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(1994) 03 BOM CK 0019

In the Bombay High Court

Case No : Company Petition No. 332 of 1993 along with Company Applications No''s. 250 and 500 of 1993 with Company Petition No. 333 of 1993

In Re. Tata Oil Mills Co. Ltd. and In Re. Hindustan Lever Ltd.

Date of Decision : 03-03-1994

Acts Referred:
Companies Act, 1956 — Section 172, 193, 194, 391, 391(1)
Monopolies and Restrictive Trade Practices Act, 1969 — Section 23, 24

Citation : (1994) 3 BomCR 225 : (1994) 81 CompCas 754

Hon'ble Judges : N.D. Vyas, J

Bench : Single Bench

Advocate : A.H. Desai, S.J. Kalhavawala, R.D. Dhanuka, M.A. Desai and T.R. Andhyarujina, K.K. Sihavi, Mandan Phadnis, N.G. Thakkar one of the Shareholders, N.G. Thakkar, N.M. Ganguli, R.M. Nakhwa, T.P. Shammi and M.G. Jajoo, T.U. Khatri, for the Appellant;

Judgement

N.D. Vyas, J.—Company Petition No. 332 of 1993 is filed by Tata Oil Mills Company Limited and Company Petition No. 333 of 1993 is filed by Hindustan Lever Limited. The said companies are hereinafter referred to as "TOMCO" and "HLL", respectively. The petitions are under sections 391 to 394 of the Companies Act, 1956, for sanctioning a scheme of amalgamation of TOMCO with HLL. The first petition is by the TOMCO, being the transferor-company, and the second petition is by HLL, being the transferee-company. It would be convenient to dispose of both the petitions by a common judgment.

2. TOMCO, the transferor-company, was incorporated on December 12, 1917, for the purpose of, inter alia, manufacturing, marketing, selling and/or distributing oils, soaps, detergents, toiletries and animal feeds. HLL, the transferee-company, was incorporated on October 17, 1933, as a private company and converted into a public limited company on November 1, 1956. During 1991-92, according to TOMCO, it incurred operating losses of Rs. 10.11 crores. TOMCO incurred further operating losses of Rs. 16.92 crores for the first six months during 1992-93. In these circumstances, the board of directors of the company, after considering various alternatives, considered merger of TOMCO with HLL. The board of

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directors of both the companies availed of the professional services of Mr. Y. H. Malegam, a senior partner of S. B. Billimoria and Company, chartered accountants, to evaluate the two companies in order to arrive at a fair exchange ratio. On March 19, 1993, Mr. Malegam accordingly determined the exchange ratio by his valuation report and recommended an exchange ratio of two equity shares of HLL for every 15 ordinary shares of TOMCO. On March 19, 1993, the board of directors of TOMCO and HLL at their separate meetings accepted the recommended exchange ratio and approved the scheme of arrangement as embodied in the scheme of amalgamation of TOMCO with HLL which scheme envisages transfer and vesting in HLL of the entire undertaking and business of TOMCO together with the assets and liabilities subject to exclusion of certain assets and/or rights. As far as TOMCO is concerned, as per the directions of this court given on April 29, 1993, meetings of debenture holders, secured creditors, unsecured creditors, ordinary shareholders and preference shareholders were convened. Notices of the said meetings were sent to the ordinary and preference shareholders and debenture holders and creditors (unsecured over Rs. 1 lakh) together with a copy each of the scheme of amalgamation and the statement as required u/s 393(1)(a) of the Companies Act along with a form of proxy. Notices convening meetings were also advertised in newspapers as per the said directions. The meeting of the ordinary shareholders was held on June 29, 1993, and attended by 1,294 members holding 85,85,009 ordinary shares and by 1,652 members holding 55,18,251 ordinary shares through proxies. The decision of the meeting of the ordinary shareholders on the amendment proposed regarding improvement in the exchange ratio (to 5 of TOMCO to 2 of HLL instead of 15 of TOMCO to 2 of HLL) was 36 per cent. in favour of amendment, and the balance of over 99 per cent. voted against the amendment. However, the decision of the ordinary shareholders on the main resolution proposed regarding approval to the scheme of arrangement embodied in the scheme of amalgamation without amendment was 99.72 per cent. in favour of the resolution. More than 99 per cent. of all the four types of debenture holders voted in favour of the resolution for approval of the scheme. Secured creditors representing 100 per cent. and unsecured creditors representing 84.30 per cent. voted in favour of the scheme as proposed. As far as the preference shareholders are concerned, 100 per cent. voting was done in favour of the scheme as proposed. Thus, the voting in favour of the scheme as proposed in respect of all the five meetings was much more than the statutory requirements.

3. As far as HLL is concerned, as per directions given by this court on April 29, 1993, meetings of equity shareholders and secured and unsecured creditors were convened. Notices of the said meetings were sent to equity shareholders, secured creditors and unsecured creditors (above Rs. 1 lakh) together with a copy each of the scheme and the statement as required u/s 393(1)(a) of the Companies Act along with a form of proxy. Notices convening meetings were also advertised in newspapers as per the directions given by this court. On June 30, 1993, the meeting of the equity shareholders was duly held and meetings of the

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secured and unsecured creditors were held on July 2, 1993. The meeting of the equity shareholders was attended by 2,528 members including proxies holding 9,59,27,477 equity shares. Thirteen amendments to the scheme were moved but the same were lost as more than 96 per cent. voted against them. However, the decision of the equity shareholders in favour of the resolution approving the scheme without any amendment was approved by 97.45 per cent. shareholders holding 99.97 per cent. shares. Three of the 13 amendments, viz., 11, 12 and 13, related to preferential allotment in favour of Unilever, the parent company of HLL. Similarly the secured and unsecured creditors at their respective meetings approved the scheme with a thumping majority, much more than the statutory requirements. The regional director by his report dated December 9, 1993, made his comments on the scheme, to which I would advert at the appropriate time, and has stated that considering the affidavits and documents and comments enumerated therein, appropriate orders may be passed on the scheme of amalgamation. The official liquidator by his report dated December 15, 1993, has in effect submitted that the affairs of TOMCO have not been conducted in the manner prejudicial to the interest of the member or to the public interest.

4. Before I advert to the objections to the scheme, it is better to state the general principles on which mergers are sanctioned by the court which by now are well settled. In the case of Navjivan Mills Co. Ltd., In re : Kohinoor Mills Co. Ltd., In re [1972] 42 Comp Cas 265, D. A. Desai J. has succinctly summarised these principles. They are (headnote) :

"The court, before according its sanction u/s 391(2) of the Companies Act, 1956, to a scheme of compromise and arrangement, must be satisfied that the provisions of the statute have been complied with, that the class or classes were fairly represented by those who attended the meeting, that the statutory majority are acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and that the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. There are certain well recognised limitations on the court''s power to sanction a scheme. The first limitation is that the court would not sanction a scheme which would be invalid without the court''s sanction even if every creditor or member concerned agreed to it. In other words, the court has no power to sanction something which the parties could not do by agreement. The second fetter on the court''s power is that the court cannot sanction an act being done if the law permits it only subject to conditions and the agreement seeks to dispense with those conditions, such as where the scheme of compromise and arrangement also includes within its ambit reduction in share capital in respect of which special procedure provided in the Act and the Rules has not been carried out. The third fetter on the court''s power is that the court would not ordinarily sanction a scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. Within the limitations set out above, the court will allow the companies the greatest freedom in devising schemes to suit

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their requirements and will approve those schemes if they are fair to all whose interests are affected. The ''compromise and arrangements'', covered by section 391(1), are of the widest character ranging from a simple composition or moratorium to an amalgamation of various companies with a complete reorganisation of their share and loan capital."

5. Keeping in mind the above principles, the role which the courts have to play in this country is more vital and potent; it is not only an inquisitorial and supervisory role but also a pragmatic role which requires the forming of an independent and informal judgment as regards the feasibility or proper working of the scheme and making suitable modifications in the scheme and issuing appropriate directions with that end in view. In Hoare and Co. Ltd., In re [1933] 150 LT 374, Maugham J., inter alia, observed :

"One conclusion which I draw from that ''fact'' - that is, the fact that the court will not ''order otherwise'', i.e., allow a man to escape from his obligations - is that the mere circumstance that the sale or exchange is compulsory is one which ought not to influence the court. It has been an expropriation, but I do not regard that phrase as being very apt in the circumstances of the case. The other conclusion I draw is this, that again prima facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair. There may be other grounds, but I can see no other grounds available in the present case for the interference of the court."

6. It is observed by Buckley J. in Bugle Press Ltd., In re [1960] 1 All ER 768, on appeal [1960] 3 All ER 791 :

"In the ordinary case of an offer under this section, where the 90 per cent. majority accept the offer, the court pays the greatest attention to the views of that majority, and that in all commercial matters, where commercial people are much better able to judge of their own affairs than the court is able to do, the court is accustomed to pay the greatest attention to what commercial people who are concerned with the transaction in fact decide; .... that where there is a large majority (and of course 90 per cent. majority is necessarily a large majority) of shareholders who are only concerned to see that they get what they consider to be a fair price for their shares, and who are in favour of accepting the offer, the burden is a heavy one on the dissentient shareholder to show that the offer is not one which he ought reasonably to have to accept."

7. In Grierson, Oldham and Adams Ltd., In. re [1967] 1 WLR 385, it was, inter

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alia, held (at p. 391) :

"... the question whether the test of the fairness of the offer is fairness to the individual shareholder or fairness to the body of shareholders as a whole ... and not whether it is fair to a particular shareholder in the peculiar circumstances of his own case."

8. Vaisey J. in Sussex Brick Co. Ltd., In re [1961] Ch 289, inter alia, observed (at pp. 292, 293) :

"A scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 per cent., with the highest possible standards of fairness, equity and reason ... It must be affirmatively established that, notwithstanding the view of the majority, the scheme is unfair, and that is a different thing from saying that it must be established that the scheme is not a very fair or not a fair one : a scheme has to be shown affirmatively, patently, obviously and convincingly to be unfair."

9. Keeping in mind the above principles, the scheme as approved by the shareholders and creditors of both the companies has to be scrutinised by this court. The court, apart from the above, must also take into consideration the public interest and the interest of the employees of the two companies to ensure that they are not adversely affected by the scheme and that adequate provision is made for them. This is because this class of persons affected by the scheme has no locus standi in the meeting and the judgment of the majority in their regard need not necessarily be of a great value or a safe guide.

10. As far as TOMCO''s petition is concerned, the scheme is opposed by two shareholders, viz., Ravindra Hazari and Madan Gopal Jajoo of the company and two unions, viz., Federation of Tata Oil Mills and Allied Company Employees'' Union and Tata Oil Mills and Associated Companies Mazdoor Union, representing the workers of the company. In the light of the above-mentioned principles, the objections are dealt with as follows :

(a)(i) It was contended on behalf of Mr. Hazari, a shareholder of the company holding 50 equity shares, that no adequate material was placed before the shareholders at the time of the meeting which would have helped the shareholders to consider the scheme. It was his contention that although he proposed a resolution, which was seconded by one Mr. Gupta, to the effect that the meeting be adjourned till further particulars be given, the said resolution was not put to vote. On the other hand, the company contended that the meeting was called with necessary particulars having been given along with the scheme by way of statement and that there was no need to give further particulars. Not only that but in fact there was no such resolution moved by Mr. Hazari. Assuming in favour of Mr. Hazari that such a resolution had been proposed, the company has contended that such a resolution was beyond the scope of the meeting. The minutes of the meeting state as follows :

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"In reply to some of the above referred shareholders proposal to adjourn the meeting and to reconvene the same at a later date for want of adequate information and disclosure regarding exclusion of certain assets, treatment of specified properties and treatment of specified shares and investments and director''s interest, the chairman indicated that he found no justification to support their said proposals. Thereafter, the queries raised by the shareholders were replied to by the chairman."

As far as the report of the chairman is concerned, the chairman has in the same, inter alia, stated that one of the members proposed a resolution that adequate details had not been given on some of the points and, therefore, the main resolution be withdrawn and fresh notice be issued with a fresh explanatory statement and the meeting be reconvened to consider and approve the scheme of amalgamation. The chairman has, inter alia, stated in the report filed in this court that after the main resolution was proposed by him, which was seconded by N. S. Sunder Rajan, he drew the attention of the members to the letter received from K. K. Patel of Nirma Pvt. Ltd. after which he enquired of the members whether they required any clarifications with regard to the scheme. Some clarifications were asked for by members, inter alia, regarding inadequacy of details in respect of subject-matter of clauses 1.7(d), 4 and 5 of the scheme, that he furnished clarifications and that he rejected the proposal as there was no justification to support these proposals. Mr. Thorat the secretary of the company in his affidavit dated September 21, 1993, has stated that he was present at the meeting of the ordinary shareholders which was convened pursuant to the directions of this court and that it was true that Mr. Hazari raised several objections. It is his contention on affidavit that the scheme of amalgamation along with the explanatory statement gave necessary particulars regarding the scheme and that the chairman explained the scheme and gave necessary particulars. As far as the proposing of the resolution is concerned, Mr. Thorat has stated that Mr. Hazari had proposed a resolution by way of an amendment which was in the nature of seeking information pertaining to certain aspects and that the proposed resolution purporting to be an amendment to the main resolution was in fact in the nature of comments on the scheme and thus was not within the scope of the agenda of the meeting convened to consider the scheme of amalgamation and was, therefore, not liable to be entertained. Mr. Hazari has challenged the affidavit made by Mr. Thorat on the ground that such an affidavit should have been made by the chairman and Mr. Thorat although he was company secretary in fact had no business to remain present at the said meeting much less had any authority to make such an affidavit. I do not see any substance as far as this contention is concerned. In my opinion, first of all Mr. Hazari had not got circulated any draft amendment earlier for being considered. Secondly, the same was definitely beyond the scope of the meeting. Thirdly, reading the scheme and the explanatory statement annexed to the same, I do not think that any further information was necessary. Moreover, prior to the meeting, no letters or enquiries were made by Mr. Hazari in order to get further

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particulars. As far as his complaint about Thorat remaining present and marking an affidavit is concerned, it is not disputed by Mr. Hazari that Mr. Thorat was present at the meeting. Affidavit is filed only by persons who want to put facts on record. It is not material whether instead of the chairman, Thorat should have filed the affidavit. As far as the chairman is concerned, the chairman''s report is accompanied by an affidavit and the same is on record of this court. Assuming for the sake of argument that there was an absence of proper disclosure, as held in the case of National Bank Ltd., In re [1966] 36 Comp Cas 626, I do not think that the omission is fatal. In the case cited above, the court, relied on a passage in Buckley on the Companies Acts, 13th edition, at page 409, to the effect that the court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme. Again, it was held in the case of Evertite Locknuts (1938) Ltd., In re [1945] 15 Comp Cas 138, following Hoare and Co. Ltd., In re [1933] 150 LT 374, that it will not suffice for the dissenting shareholder merely to show that he regarded himself as, or was in fact, unprovided with all the material upon which he could come to a just conclusion in regard to accepting or rejecting of the scheme, inasmuch as, as rightly argued by Mr. Desai, learned counsel for TOMCO, there would be no limit to the inquiry which would have to be set on a foot as to the extent to which his demands for disclosure ought to be conceded. For the above reasons, I do not see any substance in this objection.

(ii) The second limb of the argument advanced on behalf of Mr. Hazari was that the chairman left the meeting at 9.10 p.m. at the time when the polling was taking place. It is his submission, therefore, that the absence of the chairman nullified all the proceedings. This was one of the reasons why Mr. Hazari has taken out company application for production of video and audio cassettes which I had dismissed. u/s 193 of the Companies Act, minutes are required to be kept. u/s 194 of the Act, they would be evidence of the proceedings recorded therein. Lastly, section 195 of the Act provides that where minutes of the proceedings are kept in accordance with the provisions of section 193, then, until the contrary is proved, the meeting shall be deemed to have been duly called and held and all proceedings thereof to have been duly taken place. The said minutes specifically mention that the meeting terminated at 10 p.m. Mr. Jajoo, another shareholder of the company, who is supporting Mr. Hazari, as far as his objections to valuation and other things are concerned, could not throw any light on this aspect as he had left the meeting at 6 o''clock. More than 99 per cent. in number and value of the ordinary shareholders, present and voted, have approved the scheme. No other shareholders have come forward to make such an allegation. I do not find any substance in this argument.

(iii) It was further submitted on behalf of Mr. Hazari that the explanatory statement was very cryptic and that this ground alone was sufficient to nullify

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the meeting. In my opinion, the explanatory statement as required u/s 172 of the Companies Act is quite different from the explanatory statement which is required u/s 393(1)(a) of the Companies Act. Mridul J. (as he then was) has in In Re: Khandelwal Udyog Ltd. and Acme Mfg. Ltd., , inter alia, held that section 393(1)(a) does not ordain disclosure of all material facts. Clause (a) not only enumerates the categories of particulars, but it deliberately makes a departure by omitting any reference to material facts. It was further held that the Legislature having used a different phraseology in the said two provisions, it must be held that the legislative intent under the said section 393 was not to provide for disclosure of all material facts. A similar view is taken by a learned single judge of the Calcutta High Court in United Bank of India Ltd. v. United India Credit and Development Co. Ltd. [1977] 47 Comp Cas 689.

(iv) A further grievance was made by the workers employed at the Sewree Unit of TOMCO. Their grievance was that although they applied for half a day''s casual leave in order to attend the meeting, the same was refused. It was the workers'' contention that this has been the practice followed in past for over many years. In order to see that the workers would not attend the meeting, such a permission was declined. On behalf of TOMCO, Mr. Desai, submitted that in the past there was no such practice and that the workers were free to take a full day''s leave which they did not take and despite their application for half a day''s leave having been rejected, several workers numbering 17, in fact turned up at the meeting and attended the same. Mr. Phadnis on behalf of the workers could not satisfy me about the practice, nor could he deny the fact that several workers had in fact attended the meeting. In these circumstances, I do not see any substance as far as this grievance is concerned.

(v) It was lastly contended by Mr. Phadnis on behalf of the workers that the chairman of the court convened meeting should have been someone nominated by the court and not the chairman of the company and such was the practice of the Calcutta High Court. First of all, at this stage when meetings have taken place and an overwhelming majority has approved the scheme as proposed, the court would be ill-advised to go behind the directions given by this court. Moreover, neither do I find anything unsound with the practice followed by this court in the matter of giving direction nor I find any case made out for deviating from the same. However, the more important aspect of the matter is how are workers concerned with the manner in which the meetings are convened. They are expected to be concerned only with the question, viz., whether the scheme as approved by shareholders and creditors is prejudicial or not to them. Mr. Desai, learned counsel appearing for TOMCO was right in relying on the decision of Mridul J. of the Calcutta High Court. I see no substance in this objection.

(b) The second objection to the scheme was raised in respect of the exchange ratio. The scheme in clause 13 thereof envisages that upon the scheme becoming finally effective, in consideration of the transfer and vesting of the undertaking of TOMCO in HLL, HLL will allot two equity shares of the face value

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of Rs. 10 each credited as fully paid up in the capital of HLL, to shareholders of TOMCO for every 15 ordinary shares of the face value of Rs. 10 each held by the holders of the ordinary shares in TOMCO. Provision is also made for fractional certificates. The exchange ratio has been arrived at by Mr. Malegam, a senior partner of S. B. Billimoria and Co., chartered accountants. This report is at exhibit G of the petition. It is dated March 19, 1993. It is, inter alia, specifically stated therein that in arriving at the fair exchange ratio, he had considered the "yield value", the "asset value" and the "market value" of the shares of the two companies and has given appropriate weightage to each of the above values. It is further stated therein that both companies being in similar business, a uniform basis of capitalisation of profits had been adopted in determining the "yield value". Further, taking into consideration the various factors enumerated therein, for working out the "yield value" of the TOMCO share, he had assumed a figure of future maintainable profits based on its operation results for the years 1981-82 to 1988-89. Similarly, the material relied on for arriving at the "asset value" and calculation of "market value" is enumerated in detail in the said report. At the general meeting, as the minutes have recorded, after the resolution for approval of the scheme was proposed and seconded, before proceeding further, the chairman requested Mr. Malegam to make a statement as to how the valuation was made, that Mr. Malegam explained at length the basis on which valuations were generally carried out for amalgamations/mergers and that he highlighted the major aspects considered by him in making the valuation in question. A perusal of the said valuation report, in my opinion, does not contain anything which is value or ambiguous. The valuation appears to be fair. Not only that but after the filing of the petition, a further opinion was obtained by TOMCO from two well-known auditors, viz., A. F. Fergusson and Co. and N. M. Raiji and Co., who have by their letter dated September 2, 1993, in response to the request made by the TOMCO to review the methodology used and ratio of exchange determined by S. B. Billimoria and Co. stated that they had reviewed the methodology used by S. B. Billimoria and Co. in determining the fair exchange ratio of two equity shares of Rs. 10 each of HLL for 15 equity shares of Rs. 10 each of TOMCO and confirmed that the methodology used and the exchange ratio arrived at were fair. Not only that but Mr. Jajoo, a shareholder of TOMCO, had on his own written to the said two auditors, viz., A. F. Fergusson and Co. and N. M. Raiji and Co., and received a letter dated January 6, 1994, from them in which they have given reasons why they agreed with the valuation done by Mr. Malegam of Billimoria and Co. Mr. Jajoo on his own has attempted to value on the basis of the material available with him. His contention has been that the weightage given by S. B. Billimoria and Co. and approved by A. F. Fergusson and Co. and N. M. Raiji and Co. was defective. It was his contention that if given proper weightage the valuation would be different. He was permitted to file a further affidavit. On the basis of different weightage given by him there is a slight variation between Mr. Malegam''s and his, but not substantial inasmuch as according to him the exchange ratio would come to 6 1/2 of TOMCO for one share of HLL. I do not see much difference between the two. The regional

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director has suggested that this court may direct appointment of any eminent firm of chartered accountants to carry out the valuation and/or confirm the valuation of Mr. Malegam. In fact, as mentioned above, two eminent firms of chartered accountants have confirmed the valuation done by Mr. Malegam being very fair. Moreover, as far as the valuation is concerned, it is held in the decision of Mrs. Sujata Manohar. J. (as she then was) in Piramal Spinning and Weaving Mills Ltd., In re [1980] 50 Comp Cas 514 (Bom) that unless the person who challenged the valuation satisfied the court that the valuation arrived at was grossly unfair, the court should not disturb the scheme of amalgamation approved by the shareholders of the two companies. It may also be borne in mind that as far as TOMCO is concerned, almost 40 per cent. equity shares are held by the financial institutions. In the case of Bank of Baroda Ltd. v. Mahindra Ugine Steel Co. Ltd. [1976] 46 Comp Cas 227, P. D. Desai J. (as he then was) had observed that financial institutions and statutory corporations who hold shares in public companies, being usually well-informed, scrutinise the scheme with an expert''s eye and they are presumed to act bona fide and for the benefit of the company as a whole. The workers have also challenged the valuation of shares and had adopted the same line of arguments. However, they have failed to satisfy me as to in what manner the valuation is unfair. This is apart from the fact whether the workers could be heard to be concerned with the valuation. In my opinion, the exchange ratio as arrived at by Mr. Malegam has received the approval of shareholders holding more than 99 per cert. (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.

(c) As far as item No. 1.7(d) of the scheme is concerned, the opposition is that these assets should not have been excluded and, secondly, that no particulars of the alleged leave and licence arrangement have been given. It is specifically mentioned in clause 1.7 of the scheme that the "undertaking" shall mean, inter alia, all the assets and properties of the transferor-company, viz., TOMCO, as on the appointed date other than those specifically excluded under sub-clause (d) thereof. Sub-clause (d) enumerates the assets and/or rights to be excluded from the meaning of the expression "undertaking", viz., "the right to use and occupy". It is specifically mentioned that the same relates only to TOMCO''s right to use and occupy. These items according to TOMCO are premises on leave and licence basis. These are, therefore, not assets of TOMCO. In an unreported decision of a Division Bench of this court in Writ Petition No. 270 of 1984 delivered on July 20, 1993, the Division Bench had, while dealing with the question whether certain premises vested in the custodian appointed under the Textile Undertakings (Taking Over of Management) Act, 1983, inter alia, held that premises occupied on leave and licence were not an asset and would not vest in the custodian. In

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the case before me, the explanatory statement also clearly says that these are on leave and licence basis. The question of giving any particulars otherwise also would not arise. The right to use and occupy is a personal right and is a licence. Section 52 of the Indian Easements Act, 1882, defines "licence". Section 56 of the said Act prohibits transfer thereof and section 62 of the said Act provides that the licence is deemed to be revoked where the licence is granted to the licensee for holding a particular office, employment or character, and such office, employment or character ceases to exist. It is well-settled that the licence granted is a personal right and is neither heritable nor transferable. HLL, being the transferee must have satisfied itself about the nature of the occupation. Moreover, the scheme as a whole is approved by shareholders/creditors of the company by overwhelming majority. I do not see any substance in this argument.

(d) Item No. 4 of the scheme relates to certain immovable assets of TOMCO which are specified therein. This clause envisages that these assets would be conveyed, transferred or leased on long-term basis to companies nominated by Tata Sons Limited at fair value as will be independently assessed. Five properties are mentioned therein. The explanation contained in the explanatory note and further amplified in the joint circular dated June 21, 1993, issued after the scheme was circulated clearly shows that HLL is not interested in these immovable properties but would be content with the full market value thereof. Under the scheme, it is not proposed to altogether exclude the items which are owned by TOMCO. What is proposed is to dispose of these items meaning thereby that instead of immovable properties what would remain with TOMCO would be the money equivalent thereof. It is true that clause 4 as contained in the scheme is also approved by shareholders/creditors of TOMCO by a thumping majority of them in number and value. However, why should the board of directors of TOMCO be allowed to abdicate their own function in favour of another company, viz., Tata Sons Ltd. Moreover, why should valuable assets not be valued by competent valuers to ascertain the fair market value thereof and to ensure that the disposal is at fair market price and, therefore, why should the valuers'' names not be provided. The petitioners themselves, viz., TOMCO, have in their petition shown readiness to delete reference to Tata Sons Ltd. and have suggested the disposal would be done in favour of companies nominated by directors of TOMCO. The regional director has, in view of opposition by some shareholders in the present petition, suggested in his report that the suggestion of such shareholders for appointment of independent valuers be accepted and the disposal should take place before dissolution of TOMCO. In short, the dissentient shareholders'' suggestion that the matter of disposal should not be left to Tata Sons Ltd. done by the directors themselves has received the Regional Director''s support. I see some force in the dissentient shareholders''/Regional Director''s report in this behalf. The scheme requires, some modification in this behalf. The board of directors of TOMCO shall themselves before dissolution, have these properties valued by valuers named hereinafter and thereafter before dissolution to convey, transfer or lease them on long-term basis on the basis of

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such valuation.

(e) The next objection is in respect of item No. 5 of the scheme and it relates to certain investments of TOMCO. The said item says that the transferor-company or transferee-company shall either before or after the effective date transfer to Tata Sons Ltd. or its nominees the investments mentioned therein owned by TOMCO at the then prevailing market value. These items relate to several securities. Such was sought to be made of the fact that at different times, TOMCO has mentioned and given different particulars in respect of clause 5 of the scheme. However, under the said clause such a transfer and disposal of securities mentioned therein is supposed to be made either before or after the effective date either by the transferor or by transferee. Three separate particulars relate to three different periods - one is as on March 19, 1993, the second as on March 31, 1993 (the date of the letter of that date from TOMCO to HLL), and the third is mentioned in the scheme. It is stated in the affidavit of Thorat dated September 21, 1993, which is on record, that the shares listed in the said letter dated March 31, 1993, as also those listed in clause 5 of the scheme have since been sold and transferred by TOMCO at the market value of shares listed and at fair values in case of unlisted shares. Thus all the shares/ securities in question have been disposed of and the money equivalent thereof have been received by TOMCO. In these circumstances, it is academic to consider in detail the said item and as to on what basis different particulars were given. The opposition was to the effect that TOMCO and HLL had entered into a secret deal to antedate the transfer of various investments of TOMCO to other Tata companies to the detriment of the shareholders and creditors of TOMCO. No other shareholders or creditors, except the individual shareholders have raised any such objection. Moreover, as repeatedly observed by me, by an overwhelming majority of more than 99 per cent. in value and number the shareholders have approved the same. I do not see any substance as far as this objection is concerned.

(f) This takes me to the next item regarding trade marks. The provision for the same is contained in clause 7 of the scheme. This excludes several trade marks of TOMCO. Objection is taken as to giving of such valuable assets. One has to understand that the HLL is a large manufacturer of similar items and which are marketed under their own trade marks. It is for HLL to give up these trade marks as the said trade marks are associated with Tata name and in view of the fact that when amalgamation takes place, TOMCO stands dissolved and ceases to have any association with the Tata group of companies. There is, therefore, no question of the same being used by HLL. I see no substance in this objection.

(g) The next opposition relates to the grievance made by the workers that although clause 11 speaks of no prejudice being caused to TOMCO workers, they are uncertain about their future. Not only that it was even submitted that giving over the entire undertaking to HLL was contrary to the objects of the company as contained in its memorandum of association. Moreover, it was submitted that a

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resolution was sought to be moved at the shareholders'' meeting to the effect that the amalgamation should be abandoned as the same was not in the interests of TOMCO''s employees whose interests had not been adequately safeguarded but the same was not permitted to be considered by the shareholders. Mr. S. C. Kar had proposed the same resolution and was seconded by Mr. Anil Kedare. In my opinion the chairman had rightly not permitted the same to be moved as the same did not seek to modify the scheme in any manner and was thus outside the scope of the main resolution for consideration of which the meeting was convened. Moreover, clause 11 of the scheme adequately protects the employees'' interests. I do not see any substance in this submission. It was candidly admitted on behalf of the workers by Mr. Phadnis that sufficient assurance is given in clause 11 of the scheme. Mr. Nakhawa on behalf of Tata Oil Mills and Allied Company Employees'' Union drew my attention to the order dated October 5, 1993, passed by a Division Bench of the Calcutta High Court in an appeal preferred by the union against TOMCO in respect of certain assurances given to them. The Division Bench has passed an order of status quo. The apprehension of the union is in respect of the assurances given by TOMCO to them and, therefore, a suit has been filed in the Calcutta High Court and in an appeal in the suit, the above order is passed. Clause 8 of the scheme provides that all contracts, deeds, bonds, agreements to which TOMCO is a party, subsisting or having effect immediately before the effective date shall be in full force and effect against or in favour of HLL and can be enforced as fully and effectually against HLL. This provision thus keeps alive the assurances given by TOMCO. Clause 9 provides that pending legal proceedings against TOMCO and relating to its undertaking regarding its liabilities, obligations and duties shall be continued and enforced against HLL. Thus any orders passed in the said pending litigation at Calcutta would be binding on HLL. HLL is deemed to be aware of, in any case, are now put to notice of the said order passed by the Division Bench of the Calcutta High Court, which is at present seized of the matter relating to the assurances given by TOMCO. In view of the above, the workers represented by Mr. Nakhawa are, in my view, sufficiently protected. There is no substance in the same inasmuch as clauses 8 and 9 of the scheme sufficiently protect the workers of the unit of TOMCO at Calcutta and sufficiently save orders passed by the Calcutta High Court in the matter before it.

11. This brings me to the petition of HLL. Basically two objections are taken - one is about the preferential offer and allotment of 29,84,347 equity shares to Unilever, the parent company of HLL and the other is about the apprehension entertained by the workers.

(a) As far as the preferential allotment is concerned, the scheme states that Unilever, the parent company of HLL, holds 51 per cent. of the issued and subscribed capital of HLL. As an integral part of the scheme it is envisaged that simultaneously with the issue and allotment of equity shares of HLL to TOMCO shareholders in the proportion of 2 of HLL for 15 of TOMCO, HLL would make a preferential offer and allotment of 29,84,347 equity shares of the face value of

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Rs. 10 each at a price of Rs. 105 per share (i.e., Rs. 10 towards the capital and Rs. 95 towards the premium) so as to maintain the shareholding level of Unilever at 51 per cent. of the equity capital of HLL after amalgamation. HLL has in its chairman''s communication dated June 15, 1993, sent to its shareholders stated that the original shareholding of Unilever in HLL was 100 per cent. which was gradually decreased to 84.6 per cent. and subsequently to 51 per cent. The last dilution was done in 1977 and 1978, partly by a public issue and partly by a divestment on rights basis.

(b) The second limb of the argument was the price of Rs. 105 per equity share of Rs. 10 each fixed for preferential allotment in favour of Unilever. It was pointed out by the workers as well as the stray shareholders of HLL and even the Regional Director that exchange ratio of 15 : 2 shares of HLL has taken into consideration the market price of Rs. 375 for HLL equity share. The same should be made applicable (or Rs. 366 per share according to the regional director) and not doing so would result in a loss of over Rs. 70 crores. On behalf of HLL, the Advocate-General, learned counsel appearing for them, pointed out the basis on which Rs. 105 was fixed. The explanatory statement attached to the scheme as circulated and the chairman''s communication to the HLL shareholders gives the basis on which Rs. 105 have been fixed and the basis is the revised formula evolved by the apex Chambers of Commerce at the national level and the public financial institutions. This formula envisages "preferential allotment" at a price carrying (PE) multiple of 15, based on the last published audited results of the company. HLL''s earnings per share for the last accounting year were Rs. 7 per share and multiplied at 15 has resulted in Rs. 105 per share. The Advocate-General pointed out to the court several instances where the same and even a lower multiple was applied. It was also pointed out that if the C.C.I. formula used earlier in 1977 and 1978 at the time of dilution was used, the price would be only Rs. 43 per share. Mr. Singhvi on the other hand cited two instances of companies having used a higher multiple. However, taking an overall view, including the locking in period provided in respect of this allotment, I am satisfied that the price of Rs. 105 is fair and reasonable. Moreover, the additional offer and allotment to Unilever in order to maintain the present proportion of shareholding is also fair and reasonable. The learned Advocate-General is also right in his submission that it is for the shareholders ultimately to decide. This power is exercised by the shareholders as per section 81(1A) of the Companies Act. The Advocate-General rightly relied on the decision in the case of Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, , wherein it is, inter alia, held (at p. 818) :

"Finally, it is also not true to say, as a statement of law, that directors have no power to issue shares at par, if their market price is above par. These are primarily matters of policy for the directors to decide in the exercise of their discretion and no hard and fast rule can be laid down to fetter that discretion. As observed by Lord Davey in Hilder v. Dexter [1902] AC 474 :

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''I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide.''

What is necessary to bear in mind is that such discretionary powers in company administration are in the nature of fiduciary powers and must, for that reason, be exercised in good faith. Mala fides vitiate the exercise of such discretion. We may mention that in the past, whenever ever the need for additional capital was felt, or for other reasons, NIIL issued shares to its members at par."

Reliance was also placed on the reply given by the Prime Minister in Parliament on December 16, 1993, in reply to a question regarding framing of a new price formula for enabling foreign companies to increase their equity capital. The Prime Minister stated that after the repeal of the Capital Issues (Control) Act, 1947, and following the issue of guidelines by the Securities and Exchange Board of India, existing companies wishing to raise foreign equity holdings can do so at the price determined by the shareholders of the respective companies by a special resolution u/s 81(1A) of the Companies Act and, therefore, there was no question of laying down any new pricing formula by the Government. At the shareholders meeting, three amendments were moved in respect of this preferential allotment. One was for having the valuation done by the Securities and Exchange Board of India or by any public financial institution other than I.C.I.C.I. The second one was that the allotment should be made at Rs. 375 per share and not at Rs. 105 per share. And the last one was that no preferential allotment should be made. All these resolutions were lost and more than 99 per cent. shareholders in number and value passed the resolution approving the scheme as proposed.

It was submitted on behalf of the workers by Mr. Singhvi that preferential allotment was to be made to Unilever who are holding 51 per cent. shares and, therefore, obviously holding the majority, resolution fixing Rs. 105 would obviously be passed. The Advocate-General on the other hand pointed out that even if Unilever had not voted in favour of the preferential allotment, the situation would not have been much different and even then by a majority of 97.45 per cent. in number and 99.88 per cent. in value, the resolution would have been passed.

(c) In these circumstances, I am of the opinion that not only the preferential allotment in favour of Unilever, but also the price thereof is fair and reasonable.

Mr. Singhvi on behalf of the workers expressed the apprehension of the workers by saying that under the scheme in clause 11 thereof, an assurance is given to the workers of TOMCO that the merger would not prejudicially affect them. A similar assurance should also be there as far as HLL workers are concerned. Mr. Singhvi relied heavily on the affidavit of Mr. Nandkumar an dated February 1, 1994, wherein comparative basis of one isolated case of a worker is given in

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order to show that in some areas the wages received by HLL workers would be less. This would, according to him, lead to labour unrest. It was his further submission that TOMCO''s plant at Bombay, is hardly a furlong away from the HLL''s plant and, therefore, applying the industry-cum-region formula, the wage structure cannot be different between the two units. The Advocate-General on the other hand, on behalf of HLL, stated that the assurance given to TOMCO workers was because the company, being merged into HLL, was going to lose its identity completely and such an assurance for TOMCO workers was necessary. As far as HLL workers were concerned, he maintained that they were better paid and that what is required to be considered is whether there is a prejudicial impact on the workers. The apprehension expressed by Mr. Singhvi is dealt with in detail by Mr. D''Souza in his affidavit dated April 29, 1993. The same only shows a possible impact in future. The Advocate-General also submitted that the total pay packet as a whole should be considered and not individual items. I see considerable force in these submissions. In fact, an amendment (No. 2) was moved for providing clause 11A to the scheme. Thereby it was proposed that demands of HLL pending in court or out of court for reduction in benefits payable to its workmen would be withdrawn, that no demands would be made by HLL which would have the effect of designating any part of its present staff as surplus and that after the amalgamation, conditions of service will not be less favourable than what was there before amalgamation. This resolution was lost. Almost identical arguments are advanced. The only difference is that an instance of disparity as mentioned above is cited, which is not admitted on behalf of HLL. I do not see much substance in these submissions. The scheme of amalgamation is to result in dissolution of TOMCO altogether. The assurances given are, therefore, naturally TOMCO oriented. For example : what is to happen to properties of TOMCO or to the guarantees or to legal proceedings. The proceedings for sanction by court cannot be permitted to be converted into an opportunity to bargain. Adequate protection, in the event of apprehension turning into reality in future, is provided in law for safeguarding the workers'' interests. In my opinion, therefore, no modification to the scheme on this account is necessary.

11. I may add that on behalf of workers of HLL also grievances were made of the same nature as made by dissentient shareholders of TOMCO. Having dealt with them earlier, it is not necessary to deal with them again here.

12. Mr. Singhvi on behalf of HLL Employees'' Union as well as Mr. Ganguli for Consumer Action Group and the Indian Institute of Consumer Studies (Interveners) requested that the decision in the matter of the scheme of amalgamation be reserved in view of the fact that an inquiry was pending before the Commission constituted under the Monopolies and Restrictive Trade Practices Act, 1969. By the Monopolies and Restrictive Trade Practices (Amendment) Act of 1991, extensive amendments were carried out and several sections of Chapter III thereof dealing with concentration of economic power were deleted. Previous section 23 thereof, inter alia, provided that notwithstanding anything contained

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elsewhere in the Monopolies and Restrictive Trade Practices Act or in any other law for the time being in force, no scheme for amalgamation or merger could be sanctioned by any court without the same having been approved by the Central Government and that no proposal to acquire by purchase, take-over or otherwise an undertaking be given effect to unless the Central Government had approved the same. Previous section 24 of the said Act provided for the consequences for contravention of section 23 of the said Act. In view of the fact that now amalgamation/merger are not made dependable on the provisions of the Monopolies and Restrictive Trade Practices Act, the power to be exercised by this court under the Companies Act is independent of the Monopolies and Restrictive Trade Practices Act and therefore, there is no question of deferring decision in this matter of sanction of the scheme.

13. In the circumstances, I see no force in any of the objections raised, except in respect of the treatment of certain immovable properties in clause 4 of the scheme which requires some modification. Otherwise I find the scheme fair and reasonable.

14. In these circumstances, the following order :

The scheme is approved subject to the following modification :

Clause 4 of the scheme will read as follows :

"4. Treatment of specified properties/rights. - The following assets owned by the transferor-company shall, from time to time, as may be convenient to all concerned be conveyed, transferred or leased on a long-term basis by the directors of the transferor-company before dissolution at valuations done by ''C. C. Choksey and Co.'', chartered accountants, failing which ''Roshan Nanavati'' who are Government valuers, failing which ''Budh Bhatti and Associates'', who are also Government valuers.

4.1 Up to 20,000 square metres of land and structures thereon earmarked for the Tata Ceramics Kerala Limited (TCKL) out of the total area of land admeasuring about 2,20,000 square metres of the transferor-company''s factory at Ernakulam, Kerala.

4.2 Leasehold land and building thereon at Willingdon Island leased from Cochin Port Trust which has been earmarked for TCKL.

4.3 4,046 square metres of land at Bangalore at Thanneeranahalli, Yesvanthpur, Bangalore (North), Karnataka.

4.4 Thirty-two flats at Tata Housing Colony at Andheri, Bombay, presently occupied by the employees of the transferor-company.

4.5 Flat No. 29A at Sterling Apartments, Peddar Road, and Flat No. 7 at Aarti Building, Ridge Road, both in Bombay."

In the result, as far as Company Petition No. 332 of 1993 is concerned, petition

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made absolute in terms of prayers (a) to (e) subject to the above modification qua clause 4 of the scheme.

The Regional Director and the official liquidator be paid a sum of Rs. 5,000 each as and by way of costs of the petition.

Certified copy of the minutes of the order expedited.

Certified copy of the drawn up order expedited.

Copy of the above order will be delivered within 30 days of the date of the sealing of the order and the Registrar of Companies to consolidate the file immediately thereafter.

As far as Company Petition No. 333 of 1993 is concerned, petition made absolute in terms of prayers (a) to (e) subject to the above modification qua clause 4 of the scheme.

The Regional Director be paid a sum of Rs. 5,000 as and by way of costs of the petition.

Certified copy of the minutes of the order expedited.

Certified copy of the drawn up order expedited.

Copy of the above order will be delivered within 30 days of the date of the sealing of the order and the Registrar of Companies to consolidate the file immediately thereafter.

Judge''s Summons No. 500 of 1993 dismissed for the reasons above regarding exchange ratio.

15. The above orders are stayed for four weeks.

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