Commissioner Of Income Tax,Bombay And ... vs Mahindra And Mahindra Limited & Ors on 2 September, 1983

Equivalent citations: 1984 AIR 1182, 1983 SCR (3) 773, AIR 1984 SUPREME COURT 1182, 1983 TAX. L. R. 1286, 1983 SCC (TAX) 336, (1983) 3 COMLJ 30, 1983 UJ (SC) 936, 1984 UPTC 186, 1983 TAXATION 71 (3) 173, (1983) 144 ITR 225, 1983 (4) SCC 392, (1983) 54 COMCAS 651

Author: V.D. Tulzapurkar

Bench: V.D. Tulzapurkar, D.P. Madon

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           PETITIONER:
COMMISSIONER OF INCOME TAX,BOMBAY AND OTHERS

        Vs.

RESPONDENT:
MAHINDRA AND MAHINDRA LIMITED & ORS.

DATE OF JUDGMENT02/09/1983

BENCH:
TULZAPURKAR, V.D.
BENCH:
TULZAPURKAR, V.D.
MADON, D.P.

CITATION:
 1984 AIR 1182            1983 SCR  (3) 773
 1983 SCC  (4) 392        1983 SCALE  (2)236
 CITATOR INFO :
 R          1988 SC1737  (89)


ACT:
     Judicial Review-Courts'  power to  interfere and review
administrative or executive decisions and actions-Conditions
precedent.
     Loss-Accumulated  loss   and  unabsorbed  depreciation-
Conditions requisite  for carrying  forward and setting off,
by an  amalgamating  company  of  such  loss-Whether  the
recommendation of  a specified  authority  and  the  Central
Government's  decision.  thereon  allowing  the  amalgamated
Company to  carry forward  and set  off losses  is  open  to
judicial  review-Income  Tax  Act,  1961  section  72A  as
introduced by Finance Act No. 2 of 1977 scope of:
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HEADNOTE:

Section 72A of the Income Tax Act, 1961 enables an Amalgamated Company to carry forward and set off accumulated loss and unabsorbed depreciation allowance in certain cases of amalgamation on the fulfilment of three conditions viz; (a) that the amalgamating company was, immediately before its amalgamation financially non-viable by reason of its liabilities, losses and other relevant factors; (b) that the amalgamation was in the public interest; and (c) such other conditions as central government may by notification in the official Gazette specify, to ensure. that the benefit under the section is restricted to amalgamation which would facilitate the rehabilitation. Or revival of the business of amalgamating company. The Central Government's satisfaction in respect of the three conditions is to be based on the recommendation of the specified Authority, referred to in Section 72A. The Central p Government then has to make a declaration to that effect and the effect and consequence of such a declaration is that notwithstanding anything contained in any other provision of the Act, the accumulated loss and unabsorbed depreciation of amalgamating company is deemed to be the loss or as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected. For claiming the benefit of the section, the certificate issued by the specified authority under sub-section 2(ii)of section 72A to the effect that adequate steps have been taken by the amalgamated company for the rehabilitation or revival of the business of the amalgamating company must be submitted alongwith the return of the income for the said assessment year.

Mahindra and Mahindra Ltd. was incorporated under the Indian Companies Act 1913 and is thus duly registered under the Act of 1956. Its share capital has been widely held, the principal share holders being the public
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financial institutions to the extent of about 40% of its equity share capital; it is engaged in the manufacture of jeeps, motor vehicles etc. One M/s. Inter national Tractor Company of India Ltd. incorporated on April 15, 1963 under the Indian Companies Act, 1956 as a public company for the manufacture of essential commodities like agricultural tractors was commercially insolvent at the close of the financial year ending October 31, 1977. Therefore, proposal for amalgamating ITCI with M & M was considered and approved by the Boards of Directors of both the companies by two resolutions dated 4.10.76 since it was felt that it would be advantageous to both if their operations could be rationalized for better and more efficient utilisation of their existing capacities and facilities.

A scheme of Amalgamation effective from 1.11.1977 was prepared and finalised and, after obtaining the approval of the Central Government to the scheme of amalgamation as required under section 23(2) of the Monopolies and Restrictive Trade Practices Act, 1969, the Bombay High Court was moved under sections 391 and 394 of the Companies Act, 1956 seeking its sanction which was granted.

On April 27, 1978, M & M, moved an application under Section 72A of the Income Tax, 1961 Act for the grant of relief of the requisite declaration v from the Central Government which was received by the Central Government on May 3 of 1978. As the amalgamation had been effected from November 1, 1977 M & M filed the said application so as to enable the authorities to investigate the requisite factual pre-conditions for the grant of the relief and to arrive at a decision in order to enable it to file its return of income for the assessment year 1979-80 (the relevant previous year being 1.11.1977 to 31.10.1978 during which the amalgamation was effected) alongwith the requisite certificate of the Specified Authority before the due date June 30, 1979. Later M & M also furnished the latest audited financial position of ITCI together with other particulars as desired. By a notification No. S.O. 710(E) dated 11.10.1977 the Central Government constituted and notified the Specified Authority consisting of respondent Nos. 6 to 10 under S. 72A of the Act and at the suggestion of the Specified Authority the Central Government also set up a separate Screening Committee of experts to investigate as to whether the requisite statutory conditions were present or not. After considering the particulars furnished in the application made by M & M, further correspondence and evidence produced in that behalf and after hearing M & M the Specified Authority by its order dated May/June 2, 1980 recommended that the amalgamation of ITCI with M & M did not satisfy the condition specified in cl. (a); in other words, it opined that amalgamating company was financially viable and not non-viable immediately before its amalgamation with M & M. The Central Government, adopting the reasons recorded by the specified Authority for its opinion, accepted the recommendation made by it and passed an order on December 1, 1980 whereby it refused to issue the declaration under Section 72A of the Act to M & M.

The aforesaid recommendation of the Specified Authority and the Central Government's decision based thereon were challenged by M & M by filing a writ petition in the Delhi High Court; the challenges was principally
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met by raising a contention that the Central Government had refused the relief to M & M on the basis of its subjective decision about the non-fulfilment of the condition specified in cl. (a) of S. 72A (1) and for relevant and cogent reasons and hence the decision could not be reviewed or interfered with by the Court and with a view to show that both the Specified Authority and the Central Government had considered all the relevant factors and that M & M had been

fairly treated in the matter great reliance was placed on the minutes of the several meetings held by the Specified Authority which were produced before the Court. On a consideration of the entire material placed before it as well as the rival submissions made by counsel for the parties the High Court came to the conclusion that the view taken by the Specified Authority and the Central Government in the impugned orders was just not possible to be formed and that no reasonable authority much less the Specified Authority or an expert body of the Central Government could have reasonably come to the conclusion that IICI was, immediately before its amalgamation with M&M, financially viable. The High Court quashed the impugned recommendation dated May, June 2, 1980 of the Specified Authority as well as the Central Governments decision dated December 1, 1980 and directed (i) them to deal with M & M's application and dispose it of within a period of six months from the date of its order in light of its judgment; (ii) the specified Authority to consider and issue, the requisite statutory certificate under Section 72A (2)(ii) of the Act within one month of the declaration made by the Central Government; and (iii) the Income Tax officer concerned to treat the statutory certificate when furnished by the M&M, as if It was filed by M & M with its Return for the concerned year. Hence the appeal by Special Leave

Dismissing the appeal the Court

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HELD: 1. By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled. If the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters, the Court would be justified in interfering with the same. [786 F-H]

Barium Chemicals Ltd. v. Company Law Board [1966] Supp. SCR 311; Smt. Shalini Soni etc, v. Union of India and ors. etc. [1981] 1 SCR. 962 referred to.

2:1. The budget speech of the Finance Minister and the Notes on clauses of the Finance Bill (No. 2) of 1977 explaining the provision of the said Bill, make it clear that sickness among industrial undertakings was regarded as a matter of grave national concern inasmuch as closure of any sizable manufacturing unit in any industry entailed social costs in terms of loss of production and unemployment as also waste of valuable capital assets, and experience had shown that taking over of such sick units by Government was not always a satisfactory or economical solution; and that a more effective

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method would be to facilitate amalgamation of sick industrial units with sound ones by providing incentives and removing impediments in the way of such amalgamation which would not merely relieve the Government of uneconomical burden of taking over and running sick units but save the Government from social costs in terms of loss of production and unemployment. With such objective in view, in order to facilitate the merger of sick industrial units with sound ones and as and by way of offering an incentive in that behalf s. 72A was introduced in the Act where under by a deeming fiction the accumulated loss or unabsorbed depreciation of the amalgamating company is treated to be a loss or, as the case may be, allowance for depreciation of the amalgamated company in the previous year in which the amalgamation was effected; but the amalgamated company, although a successor in interest, would be entitled to carry forward and set-off the accumulated loss and unabsorbed depreciation of the amalgamating company only where the amalgamating company was not, immediately before such amalgamation, financially viable and the amalgamation, was in public interest. [789 H, 790 A-E]

2:2. The expression "financial non-viability" has not been defined in the Income Tax Act, 1961 However, the Finance Minister's speech, the notes on clauses of the Bill and the Memorandum explaining the provisions thereof make it clear that the financial non-viability of an undertaking has been equated with the 'sickness' of such undertaking and obviously in the context of its revival by a sound undertaking the sickness must be of a temporary character and not any basic or permanent sickness. An undertaking which is basically or potentially non viable will ordinarily be incapable of revival and would face a closure; in other words, the financial non-viability spoken of by the section must refer to sickness brought about by temporary adverse financial circumstances that disables the unit to stand and work on its own. This is also made clear by the provisions contained in cl. (a) of sub-sec. (1) which states that the financial non-viability of the amalgamating company has to be judged by reference to "its liabilities, losses and other relevant factors". [790 F-H]

Moreover, since the expression is occurring in a taxing statute in the P context of amalgamation of companies it will have to be understood in its popular sense, that is to say, the sense or meaning that is attributed to it by men of business, trade or commerce and by persons or institutions interested in or dealing with companies. [790 H, 791 A]

2:3. The true concept of financial non-viability as understood by men of business and commence and by financial institutions may be discerned. While announcing its scheme of merging sick units with healthy ones (Finance Act, 1977) Government of India had classified "those units where the losses, past and present, have eroded 50% of capital and reserves as sick'. According to the Reserve Bank of India, commercial banks consider a unit to be sick "if it has

incurred cash loss for one year and in their judgment is likely to continue to incur cash losses for the current year as well as the following year and which has an imbalance in its financial structure, such as current ratio of less than 1:1 an worsening debt-equity ratio (total outside liabilities to net worth)". While the commercial banks follow these criteria for banking purposes, the
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State Bank of India defines a sick unit as one "which fails to generate internal surplus on a regular basis and depends for its survival on the constant infusion of funds from outside. According to National Council of Applied Economic Research, where all the three parameters-profitability, liquidity and solvency show positive figures the unit's financial viability will be sound; where one of the three parameters shows a negative figure the unit could be regarded as 'tending towards-sickness'; when two of the three parameters show negative figures, it would be a case of 'incipient sickness' and when all the three parameters show negative figures the unit is 'sick'. It is by reference to these several tests or criteria adopted by them that the question has to be decided whether a particular undertaking is financially non-viable at a given point of time. [791 B-F, 792 A-B]

3:1. A careful and close scrutiny of para 3 of the Central Government's order comprising three aspects which constitute the substratum of the reasoning behind the conclusion will show that both had misdirected themselves in law by adopting a wrong approach and proceeding on a wrong assumption about the possibility of financial assistance from M & M which did not exist either i fact or in law:- (i) Section 72A does not require the undertaking to be basically non-viable, but merely financially non-viable which must of necessary be of a temporary character, (ii) further the close link between the two companies referred to by both, divorced from financial assistance would be an irrelevant factor; (iii) the provisions of Sections 370 and 371 o. the companies Act, 1956 have been completed ignored. Indisputably at the relevant time having regard to the provisions of S. 370 of the Companies Act, 1956 the maximum limit up to which M & M could lend and advance was Rs. 120 lakhs and in view of the advances already made to various parties to the tune of Rs. 70 lakhs it could have advanced only Rs. 50 lakhs to ITCI as against its requirement of over ten times that amount namely, Rs. 5 crores and odd, moreover any financial help in excess of Rs. 50 lakhs would have visited M & M and its directors or officers with penal consequences under S. 371 of the Companies Act.; (iv) the fact that during the year 1977-78 following the amalgamation M & M took adequate steps for the revival of ITCI's undertaking by making repayments to its creditors to the tune of Rs. 4 crores and by making investment of Rs. 0.7 crore on maintenance, replacement of machinery etc. thereby enabling the undertaking to earn a cash profit of Rs. 3.9 crores could not be regarded as a factor showing the financial viability of ITCI prior to 1.11.1977 as was wrongly done by the Specified Authority and the Central Government. All this shows that the impugned conclusion was the result of an entirely wrong approach being adopted as regards the true concept of financial non-viability. On the other hand, at the material time namely, immediately before its amalgamation with M & M which took place on 1.11.1977 ITCI, having regard to its financial position, was commercially insolvant and that all the three parameters of profitability, liquidity and solvency, by reference to which its sickness (financial non-viability) is required to be judged, showed negative figures. Admittedly, during the two years 1974-75 and 1976-77 it had Made huge losses to the tune of Rs. 253 lakhs and Rs. 433 lakhs respectively and the nominal profits of Rs. 70 lakhs (or for that matter even Rs. 208 lakhs) earned by it in 1975-76 did not convert it into a profitable concern as on 31st of October, 1977.. (v) As regards solvency, admittedly, cheques and bill issued by ITCI had bounced,

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suppliers had stopped supply of raw materials financial institutions had stopped further monetary help and legal actions including winding up proceedings had been threatened. Further, the excess of liabilities (including loans) over the assets (share capital plus free reserves) was to the tune of Rs. 61 lakhs and odd as on 31st October, 1977 and as such the entire share capital plus free reserves had been eroded (and not merely 50% as per the test of Government of India) and the 'current ratio was extremely strained at 40:60 (being less than 1:1 as required by the test adopted by commercial Banks). In other words according to the tests or criteria adopted by men of business or commerce and financial institutions ITCI, immediately before its amalgamation with M & M, was clearly and blatantly financially non-viable. In spite of such situation that obtained and which was brought to the notice of the Specified Authority and the Central Government an almost perverse conclusion was arrived at; at any rate it was a conclusion which no reasonable body of persons, properly informed, could come to; (vi) The so called statement at para 14 of ITCI's company petition No. 789177 could not be given any significance at all; (vii) Admittedly the poor performance and losses incurred by ITCI were due to factors such as mechanics of price control and the sluggishness in the market over which it had no control: (viii) The share exchange ratio fixed under the Amalgamation scheme does not passes the negative, effect, but it would only be a neutral factor. After all several aspects and considerations weigh with the share-holders of the companies concerned in the amalgamation while approving the proposed share exchange ratio and since in the instant case all the concerned share holders of M & M including the public financial institutions had, with full knowledge of all the facts including the commercially insolvent position of ITCI, agreed to the ratio and which was not disturbed by the High Court in spite of objection being raised by the Regional Director Company Law Board, it cannot be said that tile exchange ratio so fixed possesses probative value of negative character; and (ix) According to well settled principles and practice of Commercial Accounting, the concept of "Net Worth" of ITCI as per the books of account was negative on the date of amalgamation and therefore when the Specified Authority and the Central Government took into consideration the market value of the assets of the ITCI as on the date of amalgamation for coming to the conclusion that the company was a viable unit, they were clearly influenced by irrelevant and extraneous material vitiating the impugned conclusion.

[792 G-H, 793 A-H, 794 A-H 79; A-H, 796 A-E]

3:2. That the amalgamation was in public interest is clear. There is a specific averments made to it in the writ petition itself. But that apart, the admitted facts are (a) ITCI was engaged in the manufacture of agricultural tractors which have been declared as an essential commodity under the Essential Commodities Act, 1955, (b) the production had declined to 2000 tractors as against its licensed and installed capacity of 10,000 tractors during the period 1.10.76 to 31.10.1977, (c) because of its adverse financial position it was facing the prospect of immediate closure entailing social costs in terms of loss of production of an essential commodity and loss of employment to over 2000 workers employed by it, (d) the closure of ITCI would have rendered idle a large investment in productive capacity which would not have been in the national interest, and (e) the amalgamation forestalled the necessity for the State Government to take over that unit and conduct it as a relief undertaking,

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thereby avoiding a heavy burden falling on the public exchequer. In Act M & M had taken adequate steps for the revival of ITCI and had carried on the same business without any modification or reorganisation during the relevant previous year. [796 H, 797 A-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3685 of 1982.

Appeal by Special Leave from the judgment and order dated the 7th May, 1982 of the Delhi High Court in Civil Writ Petition No. 99 of 1981.

S. T. Desai, Miss A. Subhashini and M. N. Tandon, for the Appellant.

F. S. Nariman, F. H. J. Talya Khan, R. K. Kulkarni, Ravinder Narain, J. B. Dadachanji, O. C. Mathur, D. N. Mishra and Miss Rainuwalia, for the Respondents.

The Judgment of the Court was delivered by TULZAPURKAR, J. This appeal by special leave raises the question whether on the facts and in the circumstances of the case the recommendation of a statutory body (specified Authority under sec. 72 A of the Income-tax Act, 1961) and the Central Government's decision based on it-a matter of subjective satisfaction-were open to judicial review and whether the High Court was justified in interfering with the same ?

The facts giving rise to the aforesaid question may be stated: Mahindra and Mahindra Limited (for short 'M & M') was incorporated under the Indian Companies Act 1913 and is thus duly registered under the Companies Act, 1956; its share capital has been widely held, the principal shareholders being the public financial institutions to the extent of about 40 per cent of its equity share capital; it is engaged in the manufacture inter alia of jeeps and other motor vehicles on a large scale.

M/s. Inter-national Tractor Company of India Limited (for short 'ITCI') was incorporated on April 15, 1963 under the Companies Act, 1956 as a public company and was carrying on the business of manufacture and sale of agricultural tractors and implements which are an essential commodity under the Essential Commodities Act, 1955. Though it commenced production within three years of its incorporation, ITCI incurred a loss of Rs. 253 lacs in the year 1974-75; with the financial assistance received from M & M, ITCI was able to improve its operating picture and its working results for the year 1975- 76 showed a profit of Rs. 70 lacs (Rs. 208 lacs according to the Central Government but that was without providing for depreciation to the extent-of Rs. 138 lacs) but again in the financial year 1976-77 (ending October 31, 1977) for various reasons its working was not satisfactory and it made a huge loss to the tune of Rs. 433 lacs. Cheques issued by ITCI bounced, suppliers had stopped the supplies of raw materials to it and financial institutions were not willing to help it any more. During the period of 13 months, (1.10.1976 to 31.10.1977) its production had declined to 2004 tractor units as against the licensed and installed capacity of 10,000 tractor units and on a turn-over of Rs. 9. 94 crores it had incurred an operational loss of Rs. 4.33 crores and it had received several notices threatening legal actions including winding up proceedings. At at 31st of October 1977 the accumulated losses were to the tune of Rs. 555 lacs and the excess of liabilities (including loans) over the assets (share capital Rs. 306.99 lacs plus free reserves Rs. 184 95 lacs=Rs. 491.94 lacs) was to the tune of Rs. 63 lacs and odd In short as at the close of the financial year ending 31 st of October, 1977 ITCI was commercially insolvent.

In October 1976 a proposal for amalgamating ITCI with M&M was considered by the Boards of Directors of the two companies since it was felt that it would be advantageous to both if their operations could be rationalized for better and more efficient utilisation of their existing capacities and facilities and by two resolutions dated 4.10.1976 passed by the Boards of Directors of both the Companies the proposal was approved and a scheme of Amalgamation effective from 1.11.1977 was prepared and finalised. As both the companies were 'undertakings' to which Part. A of Chapter III of Monopolies and Restrictive Trade Practices Act, 1969 (for short MRTP Act) was applicable, M & M made an application on October 30, 1976 under sec. 23 (2) of the Act seeking approval of the Central Government to the Scheme of Amalgamation. At the hearing given by the Central Government under the MRTP Act it was brought to the notice of the Central Government-and this is so mentioned in the Approval order-that ITCI was not doing well for want of sufficient working Capital, that production by ITCI had declined and if that state of affairs continued for another two to three years it would lead to the closure of its entire undertaking and consequent unemployment of about 2, 400 employees. By its order dated August 10, 1977 passed under sec. 23 (2) read with sec. 54 of MRTP Act and communicated to M&M and ITCI, the Central Government accorded its approval to the amalgamation as per the scheme subject to the condition that the exchange ratio of the shares proposed in the scheme was approved by 3/4th majority of the equity share-holders of both the companies. It was however, specifically stated that this order was not to be construed as conveying any approval of the Central Government that may be required under any other law.

Thereafter ITCI and M&M preferred Company Petitions (No. 789 of 1977 by ITCI and No. 2 of 1978 by M&M) in the Bombay High Court under secs. 391 and 394 of the Companies Act, 1956 seeking the Court's sanction to the scheme of Amalgamation; and during the pendency of the Petitions pursuant to the interim directions given by the learned Company judge meetings of the shareholders of both the companies were held at which the scheme of amalgamation was approved by them and ultimately by its order dated March 9, 1978 the Bombay High Court sanctioned the Scheme of Amalgamation effective from 1.11.1977. It needs to be stated that at the hearing before the Company Judge the Regional Director, Company Law Board (representing the Central Government to whom E notice is statutarily required to be issued and was issued) appearing through Counsel raised a specific contention that the exchange ratio of the shares fixed under the scheme (two shares of M&M in exchange for three shares of ITCI) was not fair to the share-holders of M&M considering the ITCI's very bad financial position; the Company Judge took this contention into account but after considering the fact that all concerned parties, namely, the share-holders including the public financial institutions had considered the ratio so fixed as fair and equitable decided not to disturb the said ratio. Subsequently, on receipt of the requisite report under the second proviso to sec. 394 (1) of the Companies Act, 1956 from the official Liquidator based on the findings of an independent firm of chartered accountants (M/s. Batliboi & Purohit) to the effect that the affairs of ITCI had not been conducted in a manner prejudicial to the interests of the members or to public interest, the learned Company judge passed an order under sec 394 (1) (v) for the dissolution of ITCI without winding up. Upon amalgamation the undertaking of ITCI became a division of M&M known as International Tractor Division which is being continued without modification or re- organization as a separate division and it is carrying on the same business as ITCI carried on prior to amalgamation, namely manufacture and sale of agricultural tractors and allied implements.

Section 72A of the Income tax Act, 1961 (herein-after referred to as the Act) was inserted therein by Finance Act No. 2 of 1977 with effect from 1.4.1978. This section enables an amalgamated company to carry forward and set off accumulated loss and unabsorbed depreciation allowance in certain cases of amalgamation on fulfilment of the conditions mentioned in clauses (a), (b) and (c) of sub-sec.

(1) and the Central Government's satisfaction in respect thereof, which satisfaction is to be based on the recommendation of the specified Authority referred to in the section. The conditions required to be fulfilled are: (a) that the amalgamating company was, immediately before its amalgamation, financially non-viable by reason of its liabilities, losses and other relevant factors, (b) that the amalgamation was in the public interest and (c) such other conditions as Central Government may, by notification in the official Gazette, specify, to ensure that the benefit under this section is restricted to amalgamation which would facilitate the rehabilitation or revival of the business of amalgamating company. In other words, sub-sec. (1) of sec.

72A provides that if the Central Government, on the recommendation of the specified Authority, is satisfied that the aforesaid conditions are fulfilled in a given case of the amalgamation then the Central Government has to make a declaration to that effect and the consequence of such declaration is that notwithstanding anything contained in any other provision of the Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company is deemed. to be the loss or as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected. An additional statutory function of the Specified Authority under sub-sec. (2) (ii) of sec. 72A is to issue a certificate to the effect that adequate steps have been taken by the amalgamated company for the rehabilitation or revival of the business of the amalgamating company, which certificate is required to be furnished along with its return of the income for the said assessment year by the amalgamating company for claiming the benefit of the section.

On April 27, 1978, M&M made an application in the approved form under sec. 72A of the Act for the grant of relief of the requisite declaration from the Central Government which was received by the Central Government on May 3 of 1978. As the amalgamation had been effected from November 1, 1977 M&M filed the said application so as to enable the authorities to investigate the requisite factual pre-conditions for the grant of the relief and to arrive at a decision in order to enable it to file its return of income for the assessment year 1979-80 (the relevant previous year being 1.11.1977 to 31.10.1978 during which the amalgamation was effected) along with the requisite certificate of the Specified Authority before the due date June 30, 1979. Later M&M also furnished the latest audited financial position of ITCI together with other particulars as desired. By a notification No. S.O. 710 (E) dated 11.10.77 the Central Government constituted and notified the Specified Authority consisting of respondent Nos. 6 to 10 under s. 72A of the Act and at the suggestion of the Specified Authority the Central Government also set up a separate screening Committee of experts to investigate as to whether the requisite statutory conditions were present or not. It may be stated that admittedly no other condition had been specified by the Central Government under cl. (c) of sub-sec. (1) of s. 72A and the grant of the relief of declaration depended only on the fulfilment of the two conditions mentioned in cls. (a) and (b) of sub-s. (1). After considering the particulars furnished in the application made by M & M, further correspondence and evidence produced in that behalf and after hearing M & M the Specified Authority by its order dated May/June 2, 1980 recommended that the amalgamation of ITCI with M&M did not satisfy the condition specified in cl. (a); in other words, it opined that amalgamating company was financially viable and not non-viable immediately before its amalgamation with M & M. The Central Government, adopting the reasons recorded by the specified Authority for its opinion, accepted the recommendation made by it and passed an order on December 1, 1980 whereby it refused to issue the declaration under s. 72A of the Act to M & M. The aforesaid recommendation of the Specified Authority and the Central Government's decision based thereon were challenged by M & M by filing a writ petition in the Delhi High Court, the challenge was principally met by raising a contention that the Central Government had refused the relief to M & M on the basis of its subjective decision about the non-fulfilment of the condition specified in cl.

(a) of s. 72A (1) and for relevant and cogent reasons and hence the decision could not be reviewed or interfered with by the Court and with a view to show that both the Specified Authority and the Central Government had considered all the relevant factors and that M & M had been fairly treated in the matter great reliance was placed on the minutes of the several meetings held by the Specified Authority which were produced before the Court. On a consideration of the entire material placed before it as well as the rival submissions made by counsel for the parties the High Court came to the conclusion that the view taken by the Specified Authority and the Central Government in the impugned orders was just not possible to be formed and that no reasonable authority much less the Specified Authority or an expert body of the Central Government could have reasonably come to the conclusion that ITCI was, immediately before its amalgamation with M & M, financially viable and, therefore, the orders were liable to be struck down. The High Court further found from the proceedings of the Specified Authority that it had accepted the position that the amalgamation was in the public interest and that the Central Government had also declined the relief to M & M only on the ground that the condition in cl. (a) had not been fulfilled. In the circumstances the High Court quashed the impugned recommendation dated May/June 2, 1980 of the Specified Authority as well as the Central Government's decision dated December 1, 1980 and directed them both to deal with M & M's application and to dispose it of within a period of six months from the date of its order in accordance with the provisions of s. 72A (1) of the Act in light of its judgment. The High Court further directed the Specified Authority to consider and issue the requisite statutory certificate under s. 72A (2) (ii) of the Act within one month of the declaration made by the Central Government under s. 72A (1) of the Act; the High Court gave the further direction that the statutory certificate when it will be furnished by M & M to the concerned Income Tax officer shall be deemed to have been filed by M & M with its Return of Income for the concerned assessment year. The appellants have challenged the High Court's view and its directions in this appeal.

Counsel for the appellants mainly raised two contentions before us in support of the appeal. In the first place relying upon the words "... and the Central Government, on the recommendation of the Specified Authority, is satisfied that the following conditions are fulfilled" occurring in sec. 72A (1) of the Act, counsel contended that the issuance of the declaration under the section by the Central Government depended upon its subjective satisfaction about the fulfilment or otherwise of the conditions mentioned therein and if such subjective satisfaction of the Central Government was based on relevant and cogent materials on record its decision was not open to judicial review and could not be interfered with by any Court. Elaborating the contention counsel pointed out that in this case the Central Government's decision was based on the recommendation of a statutory body namely, the Specified Authority which in its turn had on relevant and cogent materials opined that the condition specified in cl. (a) of sub-sec. (1) was not satisfied in the case of the instant amalgamation. It was further pointed out that both the Specified Authority as well as the Central had inter alia relied upon two conspicuous factors that emerged from the materials on record, (a) the exchange ratio of shares fixed under the Scheme of Amalgamation (two shares of M & M in exchange for three shares of ITCI) and (b) the admission on the part of ITCI about its sound financial position contained in para 14 of its Company Petition No. 789 of 1977, for coming to the conclusion that the amalgamating company (ITCI) was financially viable immediately before its amalgamation with M & M and since the opinion of the statutory body as well as the decision of the Central Government were based on the aforesaid relevant and cogent materials the High Court was in error in interfering with the same. Secondly, Counsel contended that neither the Specified Authority in its order of recommendation dated May/June 2, 1980 nor the Central Government in its order dated December 1, 1980 had indicated that the second condition mentioned in cl. (b) of sub-sec. (1) (about the amalgamation being in public interest) had been fulfilled nor was it clear on the record that the relief sought by M&M was denied only on the ground of non-fulfilment of the condition specified in cl. (a) of sub-sec. (1) and therefore the High Court was wrong in presuming that the condition in cl. (b) had been fulfilled in the instant case and as such if at all the matter was to be remanded for reconsideration this aspect ought to have been left open for being considered by the Central Government. In these circumstances counsel urged that the several directions given by the High Court were improper and its entire decision was liable to be set aside.

On the other hand counsel for the contesting respondent (M & M Ltd.) tried to support the judgment of the High Court on more than one ground; according to him even assuming, without admitting, that the impugned decision of the Central Government was based on the aforesaid two factors said to be relevant and cogent (which is disputed), the said decision, being a result of subjective satisfaction, would be liable to be quashed or set aside if it could be shown that the same was arrived at by taking into consideration extraneous or irrelevant materials, for, it would not be known how far and to what extent such vitiating materials had influenced the mind of the Central Government and in the instant case some of the other factors admittedly taken into consideration for arriving at the decision were extraneous and irrelevant. Counsel urged that apart from the aspect that the conclusion arrived at by the Specified Authority and the Central Government about the non-fulfilment of the condition specified in cl. (a) of sub-sec. (1) was such that no reasonable body of persons, properly informed, would come to, the same was also vitiated by (a) the adoption of a wrong approach to the true concept of "financial non viability", and (b) having taken into account irrelevant and extraneous matters. Counsel further urged that the proceedings before the Specified Authority clearly showed that it was fully satisfied that the condition mentioned in cl. (b) of sub-sec. (1) (about the amalgamation being in public interest) was fulfilled and if the Central Government had disagreed with that opinion of the Specified Authority its refusal of relief would have been based on the non fulfilment of both the conditions instead of one and therefore the inference was irresistable that both the Specified Authority as well as the Central Government had refused relief to M & M only on the ground that the condition specified in cl. (a) had not been fulfilled and if that conclusion was vitiated on any of the aforesaid grounds the High Court was right in striking down the impugned orders and remanding the matter to Central Government for doing the needful in the light of its judgment; and the High Court was also right in issuing the directions which it did.

By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled and it would be redundant to recapitulate the whole catena of decisions of this Court commencing from Barium Chemicals Ltd. v. Company Law Board(1) case on the point. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. This Court in one of its later decisions in Smt. Shalini Soni etc. v. Union of India and Ors. etc.(2) has observed thus: "It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote." Suffice it to say that the following passage appearing at pages 285-86 in Prof. de Smith's treatise 'Judicial Review of Administrative Action' (4th Edn.) succinctly summarises the several principles formulated by the Courts in that behalf thus:

> "The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case; In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, is it possible to differentiate with precision the grounds of invalidity contained within each category."

As stated earlier the issuance of the requisite declaration in R favour of M & M by the Central Government under sec. 72A depended in the instant case on the fulfilment of only two conditions mentioned in sub-sec. (1) namely, (a) that ITCI was not, immediately before its amalgamation with M & M, financially viable and

(b) that the amalgamation was in the public interest. Both the Specified Authority as well as the Central Government, on the materials before them, came to conclusion that ITCI was, immediately before its amalgamation with M & M, financially viable and ' as such the first condition mentioned in cl. (a) of sub-sec. (1) had not been fulfilled. In its order of negative recommendation dated May/June 2, 1980 the Specified Authority has set out six reasons that led it to form the aforesaid conclusion and it is undisputed that substantially the same six reasons have been given by the Central Government, though couched in better language and compressed in four paragraphs of its order dated December 1, 1980 while upholding the recommendation of the Specified Authority and declining the relief to M & M. These reasons for the impugned conclusion as appearing in the four paragraphs (paras 3 to 6) of the Central Government's order are:

> 3. It has been claimed by Messrs. M & M that having regard to the losses incurred by ITCI, the company was financially non-viable immediately before the amalgamation. The amalgamation with M&M took place with effect from 1.11.1977. ITCI suffered losses for two years i.e. 1974-75 and 1976-77 while it earned a profit of 208 lakhs in 1975-76. It cannot be denied that the large losses incurred in one year viz. 1976-77 had created certain financial difficulties for ITCI. This however, does not mean that the undertaking of ITCI was non-viable. The problem was one of temporary liquidity, all that was needed was a doze of liquidity to nurse it back to health. This is borne out by the events subsequent to amalgamation. After the repayment of liabilities, ITCI actually earned a cash profit of 3.9 crores in the year after amalgamation. There is also no reason to think that without amalgamation, the liquidity problem would have remained unsolved. In this connection, the close link between the two companies and the possibility of continued financial support even without amalgamation cannot be ignored. (same as Reasons (i), (v) and (vi) of the Specified Authority).
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> 4. The statement made by ITCI in the petition filed before the Bombay High Court as late as December, 1977 that though the Company had sustained losses, it was in a sound financial position and its assets were more than sufficient to meet the liabilities, cannot just be ignored. (same as Reason (iv) of the Specified Authority).
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> 5. It is also pertinent to mention that the reports presented by ITCI to its shareholders for the year 1975 and 1976 attributed the poor performance of the company to the mechanics of price control which did not take into account the cost increase and also sluggishness in the demand for tractors, principally because of the stringent credit restrictions imposed by the Government from time to time. Thus, admittedly the poor performance of ITCI for the years of losses are due to short term difficulties existing in the relevant years. Once the short term difficulties were got over, the company was expected to take profits. (same as Reason (ii) of the Specified Authority).
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> 6. Note has been taken that the share exchange ratio fixed under the scheme of amalgamation was two shares of M & M for every three shares of ITCI in the case of equity shares and one share of M & M for one share of ITCI in the case of preference shares. This share exchange ratio does not indicate any sickness or non-viability on the part of ITCI. Moreover, although as per accounts the net worth of ITCI on the date of amalgamation was negative, if the market value of the assets is taken into

account, the assets exceeded the liabilities by 790 lakhs.

This shows that the company was a viable unit. (same as Reason (iii) of the Specified Authority).

Before undertaking a scrutiny of these reasons for ultimately deciding whether the impugned conclusion of the Specified Authority and the Central Government is liable to be interfered with or not it will be useful to indicate briefly the object with which this new provision of s. 72A was introduced in the Act as it will throw light on what was the mischief or situation that was intended to be remedied by its introduction as also the true concept of financial Don- viability. From the budget speech of the Finance Minister, the Notes on Clauses of the Finance Bill (No. 2) of 1977 and the Memorandum explaining to provisions of the said Bill it will appear clear that sickness among industrial undertaking was regarded as a matter of grave national concern inasmuch as closure of any sizable manufacturing unit in any industry entailed social costs in terms of loss of production and unemployment as also waste of valuable capital assets, and experience had shown that taking over of such sick units by Government was not always a satisfactory or economical solution; it was felt that a more effective method would be to facilitate amalgamation of sick industrial units with sound ones by providing incentives and removing impediments in the way of such amalgamation which would not merely relieve the Government of uneconomical burden of taking over and running sick units but save the Government from social costs in terms of loss of production and unemployment. With such objective in view, in order to facilitate the merger of sick industrial units with sound ones and as and by way of offering an incentive in that behalf s. 72A was introduced in the Act where under by a deeming fiction the accumulated loss or unabsorbed depreciation of the amalgamating company is treated to be a loss or, as the case may be, allowance for depreciation of the amalgamated company in the previous year in which the amalgamation was effected; but the amalgamated company, although a successor in interest, would be entitled to carry forward and set-off the accumulated loss and unabsorbed depreciation of the amalgamating company only where the amalgamating company was not, immediately before such amalgamation, financially viable and the amalgamation was in public interest. The expression "financial non-viability" had not been defined in the Act but the Finance Minister's speech, the notes on Clauses of the Bill and the Memorandum explaining the provisions thereof make it clear that the financial non-viability of an undertaking has been equated with the 'sickness' of such undertaking and obviously in the context of its revival by a sound undertaking the sickness must be of a temporary character and not any basic or permanent sickness. An undertaking which is basically or potentially non-viable will ordinarily be incapable of revival and would face a closure; in other words, the financial non-viability spoken of by the section must refer to sickness brought about by temporary adverse financial circumstances that disables the unit to stand and work on its own. This is also made clear by the provision contained in cl. (a) of sub-s. (1) which states that the financial non-viability of the amalgamating company has to be judged by reference to "its liabilities, losses and other relevant factors". Moreover, since the expression is occurring in a taxing statute in the context of amalgamation of companies it will have to be understood in its popular sense, that is to say, the sense or meaning that is attributed to it by men of business, trade or commerce and by persons or institutions interested in or dealing with companies. In this behalf counsel for the contesting respondent invited our attention to the several criteria adopted by various bodies like the Government of India, financial institutions and commercial banks on what could be regarded as a sick unit. For instance, while announcing its scheme of merging sick units with healthy ones (Finance Act, 1977) Government of India had classified "those Units where the losses, past and present, have eroded 50% of capital and reserves as sick". According to the Reserve Bank of India, commercial banks consider a unit to be sick "if it has incurred cash loss for one year and in their judgment is likely to continue to incur cash losses for the current years as well as the following year and which has an imbalance in its financial structure, such as current ratio of less than 1:1 and worsening, debt-equity ratio (total outside liabilities to net worth)". Counsel pointed out that while the commercial banks follow these criteria for banking purposes, the State Bank of India defines a sick unit as one "which fails to generate internal surplus on a regular basis and depends for its survival on the constant infusion of funds from outside". Counsel further pointed out that the National Council of Applied Economic Research (for short 'NCAER.) an approved research association, having senior Government officials on its governing body and which has a large number of research projects to its credit, had undertaken a study of 'industrial sickness' in 1979 and in its Report, after noting the aforesaid criteria adopted by various bodies for deciding whether a unit could be regarded as sick it has expressed its own conclusion on the concept of financial viability thus:

> "Financial viability: Sickness is "defined in terms of financial viability since this is the only known indicator of he health of a unit.
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> Financial viability consists of three interdependent elements, of equal emphasis and weight, viz. profitability, liquidity and solvency which are represented by cash profit or loss, net working capital and net worth respectively. Viewed in another way, solvency and liquidity are the two vital organs of financial viability and profitability its life blood."

NCAER has further observed that where all the three parameters-profitability, liquidity and solvency show positive figures the unit's financial viability will be sound; where one of the three parameters shows a negative figure the unit could be regarded as 'tending towards sickness'; when two of the three parameters show negative figures, it would be a case of 'incipient sickness' and when all the three parameters show negative figures the unit is 'sick'. This being the true concept of financial non-viability as understood by men of business and commerce and by financial institutions it is by reference to these several tests or criteria adopted by them that the question has to be decided whether a particular undertaking is financially non-viable at a given Point of time.

lt may be stated that by a Press-Note issued by the Government (Ministry of Industry) on 23rd February, 1981 certain guidelines for approval of amalgamation under s. 72A in regard to the fulfilment of the condition specified in cl. (a) of sub-s. (1) were laid down but for the purpose of deciding the issue raised in this appeal those guide-lines would not be of any avail for the simple reason that those did not exist when the Specified Authority as well as the Central Government arrived at its impugned conclusion. Suffice it to say that the factors which these guide-lines lay down as being required to be taken into account for deciding the question of non-viability of the amalgamating company are more or less similar to and in accord with aforesaid tests or criteria adopted by men of business, trade or commerce and financial institutions and Counsel for the contesting respondent claimed that those guide-lines had been more than fulfilled in the instant amalgamation. However, for the purpose of this appeal we would rather ignore the said guidelines contained in the Press Note dated 23rd February, 1981 and decide the question whether the impugned conclusion of the Specified Authority as well as the Central Government is liable to be interfered with or not by having regard to the true concept of financial non- viability as discussed above and applying the several tests or criteria mentioned in that behalf earlier.

Turning now to the reasons that prompted the Specified Authority and the Central Government to come to the impugned conclusion, a careful and close scrutiny of paragraph 3 of the Central Government's order, comprising three aspects which constitute the substratum of the reasoning behind the conclusion, will show that both had misdirected themselves in law by adopting a wrong approach and proceeding on a wrong assumption about the possibility of financial assistance from M & M which did not exist either in fact or in law. That the undertaking of ITCI had incurred huge losses in the relevant years was admitted but that has been explained away by both by observing that 'it merely created a temporary problem of liquidity and did not mean that the undertaking was basically nonviable' (vide reason (v) of the Specified Authority)- clearly a wrong approach, for the section does not require the undertaking to be basically non-viable but merely financially non-viable which, as stated earlier, must of necessity be of a temporary character. Further, the 'close link' between the two companies referred to by both, divorced from financial assistance, would be an irrelevant factor and on the prospect or possibility of financial assistance from M & M a wrong assumption in fact and law had been made by the Specified Authority and the Central Government. Indisputably at the relevant time having regard to the provisions of s. 370 of the Companies Act, 1956 the maximum limit up to which M & M could lend and advance was Rs. 120 lakhs and in view of the advances already made to various parties to the tune of Rs. 70 lakhs it could have advanced only Rs. 50 lakhs to ITCI as against its requirement of over ten times that amount namely, Rs. 5 crores and odd, moreover any financial help in excess of Rs. 50 lakhs would have visited M & M and its directors or officers with penal consequences under s. 371 of the Companies Act. These legal provisions were completely ignored and both the Specified Authority and the Central Government observed that the problem of temporary liquidity faced by ITCI could be solved by receiving a doze of liquidity from M & M. In fact, in the circumstances further financial assistance worth the name could be rendered by M & M to ITCI only after amalgamation. It is thus clear that both of the Specified Authority as well as the Central Government had come to the impugned conclusion by wrongly equating financial non-viability with basic non- viability and in complete disregard of the provisions of ss. 370 and 371 of the Companies Act. Further the fact that during the year 1977-78 following the amalgamation M & M took adequate steps for the revival of ITCI's undertaking by making repayments to its creditors to the tune of Rs. 4 crores and by making investment of Rs. 0.7 crore on maintenance, replacement of machinery etc. thereby enabling the undertaking to earn a cash profit of Rs. 3.9 crores could not be regarded as a factor showing the financial viability of ITCI prior to 1.11.1977 as was wrongly done by the Specified Authority and the Central Government. All this shows that the impugned conclusion was the result of an entirely wrong approach being adopted as regards the true concept of financial non-viability. On the other hand, while stating the facts in the earlier part of our judgment we have pointed out that at the material time namely, immediately before its amalgamation with M & M which took place on 1.11.1977 ITCI, having regard to its financial position, was commercially insolvent and that all the three parameters of profitability, liquidity and solvency, by reference to which its sickness (financial non-viability) is required to be judged, showed negative figures. Admittedly, during the two years 1974-75 1976-77 it had made huge losses to the tune of Rs. 253 lakhs and Rs. 433 lakhs respectively and the nominal profits of Rs. 70 lakhs (or for that matter even Rs. 208 lakhs) earned by it in 1975-76 did not convert it into a profitable concern as on 31st of October, 1977. As regards the liquidity even the Specified Authority and the Central Government have observed that the large losses incurred in the year 1976-77 had made ITCI face the problem of temporary liquidity. As regards solvency, admittedly, cheques and bills issued by ITCI had bounced, suppliers had stopped supply of raw materials, financial institutions had stopped further monetary help and legal actions including winding up proceedings had been threatened. Further, as stated earlier, the excess of liabilities (including, loans) over the assets (share capital plus free reserves) was to the tune of Rs. 63 lakhs and odd as on 31st October, 1977 and as such the entire share capital plus free reserves had been eroded (and not merely 50% as per the test of Government of India); and the 'current ratio' was extremely strained at 40: 60 (being less then 1:1 as required by the test adopted by commercial banks). Tn other words according to the tests or criteria adopted by men of businesses or commerce and financial institutions ITIC, immediately before its amalgamation with M & M, was clearly and blatantly financially non-viable. In spite of such situation that obtained and which was brought to the notice of the Specified Authority and the Central Government it is surprising how the impugned conclusion was reached by them and the same appears to us to be almost perverse; at any rate it was a conclusion which no reasonable body of persons, properly informed, could come to.

In paragraph 4 of the Central Government's order reliance has been placed on the so called admission on the part of ITCI about its sound financial position contained in para 14 of its Company Petition No. 789/1977. The relevant statement runs thus: "Although the petitioner company has sustained a loss it is in a sound financial position and its assets are more than sufficient to meet its liabilities"

> Torn out of context it might support the suggested inference but if.
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> paragraph 14 is read as a whole it will appear clear that the said statement was based on the latest audited accounts for the year ending 30th September, 1976 referred to in the same paragraph and as such it referred to the company's position as on 30th September, 1976 and not as on 31st October, 1977 (i.e. immediately prior to the amalgamation). Admittedly the balance-sheet as at 31st October, 1977 was ready only in May, 1978 and was furnished to the Specified Authority in July, 1978. Obviously, therefore, the so-called admission was referable to the position as on 30th September, 1976 and it cannot be forgotten that at the close of that year the working results of ITCI had shown a profit of Rs. 70 lakhs, though in the following year it again made a huge loss. Further, all these facts were clearly stated in para 6 of M & M's petition seeking Court's sanction for amalgamation and averments in both the petitions, (which were heard together by the High Court) will have to be read together. So read the so-called admission on the part of the ITCI could not be given any significance as has been done by the Specified Authority and the Central Government. - D Paragraph S of the Central Government's order merely refers to the poor performance of the lTCI during the relevant years and points out that the same

> was due to factors such as the mechanics of price control and the sluggishness in the demand for tractors over which the ITCI had no control but these factors were no pointers to - the financial position of the ITCI one way or the other. If anything they showed that for the poor performance and losses incurred by ITCI which were admittedly due to short term difficulties, no blame could attach to the management, Lastly paragraph 6 of the Central Governments order mentions to factors that were taken into account for coming to the impugned conclusion (a) share exchange ratio fixed under the amalgamation scheme and (b) net worth of ITCI on the date of amalgamation. The former, according to the Specified Authority and the Central Government negatively showed that ITCI was not sick or non-viable and as regards the latter it is stated that "although as per accounts the net worth of ITCI on the date of amalgamation was negative, if the market worth of the assets is taken into account, the assets exceeded the liabilities by 790 lakhs and this shows that the company was a viable unit". In our view the former does not possess the negative effect as suggested but would be a neutral factor.

After all several aspects and considerations weigh with the share-

holders of the companies concerned in the amalgamation while approving the proposed share exchange ratio and since in the instant case all the concerned share-holders of M & M including the public financial institutions had, with full knowledge of all the facts including the commercially insolvent position of ITCI, agreed to the ratio and which was not disturbed by the High Court in spite of objection being raised by the Regional Director, Company Law Board, it cannot be said that the exchange ratio so fixed possesses probative value of negative character as suggested. As regards the latter, according to well-settled principles and practice of commercial accountancy (vide Cost and Management Accounting by J. Batty) the concept of 'Net Worth' always denotes the excess of the book value of all assets over liabilities and market value of the assets is never taken into consideration in fact the market value of assets which gives the 'current worth' becomes a relevant factor when in liquidation the question has to be considered whether the company possesses assets which would be sufficient to meet all its creditors or not. Admittedly the 'Net worth' of ITCI as per the books of account was negative on the date of amalgamation and therefore when the Specified Authority and the Central Government took into consideration the market value of the assets of the ITCI as on the date of amalgamation for Coming to the conclusion that the company was a viable unit, they were clearly influenced by irrelevant and extraneous material vitiating the impugned conclusion.

Having regard to the above discussion the High Court, in our view, was right in holding that the impugned conclusion of the Specified Authority and the Central Government on the aspect of non-fulfilment of the condition specified in cl. (a) of sub-s. (1) of s. 72A being vitiated was liable to be set aside and that consequently the Recommendation of the Specified Authority and the order of the Central Government based thereon deserved to be quashed.

The second contention of counsel for the appellants need not detain us very long, for, having regard to the materials that are available on record it will be difficult to accept it. In the first place in the writ petition respondent No. 1, after referring to several facts which tended to show that the amalgamation was in the public interest, had specifically averred that the amalgamation was in the public interest as required by cl. (b) of sub-s. (1) of s. 72A (vide para 18B) and these averments were not specifically denied in the counter affidavit where it was merely stated that reference was invited to the proceedings and order of the Specified Authority. But that apart, the admitted facts are (a) ITCI was engaged in the manufacture of agricultural tractors which have been declared as an essential commodity under the essential Commodities Act, 1955, (b) the production had declined to 2000 tractors as against its licensed and installed capacity of 10,000 tractors during the period 1.10.76 to 31.10.1977,

(c) because of its adverse financial position it was facing the prospect of immediate closure entailing social costs in terms of loss of production of an essential commodity and loss of employment to over 2000 workers employed by it, (d) the closure of ITCI would have rendered idle a large investment in productive capacity which would not have been in the national interest, and (e) the amalgamation forestalled the necessity for the State Government to take over that unit and conduct it as a relief undertaking, thereby avoiding a heavy burden falling on the public exchequer. Further, the proceedings of the Specified Authority, particularly the minutes of the Third Meeting held on July 19, 1978 clearly show that it was in the light of the aforesaid factors that the Specified Authority expressed a clear opinion that it would be difficult to take the view that the test of public interest was not met and the said opinion was substantially reiterated in its Thirteenth Meeting held on July 11, 1979. Therefore, the Specified Authority made a negative recommendation in its order dated May/June 2, 1980 that the condition specified in cl. (a) of sub-s. (I) of s. 72A had not been fulfilled It is also clear that it was on the basis of such recommendation that the Central Government passed its order where the relief was refused to M & M on the ground that the condition specified in cl. (a) of sub-s. (1) had not been fulfilled and no other ground was given. In this view of the matter it is difficult to accept the contention that the High Court was wrong in presuming that the condition in cl. (b) had been fulfilled in the instant case. In our view, From the aforesaid material on record an irresistible inference arises that relief under s. 72A was refused by the Central Government to M & M only on the ground that condition specified in cl. (a) of sub-s. (1) had not been fulfilled.

It is also clear from the record that M & M had taken adequate steps for the revival of ITCI and had carried on the same business without any modification or reorganisation during the relevant previous year.

In the result we confirm the High Court's decision as also the several directions issued by it in the operative part of its order subject to one modification that the Specified Authority and the Central Government should dispose of M & M's application within three months from the date hereof (instead of six months as directed by the High Court) in light of our Judgment, Assessment proceedings for the years 1979-80 and 1980-81 will proceed only after the declaration is issued by the Central Government and the Certificate is issued by the Specified Authority. We dismiss the appeal with costs in favour of the contesting respondent, namely, M & M. S. R. Appeal dismissed,