
(2009) 06 BOM CK 0036

In the Bombay High Court

Case No : Company Petition No. 296 of 2009 and Company Application No. 288 of 2009

In Re: Reliance Industries Ltd.

Date of Decision : 29-06-2009

Acts Referred:

Companies (Court) Rules, 1959 — Rule 34
Companies Act, 1956 — Section 391, 391(2), 393, 394

Citation : (2009) 151 CompCas 124 : (2009) 94 SCL 35

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Anookumar Seth and Vishvesh Mahadeorao Raste, I.M. Chagla, Janak Dwarkadas Virag Tulzapurkar, Tapan Deshpande, Aditya Mehta and Amarchand Mangal Das, Rohit Kapadia, Yash Kapadia and Vivek M. Sharma, Shailesh Mehta, F.E.D. Vetre, Sandeep Parikh and Swati Bamugad, Vinod Joshi, Lata Pate, S.C. Pal, C.J. Joy and S.K. Mohapatra, for the Appellant;

Judgement

A.M. Khanwilkar, J.—This Petition is moved by Reliance-Industries Ltd. to obtain sanction to the scheme of Amalgamation of Reliance Petroleum Ltd. (Transferor company) with Reliance Industries Limited (Transferee Company). The Transferor Company is 75 per cent subsidiary of the Transferee Company.

2. The Petitioner Company was incorporated as Mynylon Limited sometime on 8-5-1973 in the State of Karnataka under the provisions of Companies Act, 1956. That name was subsequently changed to Reliance Textile Industries Limited on 11-3-1977. Later on, the place of registered office of the Petitioner company was changed from State of Karnataka to State of Maharashtra on 2-7-1977. Thereafter, the name of the Petitioner Company was changed to Reliance Industries Limited on 27-6-1985. The shares of the Petitioner Company are listed on the Bombay Stock Exchange and the National Stock Exchange of India.

3. The Petitioner Company has been established to carry on business set out in the Memorandum of Association, which is appended to the Petition. The Board of Directors of both the Transferor as well as Transferee Company in their respective Board Meetings approved the proposed scheme, keeping in mind the exchange

ratio suggested by M/s. Ernst & Young Private Limited and M/s. Morgan Stanley India Company Private Limited. The said swap ratio was approved by other two consultants appointed to give their fairness report namely Merrill Lynch and City Group Global Market India Ltd.

4. The Board of Directors of the Petitioner Company in its meeting on 2-3-2009 approved the scheme. The Scheme also received approval from the Bombay Stock Exchange and National Stock Exchange on 2-3-2009. On the basis of the said approval, the Petitioner Company filed Company Application No. 288 of 2009 in this Court seeking direction to convene meetings of its Equity Shareholders, Secured Creditors (including Debenture holders) and unsecured Creditors to seek their approval to the Scheme. That application was filed on 3-3-2009. This Court, by Order dated 6-3-2009, directed the Petitioner Company to convene requisite meetings on 4-4-2009. Accordingly, separate meetings of the Equity Shareholders, Secured Creditors (including Debenture Holders) and unsecured Creditors of the Petitioner Company were convened and held on 4-4-2009. In the meeting of the Equity Shareholders, 5813 Equity Shareholders holding 106,76,27,438 Equity Shares attended either personally or by proxy or by authorized representatives. Out of these 5642 Equity Shareholders holding in aggregate 106,75,59,806 equity shares constituting 98.861 per cent in number and representing 99.9998 per cent in holding Equity Shares were present in person or by proxy and voting at the meeting, voted in favour of the Scheme. On the other hand, 65 equity shareholders holding in aggregate 2143 equity shares constituting 1.139 per cent in number and representing 0.0002 per cent in holding of the equity shares, present in person or by proxy and voting at the meeting, voted against the Scheme. Besides, 106 Equity shareholders holding 65,489 votes were declared invalid. As a result, the Scheme was approved by overwhelming majority of the Equity Shareholders, present and voting either in person or by proxy at the said meeting. In the meeting of Secured Creditors held on the same day on 4-4-2009, it was attended by 39 Secured Creditors (including debenture holders) either personally or by proxy or by authorized representative. Out of them 38 Secured Creditors (including debenture holders) having aggregate outstanding value of Rs. 5878 Crore and constituting 100 per cent in number representing 100 per cent in value, present in person or by proxy and voting at the meeting, voted in favour of the Scheme. No Secured Creditors (including debenture holders) present in person or by proxy and voting at the meeting, voted against the Scheme. The vote of one secured creditor (including debenture holders) having aggregate outstanding value of Rs. 12 Crore was declared invalid. Accordingly, the scheme was approved unanimously by the Secured creditors (including debenture holders) present and voting, either in person or by proxy at the said meeting. In the meeting of unsecured Creditors, 994 unsecured creditors either personally or by proxy or authorized representative attended the said meeting. Out of them 801 unsecured creditors having aggregate outstanding value of Rs. 566.76 Crore and constituting 100 per cent in number representing 100 per cent in value, present in person or by proxy

and voting at the meeting, voted in favour of the Scheme. No unsecured creditors present in person or by proxy and voting at the meeting, voted against the Scheme. Whereas, votes of 193 unsecured creditors having outstanding value of Rs. 13.37 crores were declared invalid. Accordingly, the scheme was approved unanimously by the unsecured creditors present either in person or by proxy and voting at the said meetings.

5. After the Scheme was duly approved by overwhelming majority of the Equity shareholders and unanimously by the secured and unsecured Creditors, present Petition has been moved by the Transferee Company for sanction of the scheme of amalgamation u/s 391/394 of the Companies Act on 6-4-2009. The Petition was admitted on 9-4-2009 and fixed for final hearing on 8-5-2009. The record indicates that Notice of hearing of the Petition was duly served on the Regional Director, Registrar of Company and Central Government Advocate, as can be discerned from the affidavit of service filed in this Court. Besides, notice of hearing was published in specified newspapers as is stated in the affidavit of service. After publication of notice, three objectors have come forward to oppose the scheme. One Mr. Anup Kumar Seth filed his affidavit to oppose the scheme on 6-5-2009. Similarly, one Mr. Jayendra M. Shah filed his affidavit to oppose the scheme on 6-5-2009. The third objector Mr. Shailesh Mehta filed his affidavit on 7-5-2009. When the Petition came up for hearing on 8-5-2009, it was adjourned as the Regional Director did not file his report. Later on, the matter was directed to be listed on 19-6-2009 when the objector Mr. Shailesh P. Mehta submitted his affidavit titled as Revised limited Affidavit of objection, which he wanted to be taken on record and to ignore his previous affidavit already filed on record. That request was accepted. Matter was then taken up for hearing on 25-6-2009. On that date, the above said objectors were represented by Counsel. After the Counsel for the said Objectors were fully heard, one Mr. Vishvesh M. Raste appeared in person and wanted to hand over his affidavit to oppose the present scheme. That request was rejected keeping in mind that his objection was not filed within the time prescribed by Rule 34 of the Company Court Rules. The arguments were then concluded and the Petition deferred for pronouncement of order. However, on 26-6-2009, the Company Registrar drew my attention to the fact that one more objection has been received in the Registry by post from one Mr. Rasiklal S. Mardia. For the same reason noted in my order dated 25-6-2009, I would not take cognizance of this objection received by post; and especially because it has been brought to my notice (in chamber) after conclusion of the hearing of the Petition.

6. Be that as it may, it is noticed from the record that the Petitioner company has complied with all the statutory formalities. In that, the Board of Directors of the Petitioner Company as well as the Transferor-Company in their respective Board meetings held on 2-3-2009, have approved the proposed scheme. Both the Transferor and Transferee companies being listed Companies, have obtained approval from the concerned Stock Exchanges. The Petitioner thereafter filed application seeking direction from this Court to hold meeting of its shareholders

and creditors to seek their approval to the scheme. This Court issued certain directions on 6-3-2009, including to hold meetings on 4-4-2009. The Petitioner Company has complied with the directions given by this Court. It is noticed that all the relevant documents including valuation report and fairness opinion issued in relation to the scheme were kept for inspection of the shareholders and creditors of the Petitioner Company upto the date of meetings. In the meeting of the Equity Shareholders, Secured Creditors (including debenture holders) and Unsecured Creditors of the Petitioner company convened on 4-4-2009, the Scheme was approved with overwhelming majority of the Equity Shareholders and unanimously by the Secured Creditors (including debenture holders) and Unsecured Creditors of the Petitioner Company, present and voting at the respective meetings. Significantly, the Regional Director and the Registrar of Companies have also consented for approving the proposed scheme. Ordinarily, in this backdrop, the Court would readily accord approval to the proposed scheme keeping in mind, the well established position restated in the case of *Mafatlal Industries Ltd., In re* [1996] 87 Comp. Cas. 792 (Guj) : [1995] 3 SCL 69 (Guj.). The Supreme Court has expounded the broad contours to be borne in mind while considering the request for sanction of the scheme. It is well established that the Court cannot undertake the exercise of scrutinising the scheme placed for its sanction with a view to find out whether a better scheme could have been adopted by the parties. In the same decision, the Apex Court has observed that such exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest of majority agree to give green signal to such a compromise or arrangement.

7. However, the objectors who appeared before this Court through Counsel have vehemently argued that the Court should decline to exercise its discretion in according approval to the proposed scheme. Although the objectors have filed detailed affidavit in this Court, however, the points agitated before the Court at the time of argument by the learned Counsel were as follows.

8. Firstly, it was contended that the act of the Petitioner Company smacks of undue haste, as can be seen from the admitted dates. In that, the Board Meeting of the Transferee Company was held on 27-2-2009, in which decision to amalgamate two companies was taken. It was a Friday. It is intriguing that in a short interval of only two days during the weekend, valuation report was prepared by Morgan Stanley on Monday 2-3-2009. Not only that, the fairness report of other two experts was obtained on the same day on 2-3-2009 and the Board of Directors proceeded to pass resolution at 10.15 a.m. on the same day on 2-3-2009. These circumstances clearly indicate that the matter was hastened by the Petitioner Company for reasons best known to them. It is also possible to suggest, contends the Learned Counsel that it is a clear case of non-application of mind - not only of the Board of Directors, but also by the valuers appointed by the Petitioner Company. The next criticism by the Counsel for objector Shailesh

Mehta was in relation to the contents of the valuation report. He was at pains to point out that the valuers' report if read clause by clause or as a whole clearly indicates that no details are forthcoming. Forecast is not given, nor the valuation of the shares of the Transferee Company and the basis on which the same is done can be discerned. He submits that the report clearly admits of the fact that due diligence has not been carried out. In his submission, the report gives conflicting opinion, without disclosing any logic. Besides, it is only a document stating the conclusion of the valuers. Even with regard to the contents of the fairness report, similar criticism was made. It was stated that the basis on which the report is founded is not disclosed in any of this report. Adopting the same argument Counsel for the other objector Mr. Anup Kumar Seth, additionally argued that valuation done by the third Valuer M/s. City Group has not been produced by the Petitioner Company. The Valuation/Fairness Reports, according to him, fail to give arithmetical calculation on the basis of which the final conclusion has been reached by the concerned expert. It is argued that the reports are unintelligible. In that, no relevant and material information is made available to the Court by the experts regarding the justification of swap ratio. The report is a veiled document so as to deny the relevant information in relation to the subject matter on hand. That would disable the Court to reach at a correct conclusion. It is further submitted that objectors have suggested different methods, which would benefit the shareholders. Moreover, it is contended that crucial fact that there are some proceedings pending regarding Gas Supply Agreement between the Petitioner Company and M/s. Reliance Natural Resources Ltd., have not been taken into account. For, the impact due to the outcome of the said proceedings qua the Petitioner Company has not been reckoned at all though relevant. Indeed, the reply filed by the Petitioner company records that the same has been duly considered, which fact, however, cannot be substantiated from the reports. It was then argued that 41 per cent shares of the Petitioner Company have been acquired by group companies. It was argued that the swap ratio determined was unfair to the Shareholders of the Petitioner Company. Counsel for the said objectors in the alternative submitted that the Court may direct revaluation and invite fresh report from an independent valuer. It was argued that the two companies ought to prepare separate books of account which alone would facilitate the true valuation of the shares of the respective companies. Relying on the averments in the affidavit filed by the Regional Director that all intercompany transactions between the Transferor Company and Petitioner company will be eliminated in the Books of Account, it was argued that even Regional Director has taken exception to grant of approval to the proposed scheme. It was also argued that there are certain proceedings and investigations pending against the Petitioner company before the Regulatory Authority. The attempt of propounding the present scheme was to frustrate the said pending action. For all these reasons, it was argued that the Court may reject the present Petition. These are the broad arguments which were canvassed across the bar and in my judgment I would deal with the same a little later.

9. As aforesaid, the scope of intervention by the Company Judge while considering the scheme of amalgamation such as the present one, is no more *res integra*. The objections which are canvassed before this Court in my opinion, would not militate against the Petitioner Company. For, it cannot be said that any requisite statutory procedure has not been complied with. Nor it is a case where the scheme is not supported by requisite majority of votes of class of stakeholders. Significantly, in the present case the Companies appointed a renowned firm to undertake the determination of swap ratio of the respective shares. No one has doubted the integrity or honesty of the said expert. Moreover, the Company got checked and approved the opinion of the former by two other independent firms, who in turn have agreed with the said determination to be fair. It is also not possible to take the view that the concerned meetings of the Creditors or members or any class of them were not furnished with the relevant material to enable them to arrive at an informed decision for approving the scheme in question. On the other hand, it is noticed that requisite majority of the concerned class of voters have found the scheme to be just and fair to the class as a whole. If so, their decision would legitimately bind even the dissenting members of that class. It is not the case of the objector that necessary material indicated u/s 393 was not placed before the voters at the concerned meeting, as was required to be held in terms of Section 391 and directions given by this Court. Moreover, all the requisite material envisaged u/s 391(2) have been placed before the Court by the Petitioner Company. Going by the said material, it is not possible to take the view that the scheme is prejudicial either to the shareholders or the public. As a matter of fact, the Registrar of Companies as well as the Regional Director including the concerned Stock Exchanges have given approval/consent to the proposed scheme. Nothing has been brought to my notice so as to take the view that the scheme is violative of any provision of law or against the public policy. The scheme as a whole is found to be just, fair and reasonable from the point of view of taking commercial decision which is beneficial to class represented by them for whom the scheme is made.

10. In other words, all parameters to be borne in mind have been fulfilled in the present case. It necessarily follows that the Court will have no jurisdiction to sit over the commercial wisdom of the majority of the class of persons, who with their open eyes have given approval to the scheme. The Apex Court in the case of *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.* [1994] 2 SCL 157 has rejected similar argument of the Petitioner therein - that if some other method was to be adopted, probably the determination of valuation could have been bit more in favour of the shareholders. In other words, merely because some other method of valuation could be resorted to and would be bit favourable to the shareholders, that alone cannot militate against granting approval to the scheme propounded by the Company. The Court expounded that what is imperative is that the determination should not be contrary to law and/or unfair for the Shareholders of the Company which was being merged. The Court's obligation is to be satisfied that valuation was in accordance with law and it was

carried out by an independent body.

11. In the case of Tata Oil Mills Co. Ltd. In Re. Tata Oil Mills Co. Ltd. and In Re. Hindustan Lever Ltd., . This Court while considering objection of the shareholders that alternative share exchange ratio would have been appropriate and that the exchange ratio arrived at by the Company was incorrect, observed thus:

In my opinion, the exchange ratio as arrived at by Mr. Malegam has received the approval of shareholders holding more than 99 per cent (in number and value) shares at the meetings. No one except the shareholders holding minimum percentage of shares have complained before me. The valuation has been confirmed to be fair by two eminent firms of auditors. It would be extremely difficult to hold that the same is unfair. In any case, it has been approved by an overwhelming majority of persons affected and there is no basis to doubt their judgment. I, therefore, do not find any substance in this objection.

This view taken by the High Court has been approved by the Apex Court in the case of Hindustan Lever Employees' Union (supra). As observed earlier, the Apex Court went on to hold that what is imperative is that such determination of valuation or determination done by the company should not be contrary to the provisions of law or unfair to the class of stakeholder of the Company, which was being merged. If it was a case covered by such situation, the Court would be within its power to refuse approval to the proposed scheme. Reliance is rightly placed on the exposition in the decision of our High Court in the case of In Re: German Remedies Ltd., , which reads thus:

The valuers had made valuation by considering three methods of valuation namely the net asset value, profit earning value and the market value of the shares of the companies as quoted on the Stock Exchange. The valuers have arrived at the valuation on the basis of relative valuation of shares of both the companies based on the aforesaid methodologies and various qualitative factors relating to each company, business dynamics and growth potential of business. Valuation is not an exact science. Different methods are applied for valuation. Valuation made by different methods may widely differ and valuers generally consider appropriate to adopt weighted average of the valuation determined by different methodologies to arrive at the fair market value. What weightage should be given to which factor would depend upon the facts and circumstances of the case.... As stated earlier, it is again to be kept in mind that the exchange ratio is in the realm of commercial wisdom of well-informed equity shareholders. It is not for the court to sit in appeal over the valued judgment of the equity shareholders who are supposed to be commercial men. Commercial men who know their common benefit and interests underlying the proposed scheme, with open eyes, have okayed the swap ratio of 7 to 4 as above by an overwhelming majority of 90 per cent in numbers and 99 per cent in value of the members present and voting. The limited jurisdiction of the Court is only to see whether the ratio is so wrong or the error is so gross as would make the scheme unfair or unjust or oppressive to the majority of the members or any class of them....

12. That takes me to the grievance of the objectors that the Petitioner Company has introduced the scheme with undue haste, or for that matter it is a case of non-application of mind. If, the meeting of the transferee company was held on 27-2-2009 and the report of the experts were made ready on 2-3-2009 coupled with the fact that the Board of Directors approved the proposed scheme on the same day on 2-3-2009, that, by itself, in my opinion, does not mean that it is a case of non-application of mind. The report of the valuers either prepared by Morgan Stanley or the fairness report prepared by Merrill Lynch if read as a whole, it takes into account all the relevant factors which ought to be kept in mind to form an opinion about the swap ratio.

The valuers have indicated the approach and the basis of the amalgamation. It has referred to four possible methods that could be borne in mind for arrival of the decision. Each method has been analysed in the report. Insofar as net asset value methodology is concerned, it is mentioned that the valuers have computed net asset value of equity shares of both the companies. They have used the provisional consolidated balance sheet as at 31-12-2008 of RIL, and provisional balance sheet as at 31-12-2008 of RPL to make suitable adjustment as deemed appropriate. The valuers have adverted to the Comparable Companies" Multiple (CCM) Method. It is noted in the report that the valuers have used Enterprises Value (EV) to EBITDA valuation multiple of comparable listed companies for the purpose of the valuation analysis. They have then considered Historical and Current Market Price Method which is with reference to the equity shares quoted on a Stock Exchange. Significantly, the valuers have adverted to the exposition of the Apex Court in the case of Commissioner of Wealth Tax Vs. Mahadeo Jalan and Mahabir Prasad Jalan and Others etc., , as to the basis on which valuation of shares needs to be done. Relevant extract of the said decision is reproduced in the valuation report itself. It then proceeds to observe that in the present case shares of RIL and RPL are listed on BSE and NSE and there are regular transactions in their equity shares with reasonable volumes. Keeping that in mind, the volume weighted average share price of RIL over an appropriate period was considered for determining the value of RIL and RPL under the market price methodology. It is clearly mentioned that Discounted Cash Flows (DCF) Method was not applied in the facts of the present case. At the end, the basis of amalgamation is spelt out in the report to give swap ratio of 1:16, the same reads thus:

Basis of amalgamation-The basis of merger of RPL into RIL would have to be determined after taking into consideration all the factors and methodologies as mentioned hereinabove. Though different values have been arrived at under each of the above methodologies for the purposes of recommending an exchange ratio of equity shares it is necessary to arrive at a single value for the shares of RIL and of RPL. It is however important to note that in doing so, we are not attempting to arrive at the absolute equity value of RIL and RPL but at their comparative values to facilitate the determination of an exchange ratio. For this purpose, it is necessary to give appropriate weightings to the values arrived at

under each methodology.

Since RIL is a listed company and frequently traded on BSE and NSE, we have used Historical and Current Market Price method. We have also used sum of the parts valuation method for RIL by valuing the operations in different business segments by using CCM method. We have given a higher weight to the equity value of RIL computed under Historical and Current Market Price method and sum of the parts method. We have assigned a lower weight to the NAV method of valuation. Since RPL is also a listed company and frequently traded on BSE and NSE, we have used Historical and Current Market Price method and CCM method and given higher weight to the same.

The exchange ratio of equity shares of RIL and RPL has been arrived on the basis of a relative equity valuation for RIL and RPL based on the various methodologies explained herein earlier and various qualitative factors relevant to each company and the business dynamics and growth potentials of the business of the Companies, having regard to information base, management representations and perceptions, key underlying assumption and limitations.

In the ultimate analysis, valuation will have to be tempered by the exercise of judicious discretion and judgment taking into account all the relevant factors. There will always be several factors, e.g. quality and integrity of the management, present and prospective competition, yield on comparable securities and market sentiment, etc., which are not evident from the face of the balance sheets but which will strongly influence the worth of a share. This concept is also recognized in judicial decisions. For example, *Viscount Simon Bd in Gold Coast Selection Trust Ltd. v. Humphrey* reported in 30 TC 209 (House of Lords) and quoted with approval by the Supreme Court of India in case reported in *A.R. Krishnamurthy and Another Vs. Commissioner of Income Tax, Madras*, as under:

If the asset takes the form of fully paid shares, the valuation will take into account not only the terms of the agreement but a number of other factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, so forth. There may also be an element of value in the fact that holding of the shares gives control of the company. If the asset is difficult to value, but is nonetheless of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible.

Again, it is understood that this analysis does not represent a fairness opinion.

In the light of the above, and on a consideration of all the relevant factors and circumstances as discussed and outlined hereinabove, we consider that the exchange ratio of equity shares for the merger of RPL into RIL should be a ratio of 1(One) equity share of RIL of Rs. 10 each fully paid up for every 16 (sixteen)

equity shares of RPL of Rs. 10 each fully paid up.

Notably, the fairness report of Merrill Lynch also refers to share valuation report submitted by Ernst & Young Morgan Stanley. On analysing all the relevant aspects, even the Fairness Report prepared by Merrill Lynch approves the swap ratio recommended by Morgan Stanley. It is noted that exchange ratio is fair from the financial point of view to the holders of equity shares of the transferee company as a class. The report sets out the basis for arriving at that opinion. The report clearly mentions that the opinion is necessarily based upon the market, economic and other conditions as they exist and can be evaluated on, and on the information made available to the valuers as of the date of the report, including the capital structure of the Transferor Company and Transferee Company as of the date of the report. Besides, it clearly records that they have assumed that in the course of obtaining the necessary regulatory or other consents or approvals (contractual or otherwise) for the merger, no restrictions, including any divestiture requirements or amendments or modifications, will be imposed that will have material adverse effect on the contemplated benefits of the merger. The third report of City Group Global Market India Pvt. Ltd., copy whereof was produced, also more or less reiterates the same position.

13. The question is: whether the experts have given their opinion without analysing the relevant matter. Looking at the report, it is not possible to come to that conclusion. The report refers to aspects which according to the experts would require consideration for arriving at decision regarding appropriateness of share swap ratio. It is not the case of the objectors that said considerations were extraneous as such. Nor the objectors are in a position to point out as to how the opinion recorded by the experts regarding swap ratio can be termed as absurd or manifestly wrong. Suffice it to observe that the reports given by the experts which were the basis to accord approval by the Board of Directors cannot be said to suffer from the vice of non-application of mind. The fact that the entire process was completed in short spell, may at best indicate that the Experts gave their opinion on urgent basis. We cannot be oblivious to the fact that with the development in computer technology, the working of calculation can be programmed. If the basic figures are fed in the computer, the calculations howsoever complicated would become readily available. Moreover, even due to the development in communication technology on account of fax, e-mail, video conferencing etc., communication is instant. Significantly, the Offices of the Petitioner Company as well as of the Experts is located in Mumbai. Suffice it to observe that the Experts gave their opinion on urgent basis presumably because of the insistence of the Petitioner Company, who in turn was keen to speed up the entire merger process. The fairness of the scheme cannot be doubted with reference to those facts. It is not the case of the objectors that the Experts' opinion(Reports) were not placed before the Board of Directors when the decision was taken by the Board of Directors, albeit at 10.15 a.m. the same day. In other words, the fact that on the same day, the Board of Directors proceeded to give approval to the proposed scheme does not per se mean that the decision of the

Board of Directors suffers from non-application of mind. Nor it is possible to doubt the fairness of the Scheme merely because the Petitioner Company was keen to speed up the entire process of amalgamation. The fact remains that the class of stakeholders got complete opportunity and information before they took a conscious decision to approve the Scheme with requisite majority. Suffice it to note that the Board of Directors obviously have gone by the opinion given by the experts of good standing and reputation, particularly with regard to the shares swap ratio. Decision so taken by the Board of Directors cannot be termed as contrary to law or against the public policy. The Objectors are not in a position to demonstrate as to how the valuation reports are unfair and to whom. They have not substantiated their plea as to why the swap ratio determined by the Experts is wrong. No other Expert Report is relied by the Objectors to make good that argument. Nor any legal basis is pointed out to persuade me to discard the said Valuation/Fairness Reports. If so, this Court cannot sit over the decision of the Board of Directors and of the class of stakeholders as Court of Appeal and scrutinise the criticism pressed into service by the Objectors disregarding the commercial wisdom of the overwhelming majority of the Equity Shareholders as a class.

14. Insofar as the criticism with regard to the contents of the valuation report either on the ground that it does not give any forecast or disclose any logic but only conclusion. Even this argument does not commend to me. As aforesaid, on reading the reports clause by clause and as a whole, no fault can be found with the ultimate opinion reached by the experts regarding share swap ratio, which is founded on tangible material and basis. I am not at all impressed by the argument of the objectors that the report is manifestation of conflicting opinion in any manner. The fact that the language of the report would give an impression that the Expert does not take the responsibility of the accuracy of the figures furnished to them by the Company or that they have not made any independent valuation of the assets and liabilities of the companies on their own, does not mean that the relevant factors for determination of swap ratio have not been considered by the experts. Obviously, the opinion of the Experts is based on the information provided by the Company. There is nothing to show that the figures available in the Books of Account provided to the Experts were incorrect or otherwise. Thus, there is nothing in the said Reports to indicate that the consideration weighed with the Experts in arriving at the opinion is impermissible or unacceptable. It is not possible to countenance the grievance of the objectors that the reports deprive the Court from basic information regarding justification of share swap ratio. As aforesaid, Experts have adverted to different methods of evaluation of shares before recording their opinion and have given justification for the ultimate conclusion reached by them. It may be apposite to refer to the decision of the Madras High Court in the case of Kamala Sugar Mills Ltd., In re [1984] 55 Comp. Cas. 308, which had occasion to consider similar criticism of the Valuation report submitted by the Experts. It went to observe thus:

...It is not disputed that the auditors who have filed the report of the valuation

on behalf of the applicants are recognized 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 shareholders of the two companies....

The above decision has been adverted to by the Apex Court in the case of *Mihir H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 10 SCL 70 the Apex Court observed thus:

33. ...We may also refer to a decision of the Gujarat High Court in *Kamala Sugar Mills Ltd. In re* [1984] 55 Comp. Cas. 308 dealing with an identical objection about the exchange ratio adopted in the Scheme of Compromise and Arrangement. The Court observed as under:

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

These observations in our view represent the correct legal position on this aspect....

Even in the present case, no one has doubted the integrity and honesty of the valuers, who have given their share valuation report or fairness report, as the case may be. Nor the objectors have been able to point out that the method adopted by the valuers was impermissible or absurd. If so, I find no reason to discard the valuation of shares or the swap ratio determined by the Experts.

15. Insofar as the grievance made by the objectors that the experts have not reckoned the impact of the liability of the Company in relation to the pending proceedings against the Company pertaining Gas Supply Agreement. The Petitioner in the reply filed before this Court has stated that the facts relating to the said proceedings have been in public domain. The valuers and advisors were aware of and took the same into account as is normally done in similar circumstances. Even if this statement appearing in the affidavit was to be ignored as it is not supported by the contents of the Reports, in my opinion, it would make no difference. Inasmuch as, once the valuation report is accepted, the impact due to the outcome of the pending legal proceedings cannot be the basis to reject the scheme propounded by the Company, especially when the

same has been approved by overwhelming majority of shareholders and unanimously by the secured and unsecured creditors.

16. Even the argument of the objectors that 41 per cent of the shares have been acquired by the group companies does not take the matter any further. There is force in the submission made on behalf of the Petitioner that at best that is a grievance concerning misutilisation of funds of the group company, which cannot be reckoned while considering the issue of approval of the scheme submitted u/s 391 of the Act by the transferee-company.

17. The argument of the objectors that the Company, consequent to approval of the scheme, would resort to elimination of transaction between transferor-company and petitioner-company in their Books of Account, is based on the statement appearing in the affidavit of Regional Director. That statement however, cannot be read out of context. For, elimination of all transactions between the transferor and transferee-company would be the natural consequence of merger. Inasmuch as, the transaction of transferor-company would naturally be adjusted after the merger and would not continue to remain in the books of account of the transferee-company. Even the argument of the objectors that separate accounts of the two companies ought to be prepared is an argument of desperation.

18. Insofar as the apprehension of the objectors that consequent to merger, the petitioner-company would be extricated from all pending proceedings and investigations pending before the Regulatory authority, the same is also misplaced. There is no such provision in the present scheme. On the other hand, the pending proceedings and investigations will have to be continued and carried to its logical end irrespective of the approval to the present scheme of merger.

19. In the circumstances, I have no hesitation in taking the view that since the petitioner-company has complied with all the statutory requirements and formalities and the Regional Director as well as Registrar of Companies including the concerned Stock Exchanges have given their approval/consent to the proposed scheme and the scheme not being prejudicial to any stakeholders of the petitioner-company or public, the Petition deserves to be allowed in terms of prayer Clauses (a) to (g). Ordered accordingly.

20. The Petitioner in the Company Petition to pay cost of Rs. 7,500 to the Regional Director, Western Region. Costs to be paid within four weeks from today.

21. Filing and issuance of the drawn up order is dispensed with.

22. All authorities concerned to act on a copy of this Order along with Scheme duly authenticated by the Company Registrar, High Court, Bombay.

23. Counsel for the objector Mr. Shailesh Mehta prays for stay of operation of this decision for four weeks. The Petitioner has opposed this request. However, I would accede to the request of the objector. Hence, it is ordered that this decision not to be acted upon for four weeks from today.