REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 1430-1431 OF 2011
(Arising out of S.L.P (C) Nos. 8497-8498 of 2009)

SESA INDUSTRIES LTD. — APPELLANT

VERSUS

KRISHNA H. BAJAJ & ORS. — RESPONDENTS

J U D G M E N T

D.K. JAIN, J.:

Leave granted.

2. These appeals, by special leave, are directed against the judgment dated 21st February, 2009 delivered by a Division Bench of the High Court of Bombay at Goa whereby the Division Bench has set aside the judgment of the learned Single Judge dated 18th December, 2008, sanctioning a scheme of amalgamation between the appellant company and Sesa Goa Limited (for short "SGL"), the Transferee Company.

3. Shorn of unnecessary details, the facts material for the adjudication of these appeals may be stated thus:

SGL was incorporated on 25th June, 1965 as a private limited company, and thereafter, on 16th April, 1991 became a public company. The appellant company viz. Sesa Industries Ltd. (for short "SIL") was incorporated on 17th May, 1993 as a subsidiary of SGL with the latter holding 88.85% of the shares in the former.

4. On 26th July, 2005, a resolution was passed by the Board of Directors of SIL to amalgamate SIL with SGL, effective from 1st April, 2005. In pursuance thereof, on 12th January, 2006, SIL and SGL filed respective company applications in the Bombay High Court seeking the Court's permission to convene a general body meeting.

5. Respondent No. 1 herein, holder of 0.29% of the shares in SIL, filed an affidavit on 18th January, 2006 intervening in the afore-mentioned company petitions. Subsequently, on 6th March, 2006, respondent No. 1 also filed a letter dated 17th February, 2006 issued by the Director of Inspection and Investigation, Ministry of Company Affairs, Government of India, respondent No.3 herein, addressed to the Regional Director, respondent No.2 in these appeals, together with a copy of the inspection report under Section 209A of the Companies Act, 1956 (for short "the

Act"). At this juncture, it would be useful to extract relevant portion of the said report, which reads as follows:

> "It will be apparent from the various findings of the Inspection Report that the entire control of the day to day working of the company is being managed by Mitsui & Co. Ltd., Japan whereby huge turnover and profits are being siphoned away through systematic under invoicing of international financial transactions and over invoicing of import of coal. As regards inter-se transactions between SGL & SIL, systematic efforts have been made by SGL to put SIL into weal financial position by siphoning of the funds from SIL to SGL by over invoicing the price of iron ore and coke. In the process the minority shareholders of SIL have been deprived of their reasonable return in the forms of dividend or gains out of fair price of its shares. The minority shareholders of (sic) SIL have been cheated through the systematically siphoning the funds by SGL to the ultimate holding company i.e. M/s Mitsui & Co. Ltd., Japan. The I.O. has suggested for redressal of grievances of SIL by SGL in rescinding (sic.) the contract of purchase of shares at under value price of Rs. 30/- per share."

6. Ignoring the objections raised by respondent No.1, vide order dated 18th March, 2006, the High Court, allowed SIL and SGL to convene meetings for seeking approval of shareholders for the said amalgamation, and directed the companies to disclose, as part of the Explanatory Statement to be sent with individual notices, the following observations from the inspection report:

"The Central Government has issued a letter dated 17th February, 2006 to various governmental agencies including the Regional Director (Western Region) enclosing a copy of the inspection report and recording that during the course of the inspection the inspecting officer has pointed out contraventions of Section 269 read with Section 198/309, contravention of Section 289 read with Article no. 111 and 140 of the Articles, contravention of Section 260 and 313, contravention of Section 268 read with Section 256 and contravention of Section 628 of the Act. The Investigating Officer has suggested invoking the provisions of Section 397 and 398 read with Section 388B, 401, 402 and 406 of the Act including that of Section 542 of the Act. The Inspection report has also pointed out financial irregularities and also examined the complaints of Mrs. Kalpana Bhandari and Mrs. Krishna H. Bajaj which have been reported in Part "A" of the Inspection Report. Contravention of Section 297 of the Act has been reported in Part "B" of the Inspection Report. It has also been suggested Part "D" of the Inspection Report for references to be made to the Ministry of Finance and SEBI. Accordingly, the Central Government has requested the addressees to examine the report and take appropriate action."

7. Thereafter, on 8th May, 2006, the shareholders of SIL and SGL, by 99% majority, approved the scheme of amalgamation, and respondent No.1 was the sole shareholder who objected to the said scheme. SIL and SGL both filed petitions in the High Court for according approval to the amalgamation scheme.

8. On 10th August, 2006, the Registrar of Companies, Goa filed an affidavit as the delegate of the Regional Director stating that SIL and SGL were

inspected under Section 209A of the Act by the Inspecting Officers of the Ministry of Company Affairs during the year 2005 and "any violation which may be noticed during the course of inspection, there will be no dilution for initiating legal action under the Act and that will not in any way affect the amalgamation". The Registrar stated save and except the observations in para 4 of the affidavit, which included forwarding of two complaints received from respondent No.1, he had no objection to the scheme of amalgamation.

9. On the same day, Official Liquidator, respondent No.1 in these appeals, also filed a report in the High Court, *inter alia,* stating that in light of the Auditor's report dated 2nd August 2006, according to him the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members or the public. Respondent No.1 filed an affidavit objecting to the sanctioning of the scheme.

10. On 24th August, 2006 respondent No. 1 filed Application No. 56 of 2006 praying for production and/or inspection of some documents, including joint valuation report submitted by M/s. N.M. Raiji and M/s. Hairbhakti & Co.; the aforementioned Inspection Report relating to SGL and SIL, and issuance of notice to the Bombay Stock Exchange and the National

Stock Exchange; the Ministry of Company Affairs and the Central Government. On 9th February, 2009, while partly allowing the said application the Company Court directed SGL and SIL to place on record the joint valuation reports, the proxy register alongwith relevant proxies held on 8th May, 2006. However, as regards other prayers, the application was dismissed. Being aggrieved, respondent No.1 preferred an appeal before the Division Bench. Vide order dated 25th April, 2007, the Division Bench dismissed the appeal preferred by respondent No.1, observing that:

> "We have gone through the two reports. We are of the opinion that the learned Company Judge should take into consideration the said reports before passing any final orders in the matter of approving the scheme of amalgamation of the two companies for considering the purpose of it relevancy, in order to grant approval."

11. Thereafter, respondent No.1 filed yet another Company Application No. 24 of 2007, praying that the reports dated 17th February, 2006 and 20th March, 2006 sent to the Regional Director by the Ministry of Company Affairs be furnished to her. Vide order dated 13th July, 2007, the Single Judge allowed the application. Being aggrieved, SIL preferred an appeal before the Division Bench. Admitting the appeal, vide order dated 23rd

August, 2007, the Division Bench granted interim stay of the order dated 13th July, 2007. The order reads:

> "Perusal of the impugned order, however, nowhere discloses consideration of the said aspect of the relevancy of the document for the purpose of deciding the issue relating to amalgamation of the company. We, however, make it clear that the process regarding amalgamation shall proceed further in accordance with the provisions of law and in terms of direction in order dated 25.4.07 regarding relevancy of the said report."

12. Finally, vide judgment dated 18th December, 2008, the learned Company Judge sanctioned the scheme of amalgamation between SGL and SIL, *inter alia*, observing that: (i) since inspection proceedings under Section 209A of the Act are different from an investigation carried out in terms of Section 235 of the Act, they are not required to be disclosed under the proviso to Section 391 of the Act; (ii) in any event, SIL and SGL have not suppressed any material facts as the letter dated 17th February, 2006 was made part of the individual notices sent to the shareholders; (iii) inspections carried out under Section 209A of the Act cannot come in the way of sanctioning of amalgamation, as they can only result in criminal prosecution of those responsible for contravention of various Sections of the Act; (iv) three years have elapsed since the inspections but the Central Government has not taken any further actions in terms of the

inspection reports, which shows that investigations or action in terms of Section 401 of the Act was not in the offing; (v) the Central Government has, through the Regional Director, clarified that the merger would not come in the way of any action to be taken pursuant to the two inspection reports, (vi) non-disclosure of pending criminal complaints is also not fatal to sanctioning of the scheme as the Objector did not raise this contention earlier; pendency of criminal complaints cannot be equated to "material facts" in terms of the proviso to Section 391 of the Act and the merger will have no effect on the criminal complaints; (vii) merely because the Registrar has failed to perform his duties, it cannot be said that the scheme of amalgamation, which has been approved by a majority of the shareholders, should be rejected; (viii) the onus is on the Objector to prove that a scheme is contrary to public interest and is not just, fair and reasonable, and in the instant case, the Objector has not discharged the burden cast on her; (ix) the objection in relation to the share valuation was not well-founded in as much as the Objector has not placed any material to show that the valuation was unfair, especially when an overwhelming majority of shareholders have approved the share valuation; (x) violation of Section 73 of the Act is not sufficient to stall an amalgamation as the persons responsible for the violation can be

effectively dealt with even after the merger and (xi) the objection that the proposed scheme is unconscionable deserves to be rejected, as the scheme has been approved by majority of the shareholders, as also the Central Government. The learned Judge also clarified that the sanctioning of the scheme will not come in the way of either civil or criminal proceedings which may be initiated pursuant to the inspection reports as well as further progress of criminal complaints filed by the objector.

13. Aggrieved, respondent No.1 preferred an intra-court appeal before a Division Bench of the Court. The Division Bench has, vide the impugned judgment, set aside the order of the learned Single Judge and revoked the sanction to the amalgamation scheme. The division bench has*, inter-alia,* observed that: (i) when serious irregularities have been found in the inspection report and when the proceedings on the basis of the said inspection report are still pending and no further decision has been taken in this behalf and the Registrar as a delegate of the Regional Director who was in possession of such inspection report, should not have filed affidavits both, as the Official Liquidator as well as the Registrar as the delegate of the Regional Director; (ii) once it is found that the report/affidavit on behalf of the Registrar/Regional Director is not in conformity with the statutory provisions, this Court mechanically cannot

sanction the scheme simply because the majority of the shareholders have approved the scheme and the majority shareholders in their wisdom have accepted the valuation regarding exchange ratio; (iii) as per the provisions of Section 393, the Registrar as well as the Liquidator, both are required to submit their separate reports and both are, therefore, functioning in a different capacity. It is surprising as to how the Official Liquidator who was the incharge of the Registrar could have filed the affidavits one in the capacity as a delegate of the Regional Director and the other in the capacity as the Official Liquidator; (iv) the Affidavit of the Registrar is absolutely noncommittal. In the affidavit of the Official Liquidator, he has mentioned that the affairs of the company are not being conducted in a manner prejudicial to the interests of its members or to public interest. But when the same person filed affidavit as Registrar, this aspect is clearly omitted in his reply and (v) the learned Company Judge himself has found that from the stand taken by the Registrar, he has failed in his duty and it cannot be said that the requirement of Section 394 has been complied with. In fact, two contradictory affidavits have been filed by the same gentleman, one in his capacity as the delegate of the Regional Director and the other in his capacity as the Official Liquidator. When the law requires that there should be two independent

reports, it is clear that the statutory provision has not been complied with.

14. Hence these appeals by SIL.

15. We heard Mr. K.K. Venugopal, Senior Advocate for the appellant, Mr. H.P. Raval, learned Additional Solicitor General of India on behalf of respondent Nos.2 to 4 and Mr. Amar Dave, learned Advocate on behalf of respondent No.1 at considerable length.

16. Mr. K.K. Venugopal, learned senior counsel strenuously urged that once a scheme of amalgamation has been approved by a majority of the shareholders after sufficient disclosure in the explanatory statement regarding the pendency of an inspection under Section 209A of the Act, it is neither expedient nor desirable for Courts to sit in judgment over a commercial decision of the shareholders. Relying on the decisions in ***Reliance Petroleum Ltd., In re***[1], ***Programme Asia Trading Company Limited, In re***[2] and ***Core Health Care Ltd., In re***[3], learned counsel contended that it is settled that pendency of an inspection under Section 209A or under Section 235 of the Act should not stall a scheme of amalgamation.

[1] [2003] 46 SCL 38 (Guj)
[2] [2005] 125 Comp Cas 297 (Bom)
[3] [2007] 138 Comp Cas 204 (Guj)

17. Learned counsel submitted that the Division Bench erred in rejecting the scheme of amalgamation on the sole ground that the requirement of the first proviso to Section 394(1) of the Act has not been complied with, as it is settled that the said proviso only applies to the amalgamation of a company which is being wound up. Learned counsel stressed that in the instant case, the prayer in the amalgamation petition was for "dissolution without winding up" and hence only the second proviso to Section 394(1) was applicable. Relying on the decisions of this Court in ***Regional Director, Company Law Board, Government of India*** *Vs.* ***Mysore Galvanising Co. Pvt. Ltd. & Ors.***[4]***, Sugarcane Growers & Sakthi Sugars Shareholders' Association*** *Vs.* ***Sakthi Sugars Ltd.***[5]***, Marybong and Kyel Tea Estate Ltd., In re***[6] and ***Mathew Philip & Ors.*** *Vs.* ***Malayalam Plantations (India) Ltd. & Anr.***[7], learned counsel contended that the use of the word "further" in the second proviso to Section 394(1) of the Act does not indicate that the said proviso is an additional provision in relation to the situation contemplated under the first proviso.

[4] [1976] 46 Comp Cas 639 (Kar)
[5] [1998] 93 Comp Cas 646 (Mad)
[6] [1977] 47 Comp Cas 802 (Cal)
[7] [1994] 81 Comp Cas 38 (Ker)

18. While pointing out that the current investigation under Section 235 of the Act was initiated in July, 2009, after the impugned judgment was delivered and was based on a fresh complaint by respondent No.1, learned counsel urged that these investigations are at a preliminary stage of mere allegations and the final report/accusation, if any, the trial, its outcome and appeals etc., would all be a long drawn process, which cannot hold up the amalgamation, as was opined by the Company Judge. Learned counsel argued that the said finding of the Company Judge having not been disturbed by the appellate bench, the same has attained finality. Drawing an analogy with cases under the Election laws, learned counsel pleaded that unless a person is convicted, no adverse inference can be drawn against him. In support of the proposition, reliance was placed on the decision of this Court in ***Ranjitsing Brahmajeetsing Sharma*** *Vs.* ***State of Maharashtra & Anr.***[8].

19. Reliance was placed on the decisions in ***Search Chem Industries Ltd., In re***[9] and ***Banaras Beads Ltd., In re***[10] to contend that the pendency of the investigation cannot come in the way of amalgamation in as much as even if the allegations are found to be true, the same will lead only to a

[8] (2005) 5 SCC 294
[9] [2006] 129 Comp Cas 471 (Guj)
[10] [2006] 132 Comp Cas 548 (All)

report under Section 241 of the Act and ultimately a prosecution under Section 242 of the Act against the Directors/Principal officers of the company, which would not dilute or affect the scheme of amalgamation.

20. Highlighting the advantages of the amalgamation, learned counsel submitted that SIL being a subsidiary of SGL, the amalgamation between both the said companies would entail several benefits for both the companies, including consolidation of the management, control and operation of both companies thereby resulting in considerable savings by elimination of duplication of administrative expenses etc. Moreover, according to the learned counsel, the shareholders of SIL, including the appellant, will also stand to gain tremendously by allotment of shares of SGL, a very healthy company. As per the amalgamation scheme, the shareholders of SIL will get one share of SGL against five shares held by them in SIL. Learned counsel submitted that 99.68% of the shareholders of both the appellants, viz. SIL and SGL having approved the scheme, allowing a scheme of amalgamation to be stalled due to the pendency of an investigation or inspection would lead to a situation whereby any scheme for amalgamation can be held to ransom by a minority shareholder, like in the instant case, where the first

respondent/complainant had voluntarily offloaded 5,31,950 shares pursuant to a voluntary offer made by SGL out of total 5,89,400/- shares held by him in SIL.

21. Assailing the observation of the appellate Bench that the same person viz. the Registrar of Companies ought not to have filed both Affidavits himself as delegate of Regional Director as well as the Official Liquidator, learned counsel urged that as Section 448(1)(a) of the Act contemplates the possibility of part time Official Liquidators, there was nothing improper in the approach of the Registrar in as much as the Registrar had filed both the affidavits on 10th August, 2006, and the same had to be read together, which disclosed all relevant materials. Additionally, it was urged that the Single Judge had rightly concluded that a scheme of amalgamation, which is just and fair, cannot be rejected merely because the Official Liquidator had failed in his duty in placing the correct position before the Court.

22. Learned counsel then submitted that in ***Life Insurance Corporation of India*** *Vs.* ***Escorts Ltd. & Ors.***[11], this Court had held that the functioning

[11] (1986) 1 SCC 264

of a company was akin to that of a parliamentary democracy wherein the overall control is exercised by the majority of the shareholders. In the instant case, majority of the shareholders had approved the scheme of amalgamation despite having full knowledge of the proceedings against the Companies and the prima facie findings. Moreover, Section 395 of the Act provides the power to acquire shares of the shareholders dissenting from the scheme if the said scheme has been approved by the holders of not less than nine-tenth in value of the shares of whose transfer is involved.

23. Mr. Raval, the learned Additional Solicitor General, on the other hand, relying on a decision of the Gujarat High Court in ***Wood Polymer Limited, In re***[12], submitted that since the sanctioning of a scheme of amalgamation has the effect of imposing it on dissenting members, before exercising the power conferred on it by Section 391(2) of the Act, the Court needs to examine the scheme in its proper perspective. Learned counsel urged that it cannot be argued that merely because statutory formalities are duly carried out, the Court has no option but to sanction the scheme. Learned counsel also submitted that since inspection reports had been received by the Registrar of Companies and

[12] [1977] 47 Comp Cas 597

Official Liquidator, respectively on 19th October, 2006 and 15th November, 2006, i.e. after the filing of affidavit by them on 10th August, 2006, under Section 394 of the Act, no fault can be found with their affidavits. It was asserted that since serious irregularities had been found in the affairs of both SGL and SIL, cheating the minority shareholders of SIL, the order sanctioning amalgamation of the said companies cannot be permitted to be used for thwarting the investigations. Thus, the learned Additional Solicitor General supported the impugned order.

24. Mr. Amar Dave, learned counsel appearing for respondent No.1, contended that the provisions of Chapter V of Part VI of the Act were intended to introduce a system of checks and balances to promote the interests of shareholders, creditors and society at large so as to promote a healthy corporate governance culture, and the Courts should adopt an interpretation that advances this object.

25. Learned counsel urged that in the instant case the provisions of Section 393(1)(a) of the Act had not been complied with in as much as all material facts were not placed before the shareholders, in particular the preliminary letters of findings addressed to the Managing Director of SIL

by the Inspector pursuant to the inspection under Section 209A of the Act on 28th September, 2005. According to the learned counsel, a mere enclosure of an extract of covering letter dated 17th February, 2006 cannot be construed as sufficient compliance with the mandate of Section 393(1)(a), as the said letter did not disclose the details of the findings to the effect that the affairs of the company had been conducted in a manner which was prejudicial to the interests of its members. Relying on the decision of this Court in ***Miheer H. Mafatlal*** *Vs.* ***Mafatlal Industries Ltd.***[13], learned counsel contended that sufficient information had not been disclosed to the shareholders so as to enable them to take an informed decision.

26. Learned counsel contended that in light of the dictum laid down in ***Miheer H. Mafatlal*** (supra); ***Bedrock Ltd., In re***[14] and ***T. Mathew*** *Vs.* ***Smt. Saroj G. Poddar***[15], the companies had violated the provisions of the proviso to Section 391(2) of the Act in as much as SIL and SGL had not disclosed the pendency of the criminal proceedings against the companies and its directors, and of proceedings under Section 209A of the Act. Learned counsel submitted that proceedings under Section 209A

[13] (1997) 1 SCC 579
[14] [2000] 101 Comp Cas 343 (Bom)
[15] [1996] 22 CLA 200 (Bom)

of the Act would fall under the category "and of the like" as mentioned in the proviso to Section 391(2) of the Act, as every material fact which could affect the Company Court's discretion has to be disclosed. Moreover, both the Companies had not disclosed the final inspection reports under Section 209A of the Act, and the same was brought on record by respondent No.1. Learned counsel further submitted that the petitioner has failed to disclose even before this Court, that the Serious Fraud Investigation Office (SFIO) was conducting an investigation into the affairs of the company under the provisions of Section 235 of the Act, and even though the said investigation proceedings arose later, the obligation under the proviso of Section 391(2) is a continuing obligation and, therefore, the appellant was obliged to disclose the same before this Court as well.

27. Learned counsel strenuously urged that the reports submitted by the Registrar as delegate of the Regional Director and as Official Liquidator were clearly in violation of the mandate of the proviso to Section 394(1) of the Act, in as much as despite being in possession of the inspection reports prepared by the Inspecting Officer of the Ministry of Company Affairs, the Official Liquidator filed a misleading affidavit before the

Company Court, reporting "that the affairs of the transferor Company were not being conducted in a manner prejudicial to the interests of its members or to the public interest". It was alleged that the affidavit submitted by the Official Liquidator was solely based on the report of one M/s S.R. Kenkre & Associates, Chartered Accountants, who in turn had based their entire report on the information supplied by the Company, without any independent verification. Relying on the decisions in ***Securities and Exchange Board of India*** *Vs.* ***Sterlite Industries (India) Ltd.***[16]***; Modus Analysis and Information P. Ltd. & Ors, In re***[17]***; Miheer H. Mafatlal*** (supra); ***Larsen and Toubro Limited, In re***[18]***; Wood Polymer*** (supra) and ***T. Mathew*** (supra), learned counsel argued that the Division Bench had rightly concluded that the mandate of Section 394 had not been complied with thereby raising a statutory embargo on the approval of the scheme of amalgamation. Further, the disclosure of all material information to the shareholders, which included the pendency of criminal proceedings; inspection proceedings under Section 209A of the Act, and proceedings under Section 235 of the Act in the report of the Official Liquidator under Section 394(1) of the Act constitute jurisdictional requirements, and unless all of them were satisfied, the

[16] (2003) 113 Comp Cas 273
[17] (2008) 142 Comp Cas 410 (Cal)
[18] (2004) 121 Comp Cas 523

Company Court had no jurisdiction to sanction the scheme. In support, reliance was placed on the decision of this Court in ***Carona Ltd.*** *Vs.* ***Parvathy Swaminathan & Sons***[19].

28. Learned counsel then contended that the fact of huge siphoning off the funds from the transferor company (SIL) to the transferee company (SGL) being within the knowledge of the Company Court, it should not have sanctioned the scheme, as the distinction between the wrongdoer and the beneficiary gets effaced due to sanctions of law. Learned counsel also argued that under the attending circumstances the swap ratio of 1 share of the transferee company for 5 shares of the transferor company was also unfair, especially when the valuers did not have an opportunity to examine the inspection reports under Section 209A of the Act.

29. Reliance was placed on the decisions in ***J.S. Davar & Anr.*** *Vs.* ***Dr. Shankar Vishnu Marathe & Ors.***[20]***; T. Mathew*** (supra); ***Calcutta Industrial Bank Ltd., In re***[21] and ***Travancore National & Quilon Bank Ltd., In re***[22], to contend that the proposed scheme was a ruse to stifle

[19] (2007) 8 SCC 559
[20] A.I.R. 1967 Bom. 456
[21] [1948] 18 Comp Cas 144
[22] A.I.R. 1940 Mad 139

further inquiry into the affairs of the transferor and transferee company and their managements which have been initiated by the Ministry of Company Affairs, as also criminal and civil proceedings that may arise thereafter because after the amalgamation, it may not be possible to initiate any proceedings against the transferor company as it would cease to exist. Moreover, the proceedings under Sections 244, 397, 398, 401, 402, 406 and 542 of the Act against the transferor company cannot be initiated against the transferee company even if the transferee company has undertaken to take over all the future liabilities of the transferor company. Learned counsel thus, asserted that in light of the serious findings in the inspection report under Section 209A of the Act, sanction of the scheme would be detrimental to public interest, more so when on sanction of the scheme of amalgamation, the transferor company would cease to exist, losing its entity and in the process its functionaries will go scot free.

30. Relying on ***Miheer H. Mafatlal*** (supra), learned counsel contended that the proposed scheme of amalgamation was unconscionable, in as much as the minority shareholders of the transferor company have been oppressed, and in fact the "exit option" offered by the transferee

company to the minority shareholders of transferor company on 5th June 2003, at an extremely undervalued price of ` 30 per share was in violation of Section 395 of the Act.

31. Lastly, learned counsel urged that though the decision of the majority of the shareholders, while sanctioning the scheme, is of paramount importance, but in the instant case, since 99.80% of the votes of the transferor company were those of the transferee company itself, the significance of the majority decision was of no relevance and, therefore, under these circumstances the Company Court was required to ensure that the rights of the minority were not trammeled upon, as observed in ***Miheer H. Mafatlal*** (supra); ***Bedrock Ltd.*** (supra); ***T. Mathew*** (supra); ***J.S. Davar*** (supra) and ***Calcutta Industrial Bank Ltd.*** (supra).

32. Before addressing the issues raised, it will be useful to survey the relevant provisions contained in Chapter V of Part VI of the Act, which deal with "Arbitrations, compromises, arrangements and reconstructions". Section 391 of the Act, clothes the Court with the power to sanction a compromise or arrangements made by a company with its creditors and members. It reads as follows:-

"**S.391.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 creditor 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 creditors, 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:

Provided that no order sanctioning any compromise or arrangement 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."

Section 394 of the Act, lays down the procedure for facilitating reconstruction and amalgamation of companies. It reads as under:

"**S.394. Provisions for facilitating reconstruction and amalgamation of companies.**—(1) Where an application is made to the Court under Section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court—

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a 'transferor company') is to be transferred to another company (in this section referred to as 'the transferee company');

the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:—

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;
(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
(iv) the dissolution, without winding up, of any transferor company;
(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise on arrangement; and
(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

……"

33. It is plain from the afore-extracted provisions that when a scheme of amalgamation/merger of a company is placed before the Court for its sanction, in the first instance the Court has to direct holding of meetings in the manner stipulated in Section 391 of the Act. Thereafter before sanctioning such a scheme, even though approved by a majority of the

concerned members or creditors, the Court has to be satisfied that the company or any other person moving such an application for sanction under sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to the said sub-section. First proviso to Section 394 of the Act stipulates that no scheme of amalgamation of a company, which is being wound up, with any other company, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Similarly, second proviso to the said Section provides that no order for the dissolution of any transferor company under clause (iv) of sub-section (1) of Section 394 of the Act shall be made unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Thus, Section 394 of the Act casts an obligation on the Court to be satisfied that the scheme of amalgamation or merger is not prejudicial to the interest of its members or to public interest.

34. Therefore, while it is trite to say that the court called upon to sanction a scheme of amalgamation would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the scheme, as the same is best left to the corporate and commercial wisdom of the parties concerned, yet it is clearly discernible from a conjoint reading of the aforesaid provisions that the Court before whom the scheme is placed, is not expected to put its seal of approval on the scheme merely because the majority of the shareholders have voted in favour of the scheme. Since the scheme which gets sanctioned by the court would be binding on the dissenting minority shareholders or creditors, the court is obliged to examine the scheme in its proper perspective together with its various manifestations and ramifications with a view to finding out whether the scheme is fair, just and reasonable to the concerned members and is not contrary to any law or public policy. (See: ***Hindustan Lever Employees Union*** *Vs.* ***Hindustan Lever Ltd. & Ors.***[23]). The expression "public policy" is not defined in the Act. The expression is incapable of precise definition. It connotes some matter which concerns the public good and the public interest. (See: ***Central Inland Water Transport Corporation Limited & Anr.*** *Vs.* ***Brojo Nath Ganguly & Anr.***[24].)

[23] 1995 Supp (1) SCC 499
[24] (1986) 3 SCC 156

35. In ***Miheer H. Mafatlal*** (supra), this Court had, while examining the scope and ambit of jurisdiction of the Company Court, culled out the following broad contours of such jurisdiction:

> "1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
>
> 2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).
>
> 3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
>
> 4. That all necessary material indicated by Section 393(1)(*a*) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).
>
> 5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.
>
> 6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.
>
> 7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and

were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, 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 would 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 on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

36. It is manifest that before according its sanction to a scheme of amalgamation, the Court has to see that the provisions of the Act have been duly complied with; the statutory majority has been acting bona fide and in good faith and are not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purport to represent and the scheme as a whole is just, fair and reasonable from the point of view of a prudent and reasonable businessman taking a commercial decision.

37. Thus, the first question is as to whether the appellant and SGL had disclosed sufficient information to the shareholders so as to enable them to arrive at an informed decision? The proviso to Section 391 (2) requires a company to "disclose pendency of any investigation in relation to the company under Sections 235 to 351, and the like". Though it is true that inspection under Section 209A of the Act, strictly speaking, may not be in the nature of an investigation, but at the same time it cannot be construed as an innocuous exercise for record, in as much as if anything objectionable or fraudulent in the conduct of the affairs of the company is detected during the course of inspection, it may lay the foundation for the purpose of investigations under Sections 235 and 237 of the Act, as is the case here. Therefore, existence of proceedings under Section 209A must be disclosed in terms of the proviso to Section 391(2). In any event, we are of the opinion that since the said issue is a question of fact, based on appreciation of evidence, and both the Courts below have held that the information supplied was sufficient, particularly in light of the order passed by the Single Judge on 18th March, 2006, we are not inclined to disturb the said concurrent finding of the Courts below, particularly when it is not shown that the said finding suffers from any demonstrable

perversity. (See: ***Firm Sriniwas Ram Kumar*** *Vs.* ***Mahabir Prasad & Ors.***[25] and ***Ganga Bishnu Swaika*** *Vs.* ***Calcutta Pinjrapole Society***[26].)

38. The next issue that arises for our determination is whether the Division Bench was correct in holding that the affidavit filed by the Official Liquidator was vitiated on account of non-disclosure of all material facts. From a bare perusal of the affidavit dated 10th February, 2006, it is manifest, *ex facie,* that before filing the affidavit, the said official had not examined and applied its mind to the findings contained in the inspection report under Section 209A of the Act. While it is true that it was not within the domain of the Official Liquidator to determine the relvency or otherwise of the said report, yet he was obliged to incorporate in his affidavit the contents of the inspection report. We are convinced that the official liquidator had failed to discharge the statutory burden placed on him under the second proviso to Section 394(1) of the Act.

39. An Official Liquidator acts as a watchdog of the Company Court, reposed with the duty of satisfying the Court that the affairs of the company, being dissolved, have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large. In essence, the Official Liquidator assists the Court in appreciating

[25] 1951 SCR 277
[26] AIR 1968 SC 615

the other side of the picture before it, and it is only upon consideration of the amalgamation scheme, together with the report of the Official Liquidator, that the Court can arrive at a final conclusion that the scheme is in keeping with the mandate of the Act and that of public interest in general. It, therefore, follows that for examining the questions as to why the transferor-company came into existence; for what purpose it was set up; who were its promoters; who were controlling it; what object was sought to be achieved by dissolving it and merging with another company, by way of a scheme of amalgamation, the report of an official liquidator is of seminal importance and in fact facilitates the Company Judge to record its satisfaction as to whether or not the affairs of the transferor company had been carried on in a manner prejudicial to the interest of the minority and to the public interest.

40. In the present case, we are unable to appreciate why the Official Liquidator, who was aware of the inspection report dated 17th February, 2006 under Section 209A containing adverse comments on the affairs of both the companies, relied only on the report of the auditors, which admittedly was not even verified. We can only lament the conduct of the official liquidator.

41. Having held that the Official Liquidator had failed to discharge the duty cast on him in terms of the second proviso to Section 394(1) of the Act, the next issue that requires consideration is whether sanction of a scheme of amalgamation can be held up merely because the conduct of an Official Liquidator is found to be blameworthy? We are of the view that it will neither be proper nor feasible to lay down absolute parameters in this behalf. The effect of misdemeanour on the part of the official liquidator on the scheme as such would depend on the facts obtaining in each case and ordinarily the Company Judge should be the final arbiter on that issue. In the instant case, indubitably, the findings in the report under Section 209A of the Act were placed before the Company Judge, and he had considered the same while sanctioning the scheme of amalgamation. Therefore, in the facts and circumstances of the present case, the Company Judge had, before him, all material facts which had a direct bearing on the sanction of the amalgamation scheme, despite the aforestated lapse on the part of the Official Liquidator. In this view of the matter, we are of the considered opinion that the Company Judge, having examined all material facts, was justified in sanctioning the scheme of amalgamation, particularly when the current investigation under Section 235 of the Act was initiated pursuant to a complaint filed by respondent

No.1 subsequent to the order of the Company Judge sanctioning the scheme.

42. For the foregoing reasons, the appeals are allowed; and the impugned judgment is set aside. Consequently, the order passed by the Company Judge sanctioning the scheme of amalgamation is restored. However, it is made clear that the scheme of amalgamation will not come in the way of any civil or criminal proceedings which may arise pursuant to the action initiated under Sections 209A or 235 of the Act, or any criminal proceedings filed by respondent No. 1.

43. In the facts and circumstances of the case, there will be no order as to costs.

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(D.K. JAIN, J.)

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(H.L. DATTU, J.)

NEW DELHI;
FEBRUARY 7, 2011.
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