(1994) 05 BOM CK 0002

Bombay High Court

Case No: Appeals No''s. 224, 244, 298 and 301 of 1994 in Company Petition No''s. 332 and 333 of 1993 in Company Applications No''s. 250 and 251 of 1993

Hindustan Lever Employees Union	APPELLANT
Vs	
Hindustan Lever Ltd. and others	RESPONDENT

Date of Decision: May 18, 1994

Acts Referred:

- Companies Act, 1956 - Section 173, 20(7), 391, 391(1), 393(1)

Citation: (1994) 4 BomCR 465 : (1995) 83 CompCas 1 : (1995) 1 LLJ 1099

Hon'ble Judges: V.A. Mohta, J; D.K. Trivedi, J

Bench: Division Bench

Judgement

V.A. Mohta, J.

These are five appeals u/s 391(7) of the Companies Act, 1956 ("the Act"), against a common order dated March 3, 1994, made by the company court u/s 391/394 of the Act sanctioning the scheme of amalgamation of the Tata Oil Mills Company Limited (TOMCO) - the transferor with the Hindustan Lever Limited (HLL) - the transferee. Company Petition No. 332 of 1993 is by TOMCO and Company Petition No. 333 of 1993 is by HLL - both for the similar relief of sanction. On these two petitions the impugned order was passed. Since these appeals are against a common judgment they have been heard together and are being disposed of by this judgment.

2. Appeal No. 244 of 1994 is by the Federation of Tata Oil Mills and Allied Companies'' Employees'' Unions in Company Petition No. 332 of 1993, connected with Company Application No. 250 of 1993. Appeal No. 298 of 1994 is by Mr. Rabindra Hazari - a shareholder of TOMCO - in Company Petition No. 332 of 1993, connected with Company Application No. 250 of 1993. Appeal No. 224 of 1994 is by the Hindustan Lever Employees'' Union in Company Petition No. 333 of 1993 connected with Company Application No. 251 of 1993. Appeal No. 301 is by the Consumer Action group and other similar organisations, in Company Petition No.

333 of 1993 connected with Company Application No. 251 of 1993 Appeal No. 331 of 1994 is by the Consumer Education and Research Centre in Company Petition No. 333 of 1993 connected with Company Petition No. 251 of 1993.

3. Having heard learned counsel for the parties and respondent Mr. M. G. Jajoo in person at length we are satisfied that no case for interference in appeal with the impugned order exists. Here are our reasons.

4. It is submitted by the appellants in the first four appeals and other objectors that the scheme is bad in law on the following grounds.

(A) Violation of section 393(1)(a) of the Act in not making required disclosures in the explanatory statement.

(B) Valuation of share exchange ratio is grossly loaded in favour of HLL.

(C) Ignoring the effect of provisions of the Monopolies and Restrictive Trade Practices Act ("the MRTP Act").

(D) Interest of employees of both the companies is not adequately taken care of.

(E) Preferential allotment of shares at less than market price to UL which is not in public interest.

(F) Mala fides on account of existence of quid pro quo between UL and Tata Sons Ltd.

First, the basic facts and events in order of time. TOMCO is an older company having been incorporated in 1917, under the Indian Companies Act, 1913. It manufactures and markets products like soaps, detergents, toiletries and animal feeds. HLL was incorporated approximately 16 years thereafter. It was first a private company which was converted into public company in the year 1956. It also manufactures and markets similar products. Both companies have their registered office at Bombay. TOMCO has more than 60,000 shareholders with the following break up.

22 per cent. - Tata group.

41 per cent. - Financial Institutions (FI).

37 per cent. - General public.

HLL has nearly 1,30,000 shareholders with the following break up.

51 per cent. - Unilever PLC (UL) - a company incorporated under the English Companies Act, having its registered office at London.

16 per cent. - FI.

33 per cent. - General public.

5. At the inception, UL - the parent company of HLL had 100 per cent. shareholding in HLL. TOMCO though otherwise quite solvent financially, started incurring operative losses in the manufacturing and marketing business. During 1991-92, it incurred losses to the range of Rs. 13 crores which for the next six months increased to the level of over Rs. 16 crores. The board of director''s of TOMCO in the changing Indian economic scenario and severe competition in the field of consumer goods considered various alternatives for TOMCO including its association with HLL which has been a more prosperous and larger company operating in the same field of activities. Accordingly the board of directors of TOMCO put up proposals before the board of directors of HLL. Both availed of the professional services of Mr. Y. H. Malegam - senior partner of S. B. Billimoria and Company, chartered accountants, former president of the Institute of Chartered Accountants and the director of the Reserve Bank of India, for the purposes of evaluating the share price of the two companies in order to arrive at a fair share exchange ratio. On March 19, 1993, Mr. Malegam gave a valuation report and recommended an exchange ratio of two equity shares of HLL for every fifteen ordinary shares of TOMCO. The board of directors of both the companies at their separate and independent meetings accepted the recommendation and approved the scheme of amalgamation.

6. The scheme, inter alia, provides for transfer and vesting in HLL of the undertaking and business of TOMCO together with assets and liabilities excluding certain assets and/or licensee rights to use certain premises. The salient features of the scheme are to be found in clauses 1.7(d), 4, 5, 11 and 13. Clause 1.7(d) sets out the details of excluded properties in which TOMCO has no more than licensee rights. Clause 4 provides for transfer of 5 assets (immovable property) to be transferred to companies nominated by the Tata Sons Ltd. at fair market value as will be independently assessed. Clause 5 provides that TOMCO shall (before or after the effective date) transfer to Tata Sons Ltd. or its nominees certain investments/shares owned by TOMCO at the then prevailing market value and in the case of unlisted shares at a value to be determined by Mr. Y. H. Malegam. Clause 11 provides for transfer of employees of TOMCO to HLL on the basis that their service shall be deemed to be continuous and the conditions of service after the transfer shall not be less favourable. Clause 13 refers to preferential allotment of equity shares to UL of the face value of Rs. 10 each at the price of Rs. 105 per share so as to ensure its post amalgamation shareholding level at 51 per cent. of the equity capital of HLL. It may be mentioned that (i) investments/shares specified in clause 5 have been realized and (ii) clause 4 has been modified by the company court (a) by providing for transfer to companies nominated by the directors of TOMCO in place of Tata Sons Ltd. and (b) by naming well reputed chartered accountants/Government valuers.

7. In Company Application No. 250 of 1993 filed by TOMCO the court passed an order on April 29, 1993, directing to call the meetings of the debenture holders, creditors, ordinary shareholders and preference share-holders on June 29 and 30,

1993, naming the chairman of the meetings and calling upon him to submit the report within 21 days after conclusion of the meeting. TOMCO filed the notices and explanatory statements u/s 393(1)(a) of the Act along with the proxy form before the Company Registrar who after considering all objections settled the explanatory statements and approved the disclosures made therein. Individual notices of the said meetings together with a copy of the scheme of amalgamation, the statement as settled by the Company Registrar and as required u/s 393(1)(a) and a proxy form were sent to concerned members as required by law. On June 21, 1993, a joint communication to shareholders of TOMCO and HLL was also sent. Public notices of the meeting were also issued through the print media. The meeting of the ordinary shareholders was held on June 29, 1993, and was attended by 1,294 members holding 85,85,009 ordinary shares and by 1,652 member holding 55,18,251 ordinary shares through proxies. In the said meeting amendment was proposed to the effect that the exchange ratio should be of 5 : 15 shares in place of 2 : 15 shares as envisaged in the scheme. 99.64 per cent of ordinary shareholders voted against amendment and 99.72 per cent. voted in favour of the scheme as proposed. Debenture holders voted 99 per cent., secured creditors voted 100 per cent., unsecured creditors voted 84.30 per cent. and preference shareholders voted 100 per cent. in favour of the scheme. The scheme as proposed was thus approved in all the five meetings by 99.72 per cent. of equity shareholders in terms of value and 86.72 per cent. in terms of number.

8. In Company Application No. 251 of 1993, filed by HLL also similar direction for convening meetings of the equity shareholders and creditors were issued by the court on April 29 for convening the meeting on June 30, 1993. Similar procedure was followed in this also. On June 30, 1993, shareholders of HLL at their extraordinary general meeting approved by the requisite majority the proposed issue of shares to UL pursuant to section 81(1A) of the Act. The court-convened meeting of the equity share-holders was held on June 30, 1993, and the meeting of the creditors was held on July 2, 1993, under the chairmanship of the chairman of HLL Mr. S. M. Datta as directed by the court. The meeting of the equity share-holders was attended by 2,528 members including proxies holding 9,58,27,477 equity shares. In all 13 amendments were made to the scheme but more than 96 per cent. voted against the amendments. Three amendments related to allotment of shares in favour of UL. Equity shareholders holding 99.97 per cent. shares voted 97.45 per cent. in favour of the scheme. Almost at that high level of percentage even the creditors voted in favour of the scheme. The chairman of meetings filed their reports within time and within seven days thereafter TOMCO filed Company Petition No. 332 of 1993, and HLL filed Petition No. 333 of 1993, on or about July 26, 1993.

9. On August 2, 1993, judge''s summons was taken out by Mr. M. G. Jajoo praying, inter alia, for a direction to A. F. Ferguson and N. M. Raiji and Co., chartered accountants, to give their opinion on the valuation report of Mr. Malegam. The regional director and the official liquidator were given notices of petitions. In

pursuance thereof the regional director submitted his report on December 9, 1993, and official liquidator submitted his report for winding up without dissolution u/s 394 of the Act. On January 6, 1994, Ferguson and Raiji by their joint letter, with copy to Mr. Jajoo, confirmed the share exchange ratio determined by Mr. Malegam. On January 10, 1994, Mr. Jajoo sought further particulars from them. On January 12, 1994, the company court ordered the filing of affidavits latest by February 2, 1994. On February 2, 1994, Mr. Ravindra Hazari took out judge''s summons for particulars. On February 11, 1994, Ferguson and Raiji gave a reply to Mr. Jajoo. On March 3, 1994, the impugned order was passed approving the scheme subject to modifications in clause 4 as earlier indicated. No one - not even TOMCO - has challenged the modification ordered by the court.

10. By now legal principles guiding the approach of the court to such schemes of amalgamation are well crystallized due to judicial pronouncements - Indian as well as foreign - made from time to time. Before embarking upon the exercise of noting a few of them a look at the provisions of the Act and the Companies (Court) Rules may be worthwhile. Section 391 of the Act (which is corresponding to section 206 of the English Companies Act, 1948), makes the members and creditors of the company primarily the judge of the reasonableness and fairness of the scheme. The court is obliged to order a meeting of the shareholders, creditors to consider the proposed scheme. The approval has to be by the majority in number representing three-fourths in value of the members present and voting. The approval by such large majority of the members/creditors is recognized by the Act to be prima facie in their business interest. Upon the court according sanction, the scheme becomes binding on all including those dissenting members/creditors. Section 394 (which is corresponding to section 208 of the English Act) provides that the scheme of amalgamation may provide that the whole or any part of the undertaking, property and liability of any company shall be transferred to another company in which case the court will pass consequential orders in relation to the transfer of the undertaking to the transferee-company. Section 394A of the Act provides that a notice of the application u/s 391/394 should be given to the Central Government and the court shall take into consideration the representation, if any, made by the Government to consider public interest before passing any order. Section 393(1)(a) as well as the Companies (Court) Rules requires notices to be given only to the creditors and members of the company.

11. Palmer''s Companies Act, twenty-third edition, (paras 79.13 to 79.16) states that the court has to be normally satisfied on four grounds. (i) Statutory provisions must have been complied with. (ii) Class must have been clearly represented. (iii) The arrangement must be such as a man of business would reasonably approve and (iv) The arrangement must be compatible with legal provisions. An oft quoted passage in Buckley on the Companies Acts, fourteenth edition, reads :

"In exercising its power of sanction the court will see, first that the provisions of the statute have been complied with, second, 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, thirdly, 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.

The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme."

12. In the case of Navjivan Mills Co. Ltd., In re [1972] 42 Comp Cas 265, the Gujarat High Court has reiterated the above principles and has further observed (headnote) :

"There are certain well recognised limitations on the court''s power to sanction a scheme. The first limitation is that the court would not sanction a scheme which would be invalid without the court''s sanction even if every creditor or member concerned agreed to it. In other words, the court has no power to sanction something which the parties could not do by agreement. The second fetter on the court''s power is that the court cannot sanction an act being done if the law permits it only subject to conditions and the agreement seeks to dispense with those conditions, such as where the scheme of compromise and arrangement also includes within its ambit reduction in share capital in respect of which special procedure provided in the Act and the Rules has not been carried out. The third fetter on the court''s power is that the court would not ordinarily sanction a scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. Within the limitations set out above, the court will allow the companies the greatest freedom in devising schemes to suit their requirements and will approve those schemes if they are fair to all whose interests are affected."

13. It is not for the court to substitute its judgment for the collective wisdom of the shareholders/creditors of the two companies, who by and large, are not rustic illiterates but are well informed men of the practical commercial world. This is not to suggest that the court must act merely as a rubber stamp to sanction a scheme approved by majority. It has a duty to scrutinize, but the scrutiny is not with the eye of an expert or the exactness of an accountant as observed by the Gujarat High Court in Alembic Chemical Works Co. Ltd., In re [1988] 64 Comp Cas 186. Even if the scheme is open to some criticism that is not enough. The obvious unfairness of the scheme must be affirmatively shown as held by this court in the case of M. G. Investments and Industrial Co. Ltd. v. New Shorrock Spg. and Mfg. Co. Ltd. [1972] 42

Comp Cas. 145. All these cases clearly indicate that the collective judgment of the vast majority of persons finally affected by the scheme has to be given greatest possible value. The Act, as by amended section 394A, provided for calling of views of the Central Government on public interest consideration.

14. It is true that rule 73 of the Companies (Court) Rules does not provide for giving notices of the meeting to the employees. At one time the view was prevalent that employees have no say in the matter at all. But that view seems to be incorrect and outdated. Rule 80 contemplates public notice of hearing of sanction by the court and at the stage they can certainly put forth their points of view and legitimate concerns. After all the employee has a large stake in the scheme but has no role to play in the meetings since he is neither a "creditor" nor a "member" of a company in the legal sense contemplated under the Act. But in the economic sociology the worker is certainly a valuable part of the business and not an insignificant partner along with the capital and management. These factors coupled with the question of his life must oblige the court to consider his points of view also in exercise of the power u/s 391/394. In River Steam Navigation Co. Ltd., In re [1967] 2 Comp LJ 106, the Calcutta High Court has pithily summed up the issue thus :

"Normally, it is usual to provide by some such arrangement in the compromise or scheme as that the transferee-company under the scheme of compromise or arrangement to absorb as many of the labour and workers as can be consistent with the scheme. The obvious limitations so far as the labour or workers are concerned are that a scheme of compromise or arrangement with creditors or members obviously means difficulty for the company to carry on its normal business and therefore it cannot be possible to lay down as a matter of law that such a scheme shall have no effect or repercussion or impact on the labour or the workers. At the same time the court can and should examine the scheme in a way as not to cause any avoidable or unnecessary hardship to the labour or the workers. Courts thus have to adopt a flexible and ambivalent attitude in the matter-details depending upon the totality of the scheme. But the forum of the company court cannot be allowed to be used to settle what essentially is an individual dispute which generally has to be left for adjudication by the appropriate forums like Industrial/Labour Courts.

15. Keeping the above basic principles in view we proceed to deal with the five grounds seriatim -

Ground (A) : Violation of section 391(1)(a) of the Act in not making required disclosure in the explanatory statement.

16. The nature of disclosures required to be made by section 393(1)(a) in the explanatory statement is quite different from the nature of disclosures required in the notice of the special general meeting of the company u/s 173 under which a statement setting out all material facts concerning each item of business including

in particular the nature of concern or interest, if any, therein of every director, managing agent, and other specified office bearers have to be stated. Even u/s 173 too rigid interpretations which would hamper the conduct of the business cannot be adopted. After all the explanatory statement is a business document intended to give a clear idea of the nature of business to be conducted and must be used in a common sense business way. Minor insignificant matters do not render the proceedings null and void.

17. As contrasted with section 173, the provisions of section 391 are quite different, the necessity of disclosure being quite different from the necessity of disclosure required u/s 173. We reproduce for ready reference section 393(1)(a).

"393. Information as to compromises or arrangements with creditors, and members. - (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called u/s 391, -

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise, or arrangement and explaining its effect, and in particular, stating any material interests of the directors, managing director, or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons; and."

18. An analysis of the above provisions would reveal that the statement is required to state clearly : (i) the compromise or arrangement and its effect, (ii) the manner in which the material interests, if any, of specified categories of persons in any capacity are likely to be affected by the scheme, in case the effect is different from the effect on the like interest of non-specified categories of persons. The purpose of such disclosure is to enable the shareholders to make their objections because once they have approved the scheme there is no chance of questioning its arithmetic&#65533;s subsequently. The question is thus not purely theoretical and every non-disclosure cannot be fatal unless it is fraudulent and has prejudicially affected the decision making process of the member as held by the Karnataka High Court in the case of Suri and Nair Ltd. : Spraymetal (Pvt.) Ltd., In re [1983] 54 Comp Cas 868.

19. The alleged non-disclosures pertain to (i) the correct financial position of TOMCO, (ii) reasons behind the operating business losses, (iii) the names of owners of the three properties mentioned in clause 1.7(d), (iv) Mr. S. M. Datta, the chairman of HLL being responsible for the interest of UL in India. The grievance is altruistic. We do not notice any non-disclosure about the correct financial position of TOMCO. No material is suppressed. There is nothing conflicting. A company can be financially sound and yet may incur business losses. This exactly was and is the position of TOMCO. There were and can be varieties of reasons behind operating business losses, competition by more efficient and prosperous company being one of them.

The criticism that losses were manipulated only for the purposes of scheme has no foundation whatsoever. In the properties mentioned in clause 1.7(d) TOMCO had a mere gratuitous permission for occupation which as held by this court in the case of Associated Building Co. Ltd. v. Union of India (Writ Petition No. 270 of 1984, decided on July 20, 1993), is not a right, power, authority or privilege, as contemplated under the Textile Undertakings (Taking over of Management) Act, 1983. The said right is held to be neither transferable nor an asset. It is pertinent to notice that these properties are not included in the balance-sheet of TOMCO. We fail to see how Mr. Datta being responsible for the interest of UL in India constituted his "material interest" as contemplated u/s 393(1)(a). It is pertinent to notice that Mr. Datta being a representative of UL had been disclosed in the meeting of the members before voting took place. The HLL Employees'' Union even otherwise knew this fact. No objection was raised when Mr. Datta was appointed as the chairman of the meeting in pursuance of the order of the company judge dated April 29, 1993. Against the said judgment, an appeal was filed and even therein no such objection was taken. It is a common ground that Mr. Datta did not own any share of TOMCO or UL and this fact was disclosed in the explanatory statement.

20. The validity of the explanatory statement was raised before the Company Registrar in Company Application No. 250 of 1993, inter alia, on the grounds of non-disclosure. The Company Registrar after going through all the papers and objections settled the explanatory statement and approved the disclosures. The Central Government in its report has also regarded the disclosure as sufficient. Many of the points were discussed in the meeting and considered before voting. Sale of TOMCO was at the market price. Clause 4 has been amended by the court. For all these reasons the question has only theoretical value. No fraud or prejudice is demonstrated. In our view, therefore, there has been substantial compliance with the letter and spirit of the provisions.

(B) : Valuation of share exchange ratio is grossly loaded in favour of HLL.

21. For arriving at the fair value of the share the valuer Mr. Malegam has adopted a combination of three well-known methods. (1) The net worth method, (2) the market value method, and (3) the earning method. The valuation of shares is essentially a technical method requiring expertise. There can be genuine differences of opinion about the correct value of shares of any given company. If there is more than one method of valuation, the valuation cannot be exactly the same by adopting different methods. As held by this court in the case of Primal Building Spg. and Wvg. Ltd. [1980] 50 Comp Cas 514 "unless the person who challenges the valuation satisfies the court that the valuation is unfair, the court will not disturb the scheme of amalgamation which has been approved by the shareholders of two companies, who are by and large, well informed men of the commercial world." It is difficult to set aside the valuation of experts in the absence of fraud or mala fide on the part of the experts as held by the Madras High Court in the case of Coimbatore Cotton Mills

Ltd. and Lakshmi Mills Co. Ltd., In re [1980] 50 Comp Cas 623. There are various methods of arriving at a break up value but it is universally accepted that the quotation of a share on the stock market provides a largely reliable index. Keeping the aforesaid principles in view, let us notice some material facts on valuation.

22. The board of directors of both the companies availed of the professional services of Mr. Malegam, a person with repute and position. He recommended the exchange ratio of 2 equity shares of HLL for every 15 ordinary shares of TOMCO by his report dated March 19, 1994. The draft valuation report, the working of the scheme, the share exchange ratio all were discussed in advance with TOMCO, HLL and financial institutions having 40 per cent. shareholding of TOMCO. The basis of the exchange ratio and the methodology applied were also explained to the board of directors of both the companies at their separate meetings held on March 19, 1993, in which Mr. Ramkrishnan, nominee of the Life Insurance Corporation on the board of TOMCO was also present. The valuation report was kept open by TOMCO at its registered office for inspection by shareholders between June 10, 1993, to June 29, 1993. In the court, convened meeting of the shareholders dated June 29, 1993, the chairman of TOMCO had requested Mr. Malegam to clarify the queries raised by shareholders regarding valuation. It was also explained that all the quoted investments proposed to be transferred were to be sold at the market value and the unquoted investments were to be sold on the basis of their fair value. Amongst several amendments proposed at the said meeting by some of the shareholders, one was for changing the share exchange ratio to 5 : 15 in place of 2 : 15. The said amendment was rejected by 99.69 per cent. of equity shareholders in terms of value and the main resolution was approved by 99.72 per cent. of equity shareholders in terms of value and 86.72 per cent. in terms of number.

23. Review and confirmation of the valuation report prepared by Mr. Malegam was sought from two independent renowned firms of chartered accountants, A. F. Ferguson and Co. and N. M. Raiji and Co. who by their joint report dated September 2, 1993, confirmed the valuation. It may be mentioned that N. M. Raiji and Co. happen to be the auditors of TOMCO and A. F. Ferguson and Co. happen to be the auditors of HLL.

24. The Regional Director, Department of Company Affairs, Bombay, was served with a notice u/s 394 pursuant to the direction given by the company court on August 4, 1993. The Regional Director called for detailed information on various issues including valuation. The information was supplied after which the Regional Director had submitted the report dated December 9, 1993, in which there is not a whisper against the valuation.

25. Mr. Jajoo, a shareholder in TOMCO, who personally argued this appeal in support of his objection to the valuation had himself taken cut Judges Summons No. 593 of 1993, inter alia, praying for a direction to A. F. Ferguson and Co. and Raiji and Co. to give their opinion on the valuation report. He had written a letter dated

December 18, 1993, jointly to the above auditors asking for certain information to which a reply dated January 6, 1994, was sent answering the queries raised by Mr. Jajoo. Mr. Jajoo sent another letter dated January 10, 1994, to those auditors, who confirmed their opinion but resisted repeated correspondence. Even as per Mr. Jajoo the share exchange ratio comes to 6.098 : 4 : 68 and 4 : 08. Mr. Jajoo''s study and findings clearly indicate that there can always be differences in the figures arrived at by applying different methods. At least one ratio arrived at by Mr. Jajoo goes very near the ratio arrived at by Mr. Malegam. For all these reasons there is nothing objectionable about valuation specially when same measure is applied to shares of both companies to fix the share exchange ratio.

(C) : Ignoring the effect of provisions of the Monopolies and Restrictive Trade Practice Act ("the MRTP Act")

26. It is submitted that the sanction should not be made effective till the Monopolies and Restrictive Trade Practices Commission considers the matter and finally makes pronouncement on the subject. The submission is not well founded. There is no such legal requirement. In the original Monopolies and Restrictive Trade Practices Act, merger and amalgamation of certain undertakings was dealt with u/s 23. No merger or amalgamation could be sanctioned by the court until it had been approved by the Central Government which had to take a decision in terms of its economic policy. The Central Government could, u/s 20(6), refer the question to the Monopolies and Restrictive Trade Practices Commission for its opinion which was not binding on the Central Government in view of section 20(7).

27. As a result of the new economic policy nearly the whole of Chapter III including section 23 has been repealed by the Amending Act, 1991. The only part of Chapter III which has remained is section 27 under which an opinion in the matter of division of an undertaking can be taken on the aspect of public interest. u/s 27, as amended, the Commission can even suo motu make enquiry, though the nature of its jurisdiction is still advisory. Thus, the Commission has no part to play in the case of amalgamation. In this background the controversy as to whether issuance of a company''s own share amounts to "trade" or "trade practice" as defined u/s 2(s) and 2(u) of the said Act need not detain us.

28. It is submitted that at least as a propriety this court should stay its hands till the Commission takes a decision on the complaint made by the consumer forums, since the Commission has exclusive jurisdiction to examine the matter from the view of monopolistic, restrictive and unfair trade practices. The point raised is essentially relating to administrative law and under that law of requiring exhaustion of administrative remedies where a claim is cognizable in the first instance by administrative agency alone. In such cases judicial interference is withheld until the administrative process has run its course. We have indicated as to how the Monopolies and Restrictive Trade Practices Commission has no role to play in the matter of amalgamation of companies and hence the course suggested for

suspension of proceedings cannot be adopted. That may not be even in public interest. Matters like this cannot remain in a suspended state for no justifiable reason. Our attention was invited to the following two American decisions. (1) United States v. Western Pacific Railroad Company 352 US 59 and (2) General American Tank Car Corporation v. El Dorado Terminal Company 308 US 422. These cases pertain to the exclusive primary jurisdiction of the Inter-State Commerce Commission under the Interstate Commerce Act for deciding tariff rates for railroad shipments by the United States. The principles enunciated therein will have no application to the matter at hand.

(D) : Interest of employees of both the companies is not adequately taken care of

29. The employees'' unions have raised objections from the angle of the future of the employees of both the companies - of course each in its own perspective. The objections are raised by (i) the appellants, the Federation of Tata Oil Mills and Allied Companies Employees'' Unions, (ii) the HLL Employees'' Union of Sewri factory (HLEU), and (iii) the Hindustan Lever Employees'' Federation (HLEF). Clause 11 of the scheme deals with the subject of the transferor company''s staff, workmen and employees. There is no reference to the transferee-company''s staff, workmen and employees, obviously because the merger contemplated is of the transferor-company with the transferee-company. Whenever an undertaking is transferred, either statutorily or by court''s order to another employer, it is the usual formula to protect the workers of the transferred undertaking by providing that service will be continuous and uninterrupted and service conditions will not be prejudicially affected by reason of the transfer. Such provisions are made in the scheme. Merger of the two companies into one very likely may necessitate adjustments in the service conditions in certain areas but that is a matter for industrial adjudication by appropriate forums. The principal grievance was about the absence of a clause to the effect that no retrenchment of workers of either companies will be made by HLL in future only by reason of the amalgamation.

30. The learned Advocate-General, appearing for HLL, submitted that though no retrenchment was at all contemplated, HLL has not done that before even though it had surplus labour force, HLL was poised for growth after amalgamation and no such possibility exists in the near future, its freedom to act within laws after merger if the occasion arises some time in posterity cannot be taken away. Such freedom exists even today and must continue to remain in future. It seems to us that he is correct. Rightly has our attention been drawn to the provisions of section 25N of the Industrial Disputes Act, 1947 ("the ID Act"), which would apply to the instant case and which prevents retrenchment of workers without proper justification and permits it only on obtaining the Government''s approval. No doubt HLL has surplus labour force since last 5 years but it has not retrenched workers and has offered a voluntary retirement scheme giving cash benefits and at least 1,000 workers have availed of that scheme. HLL has repeatedly stated in various proceedings that it will

not retrench any workman, all workers will be given jobs commensurate with their skill and status and we see no reason to doubt the bona fides of that stand. In case HLL goes back on their stand, the workers are not remedyless. The company court in these proceedings cannot act on mere speculations. At present there is no reason to doubt the correctness of its stand that merger is bound to result into increasing prosperity of HLL which will bring about increased employment. It is HLEU''s own case that HLL is poised for big prosperity. It is of great importance and relevance to note in these proceedings that merger had not been planned as a device to effect retrenchment.

31. It is contended that the type of guarantee given in the scheme to TOMCO workers is not given to HLL workers. This objection is altruistic. Merger is of TOMCO, the transferor-company. Protection by scheme is necessary only to its workers. In this context section 225FF of the Industrial Disputes Act may be noticed.

32. It is next contended that the scheme of amalgamation should be amended to ensure that the future conditions of HLL employees are not less favourable to the conditions of TOMCO employees prevailing before merger. HLEF has even made written suggestions pertaining to service conditions including withdrawal of certain cases, parity of conditions, and protection from retrenchment. All these are typical industrial disputes calling for industrial adjudication. In this connection, one cannot lose sight of section 9A of the Industrial Disputes Act, under which no change in service conditions can be carried out without notice to the workmen.

33. All that remains to be considered is the grievance pertaining to ex-workers of TOMCO in the Calcutta factory which has been closed and who have joined the Kalyani Soap Industries Ltd., Kalyani (WB) (Kalyani) on the basis of assurances given by TOMCO recorded in the memorandum of settlement dated November 12, 1991. Kalyani is jointly promoted by TOMCO and the Government of West Bengal. TOMCO has 24 per cent. shareholding in Kalyani. The Calcutta factory was running up losses and was required to close. In that context, settlement was reached with the workers who as a package deal contained in the settlement agreed for closure and opted to be employees of Kalyani. Under that settlement service conditions of workers were protected while they were in the service of Kalyani and plant and machinery at the Calcutta factory was to be dismantled and installed and commissioned at Kalyani. The apprehension of those employees is that as a result of merger and transfer of TOMCO properties to HLL, they would suffer adversely and may not be in a position to enforce against HLL their rights protected under the settlement. The employees had filed a suit in the High Court at Calcutta, being Suit No. 365 of 1993, restraining TOMCO from effecting merger with HLL in a manner by which their rights will be adversely affected. An application for interim relief was made and in appeal arising out of the order the Division Bench of the Calcutta High Court while passing under expressed the hope that, at the time of sanctioning the scheme, the Bombay High Court will consider the settlement and give ample and appropriate protection to

those workers. It is pertinent to notice that the communication dated March 19, 1993, by Mr. N. S. Sundar Rajan of TOMCO states that as per the understanding between the two companies the merged company will retain TOMCO''s investment in specified companies which includes Kalyani. Now, in the whole background the demand of these workers is perfectly justified, but it appears that clauses 8 and 9 of the scheme would take care of the settlement and it would not be possible for HLL to go behind the settlement which is binding on them. Indeed this position is fairly not disputed by HLL. Ex abundanti cautela we record that the settlement dated November 12, 1991, would be binding on HLL. This, in our judgment, should take care of the grievance. No change in the scheme on that account is, therefore, necessary.

(E) : Preferential allotment of shares at less than market price of UL which is no in public interest

34. This by far is the most controversial and important issue. The shares are 29,847 in number and the break-up of the price of Rs. 125 is Rs. 10 towards capital and Rs. 95 towards premium. The market price at the material date would be around Rs. 366. Certain basic facts relevant to the subject are these :

(i) HLL is a subsidiary company of UL which is the parent company. UL holds 51 per cent. of the issued, subscribed and paid-up capital of HLL.

(ii) As a result of issuance of 28,67,314 equity shares to TOMCO shareholders under the scheme of amalgamation the holding of UL in HLL becomes diluted to little less than 50 per cent.

(iii) The preference share allotment ensures post-amalgamation shareholding level of UL at 51 per cent.

(iv) The initial shareholding of UL was 100 per cent.

(v) UL has contributed in a variety of ways in the phenomenal growth and prosperity of HLL. This subsidiary status has enabled HLL to get inter alia free of cost the benefits of research and development, technology, know-how, marketing support - domestic as well as international - management systems, training facilities and above all international brand names of UL such as Lux, Lux International, Lifebuoy, Pears, Dove, Surf, Sunlight in soaps, Sunsilk in shampoo, and Close-up in tooth paste.

35. In the above background, there seems to be nothing objectionable in the preferential allotment of shares to enable UL to maintain its old 51 per cent. shareholding in the new set up. The real controversy can be and is about the price of Rs. 105 which is admittedly much below the market price at the material date.

36. The price of Rs. 105 has been worked out on the basis of the price earning multiple of 15 based on the last published balance-sheet of HLL. This formula was

considered fair and reasonable even by the financial institutions having 16 per cent. shares, as is clear from their approval in the meeting of shareholders dated June 30, 1993. The common case is that the approval was on the basis of the policy of financial institutions then adopted. It appears that this formula was in conformity with the discussions at the meeting held by the Associated Chamber of Commerce and Industries (ASSOCHAM) on the subject of pricing of preferential allotment of shares to Indian promotors and foreign collaborators. This is clear from the confidential communication dated March 18, 1993, issued by the Secretary General of the ASSOCHAM to the members of the managing committee, special invitees and promoter chambers. HLL''s earning per share for the year end December, 1990, was Rs. 7 per share. Applying the multiple of Rs. 15 the price of Rs. 105 was worked out. No other formula was in the field when the meeting was convened for consideration of the scheme of amalgamation including preferential allotment of shares to UL. The Industrial Credit and Investment Corporation of India Ltd. (ICICI), a leading financial institution, also corroborated the price of Rs. 105 by its report thus :

"We have verified that the fair value arrived at from the above is in line with the norms which have been followed by investment institutions in the past for other similar cases."

37. The Government of India chose to follow a liberalisation policy and as a result the solitary control on the price of shares, viz., sanction of the Controller of Capital Issues under the Capital Issues (Control) Act, 1947, was abolished by the Government of India by repealing the said Act on May 29, 1992. Consequent on the repeal of the said Act, the Government of India issued a Press Note No. 13, dated June 29, 1992. The following paragraph from that press note is relevant.

"Following the issue of guidelines by SEBI on June 11 and 17, 1992, existing companies wishing to raise foreign equity up to 51 per cent. can make issues at the price determined by the shareholders in a special resolution u/s 81(1A) of the Companies Act, 1956. This will apply mutatis mutandis to closely held companies."

38. Thus, under the new industrial policy, shareholders are required to determine the price of shares for preferential allotment being made for raising foreign equity of 51 per cent. by passing a special resolution u/s 81(1A) of the Act. This was done by the extraordinary general meeting of HLL on June 30, 1993. The above change in the new industrial policy was also confirmed by the answer to a question on the new pricing formula framed to enable foreign companies to increase their equity shares put to the Hon''ble Prime Minister in Rajya Sabha on December 16, 1992. The answer was :

After the Capital Issues (Control) Act, 1947 (May 29, 1992), was repealed and following the issue of guidelines by the Securities and Exchange Board of India, existing companies wishing to raise equity holding can do so at the price determined by the shareholders of the respective companies in a special resolution

u/s 81(1A) of the Companies Act. In view of this, the question of laying down any new pricing formula by the Government does not arise.

39. Hence, as the law and the new industrial policy stand, the shareholders are completely free to determine the price for allotment of shares by passing a special resolution u/s 81(1A) of the Act.

40. It appears that the financial institutions have recently taken a new policy decision and modified their norms for exercising their rights as a shareholder on the price for preferential allotment. The policy is to oppose allotment at less than market price. This certainly is not only a permissible decision but a welcome decision. But we fail to see how that subsequent policy decision can affect the exercise already undertaken on the basis of policy then prevailing. After all, as observed in Navjivan''s case [1972] 42 Comp Cas 265 "the scheme has to be tested bearing in mind all the circumstances prevailing at the time of the meetings called to consider the scheme."

41. There are two depreciatory factors in shares allotted to UL. They seem to be self-imposed and are to the effect that (i) the new equity shares to be allotted to UL are not transferable for a period of 7 years from the date of allotment, and (ii) in the event of UL deciding to diversify those shares thereafter within 12 years it will in the first instance offer the shares in favour of the members of HLL on a fair and equitable basis at a price worked out by reference to the same formula of P/E multiple of 15 based on the latest audited accounts of the company at the time of the sale. The objectors contend that the restrictions are merely illusory and are a virtue out of necessity because UL would normally not be interested in transferring these shares. This controversy need not detain us in view of what is held above.

42. The law does not cast any obligation to allot shares only at the premium or at the market value. The price factor is left to the decision of the directors/shareholders of the company. In fact the legal position is that the directors have the discretion to offer the shares to the existing shareholders even at par. There is no doubt that the exercise has to be in good faith and the best interest of the company. The following passage from Palmer''s Company Law, 23rd edition (para 22.18), is relevant.

"The duty of the directors as to allotment of shares is that they are bound to act in good faith in the best interest of the company. It is the discretion of the directors to offer the shares to the existing shareholders at par even though the shares stand at a higher price in the market. There is no duty to the company to offer it at the highest price."

43. It is pertinent to notice that the price of Rs. 105 has been offered by a majority of 99.97 per cent. in terms of value. After all the members of the company are its owners and they know their business interest best.

44. The suggestion that the majority was influenced by the voting of UL to the extent of 51 per cent. does not seem to be correct. Even if the persons and votes of UL are disregarded, the remaining shareholders had almost unanimously okayed the preferential share allotment at the price of Rs. 105 per share. Not that the subject was not discussed. Three amendments moved to the resolution of preferential allotment were rejected by members by a 99.85 per cent. majority in terms of value. It is also pertinent to notice that no member of UL has objected in the court to the scheme of amalgamation including the preferential allotment of shares. The objections have come from workers some of whom may be shareholders. In the matter of price fixation the court is normally guided by the business sense of the members unless it is established that the majority has acted mala fide or to coerce a minority. In the instant case, the decision is nearly unanimous and in line with the prevailing Government policy, norms suggested by the ASSOCHAM and policy adopted by financial institutions. The company court does not sit in appeal over the price fixation. Strong reliance was placed by the objectors on the decision of the Calcutta High Court in the case of Jadabpore Tea Co. Ltd. v. Bengal Dooars National Tea Co. Ltd. [1984] 55 Comp Cas 160 in support of the point that court can interfere with price fixation. In that case, the court quashed the resolution of price fixation u/s 81(1)(a) of the Act on the basis that it was replete with mala fides and hence was void for mismanagement. No such finding is warranted in this case and hence the ratio of that decision will have no application.

45. It is contended that the court has ample discretion to modify the price and to increase it to the market price in larger public interest, specially when the Government of India has expressed doubts about the correctness of the decision of preferential allotment. Well settled principles enunciated in the matter of court''s power to interfere with schemes do not permit us to substitute our judgment on price, in place of near unanimous judgment of the members of the company specially when the decision is not illegal. We close this chapter with the following passage from Gower''s Principles of Modern Company Law, fourth edition, 712/713.

"This dictum, that creditors or shareholders know best, is repeated in almost every case relating to every type of reconstruction and it affords, of course, a perfect answer to any suggestion that the court should do more than ensure that the formal requirements have been complied with. Unhappily it is based on the fundamentally false assumption that a vote of a meeting necessarily represents the informed opinion of the majority of members of the class concerned unprejudiced by any conflicting interests. The courts realise this and occasionally their realisation finds expression, but all too often they have to renounce any attempt to form an independent judgment in the face of the harsh fact that they are in scarcely a better position than the investor to pass an informed judgment."

(F) : Mala fides on account of existence of a quid pro quo between UL and Tata Sons Ltd.

46. Some of the objectors allege that the whole scheme is mala fide because it is based on a quid pro quo between UL and Tata Sons Ltd. Tata Sons Ltd. managed to secure the transfer of valuable immovable properties of TOMCO and other property rights in its favour and in consideration permitted preferential allotment of shares at a very low price and in the whole exercise the shareholders have been made a scape-goat. Now, allegations of mala fides are easy to make and difficult to substantiate. This general proposition applies even in this case. There is no material to sustain this serious charge. Clause 1.7(d) refers to three properties which TOMCO was using purely as a gratuitous licensee with no enforceable rights. Occupation was purely permissive with no legal right to remain therein. The owners, who must be Tata group companies, could revoke the permission at any time. The question is no more doubtful and is decided by this court in the case of Associated Building Co. Ltd. v. Union of India (W. P. No. 270 of 1984 - July 20, 1993). The gratuitous occupation permission has been held to be neither a right, power, authority or privilege which was transferable nor an asset as discussed earlier. In one of the properties, viz., Bombay House, even the portions are undivided and undemocratic and are used commonly by several companies of the Tata group. TOMCO has also never considered these rights as assets, as will be clear from the balance-sheets. There is no difficulty in the owners of those properties to get back possession if they so choose by merely revoking the licence specially when TOMCO does not resist. The help of outside agencies like HLL or UL in the matter and/or going in such an unusual round about way was not at all necessary.

47. Properties referred to in clause 4 were to be transferred at the market rate to be independently assessed. Now independent assessment of the market price has been doubly secured by the court by entrusting the job of determination of the market price with the named reputed and authorised valuers. There is no reason to doubt their capacity and/or independence. Sale by open public auction or inviting tenders from the general public may fetch more price due to competition, but the desire of the purchaser to retain some choice is not unreasonable in the whole background. Suitable amendments have been made by the court in the scheme that has been accepted by TOMCO.

48. On the price aspect we have said enough. No repetition is called for. This last point must also therefore fail.

49. There has been a settlement dated September 28, 1993, between the Consumer''s Education and Research Centre (CERC) and HLL for incorporating the following terms in the scheme of merger.

"1. HLL will have all the rights and powers conferred on it by the law in connection with manufacture, sale and distribution of the products which form the subject-matter of this arrangement.

2. HLL undertakes to :

(a) assure consumers of toilet soaps and detergents and consumer organisations that it will not indulge in any trade practice or pursue any policies which have the effect of preventing, restricting or lessening competition, which is prejudicial to consumer interest;

(b) continue to manufacture and promote sales of all major brands of soaps (accounting for 90 per cent. of turnover) formerly manufactured by TOMCO before the proposed merger, and to the extent not less than percentage or value of market share before the merger.

Explanation. - In order to ensure that the aforementioned assurances are carried out, HLL will not enter into any horizontal arrangement with manufacturers or vertical arrangement with stockists, distributors or dealers, other than those currently in use, which has the effect of producing adverse results prejudicial to consumers'' interest.

3. In the event if HLL is unable to comply with any of the aforementioned assurances given in 1(a) and (b), HLL shall inform consumer organisations and consumers in general, through various media, of the reasons for the same.

4. If any disputes arise with regard to any trade practice or policy adopted by HLL in this regard, they shall be resolved by a committee consisting of two representatives of trade and industry nominated by HLL and two representatives of consumers to be nominated by CERC, preferably from among the consumer representatives on the Central Consumer Protection Council and chairman to be appointed by mutual consent of the nominee, or in the absence of such consent, by drawing of lots with respect to names recommended by four representatives mentioned above. The decision of this committee of 5 arrived at unanimously or by majority vote, shall be binding on HLL."

50. No one had prayed for modifying the scheme on that basis either before the learned single judge or before us. We have already passed an order on CERC''s Appeal No. . . . of 1994. CERC has prayed for incorporation of terms in the scheme. HLL has no objection. It is futile to go into the question as to what caused this delay and confusion. What is important is that the admitted position is that such modification was agreed upon. Under the circumstances, modification in the scheme to that extent will be but proper.

51. All that remains is to make some obvious clarification/corrections in the impugned judgment/scheme as prayed for by TOMCO to which there seems no objection. The last portion of para 5(d) of the judgment reads thus :

"The board of directors of TOMCO shall themselves, before dissolution, have these properties valued by valuers named hereinafter and thereafter, before dissolution, convey, transfer or lease them on long term basis on the basis of such valuation."

52. There can be practical difficulty in having valuation and effecting transfer of the properties before dissolution of the board of directors of TOMCO, inter alia, because of the provisions of section 269UD of the Income Tax Act. But the nomination of valuers can certainly be made before that date and actual valuation and transfer can take place after. Amended clause 4 of the scheme reads thus :

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

53. "There seems to be some unintended typing error. The words "before dissolution" instead of appearing after the words "by the directors of transferor-company" and before the words "at valuations" should appear before the words "by the directors of transferor-company" and after the words "to companies nominated". Judgment and scheme clarified and amended accordingly.

54. Hence, the following order :

The scheme as ordered by the court is approved subject to the following modifications.

(a) Main part of amended clause 4 shall read as under :

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

(b) There shall be added clause 14(a) to the scheme which reads as under :

"1. HLL will have all the rights and powers conferred on it by the law in connection with manufacture, sale and distribution of the products which form the subject-matter of this arrangement.

2. HLL undertakes to :

(a) assure consumers of toilet soaps and detergents and consumer organisations that it will not indulge in any trade practice or pursue any policies which have the effect of preventing, restricting or lessening competition, which is prejudicial to consumer interest;

(b) continue to manufacture and promote sales of all major brands of soaps (accounting for 90 per cent. of turnover) formerly manufactured by TOMCO before

the proposed merger, and to the extent not less than percentage or value of market share before the merger.

Explanation. - In order to ensure that the aforementioned assurances are carried out, HLL will not enter into any horizontal arrangement with manufacturers or vertical arrangement with stockists, distributors or dealers, other than those currently in use, which has the effect of producing adverse results prejudicial to consumers'' interest.

3. In the event HLL is unable to comply with any of the aforementioned assurances given in 1(a) and (b), HLL shall inform consumer organisations and consumers in general through various media, of the reasons for the same.

4. If any disputes arise with regard to any trade practice or policy adopted by HLL in this regard, they shall be resolved by a committee consisting of two representatives of trade and industry nominated by HLL and two representatives of consumers to be nominated by CERC, preferably from among the consumer representatives on the Central Consumer Protection Council and a chairman to be appointed by mutual consent of the nominee, or in the absence of such consent, by drawing of lots with respect to names recommended by four representatives mentioned above. The decision of this committee of 5 arrived at unanimously or by majority vote, shall be binding on HLL."

55. To conclude, the appeals are disposed of in the above terms. No order as to costs.

56. Certified copy of the above order will be filed within 30 days of the date of sealing of the order with the Registrar of Companies who will consolidate the file immediately thereafter.

57. Some appellants have prayed for continuation of the interim order of stay. The learned Advocate-General appearing for HLL has made a statement that the scheme will not be given effect up to July 18, 1994. Hence, no orders on oral prayer.

58. Needless to mention that drawn up order can proceed.