(a) to decide whether any of the ten purchasers is a non-agriculturist and if so, the extent of transfer in favour of such non-agriculturist which will be invalid and pass consequential orders in respect of such land in accordance with law;

(b) to determine whether any of the ten purchasers who are agriculturists, holds excess land by considering their share in the lands purchased as co-owners, with other lands as provided in Secs. 6 to 8 of the Ceiling Act, and pass appropriate orders in accordance with law.

(SBS) *Appeal allowed.*

* * *

COMPANY PETITION

Before the Hon'ble Mr. Justice M. S. Shah
and the Hon'ble Mr. Justice K. A. Puj

I.P.C.L. EMPLOYEES' ASSOCIATION & ANR. v. INDIAN PETROCHEMICALS CORPORATION LTD.*

(A) Constitution of India, 1950 — Arts. 14 & 226 — Companies Act, 1956 (I of 1956) — Secs. 391 & 394 — Industrial Disputes Act, 1947 (XIV of 1947) — Sec. 25FF — Scheme for amalgamation of two Companies — Workers of transferor Company do have *locus standi* to express their views before Company Court in proceedings for amalgamation — However, "the workmen of the transferor Company have no statutory right of holding meetings and to express their opinion on the question of amalgamation".

It appears that Secs. 391 to 394 of the Companies Act, 1956 are a complete Code in themselves subject to their juxtaposition with Sec. 25FF of the Industrial Disputes Act, 1947. Neither of these legislations provide for consultation with the workers for the purpose of deciding on merger or amalgamation. Meetings only of the members of the Company and creditors have been provided. No statutory provision or legal principle has been brought to the Court's notice which makes it a condition of a valid scheme that in the course of formulating the scheme of amalgamation, the workers should have been consulted or failure on the part of the management to consult the workers before formulating the scheme of merger would invalidate the scheme. Strictly speaking, there is no requirement of holding any separate meeting or discussion by the transferor Company with workmen/workmen's unions. (Para 14.1)

The workmen of the transferor Company have no statutory right of holding meetings and to express their opinion on the question of amalgamation, but the workmen of the transferor Company do have the *locus standi* to express their views before the Company Court when the proceedings under Secs. 391 and 394 are pending. (Para 16)

(B) Companies Act, 1956 (I of 1956) — Secs. 391 & 394 — Industrial Disputes Act, 1947 (XIV of 1947) — Sec. 25FF — Transfer of workmen from one employer to another — Question as to whether such transfer can be effected without consent of workmen — Following Supreme Court

*Decided on 18-3-2008. O. J. Appeal No. 240 of 2007 in Company Petition No. 93 of 2007 in Company Application No. 126 of 2007.

judgments, held, "transfer of employer is not permissible without tripartite agreement" — Consent of workmen should be informed consent — Held further, giving the employees option to leave the Company within reasonable period after amalgamation would be sufficient compliance with the legal requirement to transfer the employees to the new employer with their consent.

Absorption of the employees of I.P.C.L. into the services of R.I.L. was not to be against their volition, and therefore, whoever wanted not to join R.I.L or wanted to leave R.I.L. immediately after amalgamation was permitted to do so. In fact, pursuant to the directions given by the learned Company Judge in the order dated 16-8-2007 sanctioning the scheme, a notice was displayed on the notice-board by the transferor Company as well as by the transferee Company informing that those of the workmen/employees who did not wish to join/work with R.I.L. had the right to leave service within two months from 16-8-2007 by informing I.P.C.L./R.I.L. During the period of two months, not a single workman/employee informed R.I.L. (transferee Company) or I.P.C.L. (transferor Company) that he did not want to join/work with R.I.L. (Para 20; *See* also Para 22)

Referring to Supreme Court decision in *B.C.C.P. Mazdoor Sangh v. N.T.P.C.,* (Civil Appeal No. 678 of 2006 decided on 11-10-2007) the Court observed :

The Apex Court accepted the employees' submission that the transfer of employer is not permissible without tripartite agreement. The Apex Court also held that the consent must be express and consciously accorded in the course of negotiation contemporous with the process of transfer so as to amount to an informed consent. Consequently, in order to bind the appellants, there must be a tripartite agreement and that in absence of such tripartite agreement, the transfer from one employer to another cannot be effected. (Para 25)

The Court, thereafter extensively quoted "pearls of wisdom and the thread of impeccable, invincible and compelling logic of Lord Chancellor Viscount Simon and Lord Atkin" in *Nokes v. Doncaster Amalgamated Collieries Ltd.,* 1940 (3) All ER 549. The House of Lords therein accepted the principle that "a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve" and that "this right of choice constituted the main difference between a servant and a serf." The High Court, thereafter, held :

Nokes' decision would, therefore, apply to the case of amalgamation of two Companies under Secs. 391 to 394 of the Companies Act, 1956 with equal force. Applicability of the Industrial Disputes Act, 1947 would not change the basic nature of this transaction - transfer of undertaking based upon agreement between two Companies coming into force with the sanction of the Company Court. All that Sec. 25FF provides is that the workmen of the transferor Company are entitled to get notice and retrenchment compensation on transfer of undertaking subject to the proviso under which these benefits are not payable to workmen continuing in service under the transferee Company, if the transferee Company is ready to fulfill the conditions stipulated in the proviso. (Para 27)

On the question as to "when should the option be given to the employees, the Court held :

Giving the employees of the transferor Company an option not to join the transferee Company or to leave the transferee Company immediately after amalgamation or within a reasonable period from the date of amalgamation would also be sufficient compliance with the legal requirement to transfer the employees to the new employer with their consent. (Para 28.4)

Express or prior consent of the individual workmen or their unions is not necessary for the transfer of undertaking or amalgamation of two Companies to become effective, but express or implied consent of the workman is necessary to bring into existence the relationship of employer and employee between the transferee Company and the workmen of the transferor Company. (Para 29)

(C) Industrial Disputes Act, 1947 (XIV of 1947) — Sec. 25FF — Companies Act, 1956 (I of 1956) — Secs. 391 & 394 — Transfer of entire undertaking from one Company to another as a result of amalgamation of two Companies — Workmen cannot be transferred to transferee Company without their express or implied consent — Workmen who do not opt to join transferee Company would be entitled to retrenchment compensation in terms of Sec. 25FF of the Industrial Disputes Act.

While the consent of the workman is not necessary for transfer of the undertaking, his consent is certainly required for his absorption in the service of the new employer. Such consent need not be expressed in writing or individually by every employee. It should suffice if a workman who does not desire to join the transferee Company is permitted to opt out. (Para 29)

Where the entire undertaking is transferred from one Company to another, there will be a change of employers only where the workman of the transferor Company joins the transferee Company. The workman cannot be transferred to the transferee Company without his consent, express or implied. Hence, if the workman does not agree to join the transferee Company, he will not become an employee of the transferee Company, and therefore, *there will not be a change of employers by reason of transfer of the undertaking*. Hence, for invoking the proviso to Sec. 25FF, it is not sufficient that the transferee Company agrees to fulfill all the three conditions (a), (b), and (c) stipulated in the proviso. First and foremost, the workman of the transferor Company must agree, either expressly or impliedly, to join the service of the transferee Company. (Para 30)

Where the transferee Company is ready to fulfill all the three conditions stipulated in the proviso to Sec. 25FF, the workman *who opts to join* the services of the transferee Company will not be entitled to claim retrenchment compensation for the services rendered by him to the transferor Company. At the same time, the workman *who opts not to join* the services of the transferee Company is entitled to get retrenchment compensation from the transferor Company. Having regard to the fact that a workman might have joined service of the transferor Company with the full knowledge of its work ethos and labour philosophy, the Court sees nothing wrong in such a workman of the transferor Company exercising his right not to join the services of the transferee Company and claiming compensation from the transferor Company on the ground that the decision of the transferor Company to be amalgamated into the transferee Company is a unilateral decision of the transferor Company without any consent of the workman. Hence, even though, workmen have no legal right to be consulted before the transferor Company decides for amalgamation, the transfer of the undertaking from one Company

to the other is sufficient to be treated as resulting into retrenchment of the workman of the transferor Company who is not willing to join the services of the new employer, even if the new employer is ready to fulfill all the three conditions stipulated in the proviso to Sec. 25FF. (Para 31; *See* also Paras 32 and 37)

(D) Companies Act, 1956 (I of 1956) — Secs. 391 & 394 — Amalgamation of two Companies — Scheme of amalgamation envisaged that workmen would be treated as employees of transferee Company and conditions of service shall not be "less favourable" than those enjoyed by workmen with transferor Company — High Court clarified that this clause in the scheme would "not foreclose right of workmen of the transferor Company to demand better conditions of service after amalgamation". (*See* Paras 43 & 44)

(E) Companies Act, 1956 (I of 1956) — Secs. 391 & 394 — Appeal against order of Company Court sanctioning scheme of amalgamation — Order of Company Court implemented before the appeal was filed — Preliminary contention that appeal had become infructuous — Order of Company Judge ran into 495 typed pages — Company Judge had declined to grant stay against operation of the order — Appeal was filed within period of limitation — Preliminary objection turned down. (*See* Paras 8, 9 and 10)

National Textile Workers' Union v. Ramkrishnan (1), Gujarat Nylons Ltd. v. G.S.F.C. (2), *In Re.* Narmada Chemature Petrochemicals Ltd. (3), Management, Mettur Beardsell Ltd. v. Workmen of Mettur Beardsell Ltd. (4), B.C.P.P. Mazdoor Sangh v. N.T.P.C. (5), Rallis Group Employees' Union v. Rallis India Ltd. (6), Jeshtamini Gulabrai Dholakia v. Scindia Steam Navigation Co. (7), Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Workmen (8), Haryana Financial Corporation v. Jagdamba Oil Mills (9), Mehboob Dawood Shaikh v. State of Maharashtra (10), Nokes v. Doncaster Amalgamated Collieries Ltd. (11), *In Re. :* Blue Star Ltd. (12), Manager, M/s. Pyarchand Kesarimal Ponwal Bidi Factory v. Omkar Laxman Thanger (13), H. L. Trehan v. Union of India (14), Jawaharlal Nehru University v. Dr. K. S. Jawatkar (15), Hindustan Lever Employees' Union v. Hindustan Lever Ltd. (16), referred to.

Treatise referred :

(1) Prof. Gower in "The Principles of Modern Company Law" 3rd Edn., page 634.

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(1) AIR 1983 SC 75 (2) 1992 (1) GLH 637
(3) Comp. Petition No. 147 of 2006 decided on 9-1-2007 by Guj.H.C.
(4) AIR 2006 SC 2056 : 2006 (9) SCC 488
(5) Civil Appeal No. 678 of 2006 decided on 11-10-2007 by S.C.
(6) 2002 (1) LLJ 173 (7) AIR 1961 SC 627 (8) AIR 1963 SC 1489
(9) 2002 (3) SCC 496 (10) 2004 (2) SCC 362 (11) 1940 (3) AllER 549
(12) 2001 (104) Comp. Cases 371 (13) 1969 (2) SCR 272 : AIR 1970 SC 823
(14) 1989 (1) SCC 764 : AIR 1989 SC 568
(15) 1989 Supp. (1) SCC 679
(16) 1995 (83) Comp. Cases 30 : 1995 Supp. (1) SCC 499

Girish Patel with *Shalin N. Mehta*, for Appellant Nos. 1 and 2.
K. S. Nanavati, with *Nandish Chudgar* for Nanavati Associates, for the Opponent.

M. S. SHAH, J. This Original Jurisdiction appeal is directed against the judgment and order dated 16-8-2007 in Company Petition No. 93 of 2007 by which the learned Company Judge sanctioned the scheme of amalgamation of the petitioner-Company-Indian Petrochemicals Corporation Ltd. (hereinafter referred to as "I.P.C.L." or "the transferor Company) having its registered office at Baroda with Reliance Industries Ltd. (hereinafter referred to as "R.I.L." or "Reliance" or the "transferee Company) having its registered office at Mumbai.

2. Reliance Industries Ltd. having its registered office at Bombay filed Company Application No. 283 of 2007 before the Bombay High Court. Pursuant to the order dated 16-3-2007 in the said application, R.I.L. held separate meetings of equity shareholders, secured creditors (including debenture holders) and unsecured creditors of R.I.L. on 21-4-2007. The Chairman of the said meeting submitted his report before the Bombay High Court and the R.I.L. filed Company Petition No. 345 of 2007 before the Bombay High Court for sanctioning the same scheme of amalgamation of I.P.C.L. with R.I.L. The said Company Petition was allowed and the scheme was sanctioned by the Bombay High Court by its order dated 12-6-2007 as modified by order dated 11-7-2007.

3. Before setting out the contentions urged by the appellants, we may indicate the broad facts leading to filing of the petition for sanctioning the scheme of amalgamation.

3.1 By Resolution of the Board of Directors of I.P.C.L. and of the Board of Directors of Reliance Industries Ltd., the two Companies decided for amalgamation of I.P.C.L. with R.I.L. and for that purpose to follow the procedure prescribed by and under the provisions of Secs. 391 to 394 of the Companies Act, 1956 (hereinafter referred to as "the Act"). By order dated 16-3-2007 in Company Application No. 126 of 2007, this Court directed I.P.C.L. to convene separate meetings of equity shareholders, secured creditors (including debenture holders) and unsecured creditors of I.P.C.L. under the Chairmanship of Hon'ble Mr. Justice S. D. Dave a retired Judge of this Court.

3.2 Accordingly, three separate meetings were held at Baroda on 14-4-2007 under the Chairmanship of Hon'ble Mr. Justice S. D. Dave. The Chairman submitted his report dated 18-4-2007 placing on record the result of the meetings as under :-

(A) The scheme came to be approved by overwhelming majority of the equity shareholders present and voting as per the following details :-

"(i) 7,632 *Equity Shareholders* holding in the aggregate, 20,37,73,286 equity shares constituting 97.04% in number and *representing 99.89% in value of the Equity Shareholders,* present in person or by proxy and voting at the Meeting, *voted in favour of the scheme.*

(ii) 233 Equity Shareholders holding in the aggregate, 2,28,705 equity shares constituting 2.96% in number and representing *0.11% in value of the Equity Shareholders* present in person or by proxy and voting at the Meeting, *voted against the scheme*.

(iii) Votes of 54 Equity Shareholders holding 11,74,879 Equity Shares, were declared invalid."

(B) The secured creditors (including debenture holders) unanimously approved the scheme as per the following particulars :-

(i) 51 *Secured Creditors (including Debenture holders)* having claims against the Applicant Company of an aggregate value of Rs. 355.34 Crore and constituting *100% in number representing 100% in value of the Secured Creditors (including Debenture Holders),* present in person or by proxy and voting at the Meeting, *voted in favour of the scheme*.

(ii) *No Secured Creditor (including Debenture holder)* of the Applicant Company *voted against the scheme*.

(iii) The votes of 3 Secured Creditors having claims against the Applicant Company of an aggregate value of Rs. 0.25 crore were declared invalid."

(C) Similarly, the unsecured creditors present and voting also unanimously approved the scheme as per the following details :-

"(i) 635 *Unsecured Creditors* having claims against the Applicant Company of an aggregate value of Rs. 687.48 Crore and *constituting 100% in number representing 100% in value of the Unsecured Creditors* present in person or by proxy and voting at the Meeting, *voted in favour of the scheme*.

(ii) *No Unsecured Creditor* of the Applicant Company *voted against the scheme*.

(iii) The votes of 4 Unsecured Creditors having NIL claims against the Applicant Company were declared invalid." (Emphasis supplied)

3.3 In light of the above report, I.P.C.L. (the transferor Company) filed Company Petition No. 93 of 2007, giving rise to the present appeal, seeking sanction of the Company Court to the scheme of amalgamation of I.P.C.L. (transferor Company) with R.I.L. (transferee Company). The petition was also supported by affidavit dated 18-4-2007 of the Company Secretary, I.P.C.L. stating that the petitioner-Company (I.P.C.L.) had complied with the directions given by the Company Court in Company Application No. 126 of 2007 and that the scheme was approved by requisite majority of shareholders and creditors of the Company.

3.4 When the petition came up for preliminary hearing on 23-4-2007, the learned Company Judge admitted the petition, fixed it for final hearing on 19-6-2007 and directed publication of the advertisement in two daily newspapers *viz*. *Times of India*, Ahmedabad edition and *Gujarat Samachar*, Ahmedabad and Baroda editions. Notices were also issued to the Regional Director and the Official

Liquidator. The Official Liquidator was directed to obtain services of a Chartered Accountant and to submit the report on the affairs of the Company. The Official Liquidator attached to this Court also submitted his report dated 18th June, 2007 along with the Chartered Accountant's Investigation Report dated 4-6-2007 indicating that by sanctioning the scheme the interests of the members and the public at large would not be prejudiced. The Regional Director submitted his report indicating that the Government of India had no objection to approval of the scheme and also stating that scheme was not against the public policy. The Bombay Stock Exchange Ltd. and the National Stock Exchange of India Ltd. where the shares of the transferor and transferee Company were listed, granted their no objection to the scheme under the provisions of Sec. 24(f) of the listing agreements.

3.5 It appears that the Company Petition was extensively heard by the learned Company Judge. The objections lodged by 21 equity shareholders as well as the objections lodged by I.P.C.L. Employees' Association, I.P.C.L. Employees' Union and Petro Chemicals Kamdar Union were considered by the learned Company Judge who ultimately allowed the Company Petition by judgment dated 16-8-2007, which is impugned in this appeal filed on 24-10-2007.

4. In the meantime, after the above judgment, I.P.C.L. filed *caveat* on 22-8-2007 in the O.J. Appeals likely to be filed against the above judgment. It is the case of the respondent-I.P.C.L. (now Reliance Industries Ltd.) that the I.P.C.L. received the certified copy of the judgment on 5-9-2007 and that the said certified copy was filed with the Registrar of Companies, Gujarat State, Ahmedabad in prescribed Form 21 on 5-9-2007 itself; similarly, the order of the Bombay High Court was also filed by the R.I.L. with the Registrar of Companies, Maharashtra State, Mumbai on 5-9-2007 and that thus the scheme became effective on 5-9-2007, the appointed date being 1-4-2006. It is also the case of the respondent-I.P.C.L. (now R.I.L.) that the scheme has been implemented by the Company by taking various steps in compliance of the same; including fixing record date for issue of shares (12-10-2007), listing approval from the stock exchange (16-10-2007) and despatch of physical share certificates to members who had still not dematerialized their shares (17-10-2007) and declaration of quarterly financial results of R.I.L. post-merger with I.P.C.L., to all stock exchanges and dissemination of information to all shareholders (18-10-2007).

5. On 24-10-2007, this appeal has been filed by I.P.C.L. Employees' Association having membership of about 2039 employees and I.P.C.L. Employees' Union having membership of about 1602 employees. The third Trade Union being Petro Chemicals Kamdar Union having membership of about 1296 members has not challenged the said judgment of the learned Company Judge. The total number of employees of I.P.C.L. before amalgamation was about 14,000 (as indicated in Para 36.20 of the judgment under appeal).

6. O.J. Appeal No. 241 of 2007 was filed by 17 equity shareholders of I.P.C.L. on the same day *i.e.* on 24-10-2007. That appeal has been dismissed by our judgment dated 28-12-2007.

7. Mr. Girish Patel, learned Counsel with Mr. Shalin Mehta for the appellants has raised the following broad contentions :-

A. While the learned Company Judge has accepted that the workers have *locus standi* to appear in the proceedings under Secs. 391 to 394 of the Companies Act, the learned Company Judge has erred in not accepting the contention of the workers that since the I.P.C.L. employees are directly affected by the scheme they have a right to be informed, to represent, to be heard, to be taken into confidence, to be involved and to participate in the amalgamation proceedings even before the Company Petition is presented before the Court for sanction of the scheme. The workers have a right of participation in the decision making process of their employer especially when it is a public limited Company. The workers have not claimed any right to veto over the scheme, but nevertheless they claim a right of participation in the decision-making process regarding amalgamation.

Alternatively, even if the workers had no right to participate in the amalgamation proceedings, the workers having rendered 20 to 30 years of service under I.P.C.L. had a right to fair representation by I.P.C.L. itself when I.P.C.L. was negotiating with R.I.L. about the contents of the scheme of amalgamation, at least as regards the impact of the scheme upon the employees' life, interest and prospects.

As R.I.L. (transferee Company) had a commanding position in I.P.C.L. (transferor Company) with 46.54% share capital, it was R.I.L. in the name of I.P.C.L. which was determining the terms and conditions of I.P.C.L. employees. This has resulted into denial of fair consideration and protection of the interest and rights of I.P.C.L. employees even after their transfer to R.I.L.

B. Clause 8 of the Scheme of amalgamation declares and directly transfers the employees of I.P.C.L. to R.I.L. and makes them the employees of R.I.L. without any consent or consultation or even notice to the I.P.C.L. employees. A transfer of employment can only be by way of tripartite agreement amongst the transferor Company (I.P.C.L.), the transferee Company (R.I.L.) and the employees of I.P.C.L. Hence, Clause 8 of the Scheme purporting to transfer the employees of I.P.C.L. to R.I.L. without their consent is illegal and contrary to public policy embodied in Sec. 23 of the Contract Act.

If I.P.C.L. employees are not given the option to join or not to join R.I.L. and without ascertaining their wish if the I.P.C.L. employees are absorbed in R.I.L., any subsequent resignation or voluntary retirement by erstwhile I.P.C.L. employees would not entitle them to retrenchment compensation under Secs. 25F or 25FF. On the other hand, if it is considered to be termination of services by I.P.C.L. as a result of the transfer, it would be considered as deemed retrenchment under Sec. 25FF of the Industrial Disputes Act, 1947 and the workers will

be entitled to retrenchment compensation. (The judgment of the learned Company Judge deals with this issue on pages 334 to 336 - Para 36.2)

C. *Future Conditions of Service*

C/1. The first part of Clause 8 of the Scheme of amalgamation simply provides for continuity of service and guarantee of terms and conditions not less favourable than those erstwhile terms and conditions which the I.P.C.L. employees had. A detailed representation dated 10-4-2007 submitted by the employees' associations was not considered by I.P.C.L. nor were the workers' representatives invited for discussion. (Para 36.17 - page 365 of the judgment of the learned Company Judge).

C/2. The second part of Clause 8 containing the so-called clarification that the workers of I.P.C.L. shall not by virtue of the scheme be eligible for the benefits of any employment policies or other benefits which may be available to the R.I.L. employees is clearly illegal. (Paras 36.5 and 36.19 pages 339 and 366 of the judgment of the learned Company Judge).

The effect of Clause 8 of the Scheme would be preservation of existing rights and terms and conditions of I.P.C.L. employees in R.I.L. and the exclusion of the I.P.C.L. employees from the benefits available to the R.I.L. employees which would mean that I.P.C.L. employees would be treated as a segregated and marginalized class which would continue to rot as ex-I.P.C.L. employees without any future. The I.P.C.L. workers ought to have been given an option whether they want to continue as ex-I.P.C.L. employees or whether they want to join the main stream of R.I.L. employees.

I.P.C.L. ought to have discussed with the workers and settle at the very time of amalgamation, the questions relating to the immediate impact of amalgamation on the employees, such as fitment, seniority, promotion, transfers, old settlements, unions, future reshuffling of the office etc. However, I.P.C.L. has left all these issues to the mercy of R.I.L.

The scheme of amalgamation itself should contain all the aforesaid issues having immediate impact of amalgamation on employees of the transferor Company. The workers should not be driven to litigation before appropriate forum in respect of such issues.

C/3. The Company Court considering the question of granting sanction to the scheme of amalgamation has comprehensive jurisdiction to deal with all the matters including the matters pertaining to the status and terms and conditions of employment of employees of the transferor Company (I.P.C.L., in this case).

The Company Court cannot decline to consider the questions raised by the workers because apart from the forum of the Company Court considering sanctioning the scheme of amalgamation, the workers of the transferor Company have no other forum or proceedings where they can raise their grievance. The Company Court, is therefore, bound to consider the fairness of the scheme in respect of the workers.

D. The Company Court in exercise of its power to sanction the scheme of amalgamation is also required to ensure that the scheme is in public interest and that private economic forces and corporate power conform to the values, ideals and principles of the Constitution.

8. On the other hand, Mr. K. S. Nanavati, learned Counsel for the respondent-Company has raised the following preliminary objection :-

The order of the Company Court sanctioning the scheme of amalgamation passed on 16-8-2007 had already been implemented before the present appeal was filed because the certified copy of the order was filed in the prescribed form with the Registrar of Companies, Gujarat State, Ahmedabad on 5-9-2007. Similarly, the order of the Bombay High Court sanctioning the scheme of amalgamation in the petition filed by the transferee Company-R.I.L. was also filed with the Registrar of Companies, Maharashtra at Mumbai on 5-9-2007. Thus, the scheme became effective on 5-9-2007; the appointed date being 1-4-2006. The orders were filed with the Registrar of Companies in the prescribed forms through electronic filing on 5-9-2007. Intimations were given to the stock exchanges and the R.I.L. shares were issued to the I.P.C.L. shareholders in electronic form and to those who had not dematerialized their shares, physical share certificates were despatched on 17-10-2007. Trading approval was also given by the stock exchange on 22-10-2007 and quarterly financial results of R.I.L. post-merger with I.P.C.L. were was also declared to all stock exchanges and disseminated to all shareholders on 18-10-2007. In this view of the matter, the appeal filed on 24-10-2007 against I.P.C.L. was not competent and otherwise also infructuous.

9. *Apropos* the above preliminary objection raised on behalf of the respondent, Mr. Girish Patel, learned Counsel for the appellants has submitted that the appellants requested the learned Company Judge for stay of order sanctioning the scheme of amalgamation in order to enable the appellants to prefer this appeal and to obtain the appropriate interim orders. However, the learned Company Judge did not grant any such stay. In view of the voluminous record and judgment of the learned Company Judge running into 495 pages, the appellants took some time to prefer the appeal which was filed within the period of limitation after deducting the time requisite for obtaining the certified copy. It is, therefore, submitted that the facts narrated on behalf of the respondent cannot be held out against the appellants and for this reason alone, the appeal cannot be treated as not maintainable or infructuous.

10. Having heard the learned Counsel for the parties, we do find that in view of the voluminous record of the Company Petition and also the bulk of the judgment running into 495 typed pages, the appellants needed some time to prepare the appeal memo and the paper-books. In the meantime, the learned Company Judge having declined to stay operation of the order sanctioning the scheme of amalgamation, the transferor Company as well as the transferee Company took the necessary steps towards implementation of the scheme of amalgamation resulting into the transferor Company already having been amalgamated into the transferee Company before the appeal came to be filed

on 24-10-2007. In these peculiar facts and circumstances of the case, therefore, we are not inclined to dismiss the appeal at the threshold.

The question as to what would happen in case the judgment of the learned Company Judge were to be disturbed would arise if we find any substance in the merits of the contentions raised by the appellants.

11. Before we proceed to deal with the merits of the contentions, we may quote the relevant clauses in the scheme of amalgamation particularly Clause 8.

"8. EMPLOYEES

8.1 Upon the coming into effect of this scheme :

(a) All the permanent employees of the transferor company who are in employment as on the effective date shall become the employees of the transferee company with effect from the effective date without any break or interruption in service and on terms and conditions as to employment and remuneration not less favourable than those on which they are engaged or employed by the transferor company. It is clarified that the employees of the transferor company who become employees of the transferee company by virtue of this scheme, shall not be entitled to the employment policies and shall not be entitled to avail of any schemes and benefits that may be applicable and available to any of the employees of the transferee company (including the benefits of or under any Employee Stock Option Schemes applicable to or covering all or any of the employees of the transferee company), unless otherwise determined by the transferee company. The transferee company undertakes to continue to abide by any agreement/settlement, if any, entered into by the transferor company with any union/employee of the transferor company.

(b) The existing provident fund, gratuity fund and pension and/or superannuation fund or trusts or retirement funds or benefits created by the Transferor Company or any other special funds created or existing for the benefit of the concerned employees of the transferor company (collectively referred to as the "Funds") and the investments made out of such funds shall, at an appropriate stage, be transferred to the transferee company to be held for the benefit of the concerned employees. The funds shall, subject to the necessary approvals and permission and at the discretion of the transferee company, either be continued as separate funds of the transferee company for the benefit of the employees of the transferor company or be transferred to an merged with other similar funds of the transferee company. In the event that the transferee company does not have its own fund with respect to any such funds, the transferee company may, subject to necessary approvals and permissions, continue to maintain the existing funds separately and contribute thereto, until such time as the transferee company creates its own funds at which time the funds and the investments and contributions pertaining to the employees of the transferor company shall be transferred to such funds of the transferee company.

8.2 With effect from the first of the dates of filing of this scheme with the High Courts and up to and including the effective date the transferor company shall not vary or modify the terms and conditions of employment of any of its employees, except with the written consent of the transferee company."

In the petition, for seeking sanction for the Scheme of Amalgamation, the transferor Company prayed for various reliefs in Para 28, including the following :-

"(e) for an order under Sec. 394 of the Companies Act, 1956, that all permanent employees of the petitioner Company as on the effective date shall become the employees of the transferee company in accordance with the provisions set out in the scheme;

(f) for an order under Sec. 394 of the Companies Act, 1956 that upon the scheme taking effect, the petitioner Company be dissolved by this Hon'ble Court without an order of winding up."

Discussion :

Contention A : Workers' Right to Participate in Formulation of the Scheme of Amalgamation

12. The learned Counsel for the appellants has submitted that the workers have right to be consulted in the process of negotiations. They were never consulted, while finalizing the scheme or in the decision-making process. Even if the law is silent on the issue, such a requirement should be read into Sec. 391 of the Companies Act. It has been seriously urged on behalf of the unions that the sanction should be refused because the workmen were not associated in the process of negotiation of the amalgamation and were not made parties to the preparation and finalization of the terms of the amalgamation. Referring to Arts. 39, 41, 42, 43, 43A and 46A of the Constitution as well as the provisions of Industrial Disputes Act regarding Joint Management Council, it is urged that such requirement should be read into the Scheme for Amalgamation.

13. The reply on behalf of the respondent is that no statutory provision is cited by the Unions nor any binding precedent referred to in support of this contention, that either the workers should have been consulted at the time of preparation of the scheme or during negotiations or when a decision to merge I.P.C.L. with R.I.L. was taken. In absence of such provision, it cannot be said that the scheme is against law. It is further submitted that even otherwise, the objections that the workers have the right to be heard at the time of the hearing of the petition need not be considered, since they have been already heard and no objection has been taken to the *locus* of workmen to object to the scheme.

14. Having considered the rival submissions —

14.1 It appears that Secs. 391 to 394 of the Companies Act, 1956 are a complete Code in themselves subject to their juxtaposition with Sec. 25FF of the Industrial Disputes Act, 1947. Neither of these legislations provide for consultation with the workers for the purpose of deciding on merger or amalgamation. Meetings only of the members of the Company and creditors have been provided. No statutory provision or legal principle has been brought to our notice which makes it a condition of a valid scheme that in the course of formulating the scheme of amalgamation, the workers should have been consulted or failure on the part of the management to consult the workers before

formulating the scheme of merger would invalidate the scheme. Strictly speaking, there is no requirement of holding any separate meeting or discussion by the transferor Company with workmen/workmen's unions.

14.2 Strong reliance is of course placed on behalf of the appellant-workmen on the provisions of Art. 43A of the Constitution and Secs. 3A and 3B of the Industrial Disputes Act, 1947. Article 43A provides that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry. Pursuant to the above Directive Principle of State Policy, Secs. 3A and 3B were inserted in the Industrial Disputes Act, 1947 by Gujarat Act 21 of 1972 *w.e.f.* 20-1-1973. Section 3A provides that in relation to an industry for which the appropriate Government is the State Government, if the State Government is of the opinion that it is desirable in public interest to take action under this Section, it may, in the case of all or any class of industrial establishments having 500 or more workmen, by general or special order, require the employer to constitute a Joint Management Council comprising representatives of employers and workmen engaged in the establishment with a provision for election of representatives of the workmen whose number shall not be less than the number of representatives of the employer. Section 3B lays down functions of the Council to promote cordial relations between the employer and employees, to build up understanding and trust between them, to promote measures which lead to substantial increase in productivity, to secure better administration of welfare measures and adequate safety measures and to train the employees in understanding the responsibilities of management of the undertaking and in sharing such responsibilities to the extent considered feasible, and to do such other prescribed things. Sub-section (2) of Sec. 3B further provides that the Council shall be consulted by the employer on all matters relating to the management.

14.3 Our attention is, however, not invited to any general or special order issued by the State Government under Sec. 3A or by the Central Government under Sec. 3 of the Industrial Disputes Act, which authorizes appropriate Government to require the employer to constitute a Works Committee consisting of representatives of employers and workmen engaged in the establishment. If no such Joint Management Council or Works Committee was constituted for all these decades since the incorporation of I.P.C.L., it is difficult to appreciate as to how the management of I.P.C.L. (the transferor Company) would allow thousands of workmen to participate in the decision-making process. It was submitted on behalf of the respondent-Company that when 14,000 workmen are represented by different unions and out of them 9,000 employees never objected to the scheme of amalgamation as such or to the clauses regarding service conditions in the scheme of amalgamation, it cannot be said that interests and rights of I.P.C.L. employees after their transfer to R.I.L. did not receive a fair consideration or protection. It is, therefore, not possible to accept the alternative submission either.

15. Having regard to the decided cases also, it is not possible to accept the contention of the appellant-Unions.

In *Gujarat Nylons Ltd. v. Gujarat State Fertilizer Company*, 1992 (1) GLH 637, a similar contention was raised and this Court speaking through Hon'ble Mr. Justice C. K. Thakker (as His Lordship then was) recorded the following submissions made by the learned Counsel appearing on behalf of Union of employees and dealt with the same :-

"1. Mr. Zaveri contended that before an action of the proposed amalgamation a meeting of the workers of the transferor Company must be held and they have right to object against the proposed amalgamation. Since, the meeting is not held, all actions taken by the Company can be said to be illegal and contrary to law and they are required to be quashed.

2. Mr. Zaveri further contended that the Union has *locus standi* when the proceeding of amalgamation are pending in this Court and the Union can object against the granting of sanction of amalgamation by the Court.

....

27. I have heard Mr. K. S. Zaveri, the learned Counsel appearing for the employees of the transferor Company at length. However, I do not find any substance in any of the contentions raised by him. In my opinion, conjoint reading of Secs. 391 and 394 of the Act make it amply clear that the workmen of the transferor Company have no legal or statutory right of holding meeting and to express their opinion on the question of amalgamation. There is no statutory provision to that effect. No judgment has been shown to me wherein such a view has been taken by the Court that a meeting of the workmen is a condition-precedent in the proceeding of amalgamation of scheme under Sec. 394 of the Act."

After referring to the judgment of the Apex Court in *National Textile Workers' Union v. Ramkrishnan*, AIR 1983 SC 75, relied upon by the learned Counsel for the Union of employees of the transferor Company, this Court observed as under :-

"30. In my opinion, however, the said judgment is not helpful to Mr. Zaveri, since it cannot apply to the facts of the case on hand. As stated by me earlier, the statute does not empower or authorise the employees to object amalgamation. It also does not provide that workmen must be a party to the amalgamation proceedings. It is on the basis of the extended principles of natural justice that in certain circumstances, Courts have interpreted certain provisions granting *locus* to a class of persons who are likely to be adversely affected thereby. Again, in my view, Mr. Raval appears to be right when he submits that at the most from the observations made in *Mr. P. R. Ramkrishnan's case* (supra), it can be said that even the workmen of the transferor company have *locus* to express their view in this Court when the proceedings under Secs. 391 and 394 are pending. He has submitted that in the instant case, that has been done. They have appeared through their Counsel and they are heard by this Court and the transferee Company had not taken any objection against the *locus standi* of the employees of the transferor Company. It is, however, not necessary that a meeting of the workers is a condition-precedent before a scheme of amalgamation is submitted and that if such a meeting is not held, the petition of amalgamation is not maintainable at law. Mr. Raval also appears to be right in submitting that when this Court has in fact heard the objections raised on behalf of the workmen of the transferor Company, the principles of natural justice have been complied with."

In the facts of this case also, the learned Company Judge has heard the appellant unions through their Counsel before sanctioning the same.

16. In *Management, Mettur Beardsell Ltd. v. Workmen of Mettur Beardsell Ltd.*, AIR 2006 SC 2056 : 2006 (9) SCC 488, the Apex Court considered the following issues :-

"1. Was there a transfer of undertaking under Sec. 25FF of the Act?

2. Was this transfer vitiated by fraud?

3. Is consent of the employees required in a case of transfer of undertaking under Sec. 25FF?"

The Court then held that absence of consent of individual employees cannot invalidate the action of transfer of undertaking.

The question examined by the Apex Court in the above case was more in context of the provisions of Sec. 25FF of the Industrial Disputes Act. However, the decision in *Gujarat Nylons Ltd. v. Gujarat State Fertilizer Company* (supra) was directly on the submission raised in the present appeal regarding the right of workmen to be consulted in formulating the scheme of amalgamation and their right to participate in the amalgamation proceedings before the Court. We see no reason to take a different view in the matter, and accordingly, hold that the workmen of the transferor Company have no statutory right of holding meetings and to express their opinion on the question of amalgamation, but the workmen of the transferor Company do have the *locus standi* to express their views before the Company Court when the proceedings under Secs. 391 and 394 are pending.

Contention B : *(i) Can Employees of transferor Company be transferred to transferee Company without their Consent?*

(ii) What are rights of employees of Transferor Company who do not opt to join transferee company?

17. Mr. Patel for the workmen contended that the workers have been left with no choice and forced to continue with the transferee Company —

(i) there will be forcible change of employer by virtue of the scheme and the order of sanction and no choice or option is given to the workers under the scheme not to switch over to the new employer.

(ii) Even if such an option is given, it would be illusory because that would take away workers' means of livelihood. What would be the prospects, position and rights (including the right to get retrenchment compensation) of the workmen who opt not to join R.I.L. should have been specified in the scheme. Absence thereof makes the scheme unfair.

18. Mr. Nanavati for the respondent Company submitted as under :-

18.1 On the one hand, the objectors are seeking job security and on other hand they are alleging forceful continuance out of economic and legal compulsion. The objections are baseless. Workmen can continue with the transferee Company post amalgamation with their existing rights protected under the scheme.

18.2 Under the scheme, there is no compulsion on the workers to join the new employer. It was pointed out that relief in Para 28(e) of the petition was intended to ensure continuity of service. Existing employees have an option not to join the service of the transferee Company and leave the service. Therefore, the provision that if the relief as prayed for in Para 28(e) is granted, the existing work-force will forcibly have to join the service of the transferee Company is misplaced. A similar provision in the scheme has been considered by this Court in the matter of *Gujarat Nylon Ltd.,* reported in 1992 (1) GLH 637 (Para 24) and in the matter of *Narmada Chemature Petrochemicals Ltd.*, unreported judgment dated 9-1-2007, Comp. Petition No. 147 of 2006 (Para 27). The similarly worded relief has been construed to mean that there is no compulsion on the employees to join the transferee Company, that the provision has been made to ensure continuity of service and it is open to the workmen not to join the service of the transferee Company.

18.3 Section 25FF of the Industrial Disputes Act provides for rights of the workers of the transferor Company. As held by the Hon'ble Supreme Court in *Management, Mettur Beardsell Ltd. v. Workmen of Mettur Beardsell Ltd.*, AIR 2006 SC 2056 : 2006 (9) SCC 488, workmen's consent to the transfer is not necessary. They have even no right to demand their absorption in the transferee Company. If the new employer is not prepared to protect the existing service conditions and continuity of service, only right of the employees of the transferor Company is as specified in Sec. 25FF of the Industrial Disputes Act. Undisputably, in Clause 8 of the scheme, a provision has been made for protection of the service conditions and continuity of service, and therefore, there is no "deemed retrenchment" of the workmen. Section 25FF of the Industrial Disputes Act, which provides for transfer of ownership or management of an undertaking does not provide that even in case where the transferee employer protects the service conditions and continuity of service and a workman still desires not to join the service of the transferee employer, such a workman should be entitled to anything more than what an employee gets on voluntary relinquishment of his service. In absence of such statutory or legal right and none has been pointed out, the question of making any such provision in the scheme does not arise. In fact, Sec. 25FF has been enacted to avoid termination of service which would result on transfer of undertaking and for the benefit of the workmen.

18.4 Without prejudice to what is stated hereinabove and without prejudice to the rights and contentions of the transferee Company that the workers of the transferor Company have been well protected under the sanctioned scheme, it was submitted that as per the directions given by the Company Court while sanctioning the scheme *vide* its order dated 16th August, 2007, notice on Notice Board was displayed by the transferor Company and transferee Company informing that those of the workmen/employees who did not wish to join/work with R.I.L., had the right to leave service within two months from 16th August, 2007 by informing I.P.C.L./R.I.L. Such direction was given by the Company Court, consequent to the objectors' insistence for the same. It is an admitted fact that till date not a single workman has informed the transferor Company

or the transferee Company opting not to join/ work with R.I.L. It is thus clear that the scheme as sanctioned by this Court has also been accepted, *inter alia*, by all the workmen, including members of the appellant-unions.

19. Before dealing with the rival submissions, we may refer to the relevant part of Clause 8 of the scheme of amalgamation providing that the transferee Company (R.I.L.) shall absorb all the employees of the transferor Company I.P.C.L. as on the date of the scheme coming into force -

"8. EMPLOYEES

8.1 Upon the coming into effect of this Scheme :

(a) All the permanent employees of the transferor Company who are in employment as on the effective date shall become the employees of the transferee Company with effect from the effective date without any break or interruption in service and on terms and conditions as to employment and remuneration not less favourable than those on which they are engaged or employed by the transferor Company.

… …. ….. ..

The transferee Company undertakes to continue to abide by any agreement/ settlement, if any, entered into by the transferor Company with any union/ employee of the transferor Company."

Is consent of employees of transferor Company necessary for transfer of their services?

20. As indicated above, the learned Counsel for the appellant-workmen contended that the employees cannot be compelled to join the service of the transferee Company as it would impinge upon the employees' freedom to choose whether or not they would like to join the transferee Company.

To this, the *prima facie* answer would be that absorption of the employees of I.P.C.L. into the services of R.I.L. was not to be against their volition, and therefore, whoever wanted not to join R.I.L or wanted to leave R.I.L. immediately after amalgamation was permitted to do so. In fact, pursuant to the directions given by the learned Company Judge in the order dated 16-8-2007 sanctioning the scheme, a notice was displayed on the notice-board by the transferor Company as well as by the transferee Company informing that those of the workmen/employees who did not wish to join/work with R.I.L. had the right to leave service within two months from 16-8-2007 by informing I.P.C.L./R.I.L. During the period of two months, not a single workman/ employee informed R.I.L. (transferee Company) or I.P.C.L. (transferor Company) that he did not want to join/work with R.I.L.

21. In view of the above factual background, one may, at first blush, be tempted to agree with the submission on behalf of the respondent that the objection raised on behalf of the appellant-unions is merely academic and hypothetical. It is, however, submitted by Mr. Patel on behalf of the workmen-employees that an employee having rendered services to I.P.C.L. for 20 to 30 years may not like to join or work with R.I.L. which may have different labour philosophy or different business environment. It is also contended that the workmen of the

transferor Company may not like to be a part of a transferee Company if the latter is an aggressively competitive business enterprise. Mr. Patel for the appellant-unions submits that the workman of I.P.C.L. has no effective freedom of choice if he has the freedom not to join the transferee Company, but upon exercising such freedom he is not going to get any retrenchment compensation either from the transferor Company or from the transferee Company if the workman opting not to join the transferee Company (R.I.L.) is to be treated as voluntarily resigning from the transferee Company, and therefore, will be treated as falling outside the definition of retrenchment. (This is the stand of the respondent in their written submissions).

We find that this argument of Mr. Girish Patel, learned Counsel for the appellant-unions does require serious consideration.

22. An establishment or undertaking may be transferred from one owner to another either by operation of law or by agreement between the parties. Since, a contract of service is ordinarily not capable of transfer, the transfer of the establishment or the undertaking would put an end to the relationship of employment between the transferor Company and its employees. Section 25FF, therefore, provides that this shall be deemed to be retrenchment and provides for retrenchment compensation to the workmen. The proviso to Sec. 25FF, dispenses with payment of such compensation if the employees of the transferor Company are absorbed in the service of the transferee Company without any break or interruption and the terms and conditions of service of employees of the transferor Company are not adversely affected upon their absorption in the services of the transferee Company. This would naturally involve a *novatio* - a tripartite agreement amongst the transferor Company, the workmen of the transferor Company and their new employer (*i.e.* the transferee Company). This *novatio* would have the effect of terminating the original contract of service between the transferor Company and its employees and substituting it by a new contract of service between the transferee Company and the employees of the transferor Company who are absorbed in service of the transferee Company.

23. Now, we will consider two recent decisions of the Apex Court - one relied upon by the respondent-employer and the other relied upon by the appellant-workmen.

24. In *Management, Mettur Beardsell Ltd. v. Workmen of Mettur Beardsell Ltd.*, AIR 2006 SC 2056 : 2006 (9) SCC 488 relied upon by the respondent, the Apex Court enumerated the following issues as the basic issues involved in the facts of that case :-

1. Was there a transfer of undertaking under Sec. 25FF of the Act?
2. Was this transfer vitiated by fraud?
3. *Is consent of the employees required in a case of transfer of undertaking under Sec. 25FF?*

The Apex Court answered issue No. 3 in the following terms :-

"10. Elaborate arguments were advanced on the question as to whether an employee's consent is a must under Sec. 25FF of the Act. The common law rule that an employee cannot be transferred without consent, applies in master-servant relationship and not to statutory transfers. *Though great emphasis was laid by learned Counsel for the respondent on Jawaharlal Nehru University v. Dr. K. S. Jawatkar & Ors.,* 1989 Supp (1) SCC 679*, a close reading of the judgment makes it clear that the common law rule was applied. But there is not any specific reference to Sec. 25FF or its implication. There is nothing in the wording of Sec. 25FF even remotely to suggest that consent is a pre-requisite for transfer.* The underlying purpose of Sec. 25FF is to establish a continuity of service and to secure benefits otherwise not available to a workman if a break in service to another employer was accepted. Therefore, the letter of consent of the individual employee cannot be a ground to invalidate the action."

(Emphasis supplied)

The Apex Court further examined the scope and ambit of Sec. 25FF and held that the workmen covered by Sec. 25FF are entitled to claim retrenchment compensation in case the undertaking which they were serving and by which they were employed is transferred. Such a transfer, in law, is regarded as amounting to retrenchment of the said workmen and on that basis Sec. 25FF gives the workmen the right to claim compensation. The proviso to Sec. 25FF excludes its operation, where in spite of the transfer, the service of the workmen has not been interrupted, the terms and conditions of service are not less favourable after transfer, than they were before such transfer, and the transferee is bound under the terms of the transfer to pay to the workmen, in the event of their retrenchment, compensation on the basis that their service had been continuous and had not been interrupted by the transfer. Where all the three conditions are satisfied, the workmen concerned would not be entitled to claim compensation merely by reason of the transfer.

25. The learned Counsel for the appellants, however, heavily relied on the decision of the Apex Court in *B.C.P.P. Mazdoor Sangh & Anr v. N.T.P.C.,* (Civil Appeal No. 678 of 2006 decided on 11-10-2007). The appellants before the Apex Court were employees recruited by National Thermal Power Corporation (N.T.P.C.) for BALCO Captive Power Plant (B.C.P.P.). When steps were being taken to transfer them to Bharat Aluminium Company Ltd. (BALCO) - which was originally a public sector undertaking and subsequently under the policy of disinvestment, its management had gone to M/s. Sterlite *w.e.f.* 1-7-2002, the appellants approached the High Court of Chattisgarh challenging the clauses of the agreement transferring them to BALCO. It was submitted that they were not party to the agreement between the management of N.T.P.C. and the management of BALCO and that they cannot be transferred from N.T.P.C. to BALCO without their consent. The Management of both N.T.P.C. and BALCO filed separate affidavits and contended that once the plant was taken over by BALCO if the employees were not going to BALCO and if they were to be taken by N.T.P.C., they will become surplus and N.T.P.C. will have no option except to order retrenchment and to avoid such contingency, it was just and proper that such employees should go along with the plant. The High

Court dismissed the writ petitions filed by the employees after recording the statement made on behalf of N.T.P.C. that if any representation is made to N.T.P.C. and if any vacancy in any other projects of N.T.P.C. is available, the same will be considered. In appeal, the Apex Court observed that in order to bind these employees, the management could have executed a tripartite agreement by taking their consent. After considering the following decisions, the Apex Court accepted the employees' submission that the transfer of employer is not permissible without tripartite agreement.

(i) *Nokes v. Doncaster Amalgamated Collieries Ltd.*, 1940 (3) AllER 549

(ii) *Manager, M/s. Pyarchand Kesarimal Ponwal Bidi Factory v. Omkar Laxman Thanger & Ors.*, 1969 (2) SCR 272 : AIR 1970 SC 823

(iii) *H. L. Trehan & Ors. v. Union of India & Ors.*, 1989 (1) SCC 764 : AIR 1989 SC 568

(iv) *Jawaharlal Nehru University v. Dr. K. S. Jawatkar*, 1989 Supp. (1) SCC 679.

The Apex Court also held that the consent must be express and consciously accorded in the course of negotiation contemporous with the process of transfer so as to amount to an informed consent. Consequently, in order to bind the appellants, there must be a tripartite agreement and that in absence of such tripartite agreement, the transfer from one employer to another cannot be effected. The Apex Court then concluded as under :-

> "… The position in law is clear, that no employee can be transferred without his consent, from one employer to another. The consent must be express or implied. We do not find it necessary to refer to any case-law in support of this conclusion."

26. Since, the Hon'ble Supreme Court has already pronounced on the question of transfer of employees from one employer to another, of course - not in the same voice, it is not necessary to make any detailed reference to the decision of this Court in *Gujarat Nylons Ltd. v. G.S.F.C.,* 1992 (1) GLH 637 and the decision of the Bombay High Court in *Rallis Group Employees' Union v. Rallis India Ltd.*, 2002 (1) LLJ 173. In both the above decisions also, it has been held that the employees of the transferor Company cannot be compelled to join the transferee Company.

27. While the *B.C.P.P. Mazdoor Sangh case* itself and three out of four cases relied upon by the Apex Court in *B.C.P.P. Mazdoor Sangh case* were in relation to transfer of employees of Government Companies or a statutory body like university, the Apex Court did not rest its reasoning only on that ground. In fact, reliance placed on the decision in *Nokes v. Doncaster Amalgamated Collieries Ltd.* (supra) in most of the above cases is not without significance. The *Nokes case* also dealt with a case where an order was made under Sec. 154 of the Companies Act, 1929 (analogous to Sec. 394 of the Companies Act, 1956) transferring all the assets and liabilities of a Company to another Company. The House of Lords (by a majority of 4 : 1) held that such an order did not result into transfer of contract of service between the appellant and the transferor-Company to the transferee Company. No discussion

on this subject can be complete without referring to the following pearls of wisdom and the thread of impeccable, invincible and compelling logic of Lord Chancellor Viscount Simon and Lord Atkin running through them which have become *locus classicus* :-

Lord Chancellor Viscount Simon :-

"My Lords, the question to be decided in this appeal can be thus stated. When the Court makes an order under the Companies Act, 1929, Sec. 154, transferring all the property and liabilities of the transferor Company to the transferee Company, is the result that a contract of service previously existing between an individual and the transferor Company automatically becomes a contract between the individual and the transferee Company?

....

It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a *fundamental principle of our common law - namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promise to serve, so that the right to his services cannot be transferred from one employer to another without his assent*. The whole question, however, is whether the Companies Act, 1929, Sec. 154, provides a statutory exception to that principle. In favour of the view that it does, it is pointed out that the only transfers which the Section can authorize are transfers of the undertaking of one Company to another, and that, if the employer is a Company, the servant can have no direct contact with the artificial entity, but of necessity deals with, and acts under, the orders of the Company's agents. Moreover, the change involved in a wage-earner serving the new Company in place of the old is, in normal cases, no greater than the change he would experience when the Company which he is serving throughout changes its directors, its shareholders, its managers, its scope of operations, and its name, all of which it may do without losing its identity. No doubt this is true in many cases, though I am far from saying that the transformation of a small private or family Company, in which the wage-earner maintains a personal relation with the principal shareholders, who act as managers and directors, into a much larger concern, where personal contacts disappear, is in all cases a matter of indifference to the employees, but the point made is that such a transformation can take place without necessarily changing the identity of the Company.

....

It is no longer possible to give to Sec. 154 an interpretation which would automatically transfer every kind of current contract merely by substituting the name of the new Company for the name of the old. The argument that an order made under the Section transfers wage-earners from one employer to another without their consent thus loses much of its force. *I do not see why there should be any great practical difficulty in the old Company announcing to its work people that the undertaking is about to be transferred to a new Company, giving the necessary notice to terminate existing engagements, and informing the wage-earners that the new Company is prepared to re-engage them on the same terms, and that continuing service after such a date will be taken as acceptance of the new offer*. At any rate, after examining Sec. 154 with close attention and considering the consequences of its application in different cases, I can come to no other

conclusion than that an order made under it does not automatically transfer contracts of personal service. The word "contract" does not appear in the Section at all, and *I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor Company. Such a right cannot be the subject of gift or bequest. It cannot be bought or sold.* It forms no part of the assets of the employer for the purpose of administering his estate. *In short, Sec. 154, when it provides for "transfer" is providing, in my opinion, for the transfer of those rights which are not incapable of transfer, and is not contemplating the transfer of rights which are in their nature incapable of being transferred.* I must make it plain that *my judgment is limited to contracts of personal service with which the present appeal is concerned."*

Lord Atkin - ....

"My Lords, I confess it appears to me astonishing that, apart from overriding questions of public welfare, power should be given to a Court or to anyone else to transfer a man without his knowledge, and possibly against his will, from the service of one person to the service of another. *I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant and a serf.*

It is said that one Company does not differ from another, and why should not a benevolent Judge of the Chancery Division transfer the services of a workman to another admirable employer just as good and perhaps better. The answer is twofold. The first is that, *however excellent the new master may be, it has hitherto been the servant who had the choosing of him, and not a judge.* The second is that *it is a complete mistake, in my experience, to suppose that people, whether they are servants,* or landlords, or authors, *do not attach importance to the identity of the particular Company with which they deal.* It would possibly hurt the feelings of financial men with large organizing powers and ambitions to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns. However, it is said how unreasonable this is, for the big Company can buy the majority of the shares in the old Company, replace the directors and managers, change the policy and produce the same result. Be it so. Nevertheless, the result is not the same. The identity of the Company is preserved, and in any case, the individual concerned, while he must be prepared to run the one risk, is entitled to say that he is not obliged to the run the other. The truth is that this argument was tried out and repelled over 40 years ago by Sterling, J., in *Griffith v. Tower Publishing Co. Ltd., and Moncrieff*, 1897 (1) Ch. 21, where an author was held justified in refusing to allow his contract to be transferred to another Company." (Emphasis supplied)

Nokes' decision would, therefore, apply to the case of amalgamation of two Companies under Secs. 391 to 394 of the Companies Act, 1956 with equal force. Applicability of the Industrial Disputes Act, 1947 would not change the basic nature of this transaction - transfer of undertaking based upon agreement between two Companies coming into force with the sanction of the Company Court. All that Sec. 25FF provides is that the workmen of the transferor Company are entitled to get notice and retrenchment compensation on transfer of undertaking

subject to the proviso under which these benefits are not payable to workmen continuing in service under the transferee Company, if the transferee Company is ready to fulfill the conditions stipulated in the proviso.

28. *When should the option be given to employees?*

28.1 Mr. Patel for the workmen has submitted that the transferee Company giving the option and that too after amalgamation is no option at all. The option ought to be given by the transferor Company before amalgamation scheme is finalised and not afterwards.

28.2 The observations in *Nokes' case* (quoted in Para 27 hereinabove) suggest that it is not necessary to obtain the consent of the employees in advance and that employees continuing in service after the date mentioned in the notice may be taken as acceptance of the offer.

28.3 In *Jeshtamini Gulabrai Dholakia v. Scindia Steam Navigation Co.,* AIR 1961 SC 627, under the provisions of Sec. 20 of the Air Corporations Act, 1953, an order of transfer of contract of service of employees of the existing Company to the Corporation was passed and an option was granted to any officer or other employees who did not want to join the service of the Corporation, to get out of service by giving notice in writing to the Corporation before the prescribed date. The Hon'ble Supreme Court held that if the employees of the existing Company fail to exercise option given to them under the proviso to Sec. 20(1) of the Act, they would be governed by provisions of Sec. 20(1) of the said Act, thereby becoming employees of the new Company.

The above decision in *Jeshtamini case* was also followed by this Court speaking through Hon'ble Mr. Justice C. K. Thakker (as His Lordship then was) in *Gujarat Nylons Ltd. v. Gujarat State Fertilizer Co.*, 1992 (1) GLH 637.

28.4 The above decisions make it clear that giving the employees of the transferor Company an option not to join the transferee Company or to leave the transferee Company immediately after amalgamation or within a reasonable period from the date of amalgamation would also be sufficient compliance with the legal requirement to transfer the employees to the new employer with their consent.

Rights of Employees of transferor Company opting not to join transferee Company.

29. In short, the Courts have held that express or prior consent of the individual workman or their unions is not necessary for the transfer of undertaking or amalgamation of two Companies to become effective, but express or implied consent of the workman is necessary to bring into existence the relationship of employer and employee between the transferee Company and the workmen of the transferor Company. The question still survives as to whether an individual workman has the option of not joining the new employer and claiming retrenchment compensation on account of the deemed retrenchment resulting from transfer of the undertaking. While Sec. 25F deals with retrenchment of an individual workman or a few workmen by the employer putting an end to their services, Sec. 25FF deals with the situation where the ownership or management

of an undertaking is transferred, whether by agreement or by operation of law. In *Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Workmen,* AIR 1963 SC 1489, the Apex Court has held that -

> "*the first part of Sec. 25FF postulates that on a transfer of the ownership or management of an undertaking, the employment of workmen engaged by the said undertaking comes to an end, and it provides for the payment of compensation to the said employees because of the said termination of their services*, provided, of course, they satisfied the test of the length of service prescribed by the Section. The said part further provides the manner in which and the extent to which the said compensation has to be paid. Workmen shall be entitled to notice and compensation in accordance with the provisions of Sec. 25F, as if they had been retrenched. The last clause clearly brings out the fact that the termination of the services of the employees does not in law amount to retrenchment. The Legislature, however, wanted to provide that though such termination may not be retrenchment technically so called, nevertheless the employees in question whose services are terminated by the transfer of the undertaking should be entitled to compensation, and so, Sec. 25FF provides that on such termination compensation would be paid to them as if the said termination was retrenchment."
>
> (Emphasis supplied)

The proviso to Sec. 25FF, however, provides that nothing in Sec. 25FF shall apply to a workman in any case where there has been a change of employers by reason of transfer, if the service of the workman has not been interrupted by such transfer; the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and that the new employer is liable to pay the workman in the event of his retrenchment, compensation by computing service under the new employer as well as the service under the previous employer before the transfer. *The proviso, therefore, very much proceeds on the premise that the workman is ready to be absorbed under the new employer*. In other words, while the consent of the workman is not necessary for transfer of the undertaking, his consent is certainly required for his absorption in the service of the new employer. Such consent need not be expressed in writing or individually by every employee. It should suffice if a workman who does not desire to join the transferee Company is permitted to opt out.

30. Now coming to the heart of the debate -

When will the proviso to Sec. 25FF come into operation?

> "25FF. *Compensation to workmen in case of transfer of undertakings - Where the ownership or management of an undertaking is transferred … …* from the (existing) employer to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Sec. 25FF, as if the workman had been retrenched :
>
> Provided that nothing in this Section shall apply to a workman in any case *where there has been a change of employers by reason of the transfer,* if -
>
> (a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(c) the new employee is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer." (Emphasis supplied)

Where the entire undertaking is transferred from one Company to another, there will be a change of employers only where the workman of the transferor Company joins the transferee Company. The workman cannot be transferred to the transferee Company without his consent, express or implied. Hence, if the workman does not agree to join the transferee Company, he will not become an employee of the transferee Company, and therefore, *there will not be a change of employers by reason of transfer of the undertaking*. Hence, for invoking the proviso to Sec. 25FF, it is not sufficient that the transferee Company agrees to fulfill all the three conditions (a), (b), and (c) stipulated in the proviso. First and foremost, the workman of the transferor Company must agree, either expressly or impliedly, to join the service of the transferee Company.

31. To put it differently, where the transferee Company is ready to fulfill all the three conditions stipulated in the proviso to Sec. 25FF, the workman *who opts to join* the services of the transferee Company will not be entitled to claim retrenchment compensation for the services rendered by him to the transferor Company. At the same time, the workman *who opts not to join* the services of the transferee Company is entitled to get retrenchment compensation from the transferor Company. Having regard to the fact that a workman might have joined service of the transferor Company with the full knowledge of its work ethos and labour philosophy, we do not see anything wrong in such a workman of the transferor Company exercising his right not to join the services of the transferee Company and claiming compensation from the transferor Company on the ground that the decision of the transferor Company to be amalgamated into the transferee Company is a unilateral decision of the transferor Company without any consent of the workman. Hence, even though, workmen have no legal right to be consulted before the transferor Company decides for amalgamation, the transfer of the undertaking from one Company to the other is sufficient to be treated as resulting into retrenchment of the workman of the transferor Company who is not willing to join the services of the new employer, even if the new employer is ready to fulfill all the three conditions stipulated in the proviso to Sec. 25FF. An employee of the transferor Company may not desire to join the transferee Company for any reason; such as he does not want to be a part of aggressive competitive business environment in the transferee Company which he had never agreed to serve, but which has now taken within its fold the existing employer of the workman (*i.e.* the transferor Company).

32. In our view, the question of applying the proviso to Sec. 25FF will apply only in case of those employees who are ready and willing to serve the transferee Company. In other words, retrenchment compensation will not be

payable to those employees of the transferor Company who are ready and willing to be transferred to the transferee Company and the transferee Company satisfies all the three conditions stipulated in the proviso. However, in case of employees of the transferor Company who are not ready and willing to serve the transferee Company, they cannot be denied retrenchment compensation payable under the substantive part of Sec. 25FF, which creates the fiction of retrenchment upon transfer of ownership of management of an undertaking. In case of such employees, the transferor Company (and after amalgamation the transferee Company steps into its shoes) cannot be absolved from the liability to pay retrenchment compensation merely on the ground that transferee Company is ready to fulfill all the three conditions stipulated in the proviso. Thus, *applicability or otherwise of the proviso to Sec. 25FF cannot depend only on the unilateral decision of the transferee Company*. The Courts have held that employees of the transferor Company are not bound to serve the transferee Company and that the workmen have the option either to serve or not to serve the transferee Company. Such option will be illusory if a workman opting not to serve the transferee Company is to be denied the retrenchment compensation which is otherwise payable under the substantive part of Sec. 25FF which treats transfer of ownership of management of an undertaking as retrenchment of the workman of the transferor Company.

33. We do not find anything in the judgments cited on behalf of the respondent-Company which militates against the above interpretation. As per the settled legal position, the ratio of a decision is to be understood in the context of the controversy before the Court in that case.

In *Haryana Financial Corporation v. Jagdamba Oil Mills*, 2002 (3) SCC 496, the Apex Court has made the following pertinent observations :-

> "19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as *Euclid's theorems* nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes."

In *Mehboob Dawood Shaikh v. State of Maharashtra*, 2004 (2) SCC 362 also, the Apex Court has observed as under :-

> "12. … … A decision is available as a precedent only if it decides a question of law. A judgment should be understood in the light of facts of that case and no more should be read into it than what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court divorced from the context of the question under consideration and treat it to be complete law decided by this Court. The judgment must be read as a whole and the observations in the light of the questions which were before this Court."

In *Management, Mettur Beardsell Ltd. v. Workmen of Mettur Beardsell Ltd.*, 2006 (9) SCC 488, nearly 2500 employees had accepted the transfer and did not raise any dispute; only 27 employees alleged the transfer of undertaking to be sham and fraudulent and alleged that they (27 employees) were being targeted. 9 out of those 27 gave up their challenge. Reversing the decision of

the High Court, the Apex Court held on facts that there was no substance in those allegations, and that the transfer of undertaking was genuine. It was in the backdrop of these findings that the Apex Court held that there was no need for any fresh contract of service between the transferee Company and the employees of the transferor Company, meaning thereby, express consent of the workmen of the transferor Company was not necessary. The Hon'ble Supreme Court was not called upon to decide the question whether a workman who was not willing to join the service of the transferee Company was entitled to claim retrenchment compensation, even if the transferee Company was ready and willing to absorb him in service and to fulfill all the three conditions stipulated in the proviso to Sec. 25FF.

34. We would also like to highlight the following aspects to show that it would be unreasonable to accept the submission of the respondent that the workmen of the transferor Company not willing to join the transferee Company upon amalgamation should not get any retrenchment compensation :-

(i) *Prof. Gower in "The Principles of Modern Company Law", third edition, at page 634,* dealt with this problem in its true perspective :

> "One section of the community whose interests as such are not afforded any protection, either under this head or by virtue of the provisions for investor or creditor protection, are the workers and employees of the taken-over Company. This is a particularly unfortunate facet of the principle that the interest of the Company means only the interest of the members and not of those whose livelihood is in practice much more closely involved."

In the same book in Chapter 'The Future of Company Law in a Mixed Economy', the same author had pointedly drawn attention to the reversal of priority as a future modification of the Company Law (page 62) :-

> "The vexed question of the relationship between the employees and the Company which employs them is, in fact, a dominant theme in the current debate which flows over from Company to Labour Law. It is generally accepted that it is unreal for the Company Law to ignore, as at present, our law largely does, that the workers are as much, if not more, a part of the Company as members of it.

(ii) Originally, I.P.C.L. was a Government of India enterprise, a leading public sector undertaking which was acclaimed as one of the *Navratnas*. However, as a result of the disinvestment of the Company in June, 2002, the Reliance Petro-Investment Limited (strategic partner), as associate Company of the Reliance Industries Limited acquired shares of 46.57% in I.P.C.L.

(iii) Even in the Company Petition seeking sanction of the Court to the scheme of amalgamation, the transferor Company stated as under :-

> "The amalgamated entity will benefit from improved organization capability and leadership, arising from the combination of people from I.P.C.L. and

> Reliance Industries Limited who have diverse skills, talent and best experience to compete successfully in an increasingly competitive industry."

When employees of I.P.C.L. with such skill, talent and experience of 20 to 30 years opt not to join the transferee Company and claim retrenchment compensation on the ground that the transferor Company is dissolved and they do not wish to join the new employer, the so-called option given to the employees of the transferor Company in the past cannot be treated as meeting with the legal requirements as laid down in this judgment.

35. We hasten to add that the above discussion is only for the purpose of deciding the legal controversy raised before us and that the decision would be applicable to all such cases of amalgamation, but we clarify that the discussion in the preceding Paragraphs is not to be treated as any observation, much less an aspersion, on the philosophy or business environment of the transferee Company in the instant case.

36. Before concluding, it will not be out of place to mention that while in Clause 8 of the Scheme of amalgamation as sanctioned by the learned Company Judge, the conditions stipulated in clauses (a) and (b) in the proviso to Sec. 25FF are fulfilled; in terms, there is no specific reference to the condition stipulated by clause (c) in the above proviso. Clause (c) reads as under :-

> "(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

However, Mr. K. S. Nanavati, learned Counsel for the respondent-Company states that the new employer, that is the transferee Company, shall pay to I.P.C.L. workmen absorbed in the services of R.I.L., in the event of their retrenchment, compensation on the basis that the services of such workmen have been continuous and have not been interrupted by the transfer, that is to say, for the purpose of computation of retrenchment compensation, gratuity and other terminal benefits, services rendered by the workmen to I.P.C.L. before amalgamation will be clubbed with the services rendered after amalgamation.

We, accordingly record this statement and this statement shall be treated as a part of sub-clause (a) in Clause 8(8.1) of the Scheme. But for such statement, R.I.L., as the transferee Company stepping into the shoes of I.P.C.L. (transferor Company) would have been liable to pay retrenchment compensation to the workmen who have been absorbed in the services of R.I.L. upon amalgamation even with the consent of the workmen. However, with the above statement, all the three conditions stipulated in the proviso to Sec. 25FF are fulfilled, and therefore, the workmen who do not opt out of the services of the transferee Company pursuant to the option to be given under this judgment will not be entitled to get any retrenchment compensation on the ground that transfer of the undertaking from I.P.C.L. to R.I.L. would amount to deemed retrenchment. This is so, because such employees will be continuing in the services of R.I.L. with their consent as they will not be opting out even after the option is given to them under this judgment.

Conclusion on Contention B :

37. We, therefore, hold that while the consent of the workmen or employees of the transferor Company is not required for amalgamation or merger, the proviso to Sec. 25FF, which is enacted for the benefit of workmen, does not take away the freedom of an individual workman of the transferor Company to accept retrenchment from the transferor Company which is the legal consequence of dissolution of the transferor Company, bringing to an end the contract of service between the workman and the transferor Company and the consequential liability of the transferor Company (after amalgamation - of the transferee Company as the successor of the transferor Company) to pay retrenchment compensation to the workman who does not wish to join the transferee Company. We also hold that in case of such transfer, the workmen who agree to join the service of the new employer, who fulfills all the three conditions stipulated in the proviso to Sec. 25FF, are not entitled to claim any retrenchment compensation.

We also record the statement being made by Mr. K. S. Nanavati that the new employer, that is the transferee Company (R.I.L.), shall pay to the I.P.C.L. workmen absorbed in the services of R.I.L. with their consent as explained in this judgment, in the event of their retrenchment from R.I.L., compensation on the basis that the services of such workmen have been continuous and have not been interrupted by the transfer, that is to say, for the purpose of computation of retrenchment compensation, gratuity and other terminal benefits, services rendered by the workmen to I.P.C.L. before amalgamation will be clubbed with the services rendered to R.I.L. after amalgamation.

Contention C : Conditions of Service of workers of transferor Company after Amalgamation.

38. It was also submitted by Mr. Girish Patel for the workmen that several workmen related issues like basic pay, D.A., welfare benefits etc. are not covered in the scheme. Therefore, the scheme should not be sanctioned and the Court should direct the management of the transferee Company and the transferor Company to hold discussions/negotiations with the Objectors. Workmen should have been consulted before preparing the scheme/before taking decision of merger.

It was also submitted that the workmen of I.P.C.L. must be assured of job security in the transferee Company post amalgamation.

39. Mr. Patel for the workmen also contended that -

(i) while protecting the workmen's rights at the stage of sanction of the scheme, workmen's post amalgamation rights should not be prejudiced. The transferor Company cannot decide the entitlements of their workmen post amalgamation. It has been stated in Clause 8.1 of the Scheme that the workmen will not be entitled to benefits applicable to employees of the transferee Company. This provision is obnoxious and objectionable.

(ii) Clause 8 permanently takes away their right and blocks their future claims to demand the benefits of the employment policies and benefits that may be applicable to the employees of R.I.L.

(iii) The scheme does not address the issues of seniority and promotion of the employees when they become part of R.I.L.

40. On the other hand, Mr. K. S. Nanavati for the respondent-Company submitted as under :-

40.1 Clause 8.1 of the Scheme protects employees' rights inasmuch as it has fully safeguarded the interests of the I.P.C.L. employees by providing that *the terms and conditions of employment in the transferee Company will be without any break or interruption and the terms and conditions as to employment and remuneration shall NOT be less favourable than those on which they are engaged or employed by the transferor Company*. Further, the transferee Company undertakes to continue to abide by any agreement/settlement, if any, entered into by the transferor Company with any union/employee of the transferor Company.

40.2 The Objectors' demand of job security is highly unreasonable. In the guise of protection of workmen's interest while sanctioning a scheme of amalgamation, no undue demand can be entertained. Further, it has been argued generally as to what would be the fate of the workmen post amalgamation, where would they stand etc. However, it is NOT shown as to how the workmen's rights get adversely affected by the scheme. The arguments offered are merely theoretical, philosophical and without any substance. The question that there is a possibility of streamlining of operations of the transferee Company and that would be prejudicial to workmen is a mere hypothetical submission made by the Objectors and has no basis whatsoever.

40.3 Employees' right to seniority and promotion as of existing employees of the transferor Company constitute, to the extent that they are, part of the existing conditions of service, which are protected by Clause 8 of the Scheme and post-merger would be governed by the provisions of the Industrial Disputes Act and in particular Sec. 9A of the Industrial Disputes Act, 1947.

41. As regards the rights of the employees of the transferor Company subsequent to amalgamation *vis-a-vis* the rights of employees of the transferee Company -

(i) Mr. K. S. Nanavati for the respondent Company submits that it is well settled that it is always open to such workers as employees of the transferee Company, to raise such demands, to claim such benefits and raise such disputes as may be permissible under the Industrial Law. Clause 8 of the Scheme does not foreclose this right of the workmen in any manner. What Clause 8 of the Scheme provides is that 'by virtue" of the scheme, the employees of the transferor Company shall not be entitled to the employment policies or any schemes or benefits that may be applicable and available to the employees of the transferee Company. This does not obviously take away the rights of the employees on becoming the employees of the transferee Company to raise such demands or disputes or claim benefits on whatever ground that may be permissible under the law, as the employees of the transferee Company. Such

demands if raised, would be adjudicated by the authorities under the Industrial Law subject to the contentions of the transferee Company. The present scheme does not and cannot take away the statutory rights of the workmen under the Industrial Law.

(ii) The objection that the transferor Company cannot decide the entitlements of employees post amalgamation is without any substance. The rights of employees are well protected under the scheme. Further, all service conditions in respect of workmen shall be guided by the applicable laws in future.

(iii) Even otherwise, the transferor Company had different units and seniority, promotion and such other conditions of service were applicable *qua* each unit of the transferor Company and that similarly, transferee Company had different units before amalgamation and that after amalgamation also, the different units of the transferee Company will have their own conditions of service for the workmen in the concerned units.

42. The respondent relies upon the following decisions in support of the above submissions -

(a) *Gujarat Nylons Ltd. v. Gujarat State Fertilizers Co. Ltd.*, 1992 (1) GLH 637, Para 36,

(b) *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.,* 1995 (83) Comp. Cases 39, pages 64 and 65,

(c) *In Re : Narmada Chematur Petrochemicals Ltd.*, unreported judgment dated 9-1-2007, By M. R. Shah, J., Paras 27 and 28

(d) *In Re : Blue Star Ltd.,* 2001 (104) Comp. Cases 371 (page 392).

43. Having considered the rival submissions, we are of the view that the Clause 8.1 of the Scheme clearly provides that all the permanent employees of the transferor Company who are in employment as on the effective date shall become the employees of the transferee Company with effect from the effective date without any break or interruption in service and the terms and conditions as to employment and remuneration shall be not less favourable than those on which they are engaged or employed by the transferor Company. There was no need to make any further detailed provisions in the scheme of amalgamation regarding issues such as pay, D.A. or seniority and promotion of existing employees of the transferor Company. The learned Counsel for the respondent is justified in submitting that the conditions of service of employees of the transferor Company are protected by Clause 8 of the Scheme and that whatever disputes the employees may have in future would be governed by the provisions of Industrial Law. Nothing prevents such employees from making their demands even before the transferee Company for improvement of their conditions of service.

44. Clause 8.1 of the Scheme does not foreclose the right of the workmen of the transferor Company to demand better conditions of service after amalgamation and even to claim all the benefits available to employees of the transferee Company. A similar submission was made on behalf of the workmen

of the transferor Company in *Gujarat Nylons Ltd. v. G.S.F.C.* (supra). It was contended that after amalgamation, all the workmen can be said to be only of one Company *i.e.* the transferee Company, and therefore, they cannot be treated unequally and there should not be any discrimination between those who were workmen of the transferor Company on one hand and those who were workmen of the transferee Company prior to amalgamation on the other hand.

Dealing with the said submission, this Court held as under :-

> "The Company Judge in the exercise of powers under Secs. 391 and 394 of the Act is not concerned with all these matters. It is always open to the workers of the Company if they feel aggrieved by any action of the Company to raise a demand, dispute or claim in an appropriate proceeding. On the ground of potential liability, sanction cannot be refused. In this connection, Mr. Raval drew my attention to the decision of the Supreme Court in the case of *Union of India v. Alembic Sarabhai Enterprise*, reported in 55 Company Cases 623 and of the Karnataka High Court in the case of *Mysore Electrical Works Ltd. v. I.T.O., Bangalore*, reported in 52 Company Cases 32. In the latter case, it was specifically held by the High Court of Karnataka that the direction by the Company Court cannot relate to matters outside the scheme and obviously it is so. When the Company Court exercises jurisdiction under the Act, it has to decide the matter in accordance with the provisions of that Act. It is neither deciding any question nor expressing any opinion on the points which do not strictly fall within the purview of the scheme of amalgamation. Therefore, if the employees of the transferee Company feel aggrieved in connection with payment of wages or other conditions of service, it is always open to them to approach an appropriate forum in accordance with law and all those questions will be decided in those proceedings. Granting of sanction of amalgamation of Companies by this Court would not come in the way of workmen, while deciding the question which may be raised in those proceedings."

We also see no reason to take a different view. Clause 8.1 of the Scheme merely provides that upon amalgamation taking place and the employees of the transferor Company becoming employees of the transferee Company, this by itself cannot entitle such employees to claim all the rights, benefits and privileges which were available to the employees of the transferee Company prior to amalgamation. In our view, the learned Company Judge has also rightly clarified that if the employees of the transferor Company, after amalgamation with the transferee Company, feel aggrieved by any service condition or seek to claim better conditions of service, they can approach appropriate forum and that those proceedings will be disposed of in accordance with law by appropriate authorities under the relevant statutes.

45. As regards the apprehension that workmen of I.P.C.L. as employees of the transferor Company are not assured the job security after amalgamation with the transferee Company, we do not find anything to justify such apprehension. The transferor Company before amalgamation was a profit-making Company and the transferee Company is not only a profit-making but also a leading Company in India with global presence. As observed by the Apex Court in *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.,* (supra) '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".

Contention : D Public Interest

46. Now, we may deal with the last submission made by Mr. Girish Patel, learned Counsel for the appellant-Unions.

47. Mr. Patel submitted that the Company Court has to be satisfied that while sanctioning the scheme of amalgamation, the Company Court cannot act like a rubber stamp and has to be satisfied that the scheme is just fair and is not against the public interest or public policy. Mr. Patel also relied on the observations of the Apex Court in *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, 1995 (83) Company Cases 30 : 1995 Supp. (1) SCC 499 in support of the contention that it is not the interest of the share holders or the employees only but the interest of the Society which may have to be examined and that a scheme valid and good may yet be bad if it is against public interest.

48. *Apropos* the above submission, it needs to be noted that the above observations were made in the context of merger of T.O.M.CO. (Tata Oil Mills Company Ltd.) with Hindustan Lever Ltd., a subsidiary of Unilever Ltd., a London based Multinational Company. Justice R. M. Sahai in a separate concurring judgment made the following observations in this context :-

> "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 and general principle inherent in any compromise or settlement entered into between parties that it should not be unfair or 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 the profits of the share holders or whether the interest of employees was protected, but it has to ensure that the merger shall not result in impeding promotion of industry or obstruct the growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on the English decision for Hoare, *In Re. :* 1933 All ER 105 (Ch D) and Bugle Press Ltd., *In Re. :* 1961 Ch 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." (Emphasis supplied)

In the facts of the present case, both I.P.C.L. and R.I.L. are Indian Companies, and therefore, the Court is to apply the principles of "prudent

business management test". The provisions of the Companies Act have been complied with. The share holders and the creditors were fully represented and the arrangement was such as a man of business would reasonably approve. These questions have already been examined in our judgment dated 28-12-2007 dismissing O.J. Appeal No. 241 of 2007 which was filed by 17 minority share holders.

49. In our view, the other submissions go far beyond the scope and ambit of the jurisdiction of the Company Court while considering and sanctioning the scheme of amalgamation under Secs. 391 and 394 of the Companies Act, 1956. If any specific act of commission or omission violates any fundamental right or any statutory right of an individual workman or a group of workmen, they have all the rights to move an appropriate forum for enforcement of those rights and at that time, the concerned forum can adjudicate those controversies keeping in mind the values, ideals and principles of Constitution, but before any such actual controversy arises and is brought before the Court, it is not open to this Court to express any general view about the manner in which "the private economic forces" and "corporate power" should interact with reference to labour welfare.

O R D E R

50. In view of the above discussion, while substantially dismissing the appeal and confirming the order of the learned Company Judge granting sanction to the scheme of amalgamation of Indian Petrochemicals Corporation Ltd. (I.P.C.L.) with Reliance Industries Ltd. (R.I.L.), in view of our conclusion as recorded in Para 37 hereinabove, we direct that the persons who were in employment with Indian Petrochemicals Corporation Ltd. as on the date of the judgment of the learned Company Judge *i.e.* 16-8-2007 shall be given an option within one month from today informing them that those employees who do not wish to continue with Reliance Industries Ltd. shall be entitled to exercise within two months from today, the option not to continue with Reliance Industries Ltd. and upon exercise of such option they shall be entitled to receive compensation under the provisions of Sec. 25FF of the Industrial Disputes Act, 1947 *i.e.* the workmen who had been in continuous service for not less than one year as on 16-8-2007 with I.P.C.L. shall be entitled to compensation for services rendered to I.P.C.L. for the period upto 16-8-2007, in accordance with the provisions of Sec. 25F of Industrial Disputes Act, 1947. It shall also be mentioned in the notice that those who continue with Reliance Industries Ltd. will not be entitled to such compensation.

In view of pendency of these proceedings for almost one year and also in view of the fact that the period of notice to be given under this order for fresh option shall also be for at least one month, there will be no need to give any notice or wages in lieu of one month's notice as contemplated by Sec. 25F of the Industrial Disputes Act, 1947.

The notice as per this order shall be given by communicating the same to all the associations of employees/unions of workmen of erstwhile I.P.C.L.

and by putting up the notice on the notice boards within the premises of all the units of erstwhile I.P.C.L..

We also direct that the statement made by Mr. K. S. Nanavati as recorded in Para 36 hereinabove shall be treated as added to sub-clause (a) in Clause 8(8.1) of the Scheme as sanctioned by the learned Company Judge.

51. Subject to the directions contained and clarification made in the preceding Para, the appeal is dismissed.

(SBS) *Appeal dismissed.*

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SPECIAL CIVIL APPLICATION

Before the Hon'ble Mr. Justice Bhagwati Prasad

AMRUTBHAI G. DESAI v. STATE OF GUJARAT & ORS.*

SERVICE LAW — Altering of service conditions retrospectively — Validity — Constitution of India, 1950 — Arts. 14, 16 & 226 — Held, employer-State has right to change service conditions retrospectively, but it cannot do so without authority of law — Appointment vests civil right in employee — To divest a vested right a definite authority of law is required — On facts, G.R. in question does not have retrospective effect.

There is no denial that an employer-State has absolute right of changing the service conditions retrospectively. What has to be seen in the present set of circumstances is that whether the State Government has passed any such law whereby the petitioners can be deprived of their rights which have been conferred on them by a regular appointment retrospectively. (Para 8)

A clear and unambiguous order was passed in relation to the appointments offered to the petitioners, it indicates civil right has come to vest in them. To divest a vested right, a definite authority of law is required to be possessed by the respondents. That definite authority of law having not been acquired, the general principle of General Clauses Act which gives authority which has a right to do one thing is different than the right to undo. That right cannot be pressed into service. (Para 10)

Government of A. P. v. Syed Yousuddin Ahmed (1), Tejshree Ghag v. Prakash Parashuram Patil (2), referred to.

Tanna Associates, for the Petitioner.
Government Pleader, for Respondent Nos. 1, 2 and 4.
Rule Served by D. S. for Respondent Nos. 1 to 4.

BHAGWATI PRASAD, J. The present petitions are filed in the background that an advertisement was issued by the respondents on 13-9-2002 for making recruitment on various posts. The petitioners applied for that. Prior to applying to these posts, one of the petitioners was employed in B.S.F. His case is that looking to the service conditions which were offered in the advertisement at

*Decided on 27-2-2008. Special Civil Application No. 2954 of 2007 with Spl.C.A. Nos. 2958 to 2965 of 2007.

(1) 1997 (7) SCC 24 (2) 2007 (6) SCC 220