Blue Star Limited Vs In the matter of the Scheme of Arrangement of Blue Star Ltd. with Blue Star Infotech Limited

Court: Bombay High Court

Date of Decision: Dec. 7, 1999

Acts Referred: Companies (Court) Rules, 1959 â€" Rule 58, 60, 78, 79
Companies Act, 1956 â€" Section 101(2), 391, 392, 393, 394
Income Tax Act, 1961 â€" Section 80
Industrial Disputes Act, 1947 â€" Section 9

Citation: (2000) 3 ALLMR 727 : (2000) 2 BomCR 525 : (2000) 2 BOMLR 774 : (1998) 1 MhLj 181

Hon'ble Judges: S.S. Nijjar, J

Bench: Single Bench

Advocate: Virag V. Tulzapurkar, V.R. Dhond and Mrs. Monisha Asher, instructed by Crawford Bayley and Co, for the Appellant; Anand Grover, abindra Hazari and Basant Trilokani, instructed by Rabindra Hazari, C.J. Joy, for Regional Director, Department of Company Affairs, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.S. Nijjar, J.
The object of this petition is to obtain sanction of this Court to the arrangement embodied in the scheme of arrangement

under sections 391 to 394 of the Companies Act, 1956, hereinafter referred to as ""the Act"". By way of this scheme of arrangement, the business

and undertaking of Blue Star Limited, hereinafter referred to as ""the B.S.L"" with relation to its International Software Division, for short I.S.D, as

defined in Clause 1.4 of the scheme of arrangement, hereinafter referred to as ""the Scheme"", shall stand transferred to and is vested or deemed to

be transferred to and vest in Blue Star Infotech Limited, hereinafter referred to as ""B.S.I.L."" without any further act, deed, matter or thing so as to

become the property of B.S.I.L. but subject to all charges affecting the same.

2. B.S.L. was incorporated on 20th January, 1949 under the Indian Companies Act, 1913 as a Private Limited Company limited by shares in the

name of Blue Star Engineering Company (Bombay) Private Limited. On 23rd June, 1969 the name of the petitioner was changed to Blue Star

Private Limited. The name of the petitioner company was once again changed to B.S.L. which was duly approved by the Assistant Registrar of

Companies, Bombay vide certificate of change of name dated 28th June, 1969. B.S.L. has its registered office at Kasturi Building, Mohan T.

Advani Chowk, Jamshedji Tata Road, Mum-bai-400 020. B.S.L. is, inter alia, engaged in the business of manufacture, sale, marketing and

distribution of ""air conditioners and refrigerators"". The objects for which B.S.L. was incorporated are set out in its Memorandum of Association.

The relevant objects are Clauses 39, 40 and 41 which are as under:

39. To sell or dispose of the undertaking of the Company or part thereof for such consideration as the Company may think fit and in particular for

shares, debentures or securities of any other Company having objects altogether or in part similar to those of this Company.

40. To amalgamate, enter into partnership, or any arrangement of sharing profits, union of interests, co-operation, joint venture, reciprocal

concession or otherwise with any person, firm or company carrying on or engaged in or about to carry on or engage in any business or transaction

capable of being conducted so as directly or indirectly to benefit this company.

41. To take or otherwise acquire and hold shares in any other company having object altogether or in part similar to those of this Company, or

carrying on any business capable of being conducted so as directly or indirectly to benefit this Company, and to dispose off the same at the

discretion of the Directors

The relevant Clause for the reduction of capital in the Memorandum and Articles of Association is contained in Clause 10 which is as under:

10. The Company may subject to the provisions of sections 100 to 105 of the Act by special resolution reduce in the manner authorised by law:-

(a) its share capital

(b) any Capital Redemption Account or

(c) any Share Premium Account.

3. The Authorised, Issued and Subscribed and paid up capital of B.S.L. as on 31st March, 1998 are as under:

Authorised As at March 31, 1998

Rs. in lakhs.

10,000 7.8% Cumulative Preference 10.00

Shares of Rs. 100 each.

2,97,40,000 Equity Shares of Rs. 10 each. 29,74.00

16,000 Unclassified Shares of Rs. 100 each 16.00

50,00,00

Issued

2,70,97,102 Equity shares of Rs. 10 each. 27,09,71

27,09,71.

Subscribed & Paid Up

70,47,543 Equity Shares of Rs. 10 each shares fully paid in cash. 7,04,75

1,400 Shares allotted as fully paid pursuant to a contract without payment

being received in cash. 0.14

2,00,43,909 Shares allotted as fully paid to Bonus shares by capitalisation of 20,04,39

Reserves and Share premium 0.43

4,250 Shares allotted as fully paid up on conversion 425 -7.8% Cumulative 0.43

Preference shares of Rs. 100 each in terms of the June 24, 1969

2,70,97,102 27,09,71

The latest audited accounts of B.S.L. for the year ended 31st March, 1998 are attached with the petition at Exhibit-B. The financial position of

B.S.L. as on 31st March, 1998 is as follows.

Sr. Particulars Amount Amount in

No. Rs. lakhs.

1. Net worth (Share capital) & Reserves & Surplus 10746.44

Less: Miscellaneous Expenditure (to the extent not written oil 340.97

or adjusted).

10405.47

2. Secured Loans 2589.10

3. Unsecured Loans 3454.87

16449.44

4. Fixed Assets and Investments. 9704.68

5. Current Assets, loans and advances. 21063.44

6. Less: Current Liabilities and provisions (excluding trade 9651.14

creditors)

Less: Trade Creditors 4667.54

7. Net Current Assets (after adjusting Trade Creditors) 6744.76

8. Carry forward losses. NIL

16449,14

The Sundry Creditors of B.S.L. as on 30th September, 1998 amounted to Rs. 28,80,63,329/-.

4. Since 1984 B.S.L. has also been carrying on the business of software. This is a separate division of B.S.L., known as International Software

Division (I.S.D. for short).

5. The B.S.L. was incorporated on 4th September, 1997 under the Act, in the name of ""My Own Computers Ltd."" The transferee Company

recently changed its name to Blue Star Infotech Pvt. Ltd. A certificate to this effect has been issued on 13th July, 1998. Once again the transferee

company has changed its name to B.S.I.L. The certificate of registration has been issued on 11th September, 1998. Mr. Ashok M. Advani,

Chairman and Chief Executive of B.S.L. is also the Director of B.S.I.L. The Memorandum and Articles of Association of B.S.I.L. is attached with

the petition as Exhibit-C. The relevant Clauses in the objects of the Company for the purposes of this petition are Clauses 12 and 13 which reads

as under:

12. To acquire and undertake all or any part of the business, property and liabilities of any person or company carrying on or proposing to carry

on any business which this company is authorised to carry on.

13. Subject to the provisions of the Companies Act, 1956, to amalgamate, or to enter into partnership or, into any agreement for share profits,

union of interest, Co-operation, joint-venture, of reciprocal concession or for limiting competition with any person or persons or company or

companies carrying on or engage in or about to carry on or engage in any business transaction on or engaging in which this Company is authorised

to carry or engage in or which can be carried on in conjunction therewith.

6. B.S.I.L. is presently dormant. With the transfer and vesting of I.S.D. of B.S.L. pursuant to the scheme B.S.I.L. become active. The main

objects for which B.S.I.L. was incorporated are as under:

(a) To manufacture, assemble, erect, install, purchase, import, export, equip, sell, trade, fabricate, design, distribute, repair, maintain, exchange,

alter, lease, or hire, sell on hire purchase or installment system or to construct, develop enter into arrangement for setting up whether in whole or in

part or any other way to deal in micro processor based mini computers and data processing system, all types of softwares, calculators, electronics

and electrical apparatuses, equipments gadgets, peripherals, modulers, auxiliary instruments, tools, plants, machines, works, systems,

conveniences, spare parts, accessories, devices, components, fixtures of different capacities, sizes, specifications, applications, descriptions and

models used or may be used in the field of space aviations, surface water and air transports, railways, defence, medical, engineering, industries,

construction, mining, powers, traffics, offices, police, communications, trade, commerce, weather, satellite, research, hospitals, hotels, advertising,

educations, decoration, automobiles, geographical, recreational, domestic and other allied purposes such as computers, mini computers, super

computers, pocket computers, personal computers, micro computers, engineering computers, general purpose and process control computers,

information and word processing equipments.

(b) Subject to the provisions of the Companies Act, 1956, to amalgamate, or to enter into partnership or, into any agreement for share profits,

union of interest, co-operation, joint-venture, of reciprocal concession or for limiting competition with any person or persons or company or

companies carrying on or engage in or about to carry on or engage in any business transaction on or engaging in which this company is authorised

to carry or engage in or which can be carried on in conjunction therewith.

The authorised share capital of transferee company as on 31st August, 1998 is as under,

Share Capital : Authorised

1,00,00,000 Equity Shares of Rs. 10/ - each. Rs. 100,00,000

However, since the B.S.I.L. is a new Company, it does not have an audited balance sheet as yet. As mentioned earlier, the object of this petition is

to obtain the sanction of the Court to the scheme of arrangement whereunder it is proposed to transfer and vest the entire business of B.S.L. with

relation to its I.S.D. together with its assets, properties and all debts, liabilities, duties and obligations as provided in the scheme of arrangement to

B.S.I.L. The equity shareholders of B.S.L. have approved the scheme at the Extra-ordinary General Meeting (E.G.M.) held on 13th November,

1998 in compliance with the requirements of section 391 sub-section (2) of the Act. At this meeting, 13 amendments were moved. 12 of the

amendments were moved by the employees shareholders and one by the financial institutions. The 12 amendments moved by the employees

shareholders were rejected. The amendment moved by the financial institutions was passed. It was, inter alia, resolved as under:

Resolved that the Scheme of Arrangement be modified by amending Clause 9 of the Scheme and by adding a new sub-clause (f) of the said

clause.

(f) This scheme of arrangement will be subject to approval of financial institutions and U.T.I, L.I.C. G.I.C, National Insurance Company Ltd.,

New India Assurance Company Ltd., and United India Insurance Co. Ltd.

In view of the aforesaid amendment, B.S.L. sought the approval of the financial institutions. All the financial institutions have given their approval to

the scheme by their letters dated 8-1-99, 11-1-99, 18-1-99, 22-1-99, 15th July, 1999, 27th July, 1999 and 30th July, 1999. The scheme was

overwhelmingly approved by 89.7 per cent of the shareholding in number and 99.8 in value of the votes cast by the shareholders of B.S.L.

B.S.I.L. has only 7 shareholders. All of them had given their written consent for dispensing with the meeting of the shareholders. Thus this Court by

its order dated 24th September, 1998 dispensed with the convening of the meeting of the shareholders of B.S.I.L. In view of the amendment to the

scheme by insertion of Clause 9(f) at the E.G.M. held on 13th November, 1998 the 7 shareholders have issued fresh consent letters.

7. The salient features of the scheme have been set out in paragraph 12 of the petition, Clause 1.4 provides that ISD means all assets and liabilities

of BSL pertaining to the Software Business including investment of BSL in USIN International Inc, USA. The appointed date means 1st October,

1998 or such other date as may be fixed by the Court. The effective date means the date on which the certified copy of the order sanctioning the

scheme are filed with the Registrar of Companies, Maharashtra. Clause 2 deals with the share capital, Clause 2.1 gives the authorised and issued,

subscribed and paid up capital of BSL. Clause 2.2, relates to the share capital of BSIL as of 30th June, 1998, which is as under:

Authorised Capital

10,000 Equity Shares of Rs. 10 each Rs. 1,00,000

Issued, Subscribed & Paid-up Capital

20 Equity Shares of Rs. 10 each, Rs. 200

BSL has subscribed to 29,25,725 Equity Shares of Rs. 10 each at par and a welfare trust of the employees of BSIL formed to implement a stock

option scheme has subscribed to 3,00,000 Equity Shares of Rs. 10 each at par. These shares have not yet been allotted.

Clause 3 of the scheme provides for transfer of ISD of BSL to BSIL. Clause 3.1 provides for transfer of the entire assets of ISD of BSL to BSIL

together with the liabilities. Thereafter procedure is prescribed for transferring the assets and liabilities. It also provides that except for the transfer

of the assets of ISD to BSIL all the other assets continued to vest in BSL. There are usual provisions with regard to legal contracts, legal

proceedings etc. Clause 3.6 provides for payment of cash consideration which is as under:

3.6 Consequent upon the transfer and vesting in BSIL of the International Software Division of BSL, BSIL shall, within forty-five days from the

Schedule of Arrangement becoming fully effective pay cash consideration for the said transfer and vesting to BSL.

Clauses 3.8.1 and 3.8.2 of the Scheme protect the interest of the employees of B.S.L. engaged in and for the business of I.S.D. It is provided that

on the effective date any of the employees who are willing to become employees of B.S.I.L. shall become the employees of B.S.I.L. There will be

no break or interruption in their services. The same terms and conditions on which they were engaged as on the effective date are to be taken into

account for the purpose of all retirement benefits. Past service will also be taken into account for the purposes of payment of retirement

compensation. Continuity of service is also guaranteed. Clause 4 relates to reduction of share capital of B.S.L. Clause 4.1 provides that pursuant

to the resolution passed by the A.G.M. of B.S.L. held on August 21, 1998, the issued and subscribed share capital of B.S.L. shall be reduced

from Rs. 27,09,71,020/- divided into 2,70,97,102 equity shares of Rs. 10/- each fully paid upto Rs. 20,32,28,217/- divided into 2,03,22,827

equity shares of Rs. 10/- each fully paid up as follows:

4.1.1. The reduction shall be effected by in the first instance, cancelling Rs. 2.50 of every equity share of Rs. 10 fully paid up by the shareholders

as on the Record Date.

Clauses 4.1.2 and 4.2 provide as under:

After the aforesaid reduction, the revised issued, subscribed and paid up share capital of BSL of Rs. 30,32,28,270 shall be consolidated into

2,03,22,827 equity shares of Rs. 10 fully paid up by consolidating blocks 4 (Four) equity shares of Rs. 7.50 each into blocks of 3 (three) equity

shares of Rs. 10 each.

Provided however, that no fractional certificate (s) shall be issued by B.S.L. in respect of fractional entitlements to which shareholders of B.S.L.

may be entitled to on such reduction and consolidation of share capital by B.S.L. as aforesaid. All such fractions shall be consolidated into fully

paid up equity shares which shall be allotted by the Board of Directors of B.S.L. at its discretion to any of its two nominees upon trust to sell the

shares so allotted and distribute the net sale proceeds to those shareholders of B.S.L. who are entitled to such fractions in the proportion to which

they are so entitled.

4.2 Accordingly, on this Scheme becoming effective the Authorised, Issued and Subscribed Share Capital of B.S.L. shall be as under:

Clause 5 provides for issue of shares by B.S.I.L. Relevant Clause 5.1 reads as under:-

B.S.I.L. shall issue and allot for cash approximately 67,74,275 equity shares of Rs. 10 each to the shareholders of B.S.L. at par, the shares to be

allotted being determined in the ratio of 1 (one) Equity Share of Rs. 10 each fully paid up for every 4(Four) Equity Shares of Rs. 10 each of B.S.L.

held by them on the Record Date. The shares to be issued and allotted pursuant to this Clause are hereinafter referred to as the ""Specified Number

of Shares"".

If the ratio as aforesaid results in a shareholder being entitled to fraction of a share then the Specified Number of Shares in respect of such

shareholder shall be determined by rounding off the fraction to the nearest lower share. The total of the entitlement of each shareholder shall be the

aggregate specified number of shares. The Board of Directors of B.S.I.L. shall be authorised to allot such shares as they deem fit.

Clause 6 provides that:

6.1 On this Scheme becoming effective, the shareholders of B.S.L. shall be deemed to have given a mandate to B.S.L. for the payment of the

amount or part thereof, payable by it for reduction of its Share Capital, to B.S.I.L. for the amount payable by the said shareholders to B.S.I.L.

towards subscription to its Equity Share Capital of B.S.I.L. as per Clause 5 hereinabove.

Clause 6.2 provides that the adjustment would be considered as constructive payment by B.S.L. to its shareholders for the cancellation of its

equity shares and by the shareholders of B.S.L. to B.S.I.L. for subscription to the shares of B.S.I.L. Clause 6.3 provides that the balance, if any,

due by B.S.L. to its shareholders against reduction of its share capital shall be paid by its within 45 days from the scheme of arrangement becoming

effective.

8. It is stated that the main benefits of the scheme will be to have a clearer focus oh the Software business and to enhance shareholder value. Thus

it has been decided to spin off the Software business into a separate Company i.e. B.S.I.L. The reasons for separating the I.S.D. from the main

business of B.S.L. is that the Software business and the air-conditioning business of B.S.L. do not have any commonality of synergy. The focus on

the two activities can be improved and their value can be enhanced if the two businesses are carried on in separate entities. Secondly the scheme

will involve Income tax benefits. The benefit of reduction u/s 80HHE of the Income tax Act for Software exports can be maximised. Thirdly as the

Price Earning Multiplier (P.E.) for the Software Industry is much higher than what in the Air-conditioning industry, the capitalisation of earnings of

the two units on the Stock Exchange is different. The separation of the Software business will enable higher capitalisation of its profits and enhance

the overall value of the shareholders. It is also stated that the scheme will not have any adverse implications on the shareholders or the creditors.

9. Mr. Tulzapurkar, learned Counsel appearing in support of the scheme, has submitted that the procedure prescribed under the Act has been

followed. The scheme has been approved by an overwhelming majority of shareholders in value as well as in number. The consideration price to

be paid in cash has been worked out on book valued as on 30th September, 1998. On that date the book value has been worked out to Rs.

7,66,66,065/-. Out of that Rs. 6,77,42,750/- is to be paid by issuance of shares to the shareholders of B.S.L. Therefore, a sum of Rs.

89,23,315/- is the cash component of the consideration. 67 per cent of the share capital of B.S.I.L. will be held by B.S.L. i.e. the very same

shareholders. 29 per cent of the shares would be held by the transferor company and 3 per cent will be held by outsiders who are the employees

of the transferee company. Thus effectively the majority will continue with B.S.L.

10. The objectors to the scheme are employees shareholders/employed creditors of the Company. List of creditors was settled by this Court in its

order dated 20th April, 1999. Ultimately the certificate was issued on 7th May, 1999 under Rule 58 of the Companies (Court) Rules. The Court

had directed that the creditors be secured by providing a Bank Guarantee. The appropriate Bank Guarantee has been furnished. Therefore, the

objectors as creditors are fully secured. It is submitted that in view of the objectors as creditors being secured they are not entitled to raise any

objection to the scheme of amalgamation or for reduction of share capital. Learned Counsel has relied on Rule 60 of the Companies (Court) Rules.

I do not think the submission of Mr. Tulzapurkar can be accepted as Rule 60 simply provides that any person who has not been secured in the

manner provided by section 101(2)(c) is permitted to oppose the scheme. It does not provide that if the creditor is secured then the scheme

cannot be opposed by him. Section 101(c) of the Act also provides that if there is no consent given by the creditor, Court can order the interest of

the creditor to be secured. Therefore, it will not be necessary to obtain his consent to the scheme. But that does not mean that the creditor cannot

oppose the scheme in Court. However, there is substance in the submission of Mr. Tulzapurkar that even if their consent is required, 99.98 per

cent of the shareholders having approved the scheme, it cannot be set aside on the ground that the objectors have not given their consent to the

scheme. He has further submitted that the attitude of the employee shareholders is wholly unfair. They have purchased from the market minimal

marketable lot of shares just before the meeting. They have become members in September, 1998 when the meeting was to be held in November,

1998. In between them they held 2000 shares i.e. .007 per cent of the total number of shares. The idea of purchasing the shares is merely to

oppose the arrangement. He submits that while sanctioning the scheme the Court has to keep in mind the principle of corporate democracy. Unless

the Court finds the scheme to be fraudulent or mala fide, it ought to be sanctioned provided the procedure provided under the Act has been

followed. Test to be adopted by the Court is of a prudent businessman. Hypothetical situations ought not to be taken into consideration. He

submitted that the argument of the respondents is based on the hypothesis that if the Software business is taken away from B.S.L. they may be

adversely affected in the future. This, according to the learned Counsel, is not relevant. If anything happens in the future, law will take its own

course. Employees have been given an option to become employees of the transferee company. Their conditions of service have been protected.

Future possibilities of adverse events cannot be taken into consideration whilst sanctioning the scheme. On this proposition the learned Counsel has

relied upon the judgment of the Supreme Court in the case of Hindustan Lever Employees Union Vs. Hindustan Lever Ltd. and others, . The

learned Counsel has also submitted that it is not the function of the Court to examine the scheme from the point of view as to whether or not a

better scheme can be formed. For this proposition the learned Counsel has relied upon the case of Miheer H. Mafatlal v. Mafatlal Industries Ltd.

1996(87) ComP.Cas. 792. Relying on the aforesaid judgment, the learned Counsel has submitted that the Court cannot sit as an Appellate

Authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or

not when the majority of the creditors or members or their respective classes have approved the scheme as required by section 391(2) of the Act.

11. Mr. Grover, learned Counsel appearing for the objectors has raised a large number of objections. Mr. Grover is right in his submission that the

objectors cannot be told that they have no locus standi to object to the scheme as they have come before the Court in various capacities as

creditors, employees, shareholders, proxy-holders of shareholders of B.S.L. and as members of the Federation and Blue Star Workers Union

which are recognised Unions. The objections have been raised by them in a representative capacity for and on behalf of other employees creditors.

He has relied on a large number of authorities to show that the objectors have locus standi. It is, however, not necessary to consider them as I

have already held that the objectors have the locus standi to object. Mr. Grover has submitted that the scheme is liable to be rejected as there has

breach of fiduciary duties on the part of the Directors of the Company. The scheme has been fraudulently propagated. The Company is acting ultra

vires the Memorandum and Articles of Association. The objections raised by Mr. Grover pertain to procedure as well as law. It is stated that

B.S.L. has not filed its latest audited account for the financial year 1998-99 as mandatorily required by proviso to section 391(2) of the Act. In

support Mr. Grover has referred to a number of judgments. In the case of Navjivan Mills Co. Ltd. Kalol in Re. Kohinoor Mills Co. Ltd.,

1972(42) Com.Cas. 265 the Gujarat High Court was considering an objection to the effect that the petitioner had not satisfied the requirements

contained in the proviso to section 391(2) by not making necessary disclosures and it being a condition precedent to the Court exercising

jurisdiction u/s 391(2), the petition must fail. It was held that the scheme cannot be sanctioned if the Court comes to the conclusion that material

particulars have not been disclosed to the Court by affidavit or otherwise. However, it was held that it will be a question of fact in each case

whether the disclosures as required by the proviso have been made or not. In that case the objection was in fact rejected. Interpreting the word

latest"", the Court held that ""latest"" means latest in point of time in relation to the date on which the petition is filed. Mr. Grover has thereafter relied

on 60 Comp.Cas. 94 Bhagwan Singh and Sons P. Ltd. v. Kalawati and others. In this case the Delhi High Court dismissed the petition as having

been delayed. It was also dismissed on the ground that the Company had failed to give the upto date financial position which had to be done upto

the stage when the petition became due for sanction. This decision is not contrary to the judgement of the Gujarat High Court. It lays down that the

latest financial position has to be given as on the date of the sanction by the Court. But the observation has to be seen in the light of the facts of

each case. In that case the meetings of the creditors and shareholders were held on April 25, 1978, approving the scheme of arrangement, and the

report of the Chairman submitted on May 23, 1978. Instead of filing the petition within seven days of the filing of the report by the Chairman as

required under Rule 79 of the Companies (Court) Rules, 1959, the petition was moved on November 15, 1978. The learned Judge rejected the

reason given for the delay and dismissed the petition. While dealing with section 391(2) of the Companies Act it was observed that the Company

has chosen to file balance-sheet upto March, 1980 and has not cared to submit the latest balance-sheet. The Company had been specifically

directed in that case to submit the latest balance sheet, profit and loss account, list of shareholders and shares held by them and the Auditor''s

report, during the course of argument a month earlier before the judgment was given. It was, therefore, held that the Company has with- held the

full material facts and its latest financial position. Therefore, I am of the opinion that the observations made by the Delhi High Court are not

contrary to the law laid down by the Gujarat High Court. It was held that the scheme is mala fide and that the sole purpose of the scheme appears

to be to defeat the claim of these creditors by 50 per cent, get released the attachment of goods that they have got effected and pay the rest in

driblets covering a period of five years. Mr. Grover thereafter relied on the case of Maneckchowk and Ahmedabad Manufacturing Co. Ltd., 1970

Vol. 40 Com.Cas. page 819. In head note 3 and 4 of this case it is held as follows.

(iii) Before the Court accords its sanction to any scheme of compromise and arrangement, it would normally expect to be satisfied about three

important matters, namely (a) whether the statutory provisions have been complied with or not; (b) whether the class or classes have been fairly

represented; and (c) whether the arrangement is such as a man of business would reasonably approve.

..... It is obligatory upon the applicant u/s 391(1) to set out in an affidavit the particulars required in Form No. 34. The details required to be

mentioned in the affidavit have been so prescribed as to enable the Court to give proper directions and no disclosures are required to be made as

required by the proviso at that stage. It is not possible to accept the view that disclosures as required by the proviso should be made at the initial

stage when the application is made u/s 391(1). These disclosures are required to be made only when a petition is filed u/s 391(1) for sanctioning

the scheme and must be available when the Court proceeds to examine the scheme to find out whether sanction should be accorded to it or not.

A perusal of the aforesaid shows that the Court has come to the conclusion that it is not possible to accept the view that the disclosure should be

made at the initial stage when the application is made u/s 391 of the Act. The disclosures are required at the time when the petition is filed and must

be available when the Court proceeds to examine the scheme to find out whether sanction should be accorded to the scheme, comes up before the

Court for sanctioning the scheme. This judgment and the earlier judgment of the Gujarat High Court in Navjivan Mills Com. Ltd. are both given by

the same learned Judge viz, D.A. Desai, J. Reading all the judgments together, one can say that the relevant point of time for disclosing the latest

financial position would be at the time of filing of the petition. It is only as in the case of Bhagwan Singh (supra) when there is a long gap between

the filing of the latest balance sheet etc. and the time when Court considers the scheme for sanction that the Court may require the latest financial

position, otherwise it has been clearly laid down that the latest financial position should be disclosed at the time of moving/filing of the petition. Mr.

Grover thereafter relied upon the judgment of the Allahabad High Court in the case of Premier Motors (P) Ltd. v. Ashok Tandon and others

1971(41) Comp.Cas. 656. This judgment merely reiterates that all material particulars should be placed before the Court to enable the Court to

come to a conclusion with regard to the question of propriety of sanctioning the scheme. It does not decide the issue as to when the latest petition

should be placed before the Court. Mr. Grover thereafter relied upon 1995(82) Comp.Cas. 437 (Bharat Synthetics Ltd. v. Bank of India and

another]. In this case a Single Judge of this Court has held that the Company had not placed before the Court the authenticated latest financial

position as required under sub-section (2) of section 391 of the Act and, therefore, it is not in compliance with the provisions of section 391(2) of

the Act. From the conspectus of the judgments noticed above it becomes apparent that it is incumbent on the petitioner to place before the Court

the latest audited financial position of the Company. It also becomes apparent that the Court has to be satisfied that section 391(2) has been

complied with by taking into consideration the facts and circumstances of each case. In the present case the audited accounts for the year 1998

have been placed on the record.

Therefore, in my view, the petition cannot be rejected on the ground that section 391 of the Act has not been complied with. Mr. Grover thereafter

argued that the scheme is ultra vires the Memorandum of Articles of Association of both BSL and B.S.I.L. Referring to Clause 40 of the

Memorandum and Articles of Association of BSL, learned Counsel has submitted that the petitioner has only the power to amalgamate but does

not have the power to sell or dispose of any part of the undertaking. Apart from this, B.S.I.L. has no provision for entering into any arrangement in

its Memorandum and Articles of Association. I am unable to agree with the submission of Mr. Grover as Clause 39 of the objects which has been

reproduced above clearly shows that B.S.L. has the power to sell or dispose of the undertaking of the Company or part thereof. Similarly there is

a provision in the Memorandum and Articles of Association of B.S.I.L. to acquire and undertake all or any part of the business, property and

liabilities of any person or company carrying on or proposing to carry on any business which the company is authorised to carry on. This power is

found in Clause 12 of the objects of Memorandum and Articles of Association of B.S.I.L. Therefore, it cannot be said that scheme is ultra vires the

Memorandum and Articles of Association of either B.S.L. or B.S.I.L. Mr. Grover has thereafter submitted that there has been non-disclosure of

information at the shareholders meeting. He submitted that the uninformed consent of the shareholders is void ab initio. No disclosure has been

made about the assets and liabilities of I.S.D. on the basis of which book value is calculated. Value of I.S.D. has not been disclosed in the balance

sheet or in the profit and loss account. No details are given of the subsidiaries of U.S.A. and U.K. There are also assets at Santacruz and

Bangalore. No disclosure is made about the cash consideration to be paid to the shareholders of B.S.L. Nature of the employees Stock Option

Scheme is not given. This scheme will be controlled by the trustees who are Directors of B.S.L. Valuation report is not disclosed to the

shareholders. In fact the valuation report has been made only to satisfy the financial institutions. The valuation was not disclosed to the shareholders

at the meeting. He submits that the only object of the arrangement is to enable the promoters to take control of the new Company B.S.I.L. without

compensating the shareholders of B.S.L. It is for this reason that the valuation report was only made available to the shareholders when the

petitioners took out Judge''s Summons for disclosure of the report. It was at that stage that the report was attached to the affidavit of Mr.

Vasudevan on behalf of the petitioners dated 16th September, 1999 (Exh. B). Information given in this report was not available to the

shareholders. For the first time the petitioners came to know the details of the subsidiaries. It is further submitted that the idea behind the scheme

seems to be to list the Company on the Stock Exchange. For this reason a capital of Rs. 10 crores was, therefore, necessary. Therefore, the book

value has been relied upon which comes to Rs. 767 lacs. He submits that even the figures in the valuation report are wrong. This valuation is

motivated and has been made to fit the design of the promoters of the Company to enable them to take control of B.S.I.L. at a ridiculously low

price. According to the learned Counsel, the greatest asset of I.S.D. was the intellectual property rights. These are not even taken into

consideration whilst placing a value on the assets of I.S.D. Goodwill has been totally ignored. Learned Counsel has referred to various

mathematical figures to show that the valuation is emphatically wrong and also to demonstrate that there is no decline in earnings per share. He

submitted that if the correct methods had been used, it would have been obvious that there has been an increase in earnings per share. Quoting

from the Supreme Court judgement in the case of Hindustan Lever (supra) learned Counsel has stated that book value is more of a talking point.

He submitted that the book value has been deliberately motivated. Overseas Companies value is not shown. No provision is made for delimitation

of transfer of assets. Even details of the movable assets had not been given. It is also not clear as to whether any immovable assets have been

transferred. Learned Counsel submitted that the book value is demonstrably wrong. He pointed out that the share value of B.S.L. shares in the

year 1998 was about Rs. 50/-. If this value is taken then the total value of the shares comes to about Rs. 33.87 crores. The total share value of Rs.

67,74,275/- is sought to be reduced by 25 per cent i.e. Rs. 2.50 per share worth Rs. 10/-. In exchange the B.S.L. is issuing shares at Rs. 10/-.

Therefore, for a share of Rs. 50/- the shareholders are getting only Rs. 10/-. Thus the loss to shareholders comes to something like Rs. 27 crores.

If the losses worked out on the basis of the share value in September, 1999; then the loss to the shareholder comes to 54.19 crores. There is,

according to the learned Counsel, no justification for reduction of the share capital as there is no over capitalisation in B.S.L. He further submitted

that the benefit of the scheme is going only to the promoters as is evident from the fact that 67.77 per cent shareholders in the B.S.I.L. would be

the shareholders of B.S.L. The promoters hold 38,42 per cent in B.S.L. Therefore, they would be the majority shareholders in B.S.I.L. Only 3 per

cent of the shares are going to the employees of the transferee Company. In fact, even the trustees of the Employees Stock Option Scheme has

not been disclosed. Interest of the Directors i.e. Advani Brothers has also not been disclosed.

12. Reiterating the point about there being no over capitalisation, Mr. Grover pointed out that there are huge amounts of money locked up in

inventories and sundry debts. Thus the Company would require at least 150 crores to service the capital. The company has a negative cash flow

and has actually borrowed money to pay the dividends. Thus the amount of Rs. 10 crores received from B.S.I.L. would hardly be enough to

service the capital. He submitted that the only motive is to list the Company on the Stock Exchange and to allow the promoters to control 33 per

cent of the shares through other interests i.e. B.S.L and Stock Exchange Option Scheme. Even with regard to the Employees Stock Option

Scheme it is submitted that it will apply to employees who are going to be hired or transferred to B.S.I.L. It will not apply to the old employees of

B.S.L. who built I.S.D. No details are given as to which of the employees are going to be given the Employees Stock Option Scheme. No

valuation has been done of the fixed assets and investments of I.S.D. He thereafter gave details as to how the Advani Brothers are interested in the

scheme and the same is not being disclosed. Ashok Advani is said to be holding 36,04,590 shares and Sunil Advani holds 18,54,274 shares.

Apart from this, these persons also control shares held by family members, relatives and shares held by Companies controlled by these persons.

Thus they hold 38.61 per cent of the shares. With regard to the American Subsidiary it has not been disclosed that Sunil Advani was a Director of

the Company. The existence of U.K. subsidiary was not disclosed at all. It is mentioned for the first time in the valuation report. Sunil Advani is

said to be a Director of this Company also. Similarly Ashok Advani and Sunil Advani are the trustees of the Employees Stock Option Scheme.

Therefore, it is submitted that provisions of section 393(2) and (5) have been violated. Mr. Grover has even gone so far as to object that the

Company ought to have disclosed that one of the Partners of M/s. Crawford Bayley and Company, a firm of Solicitors, is a Director. He has

submitted that by a round about method the shareholding of Advani''s will increase from 38.61 to about 71 per cent. This fact is not disclosed.

Thereafter Mr. Grover has submitted that the role of the Chairman was not impartial whilst conducting the E.G.M. The requisite notices were not

issued to the shareholders. Inspite of the fact that Ashok Advani and his brothers are beneficiaries under the scheme yet he was appointed

Chairman of the meeting. The meeting is said to be irregular in that Chairman had permitted a large number of persons to participate who were not

proxy holders of any of the shareholder. Authorisations given by the financial institutions were not in conformity with Rule 70 of the Companies

Court Rules. The Resolutions of the financial institutions are obsolete. They were not current. Thus it is submitted that the meeting has not been

conducted in accordance with the Rules. According to Mr. Grover, there were other irregularities in the voting pattern also. Combined ballot

papers were given for voting on the scheme as well as the amendment. The report does not mention the number of persons voting and the value of

the votes. u/s 391(2) it is necessary to mention the number of persons present and voting. This has not been mentioned in the report and, therefore,

Rule 78 is violated. It is further submitted that after the amendment had been proposed by the financial institutions it ought to have been separately

voted upon. Although there is no decided case on this point but according to Mr. Grover the position has been set out in commentaries on the

procedure. He has referred to ""the Conduct of Meetings"" 23rd Edition by Mandy Burton. In this commentary it is stated that when an amendment

has been put to the meeting and carried, it must be put a second time, embodied in a substantive motion, which supersedes the original motion. He

has also referred to the commentary by A. Ramaiya on the Companies Act (1998 Edn. page 1412). On this page of this commentary it is also

mentioned that if an amendment is carried, it should be incorporated in the original motion which is then, as amended, put before the meeting for

further debate, and the next amendment (if any) can then be moved. There is no dispute with the aforesaid proposition but I am unable to agree

with Mr. Grover on facts that the amendment has not been put to vote in accordance with any of the rules. A perusal of the ballot papers on pages

279-280 of the petition would show that it was made sufficiently clear as to what the voters were required to do on the amendments as well as the

original motion. On page 279 is the main ballot paper asking the members to either vote for or against the scheme. On page 280 is the voting for

amendment Resolution and the voters were asked to vote either for or against. The main stress of the argument of Mr. Grover, however, is on the

adverse effect that the scheme is likely to have on the employees of B.S.L. It is submitted that B.S.L workmen have had to bear the brunt of the

failures of B.S.L''s management to properly manage B.S.L. Learned Counsel has given history of the previous litigation between the workmen and

the Company to show that even when the awards have been given by the Competent Court, B.S.L has not implemented the same. The

apprehension of the workmen has been proved to be justified in that B.S.L. has already served a notice of change u/s 9A of the Industrial Disputes

Act, 1947 demanding approximately 60% reduction in workmen''s wages and service conditions. In justification for this notice, B.S.L. has pointed

out before the Dy. Commissioner of Labour that the overall profitability of the company which were taken into account by the Tribunal in the

earlier Award is larger due to contributions by other Divisions including I.S.D. in which the Union and its members have made no contribution.

Thus it is submitted that the proposed separation of the I.S.D. has already been used as a device to reduce the emoluments and lower the service

conditions of the workmen. The learned Counsel has also submitted that unlike the B.S.I.L. employees the scheme offers no protection to the

B.S.L. workmen. Mr. Grover has also expressed serious apprehension of retrenchment of the S.B.L. employees in the future. In view of the

above, learned Counsel submits that the scheme does not deserve to be sanctioned. Counsel relies on a judgment of this Court in the case of Tata

Oil Mills Co. Ltd. 81 Comp.Cas, 754. In this judgment it is clearly held that the Court must also take into consideration the public interest and the

interest of the employees of the two Companies to ensure that they are not adversely affected by the scheme and that adequate provisions is made

for them. But then justification is given in the judgment to the effect that this class of persons affected by the scheme has no locus standi in the

meetings and the judgment of the majority in their regard need not necessarily be of a great value or a safe guide. In the present case all the

objectors are also shareholders as well as creditors. From the manner in which the proposed scheme has been objected to at various stages it is

not possible to hold that the interest of the employees have not been adequately represented. Mr. Grover has thereafter referred to another

judgment of the Supreme Court in the case of National Textile Workers'' Union and Others Vs. P.R. Ramakrishnan and Others, . In that case it is

held that the workers of a Company are entitled to appear at the hearing of the winding up petition whether to support or to oppose it so long as

no winding order is made by the Court. There is no dispute with the aforesaid proposition and it is for that reason that the respondents have been

fully heard. Learned Counsel has thereafter relies on J.S. Davar and Another Vs. Shankar Vishnu Marathe and Others, . In this case it is held that

the Court will not sanction the scheme if the facts which would have influenced the decision of the majority were not known or disclosed to the

majority or if the sponsors of the scheme have misrepresented the true position of the Company. Finally, if the acceptance of the scheme would

lead to the starting of an inquiry into the conduct of the delinquent directors, the Court would be slow to give its sanction to the scheme. These

observations are of no assistance to Mr. Grover in that 99.98 of the shareholders have sanctioned the scheme. Till today nobody has come to

complain that their consent has been taken by not disclosing the information to them. Mr. Grover thereafter relied on a judgment of the Calcutta

High Court in the matter of Calcutta Industrial Bank Ltd., 1948(18) Com.Cas. 144. This judgment also holds that the procedure must be correctly

followed and all relevant materials and facts must be fairly disclosed. Again on facts, this judgment is of no assistance to Mr. Grover.

13. In my view, in the present case, a minuscule minority viz. 007% of the shareholders are seeking to challenge the scheme which has been

approved by an overwhelming majority of shareholders in numbers and in value. The objections which had been raised are in the nature which

have been squarely dealt with by the Supreme Court in the case of Hindustan Lever (supra). The relevant extracts from the judgment are as

follows:

Merger under the Companies Act, 1956 (in brief ""the Act"") of the two big companies one, Hindustan Lever Limited (H.L.L), a subsidiary of Uni

Lever (U.L.L.), London based multinational company, and other Tata Oil Mills Company Limited (in brief TOMCO) the first Indian Company

founded in 1917 and public since 1957 which has been found by the High Court to be still not financially insolvent or sick company was

unsuccessfully challenged in the High Court by few rather nominal shareholders of TOMCO, Federation of Employees Union of both the TOMCO

and H.L.L, Consumer Action Group and Consumer Education and Research Centre. The attack varied from statutory violation, procedural

irregularities of provision of the Act to ignoring effect of the provisions of Monopolies and Restrictive Trade Practices Act, 1969, under valuation

of shares, its preferential allotment on leas than the market price to the multinational, failure to protect the interest of employees of both the

companies and above all being violative of public interest. The High Court was not satisfied that either the merger was against public interest or that

the valuation of the shares was prejudicial to the interest of the shareholders of TOMCO or that the interest of the employees was not adequately

protected. It was held that there was no violation of section 391(1)(a) of the Act and the claim that the disclosures in the explanatory statement

were not as required was without basis as it was not established that the statement did not disclose correct financial position of TOMCO. Nor was

there anything to show that the material was not disclosed. The Court held that the petitioner failed to establish any fraud or prejudice. On valuation

of share for exchange ratio, the Court found that a well-reputed valuer of a renowned firm of chartered accountants and a director of TOMCO

determined the rate by combining three well-known methods, namely, the net worth method, the market value method and the earning method.

The figure so arrived could not be shown to be vitiated by fraud and mala fide and the mere fact that the determination done by slightly different

method might have resulted in different conclusion would not justify interference unless it was found to be unfair. And in that the petitioner failed

miserably. The High Court did not agree that the approval to scheme of merger should be withheld till the complaint filed before Monopolies and

Restrictive Trade Practices Commission was not finally decided as the jurisdiction exercised by the High Court under the Act and that by the

Commission under M.R.T.P. Act were entirely different. Nor did it find any merit in the challenge that interest of employees of the two companies

was not adequately taken care of. It was held that service conditions of TOMCO, the transferor company, having been protected, it could not

claim it to be prejudicial either because they were not assured of same conditions of service as was operative in H.L.L or that there was no similar

provision protecting the interest of H.L.L. employees. The apprehension of the employees against probable retrenchment as the employees of

H.L.L. were already surplus was rejected as of no substance since such disputes if necessary could be raised in Labour Court. On preferential

allotment of shares to U.L. on less than market value, the Court held that H.L.L. was the holder of 51% share from before any allotment,

therefore, the allotment, which placed them at par with same holding was neither illegal nor violative of public interest.

2. Same grievances have been reiterated by the shareholders, the Employees Union and the Consumer Action Group before this Court with fresh

dressings and flourish. The sentinel nature of jurisdiction exercised by the High Court in company jurisdiction was emphasised with vehemence. It

was urged that the High Court which is expected to act as guardian in company matters failed to exercise its jurisdiction and was swayed by

considerations which were neither legal nor relevant. At-tempt was made to show that the determination of valuation was vitiated as the chartered

accountant to whom the duty was entrusted did not perform its functions objectively and in accordance with settled financial norms and practice

and its action was vitiated as he was one of the directors of the TOMCO. Comparative figures of the shares of the two companies, their market

value, their holding in the market, etc., were placed to demonstrate that the calculation was vitiated.

3. But what was lost sight of (was) that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy

if the determination satisfied the arithmetical test. A Company Court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded

on fairness. It is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method

would have been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair for the

shareholders of the company which was being merged. The Court''s obligation is to be satisfied that valuation was in accordance with law and it

was carried out by an independent body. The High Court appears to be correct in its approach that this test was satisfied as even though the

chartered accountant who performed this function was a director of TOMCO, but he did so as a member of renowned firm of chartered

accountants. His determination was further got checked and approved by two other independent bodies at the instance of shareholders of

TOMCO by the High Court and it has been found that the determination did not suffer from any infirmity. The Company Court, therefore, did not

commit any error in refusing to interfere with it. May be as argued by the learned Counsel for the petitioner that if some other method would have

been adopted, probably the determination of valuation could have been a bit more in favour of the shareholders. But since admittedly more than

95% of the shareholders who are the best judge of their interest and are better conversant with market trend agreed to the valuation determined, it

could not be interfered by courts as, certainly it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The Court

is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme. We do not think that the internal

management, business activity or institutional operation of public bodies can be subjected to inspection by the Court. To do so, is incompetent and

improper and, therefore, out of bounds. Nevertheless, the broad parameters of fairness in administration, bona fides in action and the fundamental

rules of reasonable management of public business, if breached, will become justifiable. Fertilised Corporation Kamgar Union (Regd.), Fertilizer

Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, . See Buckley on Companies Act, 14th Ed. pp. 473

and 474 and Palmer on Company Law, 23rd Ed. para 79, 16.)

4. Nor is there much merit in the claim of the employees that their interest had not been adequately protected. The scheme of amalgamation

provides that all staff, workmen or other employees in the service of the transferor company (TOMCO) immediately preceding the effective date

shall become the staff, workmen and employees of the transferor company. Clause 11.1 provides that their services shall be deemed to have been

continuing and not have been interrupted. Clauses 11.2 and 11.3 protect the interest by providing that the terms and conditions of such employees

shall not be less favourable and all benefits such as P.F. etc., shall stand transferred to the H.L.L. The grievance of the employees that no

safeguard has been provided for Hindustan Lever Employees Union appears to be off the mark as it is the interest of the employees of TOMCO

which had to be protected. Even the submission that the merger will create unemployment or that it may result in many employees of the TOMCO

being rendered surplus-does not carry much weight as these are matters which can be taken care of by the Labour Court if the contingency arises.

The learned Counsel for the petitioner time and again took strong exception to the observation made by the High Court that any dispute about

retrenchment, etc., could be adjudicated by the Labour Court. He vehemently submitted that the availability of remedy after retrenchment should

not have coloured the vision of the Court to adjudicate upon the reasonableness of the scheme. The submission overlooks the primary duties and

functions of the Company Court in matters of merger. When the Court found that service conditions of the merged company shall not be to their

prejudice, it was fully justified in rejecting the claim of employees as it was neither unfair nor unreasonable. Further the Court in its anxiety to be fair

to the employees recorded the statement of the learned Advocate General who appeared for H.L.L. that no employee of H.L.L. has been

rendered surplus and in such contingency, the company has resorted to friendly handshake by either giving lump sum or pension. A scheme of

amalgamation cannot be faulted on apprehension and speculation as to what might possibly happen in future. The present is certain and taken care

of by Clauses 11.1, 11.2 and 11.3 of the scheme. And unfriendly throwing out being amply protected by taking recourse of Labour Court, no

unfairness arises apparent or inherent. Nor the claim that merger shall result in synergies can render the scheme bad. Improved technology and

scientific method results in better employment prospects. Anxiety should be to protect workers and not to obstruct development and growth. May

be that advanced technology may reduce the manpower, but so long as those who are working are protected, they are not entitled to hinder in

modernisation or merger under misapprehension that future employment of same number of workers may stand curtailed. The wage differential

arising between employees of two companies cannot result in making the merger as unfair since the service conditions of TOMCO workers having

been protected, they cannot claim that unless they are paid the same emoluments as is being paid by Hindustan Lever the merger was unjust.

Various subsidiary submissions that the workers shareholders were not permitted to attend the meeting or that material facts were concealed from

them, does not appear to be correct as when more than 95% of the shareholders have agreed to the valuation determined by the chartered

accountant all these procedural irregularities cannot vitiate the determination.

11. The scheme of amalgamation does not run counter to any legislative provision or policy of the Government. The claim of the petitioners that the

transfer for a paltry sum of Rs. 30 crores was mala fide as it was a quid pro quo arrangement between U.L. and Tata Sons Limited by which the

immovable assets of TOMCO were virtually given to Tata Sons Limited and in lieu of U.L. has been allotted 29,84,347 equity shares of the face

value of Rs. 10 each at the price of Rs. 100 per share so as to ensure that the share of U.L. which stood diluted continued to remain at 51% was

not found to have any merit as the valuation was determined by renewed and authorised valuers. It was held that sale by open public auction or

inviting tenders from general public may have fetched more price due to competition, but that could not result in vitiating the determination of the

valuation. The amalgamation cannot be faulted for this reason.

12. Even assuming that the assets are being transferred for a very meagre sum, but that by itself would not render the agreement bad or against

public policy. Once F.E.R.A. was amended and assets of the Indian Company could be transferred to foreign Company, then the amalgamation

cannot be withheld when the shareholders themselves did not raise any objection nor was it raised by financial institutions or statutory bodies. The

challenge, therefore, founded on transfer of assets at lower price cannot be upheld as violative of public interest.

31. We are unable to uphold any of the above contentions raised by Mr. Dholakia. The overwhelming majority of the shareholders had approved

the scheme at the meeting called for this purpose and had approved the exchange ratio. In fact, a proposal for amendment of the exchange ratio

was also rejected by the overwhelming majority of 99% shareholders. There is no reason to presume that the shareholders did not know what they

were doing. Being dissatisfied with the valuation made by Mr. Malegam, Mr. Jajoo had insisted for independent valuation and that was done, two

independent valuers A.F. Ferguson and N.M. Raiji and Co- had valued the shares and came to the conclusion that exchange ratio of 15:2 was

correctly determined by Mr. Malegam.

45. Mr. Ashok Desai, appearing on behalf of TOMCO has argued that the valuation of shares had no be done according to well-known methods

of accounting principles. The valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be

difference of opinion among accountants as to what is the correct value of the shares of a company. It was emphasised that more that 99% of the

shareholders had approved the valuation. The rest 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 shareholders have approved of

the valuation. The Court should not interfere with such valuation.

53. The next point urged by Mr. Dholakia is that proper disclosure of all material facts was not made in explanatory statement, accompanying the

proposal to amalgamate TOMCO with H.L.L. Their shareholders were not given full particulars on the basis of which they could act.

55. The grievance voiced by Mr. Jajoo is not shared by more than 99% of the shareholders. An Explanatory Statement had been sent on the basis

of which Mr. Jajoo had taken inspection of all relevant documents.

58. In the facts of this case, considering the overwhelming manner in which the shareholders, the creditors, the debenture holders, the financial

institutions, who had 41% shares in TOMCO, have supported the scheme and have not complained about any lack of notice or lack of

understanding of what the scheme was about, we are of the view, it will not be right to hold that the Explanatory Statement was not proper or was

lacking in material particulars.

77. Nor do we think that public interest which is to be taken into account as an element against approval of amalgamation would include a mere

future possibility of merger resulting in a situation where the interests of the consumer might be adversely affected. If, however, in future, the

working of the company turns out to be against the interest of the consumers or the employees, suitable corrective steps may be taken by

appropriate authorities in accordance with law. As has been said in the case of Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others

Vs. Union of India (UOI) and Others, :

..... it is not a part of the judicial process to examine entrepreneurial activities to ferret out flaws. The Court is least equipped for such oversights.

Nor, indeed, it is the function of the judges in our constitutional scheme.

Now, merely because the scheme envisages allotment of 51% equity shares to Unilever, the scheme cannot be held to be against public interest.

78. Next, its was argued on behalf of the employees of TOMCO that the scheme will adversely affect them. This argument is not understandable.

The scheme has fully safeguarded the interest of the employees by providing that the terms and conditions of their service will be continuous and

uninterrupted and their service conditions will not be prejudicially affected by reason of the scheme. The grievance made, however, is that there is

no job security of the workers, after the amalgamation of the two companies. It has been argued that there should have been a Clause in the

scheme ensuring that no retrenchment will be effected after the amalgamation of the companies. There was no assurance on behalf of the TOMCO

that the workers will never be retrenched. In fact, the performance of TOMCO over the last three years was alarming for the workers. It cannot

be said that after the amalgamation, they will be in a worse position than they were before the amalgamation.

Similar is the situation here. As observed earlier, over 98 per cent of the shareholders including the financial institutions have approved the scheme.

The financial institutions were in fact so vigilant that they moved an amendment resolution and approved the scheme only after the valuation was to

their satisfaction. The Supreme Court has clearly held that hypothetical questions are not to be considered by the Court whilst sanctioning the

scheme. It is held in this judgement that unless it is shown that there is some illegality or fraud involved in the scheme, the Court cannot decline to

sanction a scheme of amalgamation. In that case the Supreme Court also observed that the scheme has been sanctioned almost unanimously by the

shareholders, debenture holders, secured creditors, unsecured creditors and preference shareholders of both the Companies. There must exist

very strong reasons for withholding sanction to such a scheme. Justice R.M. Sahai, J., in his concurring judgment has laid down that the basic

principle of such satisfaction of the Court is none other that the broad and general principles inherent in any compromise or settlement entered

between parties. In other words, it should not be unfair or contrary to public policy or unconscionable. It is further observed that in amalgamation

of Companies, the courts have evolved, the principle of prudent business management test or that the scheme should not be a device to evade law.

In my opinion, the present scheme passes both the tests laid down by Sahai, J., in the aforesaid judgment. It is settled law that the power of the

Court in sanctioning the scheme is to satisfy itself that the provisions of the Act have been complied with and that the class or classes were fully

represented and the arrangement was such as a man of business would reasonably approve between two private Companies. With regard to

valuation of shares, again it is held in this judgment that transfer of shares to a foreign company on under valuation is of course a matter of concern.

Thereafter, it is held ""It is true that the transfer of shares by one company to another company is primarily to be determined by the shareholders

and, therefore, if the 99% of them are of the view that the valuation of the shares was reasonable and fair, then the Court should be slow to

interfere with it."" Keeping the aforesaid ratio in view it would not be possible to agree with Mr. Grover to the effect that the shares have been

unnecessarily undervalued or that the Advanis have been unduly benefited from the scheme. Similarly with regard to the submission on the assets

being undervalued it is again noticed in the judgment that ""Even assuming that the assets are being transferred for a very meagre sum, but that by

itself would not render the agreement bad or against public policy"". It is specifically held: ""the challenge, therefore, founded on transfer of assets at

lower price cannot be upheld as violative of public interest"". With regard to valuation again the Supreme Court has held that there is no reason to

presume that the shareholders did not know what they were doing. The problems with regard to valuation of the assets has been noticed by the

Supreme Court in paragraph 41 of the judgment. In subsequent paragraph it is held that a combination of all or some of the methods of valuation

may be adopted for the purpose of fixation of the exchange ratio of the shares of the two companies. It is observed that the book value method

has been described as more of a talking point than a matter of substance"". Although objections were raised to the valuation done by a firm of

Chartered Accountants therein, it was observed by the Supreme Court that the financial institutions who held 41% of the shares of TOMCO, did

not find any fault in the method of valuation of the shares. Thus the objection was rejected.

14. In view of the above it may be that the respondents are not satisfied with the valuation done but that is no ground for rejecting the valuation

which has been done by a renowned firm of Chartered Accountants. The grievance voiced by the respondents is not shared by more than 98 per

cent of the shareholders. In my view, the aforesaid observations of the Supreme Court clearly negative the submissions made by Mr. Grover on

each and every point. Apart from this, the Counsel appearing on behalf of the Regional Director, on instructions, states that the Regional Director

has no objection to the scheme being sanctioned.

15. In view of the above, the petition is made absolute in terms of prayer Clauses (a) to (g).

Certified copy expedited.

At this stage learned Counsel appearing for the objectors prays that the operation of the order be stayed. I see absolutely no justification in the

prayer being made. Rejected.

Private Secretary is permitted to issue an ordinary copy of this order to the parties.

16. Petition allowed.