

(1980) 03 MAD CK 0024

In the Madras High Court

Case No : Company Petition No's. 70 and 71 of 1978

**In Re: Kamala Sugar Mills Ltd.;
In Re: Tirumurti Mills Ltd.**

Date of Decision : 14-03-1980

Acts Referred:

Companies Act, 1956 — Section 391, 391(1), 391(2), 394

Income Tax Act, 1961 — Section 72A

Monopolies and Restrictive Trade Practices Act, 1969 — Section 23, 23(1), 23(2), 28

Citation : (1984) 55 CompCas 308

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Advocate : S.V. Subramaniam, for the Appellant; U.N.R. Rao, for the Respondent

Judgement

Padmanabhan, J.—C.P. No. 70 of 1978 has been filed by Kamala Sugar Mills Ltd., Coimbatore (hereinafter referred to as "the transferor-

company"), and C.P. No. 71 of 1978 has been filed by Tirumurti Mills Ltd., Coimbatore (hereinafter referred to as "the transferor-company"),

under ss. 391(1) and 394 of the Companies Act, 1956, for sanction being accorded to a scheme of arrangement and amalgamation of the said two

companies which has been approved by the members of the two companies. The transferor-company was incorporated under the Indian

Companies Act, 1913, on July 23, 1935. Its authorised capital is Rs. 30 lakhs made up of 26,000 equity shares of Rs. 100 each and 4,000

preference shares of Rs. 100 each of which 14,635 equity shares of Rs. 100 each were issued and all the shares were fully paid up. The company

was formed to carry on the business of ginning, spinning, weaving and manufacturing or dealing in cotton or other fibrous substances and the

preparation of dyeing or colouring of any other said substances and the sale of yarn, cloth and other manufactured products.

2. The transferee-company was incorporated under the Indian Companies Act, 1913, on May 15, 1946. The nominal capital was Rs. 50 lakhs

divided into 30,000 equity shares of Rs. 100 each and 40,000 10% redeemable cumulative preference shares of Rs. 50 each of Which 10,000

equity shares of Rs. 100 each were issued and all of them fully paid up. The object of the company was to carry on the business in the manufacture

of industrial products, food products, namely, starch and glucose, pharmaceutical and other chemical preparations, food products, industrial

chemical products, etc.

3. It is stated in C.P. No. 71 of 1978 that the transferor-company has virtually become a sick textile mill since the last few years. The machinery

became outdated and it had to be replaced. They could not modernise the machinery on account of the paucity of finance. Up to 1974, the

transferor-company was able to spend a sum of Rs. 24.07 lakhs modernising its plant and machinery. To meet the further financial demands it

borrowed a sum of Rs. 45.97 lakhs from the Industrial Development Bank of Indian under the deferred payment guarantee scheme and the

borrowing was made on very stringent conditions. In spite of this, the modernisation programme could not be completed. The transferor-company

began to run into losses. The power cut at that time contributed further to decrease in the quantum of production of the transferor-company. On

account of the electricity cut imposed by the Tamil Nadu State Electricity Board, the transferor-company had to install generation at a cost of Rs.

10,67,320. This increased-company was not in a position to meet the increased demand in the categories of statutory wages dearness allowance,

ESI contribution, gratuity, etc. The report submitted on February 21, 1978, by the South India Textile Research Association, Coimbatore,

discloses that if certain change were effected in the existing frames and if a some plant and machinery were modernised, the equality of the yarn

produced by the transferor-company could be improved and it would need Rs. 8 lakhs which the transferor-company has been working on a

profitable basis for a number of years. It has surplus income available with it. In the circumstances, the directors of the two companies felt that if

the transferor-company is amalgamated with the transferee-company the surplus money available with the transferee-company could be utilised for

the modernisation of the plant and viable unit. Accordingly, a scheme of amalgamation of the two companies was drawn up. Applications Nos.

1601 and 1603 of 1978 were filed for directors of this court for convening meeting of the respective shareholders of the transferor and the

transferee-company for the purpose of considering if thought fit with or without modification the said scheme of amalgamation. Nainar Sundaram J.

by his order dated July 21, 1978, directed that the meetings of the shareholders be duly convened on 8th September, 1978, at 12-30 p.m. for the

purpose of considering the scheme of amalgamation Sri R. Venkataswamy Naidu was appointed chairman of the meeting.

4. Pursuant to the order of this court dated July 21, 1978, a meeting of the equity shareholders of the transferor-company was held on September

8, 1979, at 10 a.m. at the registered office of the transferor-company in Coimbatore. Due notice for the holding of the meeting had been served on

all the shareholders of the transferor-company and notice was also given by publication in the Mail on August 3, 1978, Nava India on August 6,

1978, and in the Tamil Nadu Gazette on August 16, 1978. The meeting was attended by 65 shareholders either in person or by proxy and holding

7,552 equity shares. The value of the shares held by them came to Rs. 7,55,200. One shareholder holding 10 equity shares of the value of Rs.

1,000 voted against the resolution.

5. The meeting of the transferee-company was held under the chairman-ship of R. Venkataswamy Naidu. The meeting was attended by 67 equity

shareholders in person or by proxy holding 7,868 equity shares, the value of which came to Rs. 7,86,800. All of them voted in favour of the

resolution. The chairman has filed separate reports of the proceedings of the two meetings.

6. Consequently, the above company petitions have now been filed for the sanction of this court for amalgamation of the said two companies.

7. As per the scheme of amalgamation all the properties, movable and immovable, and other assets of whatsoever in the transferor-company shall

be transferred to and vested in the transferee-company with effect from March 31, 1978. The debts, liabilities and obligations of the transferor-

company shall stand transferred to or deemed to be transferred, so as to become the debts, liabilities and obligations of every share of Rs. 100

each held by him in the transferor-company be entitled as of rights to hold from the transferee-company, new equity shares at the rate of Rs. 100

share. The member shall rank with the assisting equity shareholders of the transferee-company excepting for the fact that they will not be entitled to

any dividend declared for the accounting year ended March 31, 1978. The members of the transferor-company will also have the option to claim

payment at the rates of Rs. 100 per equity shares in lieu of allotment of equity shares in the transferee-company.

8. The Regional Director, Company Law Board, has filed separate representations in each of the company petitions. It is admitted in the said

representation that the Central Govt. in exercise of the powers under sub-s. (2) of s. 23 of the Monopolies and Restrictive Trade Practices Act,

1969 (hereinafter referred to as "the MRTP Act"), has approved the scheme of amalgamation subject to certain observation regarding the

exchange ratio of the shares. The Regional Director, Company Law Board, has further stated that the exchange ratio fixed in the scheme of

amalgamation at 1 : 1 is not fair and reasonable and the fair exchange ratio between the transferee-company and the transferor-company is 1 : 3. It

is further stated that the transferee-company as per the balance sheet dated March 31, 1977, is not possessed of sufficient liquid assets to the

extent of Rs. 89.50 lakhs to meet the cost of modernisation of the transferor-company's machinery. According to the Regional to the Regional

Director, Company Law Board, the transferee-company has not made it clear as to how it would meet the liabilities of the transferor-company

which comes to an extent of Rs. 45.33 lakhs. It is further added that the scheme of amalgamation should be placed for a meeting of the creditors of

the two companies.

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

10. Under s. 391(2) of the Companies Act, 1956, the scheme of amalgamation should be approved by a majority in number representing three-

fourths in value of the members or class of members present and voting either in person or by proxy. It is not disputed by Mr. U. N. R. Rao, the

senior standing counsel for the Central Government, that this statutory requirement has been satisfied in this case. From the figure already given it is

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

companies. It is also clear that those who part in the two meeting are fairly representative of the majority of the shareholders of the two companies.

11. The next aspect which the court has to bear in mind is to see whether these majority of the members have been acting bona fide and whether

the minority has been overridden by the majority having interests of its own no averment in the representation filed by the Regional Director,

Company Law Board, that there has not been a fair representation of the members of the two companies at the meetings. Nor has it been alleged

that the minority have been coerced into submitting to the will of the majority. At the Bar Mr. U. N. R. Rao fairly conceded Law Board, and that it

is not his cases been made by the Regional Director, Company Law Board, and that it is not his case that there has been any lack of bona fide on

the part to the majority or that the minority have been either coerced or tricked into submitting to the will of the majority or that the acceptance of

the scheme of amalgamation of on the overwhelming majority of the member of the two companies has been the result of fraud or undue influence

practiced by the majority on the minority. In this context, it has to be noted that notwithstanding the fact that wide publicity had been given to these

petitions, no shareholder has come forward. to object to the sanction being accorded to the scheme of amalgamation. This aspect assumes greater

importance particularly because the scheme of amalgamation provided for the payment of Rs. 100 per share to the holder of every share of Rs.

100 in the transferor-company.

12. The next aspect that has to be borne in mind while considering whether sanction should be accorded to the scheme of amalgamation or not is

that the scheme as a whole is a reasonable and fair one or not. If the court finds, having regard to the scheme as a whole is fair and reasonable, and

object of the scheme, that the scheme as a whole is fair and reasonable, it is not for the court to substitute its judgment for the collective wisdom of

the court to substitute its judgment for the collective wisdom of the shareholders of the two companies. If the court finds the schemes is fair and

reasonable the burden will be on the objective to show that the scheme is so unfair and unreasonable that no reasonable man would accept it,

notwithstanding the views of the large majority of the shareholders that the scheme is a fair one, then the court should refuse to confirm the scheme of amalgamation.

13. u/s 72A of the I.T. Act, 1961, the prior sanction of the special authority has to be obtained for a scheme of amalgamation. In this case, it sits

not disputed that the specified authority, within the meaning of section 72A of the I.T. Act, has approved the scheme of amalgamation. It may be

noted that the Secretary, Department of Company Affairs, Ministry of Law, Justice and Company Affairs, is one of the five a person pose of

section 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, Extraordinary,

Part II, section 3(ii), page 2669, dated October 11, 1977. Therefore, its maybe taken that event the Secretary, Department of Company Affairs,

Ministry of Law, Justices and Company Affairs, who is none to the fives member of the specified authority u/s 72A of the I.T. Act. 1961, has

cleared the scheme of amalgamation. Therefore, it should be taken that the said authority was satisfied that the amalgamation company was not,

immediately before such amalgamation, financially viable by reason of its liabilities, losses and the relevant factors and that the amalgamation would

facilitate the rehabilitation or revival of the business of the amalgamating company.

14. Section 23(2) of the MRTP Act requires that the prior approval of the Central Govt. has the to be obtained for the scheme of merger or

amalgamation of two or more undertakings which would come within s. 23 of the said Act. Mr. S. V. Subramaniam submitted that these two

companies have not been engaged in the production of the same goods, that section of the Central Govt. under s. 23(1) of the MRTP Act was

necessary and that such sanction has already been obtained. The Central Govt. has accorded the necessary approval by its order dated 8th

November, 1979. The approval is, of course, subject to the exchange ratio of shares to be determined by the High Court as it thinks fit. It may be

noted that before the approval is given under s. 23 of the MRTP Act, the Central Govt. have to bear in mind the principles mentioned in section 28

of the MRTP Act.

15. Mr. U. N. R. Rao, firstly, submitted that the exchange ratio envisaged in the

scheme of amalgamation is not proper and the fair exchange ratio should be 1 : 3. The applicants have filed a valuation report from their auditors, P. N. Raghavendra Rao and Co., Chartered Accountants.

According to the said report, the intrinsic value of one share of the transferor-company comes to Rs. 614.40 and that the of the transferee-company comes to Rs. 644.30. The auditors have stated that the valuation has been arrived at on the basis of the W.T. Rules. According to Mr. U. N. R. Rao, the break-up value of share of the transferor-company will be work out to Rs. 329. He submitted a note on the exchange ratio at the time of hearing. However, it is not discernible from the note how the break-up value has been arrived at or whether any qualified accountant had arrived at the break-up as 1 : 3. It is not disputed that the auditors who have filed the report of the valuation on behalf of the applicants are a recognised firm of the chartered accountants. The auditors have adopted the same method of valuation of valuing the shares of both the companies.

I do not find any reason to reject the valuation of the auditors who have given their opinion as experts in the field of valuation. Apart from this, Mr. U. N. R. Rao was not in a position to convincingly point out any mistake in the valuation adopted by the auditors. Besides, the exchange ratio has been accepted without demur by the overwhelming majority of the mistake in the valuation two companies. No shareholder has come forward and objected before me that the ratio fixed in the scheme of amalgamation is neither fair nor reasonable. It cannot be disputed and it was not disputed as matter of fact by Mr. U. N. R. Rao, that the shareholders are the best judges on the rate of exchange ratio to be fixed in a scheme of amalgamation and once they have accepted it, it is not for the court to say that the shareholder of both the companies in their collective wisdom should not have accepted the exchange ratio arrived at in the scheme of amalgamation on the ground that it was detrimental to their interest.

Further, the statement of Mr. S. V. Subramaniam that the value of the shares of the two companies as quoted on the stock exchange is more or less equal was not disputed by the learned counsel for the Central Govt.

16. Mr. U. N. R. Rao then argues that it is not shown that the transferor-company has not potential of making a profit in the future. At the same time, it was not disputed that the transferor-company has been running at a loss.

In this context, it may be recalled that the specified authority under the said section 72A of the I.T. Act, 1961, would not have given sanction under the said section if it was not necessary or feasible that the transferor-company should if it was not necessary or feasible that the transferor-company should be amalgamated with the transferee-company. As against this, prima facie evidence showing that the amalgamation is fair and reasonable and not detrimental to the public interest, Mr. U. N. R. Rao has not been able to establish that the scheme of that the scheme of amalgamation is on the face of it unfair to the shareholder of either of the two companies.

17. The next contention of Mr. U. N. R. Rao was that it is not shown how the transferee-company to Rs. 45 lakhs and admittedly a sum of Rs. 89 lakhs was needed to modernise the machinery and the scheme of amalgamation did not show how the transferee-company was going to find the funds for it. Mr. U. N. R. Rao further urged that in the circumstance the scheme of amalgamation should be placed before a meeting of the creditors of both the companies. I am not persuaded by this submission of Mr. U. N. R. Rao. Firstly, the court is not concerned with the commercial merits or demerits of the scheme in question. Further, it is not contended merits or demerits of the scheme in question. Further, it is not contended that the transferee-company is not solvent enough to meet the liabilities to the transferee-company. Secondly, the scheme itself postulates that all the debts and liabilities of the transferor-company will automatically stand transferred to the transferee-company. As rightly pointed out by Mr. S. V. Subramaniam if any creditor did not accepted the scheme of amalgamation, he would have appeared before the court and objected to the scheme being sanctioned in which event the transferee-company would have paid off the said creditor. It is important to note that notwithstanding wide publicity having been given to these company petitions, no creditor has come forward to object to the scheme of amalgamation. Therefore, I do not agree with Mr. U. N. R. Rao that the proposed scheme of amalgamation is not fair to the creditors.

18. In this connection, Mr. U. N. R. Rao cited the decision of the Delhi High Court in Ansal Properties and Industries Ltd., In re [1978] 48 Comp Cas 184. On the facts of this case, I do not think it necessary to consider the

question whether in dealing with the application for a scheme of amalgamation of companies under s. 391 of the Companies Act, the court should convene a meeting of the creditors of the two companies.

Assuming that the court has got the power to direct the proposed scheme of amalgamation for consideration before the meeting of the creditors of

the two companies, I do not think on the facts of this case, it is necessary to direct such a procedure to be followed in this case. As I have already

stated, the transferee-company is admittedly a very solvent company. For the reasons already stated by me that the interest of the creditors of the

transferor-company are amply safeguarded, I do not consider it necessary to accede to the request of Mr. U. N. R. Rao, that the scheme of

amalgamation should be directed to be placed before the meeting of the creditors. In fact, I am unable to understand why the objection to the

acceptance of the scheme of amalgamation when the Secretary, Department of Company Affairs, Ministry of Law, Justice and Company Affairs,

who is one of the members of the specified authority under s. 72A of the I.T. Act, 1961, has approved the scheme of amalgamation.

19. There is also one other aspect of the matter which has to be borne in mind. Admittedly, the transferor-company is in great financial stringency.

Indisputably it has become a sick textile unit. Losses are incurred year by year. If this state of affairs is allowed to continue the situation will

become worse and the transferor-company will have to be wound up ultimately. The result would be further loss to the shareholders and creditors

of the transferor-company. It will further result in unemployment of a large number of workers. Viewed in this light also, it is but reasonable that the

scheme of amalgamation should be sanctioned. I am, therefore, satisfied that the scheme of amalgamation is not prejudicial or detrimental to the

interest of the public. On the other hand, it is beneficial not only to the public but also to the members and creditors of the transferor-company. I

allow both the petitions and accord sanction to the proposed scheme of amalgamation.

20. In view of the fact that the transferor-company has to be dissolved without winding up, notice will be issued to the official liquidator under s.

394 of the Companies Act, 1956.