

(1995) 04 MAD CK 0058
In the Madras High Court
Case No : O.S.A. No. 30 of 1995

Sugarcane Growers and Sakthi Sugars Shareholders'
Association

APPELLANT

Vs

Sakthi Sugars Ltd.

RESPONDENT

Date of Decision : 17-04-1995

Acts Referred:

Companies Act, 1956 — Section 235, 236, 237, 238, 239
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1)

Citation : (1998) 93 CompCas 646 : (1995) 1 LW 705 : (1995) 2 MLJ 469

Hon'ble Judges : S.S. Subramani, J; M. Srinivasan, J

Bench : Division Bench

Advocate : Arvind P. Datar, for the Appellant; Ramamani, for the Respondent

Judgement

Srinivasan, J.—Sakthi Sugars Limited, the respondent herein, was registered on May 12, 1961, as a public limited company. The authorised

capital of the company is Rs. 20,00,00,000 divided into 1,50,00,000 equity shares of Rs. 10 each and 5,00,000 redeemable cumulative

preference shares of Rs. 100 each. The issued capital as on March 31, 1993, was Rs. 11.98 crores and as on March 31, 1994, Rs. 15.48 crores.

The subscribed and paid-up capital as on March 31, 1993, was Rs. 11.86 crores and Rs. 15.36 crores on March 31, 1994.

2. Sakthi Soyas Limited is a public limited company registered on March 26, 1986, with an authorised capital of Rs. 11,00,00,000 divided into

90,00,000 equity shares of Rs. 10 each and 2,00,000 redeemable cumulative preference shares of Rs. 100 each. The issued, subscribed and

paid-up capital as on March 31, 1993, and March 31, 1994, is Rs. 8.15 crores. Hereinafter this company will be referred to as "the transferor"

company"".

3. At a meeting of the board of directors of the respondent-company, held on February 27, 1994, it was decided to amalgamate the transferor-

company with the respondent as it was considered to be advantageous and beneficial to both the companies. In the opinion of the directors such

merger will enable the respondent to diversify its activities into a very good area with enormous potential for growth and also the transferor-

company to get adequate financial help. Similarly, at a meeting held on March 29, 1994, the board of directors of the transferor-company decided

to amalgamate the same with the respondent for the same reason. It should be mentioned that both the companies have a common managing

director and they belong of the same group (Sakthi group of companies). The transferor-company filed C.A. No. 263 of 1994 in this court for

necessary directions for convening and conducting an extraordinary general meeting of the shareholders to consider the proposed scheme of

amalgamation. The respondent filed C.A. No. 264 of 1994 for similar direction. By an order dated April 8, 1994, the court directed the convening

of a meeting of the equity shareholders of the respective companies for the purpose of considering the scheme and appointed Sri. N. V. Kumar,

advocate, Coimbatore, as chairman of the meeting. Pursuant thereto, notices were sent to all the equity shareholders along with copies of the

proposed scheme of amalgamation besides statements u/s 393 of the Companies Act as well as forms of proxy. The notice was also published in

one issue of News Today and one issued of Malai Murasu. The meeting of the transferor-company was held on May 13, 1994, and of the

respondent-company on May 20, 1994. Resolutions were passed at both the meetings approving the scheme of amalgamation subject to the

approval of the financial institutions and such other necessary approvals. The respective board of directors was authorised to take all such steps as

may be necessary or desirable to give effect to the scheme of amalgamation. It was also resolved to accept such alterations, modifications and/or

conditions, if any, which may be proposed, required or imposed by this court while sanctioning the scheme. The advocate-chairman filed a report

in the court on May 21, 1994.

4. Thereafter, C.P. Nos. 88 and 89 of 1994 were filed on June 14, 1994,

respectively, by the respondent and the transferor-company under sections 391 and 394 of the Companies Act for sanctioning the scheme of amalgamation and dissolution of the transferor-company, without being wound up.

5. The benefits of amalgamation as set out in the petitions are as follows :

(i) The respondent herein has been diversifying and strengthening its base. It is considered that the products from soya beans will be an excellent

area for diversification, which is allied to the main activity of the respondent-company.

(ii) The benefit of the established respondent-company with accepted product and well organised network will help both the transferor-company

and the dynamic respondent-company.

(iii) The transferor-company has developed good markets for its products, especially the protein rich soya flour. The advantage of this

development has not been enjoyed by the transferor-company so far for want of sufficient working capital. This amalgamation would, therefore, be

beneficial to both the companies as it will enable the transferor-company to get adequate financial help. Further, the respondent-company will be

able to diversify into a very good area with enormous potential for growth.

(iv) This amalgamation would enable the respondent-company to employ its financial resources to the fullest extent. Further, the managerial,

technical and marketing expertise of both the companies would complement each other beneficially.

6. The salient features of the scheme are that the assets and liabilities of the transferor-company would become the assets and liabilities of the

respondent with effect from April 1, 1993, and the equity shareholders of the transferor-company will get two equity shares at a premium of Rs.

40 per share of the respondent as fully paid-up for every ten equity shares of the transferor-company held by them. It is adverted in the petitions

that the assets of the respondent are adequate to discharge and satisfy all the binding obligations of the transferor-company and the creditors

thereof will not be prejudiced in any manner by the scheme of amalgamation. It is also averred that the fixed assets of the transferor-company were

revalued on March 31, 1993, and the same was duly approved and adopted by its shareholders at their annual general meetings held on August 9,

1993.

7. The appellant herein, which is a society registered under the Societies Registration Act, claiming to represent the interests of 16,000 cane-

growers who supply sugarcane to the respondent for crushing and conversion, one-sixth of whom were also shareholders of the respondent and

that it is vitally interest in the financial viability of the respondent, filed a notice of opposition setting out the grounds of opposition. The main crux of

the opposition is that the respondent never had liquid resources to pay the legitimate dues of sugarcane growers and the amalgamation will be

highly detrimental to the interests of the members of the society and it will also result in financial ruin of the respondent, which in turn will seriously

affect the sugarcane price payable to the growers. It is further stated as follows :

The transferor-company has become commercially insolvent and it would be difficult to revive the same within the next two or three years. Even

after amalgamation, it will continue to be in a position of perennial loss and it would be a serious drain on the resources of the respondent. It the

two companies are amalgamated, the net liability of the amalgamated company will be a staggering sum of Rs. 116.88 crores and the interest

burden on that amount will cripple the respondent. The entire profit earned by the respondent will be wiped out in view of the additional burden.

The foundry divisions and pharmaceutical division of the respondent are not doing well at all and there is no possibility of their improving. The

respondent has also taken on lease a sugar mill at Baramba in Orissa State on a lease amount of Rs. 1 crore per year. Another unit has been

started at Dhenkanal, Orissa. Though the plant capacity is 2,500 tonnes per day, the actual output works out only to 360 tonnes. Thus, the

transferor-company has serious problems in its existing units and there is no explanation as to how the amalgamation will improve the financial

working of the transferor. The burden is on the transferor to prove that the scheme is fair and reasonable. In the explanatory statement and other

documents, no material has been placed to justify the amalgamation. No reasonable man of business will approve the amalgamation. It will have an

adverse impact on the majority shareholders, who are also cane-growers and whose survival depends upon the income derived from the

respondent-company. The petition is mala fide and the proposal is only to protect

the interest of a few directors who have given personal guarantees in favour of the financial institutions for loans taken by the transferor-company. On the aforesaid averments, the appellant prayed for dismissal of the petitions.

8. The appellant also filed C.A. Nos. 959 and 960 of 1994, praying to set aside the report of the advocate-chairman dated May 21, 1994, and to

appoint a chairman to convene a fresh meeting of the shareholders of the respondent-company under the provisions of the Companies (Court)

Rules, 1959. The appellant also filed C.A. No. 999 of 1994, praying to pass an order to appoint a chairman to convene a fresh meeting of the

creditors of the respondent at the registered office of the company after issue of notices to the creditors for the purpose of considering and if

thought fit approving the scheme of amalgamation of the companies and consequently directing the said chairman to file a report of the said meeting

in this court.

9. C.A. Nos. 959 and 960 of 1994 were dismissed by an elaborate order by Jayasimha Babu J. on October 21, 1994. The learned judge found

that the approval of the proposal has to be regarded as approval by members who fairly represented the general body of the shareholders of the

company. The learned judge rejected the contentions of the appellant that the meeting did not satisfy the requirements of the law. The learned

judge also held that no material was placed before him to prove lack of good faith of the majority which passed the resolution. On the same day,

the learned judge dismissed C.A. No. 999 of 1994, by a separate order, in which he held that the sugarcane growers who supplied sugarcane to

the respondent are not the creditors of the respondent and they have no locus standi to seek a direction to convene a meeting of the creditors as

they are themselves not affected by the scheme in so far as it concerns creditors. The learned judge also pointed out that no creditor of the

respondent-company applied for convening a meeting of the creditors. The two orders of the learned judge has not been challenged either before

us or otherwise.

10. C.P. Nos. 88 and 89 of 1994, were heard thereafter and Venkatachalam J. passed an order on January 4, 1995, approving the scheme of

amalgamation, and directing the official liquidator, High Court, Madras, to file a

report within three months therefrom regarding the affairs of the transferor-company with a view to enable the court to dissolve the said company without winding up and holding that the scheme of amalgamation shall come into effect from April 1, 1993. In the judgment, the learned judge has referred to the statement made by learned counsel for the Central Government that he had no objection to the scheme being sectioned by the court. The learned judge has also referred to the fact that the only contesting party is the appellant herein. Aggrieved by the said order, the appellant has preferred this appeal.

11. Learned counsel for the appellant has while repeating the contentions advanced before the learned single judge, submitted that the respondent is guilty of suppression of material facts and on that ground alone the scheme should have been rejected. He has also argued that no reasonable man of business will approve of the proposal in view of the heavy liabilities. The proposed scheme is against public interest as it affects the livelihood of farmers, i.e., sugarcane growers. According to learned counsel, the object with which the amalgamation is proposed can be achieved by other methods and the court should not in such cases approve of amalgamation. Finally, it is contended by learned counsel that the court ought not to have passed the order sanctioning the amalgamation without first obtaining the report of the official liquidator as regards the affairs of the transferor-company. According to him, such a report is a pre-condition under the second proviso to section 394(1) of the Companies Act.

12. Per contra, learned counsel for the respondent has submitted that the amalgamation is in the interest of both the companies and so long as it is fair and reasonable, the court has to accept the same. Accordingly to him, in the absence of any fraud or mala fides, the court will not substitute its own views with regard to economic soundness of the proposal when the required majority of the shareholders has approved of the same. It is contended by him that each case has to be decided on the facts and circumstances thereof and not on any heard and fast rule based on general principles. It is submitted that there is no suppression of any material fact, either before the shareholders or before the court. According to him, all the relevant particulars and records have been made available and there is no merit in the contentions of the appellant. It is also pointed out by him

that the farmers or sugarcane growers are in no way affected by the amalgamation and their interests are fully safeguarded by the relevant

Government orders and even if the company incurs a loss, the farmers will not suffer in any manner as they will get their dues intact. As regards the

report of the official liquidator, it is argued by him that the practice prevailing in this court has throughout been the same and it does not offend the

provisions of the second proviso to section 394(1) of the Companies Act.

13. Before considering the merits of the contentions, it will be better to refer to the relevant provisions of law and the principles laid down in the

judgments cited by both the sides. Section 391 of the Companies Act provides that the court may order a meeting of the creditors or members to

be called, held and conducted in such manner as it directs, where a compromise or arrangement is proposed between a company and its creditors

or between a company and its members and an application is filed by the company or creditor or member or the liquidator in the case of a

company which is being wound up. Sub-section (2) of the said section is to the effect that if a majority in number representing three-fourths in value

of the creditors or members, as the case may be, present and voting, either in person or by proxy, at the meeting, agree to any compromise or

arrangement, the same shall, if sanctioned by the court, be binding on all the creditors or all the members and also on the company. The proviso to

sub-section (2) reads thus :

Provided that no order sanctioning any compromise or arrangement shall be made by the court unless the court is satisfied that the company or

any other person by whom an application has been made under sub-section (1) has disclosed to the court, by affidavit or otherwise, all material

facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the

pendency of any investigation proceedings in relation to the company under sections 235 to 251 and the like.

14. Section 394 provided for the matters for which the court may make provision, either by the order sanctioning the compromise or arrangement,

or by a subsequent order, where it is shown to the court in an application u/s 391 that the compromise or arrangement has been proposed for the

purposes of or in connection with a scheme for the reconstruction of any

company or companies or amalgamation of any two or more companies and that under the scheme, the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme, referred to as a transferor-company, is to be transferred to another company, referred to as a transferee-company. Under the first proviso to sub-section (1), no compromise or arrangement proposed for the purposes of and in connection with a scheme for amalgamation of the company which is being wound up with any other company or companies, shall be sanctioned by the court unless the court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interest of the members or to public interest.

The second proviso to sub-section (1), which is relevant in this case, reads as follows :

Provided further that no order for the dissolution of any transferor-company under clause (iv) shall be made by the court unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

15. In *Calicut Bank Ltd. (In Liquidation) v. Devaki Ammal* [1940] 10 Comp Cas 78, a Division Bench of this court held that the fact that the

shareholders and creditors of a company have approved of a scheme of compromise or arrangement as contemplated by section 153 of the Indian

Companies Act, 1913, does not mean that the court is bound to accept the scheme and that the duty of the court is to examine and decide whether

the terms are fair and reasonable, taking everything into consideration. The Division Bench said that the fact that the shareholders and creditors

have approved of a scheme will of course carry weight but there may be more important consideration. On the facts the court found that the

approval of the scheme was based on misrepresentation as to the position of the bank and there were allegations of mismanagement and

consequently the scheme was rejected.

16. The Calcutta High Court has in *Calcutta Industrial Bank Ltd. In re* [1948] 18 Comp Cas 144, observed that the court must look at the

surrounding circumstances which led to the proposal of the scheme, see whether

the directions of the court and the requirements of the statute were properly carried out and the meetings were properly convened and conducted and whether the matter was considered from the proper point of view of relevant facts fairly disclosed and out before the meetings and what is more, be satisfied that the scheme is a fair scheme and that there is no reasonable objection to it. The court also said that the scheme will be rejected if it brought to its notice and if it is satisfied that there has been any material oversight or miscarriage or that the material facts were intentionally withheld from or otherwise not placed before the meeting.

17. A Division Bench of the Bombay High Court has in *J.S. Davar and Another Vs. Shankar Vishnu Marathe and Others*, , reiterated that the

consent of the majority of creditors or shareholders to a scheme does not conclude the issued but the view of the majority is one element in the case though a very important one which must be taken into account in sanctioning the scheme. The Bench said (page 557 of 37 Comp Cas) :

The jurisdiction of the court which is called upon to sanction a scheme transcends the mere consideration that a majority of those affected by the

scheme is willing to submit to the scheme. The creditors of a company may agree to accept a fraction of the amount due to them from the

company and yet, on considerations of more lasting importance, like public or commercial morality, the court may refuse to accept the verdict of

the majority. It may also refuse to accept the scheme on the ground that it is not reasonable or that it is not feasible or that there is no chance that it

will yield to a smooth and satisfactory execution. By "reasonable" is generally meant that the arrangement can reasonably be supposed by sensible

business people to be for the benefit of the class which they represent. The court will also not sanction the scheme if the facts which would have

influenced the decision of the majority were not known or disclosed to the majority, or if the sponsors of the scheme have misrepresented the true

position of the company. Finally, if the acceptance of the scheme would lead to the stifling of an inquiry into the conduct of the delinquent directors,

the court would be show to give its sanction to the scheme. Considerations such as those mentioned above must be taken into account by a court

before a scheme is sanctioned but, in the very nature of things, it is not possible to enumerate exhaustively the circumstances which a court is

entitled to take into consideration.

18. In *Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re* [1970] 40 Comp Cas 819 (Guj), the court rejected a contention that

disclosure of material facts should be made at the initial stage when the application is made u/s 391(1) and held that they are required to be made

when a petition is filed u/s 391(2) for sanctioning the scheme to find out whether sanction should be accorded to it or not.

19. In *Navjivan Mills Co. Ltd., In re* [1972] 42 Comp Cas 265. A learned single judge of the Gujarat High Court has set out the well recognised

limitations of the court's power to sanction a scheme, in the following words (page 279) :

First limitation is that the court would not sanction a scheme which would be invalid without the court's sanction 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. Third known 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 their

requirements and will approve those schemes if they are fair to all whose interests are affected.

20. The learned judge has also said (page 320) :

As stated at the outset, the court, before according its sanction to the scheme of compromise and arrangement, must be satisfied that the

provisions of the statute have been complied with; that the class was fairly represented by those who attended the meeting and that the statutory

majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to

represent; and that the arrangement is such as an intelligent and honest man, a

member of the class concerned and acting in respect of his interest, might reasonably approve. That is the well recognised approach of the court to a scheme of compromise and arrangement. The scheme should not be examined in the way a carping critic, a hairsplitting expert, a meticulous accountant or a fastidious counsel would do it. It must be tested from the point of view of an ordinary reasonable shareholder acting in a business like 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 (vide *In Re: Sidhpur Mills Co. Ltd.*,).

21. The same learned judge has in *Wood Polymer Ltd.*, *In re* [1977] 47 Comp Cas 597 (Guj) held that if the only purpose discernible behind the amalgamation is defeating tax by creating a paper company and transferring an asset to such company which can without consequence be amalgamated with another company to whom the capital assets were to be transferred so that on amalgamation it may pass on to the amalgamating company, it would distinctly appear that the provision for such a scheme of amalgamation was utilised for the avowed object of defeating tax. The learned judge held that in such cases, the court will not be a party to an arrangement for avoiding payment of tax by sanctioning the scheme.

22. In *Alembic Chemical Works Co. Ltd.*, *In re* [1988] 64 Comp Cas 186, another learned judge of the Gujarat High Court held that while the court is not supposed to set its seal upon the decision of the majority it is also not supposed to scrutinise the scheme with a fine toothed comb to find out flaws and then to view them through a magnifying glass. The learned judge said that the court must be satisfied that the majority vote was honestly obtained and no financial or arithmetical jugglery was perpetrated either upon the creditors or upon the shareholders to cajole them or coax them into voting in favour of the scheme. The learned judge observed (page 194) :

However, the scheme is not to be scrutinised by the court with the eye of an expert or the exactness of an accountant but if the scheme is, broadly speaking, calculated to benefit the company as a whole, it would be entitled to the sanction of the court. In the instant case, the explanatory statement which was sent along with the notice of the meeting is very much on the record and while flaws can be found in the said statement, it

does appear on a perusal of the same that all the necessary material which would have enabled the shareholder and the creditors to contribute their instructed judgment over the merits or demerits of the scheme were incorporated in the said statement.

23. The following principles can be culled out from the aforesaid rulings :

(1) The court has to be satisfied that the resolutions have been passed by the requisite majority as prescribed in the state at a meeting duly convened.

(2) The court is not a mere rubber stamp and the fact that the majority has approved of the scheme is not conclusive.

(3) The approval by the majority is an important factor to be considered by the court.

(4) The court must be satisfied that all material facts have been disclosed at the meeting and before the court.

(5) The scheme is not for an oblique purpose to defeat the provisions of any law.

(6) The object cannot be achieved by resort to the other provisions of the Companies Act.

(7) The scheme as a whole is fair and reasonable and not vitiated by bad faith, fraud or mala fides and once the court is satisfied to that effect, the court should not substitute the decision of the majority with its own views.

24. Bearing the above principles in mind, we shall now examine the present case. The first contention of the appellant that the material facts are not

disclosed either at the meeting or before the court is unsustainable. Counsel on both the sides have taken us through the entire records. We find

that none of the facts which according to the appellant have not been disclosed, has been omitted to be set out in detail by the respondent in the

affidavits filed before the court. It will be an unnecessary exercise to repeat the contents of those affidavits. As regards the alleged staggering

liability in a sum of Rs. 116.88 crores in the event of amalgamation, one of the directors of the respondent-company by name Mr. N. K. Vijayan

has pointed out in his additional counter-affidavit that the appellant has omitted to take notice of the market value of the assets of the transferor-

company as assessed by professional valuers, which is more than the total liabilities of the said company. It is stated that the value of the assets is

more than the liabilities by Rs. 7.27 crores. It is also submitted that the income

from the income from the combined operations of both the companies is sufficient to meet the interest and other liabilities. With reference to the non-viability of the pharmaceutical division of the respondent-company, the managing director has stated in his common affidavit that the unit as only a formulating unit and in paragraph 11 of the directors' report appearing in the annual report for the year 1992-93, it has been clearly indicated that the continuance of the division is under consideration in view of the already established competitive market and prohibitive high costs of development of patent drugs. It is averred that in view of the said reasons, the operation of the division has been closed. Our attention is drawn to the annual report for 1993. At page 8 thereof, para. 11 reads as follows :

The contribution from this division was not able to absorb the heavy overhead costs. In spite of the efforts taken by the company in marketing the products, the results were not encouraging. The continuation of operations of this division is under consideration in view of the already established competitive markets and prohibitive high cost of development of patent drugs.

25. Similarly, with reference to the units in the State of Orissa, in paragraphs 3 to 5 of the same report, the following statement is found :

In Sakthi Nagar Unit, 6,87,687 tonnes of sugarcane were crushed. The national efficiency award for the season 1989-90 and the prestigious

National Award for Production of High Quality Export Sugar during the season 1992-93 were awarded to this unit. In Sivaganga Unit, 3,69,658

tonnes of sugarcane were crushed. In Baramba Sugar Unit, 57,812 tonnes of sugarcane were crushed.

The average realisation of free sale sugar price registered improvement. 18,690 tonnes of sugar for a value of Rs. 1,558.81 lakhs were exported.

The Central Government announced free sale/levy sale ratio of 60 : 40 with effect from 1st October, 1992. The general performance of this division is considered satisfactory.

In the current year, the overall crush is expected to be around 13 lakhs tonnes of sugarcane. Dhenkanal Sugar Unit is expected to commence

commercial production during 1993-94 season. Favourable working results are expected in this division.

26. At page 38, Note (1) to Schedule 25 reads thus :

The company has taken 1250 TCD Sugar Unit from a Co-operative Society in the State of Orissa under management contract.

27. In the common affidavit of the managing director, it is stated as follows :

22. I further submit that the allegation of the applicant/respondent in ground No. 14 that the transferee-company is facing serious problems with its

existing units at Baramba and at Dhenkanal at Orissa is wholly incorrect. The transferee-company has taken over a sugar mill with 1,250 TCD

capacity at Baramba in Orissa State since January, 1991. As per the terms of the agreement, the transferee-company has to pay an annual rent of

Rs. 50 lakhs and not Rs. 1 crore as erroneously mentioned by the applicant/respondent. I further state that when the Baramba Sugar Unit was

taken over, there were only 10,000 tonnes of sugarcane to crush. I further submit that the transferee-company has put in vigorous efforts for

extensive cane development in the command area of the factory which has culminated in the improvement of the area under sugarcane cultivation to

about 4,200 acres ensuring availability of 1,00,000 tonnes of sugarcane for 1994-95 crushing season. I submit further that the new sugar plant at

Dhenkanal in Orissa State with a crushing capacity of 2,500 tonnes per day has been completed and it took up trial crushing since January 31,

1994. This plan is to commence regular crushing of sugarcane from November/December, 1994. I further stated that to put the installed capacity to

remunerative use till commencement of regular crushing, reprocessing of 12,000 tonnes of raw sugar imported by Indian Sugar General Import

Export Corporation Ltd. on job work basis was taken up.

28. As regards the foundry division of the respondent-company, the managing director has stated in paragraph 20 of his common affidavit as

follows :

I further submit that the allegation of the applicant/respondent in ground No. 13 that the foundry division of the transferee-company is not doing

well is contrary to facts and is incorrect. I state that the foundry division is making positive contribution to the profits of the transferee-company

since 1991-92. It is submitted further that the performance of the foundry division is improving over the years and the existing installed capacity of

the foundry division is being fully utilised. The said foundry unit is the sole major source of supply to premier customers like Maruti Udyog Limited

and Tractors and Farm Equipments Limited (TAFE). The said foundry division applies critical components such as steering knuckles, brake drums, axle housings, etc., which are value-added products with remunerative prices. I state that, Maruti Udyog Limited have proposed to double their capacity and production. Therefore, to meet the increased requirements, the transferee-company has planned to expand the capacity of the foundry unit.

29. In paragraph 8 of the director's report in the annual report, 1993, the performance of the foundry division has been stated to be satisfactory.

30. There is no merit in the contention that no reasonable man of business would approve of the amalgamation in view of the heavy liabilities. As

stated earlier, the market value of the assets of the transferor-company is more than the total liability. The question cannot be decided merely on

the quantum of the liability, but will depend on the future potential of the business of the transferor-company. The two companies are agro-based

industries and a shrewd businessman may visualise a bright future for both the companies by amalgamating the two so that the resources can be

utilised for the benefit of both. One of the tests is to find out the debt equity ratio as pointed out by learned counsel for the respondent. It is

submitted by him that out of the total liability of Rs. 116.88 crores of the two companies put together, a sum of Rs. 69.51 crores represents the

term loan liability. The balance of Rs. 47.37 crores was borrowed for meeting the working capital needs against hypothecation of current assets.

The liability representing the working capital varies from month to month according to the stock position of inventories and receivables. It is

submitted by him that the debt equity ratio works out to only 1.1 : 1, because the term loan being Rs. 69.51 crores, the net owned funds being

Rs. 62.97 crores. The profit of the transferee-company after taking into account interest on working capital borrowings and interest on secured

and unsecured loans is a sum of Rs. 20.45 crores. Hence, the interest burden will not cripple the transferee-company as contended by the

appellant. We agree with the above contentions of learned counsel for the respondent. As rightly submitted by him, each case has to depend on the

facts and circumstances.

31. It is contended that the revaluation of the assets of the transferee-company

is only a jugglery in accounting and is totally mala fide. We are unable to accept this contention. It is brought to our notice by learned counsel for the respondents that in the proceeding before the Board for

Industrial and Financial Reconstruction initiated by the transferor-company for an enquiry u/s 15(1) of the Sick Industrial Companies (Special

Provisions) Act, 1985, the revaluation of the assets has been accepted though the application was dismissed as not maintainable in view of the fact

that the transferor-company had not completed five years of incorporation as per the amended provisions of the said Act. Paragraphs 3 and 4 of

the order of the Board are in the following terms :

Shri Vittal only pleaded that the revaluation of assets as per the definition given in the SICA regarding free reserves cannot be treated as free

reserve and is required to be excluded. On that analogy he maintained that the surplus in revaluation of assets should be taken off while determining

the position relating to accumulated losses.

The Bench observed that the provisions of the SICA do not specify any such definition about the treatment of accumulated losses and under the

circumstances the position as reflected in the balance-sheet would be construed as the current figure. The balance-sheet for the year 1992-93 does

not indicate any accumulated losses and the figure has been shown as nil.

32. It is pointed out by learned counsel for the respondent that in that proceeding all the financial institutions being the creditors of the transferor-

company were represented. We find from the order that the following institutions were the creditors :

(1) Canara Bank (Lead).

(2) Indian Overseas Bank,

(3) State Bank of Travancore,

(4) Lakshmi Vilas Bank Ltd.,

(5) The Standard Chartered Bank,

(6) IDBI,

(7) ICICI (Lead), and

(8) T. N. Industrial Development Corporation Ltd.

33. Hence, we do not accept the contention that the revaluation of the assets of

the transferor-company proves lack of bona fides or that it is an accounting jugglery.

34. The next contention of learned counsel for the appellant that the scheme is against public interest as it will affect sugarcane growers is

unsustainable. It is rightly pointed out by the respondent that it enters into an agreement with the sugarcane growers for every season and as per the

agreements, the price is payable as per the provisions of the Sugarcane (Control) Order, 1966. A copy of the English translation of the agreement

has also been placed before the court. A perusal of the same shown that there is a clear contract to pay at the controlled price as may be

determined by the Government from time to time for the entire quantity of the sugarcane planted or to be planted on the lands mentioned in the

Schedule. The statutory minimum price has to be paid to the sugarcane growers within 14 days from the date of delivery of the sugarcane. That

price is notified by the Central Government from time to time. Later, after the closure of the season, the Central Government notified additional

price to be paid for the sugarcane under clause 5A of the Sugarcane (Control) Order. The State Government further recommends the State

advised price. The respondent-company is liable to pay only the price fixed by the Central Government and though it is not liable to pay the State

advised price, it has been paying the same as an "on account" payment in instalments. The amount is adjusted subsequently against the additional

price notified by the Central Government under clause 5A of the Sugarcane (Control) Order. The respondent has been making excess payments

during 1981-82 to 1990-91 except in 1988-89. The "on account" payments are made at least one year in advance than the statutory requirement

of paying the price under clause 5A of the Sugarcane (Control) Order. Though the excess of the State advised price over the price notified under

clause 5A by the Central Government can be recovered by the respondent-company, it has not recovered any such amount as a measure of

goodwill to the cane growers. In that manner, the respondent has paid to the cane growers approximately, Rs. 18.6 crores during the three sugar

seasons commencing from 1991-92 over and above the statutory minimum price which is yet to be adjusted. Hence, there is no question of any

prejudice being caused to the sugarcane growers by the amalgamation. We have

already referred to the fact that Jayasimha Baby J., has held that the sugarcane growers are not creditors. As their apprehended grievance is only imaginary, there is no question of the scheme being against public interest.

35. We find that no creditor of the company has come forward with any objection to the scheme. All the financial institutions which have lent money to the company have agreed to the scheme. It is categorically stated in the affidavit of the director of the company, viz., Sri. N. K. Vijayan that ICICI, IFCI, State Bank of Travancore, Standard Chartered Bank, Citibank. N.A., Punjab National Bank, Canara Bank, Indian Overseas Bank, the Karur Vysya Bank Limited and Canbank Investment Management Services Ltd., have, after considering the projected results of the combined operations, granted their consent. The copies of their letters have been filed in court in C.A. No. 999 of 1994.

36. There is also no merit in the contention that the object sought to be achieved by the amalgamation can be achieved by adopting other methods.

Nothing has been placed before us to show that there is any other method which will be more beneficial to the company. It has already been found in the applications filed by the appellant that the meetings have been held properly after service of notices and publication thereof in accordance with the statutory requirements. The fact that the majority have accepted the scheme is a relevant matter in this regard. Hence, we reject the contention of the appellant.

37. The last contention of the appellant is that a report from the official liquidator as regards the affairs of the transferor-company is a condition precedent before the court sanctions amalgamations. Reliance is placed on the second proviso to section 394(1) of the Companies Act, which we have already extracted. Our attention is drawn to the judgment of the Madhya Pradesh High Court in *Kriti Plastics Pvt. Ltd., In re* [1993] 78 Comp Cas 138. The court said (page 143) :

The official liquidator is actually an agency of the court to satisfy itself that the affairs of the company to be dissolved have not been conducted in a manner prejudicial to the interest of its members and public interest. Therefore, the court has to ascertain that the schemes of amalgamation are sanctioned only after the court has the other side of the picture before it and the

report filed by the official liquidator along with the scheme of amalgamation leads the court to arrive at a conclusion that in the amalgamation scheme the interests of the shareholders are not jeopardised in any way and the public interest is not being defeated. Therefore, the report of the official liquidator in all aspects of the matter can be taken into consideration by the court.

38. Reference is also made to the judgment of a Full Bench of the Kerala High Court in *M. Philip v. Malayalam Plantations (I.) Ltd.* [1994] 81

Comp Cas 38. Construing the second proviso to section 394(1), the Full Bench observed (page 44) :

The first proviso says that the scheme of amalgamation pertaining to a company "which is being wound up" cannot be sanctioned without a report

from the Company Law Board or the Registrar. The second proviso is with reference to clause (iv), which relates to "dissolution", without winding

up of any transferor-company". The Division Bench in *Official Liquidator v. Madura Co. P. Ltd.* [1975] KLT 562 held that the second proviso

would apply only in a case where the first proviso applies as the second proviso is intended to function as an additional provision for safeguarding

the interest of the person concerned, over and above the safeguard incorporated in the first proviso. The Division Bench has laid emphasis on the

word "further" in the second proviso to arrive at that conclusion.

We do not think that the word "further" is employed in the second proviso for denoting that an additional provision is made in a situation covered

by the first proviso. It is not unusual in legislative drafting to use the word "further" in a second proviso added to the main section. The purpose is

to indicate that it is yet another proviso. It may be an additional one or it could be entirely separate from the other. The word "further" need not

necessarily mean that the proviso is intended to be in conformity with the preceding proviso.

39. The Bench referred to the judgment of a learned single judge of this court in *Bush Products Ltd.'s case* [1973] 86 LW 243 (Mad), in which it

was said that the word "further" has no special significance and the judgment of the Bombay High Court in *Sumani Pvt. Ltd., In re* [1979] 49

Comps Cas 547 and extracted passages therefrom. The Full Bench said that the entire observation made by the Bombay High Court cannot be

accepted as correct, though it was in agreement with the conclusion that the two provisos may operate in two different situations and may apply to

two different companies. Referring to the expression ""dissolution"", the Full Bench said that the position in dissolution need not be identical as in

amalgamation and the word ""dissolution"" as used in the Companies Act has a perceptive connotation. Ultimately, the Full Bench concluded thus

(page 49) :

The survey of the above provisions indicates that the legal process of dissolution can take place after commencement of the steps for winding up.

Dissolution without winding up only means dissolution without completely winding up the company. Thus, what is envisaged in clause (iv) of section

394 as "dissolution without winding up" need not be the consequence of amalgamation of two companies.

40. The above rulings do not help the appellant to contend that the report of the official liquidator should be obtained before an order sanctioning

amalgamation is passed. In our opinion, when a company is wound up or liquidated, the first proviso requires a report on the affairs of the

company prior to amalgamation. In this case, the prayer is for dissolution without winding up the transferor-company and the first proviso is not

applicable. In such cases, the order transferring wholly or in part the undertaking of the transferor-company can be made by the court without

reference to the official liquidator. The second proviso refers only to dissolution and not amalgamation. Hence, the report of the official liquidator is

required only for the purpose of passing an order of dissolution and not an order sanctioning amalgamation. The distinction between the two

provisos can easily be discerned. While the first proviso requires a report on the affairs of the company, before sanctioning the scheme of

amalgamation, if the company is to be wound up and not otherwise, the second proviso would require a report of the official liquidator before

passing an order of dissolution. While the first proviso talks of amalgamation, the second proviso talks of dissolution. The difference in the language

is significant. Hence, in our view, the order passed by the learned judge sanctioning the amalgamation and also directing the official liquidator to file

his report is quite in accord with the statutory provision contained in section 394 of the Companies Act. As rightly pointed out by learned counsel

for the respondent, the consistent practice in this court has been to pass orders on amalgamation without waiting for reports from the official

liquidator. The practice is not in violation of the statute. Hence, we reject this contention of the appellant.

41. In the result, all the arguments of the appellant fail and the appeal suffers a dismissal. The appellant shall pay the costs of the respondent in this appeal. Counsel's fee Rs. 5,000.