Karnataka High Court
Vikrant Tyres Limited vs Nil on 2 September, 2003
Equivalent citations: ILR 2003 KAR 3885
Author: Kumar
Bench: N Kumar
ORDER Kumar, J.

1. This petition is filed by the petitioner for sanction of the scheme of arrangement and amalgamation between J.K. Industries Limited (hereinafter referred to as Transferee Company) and its share holders and J.K. Agri Genetics Limited (hereinafter referred to as JKAL) and its shareholders and J.K. Sugar Limited (hereinafter referred to as JKSL) and its shareholders and Vikrant Tyres Limited, the petitioner herein, and its creditors and its shareholders.

2. The petitioner is a public company limited by shares underthe Companies Act of 1956, on October 3, 1973 having its registered office at Vikrant House, No. 54, First Main Road, V.V. Mohalla, Mysore, Karnataka. The main object of the petitioner is to manufacture, construct, produce, prepare, vulcanize, retread, repair, develop, improve, sell, export, import and generally deal in tyres and tubes of every description for all types of vehicles and other business as mentioned in the memorandum of association. The authorized share capital of the petitioner is Rs. 40 crores and Rs. 5,00,000.00 14% redeemable cumulative preference shares of Rs. 100 each of the total value of Rs. 5,00,00,000/-. The issue subscribed and paid up share capital is Rs. 25,63,44, 870- of 2,56,34,487 equity shares of Rs. 10-00 each fully paid up.

3. The petitioner with its present capacity of 13.8. lakh tyresper annum remains the smallest tyre company in the country. Therefore it would be difficult for the petitioner to raise further resources to fund any further capacity expansion in view of its unfavourable debt equity ratio with the result the operations of the petitioner are becoming uncompetitive and unviable on a stand alone basis. The transferee company had acquired controlling interest in the petitioner company in 1997 by acquiring 52% of its capital. Thereafter, a major modernization scheme at substantial investment was implemented. Therefore, it was considered necessary for the petitioner to amalgamate with its holding company ie., transferee company which is one of the largest and financially stronger tyre companies in the country in the best interest of the petitioner the transferee company and their respective shareholders.

4. The transferee company is having three businessundertakings viz. Tyre undertaking, Sugar undertaking, Agri-Genetics Undertaking. The business of tyre manufacturing, agri-genetics and sugar do not have synergies of operation or technology and have different business dynamics, require different strategies for growth and different focus for alliance/consolidation. Segregation of these three separate and distinct business undertakings in different companies would enable them to grow and focus in their core areas of operation, help attract capital/strategic investors and facilitate them in becoming major market players in their respective spheres. Therefore, in the proposed scheme of arrangement and amalgamation the transferee company proposes to transfer the agrigenetics undertaking to J.K. Agri-Genetics Ltd. and to transfer the Sugar Undertaking to J.K. Sugar Limited. It is in this background the proposed amalgamation of the petitioner into J.K.I.L. is

in line with the global trends to achieve size, scale, integration and greater financial strength flexibility, in the interest of maximizing share value. The petitioner with its present capacity of 13.8 lakh tyres per annum remains the smallest tyre company in the country. It would be difficult for the petitioner to raise further resources to fund any further capacity expansion in view of its unfavourable debt equity ratio with the result the operations of the petitioner company are becoming uncompetitive and unviable on a stand alone basis. The resultant entity is likely to achieve higher long term financial returns than could be achieved by the companies individually. Therefore, the petitioner and the transferee company believe that the manufacturing and other assets, financial, managerial and technical resources, personnel, capabilities, skills, expertise and technologies of both companies be pooled in the resultant entity which lead in synergistic benefits, increased global competitive strength, cost reduction and efficiencies, productivity gains and logistic advantages thereby significantly contributing to future growth. The said amalgamation would be in the interest of the shareholders, creditors and all other share holders. The restructuring would enable focused business approach for the maximisation of benefits to all stake holders and opportunity for future consolidation. The scheme proposed is produced along with the petition as per Annexure - A1 to this petition.

5. The petitioner made an application under Section 391 of theCompanies Act in Company Application No. 58/2003 seeking permission of the court to convene a meeting of shareholders, secured creditors and unsecured creditors to consider and if thought fit to approve the scheme of arrangement and amalgamation. This Court by order dated 23rd January 2003 permitted the meeting and directed the petitioner to hold meeting on 17th March 2003 with usual directions. Accordingly, notices of the meeting together with the copy of the scheme, explanatory statement under Section 393 of the Companies Act, proxy form and attendance slip were served individually on all the equity shareholders secured creditors and unsecured creditors of the petitioner company. Notice of the meeting was also advertised in the New Indian Express, Bangalore, and Vijaya Karnataka, Bangalore, on 8th and 9th February 2003 respectively. Accordingly, the meeting was convened by the Chairman on 17th March 2003, on that day at the meeting, Karnataka State Industrial Investment and Development Corporation Limited which holds 26% of the shares in the petitioner company and which is also secured creditor and unsecured creditor of the petitioner, and Mysore Sales International Limited, a wholly-owned subsidiary of KSIIDC, which holds 0.57% of the equity shares of the petitioner company, and the Director of Industries who is also a secured creditor submitted letters to the Chairman of the meetings informing that they have sought approval of the State Government for the scheme which was awaited. Therefore, they sought for adjournment of the meeting. Accordingly, meeting was adjourned to 3rd April 2003. Even on the date of adjourned meeting the said shareholders and secured creditors renewed their request for one more adjournment which was also granted and the meeting was adjourned to 15th April 2003. In the meanwhile, a typographical error in paragraph 4.19 of the scheme was sought to be corrected and it was accordingly corrected. In the meeting held on 15th April 2003, 962 equity shareholders representing 21572348 equity shares of the face value of Rs. 10/- each voted in favour of the resolution; 20 equity shareholders representing 1150 equity shares of the face value of Rs. 10/- each voted against the resolution; the ballots of 14 equity shareholders representing 580 equity shares of the face value of Rs. 10/- each were declared invalid. Accordingly, the Chairman declared that the scheme was approved by requisite majority. Similarly, 16 secured creditors representing Rs.

20768.82 lakhs in value voted in favour of the resolution and 1 secured creditors representing Rs. 579.96 in value voted against the resolution. Accordingly, the Chairman declared the scheme as approved by requisite majority.In so far as the meeting of the unsecured creditors is concerned, 1837 unsecured creditors representing Rs. 11278.67 lakhs in value of the unsecured debt voted in favour of the resolution; none voted against the resolution. Therefore, the Chairman declared the scheme as approved by requisite majority. It is thereafter the chairman of the meeting has submitted his report reporting to the Court that the equity shareholders, secured creditors and unsecured creditors have duly approved the scheme in accordance with the provisions of Section 391(2) of the Companies Act 1956.

6. Thereafter the petitioner has filed the present petition forsanctioning of the scheme. On 17.4.2003 the petition was admitted. Notice was issued to the Official Liquidator as well as to the Regional Director of Department of Company Affairs, Chennai, and the petitioner was directed to take out publication in one edition of the Indian Express and one edition of Vijaya Karnataka, fixing the hearing date as 29.5.2003.Accordingly, notice was published in the said dailies. Notice was also served on the Official Liquidator as well as the Regional Director. The Official Liquidator has filed OLR No. 181/2003 seeking appointment of a Chartered Accountant for scrutiny of books and papers of the petitioner. Accordingly, one Sri B.S. Ravikumar Associates, Chartered Accountant was appointedby this Court on 29.5.2003.

7.The said Chartered Accountant has filed detailed report stating that the petitioner has maintained books of account and papers as defined in the Companies Act and that the affairs of the petitioner has been conducted in a manner not prejudicial to the interest of its members or public.

8. The registrar of Companies has filed an affidavit stating thatthe ratio recommended by the valuers ie., 2:5 viz 2 equity shares of the transferee company for every 5 equity shares of the transferor company appears to be fair. But the scheme contemplates the issue of shares in the ratio 9:20 ie., 9 equity shares of the transferee company for every 20 equity shares of the transferor company which is slightly higher than the exchange ratio recommended by the valuers and which works out to 2. 25:5 as against 2:5. It is also stated that Clause 9.27(d) of the scheme which provides for adding of the authorised capital of the transferor company with the authorised capital of the transferee company without paying any fees etc. is not tenable. Upon amalgamation, the transferee company has to comply with the provisions of Section 97 of the Companies Act, 1956 and file Form No. 5 with the Registrar of Companies, West Bengal with registration fees, for increase of its authorised capital. However, it is stated that Clause 9.27 (e) of the scheme also provides for enhancement of limitprescribed under Section 372A(1) of the Companies Act, relating to inter-corporate loans and investments, without any further act or deed which is not tenable. Upon amalgamation the transferee company has to comply with the provisions of Section 372A(1) of the Act wherever necessary.

9. One Rawal Singh has filed his objections to the scheme ofamalgamation contending that he has filed a suit for possession and recovery of mesne profits/damages against the petitioner in O.S.N. 707/94 before the Addl. District Judge, Delhi, and the saidsuit has been decreed on 17.5.2002 for a sum of Rs. 55,08,689/-with interest at 12% p.a. As the said payment has not been made to him and

as there is no provision made in the scheme for payment of the said amount the scheme cannot be approved. It is also stated that he has not been served with notice of the meeting convened for considering the proposed scheme. However, they issued a legal notice calling upon the petitioner to furnish them with copy of the proposed scheme and which was complied with and they were also informed that the creditors meeting was adjourned to 15.4.2003. But they complain that notice of the said meeting was not served on them and therefore he could not attend the meeting held on 15.4.2003 and therefore contends, the petitioner has not sent notice to all the creditors and they have not maintained books correctly, the scheme should not be sanctioned by this Court.

10. There is yet another objection from the company by nameTechnoexport Foreign Trade Company Ltd. They contend that they are creditors within the meaning of Section 391 of the Act and has an award dated 20.3.2000 and the corrigendum dated 23.5.2000 passed by the Arbitration Court attached to the Economic Chamber of czech Republic and Agricultural Chamber of Czech Republic in their favour. The said award is binding on the petitioner for all purposes as the same has not been set aside. Though the petitioner has challenged the said award under Section 34 of the Act the same came to be dismissed by the Principal District Judge, Mysore, as not maintainable. However, petition under Section 48 is pending consideration. In the balancesheet of the petitioner company a part of the claim of the objector has been shown and inspite of the same, the petitioner has failed to issue notice to the objector with regard to the meeting of the creditors and therefore they contend, unless the decree is fully satisfied by the petitioner company, the scheme of amalgamation should not be sanctioned by this Court.

11. In reply to the aforesaid objections raised it is submitted bythe petitioner that once the shareholders of the petitioner company by requisite majority approved the scheme of amalgamation and in particular, the exchange ratio of the shares, the Registrar of Companies cannot have any grievance whatsoever on that account. In so far as other two objections raised by the Registrar of Companies is concerned that is a matter to be considered after the amalgamation is sanctioned by this Court.

12. In so far as the objections raised by the creditor, Rawel Singh is concerned, the decree which he has obtained is an exparte decree against the petitioner company against which the petitioner has preferred an appeal before the High Court of Delhi and that the said decree has been stayed on petitioner depositing a sum of Rs. 25 lakhs.In the event of the appeal being dismissed, the petitioner has to pay the balance amount and therefore on that ground he cannot object to the scheme being sanctioned. In so far as the allegation that no notice was served on him of the meetings is concerned, admittedly he has been served with the notice of the meeting dated 15.4.2003 but he did not choose to attending the said meeting. He sent his proxy to the petitioner company on 16.5.2003 at 4.30 p.m., and he was not allowed inside is their grievance which clearly shows that he did not appear in the meeting held on 15.4.2003 and therefore he cannot have any grievance whatsoever on that score.

13. In so far as objection of the Czech Republic Limited isconcerned, it is stated that the petitioner does not admit the claim of the said objector and therefore he is not a creditor of the company. The petitioner company has paid the value of the machinery supplied by the objector. However, what is now claimed is a belated claim towards the payment of amounts relating to and arising out of the

fluctuations in exchange rate which the petitioner company disputes. When they raised a dispute before the Arbitrator in Czechoslovakia the petitioner was constrained to file a suit in O.S.No. 94/97 on the file of the Civil Court at Mysore restraining them from proceeding with arbitration proceedings in RSP. No. 57/ 96 and an order of temporary injunction was granted. The arbitration proceedings were completed and during the pendency of the said proceedings an exparte award came to be passed on 8.3.2000. The petitioner filed Arbitration Case No. 4/2000 on the file of District Judge, Mysore, for setting aside the exparte award. The said case came to be dismissed on 13.6.2001 on preliminary issue. The said order was challenged before this Court in C.R.P.No. 2492/2001 which came to be allowed and the matter was remanded to the District Court. Again the District Judge has passed an order holding that the petition under Section 34 is not maintainable, but however, it is maintainable under Section 48 of the Arbitration and Consolidation Act 1996. Inspite of the restraint order passed in these proceedings he has filed Execution Petition No. 48/2002 and the learned District Judge has passed an order on 13.12.2002 holding that the objector herein is not entitled to proceed with the execution petition during the subsistence of temporary injunction order passed in R.F.A.No. 152/2000. Therefore they submit, in the event of the objector succeeding in establishing that it is a creditor, the scheme of arrangement and amalgamation provides for full protection of the interest of the creditors by virtue of Clause 9.4 of the said scheme, which clearly spells out that all the debts liabilities etc. of the petitioner company shall become the debts, liabilities etc. of the transferee company on the scheme being sanctioned. Further, the scheme provides at clause 9.11 that all the litigations, suits, appeals, proceedings, etc. initiated by or against the petitioner company shall be substituted with the name of transferee company on the scheme being sanctioned. It is also stated that the unacknowledged claim of the objector works out to 4.97% of the total amount of unsecured debts and the scheme having been approved unanimously ie., 100% of the unsecured creditors present in person or proxy having voted for the scheme which constituted 87.43% of the total unsecured creditors, the objector is bound by the approval granted to the scheme by the unsecured creditors. Therefore, it was contended that there is no substance in the said objection and it is to be over-ruled and the scheme is to be sanctioned.

14. Learned Counsel appearing for the petitioner contended,the proposed scheme has been approved by requisite majority of the shareholders, unsecured creditors and creditors of the company and all other statutory requirements having been complied with and the Official Liquidator as well as the Registrar of Companies have no objections for sanctioning of the scheme and as the affairs of the company is not conducted in the manner prejudicial to the interest of the petitioner, there is no legal impediment for sanctioning of the scheme. In so far as the claim of Rawel Singh is concerned, Rs. 25 lakhs has already been deposited in Court and the decree obtained in an exparte decree which is challenged is the appeal and the said decree has been stayed. The objector did not attend the meeting, convened for approval of the scheme and therefore he has no right to object before this Court. Even otherwise, a provision has been made in the scheme for payment of the amounts due to the creditors by this petitioner as the transferee company has taken over all the liabilities and make the payment. In so far as the objector Technoexport Foreign Trade Company is concerned, the award is in challenge before the competent forum which has been stayed and even ultimately if it is found that the petitioner company has to satisfy the said award, the scheme provides for payment of the said amount by transferee company. As such the interest of the said objector is also taken care of.

15. Per contra, learned Counsel appearing for Rawel Singhsubmitted, though Rs. 25 lakhs has already been deposited in Delhi High Court, and if proper provision is made for payment of the balance amount he would not have any objection as he is only interested in securing the amount which is lawfully due to him. If Court protects his interest to that extent by issuing appropriate direction in the order the said objector cannot have any grievance.

16. The learned Counsel appearing for Technoexport Foreign Trade Company submitted, when the company has not been issued with statutory notice as required under Section 391 and 394 of the Act, the meeting convened and the resolutions passed in the meeting are all vitiated and therefore this Court cannot take note of report submitted by the Chairman stating that the scheme of amalgamation has been approved by the requisite majority of the shareholders, creditors and unsecured creditors and therefore the petition filed is to be dismissed. Secondly, it was contended, as the amount due is under an award passed, the interest of the unsecured creditors has to be protected by this Court by issuing appropriate direction without going into the question of validity of the legal proceedings pending before competent Court.

17. From the aforesaid fact and rival contentions, the pointsthat arise for my consideration in this petition are as follows:

1) Whether non - issue of a notice under Section 391 of the Companies Act to a creditor whose debt is disputed and which is the subject mater of the legal proceedings would vitiate the scheme approved by requisite majority of the shareholders, secured creditors and unsecured creditors?

2) Whether the scheme requires to be sanctioned, with or without modification?

18. POINT NO.1 : In order to answer the aforesaid questions, it is necessary to have a look at relevant portion of Section 391 of the Act.

POWER TO COMPROMISE OR MAKE ARRANGEMENTS WITH CREDITORS AND MEMBERS:

(1) Where a compromise or arrangement is proposed:-

(a) between a company and its creditors or any class of them;

or

(b)between a company and its members or any class of them;

the Court may, on the application of the company or of any creditors or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2)If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed { under the rules made under section 643}, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditor, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or in the case of a company which is being wound up, on the liquidator and contributories of the company:

(3) {Provided that no order sanctioning any compromise orarrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251 and the like.} XXXXX XXXXXX XXXXXX XXXXX XXXXXX XXXXXX A reading of the aforesaid Section makes it very clear that a compromise or arrangement is proposed between a company and its creditors between company and its members, court may on the application of the company or of any creditor or member of the company order a meeting of the creditors or class of creditors or all the members or class of members as the case may be to be called and conduct in such manner as the Court directs. It is thereafter the company shall send a notice calling the meeting to a creditor or member and the said notice shall be accompanied by a statement setting forth the terms of the compromise or arrangement and explaining its effect. Such notice also should mention the place at which and manner in which creditors or members entitle to attend the meeting on obtaining copies of the statement aforesaid. Such notice is also issued through publication in a newspaper as ordered by the Court. It is only thereafter if in the meeting convened for the said purpose the said scheme is approved by requisite statutory majority of the shareholders and creditors of the company, the question of according sanction for such a scheme by the Court arise. If such a notice is not issued to one of the creditors what would be the legal effect of such a meeting and the resolutions passed in such a meeting is the point that arise for consideration in this case.

19. In the case of BHAGAT RAM KOHLI vs. ANGEL'S INSURANCE CO. LTD., DELHI, COMPANY CASES 1937 P. 161 while dealing with similar provision in Indian Companies Act of 1913, Section 153, the Lahore High Court held as under:

Section 153 does not make it obligatory either upon the Court or the Company to serve a notice of the creditors meeting on each and every creditor of the company and we have not been referred to any law which would invalidate a decision arrived at by the creditors and the company in the absence of any individual creditor. On the other hand, at page 364 of RUSTOMJI's COMPANY LAW a case has been cited in which it was held that where there was an inadvertent omission to advertise a scheme of arrangement under Section 153 but it was satisfactorily proved that thirty out of thirty-one shareholders of the company had received the notices, the meetings had in substance been held in the manner prescribed and the Court would not insist on further meetings being convened. Moreover as we interpret the law, the only safe-guard intended to protect the interest of the creditors is that provided in sub-section (2) of Section 153. In other words, if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may, present either in person or by proxy at the meeting agreed to any compromise or arrangement, the comprise, or arrangement, if sanctioned by the Court, is binding both on the creditor or members and the company. In the case before us, it is not urged that the majority required by sub-section (2) was not present or had not been notified and, in these circumstances, the objection raised by Mr. Bhagat Ram cannot prevail.

Therefore it is clear, if due to inadvertent omission or a bonafide mistake if a creditor of the company is not issued with notice under Section 391, it would not be fatal to the resolutions passed in such a meeting held without notice to the creditor. The whole object behind this statutory requirement of issuing a notice to the shareholder and creditor of the company is to hear all the affected persons as the scheme proposed it accepted by Court would affect right of such interested person. Therefore, before sanctioning of the scheme is sought from the Court, such a scheme is to be placed before the creditors and shareholders of the company so that they will have an opportunity to have their say in the matter. A further safe-guard is made in law by insisting that such a scheme has to be approved by three-fourth's majority, thus the interest of class of shareholders and class of creditors is sought to be protected. In order to find out whether non-issue of a notice to a particular creditor is fatal one or not , what is to be seen is what is the value of debt the company owes to him and whether if he was present in such a meeting and if he had voted against the resolution would it have made any difference. If such a meeting notice is given in advance as required under law, not only he has a right to object to the passing of the resolution but he can also mobilize requisite support among the class of creditors. Therefore, the law requires not only personal service of notice to the creditors and shareholders but also a public notice by way of paper publication. But Section - 391 does not make it obligatory either upon the Court or the company to serve a notice of the creditors meeting on each and every creditor of the company, failure of which the law does not declare that such a meeting held is invalid and any resolution passed in such a meeting is void. In the event such a shareholder or creditor is not served with personal notice, he can appear in such a meeting by virtue of the said meeting having been made known to him by public notice. But in a given case, if a creditor is not issued with a notice, but in the meeting held to consider the scheme over-whelming majority of the creditor approve the scheme it cannot be said that the meeting itself is invalid and the resolution approving the scheme becomes void. Having regard to the number of creditors of a company, it is quite possible that by over-sight or inadvertence if a meeting notice is not dispatched from the company that by itself would not vitiate the calling of the meeting and vitiate the resolution approving the scheme by over-whelming majority. But when a large percentage of creditors were not given notice of the meeting with a malafide intention and by such exclusion in the meeting held three-fourth's majority is obtained out of the creditors present and voting if such creditors were to appear before the Court and request the Court to take note of the conduct of the company, in not issuing notice to them and thus managing to secure a statutory majority, the Court would certainly take note of this conduct of the company in deciding whether Sanction is to be accorded to the scheme merely because the said scheme is approved by a statutory majority of creditors. If the Court is satisfied that non-issue of notice to the large number of creditors was intentional, malafide and such exclusion has seriously affected the interest of those creditors, the Court may decline to grant sanction for the scheme not on the ground that the meeting conducted without issue of notice to those creditors is invalid but on the ground that the Court is not satisfied about the conduct of the company as well as the fairness of the scheme which is produced before Court for sanction. Therefore, it is not possible to hold that a meeting conducted in pursuance of the permission granted by Court when there is substantial compliance of Section 391(2) of the Act is invalid or void merely on the ground that a creditor has not been served with a notice. The Court has to take note of all the attendant circumstance, the intention and conduct of the company, the intention of the creditors, terms of the scheme and then come to the conclusion whether to grant the sanction sought for or not.

20. It is also possible that a particular debt is not admitted bypetitioner company or the creditors name is not found in the books of accounts or the creditor's claim is disputed and it is subject matter of pending proceedings. In such circumstances, the basic question is whether the person complaining of want of notice, is he a creditor in the strict sense though no hard and fast rules can be laid down in this regard. These questions have to be answered having regard to the facts and circumstances of the case and the intention and object behind the statutory provisions and conduct of parties. If a debt is disputed and it is the subject matter of litigation and if total value of such debt makes no significant difference to the total amount of debt due by the company and if a substantial or overwhelming majority of creditors approve a scheme non-issue of notice to such a creditor would not effect the meeting held or resolutions approved in such meeting. In this background, it is necessary to know what is the right of the creditor even if such a notice has been issued and if he had appeared in such a meeting. In the case of MAHALAXMI COTTON MILLS LTD. 2. (AIR (37) 1950 CALCUTTA 399) which arise under the Companies Act of 1913 it has been held that for the purposes of an application for sanctioning a scheme of arrangement under Section 153, the creditors whose names appear in the books of the company should be considered as creditors and their votes should be taken into account. Creditors whose names do not appear in the books have to show to the satisfaction of the Court that they are creditors.

21. In the case of ZEE INTERACTIVE MULTIMEDIA LTD. vs SITI CABLE NETWORK LTD. , COMPANY CASES VOL.111 2002 P. 733 . It has been held as under:

Of course, in a given case the court may direct payment or direct that creditors or any class of them should be paid their dues or be sufficiently secured, before the court sanctions the scheme. But it must be remembered that a scheme under Section 391 of the Companies Act is not a tool in the hands of a creditor to recover money or to coerce the company to pay. The objecting creditor must show to the court that the scheme is mala fide or fraudulent is likely to adversely affect him or the interest of creditors or any class of them is likely to be adversely affected if the scheme is sanctioned without securing him or any or all the creditors. No argument was advanced as to how the Scheme is malafide or fraudulent or would adversely affect creditors of the transferee-Company. In the circumstances, objections raised by the creditors are rejected.

22. In the case of ASIA UDYOP P. LTD & OTHERS, 1974 COMPANY CASES VOL. 44. P.359 it has been held as under:

The payment by the transferee-company to the petitioner or the discharge by the transferee-company of the liability of the transferor company to the petitioner could not be said to be a step in aid of the completion of the process of amalgamation. To put it differently, the process of amalgamation of the company by the absorption of the transferor-company into the transferee-company and the consequential transfer of the assets and liabilities of the transferor company to that of the transferee company did not depend or could be said to be incomplete without the discharge of such liability by the transferee-company. The liability of the transferee company to pay the creditors of the transferor-company could not be a step in aid to amalgamation but would be a consequence of it.

Therefore the right of a creditor is to show to the Court the scheme is malafide and fraudulent and is likely to adversely affect him or the interest of creditors, and their intent has to be secured. But it is not a tool in the hands of a creditor to recover money or coerce the company to pay money. Payment of money to such creditors cannot be said to be a condition precedent for sanctioning of the scheme. All that has to be seen is by sanctioning of the scheme, whether the interest of the creditor is protected and the scheme provides for any reasonable mode in which provision is made for discharge of that liability and in case of amalgamation whether the transferee company is acknowledging the liability and able to discharge the said liability. When a statutory majority of creditors approve the scheme, a creditor or minority of creditors cannot be permitted to veto the majority view and block the approval of the scheme, as that is precisely the reason why the petition is filed before Court for sanction and once sanction is granted the majority view is respected, and by the order of sanction, the minority is bound by such scheme. Therefore, the non-issue of a notice to a creditor would not vitiate a meeting convened with the permission of the Court under Section 391(2) of the Act.

23. The apprehension expressed by the aforesaid two creditorsis also misconceived. In as much as Clause-9.4(a) and 9.11 fully take care of their interest, the proceedings initiated by them against the petitioner-company could be prosecuted against the transferee company as is clear from the aforesaid provisions and the decrees obtained against the petitioner-company could be enforced against the transferee-company. The transferee-company is one of the leading tyre manufacturers in the country. Commercially it is far superior to that of the transferor-company. Therefore the interest of these two creditors are in no way affected in any manner whatsoever. The decree and the award which they have obtained could be enforced against the transferee-company and the amounts ultimately held to be due under the same is recoverable from the transferee-company. In fact, apart from the aforesaid clause in the scheme, it was submitted in the course of arguments, ultimately if the creditors succeeds in the litigation pending against the petitioner-company, the transferee company has to certainly discharge the amounts due under the decree and the award in terms of Clause-9.4 and 9.11 of the scheme. In the light of this categorical statement in the scheme and the pleadings in the case, the interest of the aforesaid creditors is fully protected. Even otherwise, it is made clear, in the event those creditors ultimately succeed in the pending legal proceedings the transferee-company shall discharge the amounts due under the decree and the award. Thus the interest of the aforesaid creditors is fully secured.

24. POINT NO.2: The Supreme Court in the case of MIHEER H. MAFATLAL vs MAFATLAL INDUSTRIES LTD, 1996(87) COMPANY CASES 792, has laid down what are the conditions to be satisfied before the Court exercises its jurisdiction to accord sanction to the scheme of

amalgamation. Broadly stated, it is held that the Court has to see whether requisite statutory procedure for supporting such scheme has been complied with and that the requisite meetings as contemplated under Section 391(2) has been held, the scheme is sanctioned by requisite statutory majority, the majority decision is just and fair to the class as a whole so as to ultimately bind to the dissenting members of the class, that the proposed scheme of compromise and arrangement is not found to be violative of any provisions of law, that the members or creditors are acting bonafide and in good faith, and not coercing the minority in order to promote interests adverse to that of the latter comprising of same class whom they purport to represent as a whole, is it just, fair and reasonable from the point of view of a prudent man of business. Once these requirements are satisfied the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

25. In the background of these settled legal position, if we lookinto the scheme which is placed before Court for sanction the material on record clearly discloses that the company has complied with all the statutory requirements as contemplated under Section 391 of the Companies Act. From the appointed day, the petitioner company without any further act or deed together with all its properties, assets, rights, benefits or interest therein transfer to and vest in the transferee-company all debts, liabilities, duties and obligations, secured and unsecured, and whether or not provided in the books of accounts, whether disclosed or undisclosed in the balancesheet shall be the debts, liabilities, duties and obligations of the transferee-company and the transferee-company acknowledge all those liabilities. All the permanent employees of the petitioner as on the effective date shall become permanent employees of the transferee-company on similar terms and conditions as to remuneration and without any breach and interruption of service. Therefore, the employees of the petitioner have no opposition as their interest is taken care of to their satisfaction. All other legal proceedings initiated by or against the petitioner would be continued prosecuted or enforced against the transferee-company. On the scheme becoming effective and in consideration thereof, without any further act or deed nine equity shares of Rs. 10-00. each of the transferee-company is credited as fully paid up to the members of the transferor's company whose names appear on the register of members of the transferor-company on the record, date for every 20 fully paid up equity shares of the face value of Rs. 10-00 each held by each member of the petitioner. The exchange ratio of shares agreed is just and fair. Thus the scheme protects the interest of the share-holders, creditors and the workers of the petitioner-company. The report of the Chartered Accountant and the Official Liquidator clearly demonstrates that the affairs of the petitioner is not conducted in the manner prejudicial to the interest of the share-holders, creditors or public at large. The petitioner with its present capacity of 13.8 lakh tyres per annum remains the smallest tyre company in the country 52% of share capital is held by the transferee-company. The transferee-company is one of the largest and financially stronger tyre companies in the country. The proposed amalgamation of the petitioner into the transferee-company is in line with the global trends to achieve size, scale, integration and greater financial strength flexibility in the interest of maximising share value. The resultant entity is likely to achieve higher long term financial returns than could be achieved by the companies

individually. The restructuring would enable focused business approach for the maximisation benefits to all stake holders and opportunity for future consolidation. There is no legal impediment for sanctioning of the scheme. None of the provisions of the scheme offends any law. It is not against public interest. The Calcutta High Court has sanctioned the scheme filed by the transferee-Company. Under the circumstances, I am satisfied that the scheme of amalgamation/arrangement proposed by the petitioner-company is in the interest of the share-holders, creditors, workmen and in public. Accordingly, I hereby accord sanction to the scheme. Hence, I pass the following order.

1. The scheme of arrangement or amalgamation as per Annexure A-1 with typographical error in para - 4.19 of the said Scheme duly corrected so as to be binding upon the equity shareholders, secured creditors and unsecured creditors of the petitioner/ Amalgamating company with effect from 1st April 2002 the appointed date.

2. Upon the scheme becoming effective the petitioner-company /Amalgamating -company shall stand dissolved without being wound up by the order of this Court.

3. The petitioner-company do within thirty days of this order cause a certified copy of the order delivered to the Registrar of Companies, Karnataka, for registration.

4. Office is directed to draw decree in terms of Form No. 42.