai did not pursue this contention further.

44. To sum up, the scheme has been approved and accepted by an overwhelming majority of the shareholders, present in number and in value, of the two companies at the two meetings held separately under orders of this court. The exchange ratio adopted in the scheme of amalgamation has been found to be fair and reasonable on a consideration of the various factors which are necessary to be taken into consideration not only by the respective firms of auditors of the two companies, but also by an independent firm of chartered accountants, M/s. Venkatram and Company.

There is no allegation that the books of accounts are not reliable. No grounds have been suggested why the report of the professional body of chartered accountants should not be accepted. There is no allegation of lack of bona fides on the part of the majority of the shareholders, or that

the minority has been overridden and coerced into accepting the scheme of arrangement notwithstanding the fact that the scheme of amalgamation

may be detrimental to their interest. The Regional Director, Company Law Board, has not been able to convince the court that the scheme of

amalgamation is in any way unfair or unreasonable and against public interest and discharge the burden which lies heavily on him in his role as

objector to the scheme of amalgamation. The allegation in the affidavit filed on behalf of the transferor-company is that the company has been

running at a loss for the last few years and has incurred huge liabilities. It is further asserted that 40% of the existing plant and machinery of the

transferor-company need modernisation and that the company is not in a position to find the necessary financial resources. On the other hand, it is

stated that the transferee-company has made a gross profit of Rs. 1.42 crores for the year ended March 31, 1979, and a net profit of Rs. 69.39

lakhs. It is, therefore, alleged that the proposed amalgamation would help the economically non-viable unit of the transferor-company to become a

viable unit of the transferee-company and that will in the long run serve public interest as well as the interest of the textile industry as a whole. The

scheme clearly provides that all debts, liabilities and obligations of the transferor-company present and contingent shall be transferred to and

undertaken by the transferee-company and will be discharged by the latter.

45. In the result, both the petitions succeed and sanction is accorded to the proposed scheme of amalgamation.

46. As per the scheme of amalgamation, the amalgamation was to come into effect from November 30, 1977. C.A. Nos. 680 and 681 of 1979

are for permission to change the date from November 30, 1977, to April 1, 1979. These applications for change of the appointed date have been

necessitated on account of the delay in the disposal of these petitions for sanction. It was stated at the Bar that on December 27, 1978, the general

body of the companies met and passed resolutions for changing the appointed date from November 30, 1977, to April 1, 1979. The learned

standing counsel for the Central Govt. did not oppose these applications. In the circumstances, prayer No. 1 in C.A. Nos. 680 and 681 of 1979

are also ordered. The effective date on which the scheme of amalgamation dated November 2, 1977, for which necessary sanction has been

accorded this day will stand altered from November 30, 1977, to April 1, 1979.

47. In view of the fact that the transferee-company has to be dissolved without winding up, notice will be issued to the official liquidator u/s 394 of the Act.