Supreme Court of India

Hindustan Lever Employees' Union vs Hindustan Lever Limited And Ors on 24 October, 1994

Bench: A.M. Ahmadi, Cj, R.M. Sahai, S.C. Sen

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           CASE NO.:
Special Leave Petition (civil)  11006 of 1994

PETITIONER:
HINDUSTAN LEVER EMPLOYEES' UNION

RESPONDENT:
HINDUSTAN LEVER LIMITED AND ORS.

DATE OF JUDGMENT: 24/10/1994

BENCH:
A.M. AHMADI, CJ & R.M. SAHAI & S.C. SEN

JUDGMENT:
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JUDGMENT 1994 SUPPL. (4) SCR 723 The Judgment of the Court was delivered by SAHAI, J, Merger under the Companies Act, 1956 (in brief the Act,) of the two big companies- one, Hindustan Lever Limited (HLL), a subsidiary of Uni Lever (UL), London based multi national company, and other Tata Oil Mills Company Ltd. (In brief 'TOMCO') the first Indian company found in 1917 and public since 1957 which has been found by the High Court to be still 'not financially insolvent or sick company' was unsuccessfully challenged in the High Court by few rather nominal shareholders of TOMCO, Federation of Employees Union of both the TOMCO and HLL, Consumer Action Group and Consumer Education land Research Centre. The attack varied from statutory violation. procedural irregularities of provision of the Act to ignoring effect of the provisions of Monopolies & Restrictive Trade Practices Act, 1969 under valuation of Shares, its preferential allotment on less than the market price to the multi national, failure to protect the interest of employees of both the companies and above all being violative of public interest. The High Court was not satisfied that either the merger was against public interest or that the valuation of the shares was prejudicial to the interest of the shareholders of TOMCO or that the interest of the employees was not adequately protected. It was held that there was no violation of Section 391(l)(a) of the Act. and the claim that the disclosures in the explanatory statement were not as required was without basis as it was not established that the statement did not disclose correct financial position of TOMCO. Nor there was anything to show that the material was not disclosed. The Court held that the petitioner failed to establish any fraud or prejudice. On valuation of share for exchange ratio the Court found that a well reputed valuer of a renowned firm of chartered accountants and a director of TOMCO determined the rate by combining three well known methods. namely, the net worth method, the market value method and the earning method. The figure so arrived could not be shown to be vitiated by fraud and mala fide and the mere fact that the determination done by slightly different method might have result in different conclusion would not justify interference unless it was found to be unfair. And in that the petitioner failed miserably. The High Court did not agree that the approval to scheme of merger should be withheld till the complaint filed before Monopolies & Restrictive Trade Practices Commission was not finally decided as the jurisdiction exercised by the High Court under the Act and that by the Commission under MRTP Act were entirely different. Nor did it find any merit in the challenge that interest of employees of the two companies was not adequately taken care of. It was held that service conditions of TOMCO, the transferor company, having been protected it could not claim it to be prejudicial either because they were not assured of same conditions of service as was operative in HLL or that there was no similar provision protecting the interest of HLL employees. The apprehension of the employees against probable retrenchment as the employees of HLL were already surplus was rejected as of no substance since such disputes if necessary could be raised in labour Court. On preferential allotment of shares to UL on less than market value the Court held that HLL was holder of 51% share from before any allotment therefore the allotment which placed them at par with same holding was neither illegal nor violative of public interest.

Same .grievances have been reiterated by the shareholders, the Employees Union and the Consumer Action Group before this Court with fresh dressings and flourish. The sentinel nature of jurisdiction exercised by the High Court in Company jurisdiction was emphasised with vehemence. It has urged that the High Court which is expected to act as guardian in company matters failed to exercise its jurisdiction and was swayed by considerations which were neither legal nor relevant. Attempt was made to show that the determination of valuation was vitiated as the chartered accountant to whom the duty was entrusted did not perform its functions objectively and in accordance with settled financial norms and practice and its action was vitiated as he was one of the directors of the TOMCO. Comparative figures of the shares of the two companies then-market' value, their holding in the market etc. were placed to demonstrate that the calculation was vitiated.

But what was lost sight of that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical ac- curacy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted. What is imperative is that such deter-mination should not have been contrary to law and that it was not unfair for the shareholders of the company which was being merged. The Court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body. The High Court appears to be correct in its approach that this test was satisfied as even though the Chartered Accountant who performed this function was a director of TOMCO but he did so as a member of renowned firm of chartered accountants. His determination was farther got checked and approved by two other independent bodies at the instance of shareholders of TOMCO by the High Court and it has been found that the determination did not suffer from any infirmity. The company court, therefore, did not commit any error in refusing to interfere with it. May be as argued by the learned counsel for the petitioner that if some other method would have been adopted probably the determination of valuation could have been a bit more in favour of the shareholders. But since admittedly more than 95% of the shareholders who are the best judge of their interest and are better conversant with market trend agreed to the valuation determined it could not be interfered by courts as, 'certainly, it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme. We do not think that the internal management, business activity or institutional operation of public bodies can be subjected to inspection by the Court To do so, is incompetent and improper and, therefore, out of bounds. Nevertheless, the broad parameters of fairness in administration, bona fides in action and the fundamental roles of reasonable management of public business, if breached, will become jus- ticiable.' Fertiliser Corporation Kamgar Union (Regd.), Sindri & Ors. v. Union of India & Ors., [1981] 2 S.C.R, 52. See Buckley on Companies Act, 14th Ed. P.473& 474 & Palmer on Company Law, 23rd Ed. para 79.16.

Nor is there much merit in the claim of the employees that their interest had not been adequately protected. The scheme of amalgamation provides that all the staff, workmen or other employees in the service of the transferor company (TOMCO) immediately preceding the effective date shall become the staff, workmen and employees of the transferor company. Clause 11.1 provides that their services shall be deemed to have been continuing and not have been interrupted- Clauses 11.2 and 11.3 protect the interest by providing that the terms and conditions of such employees shall not be less favourable and all benefits such as PF etc. shall stand transferred to the HLL. The grievance of the employees that no safeguard has been provided for Hindustan Lever Employees Union appears to be off the mark as it is the interest of the employees of TOMCO which had to be protected. Even the: submission that merger will create unemployment or that it may result in many employees of the TOMCO being rendered surplus does not carry much weight as these are matters which can be taken care of by the Labour Court if the contingency arises. The learned counsel for the petitioner time and again took strong exception to the observation made by the High Court that any dispute about retrench-ment etc. could be. adjudicated by the Labour Court. He vehemently submitted that the availability of remedy after retrenchment should not have coloured the vision of the court to adjudicate upon the reasonableness of the scheme. The submission overlooks the primary duties and functions of a company court in matters of merger. When the court found that service conditions of the merged company shall not be to their prejudice it was fully justified in rejecting the claim of employees as it was neither unfair nor unreasonable. Further the Court in its anxiety to be fair to the employees recorded the statement of the learned Advocate General who appeared for HLL that no employee of HLL has been rendered surplus and in such contingency the company has resorted to friendly handshake by either giving lump sum or pension. A scheme of amalgamation cannot be faulted on apprehension and speculation as to what might possibly happen in future. The present is certain and taken care of by Clauses 11.1, 2 and 3 of the scheme. And unfriendly throwing out being amply protected by taking recourse to Labour Court no unfairness arises apparent or inherent. Nor the claim that merger shall result in, 'synergies' can render the scheme bad. Improved technology and scientific method results in better employment prospects. Anxiety should be to protect workers and not a obstruct development and growth: May be that advanced technology may reduce the manpower but so long those who are working are protected they are not entitled to hinder in modernisation or merger under misapprehension that future employment of same number of workers may stand curtailed., The wage differential arising between employees of two com-panies cannot result in making the merger as unfair since the service conditions of TOMCO workers having been protected they cannot claim that unless they are paid the same emoluments as is being paid by Hindus-tan Lever the merger was unjust. Various subsidiary submissions that the workers, shareholders were not permitted to attend the meeting or that material facts were concealed from them, does not appear to be correct as when more than 95% of the shareholders have agreed to the valuation determined by the chartered accountant all these procedural irregularities cannot vitiate the determinations.

What requires, however, a thoughtful consideration is whether the company court has applied its mind to the public interest involved in the merger. In this regard tie Indian law is a departure from the English law and it enjoins a duty on the court to examine objectively and carefully if the merger was not violative of public interest. No such provision exists in the English law. What would be public interest cannot be put in a straight jacket. It is a dynamic concept which keeps on changing. It has been explained in Black's Law Dictionary as, 'something' in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, whereas the interest of the particular locality which may be affected by the letters in question, interest shared by the citizens generally in affairs of local, State or national Government.' It is an expression of wide amplitude. It may have different connotation and un-derstanding when used in service law and yet a different meaning in criminal law than civil law and its shade may be entirely different in Company Law. Its perspective may change: when merger is of two Indian companies. But when it is with subsidiary of foreign company the con-sideration may be entirely different. It is not the interest of shareholders or the employees only but the interest of society which may have to be examined. And a scheme valid and good may yet be bad if it is against public interest.

Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad arid general principles inherent in any compromise or settlement entered be- tween parties that it should not be unfair of contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle of, 'prudent business management test' or that the scheme should not be a device to evade law. But when the court is concerned with a scheme of merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximising profits of the shareholders or whether the interest of employees was protected but it has to ensure that merger shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on English decision for Custina Re Haare, 1933 AER Ch. 105 and Bugle Press LIC, 1961 Chancery Division 270 that the power of the court is to be satisfied only whether the provisions of the Act have been complied with or that the class or classes were fully represented and the arrangement was such as a man of business would reasonably approve between two private companies may be correct and may normally be adhered to but when the merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The jurisdiction of the court in this regard is comprehensive.

In this case it was specifically claimed that the agreement was con-trary to public interest. It was supported by relying on the terms of agreement wherein it is mentioned that immoveable assets of TOMCO, except those which are specifically excluded, shall stand, transferred to HLL. It was urged that even though the valuation of such assets was nearly Rs. 800 crores it was being transferred for Rs. 30 crores only. Another objection violating public interest, according to the learned counsel, was that as a result of merger the share holding of UL from 51% was reduced to approximately 49%, but it was being brought on par by transferring 29,84,43,437 equity shares by preferential allotment by reducing the price of shares with the result that the multi-national shall have enormous advantages which is not conducive to the society. The learned counsel submitted that there were only two renowned competing companies who were manufacturing soap and detergent. With the merger of TOMCO with HLL there would be no competition and it would result in creating virtual monopoly in favour of HLL which could result not only in deterioration of quality, but in escalation of price. The learned counsel pointed out that even though HLL was a subsidiary of UL and claims to have the benefit of technical know-how etc., yet the quality of soaps produced by TOMCO was much better as compared to HLL.

In reply it was urged that the maintenance of 51% of paid-up equity share of UL was distinctively advantageous to HLL because the UL has become a source of major strength of HLL and has been responsible in several ways for its phenomenal growth and prosperity, This status, it was urged, enable HLL to have from UL free of cost the benefits of Research and Development technology, know how, marketing support, both domes-tic and international including brand names, managements systems, train-ing facilities and other resources in normal course of business. It was further urged that as a result of HLL being a subsidiary of UL, HLL is able to utilise international brand names of UL, such as soaps under the brand names Lux, Lux International, Lifebuoy, Pears, Dove, Surf, Sunlight, etc, It was urged that the price of Rs. 105 per share comprising of Rs. 10 towards the capital and Rs. 95 towards premium for preferential allotment to UL was worked out on the basis of norms jointly evolved by Apex Chambers of Commerce and industry operating at the national level, such as ASSOGHAM with Public Financial Institutions which own substantial shareholding in the publicly quoted companies, including HLL. It was further stated that the company had taken advice from the Merchant Banking Division of Industrial Credit & Investment Corporation of India Limited with regard to fair price for the proposed preferential allotment to UL. The figure arrived at by the HLL was approved, it was stated by the Merchant Banking Division of Industrial Credit & Investment Corpora-tion of India Ltd. It was pointed out that not only the figure was found to be fair and reasonable by the authorities, but it was ensured further that UL will not transfer the shares for a minimum period of 7 years from the date of allotment and in the event of UL desiring to sell these shares at any time after seven years, but within 12 years from the date of the allotment, they would offer do so at the first instance in favour of other members of the company in fair and suitable manner at a price worked out by reference to price earning multiple of 15 as per the last published accounts of the company available at the time of such disposal. It was also urged that the price of Rs. 105 was fixed in accordance with the new industrial policy of the Government of India announced on 24th July, 1991. The learned counsel urged that in pursuance Of this policy, on 29th May, 1992 the Government of India repealed the Capital Issues Control Act, 1947 by Ordinance No, 9 of 1992 with the result that there was no control on the issues of shares. The determination, it was claimed, was in accordance with the guidelines issued by the SEBI on 11th and 17th June, 1992 which required existing companies wishing to raise foreign equity upto 51% by taking a decision of the shareholders in a special resolution under Section 81(1)(A) of the Act. The learned counsel submitted that even though subsequently the State Bank of India has altered its policy, but that would not affect the determination or valuation done earlier as it was in accordance with the then existing guidelines and was approved by nearly 99% of the shareholders of the company. The learned counsel urged that in these circumstances, the High Court having found that the price of Rs. 105 having been worked out on the basis of price earning multiple of 1.5 based on the last published balance sheet of HLL, it was fair and reasonable and it was not liable to interference by this Court. Reliance was placed on Needle Industries (India) Ltd. & Ors. v. Needle Industries Newey (India)

Holding Ltd. & Ors., [1981] 3 SCC 333, where this Court approved the principle laid down by Lord Davey in Hilder v. Dexter, (1902) AC 474 at 480 that there was no law which obliged a company to issue its share at par because they were saleable at a premium in the Market. It was vehemently argued that since it were the shareholders who were primarily concerned with the company's finances and they have decided almost unanimously to allot the share to the parent company at the price of Rs. 105, it cannot be urged that the members of the HLL were not acting in the interest of the company as a whole.

Each of these challenges claimed to be violative of public interest have to be examined in the prevailing atmosphere which opted for liberalisation of the Government policies to promote economic growth of the country. What is remarkable is that the Legislature itself has amended Foreign Exchange Regulation Act, 1973 by Act 29 of 1993 ('FERA' for short), the Monopolies and Restrictive Trade Practices Act, 1969 and Companies Act, 1956 by Act of 58 of 1991, The amendment in MRTP Act was effected as :

"The basic philosophy behind the MRTP Act was never to inhibit industrial growth in any manner but to ensure that such growth is channelised for the public good and is not instrumental in per-petuating concentration of economic power to the common detriment. With the growing complexity of industrial structure and the need for achieving economies of scale for ensuring higher productivity and competitive advantage in the international market, the thrust of the industrial policy has shifted to controlling and regulating the monopolistic, restrictive and unfair trade practices rather than making it necessary for certain undertakings to obtain prior approval of the Central Government for expansion, establishment of new undertakings, merger, amalgamation, take over and appointment of Directors. It has been the experience of the Govern-ment that pre-entry restriction under the MRTP Act on the investment decision of the corporate sector has outlived its utility and has become a hindrance to the speedy implementation of industrial projects", In pursuance of this objective, Sections 20 to 26 were repealed. Section 23 of it which empowered the Commission to examine the scheme of amalgamation or merger is no more on the statute book. The argument of the Petitioners that the Commission being court of primary jurisdiction the Company Court should have stayed its hands and awaited the decision of the Commission does not appear after amendment to be sound. Effect of the merger resulting in monopoly is already pending before the Commission. Therefore, no further comment is called for.

In FERA there was a restriction on holding of assets by non-residents under Section 11 of the Act. Section 29 prohibited a company which was not incorporated in India or in which the non-resident interest was more than 40% from estabushing in India a branch, office or any part of the undertaking without permission from the Reserve Bank of India. Section 31 prohibited any company in which non-resident Indian had more than 40% share from acquiring or holding any immovable property in India. By Act 29 of 1993 Section 11 has been repealed and Sections 29 and 31 have been amended and there is no restriction now on a non-resident company holding in excess of 40% share. In Companies Act, Section 108-A to 108-I have been added.

The scheme of amalgamation does not run counter to any legislative: provision of policy of the Government. The claim of the Petitioners that the transfer for a paltry sum of Rs.30 crores was, mala fide as it was quid pro quo arrangement between UL and Tata Sons Limited by which the immovable assets of TOMCO were virtually given to Tata Sons Limited and in lieu of UL has been allotted 2984347 equity shares of the face value of Rs. 10 each at the price of Rs. 100 per share so as to ensure that the share of UL which stood diluted continued to remain at 51% was not found to have any merit as the valuation was determined by renowned and authorised valuers. It was held that sale by open public auction or inviting tenders from general public may have fetched more price due to competition, but that could not result in vitiating the determination of the valuation. The amalgamation cannot be faulted for this reason.

Even assuming that the assets are being transferred for a very meager sum but that by itself would not render the agreement bad or against public policy. Once the FERA was amended and assets of the Indian company could be transferred to foreign company then the amalgamation cannot be withheld when the shareholders themselves did not raise any objection nor was it raised by financial institutions or statutory bodies. The challenge, therefore, founded on transfer of assets at lower price cannot be upheld as violative of public interest.

Transfer of share to a foreign company on under valuation is of course a matter of concern. It is true that the transfer of shares by one company to another company is primarily to be determined by the shareholders and, therefore, if the 99% are of the view that the valuation of the shares was reasonable and fair then the court should be slow to interfere with it. But what is necessary to be emphasised is that a shareholder may not be interested in the ultimate effect of allotting shares to a multinational on a low price valuation, but the court certainly is. For instance, if the value of the share which has been determined at Rs. 105 for allotment to HLL is hypothetically determined, say at Rs. 210, then the result would be that the UL will have to pay more in lieu of getting the shares and that could definitely bring more foreign exchange to the national stream. It is just one illustration to demonstrate that how low pricing of the valuation of share effects the public interest. That the valuation was low-priced was found even by the High Court. Therefore, it is not open to the respondents to argue that the valuation of Rs, 105 having been accepted by majority of almost all the shareholders, no public interest is involved in it. No further need be said as allotment of shares to UL at Rs. 105 is not approved by the Reserve Bank of India. It was been challenged before the High Court and is pending adjudication.

Even though I have agreed with Brother Sen, J. that the appeals and petitions are liable to be dismissed, but I have added a few words to highlight the expansive power of the court in public interest while approving the scheme for amalgamation between a subsidiary company of a multi-national and an Indian company in the liberalised economic policy.

SEN. J. A Scheme of Amalgamation of two Companies - Tata Oil Mills Company Limited and Hindustan Lever Limited - is the subject matter of dispute in this case.

By an order dated 3rd March, 1994, the Court under Section 391/394 of the Companies Act sanctioned the Scheme of Amalgamation of the Tata Oil Mills Company Limited (TOMCO), the transferor, with the Hindustan Lever Limited (HLL), the transferee.

Aggrieved by the said Judgment and order dated 3.3.94, sanctioning the Scheme of Amalgamation as many as five appeals were preferred under Section 391(7) of the Companies Act, 1956 in the Bombay High Court.

Appeal No. 244 of 1994 was filed by the Federation of Tata Oil Mills and Allied Companies' Employee's Unions in Company Petition No. 332 of 1993 connected with Company Application No. 250 of 1993. Appeal No. 298 of 1994 was filed by Mr. Rabindra Hazari a shareholder of TOMCO in Company Petition No. 332 of 1993 connected with Company Application No. 250 of 1993. Appeal No. 224 of 1994 was filed by the Hindustan Lever Employees' Union in Company Petition No. 333 of 1993 connected with Company Application No. 251 of 1993. Appeal No. 301 was filed by Consumer Action Group and other similar Organisations, in Company Petition No, 333 of 1993 connected With Company Application No. 251 of 1993. Appeal No. 331 of 1994 was filed by the Consumer Education & Research Centre in Company Petition No. 333 of 1993 connected with Company Petition No. 251 of 1993.

The Appeal Court dismissed all the five appeals. The appellants have now come before this Court against the judgment of the Appeal Court dated -18th May, 1994.

According to the appellants, the scheme should not be sanctioned for the following reasons :

(A) Violation of Section 393(1) (a) of the Act in not making required disclosures in the explanatory statement.

(B) Valuation of share exchange ratio is grossly loaded in favour of HLL.

(C) Ignoring the effect of provisions of the Monopolies and Restrictive Trade Practices Act (the MRTP Act).

(D) Interest of employees of both the Companies was not adequately taken care of.

(E) Preferential allotment of shares less than market price to Unilever which is not in public interest.

(F) Mala fides on account of existence of quid pro quo between Unilever and Tata Sons Ltd.

TOMCO manufactures and sells products like soaps, detergents, toiletries and animal feeds. HLL also manufactures and sells similar products. Both the Companies have their registered office at Bombay. TOMCO has more than 60,000 shareholders with the following break-up:

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22%      :           Tata  Group

41 %     :           Financial institutions (FI)

37%      :           General Public
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HLL has nearly 1,30,000 shareholders with the following break-up:

51% : Unilever PLC (UL) - a Company incorporated under the English Companies Act, having its registered office at London.

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16%      :          FI

33%      :          General Public
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Originally, Unilever - the parent Company of HLL - had 100% shareholding in HLL.

The declined in the business of TOMCO began in 1990-91. During 1991-92, TOMCO incurred loss of Rs. 13 crores. In the next six months the loss increased to over Rs. 16 crores. The Board of Directors of TOMCO considered various alternatives for TOMCO including its association with HLL which was a more prosperous and a larger Company operating in the same field of activities. Accordingly, the Board of Directors of TOMCO put up a proposal before the Board of Directors of HLL. Both availed of [he professional service of Mr. Y.H. Malegam, Senior Partner of M/s. S.B. Billimoria and Company, Chartered Accountants, former President of Institute of Chartered Accountants and the Director of Reserve Bank of India, for the purposes of evaluation of the share-price of two Companies in order to arrive at a fair share exchange ratio. On 19th March, 1993, Mr. Malegam gave valuation report and recommended an exchange ratio of two equity shares of HLL for every fifteen ordinary shares of TOMCO. The Board of Directors of both the Companies at their separate and inde-pendent meetings accepted the recommendation and approved the Scheme of Amalgamation.

The Scheme, inter alia, provides for transfer and vesting in HLL of the Undertaking and business of TOMCO together with assets and liabilities excluding certain assets and/or licence rights to use certain premises. Salient features of the Scheme are to be found in Clauses l,7(d), 4, 5, 11 and 13. Clause 1.7(d) sets out the details of excluded properties in which TOMCO has no more than licensees rights. Clause 4 provides for transfer of 5 assets (immovable property) to be transferred to companies nominated by Tata Sons Ltd. at fair market value as will be independently assessed. Clause 5 provides that TOMCO shall (before or after the effective date) transfer to Tata Sons Ltd. or its nominee certain invest-ments/shares owned by TOMCO at the then prevailing market value and in the case of Unlisted shares at a value to be determined by Mr. Y.H. Malegam. Clause 11 provides for transfer of employees of TOMCO to HLL on the basis that their service shall be deemed to be continuous and the conditions of service after the transfer shall not be less favourable. Clause 13 refers to preferential allotment of equity shares to UL of face value of Rs. 10 each at the price of Rs. 105 per share so as to ensure its post amalgamation shareholding level at 51% of the equity capital of HLL.

It may be mentioned that (i) investments/shares specified in Clause 5 have been realized and (ii) Clause 4 has been modified by the Company Court (a) by providing for transfer to Companies nominated by the Directors of TOMCO in place of Tata Sons Ltd. and (b) by naming well reputed Chartered Accountants/Government Valuers.

In Company Application No. 250 of 1993 filed by TOMCO the Court passed an order of 29th April, 1993 directing to call the meetings of the debenture holders, creditors, ordinary shareholders arid preference shareholders on 29th and 30th June, 1993, naming the Chairman of the meetings and calling upon him to submit the report within 21 days after conclusion of the meeting, TOMCO filed the Notices and explanatory statements under Section 393(l) (a) of the Act along with a proxy form before the Company Registrar, who after considering all objections settled the explanatory statements and approved the disclosures made therein. Individual notices of the said meetings together with a copy of the Scheme of Amalgamation, the statement as settled by the Company Registrar and as required under Section 393(l)

(a) and a proxy form were sent to concerned members as required by law On 21st June, 1993 a joint communication to shareholders of TOMCO and HLL was also sent. Public notices of the meetings were also issued through the print media. The meeting of the ordinary shareholders was held on 29th June, 1993 and was attended by 1,294 members holding 85,85,009 ordinary shares and by 1,652 members holding 55,18,251 ordinary shares through proxies. In the said meeting amendment was proposed to the effect that the exchange ratio should be 5:15 shares in place of 2:15 shares as envisaged in the Scheme. 99.64% of ordinary shareholders voted against amendment and 99.72% voted in favour of the Scheme as proposed. Debenture holders voted 99%, secured creditors voted 100%, unsecured creditors voted 84.30% and preference shareholders voted 100% in favour of the Scheme. The Scheme as proposed was thus approved in all the five meetings by 99.72% of equity shareholders in terms of values and 86.72% in terms of number.

In Company Application No. 251 of 1993 filed by HLL also similar direction for convening meeting of the equity shareholders and creditors were issued by the Court on 29th April for convening the meeting on 30th June, 1993. Similar procedure was followed in this also. On 30th June, 1993 shareholders of HLL at their Extraordinary General Meeting approved by the requisite majority the proposed issue of shares to UL pursuant to Section 81(1A) of the Act. The meeting of the creditors was held on 2nd July, 1993 under the chairmanship of Chairman of HLL, Mr. S.M. Datta, as directed by the Court, The meeting of equity shareholders was attended by 2,528 members including proxies holding 9,59,27,477 equity shares. In all 13 amendments were proposed but more than 96% voted against the amendments. The creditors also voted for the Scheme.

On 2nd August, 1993 Judges summons was taken out by Mr. M.C. Jajoo, praying inter alia for direction to M/s. A,F, Ferguson and M/s. N.M. Raiji & Go., Chartered Accountants, to give their opinion on the valuation report of Mr. Malegatn. The Regional Director and the Official Liquidator were given notices of the petitions. In pursuance thereof the Regional Director submitted his report on 9th December, 1993 and Official liquidator submitted his report for winding up without dissolution under Section 394 of the Act. On 6th January, 1994 M/s. Ferguson and M/s. N.M. Raiji by their joint letter with copy to Mr. Jajoo confirmed that the share exchange ratio determined by Mr. Malegam was proper.

The facts stated above were noted in the judgment under appeal and are not in dispute. But a large number of legal issues have been raised in this Courts questioning the Scheme of Amalgamation.

Mr. Dholakia, learned Counsel appearing for Mr. Jajoo, one of the shareholders of TOMCO, has questioned the justification of the ratio of allotment .of shares, 2 shares of HLL in exchange of 15 shares of TOMCO. According to Mr. Dholakia, this ratio is entirely unsatisfactory and unfair to the TOMCO shareholders. It has been contended that he Board of Directors of TOMCO did not explain the; Scheme of Amalgamation in the explanatory statement circulated among the shareholders. In particular, how the share exchange ratio - 15 TOMCO shares to 2 HLL shares - was arrived at, was not stated in the explanatory statement. Instead of circulating the valuation reports, TOMCO informed the shareholders that the reports were available for inspection at the registered office of the Com-pany between 11.00 A.M. to 1.00 P.M. on 14 working days. The shareholders were not told that the joint valuer was none other than Mr. Malegam, a Senior Partner of M/s. S.B. Billimoria and Company, and also a Director of TOMCO. Mr. Malegam could not be appointed auditor of TOMCO under Section 226(3) of the Companies Act, 1956. In that view of the matter, Mr. Malegam should not have been appointed Valuer under the Indian Companies Act, 1956.

It was next contended that the reasons for the Board accepting certain proposals to make preferential allotment of shares at Rs. 105 per share has not been properly explained. ICICI had given a valuation report stating that this report was only on the basis of the material supplied by HLL and not on the basis of any independent verification. It is also significant that Mr, Malegam was a Director of ICICI. It was also con-tended that the valuation report was erroneous. A combination of different methods of valuation was adopted, which was clearly against the law laid down by the Supreme Court in the case of Commissioner of Gift Tax, Bombay v. Smt. Kuswnben Mahadevia, 122 ITR 38. If the valuation was done by the net asset method, the exchange ratio should have been 1:2 in favour of TOMCO. Moreover, market value of the shares of the two Companies was taken at a point of time when the price of TOMCO shares was the lowest for a period of 27 months. Lastly, it was contended that the preferential allotment of shares to Unilever was part of the Scheme of Amalgamation. The Board should have explained why Rs. 366 was being paid for every HLL share by TOMCO, when Unilever was paying only Rs. 105 per HLL share.

We are unable to uphold any of the above contentions raised by Mr. Dholakia, The overwhelming majority of the shareholders had approved the Scheme at the meeting called for this purpose and had approved the exchange ratio. In fact, a proposal for amendment of the exchange ratio was also rejected by the overwhelming majority of 99% shareholders. There is no reason to presume that the shareholders did not know what they were doing.

Being dissatisfied with the valuation made by Mr. Malegam, Mr. Jajoo had insisted for independent valuation and that was done. Two independent valuers -A.F. Ferguson and N.M. Raiji & Co. - had valued the shares and came to the conclusion that exchange ratio of 15:2 was correctly determined by Mr. Malegam.

Faced with this situation, Mr. Dholakia sought to produce a valuation report made by another valuer, G. Rai & Co., Chartered Accountants. According to this report, book value of equity share of TOMCO as on 31. 3.1992 based on audited and printed balance sheet of the Company was Rs.

57. 58 per share; whereas book value of equity share of HLL as on 31.12.1992 based on its audited and printed balance sheet was only Rs. 28.84 per share. This, according to Mr. Dholakia, demonstrated the absurdity of the valuation that had been made of the shares of the two Companies The exchange ratio was obviously unfair to the shareholders of TOMCO. This report is produced before this Court for the first time.

There was no dispute as to what should be the book value of TOMCO shares as on 31.3,93, The following share charts of the two Companies were enclosed with the circular letter dated June 21, 1993 addressed to the shareholders of TOMCO and HLL by the Chairmen of two companies :

HINDUSTAN LEVER LTD.

EQUITY SHARE DATA

The Market Price as on 17.6.1993 was Rs, 375

As at	31:12..92	31.12.91	31.12.90
Face Value (Rs)	10.00	10.00	10.00
Book Value per Share (Rs.)	23.80	20.75	27.36
Dividend (%)	42.00	38.50%	42.00%
Earning per share (Rs.)	7.03	5.73	6.29

*On enlarged capital after the issue of bonus shares in the ratio of 1:2.

THE TATA OIL MILLS COMPANY LTD.

EQUITY SHARE DATA The Market price as on 17.6.1993 was Rs. 52.50 As at 31.3.93 31.3.92 31.3.91 Face Value (Rs.) 10.00 10.00 10.00 Book Value per Share (Rs.) 29.75 29.45 : 36.17 Dividend (%) - 12.50% 20:00% Earning per share (Rs.) 0.30 0.50 5.19 The Profit & Loss Accounts of the two Companies for the last three years were also annexed. It appears that TOMCO made profit of Rs. 5.64 crores in 1990-91. It came down to Rs. 1,13 crores in 1991-92 and ultimately to Rs, 0.65 crores in 1992-93; whereas HLL's profit in 1990 was Rs. 58.74 crores and it went up to Rs. 98.48 crores in 1992, The Market price of TOMCO share truly reflected the bleak outlook of the Company. It has been stated that in the financial year 1992-93 TOMCO had shown a gross profit of Rs. 27.18 crores only after taking credit of Rs. 36.69 crores on sale of investments and Rs, 18.04 crores on aetouttt of refund of Excise Duty pertaining to prior periods. In fact, in the Directors' Report of the year 1992-93, it was stated that the Company had suffered severe set back resulting in operating loss. The position got worse in the year 1993-94. The Company suffered operating loss in the region of Rs. 16 crores and had to sell not only investments, but also fixed assets of the Company.

In the background of these facts, it cannot be said that the market price as on 17.6.93 did not reflect the true picture of the value of the Company's shares. If the market price of the shares of the two Companies as on 17.6.93 is compared, the quoted price of HLL was Rs. 375 per share; whereas the quoted price of TOMCO was Rs. 52.50 per share. The earning per TOMCO share had come down from Rs. 5.19 on 31.3.91 to Rs. 0.50 on 31.3.92 and Rs.0.30 On 31.3.93. As against this, dividend paid on HLL shares was 42% in the years ending on 31.12.90 38.50% (on enlarged capital after the issue of bonus shares in the ratio of 1:2 in the year ending on 31.12.91 and 42.00% again in the year ending on 31.12.92. It is true that book value per share of TOMCO was higher than that of HLL. But, even without any bonus issue, the book value of TOMCO shares had come down from Rs. 36.17 per share on 31.3.91 to Rs. 29.75 per share on 31.3.1993.

What ernerges from all these figures is that on the market price basis as On 17.6.93 (the last price available before the circular letter dated 21.6.93 issued to the shareholders of the two Companies) the exchange ratio of 2:15 was very fair. If the yield method is adopted, the ratio would be astronomically high in favour of HLL. But, if the book value is taken per share, then TOMCO shares would be of higher value than HLL shares.

The question is what method should be adopted for arriving at a proper exchange ratio. The usual rule is that shares of the going concern must be taken at quoted market value. This principle was also recognised by this Court in the case of Commissioner of Wealth Tax v. Mahadeo John, 86 ITR

621. In this case, Mr. Malegam adopted a combination of three well-accepted methods to arrive at the fair value of the shares. The methods are: (I) the yield method; (II) tie asset value method; and (III) the market value method. After considering all the relevant factors, the valuer recommended in exchange ratio of 2 equity shares of HLL for every 15 ordinary shares of TOMCO.

Mr. Dholakia has contended that a combination of two methods of valuation was condemned by this Court in the case of Commissioner of Gift Tax, Bombay v. Smt. Kusumben D. Mahadevia, 122 ITR 38. The valuation of the shares done by Mr. Malegam was clearly erroneous and contrary to the principles laid down by this Court in that case.

The observations made by this Court in Smt. Kusumben D. Mahadevia's case were in connection with the valuation of shares of a going concern under the provisions of Wealth Tax and Gift tax Acts and the rules framed thereunder. Under those two Acts, at the material time, valuation had to be done on the basis of the price which, in the opinion of the assessing officer, the shares would fetch if sold in the open market. Both Section 6 of the Gift Tax Act and Section 7 of the Wealth Tax Act had adopted the same principle of valuation. If that method of valuation is adopted, then the exchange ratio fixed in this case cannot be described as unfair to the Company' s shareholders in any way. If profits earning method had been adopted, the ratio would have been very much worse for TOMCO shareholders.

This problem of valuation in the case of amalgamation of two Com-panies has been dealt with by Weinberg and Blank in the book TAKE-OVERS AND MERGERS", in which it has been stated that some of all of the following factors will have to be taken into account in determining the final share exchange ratio ;

(1) The Stock Exchange prices of the shares of the two companies before the commencement of negotiations or the an-nouncement of the bid.

(2) The dividends presently paid on the shares of the two com-panies. It is often difficult to induce a shareholder, particularly an institution, to agree to a merger or a share-for- share bid if it involves a reduction in his dividend income.

(3) The relative growth prospects of the two companies;

(4) The cover (ratio of after-tax earnings to dividends paid during the year) for the present dividends of the two companies. The fact that the dividend of one company is better covered than that of the other is a factor which will have to be compensated for at least to some extent.

(5) In the case of equity shares, the relative gearing of the shares of the two companies. The 'gearing' of an ordinary share is the ratio bf borrowings to the equity capital.

(6) The values of the net assets of the two companies. Where the transaction is a thorough-going merger, this may be mere of a talking- pointhon a matter of substance, since what is relevant is the relative values of the two undertakings as going concerns.

(7) The voting strength in the merged enterprise of the shareholders of the two companies.

(8) The past history of the prices of the shares of the two companies.

It will, therefore, appear that in case of amalgamation a combination of all or some of the methods of valuation may be adopted for the purpose of fixation of the exchange ratio of the shares of the two companies. It is to be noted that even in such a situation, the book value method has been described as 'more of talking-point than a matter of substance'.

Mr. Malegam adopted the combination of three well-known methods of valuation of shares to arrive at the exchange ratio of the two Companies. In fact, the, method adopted was explained to the Board of Directors by a letter dated 19th March, 1993 written by S.B. Bellimoria & Co. : -

"For the above purpose we have considered the 'yield value', the 'asset value' and the 'market value' of the shares of the two companies and have given appropriate weightages to each of the above values. Both companies are in similar businesses. Therefore a uniform basis of capitalisation of profits has been adopted in determining the 'yield value'. However, while HL has shown a consistent growth in its profitability, TOMCO's performance has been more erratic. It has made substantial operating losses in the year ended 31st March, 1992 and in the six months ended 30th September, 1992 for which unaudited figures have been published and its losses during the six months ending 31st March, 1993 are expected to be even larger. Moreover its profits during the years ended 31st March, 1990 and 3lst March, 1991 have been significantly due to exports to the former USSR which exports have now dried up. Taking all these factors into account, for working out the' yield value' of the TOMCO share we have assumed a figure of future maintainable profits based on its operating results for the years 1981-82 to 1988-89."

It is also to be noted that the financial institutions who held 41% of the shares of TOMCO, did not find any fault in the method of valuation of the shares.

Mr. Ashok Desai, appearing on behalf of TOMCO, has argued that the evaluation of shares had to be done according to well-known methods of accounting principles. The valuation of shares is a technical matter. It requires considerable skill and experience, There are bound to be dif- ference opinion among Accountants as to what is the correct value of the shares of a company; It was emphasised that more than 99% of the shareholders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder. Mr. Jajoo may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the shareholders have approved of the valuation. The Court should not interfere with such valuation.

It is also difficult to follow the argument that Mr. Malegam's report is not acceptable to the TOMCO shareholders, because he was a Director of TOMCO, HLL had no difficulty in accepting the share exchange ratio fixed by Mr. Malegam, even though he was a Director of TOMCO, If there was any bias, it should have been in favour of TOMCO and not against TOMCO. This exchange ratio was endorsed by two other eminent firms of Chartered Accountants and also by ICICI. We are unable to uphold the contention that there was any impropriety in the valuation of the shares. The argument based on Section 226(3) of the Companies Act is misleading, An officer or an employee of the company may not be appointed as an auditor. An auditor must be independent of the Board of Directors of the company. He is expected to play the role of a watch-dog on behalf of the shareholders of the company. But, in this case the two Companies are going to be amalgamated, both the Companies have chosen Mr. Malegam, Director of TOMCO to fix tie share exchange ratio. If HLL agreed to accept Mr. Malegam as the Valuer and there was no objection from TOMCO, we fail to see how TOMCO shareholders have been prejudiced.

On the question of valuation on shares, another issue has been raised. It was argued that Unilever, a foreign Company, held 51% of shares of HLL. The Scheme envisaged that Unilever will continue to hold 51% of the shares of HLL even after amalgamation. It was decided to make preferential allotment of shares to Unilever at a price of Rs. 105 per share, for the purpose of maintaining shareholding of 51% even after amalgamation. For this purpose, two conditions were imposed :

(1) Unilever shall not be able to sell the shares allotted to them on preferential basis for a period of 7 years. (2) In case Unilever decides to sell these shares after the expiry of 7 years but before 12 years after the date of preferential allotment, they shall sell the shares to the Indian shareholders of Unilever at a price 15 times earning per share calculated on the basis of the last audited balance sheet.

It was contended by Mr. Andhyarujina, and in our opinion rightly, that these two conditions are important depreciatory factors in the preferential allotment of shares to Unilever. The shares issued to Unilever would be franked by restrictive covenants. These shares cannot be com-pared to the other shares of HLL which could be freely traded in the market.

It was contended by Mr. Dholakia that a foreign company was being given a large interest in the assets of TOMCO at a gross undervalue. We are unable to uphold this argument. The shareholder has no interest in the assets of the company While the company is an existence. It is only at the stage of liquidation of the company that the shareholders become inter-ested in the assets of the company. The share of any member in a company is movable property and transferable in the manner provided by the Articles of the company. This is provided by Section 82 of the Companies Act, The definition of 'goods' in the Sale of Goods Act, 1930 specifically includes stocks and shares. A share represents a bundle of rights which include, inter alia, the rights (i) to elect directors; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company, if and when dividends is declared and distributed; and (iv) to share in the surplus, if any, on liquidation. In the case of Bacha F. Guzdar v. C.I.T., AIR (1955) SG 74, the position of a shareholder was explained thus :

"There is nothing in the Indian Law to warrant the assumption that a shareholder who buys shares, buys any interest in the property of the company which is juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares he becomes entitled to participate in the profits of the company in which he holds the shares, if and when the company declares, subject to the Article of Association, that the profits or any portion there of should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up."

In any event, whether Unilever was paying the proper price for the shares Or not, is a question which is now before the Bombay High Court in a separate proceeding Hindustan Lever Ltd. & Ors. v. Reserve Bank of India & Ors., Writ petition No, 1666 of 1994.

It appears that the Reserve Bank of India has not granted approval to the proposal of alloting 29,84,347 equity shares of Rs. 10 fully paid up at a premium of Rs. 95 per share. According to the guidelines set by the Reserve Bank of India, a premium of Rs. 346 will have to be paid per share In a writ application before the Bombay High Court, HLL has prayed for, inter alia, following orders:

(i) Petitioner No 1 shall allot 29,84,347 equity shares of Rs. 10 each fully paid up at a premium of Rs. 95 per share to Unilever and appropriate an amount of Rs. 28,35,12,965 ac-cordingly.

(ii) The difference between Rs. 346 being the premium per share as per the revised guidelines and Rs. 95 being the premium per share approved by the shareholders and the approved Scheme of Amalgamation shall be kept in separate 'Share Premium Suspense Account' by the Company till the final disposal of the Writ Petition.

(iii) The said Share Premium Suspense Account will be dealt with in accordance with the final judgment of the Court in the Writ Petition.

Since the entire question is now pending before the Bombay High Court in another independent proceeding, questioning the price indicated by the Reserve Bank of India, this question cannot be pursued in this proceeding any further.

The next point urged by Mr. Dholakia is that proper disclosure of all material facts was not made in the explanatory statement, accompanying the proposal to: amalgamate TOMCO with HLL. Their shareholders were not given full particulars on the basis of which they could act.

Section 393(l)(a) reads as under :

"(1) Where a meeting of creditors or any class of creditors, or of members, or any class of members, is called under section 391 -

(a) With every notice calling the meeting which is sent to a creditor member there shall be sent also a statement setting forth the terms of the compromise or arrangement and ex-plaining its effect; and in particular, stating any material interests of the directors, managing director, managing agent, secretaries and treasurers or manager of the company, whether in their capacity as such or as member or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different, from the effect on the like interests of other per-sons; and...."

The grievance voiced by Mr, Jajoo is not shared be more than 99% of the shareholders. An explanatory statement had been sent on the basis of which Mr. Jajoo had taken inspection of all relevant documents.

Notice must be taken of the fact that even after these points were raised in the meeting, the overwhelming majority of shareholders voters for the Scheme. That the explanatory statement was approved by the Registrar, is.it self a relevant factor.

A similar question came up for consideration before a Division Bench of Gujarat High Court in the case of jitendra R. Sukhadia v. Aletnbic Chemical Works Co, Ltd., (1987) 3 Company Law Journal 141. That was also a case of amalgamation; In that case, it was held that the exchange ratio of the shares of the two companies, which were being amalgamated, had to be stated alongwith the notice of the meeting. However, this ex-change ratio was worked out, however, was not required to be stated in the statement contemplated under Section 393(l)(a).

In the facts of this case, considering the overwhelming manner in which the shareholders, the creditors, the debenture holders, the financial institutions, who had 41% shares in TOMCO, have supported the Scheme and have not complained about any lack of notice or lack of understanding of what the Scheme was about, we are of the view, it will not be right to hold that the explanatory statement was not proper or was lacking in material particulars.

There is another aspect of this case. Should the fact that Mr. Malegam was a Director of a Company have been disclosed? Section 393 (l)(a) requires particulars to be given of any material interests of some persons connected with the company, including the directors and managing director. The interest that is contemplated in Section 393(l)(a) is interest material for consideration of the scheme by the shareholders. It has not been shown that Mr. Malegam had any interest in the scheme. If he had any shares in TOMCO, then his interest would be like that of any other shareholder. His: specialised services were utilised for the purpose of arriving at a fair exchange ratio. Both TOMCO and HLL reposed faith in his professional skill. We are of the view that non-disclosure of the fact that Mr. Malegam, a Director of the Company, had been appointed Valuer, will not detract from the Scheme in any way. This will also not amount to suppression of any material interest of a Director in the Scheme.

The next question relates to the provisions of Monopolies and Restrictive Trade Practices Act (MRTP Act). An argument has been made that the MRTP Commission is seized of the matter and until the MRTP Commission decides, it will be proper to sanction the Scheme.

Ms. Indira Jaising, appearing on behalf of Consumer Action Group, has argued that the Monopolies and Restrictive Trade Practices Act, 1969 is a special enactment. The question of merger of HLL and TOMCO has to be considered in the background of the provisions of the said Act, Since this very issue is under consideration by the MRTP Commission, the Court exercising company jurisdiction Should hot pass any order Which may prejudice the proceedings before the MRTP Commission. Alternatively, it has been argued that assuming that the jurisdiction of the Company Court is not barred but it is parallel, then as a matter of propriety the Company Court should await the decision of the MRTP Commission with regard to the issues involved. The allegation before the MRTP Commission is that the proposed merger was in violation of the provisions of MRTP Act. The decisive questions whether the issues arising before the MRTP Commission are the same as are now before this Court.

It was further argued that even if the proposed amalgamation is sanctioned by this Court, it must be made subject to the final outcome of the proceedings pending before the MRTP Commission. The MRTP Com-mission gravely erred in rejecting the application for interim order under Section 12A of the MRTP Act. It was submitted that the Commission has erred in refusing to pass an interim order on the ground that any interim order passed will take away the jurisdiction of the Company Court. The Commission has jurisdiction, even after deletion of Section 23, to inquire into monopolies and restrictive trade practices. The Commission has over-looked the fact that the allegations made by the aggrieved parties before it, were not based on 'assumption' but on hard facts.

Our attention was invited to the Directive Principles of State Policy in Part-IV of the Constitution and it was urged that the economic system should not be operated in a way that results in the concentration of wealth and means of production to the common detriment. In particular, it was emphasised that issuance of preferential shares at a very favourable price to Unilever will come within the definition of Section 2(e) and will amount to restrictive trade practice.

This argument of Ms. Jaising was supported by Dr. Dhavan, appear-ing on behalf of the Federation of Tata Oil Mills and Allied Companies Employees Union. It was argued that the Scheme will attract anti-merger jurisdiction of the MRTP Commission straightway. The two big Companies in the same field of consumer articles are merging to ensure that there was no inter se competition. Under the MRTP Act, injunction can be granted under Section 12A during an enquiry even where the impugned trade practice was likely to affect prejudicially the public interest or the interest of the consumers generally. The Commission may, for preventing such a situation from developing, restrain the undertaking involved from carrying or any monopolistic or restrictive unfair trade practice until the enquiry is concluded. It was argued that judgment under appeal has seyerery curtailed the jurisdiction of the MRTP Commission. Lastly, it was contended that preferential allotment of a large number of shares to Unilever at a throw away price is apart of the Scheme of Amalgamation and it wifl result in Unilever's acquisition of 51% shares in the enlarged Company and thereby Unilever will be able to control the market more effectively.

In order to appreciate this argument, it is necessary to refer to the various provisions of the Monopolies and Restrictive Trade Practices Act, 1969 This Act in consonance with the new economic policy of the Govern-ment has undergone drastic amendment with effect From 27.9.91. The relevant provisions for the purpose of this case are as under :

"2, In this Act, unless the context otherwise requires,-

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(o) "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular

(i) which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions;

(s) "trade" means any trade, business, industry profession or occupation, relating to the production, supply, distribution or control of goods and includes the provision of any services;

....

(u) "trade practice" means any practice relating to the carrying on of any trade, and includes -

(i) anything done by any person which controls or affects the price charged by, or the method of trading ofs an) trader or any class of traders;

(ii) a single or isolated action of any person in relation to any trade;"

Section 10 empowers the Commission to enquire into any restrictive trade practice or any monopolistic trade practice. Section 12A empowers the Commission to issue temporary injunction, if it is proved that 'any undertaking or any person is carrying on, or is about to carry on, any monopolistic or any restrictive, or unfair, trade practice and such monopolistic or restrictive, or unfair, trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders of traders generally or of any consumer or consumers generally". Chapter III of MRTP Act dealt with concentration of economic power. Part-A of this Chapter (Sections 20 to 2(5 and also Section 28) was deleted by the MRTP Act, 1991 with effect from 27.9.91. Part III-A (Sections 30A and 30G) which dealt with restriction on acquisition and transfer of shares by certain body corporates was also deleted from the said date; Section 23 specifically dealt with merger, amalgamation and take over was to the following effect "23. Merger, amalgamation arid take over. - (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force.-

(a) no scheme Of merger or amalgamation of two or more undertakings, to which this Part applies with any other under-taking;

(b) no scheme of merger or amalgamation of two or mote undertakings which would have the effect of bringing into existence an undertaking to which clause (a) or clause (b) of section 20 would apply;

shall be sanctioned by any Court or be recognised for any purpose or be given effect to unless the scheme for such merger or amalgamation has been approved by the Central Government under this section."

The intention behind deletion of Section 23 is obvious : the require-ment of prior approval of the Central Government before sanctioning a scheme of merger or amalgamation has been done away with. The effect of the deletion of this section cannot be nullified by giving an unnatural and artificial interpretation of the words of the statute.

It is being argued that even though Section 23 has been deleted, their are other provisions in the Act under which it is necessary to have prior sanction of the Central Government or MRTP Commission before a Scheme of Amalgamation or merger can be sanctioned. If this argument is to be accepted, then in the first place it has to be held that the provisions of Section 23 were wholly unnecessary and otiose, because even otherwise sanction or clearance of the Central Government was a condition prece-dent for effecting a scheme of amalgamation or merger. Such a construction must be avoided. The enquiry must be as to what was the mischief which was sought to be cured by the Legislature by the amendment. By deleting Section 23, the Legislature removed the requirement of prior approval of the Central Government to a scheme of merger before the Court could sanction it.

Section 27A and section 27B are the only sanctions in Chapter III of the Act which have been retained by the Legislature. Section 27 deals with division of undertaking and enables the Commission in the circumstances specified in that section, to pass an order for the division of any trade or undertaking or inter-connected undertaking, into such number of under- takings as the circumstances of the case may justify. Section 27A empowers the Central Government to protect severance of inter-connection between undertakings. Section 27B lays down the manner in which any order passed under Section 27 or Section 27A shall be carried out; The provisions as to restriction on the acquisition and transfer of shares by certain bodies corporate (Section 28 to Section 30G) have been entirely deleted. The intention of the Legislature is clear. A merger or amalgamation is not now subject to the prior approval of the Central Government. But, if the working of the company is found to be prejudicial to public interest or has led to the adoption in monopolistic or restrictive trade practice, the Central Government may .after being satisfied as to the requirement of the section or division of the undertaking, act according to law.

We are unable to uphold the contention of Ms. Jaising that MRTP Commission erred in law in not passing an order of injunction under Section 12A of the Act, restraining the implementation of the Scheme of Amalgamation. We are of the view that it was not necessary to obtain any prior approval from the Central Government or the MRTP Commission before the Scheme could be sanctioned by the Court. This requirement has been specifically deleted from the statute.

As a result of the amalgamation, if it is found that the working of the Company is being conducted in a way which brings it within the mischief of the MRTP Act, it would be open to the authority under the MRTP Act to go into it and decide the controversy as it thinks fit, Mr. Andhya. Ujina has argued that the concept of applicability of monopolistic trade practice under Chapter TV or restrictive trade practice or Unfair trade practice under Chapter V, necessitates that there must be a 'trade' as defined .under Section 2(a) and 'trade practice' as defined Under Section 2(u). He has further contended that a company when it allots shares is not trading shares. Further under Section 77 of the Companies Act, a company cannot buy its own shares. Therefore, there can no question of a company trading in its own shares or unlawful trade practice at this stage.

This controversy has got another aspect which has been highlighted by Dr. Dhavan and Mr.. R.K. Jain. It has been argued that a very large company is coming int.: existence which will have substantial share of the market. A foreign company will have controlling interest in HLL after amalgamation. This is against public policy. In my judgment, what has been expressly authorised by the statute cannot be struck down as being against the public policy. A foreign company under the new economic policy of the Government has been allowed to acquire controlling share of any Indian company. This has; been done by express amendment of the Foreign Exchange Regulation Act-

Under Section 29 of the Foreign Exchange Regulation Act (as it stood originally), a perstui resident outside India or a company (other than banking companies) which was not incorporated in India or in which the non- resident interest was more 40%, could not carry on business in India Or establish in India a branch office or other place of business. Nor could such a person or company acquire the whole or any part of any undertaking in India of any company carrying on any trade, commerce or industry or purchase the shares in India of any such company. The object of Section, 29, inter alia was to ensure that a company (other than banking company) in which the non-resident interest was more than 40% must reduce in to a level not exceeding 40% [Needle Industries (India) Ltd, and Others, v. Needle Industries Newey (India) Holdings Ltd. and others, AIR (1981) SC 1298). But, now this restriction of 40% has been removed by an amend-ment by the Act 29 of 1993. A company in which non-resident interest is more than 40% can carry on business without having to obtain permission from the Reserve Bank of India. The underlying idea of this liberalisation is clear. Non-resident persons were being invited to inves in India and/or in Indian companies. If any non-resident invests in Indian company, it is but natural that dividends payable by an Indian company will be enjoyed by the non-resident. All other rights that a shareholder enjoys by virtue of the shareholding will be enjoyed by the non-resident. Merely because a foreign shareholder acquires 51% shares in an Indian company it cannot be said that this is against public interest or public policy.

In this connection it should also be noticed that Section 11 of Foreign Exchange Regulations Act, 1973 which had empowered the Reserve Bank to put restrictions on transfer of any asset in India to a person resident outside India or a person intending to become resident outside India, has now been repealed with effect from 8.1.1993 by the Amending Act 29 of 1993. Here again the intention of the legislature is quite clear. The entire object is to allow the non-residents to do business in India and to deal with assets in India with greater freedom.

In view of all these, it is difficult for us to uphold the contention that the Scheme of Amalgamation is against public interest. Merely because 51% of the shares of HLL is being given to a foreign company, the Scheme cannot be said to be against public interest. The Foreign Exchange Regulation Act has been amended specifically to encourage foreign participation in business in India. The bar to haying more than 40% shares in an Indian Company by a non-resident has been hefted. The Amending Act 29 of 1973 is not under challenge. In order to give greater freedom to the companies for doing business in India, the MRTP Act has been amended. Prior approval of Government of India is not a necessary for amalgamation of companies any more. In fact, it is in public interest that TOMCO with its 60,000 shareholders and also a very large Work-force does not deteriorate into a sick company.

Nor do we think that 'public interest' which is to be taken into account as an element against approval of amalgamation would include a mere future possibility of merger resulting in a situation where the interests of the consumer might be adversely effected. If, however, in future the working of the Company turns out to be against the interest of the con-sumers or the employees, suitable corrective steps may be taken by appropriate authorities in accordance with law. As has been said in the case of Fertilizer Corporation Kamgar Union v. Union of India, [1981] 2 SCR 52 at page 77 :"...........it is. not a part of the judicial process to examine entrepreneurial activities to forret out flows. The Court is least equipped for such oversights. Nor, indeed, it is the function of the judges in our constitutional scheme." Now merely because the scheme envisages allot-ment of 51% equity shares to Unilever, the scheme cannot be held to be against public interest.

Next it was argued on behalf of the employees of TOMCO that the Scheme win adversely affect them This argument is not understandable. The Scheme has fully safeguarded the interest of the employees by providing that the terms and conditions of their service will be continuous and uninterrupted service and their service conditions will not be prejudicially affected by reason of the Scheme. The grievance made, however, is that there is no job security of the workers, after the amalgamation of the two Companies. It has been argued that there should have been a clause in the Scheme ensuring that no retrenchment will be effected after the amalgamation of the two

Companies. There was no assurance on behalf of the TOMCO that the workers will never be retrenched. In fact, the performance of TOMCO over the last three years was alarming for the workers. It cannot be said that after the amalgamation they will be in a worse position than they Were before the amalgamation.

We do not find that the amalgamation has caused any prejudice to the workers of TOMCO. The stand of the employees of HLL is equally incomprehensible. It has been stated that if the TOMCO employees con-tinue to enjoy the terms and conditions of their service as before, then two classes of employees will come into existence, Terms and conditions of HLL employees were much worse than that of TOMCO employees. If there are two sets of terms and conditions under the same company, then a case of discrimination will arise against the HLL employees.

We do not find any substance in this contention. The TOMCO employees will continue to remain on the same terms and conditions as before. Because of this arrangement, it cannot be said that a prejudice has been caused to HLL employees. They will still be getting what they were getting earlier. TOMCO employees who were working under better terms and conditions, will continue to enjoy their old service conditions under the new management.

Fear has been expressed both by TOMCO employees as well as HLL employees that the results of the amalgamation would necessitate stream-lining of the operations of the enlarged Company and the workers will be prejudiced by it.

No one can envisage what will happen in the long run. But on this hypothetical question, the Scheme cannot be rejected. As of now, it has not been shown how the workers are prejudiced by the Scheme.

Lastly, there was a vague allegation of mala fide, because of some trade arrangement between Unilever and Tata Sons Limited. It appears that three properties belonging to Tata Sons Limited. were being used by TOMCO as licensee with no enforceable rights. Occupation was purely permissive. TOMCO never considered these properties or rights relating to these properties as their assets. They were never shown in the balance sheet of the Company. Tata Sons could get back possession of these properties by revoking the licence. It was not necessary for Tata Sons to obtain the help of HLL or Unilever for getting back the possession. Under the Scheme, the properties are to be transferred at market rate, which has to be independently assessed. The determination of the market price has been entrusted by the Court to a reputed valuer. There is no reason to doubt their competence. No case of mala fide has been established.

An argument was also made that as a result of the amalgamation, a large share of the market will be captured by the HLL. But there is nothing unlawful for illegal about this. The Court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved. But this is not the case here. A company may, on its own, grow up to capture a large share of the market. But unless it is shown there is some illegality or fraud involved in the scheme, the Court cannot decline to sanction a scheme of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO. Dr. Dhavan has argued that TOMCO is not yet a sick Company. That may be right, but TOMCO at this fate will become a sick Company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The shareholders, the employees, the creditors will all suffer. The argument that the Company has large assets is realty meaningless. Very many cotton mills and jute mills in India have become sick and are on the verge of liquidation, even though they have large assets. The Scheme has been sanctioned almost unanimously by the shareholders, debenture holders, secured creditors, unsecured creditors and preference shareholders of both the Companies. There must exist very strong reasons for withholding sanction to such a scheme. Withholding of sanction may turn out to be disastrous for 60,000 shareholders of TOMCO and also a large number of its In view of the aforesaid, the Appeals are dismissed. The Special Leave Petitions are also dismissed. There will be no order as to costs.

ORDER In view of the separate but concurring judgments, the appeals said petitions are dismissed. But the parties are left to bear their own costs.