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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CO.PET. 228/2010 & CO. APPLS. 1008/2010 AND
2486/2010

IN THE MATTER OF

M/S. RECKITT BENCKISER (INDIA) LTD. Petitioner

Through: Mrs. Pallavi S. Shroff, Advocate with
Mr. Anirudh Das, Advocate for
petitioner-company.
Mr. Chander Bhan Gandhi, Objector in
person.
Mr. Ankit Shah, Advocate.

Reserved on : 21st September, 2011.

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Date of Decision: 3rd October, 2011.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

J U D G M E N T

MANMOHAN, J :

1. Present petition has been filed under Sections 100 to 105 of the Companies Act, 1956 (for short 'Act') read with Rule 46 of the Companies (Court) Rules, 1959 (for short 'Rules, 1959) for confirming the reduction of share capital of the petitioner-company.

2. The relevant facts of the present case are that on 5th July, 1951, the petitioner-company was incorporated as a public limited company under the name of M/s. Reckitt & Colman of India Limited. On 18th December, 2000, the name of the petitioner-company was changed to M/s. Reckitt Benckiser (India) Limited.

3. Between 14th February, 2003 and 19th May, 2005, the equity shares of petitioner-company were delisted from Bombay, Calcutta and National Stock Exchanges in accordance with Regulation 21(3)(a) of Substantial Acquisition of Shares and Takeovers Regulations, 1997. In fact, in view of the directions received from the said Stock Exchanges, M/s. Reckitt Benckiser Plc's subsidiary company, namely, Lancaster Square Holdings SL made an exit offer to acquire shares in petitioner-company under the aforesaid Regulations.

4. Post delisting, the petitioner-company filed a petition being CP No. 206 of 2004 for reduction of its paid up equity share capital from ₹ 32,91,31,880/- divided into 3,29,13,188 fully paid up equity shares of ₹ 10/- each to ₹ 26,27,96,120/- divided into 2,62,79,612 fully paid up equity shares of ₹ 10/- each. This Court vide its order dated 31st May, 2005 approved the said Scheme of Reduction. The relevant portion of

the said order is reproduced hereinbelow:-

“36. To summarize, when in the instant case 99.97% shareholders have supported the resolution of reduction of share capital; the valuation of the share is arrived at in a reasonable manner and lucrative price for the share is offered; and above all the petitioner has agreed that the objectors may retain their shares, I do not find any legal impediment or any valid reason for not accepting the proposed scheme of reduction of share capital. It is allowed accordingly.....”

5. Though Mr. Janak Mathuradas, an equity shareholder of petitioner-company filed an appeal being Co. Appeal No. 105 of 2005 against the aforesaid judgment and order dated 31st May, 2005, yet the same was subsequently withdrawn.

6. A chart indicating the shareholding pattern of petitioner-company after approval of the first Scheme of Reduction is reproduced hereinbelow:-

<i>Sl. No.</i>	<i>Shareholder(s)</i>	<i>Details of shareholding</i>	<i>Amount (in Rupees)</i>	<i>Shareholding Percentage (appx)</i>
<i>1.</i>	<i>Reckitt Benckiser Plc</i>	<i>1,67,85,722 Equity Shares of Rs.10/- each fully paid-up constituting about 63.87% of the issued and paid-up share capital of the Company</i>	<i>16,78,57,220</i>	<i>63.87%</i>

2.	<i>Lancaster Square Holdings SL</i>	<i>94,65,355 Equity Shares of Rs.10/- each fully paid-up constituting about 36.02% of the issued and paid-up share capital of the Company.</i>	<i>9,46,53,550</i>	<i>36.02%</i>
3.	<i>Public Shareholders</i>	<i>28,531 Equity Shares of Rs.10/- each fully paid-up constituting about 0.11% of the issued and paid-up share capital of the Company.</i>	<i>2,85,310</i>	<i>0.11%</i>
4.	<i>Employee Shareholders</i>	<i>4 Equity Shares of Rs.10/- each fully paid-up constituting about -- % of the issued and paid-up share capital of the Company.</i>	<i>40</i>	<i>--</i>

7. Since in 2010, petitioner-company was of the opinion that its equity capital was still in excess, it decided to reduce 1.55% of its issued and paid-up equity share capital by canceling and extinguishing 3,78,614 equity shares held by Lancaster Square Holdings SL (Lancaster) constituting about 1.44% of the issued and paid-up equity share capital of the petitioner company and 28,531 equity shares held by the public constituting about 0.11% of the issued and paid-up equity

share capital of the petitioner company both aggregating to 4,07,145 equity shares. The petitioner-company appointed M/s. T.R. Chadha & Co., Chartered Accountants to determine the fair value of its equity shares.

8. On 3rd March, 2010, the Board of Directors of petitioner-company approved further reduction in its paid up share capital, subject to approval of its equity shareholders and confirmation by this Court. At the said Board Meeting, the Valuation Report of M/s. T.R. Chadha & Co. was considered and the Board approved the payment of ₹ 940/- per equity share as against the value of ₹ 836/- recommended by the Valuer, M/s. T.R. Chadha & Co.

9. On 26th March, 2010, the largest shareholder of the petitioner-company, namely, M/s. Reckitt Benckiser Plc wrote to petitioner that it had no objection to the new Scheme for Reduction of share capital. The relevant portion of the said letter dated 26th March, 2010 is reproduced hereinbelow:-

“.....This is also to confirm that as Promoter shareholder of your Company, we would like to retain our shareholding in the Company and in line with the

‘first in and last out’ principle, we will continue to hold the capital till the final exit of all other shareholders.’

(emphasis supplied)

10. In pursuance to the decision taken by the Board on 3rd March, 2010, a Notice along with Explanatory Statement was sent to the equity shareholders of petitioner-company informing them that an Extra-Ordinary General Meeting (for short ‘EOGM’) was to be held on 24th April, 2010 to consider the proposed reduction of share capital of the petitioner-company. The relevant extract of said Notice as well as Explanatory Statement is reproduced hereinbelow:-

a) **Notice to the Members dated 27th March, 2010**

“Special Business:

To consider and, if thought fit, to pass with or without modification(s), the following resolution as a special resolution, referred to as a “resolution for reduction of share capital”:

“RESOLVED THAT pursuant to the Articles of Association of the Company and Section 100 of the Companies Act, 1956, and subject to confirmation by the Hon’ble High Court of Delhi at New Delhi, the issued and paid up equity capital of the company be reduced from Rs. 26,27,96,120 (consisting of 2,62,79,612 equity

shares of Rs.10 each fully paid up) to Rs. 25,87,24,670/- (consisting of 2,58,72,467 equity shares of Rs.10 each fully paid up), the amount by which the equity capital is so reduced being in excess of the requirements of the Company and that such reduction be effected by canceling and extinguishing 378,614 equity shares held by Lancaster Square Holdings SL (“Lancaster”) constituting about 1.44% of the issued and paid-up equity share capital of the Company and 28,531 equity shares held by the public constituting about 0.11% of the issued and paid-up equity share capital of the Company, both aggregating to 407,145 equity shares of Rs. 10 each fully paid up constituting about 1.55% of the issued and paid-up equity share capital of the Company.”

b) **Explanatory Statement**

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*“The management of your Company has focused on profitability and its emphasis on financial discipline including effective management of net working capital has resulted in the capital requirements of the Company having appreciably reduced. The Company’s concentration on quality and performance as well as approach to the market has resulted in good growth numbers. **Keeping in view the excess capital available with the Company the Board has evaluated the various options available for the utilization of the same. However, even after taking into account all the capital expenditures for its future growth plans, upgradation of existing product lines, investments in research and development, the Company has more capital resources***

than it can profitably utilize giving rise to the need to readjust the relation between capital and assets and to accurately and fairly reflect the liabilities and assets of the Company in its books of accounts.

After a close examination and analysis of the various options available to the company and in the absence of adequately attractive acquisition opportunities, the restructuring of the Company's existing capital structure becomes imperative. After detailed deliberations, the Board of Directors of the Company are of the view that the reduction of the equity share capital in accordance with Section 100 of the Companies Act, 1956 (the "Act") is the only practical and economically efficient legal option available to the Company. As such, the Board proposes to return capital to identified equity shareholders in accordance with Section 100 of the Act, whereby the paid-up equity share capital in excess of its requirements be reduced and that such reduction be effected by canceling and extinguishing of 378,614 equity shares held by Lancaster, constituting about 4% of Lancaster's equity shareholding in the Company, and 28,531 equity shares held by the public, constituting 100% of the equity shareholding of the public in the Company.....

The Board has recommended that Reckitt Benckiser Plc being the promoter shareholder should not be returned any of its equity capital contribution before the public equity shareholders or Lancaster are returned their equity capital contribution. Reckitt Benckiser Plc being the promoter shareholder of your Company has agreed vide its letter dated 26th March, 2010 to retain its

shareholding in the Company as the promoter while enabling the other equity shareholders to exit from the Company prior to any impairment of share value.

Pursuant to the reduction of the issued and paid-up equity share capital of the Company as mentioned above, the issued and paid-up share capital of the Company would be held by Reckitt Benckiser Plc and Lancaster or their nominees. Your Company is engaged in business industry where there is no sectoral cap and non-resident shareholders are permitted to hold 100% of the issued and paid-up equity share capital of the Company in accordance with applicable laws and regulations.....”

11. On 24th April, 2010, an EOGM of petitioner-company was held in accordance with the Notice and Explanatory Statement dated 27th March, 2010. The special resolution proposing the reduction of equity share capital of petitioner-company was passed by special majority of equity shareholders holding 2,62,51,081 equity shares of ₹ 10/- each. The equity shareholders holding 536 equity shares of ₹ 10/- each voted against the resolution. In fact, out of the public shareholders, only one shareholder, namely, Mr. Chander Bhan Gandhi, holding 536 equity shares attended and voted against the motion at the EOGM.

12. Initially in this Court, twenty-four shareholders had filed their objections to the present Scheme of Reduction. However, upon the

petitioner company offering to pay to the public shareholders an amount of ₹ 1500/- per equity share, Mr. Janak Mathuradas and twenty-two other objectors accepted the offer and unconditionally withdrew their objections as well as affidavits along with the valuation report of J.C. Desai & Co. filed before this Court. The order dated 16th September, 2011 is reproduced hereinbelow:-

“In the present case, Mr. Janak Mathuradas has filed objections to the Scheme of Reduction. 22 other public shareholders have filed one page affidavit supporting the objection of Mr. Mathuradas.

Learned counsel for the petitioner submits that without prejudice to its rights and contentions, petitioner is willing to pay to the Indian public shareholders an amount of Rs.1500/- per equity share.

In view of the aforesaid offer, Mr. Ankit Shah, learned counsel for Mr. Janak Mathuradas and 22 other objectors, upon instruction of Mr. Janak Mathuradas, who is personally present in Court, states that he would like to withdraw the objections filed by Mr. Mathuradas and 22 other public shareholders. Mr. Shah, learned counsel further wishes to withdraw the affidavit filed by Mr. Janak Mathuradas in the month of February, 2011 along with the valuation report of J.C. Desai & Co.

Keeping in view of aforesaid agreement between the petitioner and all the objectors, except Mr. Chander Bhan Gandhi, petitioner is directed to pay an amount of Rs. 1500/- per equity shares to public shareholders of petitioner-company. The objections filed by Mr. Janak Mathuradas and 22 other shareholders along with the

affidavits of Mr. Mathuradas and valuation report of J.C. Desai & Co. are dismissed as withdrawn.

List the matter for arguments in the objections filed by Mr. Chander Bhan Gandhi, the only remaining objector, on 21st September, 2011 at 2:15 p.m.”

13. The only remaining objector Mr. Chander Bhan Gandhi submits that the Government policy of removing sectoral caps in personal care and health sector is illegal. According to him, the present Scheme of Reduction is nothing but a product of wrong economic policies being followed by the Government of India.

14. Mr. Gandhi further submits that the proposed Reduction of Share capital by the petitioner company amounts to ‘forcible acquisition’ of shares of public shareholders as only their shares are being extinguished, whereas the shares of the promoter group remain unaffected. According to him, the actual intent and reason for reduction of share capital is only to ‘eliminate’ the minority public shareholders as members of the company and is thus, wholly unfair, discriminatory and *mala fide*. In this connection, he relies upon the Explanatory Statement attached to the Notice to Members dated 27th March, 2010 wherein it is stated that Reckitt Benckiser Plc being the

promoter shareholder of the company has agreed by its letter dated 26th March, 2010 to retain its shareholding in the company as promoter, while enabling the other shareholders to exit from the company. Mr. Gandhi submits that reduction, if any, should be spread equally over all the different classes of shareholders of petitioner-company.

15. Mr. Gandhi submits that the Scheme of Reduction proposed by the petitioner-company does not fall within any of the three modes of reduction of share capital provided for in Section 100(1) of the Act. According to him, this Court is empowered to look into the petitioner's proposal for reduction of share capital and decide whether the same is legal, fair and equitable. In this connection, he relies upon the judgments of Supreme Court in *Sesa Industries Limited vs. Krishna H. Bajaj and Others* (2011) 3 SCC 218 and *Miheer H. Mafatlal vs. Mafatlal Industries Ltd.* (1997) 1 SCC 579; and Andhra Pradesh High Court's judgments in *Aurbindo Pharma Ltd., In re.*, (2011) 105 SCL 71 (AP) and *Chetan G. Cholera and Another vs. Rockwool (India) Ltd.*, (2010) 155 Comp Cas 605 (AP).

16. According to Mr. Gandhi, the petitioner's shares are invaluable. He emphasizes that the shares of the petitioner-company are at par with

a 'Kohinoor Diamond'. He states that the valuation report of M/s. T.R. Chadha & Co. is improper and has been filed with an intent to evaluate the shares at a lower value. In this connection, Mr. Gandhi relies upon the report of M/s. J.C. Desai & Co. filed by Mr. Janak Mathuradas.

17. He also submits that the petitioner has acted in a *mala fide* manner by clubbing the minority shareholders whose rights are being affected by the proposal to reduce the share capital along with petitioner's own subsidiary namely, Lancaster Square holdings SL. He submits that such artificial classification of the class of shareholders for holding class meetings of shareholders for reduction of share capital by the petitioner is absolutely wrong and irrational and it has been made only with a view to ensure that the special resolution is passed. He states that had the petitioner company constituted the true minority shareholders that means, the public shareholders as a separate class of shareholders, then it would have been impossible for the petitioner company to pass the special resolution for 'extinguishing' their shares.

18. Mr. Gandhi points out that a similar previous attempt by the petitioner had been given up by the petitioner itself, upon objections raised by objectors like him, as would be apparent from the judgment

dated 31st May, 2005 passed by this Court in CP No. 206/2004 wherein the petitioner agreed to let the objectors continue to be shareholders and it was only thereupon that this Court permitted reduction of petitioner's share capital. He submits that *res judicata* is attracted to the facts of the present case and, therefore, the petitioner-company should not be allowed to go back on its statement as recorded in the judgment dated 31st May, 2005. The relevant portion of the judgment dated 31st May, 2005 relied upon by Mr. Gandhi is as under:-

“33.However, it is not necessary to deal with this question any further and record any definite findings in view of the offer given by learned counsel for the petitioner during the proceedings namely, allowing the objectors and others to intervene later on to retain their shares.....”

19. Mr. Gandhi submits that the reduction of share capital proposed by the petitioner is in effect a buy-back of the shares by the petitioner under Section 77A of the Act. Consequently, he submits that reduction of share capital has to be done on proportionate basis in accordance with Section 77A(5) of the Act.

20. Mr. Gandhi also contends that forms of representation executed by Reckitt Benckiser Plc and Lancaster Square Holdings SL for EOGM held on 24th April, 2010 are invalid as the same have not been

notarised. In this connection, Mr. Gandhi draws attention of this Court to the letter given by him to the Chairman of the EOGM wherein it is stated '*My joint report of polling today subject to my reservation that the form of representation executed by the board of directors under seal of company for appointment of proxy should have or not the seal of notary public. This may be got verified*'.

21. At the outset, Mrs. Pallavi S. Shroff, learned counsel for the petitioner-company submits that it is not within the domain of this Court to inquire as to whether a particular economic policy is wise or whether a better economic policy can be evolved.

22. Mrs. Shroff further submits that Section 100 of the Act permits a company to reduce its share capital in any manner. She also submits that it does not contemplate class meetings. According to her, it only requires passing of a special resolution by the equity shareholders. She points out that equity shares of Lancaster Square Holdings SL are also being reduced and, therefore, they were also entitled to vote at the EOGM.

23. Mrs. Shroff submits that shares of Reckitt Benckiser (India) Ltd., being the promoter, are not being reduced on the principle of '*first in*

and last out'. Mrs. Shroff also submits that the objections with regard to 'forcible acquisition' and 'elimination' are no longer *res integra* as identical objections have been rejected in similar cases of reduction by Bombay High Court in *Sandvik Asia Limited vs. Bharat Kumar Padamsi and Ors. (2009) 92 SCL 272 (Bom)* and *Organon (India) Ltd., In Re.(2010) 98 CLA 480 (Bom.)*.

24. Mrs. Shroff points out that the valuation with respect to the entire value of the petitioner's equity shares has been done by a reputed firm of Chartered Accountants, i.e., M/s. T.R. Chadha & Co. She states that the valuation has been done with reference to the position as on 31st December, 2009 and the Valuer has considered the future stream of earnings of the petitioner-company. According to her, as the report of M/s. J.C. Desai & Co. had been filed at the instance of Mr. Janak Mathuradas who has now withdrawn his objections, the same cannot be relied upon in the present proceedings. In any event, she points out that M/s. T.R. Chadha & Co. has used both the income approach and the market approach for its Valuation, whereas M/s. J.C. Desai & Co. has used only the market approach.

25. Without prejudice to the aforesaid, Mrs. Shroff states that the

report of M/s. J.C. Desai & Co. considers data and transaction that occurred after the date of M/s. T.R. Chadha & Co. valuation as also after the passing of the shareholder's resolution approving the reduction. Mrs. Shroff points out many irregularities in the valuation report such as though the equity shares of the petitioner company are not listed, yet M/s. J.C. Desai & Co. has provided a mobility discount. According to her, the report of M/s. T.R. Chadha & Co. should not be lightly interfered with. In this connection, Ms. Shroff relies upon the judgments of Supreme Court in *Miheer H. Mafatlal* (supra); *Hindustan Lever Employees' Union v. Hindustan Lever Ltd. & Ors.*, *1995 Supp (1) SCC 499* and Gujarat High Court's judgment in *Reliance Petroleum Ltd., In re.*, (2010) 96 CLA 305 (Guj.).

26. Mrs. Shroff contends that the judgment and order dated 31st May, 2005 passed by this Court in Company Petition 206/2004 records that the earlier Scheme for Reduction of share capital of the petitioner company has been accepted without any modification. She states that objections raised by the objector in that matter were not considered or adjudicated upon by this Court in view of the petitioner's statement allowing the then objectors to retain their shareholding. Consequently,

according to her, the concept of *res judicata* is not attracted to the present case.

27. Mrs. Shroff submits that Section 77A of Act cannot be read into Section 100 of the Act. In this connection she relies upon the judgment of the Bombay High Court in *The Securities & Exchange Board of India vs. Sterlite Industries (India) Ltd. (2003) 113 Com.Cas 273 (Bom)*.

28. Mrs. Shroff states that the EOGM was conducted in a fair and transparent manner. According to her, objections of Mr. Gandhi were duly recorded in the minutes of the EOGM and he was also given an opportunity to examine the valuation report. Mrs. Shroff points out that Reckitt Benckiser Plc. by resolution dated 12th April, 2010 authorised the execution of form of representation for meeting of 24th April, 2010. She states, similarly Lancaster Square Holdings SL at its meeting on 9th April, 2010 appointed Mr. S.N. Kannan to represent the company at the EOGM. He submits, there is no requirement in law for an Indian subsidiary to maintain specimen signatures of Directors of its holding company.

29. Having heard the parties at length, this Court is of the view that it is first essential to analyze Section 100 of the Act. Section 100 of the Act reads as under:-

“100. Special resolution for reduction of share capital.—

(1) Subject to confirmation by the [Tribunal], a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles, by especial resolution, reduce its share capital in any way; and in particular and without prejudice to the generality of the foregoing power, may—

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;*
- (b) either with or without extinguishing or reducing liability on any of its shares cancel any paid-up share capital which is lost, or unrepresented by available assets; or*
- (c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,*

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as “a resolution for reducing share capital”.

30. From the aforesaid, it is apparent that Section 100 of the Act expressly permits a company, if so authorised by its articles of association, to reduce its share capital provided it has passed a special resolution for that purpose and the said resolution has been sanctioned by the Court.

31. Clauses (a), (b) and (c) of Section 100(1) of the Act are mere illustrations and are not the only manner in which share capital of a company can be reduced. In fact, the power of reduction of capital is general and extends to any possible method of reduction subject to compliance with the applicable provisions. In *Bhimhai & Ors. vs. IshwarDa's JugjiwanDa's & Anr., (1894) ILR 18 Bom 152*, the Court has held that any arrangement concerning the company's capital which has the effect of reducing it is within the purview of this Section. Consequently, in the opinion of this Court, Section 100 of the Act enables a company to reduce its capital in any manner it deems proper.

32. Mr. Gandhi's reliance on *Aurbindo Pharma Ltd.* (supra) is misplaced on facts. The said case relates to a Scheme of Arrangement under Section 391 wherein as a part of the Scheme, the Company proposed to utilize the capital redemption reserve towards expenses and

redemption of preference shares. The Court held that if the capital reserve account is used in any manner, it results in reduction of share capital which requires permission of the Court. It further held that certain adjustments in the Scheme were not permissible under law and, thus, the Scheme under Section 391 could not be sanctioned.

33. The other judgments relied upon by Mr. Gandhi, namely, *Sesa Industries Limited* (supra) and *Miheer H. Mafatlal* (supra) deal with a Scheme of Arrangement under Section 391 of the Act and not with regard to reduction of share capital under Section 100 of the Act. In fact, when direct judgments are available on reduction of share capital, this Court is of the view that reliance upon judgments under Section 391 of the Act is not apposite.

34. Moreover, in the present case, the proposed reduction in the paid-up equity share capital of the company is duly authorised by Article 54 of its Articles of Association. The said Article states, “The Company may from time to time by Special Resolution, reduce its capital and any Capital Redemption Reserve Account or Share Premium Account in any manner and with and subject to any incident authorised and consent

required by law". It is settled law that Articles of Association constitute a contract between the shareholders and its company.

35. Section 85 of the Act specifies that there are only two kinds of share capital i.e. Preference and Equity share capital. In the present case, the petitioner company has only one class of share capital. Further, in the opinion of this Court, Section 100 of the Act read with Rule 47 of the Rules, 1959, does not envisage class meetings. Section 100 of the Act requires passing of a special resolution by equity shareholders and does not require passing of a separate class resolution.

36. It is only Section 391 of the Act read with Rule 61 of the Rules, 1959 which deals with Scheme of Arrangement, recognizes that class meetings can be directed to be held. In the opinion of this Court, Rule 67 of the Rules, 1959 cannot be read with Section 100 of the Act. In fact, Rule 67 of the Rules, 1959, has been inserted as under a Scheme of Arrangement, similarly placed shareholders or creditors may be treated differently and this is the concept recognized in the judgment of *Miheer H. Mafatlal*. (supra). Accordingly, the prescribed majority under Section 100 of the Act is a majority of the entire body of shareholders of the company and not minority public shareholders as

canvassed by Mr. Gandhi.

37. The principle of “*first in last out*” in cases of reduction is a well established one and has been accepted by the Bombay High Court in the case of ***Organon (India) Ltd.*** (supra), wherein it held “*In response to this objection, the petitioner-company has submitted that the principle of 'first in last out' referred to by the petitioner-company implies that the promoter shareholders being the initial shareholders of the petitioner-company would exit last. Admittedly, the petitioner-company became a shareholder prior to Mr. Lakhani and, therefore, should exit later than him. Subsequent acquisition of shares by the promoter shareholders would not affect the status of the promoter shareholders being the initial shareholders. Moreover, the petitioner-company submits that section 100 of the Act does not prohibit the classification of shares for the purpose of effecting the reduction of capital. A special resolution to the effect of proposed reduction of the equity share capital need not affect the shares held by the promoter shareholders. Therefore, the said objection of Mr. Lakhani is untenable. On a reading of section 100, I find that the submission of the petitioner-company is correct and this objection of Mr. Lakhani, raised*

on the principle of 'first in last out' is, therefore, rejected.”(emphasis supplied).

38. The fact that minority shareholders are Indian and the majority promoter shareholders are foreigners is of no relevance as long as the mandate of law is complied with. This Court is of the opinion that there is nothing in the Act which requires that the reduction should be spread either equally or rateably over all the shareholders of the company.

39. The House of Lords in ***British and American Trustee and Finance Corporation vs. Couper, (1891-4) All E.R. 667***, upheld a Scheme of Reduction by which an English company cancelled only the shares held by its American shareholders. The House of Lords held “.....the question whether each member shall have his share proportionately reduced, or whether some members shall retain the shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is a purely domestic matter(page 672).....
It is for the company, and for the company alone, to judge of the prudence of the course proposed. The objects of the company are wide enough to swallow up the wealth of Lombard Street, or of the city of London. But again it is for the company to determine, subject of course

to the statutory provisions for the protection of creditors, whether its capital, under the circumstances, and in view of the policy approved by the shareholders, is or is not in excess of its present wants(page 675)......it follows as a self-evident proposition that the interests of the shareholders in respect of their shares as regards dividend and everything else must be equal. In the result, therefore, I am of opinion that the objection on the part of the respondent is not well founded. I think that the proposed reduction is within the power conferred by the Act of 1867.....” (page 677) (emphasis supplied).

40. In fact a Division Bench of the Bombay High Court in **Sandvik Asia Limited** (supra) following the aforesaid House of Lords decision held “In our opinion, the above quoted observation of the House of Lords from its judgment in the case of Poole & ors, referred to above, squarely apply to the present case. In our opinion, once it is established that non-promoter shareholders are being paid fair value of their shares, at no point of time it is even suggested by them that the amount that is being paid is any way less and that even overwhelming majority of the non-promoters shareholders having voted in favour of the resolution shows that the court will not be justified in withholding its

sanction to the resolution. As the Supreme Court has recognised that the judgment of the House of Lords in the case of British & American Trustee and Finance Corporation Ltd. is a leading judgment on the subject, we are justified in considering ourselves bound by the law laid down in that judgment. As we find that there is similarity in the facts in which the observations were made in the judgment in the case of British & American Trustee and Finance Corporation, we will be well advised to follow the law laid down in that case. In our opinion, therefore, the learned single Judge was in error in declining to grant sanction to the special resolution.” (emphasis supplied).

41. In ***Organon (India) Ltd.*** (supra) another Single Judge of Bombay High Court specifically rejected the argument of forcible acquisition of public shareholders in context of a Scheme of Reduction. In the said judgment, it held as under:-

“13. Mr. Lakhani has first submitted that such reduction of the share capital proposed by the petitioner-company, by paying off the public holders of equity shares, other than the promoter shareholders and given them certain compensation, amounts to a forceful acquisition of the shares held by them. He states that such action on the part of the petitioner-company is against the principles of natural justice, corporate

democracy and corporate governance. He states that such reduction tantamount to a sophisticated corporate mafiaism.

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19. This Court is, however, bound by the decision of the Division Bench of this Court, reported in Sandvik Asia Ltd. v. Bharat Kumar Padamsi [2009] 91 CLA 247 [2009] 111 (4) Bom. LR 1421, concerning the reduction of capital of Sandvik Asia Ltd. The learned Single Judge of this court, had refused confirmation of the proposal for reduction of Sandvik Asia Ltd. on the ground that the promoters group could virtually bulldoze the minority shareholders and purchase their shares at the price dictated by them. The learned Single Judge found that the minority shareholders were not given any option under the proposal. Hence, the learned Single Judge concluded that such schemes for reduction of capital were totally unfair and unjust. In appeal, the Hon'ble Division Bench held that they were bound by the law laid down by the Hon'ble Apex Court in Ramesh B Desai v. Bipin Vadilal Mehta [2006] 73 CLA 357/[2006] 5 SCC 638 (SC) where the Apex Court recognised the judgment of the House of Lords in the case of British & American Trustee & Finance Corporation (supra). The Learned Bench also referred to the judgment in Poole v. National Bank of China Ltd. [1907] AC 229 (HL), the relevant portion of which is as follows:

“The dissenting shareholders do not demand, and never have demanded, better pecuniary terms, but they insist on retaining their holdings which in all reasonable probability can never bring profit to any of them and may be detrimental to the company.”

20. The learned Bench granted sanction to the reduction of capital, overruling the order of the learned

Single Judge in Sandvik Asia Ltd. (supra), and posited as follows:

“Once it is established that non-promoter shareholders are being paid the fair value of their shares, at no point of time it is even suggested by them that the amount that is being paid is way less and even the overwhelming majority of non-promoter shareholders having voted in favour of the resolution shows that the court will not be justified in withholding its sanction to the resolution.” [para 9]

21. An SLP [Petition for Special Leave to Appeal (Civil) No. 12418/2009] filed therefrom, was dismissed by the Hon’ble Apex Court, by its order dated 13th July, 2009. Thus, this Court is bound by the decision of the learned Division Bench and cannot withhold sanction to the special resolution for reduction of capital, unless there is some patent unfairness regarding the fair value of the shares or there is lack of an overwhelming majority of non-promoter shareholders who vote in favour of the resolution.”

(emphasis supplied)

42. In view of the aforesaid judgments, Mr. Gandhi’s submission with regard to the ‘forcible acquisition’, ‘elimination’ and challenge to ‘first in last out’ are untenable in law.

43. This Court is of the opinion that the observations of the Andhra Pradesh High Court in *Chetan G. Cholera and Another* (supra) are *obiter dicta* inasmuch as in the said case the Court was dealing with an

application for recall of an order sanctioning a Scheme for Reduction of share capital. It is pertinent to mention that the said recall application was ultimately dismissed by the said decision.

44. It is also settled law that a valuer's report is not to be interfered with by a Court in the absence of any fraud or illegality – which allegation is missing in the present petition. In fact, Supreme Court in *Hindustan Lever Employees' Union v. Hindustan Lever Ltd., 1995 Supp (1) SCC 499* has held “*Mr. Ashok Desai, appearing on behalf of TOMCO, has argued that the valuation of shares had to be done according to well-known methods of accounting principles. The valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be differences of opinion among accountants as to what is the correct value of the shares of a company. It was emphasised that more than 99% of the shareholders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder. Mr Jajoo may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the shareholders have approved of the valuation. The Court should not interfere with such*

valuation.”(emphasis supplied).

45. Moreover, the valuation report of M/s. J.C. Desai & Co. cannot be relied upon in the present proceedings as it had not been placed before the EOGM by any of the objectors and further as it has been withdrawn by Mr. Janak Mathuradas at whose instance it had been furnished. In any event, the price of ₹ 1500/- per share, now being offered by the petitioner-company to its public shareholders, has been accepted by all its shareholders except Mr. Gandhi. Consequently, this Court is of the view that the price of ₹ 1500/- is fair and reasonable.

46. This Court is further of the opinion that the judgment dated 31st May, 2005 in Co. Pet. 206/2004 does not raise or create any bar on the petitioner from presenting another Scheme of Reduction. The statement recorded in the aforesaid judgment is in the context of the first Scheme of Reduction and not the present one. Consequently, the statement made in Co. Pet. 206/2004 cannot bind the petitioner company for perpetuity.

47. Moreover, to attract the concept of *res judicata* amongst other conditions precedent, there has to be final determination/decision of the same issue by a Court of law. Since this essential ingredient and

condition precedent is missing, this Court is of the view that the plea of *res judicata* in the present proceedings is untenable.

48. Mr. Gandhi's challenge to the validity of form of representation is also untenable in law as it is not a proxy form, but a form of representation as contemplated under Section 187 of the Act. The relevant portion of the said Section reads as under :-

“187. Representation of corporations at meetings of companies and of creditors.— A body corporate (whether a company within the meaning of this Act or not) may—

(a) if it is a member of a company within the meaning of his Act, by resolution of its Board of directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company, or at any meeting of any class of members of the company;.....”

49. During the hearing, no provision was shown which would indicate that notarisation of form of representation is mandatory. Accordingly, the objection with regard to validity of EOGM is *sans merit*.

50. This Court is also of the opinion that Mrs. Shroff is correct in her submission that Section 77A of the Act is a facilitating provision which enables a company to buy- back its shares without approaching the

Court under Sections 100 to 105 of the Act. In fact, the provisions of Sections 77A and 100 of the Act operate in different fields. The Bombay High Court in *The Securities & Exchange Board of India vs. Sterlite Industries* (supra) has held "The submission of the appellants that the non-obstante clause in Section 77A gives precedence to that section over the provisions of Sections 100-104. Section 391 is misconceived. The non-obstante clause in Section 77A namely "notwithstanding anything contained in this Act..." only mean that notwithstanding the provisions of Section 77 and Sections 100-104, the company can buy back its shares subject to compliance with the conditions mentioned in that section without approaching the court under Sections 100-104 or Section 391. There is nothing in the provision of Section 77A to indicate that the jurisdiction of the court under Section 391 or 394 has been taken away or substituted. It is well settled that the exclusion of the jurisdiction of the Court should not readily be inferred, such exclusion should be explicitly or clearly implied. There is nothing in the language of Section 77 that gives rise to such an inference. We are, therefore, inclined to hold that Section 77A is merely an enabling provision and Court's powers under Sections

100-104 and Section 391 are not in any way affected. The conditions provided in Section 77A are applicable only to buy-back of shares under Section 77A. The conditions applicable to Sections 100-104 and Section 391 cannot be imported into or made applicable to a buy-back under Section 77A. Similarly, the conditions for a buy-back under Section 77A cannot be applied to a scheme under Sections 100-104 and Section 391. The two operate in independent fields.(emphasis supplied).

51. The Andhra Pradesh High Court in ***In Re: T.C.I. Industries Ltd.*** (2004) 188 Co.Case 373 (AP) has also held as under:-

“14. Be it noted that Sections 391 and 77A of the Act are independent of each other. Section 77A of the Act, which was incorporated by reason of the Companies (Amendment) Act, 1999, and which came into effect from January 31, 1999, was not given any overriding effect over the provisions of Sections 391 and 394 of the Act. The said provision is merely an enabling provision, providing for alternative mode by which the company can buy back its shares up to a certain percentage.....

xxx xxx xxx xxx

19. In the instant case, as already noted supra, the proposed scheme of arrangement, was unanimously approved by 100 per cent, vote, and there was not even a single vote, which was polled against the proposed scheme of arrangement. This apart, the petitioner had made provision for depositing a sum of Rs.45 lakhs and

earmarked a sum of Rs.6.50 crores, for meeting the payment needs of the shares, which may be cancelled. When the shareholders, in their wisdom, thought that the proposed scheme of arrangement, is fair and reasonable for them and that it had safeguarded their interest, it is not for this Court to go into the pros and cons thereof and balance them. Suffice it to say that the proposed scheme of arrangement, having been approved by 100 per cent, vote and there being no resistance from any of the shareholders or persons interested in the affairs of the company, this court has no other alternative except to approve the proposed scheme of arrangement, as approved by the shareholders of the company.

(emphasis supplied)

52. In view of the aforesaid, it is apparent that the conditions precedent in Section 77A (5) of the Act are applicable only to buy-back of shares under Section 77A of the Act. Consequently, Section 77A(5) of the Act does not apply to a Scheme of Reduction under Section 100 of the Act, as the two operate in entirely different fields.

53. As far as challenge to economic policy is concerned, it is well settled that Courts do not interfere with an economic policy which is in the domain of the executive unless the same is capricious, arbitrary, illegal or uninformed. Also, it is not the function of a Court to sit in judgment over matters of economic policy which must be necessarily left to expert bodies. In fact, a Court does not supplant the view of an

expert with its own. [See *Balco Employees Union vs. Union of India (2002) 2 SCC 333*]. Accordingly, it is not open for this Court to strike down the Government policy of removing sectoral caps in personal care and health sector.

54. Consequently, keeping in view the aforesaid as well as the fact that reduction of share capital is a commercial and business decision, which has been approved by 99.999% of equity shareholders of petitioner-company and only 0.0020% of shareholders are opposing the new purchase price of ₹ 1500/- per share, this Court is of the opinion that there is no valid reason for not accepting the proposed scheme of reduction of share capital. It is, accordingly, allowed. The Resolution dated 24th April, 2010 and the Form of Minutes proposed at ‘Annexure O’ to be registered under Section 103(1)(b) of the Act for reduction of paid up equity share capital of the petitioner-company are approved. A copy of the approved minutes be filed with the Registrar of Companies within six weeks. Notice of registration of this order and the minutes approved by the Registrar of Companies be published by the petitioner-company in newspapers, namely, ‘Times of India’ (English edition) and ‘Jansatta’ (Hindi edition).

55. With the aforesaid directions, the petition and pending applications stand disposed of.

MANMOHAN, J.

OCTOBER 03, 2011

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