(1936) 10 BOM CK 0012

Bombay High Court

Case No: I.C. No. 25 of 1936

In Re: The Katni Cement and Industrial Co. Ltd. — APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 16, 1936

Acts Referred:

- Companies Act, 1956 - Section 153, 213

Citation: AIR 1937 Bom 423 : (1937) 39 BOMLR 675

Hon'ble Judges: Rangnekar, J

Bench: Single Bench

Judgement

Rangnekar, J.

The Katni Cement and Industrial Co. Ltd., was incorporated under the Indian Companies Act, 1882, on August 13, 1912, with a nominal capital of rupees twenty lacs. The capital of the company was increased in 1919 and the present capital is rupees thirty lacs, divided into 5,000 first preference shares of Rs. 100 each, 10,000 second preference shares of Rs. 100 each, 14,376 ordinary shares of Rs. 100 each, and 1,560 deferred shares of Rs. 40 each.

2. The first preference shares were issued in terms of Clause VII (") of the memorandum of association of the company and entitled the holders to a fixed cumulative preferential dividend at the rate of seven per cent, per annum on the capital for the time being paid up thereon and the right in a winding up to payment of capital in priority to the ordinary and deferred shares. The second preference shareholders were entitled to a fixed cumulative preferential dividend at the rate of seven per cent, per annum on the capital for the time being paid up thereon free of Income Tax and the right in a winding up to payment of capital after payment to the holders of the first preference shares. The holders of ordinary shares, under Clause VII (b) of the memorandum of association of the company, were entitled to a non-cumulative dividend at the rate of eight per cent, per annum on the capital for

the time being paid up thereon. The deferred shareholders, under Clause VII (c) of the memorandum of association of the company, were entitled to a non-cumulative dividend at the rate of twenty-five per cent, per annum on the capital for the time being paid up thereon. Then it was provided by Clause VII O) of the memorandum of association that any further profits which it might be determined to distribute by way of dividends should be divided between the holders of ordinary and deferred shares, fifty per cent. to the former and fifty per cent, to the latter. By Clause VII (g) of the memo-randum of association it was provided that, subject to the rights of the Industrial holders of the first preference shares and subject to the rights of the holders of the second preference shares, any surplus assets in a winding up after" paying off the capital paid up on the ordinary shares and the deferred shares rateably were to be distributed between the ordinary and deferred shareholders in the proportion of forty per cent, and sixty per cent, respectively.

3. As one of the objects of the company, clause III (26) of the memorandum of association reads as follows :

To sell and in any other manner deal with or dispose of the undertaking or property of the Company or any part thereof for such consideration as the Company may think fit and in particular for shares, debentures and other securities of any other Company having objects altogether or in part similar to those of this Company.

4. It is clear on the affidavits filed in the case that the company did not apparently flourish during the early part of its career. There were several companies carrying on the same kind of business in India, and owing to keen competition among them the condition of the cement industry as a whole was deplorable and this company along with some others had sometimes even to incur losses. In 1926 some of these companies entered into what is called a pooling arrangement, which improved matters. Not only the internal competition was reduced, but the prices were stabilized as a result of the arrangement, and confidence restored in the industry as a whole. This went on till 1930, when a further progressive step was taken by the companies manufacturing cement. This was the establishment of what is called the Cement Marketing Company. This company took over the control of the sales and distribution of the cement manufactured by the various companies, with the exception of two companies, one of which, however, subsequently became a member of the Cement Marketing Company and the other entered into an agreement by which prices were fixed and maintained by mutual consent. The arrangement then adopted was to allot a certain quota to the members of the Cement Marketing Company; and this, it is clear, resulted in improving the position of the various companies. Each company was given a rated capacity representing as far as possible its normal production. The Marketing Company allocated the total available business each year to the companies in the proportion that their rated capacity bore to the total rated tonnage of all the member companies. This led to considerable cooperation as regards the manufacture and sale of cement

throughout the country resulting in increased consumption. It was, however, found that even this arrangement was capable of being improved upon. There were several difficulties which required serious consideration of those who were interested in the cement industry in this country. Not only the demand for cement increased since 1930, but the rated capacity, which was taken as the basis for allotting quotas to the members of the Cement Marketing Co., was found to be inadequate, and it was felt that the industry was capable of expansion and it was possible to have new factories erected in different places where there was a greater demand than the companies were able to cope with, so as to reduce the cost of transport and in Cement & the result to reduce the selling prices of the commodity. It was considered Industrial desirable that there should be a merger of all these companies so as to consolidate the whole business of the various companies manufacturing cement, not only as regards the manufacture and selling prices, but also in regard to the erection of more factories wherever it was considered to be necessary to do so together with better economical distribution. It seems that this merger scheme was talked about and discussed in the market long before October, 1935. The directors of this company naturally were interested in this proposed scheme. The merits of the scheme were very seriously considered by the respective boards of the various companies. The scheme, it seems, owes its origin to the late Mr. F.E. Dinshaw, and the general outlines of the scheme apparently were prepared by him. The main idea was to float a merger company on business lines, consisting of some ten companies carrying on the business of manufacturing cement throughout this country, who were to enter into an agreement. It was proposed that each of the companies should transfer its business and undertaking to a combined company known as the Associated Cement Companies Limited. The consideration for such transfer was to be Rs. 60 per ton of what is described as the rated capacity of each company, subject, of course, to other contributions to be made subsequently. For this purpose the capacity of each of these companies was carefully calculated, and in the case of the petitioners the rated capacity was 87,000 tons a year, and the price to be paid by the Associated Cement Companies Limited, was 52-2 lacs of rupees, which was to be satisfied by the issue of fully paid shares in the Associated Cement Companies Ltd., of an equivalent nominal value. The price fixed at Rs. 60 per ton of its rated capacity was not to include book debts or cash out standings, securities, funds and investments, and stocks of cement, etc., of each company; and each of the companies was entitled to retain its cash funds, securities, out standings and investments as well as the stock in hand for the benefit of its own shareholders. The proposed agreement further provided that in addition to the sale of the undertaking and business abovementioned, each of the companies had to subscribe for shares in the Associated Cement Companies Ltd., of the nominal value equivalent to Rs. 10 per ton of its rated capacity, so that in the case of the petitioners the company had to subscribe for shares of the nominal amount of Rs. 8.7 lacs in the Associated Cement Companies Ltd., and pay for the same in cash. The cement companies also agreed to sell to the Associated Cement Companies Ltd.,

their respective holdings in Burma Cement Co. Ltd., which was one of the companies which had refused to join, at the nominal fully paid price of the shares. The result of the scheme was practically to bring the working of that company under the control of the members of the Associated Cement Companies Ltd. There were various other terms of the proposed agreement, to which it is not necessary to refer.

5. The question, then, which arose before the directors of the petitioning company was, whether they should join the merger; and as they say in their petition they naturally anticipated that after the sale of the undertaking of the company, although it was not essential to and was no part of the scheme, it was probable that the company would be wound up to facilitate a distribution amongst shareholders of the assets of the Company which were far in excess of the capital of the company, and that upon such winding up the amount cement & payable by way of return of capital to the first and second preference share- Industrial holders in terms of the memorandum and articles of association of the company would be far below the present market value of such shares, and if invested by these shareholders would not produce the same income to them that they were entitled to get by way of dividends. It is clear, therefore, that if the scheme had to go through, the concurrence of the holders of the preference shares was essential and it was but fair to provide that in the event of liquidation, these shareholders should receive a larger sum than the par value of the shares. Similarly the claims of the holders of ordinary shares had also to be considered. This was recognized by the general body of the shareholders, who it is clear also realized that the proposed sale was in the interest of the company. It was also recognized that the scheme would certainly result in a considerable benefit to the ordinary and deferred shareholders of the company. The ordinary shareholders also were practically in the same position, because the prices of the ordinary shares were much above par. The directors, therefore, realized, it seems to me, as most of the shareholders seem to have realized, that the scheme of distribution on a winding up had in some respects to be varied if the scheme of the merger was to be put through.

6. Accordingly, the directors prepared a scheme of arrangement, which is now submitted to the Court for approval u/s 153 of the Indian Companies Act. The scheme, shortly put, was that in the event of the sale of the undertaking and assets of the company to the Merger Company in a winding up of the company, whether voluntary or compulsory, each holder of a first preference share was to be paid Rs. 143 in full satisfaction of the capital paid on it, a holder of a second preference share, Rs. 150, and for dividing the surplus assets each deferred share was to be deemed to be equivalent in value to six ordinary shares. It appears from the affidavit of Sir Jehangir Boman-Behram, chairman of the board of directors of the company, that on May 9, 1936, the directors issued a circular letter to all the shareholders of the company inviting the ordinary shareholders to meet the directors at an informal meeting on May 22, 1936, the deferred shareholders on May 23, 1936, and the first and second preference shareholders on May 25, 1936, in

order that the directors might discuss the scheme with the different classes of shareholders to find out whether the shareholders would approve of the scheme. It appears from the circular letter that the market prices of the different classes of shares of the company were as follows :-

1st Preference	Rs. 138-12-0
2nd Preference	" 146-14-0
Ordinary	" 366- 4-0
Deferred	"2440- 0-0

These meetings accordingly were held, and each class of shareholders appointed four representatives to meet the directors and consider in greater detail whether the proposed amalgamation would be beneficial to the company as a whole, and, if so, whether there should be a re-organization of the rights of the different classes of shareholders. Ten meetings were held by the w re directors of the company with these representatives. Further informal meeting of the classes of shareholders were held, and it seems clear to me that Industrial the scheme was approved by the bulk of the shareholders of the several classes present at such meetings. Another circular letter was issued on June 17, 1936, to all the shareholders of the company giving more detailed. information with regard to the scheme of amalgamation and the benefits expected to be derived there from. I am satisfied from the affidavits that the shareholders were taken into complete confidence by the directors; the scheme was very carefully submitted to them in considerable detail, and the advantages were pointed out. On August 1, 1936, the directors decided to call an extraordinary general meeting to take place on August 19, 1936. Notice was issued to all the shareholders, and it was proposed that a resolution authorizing the sale of the undertaking of the company to the Associated Cement Companies Ltd., and for re-organization of the rights of, and distribution of assets among, the different classes of shareholders in the event of the company being wound up after the amalgamation, would be submitted. The notice with regard to the meeting with a copy of the resolution was circulated to the shareholders in the form of a circular letter.

7. The affidavit of Haridas Gopaldas, who is the secretary of the petitioners, shows that on August 19, 1936, at an extraordinary general meeting of the petitioners duly convened and held at the registered office of the petitioners, a resolution sanctioning the sale of the works and undertaking of the petitioners was passed by a large majority of the shareholders present. Ten shareholders holding in the aggregate forty-nine shares voted against the resolution. In view of the resolution having been carried on a show of hands as aforesaid, a poll was not demanded, but the number of shares held by all the shareholders present and entitled to vote at the meeting was 3484, whilst proxies had been lodged with the petitioners in favour of the resolution, by holders of 9254 shares.

8. In these circumstances, the petitioners took out a chamber summons, on: which it was ordered by Mr. Justice B.J. Wadia on August 7, 1936, that the company should convene meetings of the four classes of shareholders to be held at the registered office of the company for the purpose of considering and, if thought fit, approving with or without modification the scheme of arrangement. The learned Judge also gave certain directions as to the convening of the meetings, as to the deposit of proxies, and as to who was to be the chairman of the meetings. Accordingly, in pursuance of the order made, on August 28, 1936, a meeting of the holders of the first preference shares was held at 3 p.m., a meeting of the holders of the second preference shares was held on the same day at 5 p.m., and on August 29, 1936, a meeting of the holders of the ordinary shares was held at 2 p.m.,. and of the holders of the deferred shares on the same day at 4 p.m. The first meeting, that is to say, the meeting of the holders of the first preference shares, was attended personally or by proxy by 177 shareholders holding a total of 1803 first preference shares of Rs. 100 each, and the scheme was approved of by all the shareholders present, excepting one who held ten first preference shares. That exactly was the position with regard to the meeting of the holders of the second preference shares. There also the same gentleman dissented; all the others voted for the scheme. The meeting was attended by 203 shareholders holding a total of 5843 second preference shares of Rs. 100 each, cement & As regards the ordinary shareholders, the meeting was attended by 272 share- Industrial holders holding a total of 5533 ordinary shares, and excepting the same dissentient all the others present approved of the scheme and agreed to it. The meeting of the holders of the deferred shares was held on August 29, 1936, and was attended personally or by proxy by 223 shareholders holding a total of 913 deferred shares valued at Rs. 40 each. The resolution, which was read and explained by the chairman to the meeting, was accepted by all the shareholders with the exception of twenty-nine dissentients holding an aggregate of forty-nine shares.

9. In these circumstances, the company has now presented a petition for sanctioning the scheme u/s 153 of the Indian Companies Act. The petition is opposed (1) by Gordhandas Bhagwandas and about twenty-five other deferred shareholders who were present at the meeting and are represented by Mr. Setalvad, some of whom had dissented and the rest had not voted either one way or the other; (2) by one deferred shareholder, Laxmichand Damji, who is represented by Mr, B.T. Desai; (3) by U.S. Desai and nineteen other deferred shareholders, who were present at the meeting and voted for the resolution but now recant; (4) by Pranjivan Madhavji and two others, who are deferred shareholders, and it is not clear whether they were present or not; (5) by one deferred shareholder, Pavri; and (6) by the holder of one deferred share, Matani, who appeared after the arguments were closed. Almost all of these shareholders have become shareholders of the company after the scheme as to the merger of the cement companies came to be widely known in the market; and it is suggested that these persons'' opposition is not so

disinterested as would appear to be at first sight. There seems to be some force in this contention, though it is not necessary for me to express any opinion on it. The case on behalf of these opponents was argued elaborately by Mr. Setalvad, who was supported by the other learned Counsel.

10. The first ground on which the petition is opposed is that this petition is misconceived and incompetent. This is based upon the contention that as the scheme involves a sale of the undertaking of the company and distribution of the assets of the company amongst the shareholders, which can only be done by a petition u/s 213 of the Indian Companies Act, the petition u/s 153 is misconceived. It is further contended that the scheme involves a winding up of the company, and that the directors actually propose to wind up the company, and, therefore, the Court has no jurisdiction to sanction it u/s 153. It is further contended that the resolution is ultra vires the company as it amounts to altering the contractual rights of the deferred shareholders. Then it is argued that the scheme should not be sanctioned as there is no provision made for safeguarding the rights of the dissentients, and the Court will usually insist upon such a provision being made before sanctioning a scheme of this nature. Rule 86 The next ground is that the meeting was not fair as the shareholders were prevented from attending it because an influential director of the company or a bullion broker represented that the company promised a benefit to the shareholders who did not oppose the scheme. Lastly, it is contended That the scheme on the merits is not fair and reasonable, and there is no Industrial real majority in favour of it, and that the scheme is not fair as it seeks to enrich the preference and ordinary shareholders at the cost of the deferred shareholders.

11. The petition, as stated, is presented u/s 153, which is in these terms :

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members, or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) In this section the expression ''company'' means any company liable to be wound up under this Act.

This section corresponds to Section 120 of the (English) Companies (Consolidation) Act, 1908, and to Section 153 of the English Companies Act, 1929. The plain language of Section 153 of our Act clearly shows that the machinery provided by the section is available where there is and where there is not a winding up in progress, and the section would apply to a going concern as well as in a winding up. That also seems to be the view of the Courts in England. Section 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up. Further, as observed in Buckley on the Companies Act, 1929, 11th edn., (p. 315), a wide interpretation has to be placed upon the section. The learned author observes :

All modes of reorganizing the share capital, even when involving an interference with preferences or special rights attached to shares by the memorandum, can be effected as part of an arrangement with members under the section, with the possible exception, whilst Section 45 of the Act of 1908 was in force, of the two classes of reorganization of capital falling within that section, and subject to the qualification that if the arrangement involves a dealing with capital, e.g. reduction of capital, for which other sections of the Act prescribe special formalities, such formalities must also be complied with.

12. The following passage in the same work at p. 316 seems to be relevant to the question in debate in this case :

It is no objection to an arrangement with classes of members under this section that it involves a winding up of the company and a transfer of its undertaking to another company, including a foreign company, for fully or partly paid shares in that company for distribution amongst the different classes of members of the transferor company in manner or proportions provided by the arrangement. In such a case the Court may, but does not necessarily, insist upon dissentient members being given protection similar to that provided by Section 234 in the case of a transfer under that section without the sanction of the Court. If, however, the so-called arrangement is really a transfer u/s 234 simplkiter, but without giving dissentients the protection provided by that section, quaere whether the transfer can be sanctioned as an arrangement under this section.

13. On a careful consideration of the cases referred to by Buckley as authorities Katni for the statement of the law and practice in the above passage, and others industrial cited at the bar, it seems to be well established in England that (see Palace Hotel Limited, In re [1912] 2 Ch. 438 Scheweppes Limited, In re [1914] 1 Ch. 322 and J.A. Nordberg Limited, In re [1915] 2 Ch. 439 the Court can under this section sanction a scheme, even though it involves acts which, apart from such provisions, would be ultra vires the company; but this rule is subject to the limitation that if the Companies Act contains express provision enabling the doing of any act in a

particular way, the provisions of the enabling section, and not those of Section 153, must be followed. The decision in the three cases to which I have referred above would seem to show that Section 153 as altered by the Act of 1929 would, read with Section 154, give a very wide power to a company in this respect and a scheme involving a re-organization of capital which altered rights conferred by the memorandum of association can be sanctioned u/s 120. A non-cumulative dividend conferred by the memorandum was altered into a cumulative dividend as part of a scheme u/s 120(United States and South American Investment Trust Co. (00145 of 1913), Neville J., July 8, 1913).

14. Mr. Setalvad relies on Bisgoad v. Hendersonl''s Transvaal Estates Limited [1908] 1 Ch. 743. In that case it was held that the sale of all the assets of a company and all its undertaking and the distribution of the proceeds cannot be a corporate object so that under a clause for that purpose introduced into the memorandum of association such a sale and distribution can be made without regard to the provisions of Section 161 of the Companies Act, 1862. In my opinion, this case is hardly applicable to the facts before me. It is conceded that in that case the company passed a resolution for winding up the company. That is not the case here. Then the case only decides that the company cannot deprive the members of their rights u/s 161 merely because there was power to do so in the memorandum of association. This case was considered in Anglo-Continental Supply Co., In re [1922] 2 Ch. 723. In that case it was held that the reconstruction of an existing company by winding up and sale of its entire undertaking and assets for shares in a new foreign company, though quite outside the scope of a reconstruction u/s 192 of the Companies (Consolidation) Act, 1908, may be effected as an arrangement u/s 120. The decision in Bisgood''s case was explained by Astbury J. in this way (p. 735):
In Bisgood v. Henderson''s Transvaal Estates Limited [1908] 1 Ch. 743 the decision was limited to the proposition that a company cannot by its memorandum of association impose upon a minority of its shareholders a scheme under which such members must come under increased liability or be expropriated.

I think it would not be inappropriate if I were to refer to the arguments of counsel at p. 728 in that case. It seems to me that the principles which apply to petitions like the one I have before me are clearly laid down in 1936 those arguments, which seem to have been accepted by Mr. Justice Astbury. The arguments are as follows :

1. Where a scheme is exactly within Section 192, the provisions of that section can not be evaded by calling it a scheme u/s 120 : In re General Motor Cab Industrial Co. [1913] 1 Ch. 377. In re Guardian Assurance Co. [1917] 1 Ch. 431.

2. Where the scheme is only partly within Section 192 the Court has full jurisdiction to sanction it u/s 120 alone, and! no resolution u/s 192 is necessary. It has merely to see that the scheme is fair. If as a matter of fairness it thinks that dissentients should have the protection of Section 192, it can make that protection a condition of

its sanction : see the Canning Jarrah Case [1900] 1 Ch. 708 and the Sandwell Park Case [1914] 1 Ch. 539. But that protection is not a matter of right : In re Standard Exploration Co. (1902) Times, March 21, p. 13c; March 26, p. 3b referred to in Palmer, 11th ed., pt. 11., p. 993; 12th ed., p. 978, In re Tea Corporation [1904] 1 Ch. 12.

3. If, as in the present case, the scheme is altogether outside Section 192, proposition 2 applies a fortiori : see Palmer, pt. ii., 12th ed., pp. 1009, 1015.

15. In my opinion, the decision in Anglo-Continental Supply Co., In re, to which Mr. Setalvad has referred, amounts to this that the Court has a discretion to sanction a scheme like the one I have before me, even though the scheme may involve winding up, though in the exercise of its discretion the Court may impose certain conditions upon the company before sanctioning the scheme. It is, therefore, difficult, in my opinion, to accept the argument of the learned Counsel that the Court has no jurisdiction and that the petition is misconceived on the ground that in effect it is a petition u/s 213. Although Section 213 begins with the words "Where a company is proposed to be...wound up," it is clear from the language of Section 213 that the section can only apply in cases where there is a resolution passed for winding up a company, or where there is an actual winding up in progress, as all the powers given under that section are the powers of the liquidator and no one else. It is clear that the scheme here does not in terms come u/s 213. Here there is no question of liquidating and paying in kind. Here what is proposed is to reorganize the rights of different classes of shareholders. The gist of Section 213 is merely this that where there is a winding up, whether voluntary or by the Court or under the supervision of the Court, it is the duty of the liquidator to convert the assets of the company into money, pay the creditors and the costs of the winding up, and then to distribute the surplus, if any, among the members according to their rights and equities. The section merely deals with the powers of the liquidator.

16. Then, I may refer to the Tea Corporation case. In that case it was held that u/s 2 of the Joint Stock Companies Arrangement Act, 1870, combined with Section 24 of the Companies Act, 1900, the Court has jurisdiction to sanction a scheme of arrangement with the creditors and contributories of a company in liquidation, notwithstanding the dissent of one class of contributories, if the Court is satisfied that having regard to the value of the company''s assets that class has no interest in them, and that under such circumstances the scheme must be treated as made between the company and their creditors, and between the company and the other classes of contributories, and a provision made by it for the benefit of the dissentient class must be regarded: as in the nature of a gift or concession to them.

17. In the English Act, 1929, Section 153, (corresponding to Section 153 of the Indian Act), it is declared that the expression ''arrangement'' includes ''a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods''; these words are taken from Section 45 of the English Act of 1908 (Section

54, Indian Act), which is not re-enacted in the Act of 1929. Such re-organizations can now be effected as '' arrangements'' with members u/s 153 of the English Act, 1929 (Buckley, 11th ed., p. 324). It is dear, therefore, that under the Act of 1929 in England a re-organization like the one which the company seeks in this case can be effected without any objection. I see no principle or no ground why I should not follow the same principle. Mr. Setalvad relies on the case of General Motor Cab Company Limited, In re [1913] 1 Ch. 377. which is also explained in Anglo-Continental Supply Co., In re [1922] 2 Ch. 723 Apart from that, as observed by Stiebel in his Company Law, 3rd ed., at p. 720, foot-note (d), "the truth is that General Motor Cab Co. has always been regarded as a very doubtful case, and Section 154 of the present Act certainly seems to contemplate the Court sanctioning such a scheme as the one in that case." It is pointed out by Buckley in the foot-notes at p. 316 that the decisions in Tea Corporation and in Standard Exploration Co. (1902) Times, March 21, 26 were not brought to the attention of the learned Judges in that case :

It is, however, to be observed that the scheme in General Motor Cab Co. was not a transfer under a 234 simpliciter, but included an arrangement between the two classes of members as to the distribution inter se of the fully paid shares to be received. Semble, this case, in which the earlier decision of the C.A. in Tea Corp. (in which the point was taken and fully argued and the preference shareholders in any event had an interest in the assets), and that of Buckley, J., in Standard Exploration Co., supra, were not cited, cannot be reconciled with the other cases. See also Guardian Assurance Co.[1917] 1 Ch. 431 (Buckley''s Company Law, 11th edn., p. 316, f. n. (h).

18. Upon these authorities, therefore, I have no hesitation in rejecting the arguments advanced and holding that the application u/s 153 is not misconceived, and the Court has jurisdiction to consider the scheme, and see if it is fair and reasonable. In this state of things, it is not necessary to consider the argument that the scheme involves, and must necessarily involve, a winding up. In support of that argument Mr. Setalvad has relied upon various statements made in the petition and affidavits and in the circulars and notices issued by the Company from time to time. I am certainly not satisfied on the material''s before me that the scheme would necessarily involve a winding up. I am rather inclined to think, as the directors themselves say, that it is possible that the company would have to be wound up. Whether it involves a winding up or not, however, the application is u/s 153, and such an application is perfectly competent.

19. This brings me now to the question as to the discretion of the Court and the duty of the Court. This is laid down in In re Albania, New Orleans, Texas and Pacific function Railway Co [1891] 1 Ch. 213 by Lindley L.J. in this way (pp. 238-39) :-

...what the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The Court also has to see that the minority is not being overridden by a

majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly...take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

20. It is said that the scheme is not reasonable. It is clear that unless the resolution in question is sanctioned, the scheme of the merger cannot be put through. If the merger fails, I do not think that this company would be able to carry on by itself in the light of its previous experience, and in the face of competition which it will have to face, if the other proposed partners in the Associated Cement Companies Ltd., combine. The object of the scheme is really to reduce competition and to buy out the competition of the different companies among themselves. It is for this purpose that it is proposed that the preference shares should go out, and that the new shares of the new company should be distributed between the ordinary and deferred shareholders. I am not prepared to say, having regard to the present value of the shares held by the preference shareholders, that they are having things all their own way. Under the memorandum it is clear that the holders of the first preference shares are entitled to seven per cent, cumulative interest, and the second preference shareholders are entitled to the same rate of interest free of Income Tax. The present value is Rs. 143, and the value proposed is Rs. 150. It is difficult to see how, if these people are paid these values, they will be able to realize the same interest, as they are getting now under the memorandum of association. In my opinion, the scheme is fair and reasonable, put forward bona fide, and accepted by a very large majority of all classes of shareholders who have been acting honestly and bona fide on sufficient and detailed information and with plenty of time to consider what they are about. The test of a reasonable compromise or scheme is whether it is regarded by reasonable people conversant with the subject as beneficial to those on both sides who are making it. The question is, is the scheme made for the common benefit of all the shareholders, and in my opinion, it is. I am also of opinion, under the circumstances of the case, that the prices offered for the various kinds of shares are fair and reasonable.

21. Then, if the preference shareholders go out, and it is reasonable to expect the merger will succeed, the whole benefit of the merger will go to the ordinary and deferred shareholders. It is true that the deferred shareholders stand to gain a little more if the company is wound up; but, as I have remarked, the Court has to consider the business point of view. The majority of the holders of deferred shares seem to be of opinion that the merger is for the benefit of all the shareholders

including themselves. As against this majority I have got a few dissentient shareholders who have not put any materials before me to enable me to hold that the scheme is being forced cement upon the deferred shareholders, and that if the scheme is rejected the position of the deferred shareholders will be the same, if not a little better. I do Co. Ltd. not find on the affidavits made on behalf of these people any ground for thinking that there has been any oppression, or that the majority are not any acting bona fide. As a matter of fact, the affidavits consist of nothing but sheer arguments and matters of law. No facts are put before me which would enable me to say that the scheme is unreasonable from the business point of view, and that the interests of the deferred shareholders are being deliberately sacrificed in order to benefit the other three classes of shareholders.

22. Then, the only question which remains is, whether I should impose any condition upon the company before sanctioning the scheme, in other words, whether I should ask the company to make some provision for the dissentients. As the authorities, to which I have referred, show, the Court does not necessarily make any provision in favour of the dissentients, if the Court is satisfied that the scheme'' is reasonable and fair and in the interest of the general body of shareholders. In any case, under the modern practice, such a provision is not a sine qua non to sanctioning the scheme if it is reasonable and fair. The question, therefore, is, whether there is any special case made out in the circumstances that I should exercise my discretion in favour of these dissentients. Now, it is clear from the affidavits that the whole scheme was carefully worked out and discussed threadbare by the directors and the various shareholders, and the shareholders had plenty of opportunities to express their opinions as regards the merits of the scheme. The result of the meetings and of the other steps taken by the directors clearly is that the majority have approved of the scheme and of the resolution without considering it necessary to have any provision made to buy out the rights of those who were opposed to the scheme and the resolution. To impose, therefore, any conditions at present in accepting the application made to me that there should be some provision made for the dissentients would really mean to undo the whole scheme. It is not as if that the company should be asked to buy out only the persons appearing before me. Once it is known that the Court has made such a provision, the result in all probability would be that there will be many other persons who will be coming forward to exact as much as they can from the company, with the result that the scheme practically will be wiped out. I see no special circumstances, and I should, therefore, impose no conditions at this stage.

23. Lastly, it was said that the meeting was not fair, and that many shareholders who would otherwise have voted were prevented from attending by a promise held out by one of the directors that if they did not oppose the scheme they would be able to make some money out of it. In my opinion, there is no evidence of any such suggestion made by the company or even by anyone else on behalf of the company. I think the directors seem to have acted with scrupulous honesty in this case and

taken the shareholders in their confidence right from the beginning and given them time to consider the whole situation, and it was after they found that the majority accepted the In re scheme that they came to the Court for sanction.

24. Upon the whole, therefore, I have reached the conclusion that the petition must be accepted and made absolute. Order in terms of prayers (1) and (2) Co. Ltd. of the petition.

25. The petitioners'' costs will be paid by the company. There will be one Set of cost to be paid by the company for the shareholders represented by Mr. Setalvad and Mr. Desai. As Mr. Engineer''s and Mr. Sabnis'' clients voted at the meeting in favour of the scheme and now oppose, they are not entitled to any costs.