

(1983) 01 BOM CK 0012

In the Bombay High Court

Case No : Company Petitions No's. 684 and 685 of 1981

In Re: Swastik Textile Mills Ltd. and In Re: Phaltan Sugar Works Ltd.

Date of Decision : 14-01-1983

Acts Referred:

Companies Act, 1956 — Section 391, 394, 394A
Monopolies and Restrictive Trade Practices Act, 1969 — Section 2, 20, 23, 23(1)

Citation : (1983) 85 BOMLR 244 : (1985) 57 CompCas 766

Hon'ble Judges : M.H. Kania, J

Bench : Single Bench

Judgement

Kania, J.—These are two petitions under ss. 391 and 394 of the Companies Act, 1956, whereby the petitioners in Company Petition No. 684 of 1981 have prayed for being amalgamated with the petitioners in Company Petition No. 685 of 1981. The petitioners in Company petition No. 684 of 1981 are the Swastik Textile Mills Ltd. I propose to refer to them as "the transferor company". The petitioners in Company petition No. 685 of 1981 are Apte Amalgamations Ltd. (formerly called "Phaltan Sugar Works Ltd.") which I propose to refer to as "the transferee company".

2. The facts necessary for the disposal of these petitions can be stated shortly. The authorised capital of the transferee company is Rs. 2,00,00,000 (rupees to Crores only). The paid-up capital of the transferee company is Rs. 82,50,000 (rupees eighty-two lakhs fifty thousand only). The transferee company was incorporated on March 8, 1933, and its main business was to manufacture sugar. At one time, the transferee company had vast agricultural lands from which it was obtaining a good part of its requirements of sugarcane, but it is now dependent in supplies of sugarcane from the Maharashtra State Farming Corporation. The transferor company was incorporated as a public limited company on October 22, 1946. The transferor company carries on business in Bombay mainly of processing of textile goods. It was considered desirable by the management of the two companies that the two companies should be amalgamated by the amalgamation of the transferor company with the transferee company in order to carry on these business in a better manner. A

scheme was formulated for such amalgamation and agreed to by the requisite majority of the members of the transferor company and the transferee company and the present petitions were made to this court for sanctioning the scheme of amalgamation. The requirements of ss. 391 and 394 of the Companies Act, 1956, have been duly carried out. The official liquidator has made a report stating on the basis of the finding recorded by M/s. Chandabhoy & Jassoobhoy, chartered accountants, that the affairs of the transferor company had not been conducted in a manner prejudicial to the interest of its members or public interest. This report was submitted in accordance with the provisions of s. 394 of the Companies Act. It may be mentioned that M/s. Chandabhoy & Jassoobhoy were the auditors appointed to scrutinise the books and papers of the transferor company and to submit report to the official liquidator, after investigating into the affairs of the transferor company. There is no objection by any of the shareholders or creditors of either of the said two companies to the amalgamation sought by them. There is, however, an objection raised by Mr. Rao, who appears for the Union of India, pursuant to the notice issued under s. 394A of the Companies Act. It is this objection which has to be considered in disposing of this petition.

3. The objection raised by Mr. Rao, very briefly put, is to the effect that in view of the provisions of s. 23 of the Monopolies and Restrictive Trade Practices Act, 1969 (referred to hereinafter as "the MRTP Act") the amalgamation sought by the transferor and the transferee companies cannot be sanctioned as it has not been approved by the Central Govt. under the MRTP Act. The submission of Mr. Rao is that the transferor and the transferee companies are undertakings to which the provisions of Chap. III, part "A" of the MRTP Act apply in view of s. 20 thereof and, hence, no scheme for merger or amalgamation of such undertakings can be sanctioned by the court or recognised for any purpose nor can effect be given to it unless such scheme has been approved by the Central Govt. and no such approval has been sought for or any purpose nor can effect be given to it unless such scheme has been approved by the Central Govt. and on the other hand, the contention of Mr. Desai, learned counsel for the petitioners, that the transferor and the transferee companies are not companies to which the provisions of part "A" of Chap III of the MRTP Act can apply and, hence, no approval of the Central Govt. is necessary before a scheme for amalgamation in respect of the said companies can be sanctioned., In order to appreciate these arguments, it is necessary to set out some of the relevant provisions of MRTP Act.

Sub-section (1) of s. 23 of the MRTP Act, 1969, runs as follows :

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

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

(b) no scheme of merger or amalgamation of two or more undertakings which

would have the effect of bringing into existence an undertaking to which clause (a) or clause (b) of section 20 would apply.

shall be sanctioned by any court or to 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."

4. The relevant portion of s. 20 in Part A of Chap. III of the MRTTP Act runs thus :

"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 interconnected undertakings is not less than twenty crores of rupees - ...

Explanation. - The value referred to in this section shall be -

(i) in the case of an undertaking referred to in clause (a) or clause (b), as the case may be the value of its assets on the last date of its financial year which closes during the calendar year immediately preceding the calendar year in which the question arises as to whether this part does or does not apply to such undertaking; and

(ii) in the case of an interconnected undertaking, the value of its assets on the last day of its financial year which closes during the calendar year immediately preceding the calendar year in which the question arises as to whether this part does or does not apply to the undertaking referred to in clause (a) or clause (b)."

5. Clause (v) of s. 2 of the MRTTP Act, 1969, defines the word "undertaking" as follows :

"'undertaking' means an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind."

6. Clause (g) of s. 2 defines the term "interconnected undertakings". The definition shows that several types of undertakings are covered within the definition. What is material, however, is that under Expln. I, it is provided that for the purpose of the said Act, two undertakings, owned by bodies corporate, shall be deemed to be under the same management, inter alia, if one such body corporate holds not less than one-third of the equity shares in the other or controls the composition of not less than one-third of the membership of the board of directors of the other. The said Explanation also, inter alia, provides by cl. (ix) thereof that the same shall be the position if the directors of one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not. It may be mentioned that where the undertakings are owned by bodies corporate, they are

said to be interconnected undertakings under sub-cl. (iii) of cl. (g) of s. 2, if one manages the other.

7. On behalf of the Central Govt., affidavits opposing the aforesaid two petitions have been filed by Surendra Kumar, Regional Director, Company Law Board, Western Region, Bombay. In both the petitions the affidavits filed are identical. In the affidavit filed by Surendra Kumar on December 15, 1982, it was contended by him that, on the basis of the data as on January 1, 1982, furnished by the amalgamating companies and other companies, the 13 companies, which have been mentioned in Exh. "I" to the said affidavit, were interconnected companies, and the total assets of these interconnected companies, according to him, came to over Rs. 20 crores. It is curious that in this affidavit, no particulars whatsoever were given as to the factual basis on which these companies were alleged to be interconnected companies. I may at this stage set out the names of the 13 companies, which were alleged to be interconnected companies. The said names are as follows :

- (1) Swastik Textile Mills Ltd. (transferor company).
- (2) Phaltan Sugar Works Ltd. (transferee company).
- (3) Frozen Foods P. Ltd.
- (4) Matalors P. Ltd.
- (5) Plasto Crafts Industries P. Ltd.
- (6) Apte Industrial & management Services P. Ltd.
- (7) Laxmi Vishnu Textile Mills Ltd.
- (8) Real Estate Sales Agency.
- (9) V. S. Apte & Sons.
- (10) Automobile products of India Ltd.
- (11) Technical Services P. Ltd.
- (12) Gaikwad Printers P. Ltd., and
- (13) Pratap Investment P. Ltd.

8. In the affidavit in rejoinder filed by one Muragendra S. Khadbai in company Petition No. 684 of 1981, and the affidavit in rejoinder filed by Arvind D. Gupta in Company Petition No. 685 of 1981, it was contended that these affidavits filed by Surendra Kumar were of no value whatever as no factual particulars were given in the same and a mere opinion was expressed that the aforesaid 13 undertakings were interconnected undertakings. Thereafter, in the course of the hearing on January 13, 1983, Surendra Kumar filed a further affidavit giving the factual particulars on the basis of which it is contended by him that the aforesaid undertakings are interconnected. It is the correctness of this basis which will

have to be examined.

9. Before examining whether the facts contained in the affidavit of Surendra Kumar on January 13, 1983, sustain the contention that the said 13 undertakings are interconnected, I may mention that a preliminary objection was taken by Mr. Rao to the maintainability of the petitions on the ground that one it is contended that the approval of the Central Govt. under s. 23 of the MRTP Act is required before the sanction of a scheme of amalgamation, that the question cannot be determined by the court at all and the court has no jurisdiction to go into that question in my view, this submission is altogether devoid of merit. In the first place, Mr. Rao was unable to point out any provision of the MRTP Act or any other provision of law whereby the court was debarred from going into the validity of this contention in deciding whether to sanction a scheme of amalgamation. Moreover, if this contention was correct, the result would be to drive the parties to a petition for amalgamation to apply for an approval of the Central Govt. whether it is required under s. 23 of the MRTP Act or not, once a contention to that effect is taken by the union of India, In fact, as pointed out by Mr. Desai, such objections against sanction of a scheme of amalgamation have repeatedly been taken in courts by the Central Govt. and decided by the courts, which would necessarily imply that the court has jurisdiction to determine the said objections. (See *Union of India v. Tata Engineering and Locomotive Co. Ltd* [1971] 74 Bom LR 1: [1972] 42 Comp Cas 72 , a judgment of a Division Bench of this court in *Tata Iron and Steel Co. Ltd, In Re: Tata Iron and Steel Company Ltd.*, and *In Re: Kril Standard Products Private Ltd.*,

10. Before going to the specific averments in the affidavit of Surendra Kumar dated January 13, 1983, I propose to refer in passing to the relevant previous correspondence. By their letter dated October 7, 1981, addressed to the Company prosecutor for Regional Director, the petitioners' advocates" inter alia, set out that the petitioner companies in the said two petitions were not registered under the MRTP Act, by their letter dated November 18, 1981, addressed to the said Company prosecution, Grade 1, for Regional Director, the petitioners' advocates stated that the following Companies, viz. the Phaltan Sugar Works Ltd., the Swastik Textiles Mills Ltd., Frozen Foods P. Ltd. Plasto Crafts industries (P.) Ltd., Matalors P. Ltd. and Apte Industrial and Management Service P. Ltd., were interconnected undertakings within the meaning of the said term under the MRTP Act. The Regional Director by her letter dated February 16, 1982, addressed to at the advocates for the petitioners contended that 14 companies, including the 13 companies set out earlier, and one Messrs Pratap Investment P. Ltd. were interconnected companies, but gave no factual basis on which this interconnection was alleged. In the further correspondence which followed, the petitioners' advocates pointed out that the Regional Director had not given any basis on which the allegation of interconnection of the aforesaid 14 companies was made. In the course of that correspondence, the petitioners' attorneys discussed the possible grounds on which it might be contended that there was interconnection between the said companies and sought to refute

those grounds.

11. Although the affidavit of Surendra Kumar dated December 15, 1982. Contained the allegation that the aforesaid 13 companies were interconnected as aforesaid, no facts were set out therein on the basis of which it could be said that the said companies were interconnected. Such factual basis as I have already pointed out, was sought to be given by Surendra Kumar in his affidavit dated January 13, 1983. It is only to the facts averred and contentions raised in that affidavit that I need, therefore, refer. The factual allegations in the affidavit are contained in cls. (a) to (f) of paragraph 1. In fact that is the only paragraph numbered as such in the said affidavit. The allegations contained in cls. (a) to (c) certain to companies which are admittedly interconnected. However, it is common ground that the total value of the assets of the said companies does not exceed Rs. 20 cores, even on the footing of the said value being taken as set out in the affidavit of Surendra Kumar dated December 15, 1982. I need not, therefore, consider these allegations at all. Clause (d) of the said paragraph of the said affidavit is material and it runs as follows :

"Shri M. S. Hardikar, one of the two directors of Apte Industrial and Management Services, is the chief executive of Laxmi Vishnu Textile Mills. These two are, therefore, interconnected under Expln. I of cls. (ix) and (iii) to s. 2(g)(iii)(c) of the said Act."

12. The section referred to is s. 2(g)(iii)(c) of the MRTP Act. In this regard it must be pointed out that if this contention is correct, s. 23 of the MRTP Act would undoubtedly be brought into play because the total assets of the admittedly interconnected companies combined with the total assets of Laxmi Vishnu Textile Mills would certainly exceed Rs. 20 crores. The question, however, is whether the contention is justified. Before going into the merits of this contention, I may point out that it was contended by Mr. Desai that at present M. S. Hardikar was no longer a director of Apte Industrial and management Services, and, hence, the entire contention was misconceived. It was pointed out by him that Hardikar resigned from the directorship of the said concern on January 27, 1982. The fact of resignation was not disputed by Mr. Rao But it was contended by him that the position, which has to be taken into account, is the position which prevailed at the time when the petitions were presented or as on January 1, 1982. It was, on the other hand, contended by Mr. Desai that for the purpose of determining the question of interconnection, one must examine the facts as they are today, In support of that contention, Mr. Desai placed strong reliance on the language of s. 23, which clearly suggests that it is at the time of the granting of the sanction that the factual situation regarding interconnection has to be considered. It is true that s. 20 of the MRTP Act lays down the dates on which the value of the assets of the undertaking in question has to be considered, but the determination of interconnection and the determination of valuation are different questions. there appears to me to be, therefore, considerable substance in the contention of Mr. Desai. However, it is not necessary for me to determine that

question because, in my view, even accepting the position at the relevant time, as set out in cl. (d) of paragraph 1 of the said affidavit, it could still not be said that the petitioner companies were interconnected with Laxmi Vishnu Textile Mills. The first contention of Mr. Rao in this regard was that because M. S. Hardikar was a chief executive of Laxmi Vishnu Textile Mills, it must be presumed that in his capacity as a director of Apte Industrial and Management services, he would act in accordance with the directions given to him by the directors of the Laxmi Vishnu Textile Mills, and, hence, the case is covered by sub-cl. (ix) of Explan. 1 to s. 2(g) of the MRTP Act. The said sub-clause has already been set out earlier and what that sub-clause contemplates is that the directors of one body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other body corporate. Whether certain persons are accustomed to act in a particular manner or not is something which can be shown by instances of past behaviour or other material facts and not by mere presumptions, as suggested by Mr. Rao. Moreover, not a single instance has been given of Hardikar having acted in his capacity as a director of Apte Industrial and Management Services pursuant to the directions given to him by the directors of Laxmi Vishnu Textile Mills. Hence, I fail to see how it can be said that he was accustomed to act in accordance with such directions given by the directors of Laxmi Vishnu Textile Mills. This contention of Mr. Rao must, therefore, be rejected.

13. The next contention of Mr. Rao was that there were only two directors in Apte Industrial and Management Services, Hardikar being one of them, and thus it could be said that Laxmi Vishnu Textile Mills controlled the composition of not less than one third of the total membership of the board of directors of Apte Industrial and Management Services, and, hence, the case would be covered by sub-cl. (iii) of Explan. 1 to cl. (g) of s. 2 of the MRTP Act. In my view, this contention is also totally unsustainable. Merely because a chief executive of one company is one of the two directors in another company, I fail to see how the first company could be said to control one-half of the membership of the board of directors of the second company. It must be realised, as I have already pointed out, that the two capacities, in which Hardikar was acting, were completely different and there was nothing to show that in his capacity as a director of Apte Industrial and Management Services, he was acting in accordance with the directions given by the directors of Laxmi Vishnu Textile Mills which he was the chief executive. Moreover, merely because company "A" can control a director of company "B", it could not be said that company "A" controls a part of the membership of the board of directors of company "B". Such a situation arises only when a company is in a position nominate a certain number of directors or control the election of a certain number of directors in the other company. It is only in such a case that the former company can be said to control the total membership or a part of the membership of the board of directors of the latter company. No such case is made out in cl. (d) of the aforesaid paragraph. This contention of Mr. Rao must also be rejected.

14. Although some allegations are made in cls. (e) and (f) of paragraph 1 of the said affidavit of Surendra Kumar, no contention has been raised before me on the basis of those allegations and it is wholly unnecessary for me to consider the contentions set out in the said clauses.

15. In the result, in Company petition No. 684 of 1981, there will be an order in terms of prayers (a) to (e) of the petition, and in Company Petition No. 685 of 1981, there will be an order in terms of prayers (a) to (d) of the petition.

16. The Petitioners in the aforesaid two petitions to pay Rs. 300 each to the Central Govt. as costs.