

(1979) 12 AP CK 0005

In the Andhra Pradesh High Court

Case No : Company Petition No's. 9 and 10 of 1978

**In Re: Vijaya Durga Cotton Trading Ltd.
 In Re: Nava Bharath Enterprises (P.) Ltd.**

Date of Decision : 27-12-1979

Acts Referred:

Companies Act, 1956 — Section 391

Citation : (1980) 50 CompCas 785

Hon'ble Judges : Ramachandra Rao, J

Bench : Single Bench

Advocate : Parvatha Rao, Registrar of Companies for the Regional Director, Company Law Board and the official liquidator, for the Appellant;

Judgement

Ramachandra Rao, J.—C.P. No. 9/78, is filed by the Vijaya Durga Cotton Trading Ltd. (hereinafter referred to as " VDCT Ltd."), u/s 394 read with Section 391(2) of the Companies Act, 1956, for sanction of the arrangement by way of a scheme for amalgamation of the said company with a private limited company, Nava Bharat Enterprises Private Ltd. (hereinafter referred to as " NBE P. Ltd. ").

2. C.P. No. 10/78, is filed by Nava Bharat Enterprises Private Ltd. under the same provisions of law for sanction of arrangement by way of a scheme for amalgamation of the Vijaya Durga Cotton Trading Ltd. with Nava Bharat Enterprises Private Ltd.

3. VDCT Ltd. was incorporated as a private limited company in 1973 with an authorised capital of Rs. 5,00,000 divided into 5,000 equity shares of Rs. 100 each. Subsequently, the authorised capital was raised to Rs. 50,00,000 in 1975 and to Rs. 75,00,000 in 1976 and was converted into a public limited company in the year 1975 by virtue of the provisions of Section 43A(1A) of the Companies Act, 1956. The present subscribed and paid up capital is Rs. 61,00,000 divided into 61,000 equity shares of Rs. 100 each. The objects of the company according to its memorandum of association were to do business in ginning, pressing and baling of cotton, and dealing in fibres like cotton, hemp, jute, etc , extracting of oils from oil seeds like cotton seeds, groundnuts, sun flower seeds, etc., and

extracting oil from oil cakes and bran and utilising their by-products for feeds and fertilizers. The said company was originally doing cotton ginning and pressing business. In 1975, it constructed an oil mill along with solvent extraction plant and the products of the solvent extraction units are exclusively for exports, and the industry has been recognised as export oriented. The exports of the company of de-oiled cakes and bran were Rs. 3.56 lakhs in 1975, Rs. 20.12 lakhs in 1976 and Rs. 27.94 lakhs in 1977.

4. The petitioner in C.P. No. 10/78, Nava Bharat Enterprises Private Ltd., was incorporated in 1957, under the Companies Act, 1956, as a private limited company with Nava Bharat Agencies Private Ltd., which was later converted into Nava Bharat Enterprises Private Ltd. on May 2, 1958. The original authorised share capital of NBE P. Ltd. was Rs. 2,00,000 divided into 2,000 equity shares of Rs. 100 each, of which Rs. 20,000 was the subscribed and paid up capital. The authorised paid up capital was Rs. 5,00,000 in 1962, Rs. 20,00,000 in 1973 and Rs. 50,00,000 in 1975. The present subscribed and paid up share capital of NBE P. Ltd. is Rs. 33,35,000 divided into 33,350 equity shares of Rs. 100 each, out of which Rs. 15,00,000 was issued by way of bonus shares during 1973. NBE P. Ltd. was incorporated mainly as an export house and since then has been exporting items like tobacco, tea, pepper, de-oiled cakes, besides other products. NBE P. Ltd. was recognised as an eligible export house with its turnover ranging between Rs. 25 crores and Rs. 45 crores during the year 1973-77. It was stated that VDCT Ltd. was capable of exporting Rs. 135 lakhs of extraction annually. NBE P. Ltd. with a view to be the sole exporter, deposited Rs. 8 lakhs with VDCT Ltd. as trade deposit and also advanced considerable amount to VDCT Ltd. so that its oil mill may be worked on economic level and may supply extraction for eventual export by NBE P. Ltd. The total amount due to NBE P. Ltd. from VDCT Ltd. stood at Rs. 52.49 lakhs as on September 30, 1977. Due to several causes, VDCT Ltd. incurred losses in successive years. As on September 30, 1977, the book losses stood at Rs. 60.12 lakhs and the carried forward losses and unabsorbed depreciation and development rebate as per Income Tax assessments and estimates stood at Rs. 98.54 lakhs against the paid up share capital of Rs. 61 lakhs. By 30th September, 1977, the financial position of VDCT Ltd. became critical. The outstandings to the tune of 27.62 lakhs payable to Andhra Pradesh State Financial Corporation and Vijaya Bank Ltd. and advances of Rs. 52.49 lakhs to NBE Ltd. could not be paid. While so, it was considered by the board of directors of companies that it would be in the best interests of both the companies to merge. Accordingly, the general bodies and board of directors of both the companies met and approved the scheme of amalgamation of the VDCT Ltd. with NBE P. Ltd.

5. According to the scheme the undertaking, property and liabilities of VDCT Ltd. will be taken over by NBE P. Ltd. with effect from September 30, 1977 (appointed day), and with effect from the said day, the NBE P. Ltd. shall be deemed to have been carrying on all business activities, if any, for and on account of VDCT Ltd. The members of VDCT Ltd. will be allotted 15,250 shares of

NBE P. Ltd., i.e., one share of NBE P. Ltd. for every 4 shares of the VDCT Ltd. and the new equity shares to be allotted shall rank for voting and all other rights *pari passu* with the existing equity shares of the NBE P. Ltd. It is alleged that the scheme of amalgamation will not affect the rights of creditors of either of the companies. The various benefits that would accrue to the companies by the proposed merger have also been set out in the petitions.

6. Pursuant to the aforesaid proposal to merge, VDCT Ltd. filed C.A. No. 86/78 u/s 391(1) of the Companies Act for convening a meeting of its members for the purpose of considering the arrangement by way of the said scheme. Similarly, NBE P. Ltd. filed C. A. No. 85/78 u/s 391 of the Companies Act for convening a meeting of its members for the purpose of considering and approving the scheme. By order dated July 7, 1978, the said applications were ordered by this court appointing Sri Geda Srihari Rao as chairman of the meeting of the VDCT Ltd. and Sri T. N. Viswanadha Reddy to act as chairman of the meeting of the members of NBE P. Ltd. and to report the result of the said meeting. Notices of the said meetings were duly issued as prescribed by the Act and the Rules and the meetings of the members of each of the companies were convened and the results of the meetings were duly submitted by the chairman to this court. According to the report, the members of each of the companies had unanimously resolved to approve all the arrangements by way of scheme of amalgamation of VDCT Ltd. with NBE P. Ltd. on the terms and conditions of the scheme submitted to the said meetings. Thereafter, each of the companies has filed these petitions u/s 394 read with Section 391(2) of the Act for according sanction for the arrangement embodied in the scheme for amalgamation of VDCT Ltd. with the NBE P. Ltd. and for incidental and consequential reliefs as follows :

(a) that the arrangements embodied in the scheme for amalgamation of the VDCT Ltd. with NBE P. Ltd. approved by the members of both the companies may be sanctioned by this hon"ble court so as to be binding on all the members (equity shareholders) of both the companies ;

(b) for an order u/s 394 of the Act that subject to the approval of the scheme by the Central Government u/s 72A of the Income Tax Act, 1961, the concern, property, rights and powers of the VDCT Ltd. and all the estates and interests of the VDCT Ltd. therein be transferred to and vested in NBE P. Ltd. without any further act or deed with effect from 30th September, 1977, or from such other date the Central Government may specify while sanctioning the approval u/s 72A of the Income Tax Act, 1961 ;

(c) for an order u/s 394 of the Act that subject to the approval of the scheme by the Central Government u/s 72A of the Income Tax Act, 1961, all the debts, duties and obligations of VDCT Ltd. be transferred to and vested in NBE P. Ltd. without any further act or deed with effect from September 30, 1977, or from such other date as the Central Government may specify while sanctioning the approval to the scheme u/s 72A of the Income Tax Act, 1961, so that the debts, duties and obligations of the VDCT Ltd. became the debts, duties and obligations

of the NBE P. Ltd.;

(d) for an order u/s 394 of the Act that subject to the approval of the Central Government u/s 72A of the Income Tax Act, 1961, all proceedings now pending by or against the VDCT Ltd. do continue by or against NBE P. Ltd.;

(e) for an order u/s 394 of the Act that VDCT Ltd. do within 30 days after the date of the order cause a certified copy to be delivered to the Registrar of Companies, Hyderabad, for registration and that subject to the approval of the Central Government u/s 72A of the Income Tax Act, 1961, on such certified copy being delivered or such other date as may deem fit, the VDCT Ltd. be dissolved without winding up and that upon such dissolution the Registrar of Companies, Hyderabad, shall take all necessary consequential action by way of alterations in the registers and files maintained by him in respect of the VDCT Ltd. and NBE P. Ltd. ;

(i) that the parties to the scheme for amalgamation or other persons interested shall be at liberty to apply to this court for any directions that may be necessary in regard to the carrying out of the arrangements by way of a scheme ;

(g) that such further and other orders may be passed as this court deems fit.

Notices of these petitions were published as required by the rules and also served on the Registrar of Companies, Hyderabad, and the official liquidator as required by Section 394 of the Companies Act, and on the Central Government as required by Section 394A of the Act.

7. The official liquidator after scrutinising the books of account and records of the VDCT Ltd. submitted that the accounts of the company have not been conducted in a manner prejudicial to the interests of the members and the public. On behalf of the Central Government, the Regional Director, Company Law Board, Southern Region, Madras, filed affidavits in both the company petitions raising the following objections to the scheme of arrangement for the purpose of amalgamation.

(1) Large amounts were due to the secured and unsecured creditors by VDCT Ltd. and there was a proposal to issue shares of the value of Rs. 2 lakhs to the creditors of VDCT Ltd. Hence, the scheme of arrangement for amalgamation should be approved at the meetings of the creditors of VDCT Ltd., or, in the alternative, notices should be issued to the creditors of VDCT Ltd. In respect of NBE P. Ltd., it is stated that as per the balance-sheet as on June 30, 1977, Rs. 1,591.88 lakhs were due to various secured and unsecured creditors and a provision of Rs. 85 lakhs was made towards taxation and the contingent liabilities of the company exceed Rs. 2 crores. In view of the aforesaid financial position and as a huge amount was payable by NBE P. Ltd. to its creditors, the scheme of amalgamation should be approved at a meeting of the creditors or, in the alternative, notices should be issued to the creditors of NBE P. Ltd.

(2) The shareholders of the VDCT Ltd. will get one share of NBE P. Ltd. for every

four shares held by them. The exchange ratio of 1 : 4 has been arrived at on the basis of the valuation made by the auditors in respect of both VDCT Ltd. and NBE P. Ltd. The auditors worked out the value of each share of VDCT Ltd. at Rs. 50 per share having a nominal value of Rs. 100 and the value of each share of NBE P. Ltd. was calculated at Rs. 200 per share with a nominal value of Rs. 100. This valuation is defective as the auditors had valued the shares after revaluation of assets and increasing the value of Rs. 26.11 lakhs and also increased the yield value on the basis of the average expected profits as per the revival scheme. The valuation on the basis of assets revaluation is not justified as this procedure was adopted only in respect of the assets of VDCT Ltd., where exchange of shares is involved. Either the assets of both the companies should be revalued or there should not be any revaluation of assets at all. Revaluation of assets of only one particular company leaving aside the assets of the other company will not give the fair value of the shares. The valuation of the shares of VDCT Ltd. at Rs. 50 per share of Rs. 100 was not arrived at properly and the fair value of the share of VDCT Ltd. is Re. 1 per share of the nominal value of Rs. 100. The fair value of the shares of NBE P. Ltd. works out to Rs. 320 per share with a nominal value of Rs. 100. On the basis of the above valuation an exchange of one share of the value of Rs. 320 is to be given to the shareholders of VDCT Ltd. since the value of the shares of VDCT Ltd. is only Re. 1 per share with a nominal value of Rs. 100. An exchange ratio of 1 : 320 appears to be reasonable, and, accordingly, the shareholders of VDCT Ltd. will get one share of NBE P. Ltd. for every 320 shares held by them in VDCT Ltd.

(3) VDCT Ltd. is a public company, whereas NBE Ltd. is a private company. By the proposed amalgamation, NBE P. Ltd. will become a public company since the shareholders of VDCT Ltd. who were more than 50 will become shareholders of NBE P. Ltd. in addition to its existing members. Unless the articles of association of NBE P. Ltd. are modified by deleting art. 3 of the articles of association, and the NBE P. Ltd. complies with the other formalities required by law by converting itself into a public company, the scheme of amalgamation cannot be applied.

(4) The order for dissolution of the VDCT Ltd. without winding up should be made only after the official liquidator makes a report in accordance with the provisions of the proviso to Section 394(1) of the Companies Act.

(5) VDCT Ltd. is carrying on the business of extraction of oil. The memorandum of association of NBE P. Ltd. does not provide for carrying on the business of extraction of oil. Hence, NBE P. Ltd. cannot carry on the the business of VDCT Ltd. in the matter of extraction of oil unless NBE P. Ltd. is empowered to carry on the business by its memorandum of association.

A reply affidavit has been filed in each of the company petitions meeting all the aforesaid objections raised on behalf of the Central Government. It is stated in the reply affidavit that the scheme of amalgamation is very beneficial to VDCT Ltd. inasmuch as all the liabilities of VDCT Ltd. are being taken over by NBE P. Ltd., and that the interests of creditors of VDCT Ltd. are better safeguarded after

amalgamation, and that the principal creditors of VDCT Ltd. are not opposed to the scheme of amalgamation and that the principal creditors, M/s. Andhra Pradesh State Financial Corporation and the Vijaya Bank Ltd., have sent letters (filed as annexs. I and II) approving the proposed scheme of amalgamation. The other creditors, A. Venkateswara Rao and his firm, M/s. Sree Durga Tobacco Company, to whom an amount of Rs. 4 lakhs is due, have agreed to adjustment of the said amount by allotment of 2,000 shares of Rs. 100 each. It is further stated that the profit position of the NBE Ltd. after merger is expected to be substantially better than before merger because of the benefits accruing to NBE Ltd. u/s 72A of the I.T. Act and because of the reduced rate of Income Tax as NBE Ltd. will have to be treated as an industrial company and because of the profits made by the business of VDCT Ltd., which is taken over by NBE Ltd. under a scheme for revival of the sick unit. It is also stated that general notice with regard to the scheme was published in the dailies and no objection was received from any quarter. Farther, it is stated that under the scheme of merger and revival, NBE Ltd, proposed to increase its capital base by issue of 22,250 equity shares of Rs. 100 at Rs. 200 each as fully paid up to certain categories of shareholders and creditors and outsiders, and thus, the share capital of NBE Ltd. would increase from Rs. 33,35,000 to Rs. 55,60,000. With regard to the objection raised against the equation of shares of VDCT Ltd. and NBE Ltd. at 4 ! 1, the petitioners had filed an auditois" report setting out the reasons given in justification of the valuation and equation of shares. With regard to the objection raised that the NBE Ltd., which is a private limited company, would become a public limited company as the number of shareholders would go beyond 50, it is stated that both the members of the companies have approved the scheme and it is only after amalgamation NBE Ltd. will become a public limited company, and that the articles of association could be modified by deleting Article 3 by passing a special resolution and as the members of the NBE Ltd. had approved the scheme of merger, this court has power to sanction and approve the scheme of merger by effecting conversion of NBE Ltd. into a public limited company.

8. With regard to the objection raised in the reply affidavit filed in C.P. No. 10/78, it is stated that the objects in the memorandum of association of NBE Ltd. are very wide and particularly, Sub-clauses 49 and 76, and, therefore, the activities including the extraction of oil are within the scope and objects of NBE Ltd. With regard to the meetings of the creditors, it is stated that the scheme of amalgamation is an arrangement between the members of VDCT Ltd. and NBE Ltd., and the provisions of the Companies Act did not require meetings of the creditors of the two companies. Even otherwise, it is stated that the financial position of the NBE Ltd. is very sound and the creditors of both the companies stand to benefit by the amalgamation. It is also stated that in the event of the merger of the two companies, there would be no liability of the VDCT Ltd. to be assumed by the NBE Ltd. and that the creditors of the NBE Ltd. can have no grievances whatsoever by reason of the proposed scheme of amalgamation, and that the proposed scheme would considerably improve the position of the NBE

Ltd., and, hence, no meetings of the creditors are contemplated or necessary in the circumstances of the case. It is further stated that the scheme for amalgamation need not be rejected on the ground that the NBE Ltd. would get converted into a public limited company, and that necessary directions can be given at the time of sanctioning the scheme for alterations of the articles of association of NBE Ltd. or the sanction may be given subject to conversion of NBE Ltd. into a public limited company. I shall now consider each of the objections taken by the Central Government to the scheme of amalgamation. The first objection is that no meetings of the creditors of VDCT Ltd. or NBE Ltd. were held. But, in the instant case, the proposed scheme of amalgamation is between the company and its members u/s 391(1), which contemplates that in respect of such a scheme, only the meetings of the members should be held. No doubt large amounts are due to secured and unsecured creditors by VDCT Ltd. But the principal creditors of VDCT Ltd. are the A.P. State Financial Corporation and the Vijaya Bank. They have sent letters filed as annexes I and II, that they are consenting to the proposed amalgamation of VDCT Ltd. with NBE Ltd. The other major creditor of VDCT Ltd. is NBE Ltd. itself. The two other creditors of VDCT Ltd. are Sri A. Venkateswara Rao and his firm, M/s. Sri Durga Tobacco Co., to whom an amount of Rs. 4 lakhs is due, who had agreed to the adjustment of the said amount by the allotment of 2,000 shares of Rs. 100 each. It is stated by Sri S. Parvatha Rao that the creditors of NBE Ltd. were not approached for their consent. But it is stated in the reply affidavit that the profit position of NBE Ltd. after the merger is expected to be substantially better than before merger because of the benefits accruing to the NBE Ltd. u/s 72A of the Income Tax Act and also because of the reduced rate of Income Tax as NBE Ltd. will be treated as an industrial company. It is further stated that though a general notice with regard to the scheme of amalgamation was published in the dailies, no objection has been received from any quarter. Under the proposed scheme of merger, NBE Ltd. proposes to increase its capital by the issue of 22,250 equity shares of Rs. 100 at Rs. 200 each as fully paid up to certain categories of shareholders and creditors and also outsiders. Thus, the share capital of NBE Ltd. will be increased from Rs. 33,35,000 to Rs. 55,60,000. Thus, it is seen that the creditors of NBE Ltd. will not in any way be prejudicially affected by the merger. On the other hand, they will stand to benefit and their interests are amply safe-guarded or secured by the merger. Further, when the scheme proposed is between the company and its members, it is not mandatory to direct the holding of meetings of the creditors. No doubt, the court may also direct the holding of the meetings of the creditors where the court finds that the scheme of amalgamation is likely to adversely affect the interests of the creditors. But, in the instant case, the scheme of amalgamation does not adversely affect the creditors of VDCT Ltd. or NBE Ltd. Therefore, I do not think the holding of the meeting of the creditors of VDCT Ltd. or NBE Ltd. is called for.

9. In *Ansal Properties and Industries Ltd. and Another Vs. Company*, an application was made to the court for sanction of a scheme of amalgamation of

two companies. The two companies entered into a scheme of amalgamation. The effect of the scheme of merger was to make the creditors of the transferor-company the creditors of the transferee-company. The major creditor of the transferor-company is the transferee-company itself. The only other creditor of the transferor-company is a firm having a credit of Rs. 1,600. On the other hand, the creditors of the transferee-company amount to Rs. 50 lakhs. The question was whether the scheme would be adverse to their interests. The transferor-company was a new company set up in 1974, and it had not gone into production. The merger of the assets and liabilities of the transferor-company in the transferee-company would not be adverse to the creditors of the transferee-company. On those facts, it was held that the meeting of the creditors of the transferee-company was not necessary and that there was no impediment to the sanctioning of the scheme. It was also held that the creditors have to be protected by the court itself and no scheme of merger can be put into effect without the sanction of the court even if it is unanimously passed by the shareholders. If the court is of the view that the interests of the creditors are adversely affected by the merger, it can insist on refusing to sanction the scheme unless the consent of the creditors has also been obtained. For this purpose, the legislature has obviously cast a duty on the court to find out whether the scheme affects the interests of the creditors to such an extent that their meeting is essential.

10. In *In re W. A. Beardsell & Co. (P.) Ltd. and Mettur Industries Ltd.* [1968] 38 Comp Cas 197 (Mad), an application was filed under Sections 391(2) and 394 of the Companies Act, 1956, for merger of the two companies. Separate meetings of the ordinary shareholders of the companies were convened, and held on the direction of the court u/s 391(1). The chairman of the meeting submitted a report stating that the members who were present at the meetings unanimously approved the scheme of amalgamation. An objection was raised that notice of the scheme should have been given to one of the creditors of the transferor-company. Ramaprasada Rao J., as he then was, held that it was not necessary to issue notice to every creditor of the company and that he should be personally heard before an order was made, was not the primary intendment of Section 394 and if "on an overall consideration of the entire picture the court's conscience is satisfied that an amalgamation would benefit not only the company amalgamating but the company with which amalgamation is made and it is in the mutual interests of both the companies that such a scheme should be sanctioned, the court should not hesitate to sanction the compromise and should not falter in giving effect to the genuine and bona fide scheme chalked out by the two companies."

11. The learned judge further held that amalgamation being within the scope of the decision of the body of the shareholders, such decision if made by the body unanimously ought not to be lightly interfered with by the court.

12. In the instant case, the facts and circumstances mentioned above show that

the major creditors of the transferor-company have agreed to the proposed scheme of amalgamation and that the creditors of NBE Ltd. will stand to benefit by reason of the merger as the profit position of NBE Ltd., after merger is expected to be substantially better than before the merger in view of the several facts mentioned in the reply affidavit. Therefore, in the circumstances of the case, the proposed merger, far from adversely affecting the interests of the other creditors of VDCT Ltd., or NBE Ltd., is clearly beneficial and advantageous to the creditors of both the companies. Hence, I do not think it is necessary to hold separate meetings of the creditors of each of the companies or that individual notices should be given to the creditors of each of the companies. Therefore, the first objection of the Central Government that meetings of the creditors should be convened before the sanctioning of the scheme is devoid of any force.

13. The second objection raised on behalf of the Central Government that the auditors had worked out the value of each share of VDCT Ltd. at Rs. 50 per share having a nominal value of Rs. 100 and the value of each share of NBE Ltd. at Rs. 200 per share having a nominal value of Rs. 100 and this valuation of the shares of the two companies was defective, that the assets of NBE Ltd. were revalued and not the assets of VDCT Ltd., and the exchange ratio of one share of NBE Ltd., to 320 shares of VDCT Ltd. would be reasonable. In reply to this objection, a detailed report of the auditors, M/s. Brahmaiah & Company, has been filed in justification of the valuation and equation of the shares of both the companies. It is stated in the report of the auditors that the valuation and equation of the said shares was reasonable and based on the asset and profitability position of the two companies and detailed reasons have been set out in the auditors' report as to how the valuation and equation have been arrived at. It is stated that the method of valuation of shares by averaging the yield value and the asset value is preferred where there is substantial difference between the calculated value of the tangible assets on the one hand and the capitalisation of the earning capacity on the other and that viewing the stability of the company along with its revenue potentialities this method of valuation has the effect of correcting distortion which the two methods of valuation on comparison are likely to show. It is further stated that the shares of the transferor-company are valued after revaluing the assets because this method is to be adopted in the case of a company having a strong capital asset backing (productive assets like plant and machinery) but constantly losing because of certain abnormal factors and when such assets are capable of earning future profits if the abnormal factors are removed especially when there is no other means of finding the value of shares and, therefore, in the case of VDCT Ltd., revaluation of assets was adopted though not in the case of NBE Ltd. It is also stated that in the case of NBE Ltd., even when the assets are revalued, the appreciation of some assets will offset the depreciation in the case of other assets and there will not be any appreciable difference. Moreover, in the instant case, the shareholders of both the companies have unanimously approved the conclusions arrived by the auditors. Further, NBE Ltd. is a private limited company and the shareholders of the said company also

have unanimously agreed for the equation of the shares and no public interest is involved. If the equation of the shares in the ratio of one share in NBE Ltd. for 320 shares of VDCT Ltd. is to be adopted as suggested by the Central Government, the shareholders of VDCT Ltd. will be greatly prejudiced and such an equation will be wholly disadvantageous to the shareholders of the VDCT Ltd. and it will be disproportionately advantageous to the members of NBE Ltd.

14. In *In Re: Sidhpur Mills Co. Ltd.*, it was held that in dealing with an application for sanction of a scheme of amalgamation of companies under Sections 391 and 394 it is the duty of the court to see that the scheme is a fair and reasonable one and that initially the burden is on the petitioner to show that prima facie the scheme is fair and reasonable such as a prudent and reasonable shareholder would approve of and not object to. With regard to the functions of the court, the learned judge observed as follows (p. 311):

" Therefore, in my judgment, the correct approach to the present case is (i), to ascertain whether the statutory requirements have been complied with, and (ii) to determine whether the scheme as a whole has been arrived at by the majority bona fide and in the interests of the whole body of shareholders in whose interests the majority purported to act, and (iii) to see whether the scheme is such that a fair and reasonable shareholder will consider it to be for the benefit of the company and for himself. The scheme should not be scrutinized in the way a carping critic, a hair-splitting expert, a meticulous accountant or a fastidious counsel would do it, each trying to find out from his professional point of view what loopholes are present in the scheme, what technical mistakes have been committed, what accounting errors have crept in or what legal rights of one or the other sides have or have not been protected. It must be tested from the point of view of an ordinary reasonable shareholder, acting in a businesslike manner, taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question."

15. In *In re Maneckchowk and Ahmedabad Manufacturing Co. Ltd.* [1970] 40 Comp Cas 819 (Guj), Justice D. A. Desai has observed thus (heatnote)

" The court in exercising its discretion in sanctioning a scheme of compromise with members and creditors u/s 391(2) of the Companies Act, 1956, must treat it as cardinal that its function does not extend to usurping the view of the members or creditors. It must look at the scheme to see that it is a reasonable one and, while so doing, the court will be strongly influenced by a big majority vote and the reasons which actuated the contesting creditors in opposing the scheme. None the less it is essential that the scheme must be a fair and equitable one, though it is none of the business of the court to judge upon the commercial merits which in fact is the function of the creditors and members."

16. Again, his Lordship observed thus (heatnote):

" The scheme has not got to be scrutinised by the court with that much care with

which an expert will scrutinise it, nor will it approach it in a carping spirit with a view to pick holes in it. If the majority is acting in a bona fide and honest manner, and in the interests of the Class that it purports to represent, then, if the scheme is such as a fairminded person, reasonably acquainted with the facts of the case as prevailing at the time when the scheme was sponsored and approved, can regard it as beneficial for those whom the majority seeks to represent, then, unless there are some strong and cogent grounds to show that the scheme was conceived, designed or calculated to cause injury to others, the court will ordinarily sanction it, rather than reject it. While examining the scheme the court should, keeping in view all the aspects of the matter, prefer a living scheme to compulsory liquidation bringing about an end to a company."

In the instant case, the shareholders of both the companies have, at separate meetings unanimously approved of the scheme of amalgamation and have also held that the scheme of amalgamation is beneficial to the creditors of both the companies. In the circumstances, I do not think this court will be justified in refusing to accord its sanction to the scheme of amalgamation as proposed by the two companies.

17. It is next contended for the Central Government that NBE P. Ltd. is a private limited company whereas VDCT Ltd. is a public limited company and by reason of the merger of VDCT Ltd. with NBE P. Ltd., NBE P. Ltd. will have to be converted into a public limited company and unless NBE P. Ltd. converts itself first into a public limited company, the scheme of amalgamation cannot be sanctioned. But this conversion of NBE P. Ltd. into a public limited company can be effected by a simple alteration of the articles of association by a special resolution. Therefore, the sanction for the scheme of amalgamation can be given subject to the conversion of NBE P. Ltd. into a public limited company. It is only after NBE P. Ltd. converts itself into a public limited company, the transfer of shares in the ratio proposed in the scheme of amalgamation can be effected, and it is only thereafter that VDCT Ltd. will stand dissolved. Therefore, this objection raised by the Central Government is not an insurmountable difficulty and the scheme can be sanctioned by the court subject to NBE P. Ltd. getting itself converted into a public limited company by alteration of the articles of association in accordance with the relevant provisions of the Companies Act, and the scheme will come into effect with effect from the date on which the said company converts itself into a public limited company.

18. It is next contended on behalf of the Central Government that the objects in the memorandum of association of NBE P. Ltd. do not contain a provision for carrying on the business of extraction of oil. But the learned counsel for the petitioners relied upon Clauses 49 and 76 and of the memorandum of association of NBE P. Ltd., which read as follows :

" 49. To buy, sell (both to persons residing on the company's premises and to non-residents), import, produce, manufacture or otherwise deal in food products, meat, groceries, fruits, confectionery, wine, spirits, beer and alcoholic beverages,

tobacco, druggist supplies, beverages, linen, furniture and furnishings and other articles required in the said business."

" 76. To carry on the business of fruiterers and green grocers, bacon factors and merchants, bakers, butchers, meat salesmen, butter factors and salesmen, cheesemongers, corn and flour merchants, cheese factors and agents, dairymen, egg merchants and salesmen, poulterers and general provision merchants, and to buy, sell, manufacture and deal in goods, stores and consumable articles of all kinds, both wholesale and retail, and to transact every kind of agency business."

Clause 49 provides, inter alia, for the manufacture or otherwise deal in food products. These objects are sufficient to cover the extraction of oil from oil seeds like cotton seeds, oil cakes bran and utilising their by-products for feeds and fertilisers. The expression " manufacture or otherwise deal in food products " in Clause 49 and the expression " manufacture and deal in consumable articles of all kinds " in Clause 76 of the memorandum of association of NBE P. Ltd. are wide enough to cover the manufacture of oil from cotton seeds, etc., and, therefore, there is no force in this objection raised on behalf of the Central Government.

19. It is next contended on behalf of the Central Government that the proposed allotment of shares of the value of Rs. 2 lakhs to A. Venkateswara Rao, a creditor of VDCT Ltd., and the proposed allotment of shares of the value of Rs. 5 lakhs to outsiders after merger is not valid and cannot be sanctioned as part of the scheme of amalgamation but it is contended by Sri Parvatharao that an application has been made to the Controller of Capital Issues, who is the concerned competent authority, for sanctioning the allotment of the shares and that it is outside the scheme and that the question of allotment will be subject to the orders that may be passed by the Controller of Capital Issues and, therefore, the proposed allotment of shares cannot be a legal impediment in the way of sanctioning the scheme. I think this submission of Sri Parvatharao is well founded and has to be accepted. I do not see how the proposed allotment of shares to one of the creditors in lieu of his debt and the allotment of shares to outsiders would stand in the way of sanctioning the scheme of amalgamation u/s 394 read with Section 391(2) of the Companies Act.

20. For all the foregoing reasons, both the applications are ordered as prayed for subject to the condition that NBE P. Ltd. will get itself converted into a public limited company by getting its articles of association duly amended as required by law and that the scheme shall come into operation only with effect from July 1, 1978, and that all the assets and interest of VDCT Ltd. shall stand transferred to and vest in NBE P. Ltd. with effect from July 1, 1978, or from such other date as the Central Government may specify while sanctioning its approval u/s 72A of the Income Tax Act, 1961, and not with effect from 30th September, 1977, as prayed for in Clause (b) of para. 16 of Company Petition No. 9 of 1978 and Clause (b) of para. 15 of Company Petition No. 10 of 1978.

21. Subject to the above conditions, both the petitions are ordered as prayed for.

In the circumstances, there will be no order as to costs.