

(1982) 09 CAL CK 0009

In the Calcutta High Court

Case No : Appeal No. 171 of 1982 and Civil Petition No. 75 of 1982

Regional Director, Company Law Board, Eastern Region

APPELLANT

Vs

Hindusthan General Electrical Corporation Ltd. and Another

RESPONDENT

Date of Decision : 13-09-1982

Acts Referred:

Monopolies and Restrictive Trade Practices Act, 1969 — Section 23, 23(3), 25, 44

Citation : (1984) 55 CompCas 557

Hon'ble Judges : Suhas Chandra Sen, J;Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : S.B. Mukherjee, U. Mukherjee and R.N. Banerjee, for the Appellant; R.C. Nag, Sunil Mukherjee and P.K. Jhunjunwalla, for the Respondent

Final Decision : Allowed

Judgement

Suhas Chandra Sen, J.—This is an appeal preferred by the Regional Director, Company Law Board, Eastern Region, against a judgment dated April 29, 1982, delivered by T.K. Basu J. Hindusthan General Electrical Corporation Ltd. Vs. Karamchand Thapar and Bros. and Others, , on an application u/s 391(2) read with Section 394 of the Companies Act, 1956, for confirmation of a scheme of amalgamation.

2. An application was made for obtaining sanction of this court to a scheme of amalgamation of the entire undertaking of Hindusthan General Electrical Corporation Ltd. with Karam Chand Thapar Ltd. It has been stated in the petition that shortly after incorporation Hindusthan General Electrical Corporation Ltd. was engaged in the business of raising iron ore and manganese ore. From the profit & loss account of the company for the year ended 31st July, 1981, it appears that the company also manufactured iron clad switches, starters, cutouts, distribution board/boxes and lighting equipments, wireless receivers (valves & transistors), electrical accessories, casein and dicalcium phosphate.

3. It also appears from the profit & loss account of Karam Chand Thapar Ltd. for

the year ended 31st March, 1981, that it was engaged in the production of iron and manganese ores, agricultural farm products, building and construction materials and equipments.

4. The admitted position is that although each of the two companies is engaged in production of a number of goods, both the companies produced iron and manganese ore. The short point that has come up for consideration in this case is whether the requirements of Section 23(3) of the MRTP Act, 1969, have been fulfilled in this case so that the two companies can amalgamate without the prior approval of the Central Govt. The petitioners have stated in their petition that both Karam Chand Thapar Ltd. and Hindusthan General Electrical Corporation Ltd. are inter-connected undertakings and both the companies are registered u/s 20(a)(ii), MRTP Act, 1969. None of the two companies is a dominant undertaking as defined in the MRTP Act, 1969. Both the companies own iron ore and manganese ore mines and produce the-same goods. It has been submitted that by virtue of the provisions of Section 23(3) of the MRTP Act, 1969, no approval of the Central Govt. under the MRTP Act, 1969, is necessary for giving effect to and/or sanctioning the scheme of amalgamation.

5. The learned trial judge held that the two companies in this case had fulfilled the three requirements of Section 23(3) of the Act in order to avail of the exemption contained therein. There was no dispute that both the transferor and the transferee companies were inter-connected companies. There was also no dispute that neither of the two companies before the amalgamation and even after amalgamation was a "dominant undertaking" within the meaning of the Act and that both the companies produced the same goods. The learned judge was of the view that in a case where both the companies produced a multiplicity of goods but had only one common item of production the volume of production of that common item in relation to the total volume of business of the company was not a relevant consideration.

6. It has been argued on behalf of the appellant, the Regional Director, Company Law Board, Eastern Region, that Section 23(3) of the Act has been wrongly construed by the learned judge. It has been argued that Section 23(3) contemplates amalgamation of two undertakings and not companies and the expression "undertaking" has to be understood as a unit of production. "Inter-connected undertakings" in Section 23(3) should not be understood to mean inter-connected companies. In support of this argument reference has been made to Sections 2(g), 21, 22, 23(4), 23(9) and 25 of the Act. It has also been argued that if the item of goods which is commonly produced is a minor item of production from the point of view of the manufacturer, then the exception of Section 23(3) is not attracted. The two undertakings must either produce the same goods only or must produce substantially the same goods. The facts as revealed by the balance-sheets of the two companies will go to show that the production of the two common items, iron ore and manganese ore, was not the major items of production of the two companies.

7. Lastly, it has been argued that the two companies were not engaged in production of the same goods at all. The expression "as produce the the same goods" will not cover the case of the two companies in the instant case because the two companies are each producing a number of goods and the common items of production being iron ore and manganese ore only.

8. On behalf of the respondents it has been contended that there cannot be any dispute that the two companies are undertakings within the meaning of the Act. It has been argued that the two companies have been registered u/s 26(2) of the Act as registered undertakings and it is not open to the appellant to argue that the two companies are not undertakings within the meaning of Section 23(3).

9. It has further been argued that the court should not try to find out whether the two companies produce substantially the same goods as suggested by the appellant. It has been argued that this test will not be a workable test at all and a number of practical difficulties will arise if this test is sought to be applied. Thirdly, it has been argued that there cannot be any dispute that the two companies in this case are engaged in production of iron ore and manganese ore. The two companies are producing the same goods and all the conditions laid down in Section 23(3) of the Act have been fulfilled. Reliance has also been placed on a judgment of the Bombay High Court in the case of Tata Iron and Steel Co. Ltd., In re [1975] 45 Comp Cas 355, in support of this contention.

10. The MRTP Act, 1969, has defined "undertaking" in Section 2(v) as an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind. The definition is not restricted to only units of production of a company. The Act applies to an individual, to a firm and also to a body corporate. Therefore, the meaning of the word "undertaking" has to be gathered from the context in which it appears in the various parts of the Act. It appears to us that in some of the sections, the word "undertaking" has been used in the restricted sense of a unit of production as in Section 2(g)(ii), (iv) and (v). But it has also been used in a wider sense in some other sections. In the group of sections under Chap. III, Part A, in Section 21, the expression "undertaking" must be understood to mean a company where it has been provided : "where an undertaking to which this Part applies proposes to substantially expand its activities by the issue of fresh capital". Section 23 provides that "no scheme of merger or amalgamation of an undertaking to which this Part applies with any other undertaking shall be sanctioned by the court unless the scheme for such merger or amalgamation have been approved by the Central Govt. under this Act". It has further been provided in Sub-section (4) that if an undertaking to which this part applies proposes to acquire by purchase, take over or otherwise the whole or part of an undertaking, which will or may result either in the creation of an undertaking to which this Part would apply or in the undertaking becoming an inter-connected undertaking, sanction of the Central Govt. will have to be taken. Section 24 deals with consequence of contravention of the provisions of Section 23, and Section 25 provides that no

person who is a director of an undertaking to which this part applies shall be appointed after the commencement of this Act as a director of any other undertaking except with the approval of the Central Government. In our opinion, the word "undertaking" in Section 23(3) cannot be given a restricted meaning. When the expression merger or amalgamation or takeover is used in Section 23, it must be understood in the sense of merger or amalgamation of two companies. Section 24 which deals with imposition of penalty for violation of the embargo placed by Section 23 provides that the Central Government may direct the undertaking "to divest itself of the stock or other share capital or assets" and Section 25 deals with the position of a director of an undertaking. In the context of all these sections and the scheme of this Act it appears to us that the expression "undertaking" in Section 23(3) has not been used in the restricted sense of an unit of production but in the sense of a company. Therefore, if these two companies fulfil the other conditions laid down in Sub-section (3) they are entitled to amalgamate without prior sanction of the Central Government.

11. The case of *In Re: A.W. Figgis and Co. Pvt. Ltd.*,, , is not of any relevance for the purpose of the present inquiry. In that case, A. W. Figgis & Co. Pvt. Ltd. had two businesses, one of tea broking and auctioneering and, the other, property business. Queens Park Property Co. Pvt. Ltd. was a wholly owned subsidiary of Figgis & Company. The property business of the company was sought to be transferred to the new company, Queens Park Property Co. Pvt. Ltd. The proposed scheme was aimed at relieving the transferor-company from looking after its property business. The bifurcation of the business was for the benefit of the company and its shareholders and an application was made to court for sanction of the scheme. The Company Law Board contended that the proposed scheme of arrangement is not a bona fide scheme and/or compromise and the same is not a scheme of amalgamation within the meaning of the Companies Act, 1956. The object was to transfer valuable property from the transferor-company to the transferee-company. The scheme was, however, sanctioned by court.

12. We are also unable to accept the argument made on behalf of the appellant that the expression "as produce the same goods" must be understood to mean "as produce substantially the same goods". In the first place, this cannot be done without introducing words into the section which Parliament in its wisdom had thought fit not to incorporate. Moreover, this test will be unworkable. The main difficulty would be how to determine whether substantially the same goods are being produced by the two companies or not. Will it be judged by the volume of production or by the total sale proceeds or by the quantum of capital employed or by some other yardstick ? The section has not used the word "substantially" and, in our opinion, we should not import any word which will make the section unworkable.

13. We shall now deal with the third point that has been urged in this appeal. To appreciate this point, we shall have to consider the scope of Section 23(3) of the

Act. Chapter III of the Act is divided into three parts and is under the general heading "Concentration of Economic Power". Part A comprises of Sections 20 to 26. Section 20 defines "undertakings" to which this part applies and is in the following terms :

"The Part shall apply to-

(a) an undertaking if the total value of-

(i) its own assets, or

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

(b) a dominant undertaking-

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

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

14. There is an Explanation to Section 20 which is not necessary for our purpose.

15. Sections 21, 22 and 23 require that an undertaking to which Part A applied will have to obtain prior approval of the Central Govt. before implementing any scheme for expansion of undertakings (Section 21), establishment of new undertakings (Section 22), merger or amalgamation of two undertakings (Section 23(1) and 23(2)) and purchase or take-over of other undertakings (Section 23(4)). Section 21 which relates to expansion of undertakings has been specifically made subject to Section 23. The object of these provisions appears to be that no scheme of merger or amalgamation, expansion or setting up of a new undertaking as an interconnected undertaking which comes within the mischief of Section 20 can be implemented without prior approval of the Central Government. On this general embargo an exception has been provided in Section 23(3) which provides that the prohibition contained in Sub-section (1) or (2) of Section 23 will not apply to a scheme of merger or amalgamation of such interconnected undertakings "as are not dominant undertakings" and "as produce the same goods".

16. In this connection it is also important to note the language of Sections 23(3), 23(4) and the exception in Sub-clause (9):

"23(3) Nothing in Sub-section (1) or Sub-section (2) shall apply to the scheme of merger or amalgamation of such interconnected undertakings as are not dominant undertakings and as produce the same goods.

(4) If an undertaking to which this Part applies proposes to acquire by purchase, take-over or otherwise the whole or part of an undertaking which will or may result either-

- (a) in the creation of an undertaking to which this Part would apply, or
- (b) in the undertaking becoming an interconnected undertaking of an undertaking in which this part applies;

it shall, before giving any effect to its proposals, make an application in writing to the Central Government in the prescribed form of its intention to make such acquisition, stating therein information regarding its interconnection with other undertakings, the scheme of finance with regard to the proposed acquisition and such other information as may be prescribed.....

(9) Nothing in Sub-section (4) shall apply to the acquisition by an undertaking which is not a dominant undertaking, of another undertaking which is not also a dominant undertaking, if both such undertakings produce the same goods :

Provided that nothing in this sub-section shall apply if as a result of such acquisition, an undertaking comes into existence to which Clause (a) or Clause (b) of Section 20 would apply."

17. One thing is clear from the reading of the sections that these undertakings which do not produce the same goods will not be able to avail of the exemption granted by Section 23(3) or Section 23(9). But the question is, will the provisions of Sub-section (3) apply to a case where both the undertakings are engaged in the production of a number of goods some of which are in common ? The object of the Act seems very clear. The object is that the exemption will not be available to the undertakings which do not produce the same goods. If that be the object, there is no reason to hold that the statute will permit merger or amalgamation of two undertakings which produce entirely different and dissimilar goods to merge only because there is one common item of production. This appears to run against the object of the provisions contained in Chapter III under the heading "Concentration of Economic Power".

18. In this connection it will be instructive to notice the meaning of the word "same". The word "same" has been explained in Black's Law Dictionary, fifth edition, page 1203, as follows :

"Same, identical, equal, equivalent. The word "same", however, does not always mean "identical". It frequently means of the kind or species, not the specific thing. When preceded by the definite article, means the one just referred to."

19. The clear wording of the section itself runs counter to the argument made by the respondent. The two qualifying phrases used in Section 23(3) are "as are not dominant undertakings" and "as produce the same goods". The phrase "as produce the same goods" is descriptive of the two undertakings. We shall have to see the goods that are actually produced by the two companies to decide this question. Only if the goods produced by one undertaking are the same as the goods produced by another undertaking, the two undertakings can be described as undertakings "as produce the same goods".

20. It will not be in keeping with the object of the statute to hold that although the two undertakings were engaged in production of a number of divergent goods and if there was only one common item of production, no approval of the Government is necessary. It has been argued on behalf of the respondent that if a company produces steel, copper, aluminium and other heavy engineering goods and wants to merge or amalgamate with a company which produces paper, chemicals and cotton, prior approval of the Government will be necessary. But if both the companies also manufacture rubber, such approval will not be necessary. In other words, the Act does not stand in the way of merger of the two undertakings in the second case when a common item is being produced. While bearing in mind the object of the Act, this construction does not seem to be reasonable. If it amounts to concentration of economic power in the first case, it will not cease to be concentration of economic power in the second case only by virtue of presence of one common item of production. Such a construction, in our opinion, will frustrate the object of the statute and the clear words of the statute do not warrant such a construction.

21. Section 23(3) provides that nothing in Sub-section (1) or Sub-section (2) shall apply to the scheme of merger or amalgamation of such interconnected undertakings "as are not dominant undertakings" and "as produce the same goods". In this case, admittedly, the two companies before us are interconnected companies. The admitted position is also that the two are not dominant undertakings. The proposed amalgamation or merger will not bring into existence a dominant undertaking within the meaning of the Act. The statute envisages that interconnected undertakings "as are not dominant undertakings" and "as produce the same goods" will not come within the mischief of Sub-section (1) or Sub-section (2) of Section 23. If the two undertakings do not produce the same goods, they will not be able to avail of the benefit of Section 23(3). The question is can the two companies before us be described as undertakings which produce the same goods? We have noticed earlier that Hindusthan General Electrical Corporation Limited produces iron ore and manganese ore and also iron-clad switches, starters, cut-outs, distribution board/boxes and lighting equipments, wireless receivers (valves and transistors), electrical accessories, casein and dicalcium phosphate. The other company before us, Karam Chand Thapar, does not produce iron-clad switches, starters, cut-outs, distribution board/boxes and lighting equipments, wireless receivers (valves and transistors), electrical accessories, casein and dicalcium phosphate. But it produces a number of goods like agricultural farm products, building construction materials and equipments which are not produced by Hindustan General Electrical Corporation Limited, It, however, also produces iron and manganese ore, It is very difficult to accept the contention that both the companies produce the same goods. It is true that both the companies produce iron ore and manganese ore. It is equally true that each of the two companies produces a number of goods which are not produced by the other. It is one thing to say that the two companies are engaged in production of goods some of which are the same and quite another thing to say

that the two companies produce the same goods. Sameness must be of all the goods that are produced. "As produce the same goods" in Section 23(3) cannot mean "as produce goods some of which are the same".

22. We are of the opinion that when two companies are engaged in production of a multiplicity of goods, they cannot be described as companies "as produce the same goods" only because some of the products are in common and a large number of other products are entirely dissimilar and different.

23. Strong reliance on behalf of the respondent was placed on the case of *In Re: Tata Iron and Steel Company Ltd., and Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd.*, *In re: [1980] 50 Comp Cas 623 (Mad)*. In our opinion, the point that has now been raised before us was neither argued nor considered in the aforesaid two cases. In the case of *Tata Iron and Steel Co, Ltd.*, the argument that was sought to be advanced was that the word "goods" meant and was referable to production of any end product and that the expression could not be considered so as to include production of any intermediate product like raw material intended to be used for producing the products or marketable products. This argument was negated by the Bombay High Court and it was held that since the two undertakings were engaged in the production of coal, they must be regarded as producing the same goods.

24. In the case of *Coimbatore Cotton Mills Ltd. [1980] 50 Comp Cas 623 (Mad)*, *Padmanabhan J.* followed the judgment of the Bombay High Court in the case of *In Re: Tata Iron and Steel Company Ltd., ,* and observed at page 639 of *[1980] 50 Comp Cas* as follows :

"In that particular case, the transferor company undoubtedly produced coal. In fact, it was not argued before the Bench of the Bombay High Court on behalf of the Regional Director of Company Law Board that to satisfy the third condition u/s 23(3) of the MRTP Act, the two companies which were sought to be amalgamated into one should not produce the same goods, but should produce different goods. On the other hand, the argument that was sought to be advanced, but which was not accepted, was that the word "goods" meant and was referable to production of any product and that the expression could not be considered so as to include production of any intermediate product like raw materials intended to be used for producing the products or marketable products. Therefore, since the undertaking of the petitioner-company as well as the undertaking of the transferor-company were engaged in the production of coal, the two undertakings were regarded as producing the same goods and it was held that the third condition was satisfied."

25. Again, *Padmanabhan J.* held (at pages 643-644) that "On an independent consideration of the language of Section 23(3) of the MRTP Act, I have come to the conclusion that to be eligible for exemption u/s 23(3), apart from being not dominant undertakings, the amalgamating companies should be engaged in the production of the same goods and not different goods".

26. Neither the Bombay High Court nor the Madras High Court were called upon to decide the question that has been raised in this case. Here, we have to consider the argument that when some of the goods produced by the two companies are the same and some of the goods produced are entirely dissimilar, can the two companies be described as undertakings "as produce the same goods".

27. In *In Re: Kril Standard Products Private Ltd.*, , the transferor-company was producing blow moulding machine and injection moulding machine and the transferee-company was formed with the principal object of manufacturing, producing, assembling, preparing, converting, repairing, etc., injection moulding machines, apparatus and the accessories, spare parts, etc., relating thereto. The company also for some time carried on business of preparing and selling artificial leather cloth, waterproof cloth, etc. In construing Section 23(3), it was held at page 224 that "the last condition can only be satisfied if the undertakings sought to be amalgamated are not producing the same goods. If they are producing the same goods, the composite undertaking may as well become a dominant undertaking and, by the very exception, what is sought to be prohibited by the substantive section would be achieved. Therefore, both from the point of view of plain grammatical meaning of the language employed in Sub-section (3) as well as the object sought to be achieved by the provision contained in Part A of Chapter II, the meaning that can be assigned to the expression "as are not dominant undertakings and as produce the same goods" would be that, none of the undertakings sought to be amalgamated is a dominant undertaking, and they are not producing the same goods. In order, therefore, to attract Sub-section (3), three conditions which must be satisfied are that (i) the scheme of amalgamation is in respect of interconnected undertakings ; (ii) that none of them is a dominant undertaking ; and (iii) the undertakings sought to be amalgamated are not producing the same goods. If these three conditions are satisfied, Sub-section (3) will be attracted. "

28. In the case of *Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd.*, *In re*, [1980] 50 Comp Cas 623 (Mad), Padmanabhan J. has differed from the judgment delivered by the Gujarat High Court in the case of *Kril Standard Products P. Ltd.*, *In re*, [1976] 46 Comp Cas 203. Because of the interpretation we have placed on Section 23(3), we respectfully differ from the view taken by the Gujarat High Court in the case of *Kril Standard Products P. Ltd.* We are in respectful agreement with the view expressed by Padmanabhan J. in the case of *Coimbatore Cotton Mills Ltd.* on this aspect of the case.

29. Apart from the reasons given in the judgment of Padmanabhan J., regard must be had to the provisions of Section 23(4) and Section 23(9). We are of the view that "as produce the same goods" in Section 23(3) cannot be read as "as not produce the same goods".

30. In that view of the matter, in our opinion, the two companies before us cannot be described as undertakings "as produce the same goods". Therefore, in

our opinion, the proposed scheme of merger or amalgamation between these two companies cannot be sanctioned by this court without the prior approval by the Central Govt. u/s 23 of the Act.

31. In that view of the matter, this appeal succeeds. The judgment and order appealed from are set aside. We hold that prior approval of the Central Govt. is necessary before the scheme of merger or amalgamation between the two companies before us can be sanctioned by this court.

32. In the facts and circumstances of the case, each party will pay and bear its own costs.

33. In view of the fact that there is no judgment of the Supreme Court on this important aspect of the matter, on the oral applications of the learned counsel for the respondent, it is certified that it is a fit case for appeal to the Supreme Court. Let a separate certificate be issued expeditiously.

Sabyasachi Mukharji, J.

34. I agree.