(2005) 05 DEL CK 0201

Delhi High Court

Case No: C.P. 206 of 2004

Reckitt Benckiser (India) Ltd. APPELLANT

Vs

RESPONDENT

Date of Decision: May 31, 2005

Acts Referred:

- Companies Act, 1956 - Section 10, 100, 100(1), 101, 102
- Constitution of India, 1950 - Article 27, 300A
- Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 - Regulation 21, 21(3)

Citation: (2005) 122 DLT 612

Hon'ble Judges: A.K. Sikri, J

Bench: Single Bench

Advocate: Shardul S. Shroff, Gunjan Shah and Ruchi A. Mahajan, Janak Dwarkadas, Chirag H. Mody, Rishi Agarwala and Neha Tandon, for the Appellant;

Judgement

A.K. Sikri, J.

M/s. Reckitt Benckiser (India) Ltd. was incorporated under the Indian Companies Act (for short the ''Act'') on July 5, 1951 under the name and style of Reckitt and Colman of India Ltd. This name was changed to present name with effect from December 18, 2000 vide certificate of incorporation consequent to change of name No. NCR-CN-1982. The registered office of the company is in Delhi. The present authorised share capital of the company is Rs. 35 crores. Its existing issued and paid-up share capital is Rs. 32,91,31,880/-. The company proposes to reduce its share capital to the extent of Rs. 6,63,35,760/- Constituting about 20.15% of its issued and paid-up share capital and its reserves to the extent of about Rs. 159,20,58,240/-. This petition is filed by the petitioner company under Sections 101-105 of the Companies Act (in short the ''Act'') inter alia, seeking reduction of this share capital.

2. It is stated in the petition that in February, 2003 the equity shares of the company were mandatorily de-listed from the Stock Exchange in accordance with Regulation 21(3)(a) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred to as the ''SEBI Regulations''). The market value of the shares of the company, immediately prior to de-listing was Rs. 247/- per share. Pursuant to directions received from the Stock Exchange in reaction to the mandatory de-listing of the company, Lancaster SL (for short ''Lancaster'') made an exit offer to acquire shares of. the company under Regulation 21 of the aforesaid SEBI Regulations. The said exit offer was opened on May 9, 2003 and was valid till May 18, 2003. Price of Rs 260/- per share was offered in the said exit offer. This fact is stated to indicate the value of the shares at relevant time.

3. The Board of Directors of the company in its meeting held on 18th June, 2004 passed a resolution of reduction of share capital, which was, of course, subject to prior approval of the share holders to be sought at a General Body Meeting and also subject to confirmation of the proposed reduction and return of paid-up share capital by the Court. It was also resolved that an Extraordinary General Meeting of the share holders be convened on July 21, 2004 to seek their approval, Notice dated 25th June, 2004 along with an explanatory statement was sent to the share holders intimating them that General Meeting had been convened on 21st July, 2004 to consider and approve the proposed reduction of share capital, Separate class meetings were to be held for: (a) the share holders of the company whose shareholding was proposed to be reduced; and (b) share holders of the company whose shareholding was not proposed to be reduced.

4. In the meeting held on 21st July, 2004 necessary resolutions were passed with a special majority at the meeting of (a) all the equity share holders of the company; (b) share holders of the company whose shareholding is proposed to be reduced; and (c) shareholding of the company whose shareholding is not proposed to be reduced. Thereafter this petition has been filed seeking confirmation of its move to reduce the share capital.

5. In the application it is stated that M/s. T.R. Chadha and Company, Chartered Accountants, and External Valuers had submitted a report dated 24th June, 2004 on the equity shares of the company. As per this report, the share is valued at Rs. 175/-, which was placed before the General Body. The reasons necessitating reduction and structure of reduction are mentioned in para-11 of the petition explaining that over a period of time, the management''s focus on overall profitability and financial discipline including effective management of net working capital and caution in launching new products has significantly reduced the capital requirements of the petitioner company. As a result, the petitioner company now has more capital resources and reserves that it can profitably employ giving rise to the need to readjust the relation between capital and assets and to accurately and fairly reflect

the liabilities and assets of the petitioner company in its books of accounts. The petitioner company has capital excess of its requirements to the extent of Rs. 6,63,35,760/-, Constituting about 20.15% of its issued and paid up share capital. The petitioner company has also reserves consisting of general reserves, balance in the profit and loss account, capital reserves, modernisation and expansion reserves and the share premium account, in excess of its requirements to the extent of Rs. 159,20,58,240/-. The petitioner company has evaluated the effect of such over-capitalisation upon its functioning and has carefully examined the various options available to it such as alternate business prospects and/or restructuring the share capital in the interests of the share holders. In the absence of adequately attractive acquisition opportunities in the present market scenario, the restructuring of the petitioner company''s existing capital structure becomes imperative. Section 100(1)(c) of the Act provides that a company may either with or without extinguishing or reducing liability of any of any of its shares, pay off any paid-up share capital which is in excess of the wants of the company.

6. The proposed move is also justified by stating that de-listing of the equity share by the SEBI has resulted in non-tradability of the company''s equity shares and, thus, the individual share holders do not have tradable security for exit, which would significantly impair the value of the shares. It is also explained that in the meeting held on June 18, 2004 the Board of Directors considered the options available to the company and agreed that the reducing of share capital in accordance with Section 10 of the Act is the only practical and economically efficient legal option available to the company and, thus, it was proposed to return the capital Constituting about 20.15% of its issued and paid-up share capital to selected share holders by returning Rs. 250/- per share consisting of par value of Rs. 10/- at a premium of Rs. 240/- per share, as the company is in a position to return about 20.15% of its present issued and paid-up share capital. In the interest of minority share holders it was proposed that the public share holders holding of about 3.75% of the issued and paid-up share capital be returned their entire capital contribution and Lancaster be returned about 16.40% of the issued and paid-up share capital of the company. The petitioner has also sought to justify the selective return. This aspect will be taken note of at the appropriate stage while dealing with the arguments of the parties.

7. Since along with the petition, the petitioner has filed ''no objection'' from 99.96% in value of the affected unsecured creditors, procedure of proof for the unsecured creditor, as required in Section 101(2) of the Act, was dispensed with -by this Court vide order dated August 9, 2004, while taking note of another fact as well, namely, the Chartered Accountants of the company had given the certificate dated 31st July, 2004 to the effect that the petitioner company had sufficient cash reserved to repay its unsecured creditors as on 30th June, 2004, Citations were directed to be published in the ''Statesman'' (English) and ''Jansatta'' (Hindi) for 6th October, 2004.

8. Pursuant to these citations Mr. Janak Mathuiadas, one of the share holders, has put in appearance and filed his objection to the proposed reduction. Before taking note of these objections, it would be desirable to scan through the pattern of shareholding of the company. It may be noted at the outset that 51% of the paid-up share capital is held by Rickett Benckiser Plc, holding company of the petitioner. 45.25% shares are held by Lancaster and public holding is 3.75%. The present position of the shareholding and consequence of reduction would be as under:

Present position:

S.No.	Shareholder(s)	Details of Shareholding	Amount (rupees)
1.	Reckitt Benckiser Plc	1,67,85,726 Equity shares of Rs. 10/- each fully paid-up Constituting 51% of the issued and paid-up share capital of the petitioner company	16,78,57
2.	Lancaster Square Holding SL	1,48,93,374 Equity Shares of Rs. 10/- each fully paid-up Constituting about 45.25% of the issued and paid-up share capital of the petitioner company (including 3,65,088 Equity Shares being subject to the receipt of approval of the RBI and 5,973 Equity Shares held in an Escrow account)	14,89,33
3.	Public share holders	12,34,088 Equity Shares of Rs. 10/- each fully paid-up Constituting about 3.75% of the issued and paid-up share capital of the petitioner Company	1,23,40

Position after proposed reduction:

S.No.	Shareholder(s)	Details of Shareholding	Amount (in rupee
1.	Reckitt Benckiser Plc	1,67,85,726 Equity Shares of Rs. 10/- each fully paid-up Constituting about 63.87% of the issued and paid-up share capital of the petitioner company	16,78,57

2.	Lancaster Square	94,93,886 Equity Shares of Rs. 10/- each fully paid-up Constituting about Holding SL 36.13% of the issued and paid-up share capital of the petitioner company	9,49,38,

9. Thus, the proposal is to pay up all the public share holders and reduce the shareholding of Lancaster, without touching the shares of the holding company. In the petition this move is sought to be justified by stating that the Board of Directors decided that since Reckitt Benckiser Plc is the promoter shareholder, it be not returned its capital contribution which move is accepted by the Reckitt Benckiser Plc vide its letter dated 23rd June, 2004 agreeing to reduce its shareholding in the company as the promoter, while enabling the other share holders to exit from the company prior to any impairment of the share value and it has agreed to bear responsibility for the First the Last Out principle. It is further stated that the primary concern of the company is the protection of the interest of its minority share holders, so that no impairment of any asset or changed business by the promoters affect such persons. Therefore, claims the petitioner, the minority share holders are the primary beneficiaries of the proposed reduction and are being returned their complete issued and paid-up share capital in spite of a pro rata return of their capital shared with the promoter of the company. In this manner, it is explained, the continuing risk in relation to the venture would only rest with the promoter. It is also stated in the petition that value of Rs. 250/- per Equity Share offered is much higher than the fair value per share determined by M/s. T.R. Ghadha and Company.

10. In this background, let me now point out the objections raised by the objector. The plea of the objector is that he is a shareholder in the company for the last 35 years. He and his family hold 1750 shares. In the objections filed by him the proposed move of the petitioner is challenged on various grounds, which may be summarised as under:

(i) Reduction of share capital as proposed by the company does not fall within any of the modes of reduction of share capital provided in Section 100(1) of the Act and no case for need or necessity to reduce the share capital is made out.

(ii) The proposed reduction is discriminatory, unfair and mala fide to extinguish the class of public share holders. The reduction is not effected on equal proportionate basis but selectively aimed at minority share holders. The motive is to buy back the shares of the public, including the petitioner, who belongs to this class.

(iii) Once the effect is to buy back the shares of the petitioner by the company, provisions of Section 77A of the Act are also required to be followed, which has not been done. Alternatively, in such a case, provisions of Section 391 of the Act would also be attracted and procedure contained therein is also not followed.

(iv) Shares of a company is movable property of the shareholder, who is absolute owner thereof and is entitled to deal with it in any manner he deems fit. There cannot be forcible acquisition of these shares, which is sought to be achieved. It will also violate the right of property vested in a person by the Constitution of India.

(v) Attempt also amounts to forcing minority share holders to give up their shares, which would constitute oppression by the minority foreign share holders. It is also against the interests of the general investing public as it sets wrong precedence and shall also have cascading effect on the market, as no small investor would be willing to invest in the company for fear of being thrown out. It also deprives the small investors opportunity to grow with the company.

11. Reading of the aforesaid objections would make it clear that primary objection is that it is a calculated attempt to throw the minority share holders/ public share holders out of the company so that the entire control of the company rests with the promoter and its subsidiary company by acquiring 100% equity, which the objector alleges is a mala fide move of the company. In order to prove these mala fide intentions, the objector has also given the events which led to the present move. It is stated that prior to the year 2002 the promoters held 51% equity shares as at the relevant time prior Foreign Direct Investment Regulation allowed foreign investors to hold 51% Equity Shares. After this restriction was removed promoters introduced Lancaster, one of its subsidiaries, to acquire the balance 49% Equity Shares from the non-promoter share holders. Lancaster was a special purpose vehicle created mainly to achieve this acquisition. With that aim in mind Lancaster made an open offer to acquire the balance 4% stakes and in the process, it could acquire 36.27% shares. In this way the promoter and Lancaster came to hold 87.27% shares and shareholding with public was reduced to 12.73%. In September, 2002 Lancaster made second open offer to acquire the balance 12.73% Equity Shares at Rs. 250/- per share and acquired 5% capital in this move thereby increasing the holding of the promoter and Lancaster to 92.27%. In November, 2002 third such attempt was made by Lancaster to purchase the balance 7.73% shares from the public @ Rs. 250/- per share. This time Lancaster obtained 3.98% shares increasing promoter''s holding, i.e. promoter and Lancaster together to 96.25%. Since public shareholding carne to less than 10%, shares of the petitioner company were de-listed from Calcutta Stock Exchange, Bombay Stock Exchange and National Stock Exchange. As the promoters wanted to acquire balance shares held by the public, which were now only 3.75%, present device is adopted whereby under the garb of reducing the share capital that too selectively, the promoter and Lancaster proposed to control 100% shareholding if their move is successful.

12. It is further submitted that artificially three classes of equity shares are created, namely, promoters, Lancaster and the general public. There is no such distinction in law. The three categories are created only to wipe off the so-called category to

which the objector belongs. Otherwise, admittedly Lancaster is a subsidiary of the promoter and is acting in concert with the petitioner company as well as the promoter. The reduction of the share capital of the Lancaster is a make-belief in order to give it a legitimate hue.

13. The objector has also questioned the criteria for arriving at a fair valuation of shares, namely, the book value. It is further stated that even the book value is not arrived at correctly, as company has not valued and considered, for the purpose of valuation, the brands of the company, namely, Mortein, Harpic, Kleen, Lizol, Robin, Cherry Blossom, Analjesic, Detol soap and liquid and shaving cream, etc., which are growing very fast and command very high market. Harpic has over 75%, Robin over 35% and Detol soap and liquid over 48% market share as per the management discussion and analysis report in the Annual Report 2002. It is, Therefore, pointed out that intangible assets of the company in the form of goodwill and intellectual rights in the aforesaid brands are worth mind-boggling amount. Another ill-effect of the proposed reduction, according to the objector, would be to pay to Lancaster a sum of about Rs. 135 crores from the reserves of the company, which could have been utilised for betterment of the company. Thus, according to the objector, with the proposed schemes, the company wants to kill two birds with one stone, namely, (i) to kill the minority share holders in its entirety and (ii.) to return the investments made by Lancaster ''as quickly as possible'' in acquiring the shares of the company earlier through public offer. Thus, according to the objector, the purported object, i.e. the primary concerned of the petitioner company is the protection of the interest of its minority share holders, so that no impairment of any assets or changed business by the promoters affects such persons, is a bogey raised under the guise of good Samaritan to protect the minority share holders, whereas the harsh reality is that the company is, in fact, throwing them out at a price dictated by them even though the minority share holders do not want to part with their shareholding. Otherwise, it is stated, there was no deed to reduce the share capital as company is a zero debt company and rather cash rich company.

14. Legal Position: Before dealing with these objections, which were highlighted by Mr. Janak Dwarkadas, learned Senior Counsel for the objector, with the aid of certain case law, it would be necessary to state the law relating to reduction of such share capital in a company. Provisions are contained in Sections 100-105 of the Act. Section 100 authorises a company to reduce the share capital and lays down the procedure for taking such action. This section reads as under:

"100. Special resolution for reduction of share capital.--(1) Subject to confirmation by the [Tribunal], a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by '' its articles, by especial resolution, reduce its share capital in any way; and in particular and without prejudice to the generality of the foregoing power, may--

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares cancel any paid-up share capital which in list, or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as a resolution for reducing share capital.

15. Sub-section (1) entitles a company, under certain circumstances, to reduce its share capital in any way. For doing this the company should be one which is limited by shares or limited by guarantee and having a share capital and Article of Association of the company should authorise a company to reduce its share capital. Once these conditions are fulfilled ,then reduction can be by special resolution. Without affecting this general power, Clause (c) of Sub-section (1) provides that reduction can breather with or without extinguishing or reducing liability of any of its shares, pay off any paid-up share capital, which is in excess of the wants of the company. It is not in dispute that the petitioner company is a company limited by shares and is having share capital and Article of Association also authorises the company to reduce the share capital. Special resolution has also been passed. Provision for reduction in share capital has come up for interpretation by Courts in India as well as in England, (where similar provisions exist) a number of times. Some of the judgments, which were cited at the Bar, may be noted to cull out the principles laid down in these judgments.

16. One of the oldest cases on the subject is the judgment of the House of Lords of England in the case of British and American Trustee and Finance Corporation v. Couper (1894) AC 399. In that case the Court held that the prescribed majority of the share holders of a company is entitled to decide whether there should be a reduction of capital, and if so, in what manner and to what extent it should be carried into effect. In the words of Lord Macnaghten "if there is nothing unfair or inequitable in the transaction, I cannot see that there is any objection to allowing a company limited by shares to extinguish some of its shares without dealing in the same manner with all other shares of the same class. There may be no inequality in the treatment of a class of share holders, although they are not all paid in the same coin, or in coin of the same denomination."

17. Lord Harschell in his separate judgment also opined that the policy of the Legislature was to entrust the prescribed majority of the share holders with the decision whether there should be a reduction of capital and if so, how it should be

carried into effect. The relevant portion making these observations reads as under:

"It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor there is any limitation of the power of the Court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured.... I think that it is the policy of the Legislature to entrust the prescribed majority of the share holders with the decision whether there should be a reduction of capital, and, if so, how it should be carried into effect...."

18. This judgment was followed by the appeal Court in Poole v. National Bank of China 1907 AC 229, and by Calcutta High Court in the case of Hindustan Commercial Bank Ltd. v. Hindustan General Electric Corporation, (1960) 3 CC 367 (Cal.).

19. House of Lords have, also in the case of ex parte Westbern Sugar Refineries Ltd. 1951) 1 All. E.R. 881 reiterated this principle by observing that "the general rule is that the prescribed majority of the share holders is entitled to decide whether there should be a reduction of capital, and, if so, in what manner and to what extent it should be carried into effect". Same principle is restated by Madras High Court in Re. Panruti Industrial Company (Private) Ltd. AIR 1960 Mad. 537, that "...the question of reduction of capital has been treated as a matter of domestic concern, one for the decision of the majority of the share holders of the company".

20. The principles, which can be distilled from the aforesaid judicial dicta, are summarised as under:

(i) The question of reduction of share capital is treated as matter of domestic concern, i.e. it is the decision of the majority which prevails.

(ii) If majority by special resolution decides to reduce share capital of the company, it has also right to decide as to how this reduction should be carried into effect.

(iii) While reducing the share capital company can decide to extinguish some of its shares without dealing in the same manner as with all other shares of the same class. Consequently ,it is purely a domestic matter and is to be decided as to whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished totally, receiving a just equivalent.

(iv) The company limited by shares is permitted to reduce its share capital in any manner, meaning thereby a selective reduction is permissible within the framework of law (see Re. Denver Hotel Co. 1893 (1) Ch D 495.

(v) When the matter comes to the Court, before confirming the proposed reduction the Court has to be satisfied that (i) there is no unfair or inequitable transaction and (ii) all the creditors entitled to object to the reduction have either consented or been paid or secured.

21. At this stage, let me deal with the two judgments cited by the objector to state some further principles culled out therein. These cases are : (i) Trevor v. Whitworth 12 AC 409 and (ii) Re. Denver Hotel Co. 1893 (1) Ch.D 495 (both these judgments were considered by the House of Lords in British and American Trustee and Finance Corporation v. Couper (supra). Trevor v. Whitworth (supra) was a case where a limited company was incorporated under the Joint-Stock Companies Act with the object (as stated in its memorandum) of acquiring and carrying on a manufacturing business and any other business and transaction which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorise the company to purchase its own shares. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and no wholly paid for. The House of Lords held that such a company had no power under the Companies Act to purchase its own shares and, thus, the purchase in question was ultra vires. Claim of the petitioner was, Therefore, rejected. In the process the Court made following observations which were relied upon by the learned Counsel for the respondent:

" Your Lordships then asked in what case, and under what circumstances, such a purchase could be said to be incidental to the objects of a limited company. In answer to that question the learned Counsel not unnaturally turned to in re. Downfield Stinkstone Coal Company 17 Ch. D. 76, and suggested that at any rate it might be so when the power was used as an incident of domestic management to buy out share holders whose continuance in the company was undesirable.

That was the way in which the proposition was put in in re. Dronfield, and Co., where matters had come to a deadlock. But I would ask, is it possible to suggest anything more dangerous to the welfare of companies and to the security of their creditors than such a doctrine? Who are the share holders whose continuance in a company the company or its executive consider undesirable? Why, share holders who quarrel with the policy of the Board, and wish to turn the directors out; to answer; share holders who want information which the directors think it prudent to withhold. Can it be contended that capital of the company in keeping themselves in power, or in purchasing the retirement of inquisitive and troublesome critics? xxxx After all, the inconvenience sought to be avoided arises either from restrictions which Parliament has thought right to impose, or from the common misfortune of having to pay for what one wants out of one''s own purse, when there is no other way of getting it. If the capital proposed to be expanded in the purchase of its shares is in excess of the wants of the company, the transaction must be carried out under the provisions of the Acts to which I shall have presently to refer. If the capital of the company is not in excess of the company''s wants, it certainly ought not to be diverted from its proper objects. But even then there is no reason why there should be a deadlock. The end in view may still be attained by means to which no exception can be taken. If share holders think it worthwhile to spend money for the purpose of getting rid of a troublesome partner who is willing to sell, they may put their hands in their own pockets and buy him out, though they cannot draw on fund in which others as well as themselves are interested. That, I think is the law, and that is good sense of the matter."

It is clear from the above that the observations were made in the context of deciding as to whether there was power with the company to purchase its own shares. No doubt, if there is a ploy to oust inconvenience share holders in a scheme for reduction, the Court can treat the same, in a particular case as unfair or inequitable and reject the proposed reduction.

22. Re. Denver Hotel Co. (supra), was a case where that company under its Article of Association, was forbidden to purchase its own shares. However, it had power to reduce its capital and to accept surrenders of his shares, which were fully paid up. This company having two hotels, of which one was a valuable asset and the other was held under a onerous lease, entered into an arrangement with some of its share holders. This arrangement, in substance, was that the company should sell the lease and goodwill and furniture and stores of the leasehold hotel, and that the purchasing share holders should pay � 3000 to the company for the furniture, stores, and goodwill of the hotel, and should take upon themselves the obligations of the company under the lease of the hotel, and indemnified them against loss in respect of the hotel. It was also a part of the arrangement that such share holders should surrender their shares to the company and that the capital of the company should be reduced to the extent of such shares. A special resolution was passed to the effect that nominal capital of the company should be reduced by paying the capital represented by the shares of such share holders and by extinguishing the liability thereon. All the creditors and share holders assented to this arrangement. When the petition by the company was filed for confirmation by the Court, the Court did not treat it as purchase of its shares by the company but looked it as a sale of some of its assets for not less than their cash value in consideration of a relief from heavy burdens. Thus, while affirming the principle laid down in Trevor v. Whitworth (supra), the proposed reduction of capital was sanctioned in the following words:
"This appears to us to be a transaction which the company can carry out, with the consent of the debenture-holders/ under the company''s memorandum and articles of association, without the sanction of the Court. The company can sell part of its assets, and it can accept a surrender of its shares under Article 27. No doubt a surrender of shares in consideration of a payment in money or money''s worth by the company is a purchase by it of its own shares, and is ultra vires, as pointed out by Lord Macnaghten in Whitworth. But, as we understand this transaction, the company is giving nothing in the shape of money or other available assets for the shares which it acquires. The assets it parts with are the consideration for the release of the company from he heavy obligations and liabilities involved in the retention of the onerous lease of the hotel; and, on the other hand, the company is

compromising a dispute with its managing director.

23. Facts of British and American Trustees (supra), were as under:

"A company carried on business in the United Kingdom and in America, and a portion of its investments and some of its share holders were in that country. Differences having arisen between the directors in England and the American committee, it was agreed that the American share holders should take over the American investments upon the terms that the company should cease to carry business in America and that the capital of the company should be reduced by the amount of the shares held in America. A special resolution for carrying out this agreement was passed and confirmed. All the creditors of the company had either been paid or had assented to the arrangement."

24. Holding that the arrangement was not ultra virus the company and should be sanctioned by the Court, the House of Lords observed that it was not beyond the statutory jurisdiction of the Court under the Companies Act to sanction a scheme for reduction of capital of a company which does not deal in the same way with all shares of the same class. In the process the Court distinguished Denvor Hotel (supra), adn explained the ratio of Trevor v. Whitworth (supra).

25. Lord Herschell, LC, after quoting Re. Denvor Hotel Co. (supra), made following significant observations:

"If all the share holders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off one shareholder and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877, which would render it incumbent on the Court to refuse to confirm such a resolution, or which shows that it would be ultra virus to do so. I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, or, any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the share holders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the share holders (if there be such) are properly protected by this: that the decision of the majority can only prevail upon it be confirmed by the Court. This is a complete answer to the argument ably urged by Counsel for the respondent that if all the share holders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly scarified to those of the majority. There can be no doubt that any scheme which does not provide for uniform treatment of share holders whose rights are similar, would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it."

26. One will find, on going through this judgment, that one of the arguments raised was that reduction of the capital was not proportionate but aimed at a particular class. Lord Watson in his judgment specifically dealt with this aspect and negatived the contention. He relied solely upon the plea that it is beyond the statutory jurisdiction of the Courts to sanction any scheme for the reduction of capital which does not deal in precisely the same way with each and every share belonging the same class. If that be the law it is manifest that in some cases the result might be unfortunate. Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members shall retain the shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is purely domestic matter, and it may be greatly for the advantage of the company that the latter alternative should be adopted. Lord Macnaghten described that the provisions of the Companies Act, 1867, while permitting a company to reduce its share capital provided sufficient safeguards to ensure that all categories were duly protected. His Lordships observed:

"The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of share holders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured, or their claims must be satisfied. The public, the share holders, and every class of share holders, individually and collectively, are protected by the necessary publicity of the proceedings, and by the discretion which is entrusted to the Court until confirmed by the Court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new departure.

With these safeguards, which are certainly not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free."

27. Nothing the amendment made in the Companies Act, 1877, he also declared that while sanctioning such a reduction, the Court must look at the arrangement as a whole and have regard to all the circumstances of the case and the consequences which the reduction involves. Reduction of capital is a matter which concern or may concern, the public. Therefore, the Court must take everything into account before confirming the reduction. He, however, added that Act of 1877 had not tended to narrow the scope of 1867 and the generality of the powers conferred by 1867 was left fully untouched.

28. In the present case, admittedly requirements as contained in (i) to (iv) of para 21 have been complied with. Most of the arguments of the objectors stand answered in view of the principles of law laid down in the aforesaid judgments. It is clear that majority share holders have decided to reduce the share capital. Normally, decision

of the majority is to prevail. It is also their right to decide the manner in which the shareholding is to be reduced and in the process they can decide to target a particular group (of course it is to be seen that this is not with mala fide and unfair motive which aspect is discussed hereinafter). Thus such a step cannot be treated as buying back the shares and the provisions of Section 77A of the Act would not be attracted. Similarly there is no question of following provisions of Section 391 of the Act, although in the instant case even the procedure prescribed therein has been substantially followed. Likewise, provisions of Article 300A of the Constitution of India would not be attracted.

29. A submission was made by learned Counsel for the objector about the holding of the class meetings. However, it is rightly contended by learned Counsel for the petitioner that holding of class meetings is not a requirement under the provisions of Section 100 of the Act in contradistinction to such a requirement in Section 391 of the Act. Section 100 merely prescribes that the share holders of a company proposing to reduce its share capital are required to pass a special resolution approving the proposed reduction of share capital. This principal of law can be found in the Supreme Court judgment in the case of Mihir H. Mafatlal v. Mafatlal Industries Ltd. (1996) 87 CC 792 , and the relevant portion of that judgment is as under:

"No separate class of equity share holders is contemplated either by the Act or the Articles of Association of respondent company. Appellant is admittedly an equity shareholder. Therefore, he would fall within the same class of equity share holders whose meeting was convened by the orders of the Company Court. On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between the company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the Scheme arrangement or compromise is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question holding a separate meeting of sub-class would at all survive. It is for the company to decide what constitutes a separate class of share holders, in accordance with what the proposed scheme purports to achieve,"

30. However, it may be worth noticing that vide notice dated 25th June, 2004, Extraordinary General Meeting (AGM) of the share holders was convened and it was also stipulated in that notice that separate meetings for (i) the share holders of the petitioner company whose shareholding was proposed to be reduced, and (ii) the share holders of the petitioner company whose shareholding is not proposed to be reduced, would be held at the same time and at the same venue as the meeting of all the equity share holders, for the purpose of determining their will separately in relation to the proposed reduction of capital and return of share capital with a view to protecting the interests of the minority share holders. These meetings were held and the resolutions were passed with a special majority at both separate class

meetings. No doubt, in the case of in Re. Sandvik Asia Ltd. (2004) 121 CC 58 , the Bombay High Court treated the promoter share holders distinct from non-promoter share holders and held that they constitute separate classes and, Therefore, concluded that two separate class meetings should be held for these classes. Learned Counsel for the petitioner tried to distinguish this judgment. However, it is not necessary to go into that aspect as is the present case, separate class meetings were held for the share holders whose shareholding is proposed to be reduced and for the shareholder whose shareholding is not proposed to be reduced.

31. This leaves us with most vital issue raised by the objector i.e. whether the proposed reduction is unfair or inequitable. Two limbs of this aspect are to be considered: (a) alleged motive of the petitioners in extinguishing the entire class of public share holders; and (b) proper valuation of the shares.

32. While dealing with the first aspect, this Court has to keep in mind the principles laid down by the Courts in the aforequoted judgments, including the observations of Lord Herschell, LC in Re. Denver Hotel Co. (supra). No doubt the Court observed that it was the policy of the Legislature to entrust the prescribed majority of the share holders with the justification whether there shall be a reduction of capital, and if so, how it should be carried into effect. At the same time, the principle enunciated gave the responsibility to the Court to protect the interests of the dissenting minority of the share holders (if there be such) while confirming such a move for reduction of share capital.

33. In the instant case, the petitioner has given its own justification for its move to reduce the share capital and that too in a specific manner. Admittedly, the effect of the reduction of share capital in the manner contemplated in the scheme is to extinguish the public shareholding and reduce the shareholding of the Lancaster and not affecting shareholding of the promoter. The result would be that the promoter and its subsidiary, namely, Lancaster would hold 100% equity after the proposed reduction. Further, the act of Lancaster in making exit offers three times before the proposed reduction would show that the idea was to acquire the entire shareholding held by public at large. This act preceded the proposed action and, Therefore, there may be force in the argument of learned Counsel for the objectors that motive behind the move is not what is sought to be projected by the petitioner, but to oust public by divesting their shareholding. However, it is not necessary to deal with this question any further and record any definite findings in view of the offer given by learned Counsel for the petitioner during the proceedings, namely, allowing the objectors and others to intervene later on to retain their shares. During the course of hearing 2 persons also joined the objector. Statement was made by learned Counsel for the petitioner that if these objectors do not want to part with their equities, the company shall not insist upon the same. In view of this statement, in fact, nothing survive in the objections, as the objections are not going to be affected by the proposed reduction of share capital, because their share would

remain intact and they would continue to be the share holders. After all, on the exit offers given by the Lancaster earlier, many share holders sold their shares to Lancaster. Out of the share holders left now, if others who have not come forward and objected to the move of the petitioner inference can be drawn that they have no objection to part with their shares at the offered rates and, Therefore, if the share capital held by them is reduced, the objectors cannot have any grievance as far as others are concerned as their rights are protected.

34. As far as valuation of shares is concerned ,it may be noted that this task was assigned to M/s. T.R. Chadha and Co., Chartered Accountants. They submitted their valuation report which reflects that ''Net Asset Valuation Method'' (Asset approach) and ''Earning Per Share Method'' (Income method) was adopted. Using the ''Net Valuation Method'' value per share works out to Rs. 61=73p. per share. Under the ''Earning Per Share Method'' the earning per share was computed at Rs. 18=90p. The Chartered Accountants accordingly determined the value per share of the petitioner company using PE multiple, which is based on the PE multiples of comparable companies in the faster moving consumer goods sector. Based on this methodology the value per share of the petitioner company was ascertained at Rs. 231=62p. From the report it is clarified that the valuer has assigned a greater weight to the earnings per share method and accordingly the fair value per share, based on a weighted average of the aforementioned two methods was determined at Rs. 174.99 per share, which amount is 43% lower than the price of Rs. 250/- per share being offered by the petitioner company to its share holders whose shareholding is proposed to be reduced. In view of the aforesaid, it is submitted that the valuation of the shares of the petitioner company has not been undertaken on a book value basis alone as alleged. The independent valuer has compared values on net asset value, earnings per share and has determined the fair value in accordance with accepted valuation principles.

35. We may also refer to the following observations of the Supreme Court in the case of Hindustan Lever Employees Union v. Hindustan Lever Limited [1995] (Suppl.) (1) SCC 499:

"The Court''s obligation is to be satisfied that the valuation was in accordance with law and it was carried out by an independent body.... The valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be differences of opinion among accountants as to what is the correct value of the shares of a company. It was emphasised that more than 99% of the share holders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder.... Mr. Jajoo may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the share holders have approved of the valuation. The Court should not interfere with such valuation."

36. To summarise, when in the instant case 99.97% share holders have supported the resolution of reduction of share capital; the valuation of the share is arrived at in a reasonable manner and lucrative price for the share is offered; and above all the petitioner has agreed that the objectors may retain their shares, I do not find any legal impediment or any valid reason for not accepting the proposed scheme of reduction of share capital. It is allowed accordingly. The resolution and the Form of Minutes proposed to be registered u/s 103(i)(b) of the Act as mentioned in paras 14 and 21 of the petition respectively, for reduction of paid up equity share capital of the petitioner company, are approved with the modification that the share capital shall be reduced from Rs. 32,91,31,880/- divided into 3,29,13,188 fully paid up equity shares of Rs. 10/- each to Rs. 26,27,96,120/- divided into 2,62,79,612 fully paid up equity share of Rs. 10/- each and these changes shall be incorporated in the Minutes. Amended Minutes be registered u/s 103(i)(b) of the Companies Act. Copy of the approved minutes be filed with the Registrar of Companies within six weeks. Notice of registration of this order and the approved minutes by the Registrar of Companies be published by the petitioner in Hindustan Times (English) and Nav Bharat Times (Hindi).

37. Petition stands disposed of.

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