
(1973) 08 GUJ CK 0014

In the Gujarat High Court

Case No : Company Petition No. 7 of 1972 connected with Company Application No. 7 of 1972

In Re: Kril Standard Products Private Ltd.

Date of Decision : 24-08-1973

Acts Referred:

Companies Act, 1956 — Section 2, 20, 23, 23(1), 23(2)
Monopolies and Restrictive Trade Practices Act, 1969 — Section 20, 23

Citation : (1976) 46 CompCas 203 : (1974) 15 GLR 810

Hon'ble Judges : D.A. Desai, J

Bench : Single Bench

Advocate : I.M. Nanavati, for the Appellant; K.G. Vakharia, for the Respondent

Judgement

D.A. Desai, J.—Kril Standard Products Private Ltd., petitioner (hereinafter referred to as "the transferor-company"), has filed this petition u/s 391(2) read with section 394 of the Companies Act praying for an order sanctioning the scheme of arrangement for amalgamation of the transferor-company with the Art Leather Private Ltd., Bombay (hereinafter referred to as "the transferee-company") and for making consequential orders as envisaged by section 394. The transferor-company was incorporated on 23rd October, 1964, with a nominal capital of Rs. 5 lakhs divided into five thousand equity shares of Rs. 100 each and the entire nominal capital was issued and subscribed and the equity shares are fully paid shares. The transferor-company was formed with the principal object of manufacturing, producing, assembling, preparing, converting, repairing, etc., injection moulding machines, apparatus and the accessories, spare parts, etc., relating thereto. The company also for some time carried on business of preparing and selling artificial leather cloth, waterproof cloth, etc. The principal activity of the transferor-company, however, was of manufacturing blow moulding and injection moulding machines. The transferor-company is a private limited company and by December, 1971, all its equity shares were purchased and held by the transferee-company and its nominees with the result that the transferor-company has become a wholly-owned subsidiary company of the transferee-company.

2. The transferee-company was incorporated on 4th September, 1948, and at present it is engaged in the manufacture of tracing cloth, processing of book binding cloth, acting as purchasing agents of Cable Corporation of India Ltd. and is also doing money-lending business for which it has got the necessary licence under the Bombay Money-lenders Act. The transferee-company appears to have recently reduced its manufacture of tracing cloth and processing of book binding cloth. It has surplus funds in the amount of about Rs. 13 lakhs. The transferee-company is also a private limited company. The authorised capital of the transferee-company is Rs. 10 lakhs divided into 10,000 equity shares of Rs. 100 each. It issued, subscribed and paid-up capital is Rs. 6,30,000 consisting of 6,300 equity shares of Rs. 100 each fully paid. The equity shares of the transferee company are held by the members of Thackersey family.

3. The directors of the transferor-company at their meeting held on 22nd day of December, 1971, unanimously adopted a resolution proposing a scheme of arrangement for amalgamation of the transferor company with the transferee-company. The purpose sought to be achieved by the proposed amalgamation is to provide liquid funds for the expansion of the production and manufacture of injection and blow moulding machines by the transferor-company. The transferor-company has been recently able to enter into an agreement with foreign collaborators, M/s. U.S.M. Corporation, United States. Pursuant to this collaboration agreement, the activities of the transferor-company are to be diversified and expanded which would need additional liquid finance. The transferee-company has surplus funds to the tune of Rs. 13 lakhs and if the transferor-company is amalgamated with the transferee-company, the transferee-company would be able to use its surplus liquid finance for expanding the activities of the transferor-company. In order to bring cohesion in management and to provide for liquid funds for expanding production which was hitherto undertaken by the transferor-company and for diversification of the activity of the transferee-company the directors proposed an arrangement for amalgamation. Similarly, the directors of the transferee-company at the meeting held on 23rd December, 1971, unanimously adopted a resolution to put forth the scheme of arrangement for amalgamation of the transferor-company with the transferee-company.

4. The transferor-company took out judge's summons in Company Application No. 7 of 1972 u/s 391(1) of the Companies Act requesting the court to give directions for convening meetings of the secured and unsecured creditors of the transferor-company for the purpose of considering and if though fit to approve with or without modification the scheme of arrangement for amalgamation as proposed by the directors of the transferor-company and the transferee company. J. B. Mehta J. gave directions by his order dated 24th January, 1972, for convening meetings of the secured and unsecured creditors of the transferor-company and appointed Mr. M. M. Shastri, Deputy Registrar of this High Court, to preside over the meetings. The Chairman appointed by the court submitted the report broadly stating in it that the scheme of arrangement for amalgamation

was approved by more than statutory majority in the meeting of the secured and unsecured creditors. After the report was received, the transferor-company filed the present petition u/s 391(2) of the Companies Act for the aforementioned reliefs.

5. While admitting the petition, Divan J. (as he then was), gave directions for advertising the petition in various newspapers and for serving notice on the Regional Director, Company Law Board, Western Region, Bombay, as required by section 394A of the Companies Act. Mr. I. M. Nanavati, learned advocate who appeared for the petitioner, has filed his affidavit stating therein that he has not received any notice either to oppose or support the petition from any creditor of the company or anyone interested in the company.

6. Mr. K. G. Vakharia, learned counsel for Central Government, appeared on behalf of the Regional Director, Company Law Board, Western Region, Bombay, and filed an affidavit of Shri S. Rajagopalan, Regional Director, Company Law Board, Western Region, contesting the petition. No one else appeared at the hearing of the petition either to support or oppose the petition.

7. The scheme of arrangement for amalgamation is set out in annexure "A" to the petition. The scheme provides for amalgamation of the transferor-company with the transferee-company. If the scheme is sanctioned, the transferor-company will have to be dissolved without winding up and that would be an end of the transferor-company. The scheme provides for provisions ancillary and incidental to such amalgamation. It is, therefore, not necessary to set out the details of the scheme.

8. Mr. K. G. Vakharia, who appeared for the Regional Director, Company Law Board, Western Region, contested the petition, inter alia, contending that :

(i) this court cannot examine the petition and accord its sanction u/s 391(2) of the Companies Act in view of the fact that the transferee-company has not approached the court, first, for getting direction for convening meeting of its members for considering and if though fit for approving the scheme of arrangement for amalgamation; and

(ii) that as Part A of Chapter III of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as "the Act"), applies to the transferor-company, the court cannot accord sanction to the scheme of arrangement for its amalgamation unless the same has been approved by the Central Government, as provided by section 23 of the Act.

9. First ground of attack was that this court cannot accord sanction to the scheme of arrangement for amalgamation of two or more companies unless each company involved in the scheme of amalgamation approaches the court u/s 391(1) of the Companies Act and obtained suitable directions for convening meetings of the members and, if the creditors are affected by the amalgamation, of the creditors for considering and if though fit for approving with or without

modification the scheme of amalgamation and pursuant to such directions, requisite meetings are convened and in each such meeting the proposed scheme of amalgamation is approved by a statutory majority. Mr. Vakharia pointed out that, undoubtedly, the transferor-company had filed Company Application No. 7 of 1972 for obtaining requisite directions and has complied with the directions given by the court. But, urged Mr. Vakharia, that the transferee-company has neither approached this court, nor the Maharashtra High Court, as the registered office of the transferee-company is situate in Maharashtra State, with an application u/s 391(1). Therefore, it was contended that the court cannot accord sanction to the scheme of amalgamation at the instance of the transferee-company, without satisfying itself that those interested in the transferee-company have had a chance and opportunity to examine the scheme of amalgamation, and if the court accords its sanction at this stage, the court would be denying such opportunity to those interested in the transferee-company to examine the scheme of amalgamation as the scheme would be imposed upon the transferee-company without the members of the transferee-company having chance to express their opinion on it. Initially, Mr. Nanavati was inclined to seriously contend that there is nothing in section 391(1) which impels the transferee-company in a scheme of amalgamation to approach the court u/s 391(1) and seek direction to convene meeting at least of the members of the transferee-company for examining and according approval to the scheme. However, Mr. Nanavati expressly gave up the contention. Therefore, it is not necessary to examine the contention of merits. Following my earlier judgment on this point I would hold that where a scheme of amalgamation is proposed for amalgamation or merger of any one company with the other company, it would be incumbent both upon the transferor-company and the transferee-company to approach the court u/s 391(1) of the Companies Act and seek proper directions for convening meetings of those affected by the scheme of amalgamation and to obtain the approval of the scheme by those interested persons examining the scheme in separate meetings and approving it by a statutory majority. The view which I have taken in my earlier judgment is in accord with the view expressed by Vimadalal J. of the Bombay High Court in Ahmedabad Manufacturing & Calico Printing Company Ltd. and of the Madras High Court in In re Union Services Private Ltd. Therefore, before the present proposed scheme of amalgamation take effect it would be necessary for the transferee-company to approach the High Court having jurisdiction with an application u/s 391(1) and to seek appropriate directions and convene the meetings pursuant to the directions, and if the scheme is approved by the persons in respect of whom meetings are directed to be convened, by statutory majority, then alone the scheme can be given effect to. As I am inclined to accord sanction to the scheme of amalgamation, I would make it conditional upon the sanction taking effect subject to the sanction of the scheme by the Maharashtra High Court upon an application made by the transferee-company.

10. The real controversy centred round the second contention of Mr. Vakharia. It

was contended that as section 20 in Part A of Chapter III of the Act applies to the transferor-company the scheme of merger or amalgamation involving the transferor-company cannot be sanctioned by this court, unless the scheme of amalgamation has been approved by the Central Government, as required by section 23 of the Act. In order to examine this contention in its proper perspective, it is necessary to refer to some of the provisions of the Act. Long title of the Act shows that it is an Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. The Act came into force on 1st June, 1970. Section 2(d) defines "dominant undertaking" to mean as under :

"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."

Section 2(g) defines "inter-connected undertakings" to mean as under :

"Two or more undertakings which are inter-connected with each other in any of the following manner, namely :- (i) if one owns or controls the other,

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

(a) if one manages the other, or

(b) if one is a subsidiary of the other, or

(c) if they are under the same management within the meaning of section 370 of the Companies Act, 1956, or

(d) if one exercises control over the other in any other manner,

(vi) if the undertakings are owned or controlled by the same person or group of persons,

(vii) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses."

Section 2(j) defines "monopolistic undertaking" to mean as under :

"(i) a dominant undertaking which, or

(ii) an undertaking which, together with not more than two other independent undertakings, -

(a) producers, supplies, distributes, or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in India or any substantial part thereof, or

(b) provides or otherwise controls not less than one-half of the services that are rendered in India or any substantial part thereof."

11. Chapter III is divided into three parts. In this petition we are concerned more with the provisions contained in Part A and especially section 20 and 23 thereof. Section 20 reads as under :

"20. This Part shall apply to -

(a) an undertaking if the total value of -

(i) its own assets, or

(ii) its own assets together with the assets of its inter-connected undertakings, is not less than twenty crores of rupees;

(b) a dominant undertaking -

(i) where it is a single undertaking, the value of its assets, or

(ii) where it consists of more than one undertaking, the sum total of the value of the assets of all the inter-connected undertakings constituting the dominant undertaking is not less than one crore of rupees."

Section 23 reads as under :

"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) of 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) of 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"

12. The contention is that the transferor-company and the transferee-company are inter-connected undertakings, and the total value of their assets together with the assets of their other inter-connected undertaking is not less than twenty crores of rupees; and, therefore, Part A applies to them. And if Part A applies to them, any scheme of amalgamation in respect of the undertaking to which Part A applies, cannot be sanctioned by the court, unless the scheme has been approved by the Central Government. Undoubtedly, if either to the transferor-company or to the transferee-company Part A of Chapter III of the Act applies, no scheme of amalgamation in respect to such an undertaking with any other undertaking can be sanctioned by the court unless the scheme of amalgamation has been approved by the Central Government. It is an admitted position that neither the transferor-company nor the transferee-company has approached the Central Government for according approval to the proposed scheme of amalgamation. If, therefore, it is found as a fact the Part A of Chapter III applies either to the transferor-company, or the transferee-company, or to both, this petition cannot be granted and the court cannot accord its sanction to the proposed scheme of amalgamation as the Central Government has not been given an opportunity to examine it.

13. Mr. I. M. Nanavati, learned advocate who appeared for the petitioner, repelled the contention by putting forth a two-fold reply to the contention of Mr. Vakharia. Says Mr. Nanavati, that Part A of Chapter III does not apply either to the transferor-company, or to the transferee-company and their other inter-connected undertakings, because the total value of their assets does not exceed twenty crores of rupees. The second limb of the reply was that even if the court comes to the conclusion that either to the transferor-company, or to the transferee-company, or to any its inter-connected undertakings, Part A of Chapter III applies, and, therefore, the scheme of amalgamation involving such an undertaking would need prior approval of the Central Government before the court can proceed to accord its sanction to it under the provisions of the Companies Act, as envisaged by section 23 of the Act, yet, in view of the provision contained in sub-section (3) of section 23, the proposed scheme of amalgamation being a scheme of amalgamation of two inter-connected undertakings which are not dominant undertakings and which do not produce the same goods, the fetter placed on the court's power to sanction the scheme is removed and the bar is lifted and the court can proceed to examine the scheme of amalgamation on its merits, notwithstanding the fact that neither the transferor-company, nor the transferee-company, has approached the Central Government for according approval to the scheme of amalgamation. In other words, Mr. Nanavati contended that sub-section (3) of section 23 carves out an exception to sub-section (1) and (2) and if conditions for attracting application of sub-section (3) are satisfied, the bar or fetter placed on the power of the court u/s 23(1) and

(2) would be lifted. Therefore, the first important question to which the court must address itself is : Whether Part A of Chapter III, and especially the provision contained in section 20 applies either to the transferor-company or to the transferee-company ? At this stage, it is necessary to state some undisputed facts.

14. Mr. S. Rajagopalan has annexed a statement to his affidavit-in-reply in which he has set out at Sr. Nos. 1 to 26, different undertakings and against the name of each undertaking its total assets; and on the basis of this statement, it was contended that the undertaking set out at Sr. Nos. 1 to 26 in the statement are inter-connected undertakings and the value of their total asset is not less than twenty crores of rupees, and, therefore, to each one of the inter-connected undertaking Part A of Chapter III would apply. In the statement, Bhor Industries Pvt. Ltd. is shown at Sr. No. 1. It is an admitted position that Bhor Industries Pvt. Ltd. is a dominant undertaking to which the Act applies. A photostat copy of the certificate issued to the Bhor Industries Pvt. Ltd. under the Act has been place on record and it shows that Bhor Industries Pvt. Ltd. is an undertaking which has been registered in the register maintained under sub-section (2) of section 26 of the Act. The register contemplated by sub-section (2) of section 26 is a register to be maintained under the Act and in which name of the undertakings to which the Act applies have to be registered. It is again an admitted position that Bhor Industries Pvt. Ltd. is a dominant undertaking, meaning thereby that it by itself produces, supplies, distributed or otherwise control not less than one-third of the total goods which are in its line of manufacture that are produced, supplied or distributed in India or any substantial part thereof. It is again an admitted fact that the undertaking shown at Sr. Nos. 2 to 20 are inter-connected undertakings amongst themselves as well as with the dominant undertaking, namely, Bhor Industries Pvt. Ltd. Therefore, undertakings shown at Sr. Nos. 1 to 20 are admittedly inter-connected undertakings. These undertakings are held to be inter-connected undertakings because they are under the same management. The total value of the assets of the undertakings shown at Sr. Nos. 1 to 20 comes to Rs. 9.82 crores. It may be mentioned that in the statement annexed to the affidavit of Mr. S. Rajagopalan the value of the assets of the undertaking shown at Sr. Nos. 13 to 20 is not shown. The figures were supplied by Mr. I. M. Nanavati and then the totals are made. The total value of the assets of undertakings ar Sr. Nos. 1 to 26 comes to Rs. 25.70 crores after adding the value of the assets of the undertakings shown at Sr. Nos. 13 to 20. The petitioner vehemently contended that the undertakings shown at Sr. Nos. 21 to 26 are not inter-connected undertakings with the undertakings shown at Sr. Nos. 1 to 20. It was, therefore, contended on behalf of the petitioner that if the total value of the assets of the undertakings shown at Sr. Nos. 21 to 26 are excluded from the total value of the assets of the undertakings shown at Sr. Nos. 1 to 26, the total value of the assets of undertakings shown at Sr. Nos. 1 to 20, which are admittedly inter-connected undertakings, would come to Rs. 9.82 crores. And on that reckoning of the factual position, section 20(a) will not apply because the total

value to the assets of the transferor-company or of the transferee-company of the total value of the resultant amalgamated company, or the total value of the assets of the transferor and transferee-companies along with the total value to the assets of its inter-connected undertakings, would not exceed twenty crores of rupees. This factual position was not disputed by Mr. Vakharia.

15. Mr. Vakharia, however, contended that according to the Central Government, the undertakings shown at Sr. Nos. 21 to 26 in the statement annexed to Mr. S. Rajagopalans's affidavit-in-reply are inter-connected undertakings with the dominant undertaking shown at Sr. No. 1 and its inter-connected undertakings shown at Sr. Nos. 2 to 20; and if that statement is accepted, the total value of the assets of the inter-connected undertakings, including the transferor and transferee-companies would exceed twenty crores of rupees and section 20 in Part A of Chapter III of the Act would apply to the transferor-company and the transferee-company, because they are inter-connected undertakings. In this connection, it is worthwhile to examine the case of an undertaking mentioned at Sr. No. 23, Hindustan Spinning and weaving Company Ltd., because the total value of its assets is Rs. 7.95 crores. If it is shown that Hindustan Spinning and Weaving Company Ltd. is not an inter-connected undertaking either with the dominant undertaking, Bhore Industries Pvt. Ltd., or with other inter-connected undertakings shown at Sr. Nos. 1 to 20, then the total value of its assets will have to be deducted from the total value of the assets of all 26 undertakings and the total value of the assets of the undertakings other than the one shown at Sr. No. 23 works out to Rs. 17.75 crores, and, therefore, section 20(a) in Part A would not apply to the transferor-company and transferee-company. It is not, therefore, necessary to examine the question whether the undertakings shown at Sr. Nos. 21, 22, 24, 25 and 26 are inter-connected undertakings with the undertakings shown at Sr. Nos. 1 to 20, because even if the value of their total assets is added to the value of the total assets of the undertakings shown at Sr. Nos. 1 to 20, the total value of the assets would not exceed twenty crores of rupees, and the outcome would not be different.

16. According to the Central Government, Hindustan Spinning and Weaving Company Ltd. is an inter-connected undertaking with the undertakings shown at Sr. Nos. 1 to 20, because they are under the same management, within the meaning of section 370 of the Companies Act, 1956. Relevant averments on this point in the affidavit-in-reply of Mr. S. Rajagopalan are as under :

"I say that Hindustan Spg. and Wvg. Mills Ltd. was formerly comprised of two separate undertakings, viz., Indian Manufacturing Co. Ltd. and Hindustan Spg. & Wvg. Mills Co. Ltd. and both these undertakings were managed by the Thackersey group as their managing agents. In April, 1970, Hindustan Spg. & Wvg. Mills Co. Ltd. was amalgamated with Indian Manufacturing Co. Ltd. and the name of Indian Manufacturing Co. Ltd. has been changed to the present name of the composite undertaking, viz., Hindustan Spg. & Wvg. Mills Ltd. This undertaking is even now managed by Thackerseys associated with the family of

Voras who were interested in the former managing agency firms. Out of 10 directors of the said undertaking, Thackerseys and Voras constitute majority of 7, i.e., 4 directors belonging to Thackerseys and 3 to Voras. As a matter of fact, this undertaking has been all along managed by Thackerseys in association with Voras and the inference is clear that Voras have been close associates of the Thackerseys in managing this undertaking. It would, therefore, be obvious that this undertaking is for all the purposes under the control of the same group as the undertaking at Sr. No. 1 to 20 of the enclosed statement which are managed as well as controlled by the Thackerseys. The Bhor Industries Private Ltd. in its balance-sheet as at March 31, 1970, has also shown this company as a company under the same management."

17. Two or more Undertakings would be inter-connected undertakings within the meaning of the Act if, amongst other things, where undertakings are owned by a body corporate if they are under the same management within the meaning of section 370 of the Companies Act, 1956. Section 370(1B) of the Companies Act provides that two bodies corporate shall be deemed to be under the same management if any one of the five conditions therein set out is satisfied. Mr. Vakharia was specifically invited to put his finger on the sub-clause of sub-section (1B) of section 370 which is attracted in this case, so as to come to the conclusion that the Hindustan Spinning and Weaving Company Ltd. was under the same management as Bhor Industries Pvt. Ltd. After going through various sub-clauses of sub-section (1B) of section 370, Mr. Vakharia, with some hesitation, placed his finger on clause (v), a bare perusal of which would be sufficient to negative his contention. In order to attract sub-clause (v) of sub-section (1B) of section 370, it must be shown that one or more directors of the one body corporate while holding. Whether by themselves or together with their relatives the majority of shares in that body corporate also hold, whether by themselves or together with their relatives, the majority of shares in the other body corporate. The essential requirement would be holding of majority of shares by same individuals in two different companies and those individuals must be so related as to fall in Schedule IA referred to in section 6 of the Companies Act. Schedule IA refers to 22 different categories of relations and only those relations must be shown to be holding shares as required by clause (v) in sub-section (1B) of section 37 of the Companies Act. There is no factual averment to that effect. In fact, there is no averment showing holding of shares of the Hindustan Spinning & Weaving Mills Ltd. and Bhor Industries Pvt. Ltd. or any of its inter-connected undertakings. In fact, this difficulty was present to the mind of Mr. Vakharia while putting forth this contention, because in para. 7 of the affidavit-in-reply, Mr. S. Rajagopalan had averred that "the term "Thackersey persons" refers to the members and relatives of the family of Thackerseys among whom Shri. K. M. D. Thackersey, his brothers and Lady Premila v. Thackersey are the leading members, though the relationship of K. M. D. Thackersey and Lady Premila Thackersey, is not covered by Schedules IA to section 6 of the Companies Act, 1956, their unity of interest due to their close family relationship cannot be

ignored for the purpose of management control by Thackersey group of persons". If sub-clause (v) of sub-section (1B) of section 370 clearly provides for holding of majority of shares by relations in both the companies and the relation must be only those relations set out in Schedule IA shown in section 6 of the Companies Act, any further extension of the provision by including some other relations as is understood in popular vocabulary cannot attract the application of the section. Therefore, the contention will have to be rejected on two specific grounds : (i) that holding of the shares of the two concerned companies is not set out; and (ii) it is not shown that the majority holders of shares in both concerns are relations within the degree of relationship as set out in Schedule IA referred to in section 6 of the Companies Act. However, when the case of Hindustan Spinning & Weaving Mills Ltd. is examined from the stand-point of majority directors being common both to than company and Bhor Industries Pvt. Ltd., the fallacy of the argument becomes evident. An attempt was made to urge that Thackerseys are in control and management of Bhor Industries Pvt. Ltd. This is not disputed. It was tatted that Hindustan Spinning & Weaving Mills Ltd. is controlled and managed by Thackerseys. This was seriously disputed. Now, Hindustan Spinning & Weaving Mills Company Ltd. Indian Manufacturing Company Ltd. were managed by the managing agents and the managing agents were a firm. By efflux of time the managing agency agreement expired and it was not renewed. In the meantime in April, 1970, Hindustan Spinning & Weaving Mills Company Ltd. was amalgamated with Indian Manufacturing Company Ltd. and the name of the composite undertaking was given as Hindustan Spinning & Weaving Mills Ltd. This Hindustan spinning & Weaving Mills Ltd. is being managed by a board of directors. There are ten members of the board of directors. Their composition is in the ratio of 4 : 3 : 3, meaning thereby that four of them belong to Thackersey group, three of them belong to Vora group and three are outsiders. Therefore, neither Thackerseys nor Voras each by themselves are in majority in the board of directors and none can be said to be controlling or managing, in the technical sense of the term, the Hindustan Spinning & Weaving Mills Ltd. But quite in ingenious, yet interesting, argument was put forward by Mr. Vakharia that Thackerseys and Voras have been jointly managing and controlling the Hindustan Spinning & Weaving Mills Ltd. for such a long time that one can say that in the commercial parlance they constitute one management. Thackerseys and Voras are not shown to be inter-related. they are two different commercial houses. Both may have their nominees in the board of directors. Both may be quite close and intimate friends. But these facts are not sufficient to constitute a single entity which can be described as in management or control of Hindustan Spinning & waving Mills Ltd. In fact Thackerseys alone cannot carry forward their proposal if the remaining directors aligned against them; so would be the position of Voras. It is those three independent unconnected and uncommitted directors who would be holding balance of power. These three individuals probably may be having almost a veto over both Thackerseys and Voras. But the submission that Voras and Thackerseys constitute one composite management because in the past they had aligned themselves together cannot

be accepted.

18. In this connection reference may be made to the affidavit in rejoinder of MR. K. M. D. Thackersey wherein he has averred that Thackerseys and Voras were not partners in any other firm nor are they related in any manner whatsoever and, therefore, to try to rope in Voras with Thackerseys is not warranted by law in any manner, particularly because the whole question is this matter is to what extent Thackerseys are controlling the board of directors of the Hindustan Spinning & Weaving Mills Ltd. and on that basis out of the 10 directors, Thackerseys are having only 4 directors and they do not constitute majority of the directors and have no control over the Hindustan Spinning & Weaving Mills Ltd. and, therefore, it cannot be urged that it is an inter-connected undertaking for the purpose of the Act with the other undertakings listed in the statement annexed to the affidavit of Mr. S. Rajagopalan. Therefore, the contention of Mr. Vakharia must be negatived on the facts disclosed in this affidavit.

19. Mr. Vakharia had also drawn the attention of the court to a statement made in the balance-sheet and statement of account of the Bhor Industries Pvt. Ltd. for the year 1970. Under the heading "Sundry debtors", there is the following entry :

0"A. Due from the following companies under the same management and/or Pvt. Cos. wherein some of the directors and/or members; Indian Mfg. Co. Ltd."

20. From this entry in the balance-sheet and the statement of accounts, an argument was spelt out that the dominant undertaking, namely, Bhor Industries Pvt. Ltd., had admitted that Indian Mfg. Co. Ltd., whose name after amalgamation is changed to Hindustan Spg. & Weg. Mills Ltd., is admittedly under the same management as Bhor Industries Pvt. Ltd. This admission would have been quite relevant but for the fact that proper explanation in this behalf is offered by Mr. K. M. D. Thackersey in his affidavit-in-rejoinder and his explanation is borne out by the relevant correspondence. It is stated in the affidavit-in-rejoinder that the said statement was made in the balance-sheet and statement of accounts of Bhor Industries Pvt. Ltd. through inadvertence and subsequently Bhor Industries Pvt. Ltd., by its letter date 20th September, 1972, in reply to the Senior Research Officer, Department of Company Affairs, Government of India, have stated so. Copies of the correspondence bearing on the subject have been annexed to the affidavit-in-rejoinder. It was also pointed out that in the balance-sheet and statement of accounts of the subsequent year the entry is deleted. It was also pointed out that in the application made by Bhor Industries Pvt. Ltd. for its registration u/s 26 it did not show that the Hindustan Spinning and Weaving Mills Ltd. was a company under the same management or was an inter-connected undertaking. Therefore, it is not possible to attach any importance to this inadvertent statement in the balance-sheet and statement of account of Bhor Industries Pvt. Ltd. for the year 1970. In fact, apart from anything else, it would not bind Hindustan Spinning and Spinning and Weaving Mills Ltd. There is, therefore, nothing to show that Hindustan Spinning and Weaving Mills Ltd. is under the same management as Bhor Industries Pvt. Ltd. or

that they are under the same management within the meaning of section 370 of the Companies Act. As a necessary corollary, while finding out the value of the total assets of the dominant undertaking, namely, Bhor Industries Pvt. Ltd. and its other inter-connected undertakings shown at Sr. Nos. 1 to 20, and adding to it the total value of the assets of the undertakings shown at Sr. Nos. 21 to 26 except No. 23, the total value of the assets comes to Rs. 17.75 crores. Now, it is not for a moment suggested that the court accepts the statement that the undertakings shown at Sr. Nos. 21, 22, 24, 25 and 26 are inter-connected undertakings with Bhor Industries Pvt. Ltd. They are left out of consideration because even if the total value of their assets is added to the total value of the assets of undertakings shown at Sr. Nos. 1 to 20, they do not exceed twenty crores of rupees. Therefore, the conclusion is inescapable that section 20(a) of Part A in Chapter III of the Act does not apply either to the transferor-company or to the transferee-company.

21. Next point to be considered is : whether section 20(b) applies either to the transferor-company or to the transferee-company. Bhor Industries Pvt. Ltd. by itself is a dominant undertaking. The transferor-company and the transferee-company along with other undertakings are inter-connected undertakings with the dominant undertaking. But neither the transferor-company, nor the transferee-company, by itself is a dominant undertaking. Therefore, section 20(b) (i) will not be attracted. It will, however, have to be found out whether the total value of the assets of the transferor-company, and transferee-company exceed one crore of rupees to eliminate the applicability of section 20(b)(ii). The total value of the assets of the transferee-company is Rs. 0.32 crore and that of the transferor-company is Rs. 0.49 crore. The total value of their assets would be Rs. 0.81 crore. It does not exceed the limit of one crore of rupees. In fact, section 20(b) would not be attracted because the first condition is not satisfied in that, in order to attract section 20(b), before the total value of the assets of the undertaking is examined, it must be a dominant undertaking. Neither the transferor-company nor the transferee-company by itself is a dominant undertaking. Therefore, for this additional reason also, section 20(b) would not be attracted in the case of the transferor-company and the transferee-company.

22. This is thus a scheme of amalgamation of the two undertakings to none of which either section 20(a) or section 20(b) would apply.

If section 20 would not apply either to the transferor-company or to the transferee-company, section 23(1)(a) would not be attracted. If the scheme of amalgamation is sanctioned, the composite company would not be one to which either clause (a) or clause (b) of section 20 would apply. In this view of the matter, section 23(1)(b) would not be applicable. If such be the position, it would not be necessary for the transferor-company to approach the Central Government for prior approval of the scheme of amalgamation before the court examines it under the provisions of the Companies Act, 1956.

23. Assuming that the court is not right in coming to the conclusion that no part

of section 20 applies to the transferor-company or to the transferee-company and further assuming that either clause (a) or clause (b) of section 20 applies to the transferor-company or to the transferee-company or it would apply to the composite company which would come into existence after the scheme of amalgamation is sanctioned, the question is : whether the transferor-company should have obtained the prior approval of the proposed scheme of amalgamation, looking to the fact that the proposed scheme of amalgamation is in respect of two inter-connected undertakings, none of which is a dominant undertaking, and both of them are not producing the same goods. In other words, would the exception carved out in sub-section (3) of section 23 be attracted in this case ?

24. The scheme of section 23 shows that if a scheme of merger or amalgamation is of an undertaking to which Part A of Chapter III applies, with any other undertaking, or on the scheme of amalgamation of two or more undertakings being sanctioned the new composite undertaking is one to which clause (a) or clause (b) of section 20 would apply, the court cannot proceed to accord sanction to such a scheme of amalgamation, unless the scheme for amalgamation has been first approved by the Central Government under the Act. I would for the present leave out of consideration sub-section (2) of section 23. Section 23(3) opens with a non-obstante clause and carves out an exception not only to sub-section (1) but to sub-section (2) also. In other words, the effect of the provision contained in sub-section (3) is that if a scheme of amalgamation is such as would otherwise require the prior approval of the Central Government as envisaged by section 23(1) or section 23(2), the same can none the less be examined by the court without the prior approval of the Central Government and sanctioned if the conditions set out in sub-section (3) are satisfied. On analysis of sub-section (3) the conditions requisite for attracting its application appear to be : (i) that the scheme of merger or amalgamation is in respect of two inter-connected undertakings; (ii) the inter-connected undertakings are not dominant undertakings; and (iii) they do not produce the same goods. Mr. Vakharia urged that in order to attract sub-section (3), the scheme of amalgamation must be in respect of two inter-connected undertakings, none of them being a dominant undertaking, and they must be producing the same goods. Says Mr. Vakharia, that Parliament has clearly manifested its intention by using plain language which unmistakably reveals the purposes behind enacting the exception. He did not dispute that sub-section (3) carves out an exception to sub-section (1) and (2) of section 23. But it was urged that the exception would apply if conditions requisite for its application are established and they appear to be that the scheme of amalgamation must be in respect of two inter-connected undertakings, none of which is a dominant undertaking, but both of which are producing the same goods. Says Mr. Vakharia, that only such a scheme may be examined by the court under the provisions of the Companies Act without the prior approval of such a scheme by the Central Government. Thus, a clear case of construction of the language used in sub-section (3) arises. Now, it must be

made distinctly clear that both the sides agree that of the three condition requisite for attracting the application of sub-section (3) there is no dispute about the first two conditions having been fulfilled. Both Mr. Nanavati and Mr. Vakharia agree that in order to attract sub-section (3), it must be established that : (i) there is a scheme of amalgamation in respect of two inter-connected undertakings, and (ii) that none of the two inter-connected undertakings is a dominant undertaking. The dispute centres round the third condition. Mr. Nanavati says that the undertakings covered by the scheme of merger or amalgamation must not be producing the same goods. On the other hand, Mr. Vakharia says that the language of sub-section (3) is clear and unambiguous and it only means that the undertakings covered by the scheme of amalgamation must be producing the same goods. This is the only point of divergence of opinion between them.

25. The cardinal rule for the construction of the Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The court has to determine the intention expressed by the words used. And in order to understand these words, it is material to inquire what is the subject-matter with respect to which they are used and the object in view. A certain amount of commonsense must be applied in construing statutes. The object of the Act has to be considered (vide *Barnes v. Jarvis*). If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense, for in that case the words of the statute speak the intention of the legislature.

26. In order to give effect to the directive principles of State policy as enunciated in sub-clause (c) of article 39 of the Constitution, this particular wholesome piece of legislation has been enacted by parliament. Article 39(c) provides that the state shall, in particular, direct its polity towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. In order to give effect to this directive principle, this Act having far-reaching consequences has been enacted by Parliament. Political independence was but a means to achieve the end of economic salvation. For speedy transformation of the backward rural society of an under-developed country into a highly advanced industrialised society and to develop economy, the State resorted to economic planning. Mixed economy ruled the root of economic planning. Consequently, the private sector reservation got a fillip and it undertook rapid industrialisation. The evils flowing therefrom became immediately visible. For the time being it was a price paid to achieve faster and higher growth rate. Soon it became evident that the cartels and giant industrial combines grew side by side and had a strangle-hold on the market, price structure, distribution and supply of goods. They started playing ducks and drakes with availability of goods and services at fair and reasonable price and the ultimate consumer became a pawn in their game. Concentration of wealth and the power flowing therefrom became a menace and threatened to destroy the basic concept of socio-economic justice on the foundation of which we in the

Constitution intended to build up an egalitarian society. The Government set up the Monopolies Inquiry Commission and the present Act is more or less drafted on the report of this Commission with such additions and alterations as were considered expedient for the effective implementation of the declared economic polity of the State in conformity with article 39(c) of the Constitution. The Act seeks to guard against acquisition of dominant position by one or more industrial units so as to be able to control the market by regulating the prices or output or eliminating competition. It seeks also to curb such practices which restrain competition and thereby deprive the community of the beneficent effects of healthy rivalry between different producers of the same commodity. This is sought to be done in public interest. If the growth of monopolies is not checked, abated or controlled, the common man in the society or the ultimate consumer would be a victim or a pawn in the game of these big industrial empires. Whenever, therefore, a question of construction of any of the provisions of this Act comes up before the court, every attempt must be made to advance the purpose of the Act, so that the polity underlying in can be given effect to.

27. It must also be made distinctly clear that the Act does not wholly prohibit amalgamation of undertakings. It frowns upon the expansion of giant undertakings so as not to permit them to acquire power to put a strangle-hold both on the market as well as on the consumer and further industrial expansion of the country. The object behind enacting section 23(3) manifests the legislative intent that there are certain schemes of amalgamation which the court may proceed to examine albeit without the prior approval of the Central Government. In fact, amalgamation of undertakings itself is not prohibited. In the case of certain types of amalgamation or merger of undertakings the Central Government wants to look into it before the court undertakes to examine it, the idea being that the Central Government is in a better position to know how this concentration of economic power would work to the common detriment. But at the same time, it cannot be disputed that the Act does envisage a scheme of amalgamation of undertakings for examination by the court without the prior approval of the scheme by the Central Government. Sub-section (3) of section 23 clearly brings out the legislative intent.

28. If one can envisage such a scheme of amalgamation of undertakings which the court can examine without the prior approval of the scheme by the Central Government within the meaning of sub-section (3) of section 23, it must be ascertained with reasonable certainty which are those schemes. These schemes must fulfill three essential conditions set out in sub-section (3). It is not disputed that two of the three conditions are fulfilled in this case. Both the transferor-company and the transferee-company are inter-connected undertakings. The second condition that none of them must be dominant undertaking is also fulfilled.

29. The controversy centres round the third condition. On a plain reading of the section, Mr. Vakharia contended that two undertakings must be producing the

same goods and only then sub-section (3) can be attracted. On the other hand, Mr. Nanavati contended that these two undertakings must not be producing the same goods, and in that event alone the third condition is satisfied. On a plain grammatical meaning of the language employed in sub-s. (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.

30. 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, distributed 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 provision contained in Part A of Chapter II, the meaning that can be assigned to the expression "as are not dominant undertakings and as product 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.

31. As stated earlier, the first two conditions are satisfied. And the third condition is equally satisfied, because it is not in dispute that the transferor-company and the transferee-company are not producing the same goods. In fact the transferor-company is producing blow moulding machines and injections moulding machines and the transferee-company is manufacturing tracing cloth, processing

of book binding cloth, etc. Therefore, all the conditions for attracting sub-section (3), of section 23 satisfied. If the case falls under sub-section (3), nothing contained in sub-section (1) or (2) of section 23 would apply to the scheme of amalgamation of such inter-connected undertakings as are not dominant undertakings and as do not produce the same goods, and the court can examine the scheme on merits even if the prior approval of the Central Government is not obtained in respect of the scheme of amalgamation of such inter-connected undertakings. Therefore, the proposed scheme did not require prior approval of the Central Government.

32. Now, having disposed of the contentions raised by Mr. Vakharia under the Monopolies and Restrictive Trade Practices Act, 1969, the court must proceed to examine whether the court would accord sanction to the scheme of amalgamation under the provisions of the Companies Act, 1956. The principles governing the court's direction for according sanction to the scheme of arrangement for amalgamation are by now well-settled. Before the court accords sanction to such a scheme, it will normally expect to be satisfied on three matters : (i) statutory provisions must have been complied with; (ii) classes must have been fairly represented; and (iii) the arrangement must be such as a man of business would reasonably approve.

33. There is enough material on record to come to the conclusion that the statutory provisions have been complied with. The board of directors of the transferor-company adopted a resolution in which the scheme of amalgamation was proposed. Direction of the court were sought u/s 391(1). Full disclosures were made at the time of seeking directions of the court u/s 391(1). There were no averments in the petition that the requirements of the proviso to section 391(2) have been complied with. Mr. Nanavati agreed to file an affidavit of the directors, Mr. K. M. D. Thackersey, to which he would annex the latest balance-sheet of the transferor-company and the affidavit would contain express statement that no investigation is pending against the transferor-company either u/s 235 or any other section of the Companies Act. It would thus appear that the statutory provisions have been properly complied with.

34. The report of the Chairman shows that at the meeting of the secured creditors three secured creditors were present and all of them unanimously voted in favour of the scheme of amalgamation. It further shows that at the meeting of unsecured creditors 9 unsecured creditors were present having total claim of Rs. 97,545 and all the nine voted in favour of the scheme of amalgamation. As the transferor-company is a wholly-owned subsidiary company of the transferor-company, meaning thereby all the equity shares of the transferor-company are held by the transferee-company or its nominees, no question arises of convening a meeting of the members of the transferor-company. Their consent is implied in their conduct in moving for sanction of the scheme of amalgamation of the transferor-company with the transferee-company. Thus, the statutory provisions are properly complied with.

35. At the meeting of the secured creditors, all the secured creditors attended the meeting. There were in all 214 unsecured creditors and none attended and unanimously voted in favour of the scheme and, therefore, classes were fairly represented.

36. Last question is whether this court should accord sanction to the scheme of amalgamation. The matter is within the discretion of the court. In exercising this discretion, the court will examine the scheme as a man of business would reasonably evaluate it. I have been often told that the court should not try to substitute its judgment for the commercial judgment of those interested in the company as expressed in various meetings. That apart, the court still has discretion in the matter and the court is not a mere rubber stamp because the scheme has been approved by a statutory majority in various meetings. The zeal with which attempt is made to acquire controlling block of shares in companies, it is not difficult for the industrialists to push through the scheme with the majority at their beck and call, but the court cannot abrogate the discretion in favour of such a majority. Therefore, the court must and should examine the scheme on its own merits. I would, however, not dilate upon this, for this reason that by the scheme of amalgamation, a wholly-owned subsidiary company merges into the holding company. The factual merger is now being converted into a legal and total merger. Further, both the companies are private limited companies, meaning thereby that they are something like a family concern. In this background, I need not examine the scheme in all its details.

37. Having given my anxious thought to the scheme, I would accord sanction to the scheme of arrangement for amalgamation of the transferor-company with the transferee-company, with this condition that the scheme shall not take effect and be operative until and unless it is sanctioned in an appropriate proceeding to be taken by the transferee-company in the High Court having jurisdiction to be invoked by the transferee-company. Subject however to this specific reservation, the consequential orders, as are required to be made u/s 394 prayed for in prayers (i) to (iv) of paragraph 12 of the petition, including the one that on scheme of amalgamation becoming effective, the transferor-company should be deemed to have been dissolved without winding up, are hereby made.

38. As the Central Government is entitled to statutory notice and as the court is inclined to examine the contentions under the Monopolies and Restrictive Trade Practices Act, 1969, I think, even if the petitioner succeeds, justice demands that the petitioner who can well afford, must pay Rs. 1,000 to the Central Government as and by way of costs.