
(2007) 01 BOM CK 0089

In the Bombay High Court

Case No : Company Petition No. 472 of 2006 in Company Application No. 527 of 2006 in Company Petition No. 404 of 1986

Brij Mohan Grover

APPELLANT

Vs

O.L. High Court of Bombay

RESPONDENT

Date of Decision : 15-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Companies Act, 1956 — Section 391, 392, 393, 394, 529A

Citation : (2007) 139 CompCas 682 : (2008) 81 SCL 334

Hon'ble Judges : R.S. Mohite, J

Bench : Single Bench

Advocate : A.Y. Bookwalla, Shrikant Mehta, Roshan Kshatrashah, J.P. Cama, Sanjay Udeshi, Londhe, Sanjay Singhvi, Jane Cox, Bannet D'cousta, Fredun D'vtre, D.D. Madon, Neeta Rajda, Madhuri Gaikwad, C.J. Joy, Pankaj Kapoor, K.V. Gautam and M.H.I. Patel, for the Appellant;

Judgement

R.S. Mohite J.

1. All parties are heard. Counsel for the petitioner upon instructions states that his client is willing to raise the percentage of interest on amount payable as down payment to the workmen from 10 per cent per annum to 11 per cent per annum. Mr. J. P. Cama, counsel for Shramik Utkarsha Sabha (hereinafter referred to as the "Sabha") and Mr. Fredun D'vtre state on instructions that their clients are also willing to hike the said interest from 10.17 per cent per annum to 11 per cent per annum. The amount by way of down payment to workers offered by the petitioner thus stands increased to Rs. 14,34,71,743 and the amount as offered by the sabha and its sponsor stands increased to Rs. 14,36,37,497 on the basis of 11 per cent interest on their own recorded offers in this regard. These counsel also state that on the acceptance of the scheme, their clients will pay the full value of the property as quantified by the petitioner in paragraph 20 of the petition, i.e., Rs. 52,07,50,000 to M/s. Bali Properties and Investments (P.) Ltd. Mr. Sanjay Singhvi appearing for the rival workers union Shramik Mahasangh

(hereinafter referred to as the "Mahasangh") states that in view of these statements, the modified scheme as propounded by the Shramik Utkarsha Sabha would be preferred by his clients. Also at the stage of arguments the advocate appearing for M/s. Bali Properties and Investments (P.) Ltd., submitted 2 documents, one being a xerox copy of a letter dated 12-12-2006, said to have been written by one Sanjay Dalmia, a director of Prateek Apparels (P.) Ltd., to advocates Sanjay Udeshi and to his advocate Rajesh Shah and an auditor's report dated 31-8-2006, dealing with the balance-sheet of the said company. He states that these documents could not have been placed earlier on the record since they have just been received. Hence, even at this late stage, in the interest of justice, he is permitted to place these documents on record by way of affidavit by 26-12-2006. All the parties have been heard on these two additional documents. Advocates Rajesh Shah and Sanjay Udeshi who are present in the court state that they have never received such a letter dated 12-12-2006, from Sanjay Dalmi. Mr. J.P. Cama counsel for Shramik Utkarsha Sabha brings to my notice another letter of Sanjay Dalmia also dated 12-12-2006, which is annexed to the affidavit of Krishna Mokhal dated 12-12-2006. This letter is also addressed to advocates Rajesh Shah and Sanjay Udeshi and is annexed in original. Mr. Cama states that under this letter the textile unit under the scheme will be started in the name of BLR Knits, which is a nominee within the term "sponsor" as defined under the modified scheme propounded by the sabha. All these statements are recorded and accepted and I proceed to deal with the matter on merits.

2. Company Petition No. 472 of 2006 has been filed by one Brij Mohan Grover who is a shareholder and an ex-managing director of Modella Textile Industries (P.) Ltd., which is a company in liquidation (hereinafter called "the company").

3. By an order passed by this Court on 14-8-1986, in the main Company Petition No. 404 of 1986, the Official Liquidator was appointed as a provisional liquidator of the company. In due course, the company was directed to be wound up on 11-6-1987, and the Official Liquidator was continued.

4. Prior to the winding up of the company, in November 1986, the only secured creditor of the company, i.e., Central Bank of India filed a suit in this Court against the company and the present petitioner Brij Mohan Grover seeking to recover an amount of Rs. 2,98,675,713 with interest at diverse rates ranging between 12.5 per cent and 15.7 per cent per annum and for a further declaration that the repayment of the said amount and further interest was secured by an equitable mortgage and/or hypothecation of various immovable and movable properties of the company. The suit further sought enforcement of the security in respect of the mortgaged and charged properties, by sale thereof.

5. By an order dated 24-11-1986, passed by this Court in the aforesaid suit bearing No. 3290 of 1986 filed by the Central Bank of India, the court receiver, High Court, Bombay was appointed as ad interim receiver of the movable and immovable properties of the company with all powers under Order 40, Rule 1 of

the Civil Procedure Code, save and except the powers to sell the properties. The court receiver continues to-date.

6. It appears from the record that on the date of winding up of the company, there were in all 1312 workers working in the company. Some of these workers were staying within the factory premises of the company at Thane. These workers who were residing in the premises resisted the taking of the possession by the court receiver and claimed tenancy rights. There was litigation in this regard and attempts were made to evict them. At one stage this Court had directed that they be evicted forcibly but that order was set aside in appeal and ultimately, the Official Liquidator was directed by this Court to evict them in accordance with law by filing proceedings u/s 630 of the Companies Act. Thirty such complaints u/s 630 of the Companies Act were filed by the Official Liquidator before the Judicial Magistrate, First Class at Thane and those cases are pending.

7. Apart from the factory premises at Thane, the company had several other properties as listed in paragraph 5 of the Official Liquidator's report dated 11-10-2006. All these properties of the company were also mortgaged as security to the Central Bank of India who were the sole secured creditors.

8. Since the Central Bank of India preferred to stand outside the winding up proceeding and made a separate claim by way of a suit and since the receiver was appointed in that suit, the admitted position is that the workers of the company could not be paid their full dues though the winding up order was made in the year 1987. From some monies which were collected by the Official Liquidator from other properties and sources, two dividends of 15 paise in a rupee each were released to the workers. 70 per cent of the dues payable to the workers is yet to be paid with accruing interest. In view of the pendency of such litigation for a very long period of time of about 19 years, it is not disputed that several of the workers expired and many others reached the age of superannuation. Many of these workers left their premises in and around Thane and Mumbai to migrate to other places.

9. According to the petitioner, at his request a company by name Bali Properties and Investments (P.) Ltd. settled with the secured creditor, i.e., the Central Bank of India and paid them an amount of Rs. 17 crores as per the settlement and thereupon the said bank assigned their claim in the said suit in favour of said Bali Properties and Investments (P.) Ltd. Consequent to the agreement in favour of Bali Properties and Investments (P.) Ltd., they were impleaded as plaintiffs in Suit No. 3290 of 1986 by an order dated 18-10-1995, passed by this Court. The said Bali Properties and Investments (P.) Ltd., is thus the substituted plaintiff in Suit No. 3290 of 1986 and is perusing the said suit with leave granted under the Companies Act.

10. In this background, the present company petition under Sections 391 to 394 of the Companies Act, 1956, came to be filed for a scheme of compromise/

arrangement between the company and its equity shareholders, secured creditors, unsecured creditors, statutory creditors and workers.

11. After the filing of this petition, the petitioner took out Company Application No. 527 of 2006 for directions relating to convening of various meetings of equity shareholders, secured creditors, unsecured creditors, statutory creditors and workers and by an order dated 21-4-2006, the petitioner was directed to convene separate meetings of equity shareholders, secured creditors, unsecured creditors, statutory creditors and workers.

12. The scheme which was to be put up at these meetings was the scheme of compromise or arrangement as annexed at exhibit A to the petition. The substance of the said scheme as originally filed in this Court and put up at the various meetings was as follows:

(a) The petitioner would borrow and bring in the sum not exceeding Rs. 1,16,83,738 for payment of outstanding dues to the unsecured creditors and statutory creditors of the company (the statutory liability being Rs. 53,77,359 and dues of unsecured creditors being Rs. 63,06,379).

(b) The applicant would arrange and borrow a further sum of Rs. 8,40,53,925 for payment of the dues of the workmen of the company and if there was any shortfall, inclusive of the claim of 65 workers, which had not been adjudicated, to bring in further amounts to meet such claims.

(c) That upon acceptance and sanction, the winding up order dated 11-6-1987, would be permanently stayed. The Official Liquidator will cease to act as such and will handover possession of all the properties of the company's movable or immovable that may be in his possession or custody to the company of which the petitioner, Mr. Vinodkumar Grover and one J. Joshi would be the directors.

13. The petition filed by the petitioner stated that the property in respect of which the scheme was being proposed was land with structures thereon situated at Thane and that the value of the said land and structures was Rs. 52,07,50,000. The scheme originally stated that the claim of the secured creditors was to the tune of Rs. 104 crores. As regards the secured creditors the scheme did not originally contain any specific provision for meeting a possible future liability. In Clause IV-B the only statement made regarding meeting the liability of the sole secured creditor was in the following words:

The claim of Bali Properties and Investments (P.) Ltd., being the secured creditors is covered in H.C. Suit No. 3290 of 1986.

14. It appears from the record that several meetings as directed by this Court were all held on 3-6-2006. The additional Prothonotary and Senior Master chaired these meetings and as per his report dated 30-6-2006, all the 20 equity shareholders who were present in the meeting voted for the scheme. In the meeting of the secured creditors the only secured creditor who attended the meeting voted in favour of the scheme. In the meeting of the unsecured

creditors, all the eight unsecured creditors who attended the meeting voted in favour of the scheme. In the meeting of the statutory creditors, one statutory creditor voted against the scheme but more than 3/4th of the statutory creditors by value voted in favour of the scheme. In the meeting of the workers, however, confusion prevailed and no agreement regarding the scheme could be arrived at. The workers even refrained from voting and therefore, the chairman had no alternative but to conclude the workers' meeting without any approval to the petitioner's scheme. It is not in dispute therefore, that at the meeting the workers, (who are creditors of the company since they have not been paid) did not grant approval to the scheme of the petitioner as originally proposed.

15. After the filing of this petition, in pursuance to the advertisement, on behalf of one of the two workers' unions of the company, i.e., the Shramik Utkarsha Sabha, an affidavit dated 12-10-2006, came to be filed. It was mentioned in the affidavit that the union had approximately 338 members and that their office bearers Mr. Vijay Kamble and Krishna Mokal had attended the workers' meeting but were not allowed to voice their grievances. By the said affidavit the opposition to the scheme of the petitioner was placed on record. It was contended that the secured creditor M/s. Bali Properties and Investments (P.) Ltd., was only a nominee of the present petitioner and the intention behind the scheme was to appropriate the assets of the company by denying the workers' reemployment. They suggested modifications u/s 392 of the Companies Act which according to the union were more beneficial to the displaced workers and contained a proposal aimed at getting eligible workers re-employed and rehabilitated. The proposal was to repay the full value of the companies assets of Rs. 52,07,50,000 to the petitioner and/ or Bali Properties and Investments (P.) Ltd. Another modification proposed was to provide an amount of Rs. 14,44,83,133 out of which workers could be paid Rs. 13,27,99,395 and unsecured creditors and statutory creditors could be paid an amount of Rs. 1,16,83,738 as provided for under the scheme. The modification which related to the generation of reemployment contemplated that a built up area of approximately 20,000 sq. feet would be made available for starting a new textile unit and reemploying eligible workers. A prayer was made that since the proposed modification to the scheme only improved upon the scheme as propounded by the petitioner, the scheme should be sanctioned along with the modifications as proposed by the "sabha".

16. On 12-10-2006, Mr. Krishna Mokal filed a further affidavit on behalf of the sabha in which certain allegations were made against M/s. Bali Properties and Investments (P.) Ltd. The modifications as stated in the earlier affidavit were reiterated and once again this Court was requested to sanction the scheme with the modifications as proposed by the "sabha" and acceptable to the workers who were members of the sabha.

17. On 11-10-2006, the Official Liquidator filed a report which indicated the extent of the claims as adjudicated by the Official Liquidator. The outstanding

liabilities as mentioned in this report dated 11-10-2006, were as follows:

18. The Official Liquidator also referred to the modifications as suggested by the "sabha". There were however, no comments on merits or comparative merits made in this report regarding both the propounded scheme and the suggested modifications of the sabha. It however, appears that the workers' claim of Rs. 3,53,37,896 as mentioned in this report dated 11-10-2006, was without inclusion of interest due and payable to the workers and I had therefore, directed the Official Liquidator to file an additional report indicating the amount that was due and payable to the workers after including interest.

19. On 12-10-2006, one Mr. Sanjay Dalmia as a director of the company by name Prateek Apparels (P.) Ltd., (hereinafter referred to as a "sponsor") filed an affidavit contending that he had been approached by the "sabha" along with a copy of Company Petition No. 472 of 2006 and had been asked whether he was willing to sponsor a scheme for revival of the company. In this affidavit, Mr. Sanjay Dalmia indicated his agreement to sponsor the scheme and to pay the following amounts in full and final discharge of all liabilities of the company:

(a) Rs. 52,07,50,000 to M/s. Bali Properties and Investments (P.) Ltd.,

(b) Rs. 13,27,99,395 to the workers of the company,

(c) Rs. 1,16,83,738 to the unsecured creditors and statutory creditors of the company.

20. It was placed on record that they were further willing to start a textile unit with a new name and that they had no objection if the name Modella was retained by the erstwhile promoters of the company. In paragraph 8 of the affidavit an undertaking was given to start the textile unit within a maximum period of 18 months from the date of conveyance including construction of the built up premises and installation of plant and machinery. Pursuant thereto, they undertook to re-employ all the eligible workers who may opt for re-employment and also undertook to run and keep running the unit for a minimum period of 3 years. Further, that if they did not start the textile unit within 18 months from the date of the final sanction of the scheme as detailed in paragraph 8, a bank guarantee for the sum of Rs. 13,27,99,395 which would be given by the sponsor to this Court could be enforced and this money could also be paid to the workers. A prayer was made to sanction the propounded scheme, along with modifications proposed by the "sabha".

21. On 19-10-2006 Mr. Krishna Mokal the President of the "sabha" filed yet another affidavit placing on record that the workers were agreeable to approve the said scheme only with the modifications as suggested by the "sabha". It was stated that 366 workers had submitted this on affidavit to the sabha. A list of these 366 workers along with few sample affidavits of the workers is annexed at exhibit 1 to the affidavit.

22. In pursuance of the directions given by this Court on 19-10-2006, the Official

Liquidator submitted a updated report to this Court which gave the latest figures relating to the liability of the company and since these figures are at slight variance and included the interest payable to the workers. They are reproduced as under:

23. On 19-10-2006, the Regional Director also filed a report in which he raised certain objections to the petitioner's scheme. As mentioned in the said report the objection was that the scheme was silent as to who would bring in the funds to revive the business of the company and whether the ex-workers would be taken back in the event of the revival of the company. There was also an objection regarding the affidavit filed by the sponsor, Prateek Apparels (P.) Ltd., supported by some group of workers and this objection was that the affidavit was silent as to how much fund was to be brought in for revival of the company and whether the workers will be taken back at the event of revival of the company. A request was made that the petitioner may be directed to meet any contingent liability which may arise in the future in respect of the company, after revival. I must say that the objections raised do not indicate a full and proper application of mind.

24. On 15-12-2006, for the first time another union by name Shramik Mahasangh (hereinafter referred to as the "mahasangh") filed an affidavit of their Vice-President Mr. Vilas Madhukar Naik and in this affidavit, the modifications sought by the rival union (sabha) were dealt with. It was stated that the modifications put forward by the sabha as they stood were illusory and less beneficial to the scheme as proposed by the petitioner Brij Mohan Grover. It was placed on record that this union and a majority of workmen preferred the scheme as proposed by the petitioner (as court's time is over, rest of the judgment is reserved).

25. In the course of hearing on various dates, as the sabha had come with a better deal for the workers (offering down payment of Rs. 13,27,99,395 as against Rs. 8,40,53,395 proposed to be paid by the petitioner) and to the secured creditor, I had called upon the petitioner's counsel to see if he could persuade the petitioner to better his offer in order to make the scheme more attractive vis-a-vis the workers and less vague as regards the secured creditors. In consequence, the petitioner filed Company Application No. 1182 of 2006 for amending the scheme. By the said application, several improvements were sought to be made by the petitioner to his scheme. The main improvements were that instead of an amount of Rs. 8,40,53,395, the petitioner now indicated his willingness to give interest at 10 per cent per annum on the adjudicated amount of Rs. 4,87,45,470 from 11-6-1987, being the date of the winding up order till 15-12-2006. This amount according to the petitioner worked out to be Rs. 13,04,28,857 (this amount still being less than the amount of Rs. 13,27,99,395 offered by the modification of the sabha). As regards the secured creditors the vague proposal in the original scheme was sought to be substituted by the following words:

The petitioner states that in the event of there being a decree in favour of the secured creditor in the said H.C. Suit No. 3290 of 1986 the said claim will stand satisfied and/or be met with from the mortgaged property. The secured creditor has agreed to waive the claim for the balance, remaining unsatisfied, if any, provided the scheme of the petitioner is sanctioned by this hon'ble court.

26. When the matter was heard on 15-12-2006, the petitioner's application for amendment being Company Application No. 1182 of 2006 was allowed and the said amendments were accordingly, carried out on 20-12-2006.

27. However, at the hearing on December 15, 2006, itself the secured creditors Bali Properties and Investments (P.) Ltd., filed an additional affidavit opposing the petitioner's scheme as sought to be amended as well as the modifications of the sabha thereto. In short, it was their case that they had given their approval to the petitioner's scheme subject, to their claim of more than Rs. 104 crores against the company being satisfied and taken care of in the pending suit filed against the company. They relied upon their letter dated 1-6-2006, addressed to the chairman appointed for chairing the meeting of the secured creditors, which was received by him on 3-6-2006. On 15-12-2006, the sabha had also sought to place on record of the court a document which incorporated the scheme along with the suggested modifications. I had directed on 15-12-2006, that they should place this document on record along with a supporting affidavit.

28. On 19-12-2006, an affidavit of Mr. Krishna Mokal on behalf of the sabha was filed placing on record the proposed modified scheme of compromise or arrangement. The said document which was an annexure to the affidavit further crystallised the modifications propounded by the sabha as under:

(a) that their sponsor would deposit with the Official Liquidator a sum of Rs. 1,16,83,738 for payments due to unsecured creditors and statutory creditors within 15 days of the sanction of the scheme by this Court.

(b) The claim of Bali Properties and Investments (P.) Ltd., being the secured creditors would be paid by their sponsor by settlement and if there was no settlement the sponsor agreed to pay the decretal amount as decreed in High Court Suit No. 3290 of 1986. That in the event of there being a decree in favour of the secured creditors in High Court Suit No. 3290 of 1986 and in the event of the decree remaining unsatisfied by the sale of the properties of the company the sponsor would bring in or make good the shortfall amount, if any, to satisfy the decree. The sponsor would be entitled to be brought on record in the said suit as the defendants and would be entitled to contest the said Suit No. 3290 of 1986.

(c) That their sponsor would deposit a further amount of Rs. 13,27,99,395 towards the down payment to be made to the workers within a period of 15 days, (against the earlier offer of deposit in 30 days) from the date of sanction of the scheme. This amount included interest at 10.17 per cent on the adjudicated amount of Rs. 4,87,45,470 from 11-6-1987, i.e., the date of the winding up

order till 15-12-2006.

(d) That in addition to the amount of Rs. 13,27,99,395 the sponsor would provide a bank guarantee for an amount of Rs. 13,27,99,395 to be deposited with the Official Liquidator, High Court, Bombay, within 90 days of the sanction of the scheme by this Court, as a performance guarantee to start a textile unit on a part of mill land and re-employ all eligible workers who were desirous of employment. That this textile unit would be started within a maximum period of 18 months from the date of possession including construction of the factory building and installation of plant and machinery. Pursuant thereto, the sponsors would undertake to re-employ all the eligible workers who opt for re-employment and also undertake to run and keep running the unit for a minimum period of 3 years. The sponsor had agreed that if they do not start the textile unit within a period of 18 months from the date of the final sanction of the scheme, the bank guarantee given by them could be enforced by the office of the Liquidator and this additional amount of Rs. 13,27,99,395 may then also be distributed between the workers.

29. On 22-12-2006, a further affidavit of Mr. Krishna Mokal on behalf of the sabha was filed placing on record a letter dated 12-12-2006, signed by Mr. Sanjay Dalmia, a director of their sponsor M/s. Prateek Apparels (P.) Ltd., informing his and their advocates that the textile unit as per the scheme will be started in the name of M/s. BLR Knits (P.) Ltd. The original of the said letter was annexed to the affidavit. Counsel contended that under the definition of sponsor of their scheme, the words "sponsors" meant "M/s. Prateek Apparels (P.) Ltd., or their group companies, family concerns or nominees". My attention was drawn to this definition in Part II-A(1) of the modified scheme as annexed to the affidavit of Mr. Krishna Mokal dated 19-12-2006. The said affidavit gave certain further clarifications and stated that M/s. BLR Knits (P.) Ltd., had also agreed that all the workers who had not reached the age of superannuation will be offered employment in the textile unit which will employ approximate 300 workmen. In case after providing employment to all the eligible workers as above, if there were any vacancies, then employment to the nominees of the other workmen will also be considered. That M/s. BLR Knits (P.) Ltd., had also agreed to submit a project report which was under preparation, giving the details of the revival scheme including the plant and machinery, production capacity, cost of project, means of finance, etc., which will be submitted within 60 days on the final sanction of the scheme by the High Court.

30. On 22-12-2006, on behalf of the mahasangh a further affidavit was filed placing on record that the sangh now supported the amendments as put forward by the sabha since the workers would stand to get an additional amount of Rs. 23,70,538 as compared to the amount payable under the amended scheme by the petitioner and as this amount is promised to be paid within 15 days of the sanction of the scheme.

31. Shri Sanjay Singhvi, learned Counsel for mahasangh, however, argued before

the court that the stand of the workers would be, in his words, mercenary in nature and they would support the scheme/modification which gave the maximum benefits to the workers. According to him, it was therefore, clarified in the aforesaid affidavit that if the petitioner was to further amend the scheme to provide interest at a substantially higher rate, say at 11 per cent per annum and to provide for the payment of this amount within 15 days of the sanction of the scheme, the mahasangh would support the petitioner's scheme instead.

32. As stated in paragraph one of this judgment, the petitioner as well as the sabha then, through the recorded statements of their counsel, increased the interest payable to the workers to 11 per cent and in view of certain additional benefits like revival being offered by the sabha, a statement came to be made by the advocate of the mahasangh in such a case; all things considered, the scheme as modified by the sabha would be preferable to the members of the mahasangh. It may be stated that a further affidavit dated 26-12-2006, was filed by S.M. Hegde, a director of M/s. Bali Properties and Investments (P.) Ltd., placing on record the two documents which are referred to in paragraph 1 of this judgment. This is how the record in the case rests.

33. At this stage, it will be convenient to give a comparative, table of the scheme offered by the petitioner and the said scheme as modified by the sabha. The comparative table is as follows:

(A) Amount offered to unsecured creditors and statutory creditors: The scheme of the petitioner as well as suggested modification, both offer to liquidate the liability of the unsecured creditors and the statutory authorities by deposit of an amount of Rs. 1,16,83,738. This figure is well above the adjudicated claim arrived at by the Official Liquidator in this regard and the unsecured creditors present at the meeting have unanimously granted their approval. The statutory creditors exceeding 3/4th in value have also granted their approval. The scheme and the modifications of the sabha are therefore, exactly at par.

(B) Amount payable to workers: (z) The petitioner has offered to pay the adjudicated amount of Rs. 4,87,45,470 from June 11, 1987, with interest at 11 per cent on the adjudicated amount totalling Rs. 14,34,71,743, though it is not specifically mentioned in the petition as to within how much time this amount would be paid. The amount is to be raised by obtaining a loan. The petitioner's scheme is not approved by both the workers unions or any worker.

(ii) As against this, the modified scheme of the sabha offers to pay an amount of Rs. 1,43,46,37,497 within 15 days of the sanction of the scheme by the High Court. However, in addition to this offer the modified scheme of the sabha offers a proposal for the revival of the company's textile business and re-employment of such workers who have not reached the age of superannuation by the putting up and starting of a textile unit which will employ approximately 300 workers and which unit will be housed on an area of approximately 20,000 sq. ft. This modified scheme submitted by the sabha is now supported by both the unions

who claim to represent and is not opposed by any individual worker.

(C) Amount due to secured creditor: (i) The scheme of the petitioner provides that in the event of there being a decree in favour of the secured creditor in the High Court Suit No. 3290 of 1986, the said claim will stand satisfied and/or be met with from the mortgaged property. It states that the secured creditor has agreed to waive the claim for the balance, remaining unsatisfied, if any, provided the scheme of the petitioner is sanctioned by this Court (which statement and alleged waiver is denied by the secured creditor on oath). The secured creditor does not approve of the petitioner's scheme.

(ii) As per the modified scheme of the "sabha", the claim of Bali Properties and Investments (P.) Ltd., would be settled and payment made as per settlement, failing which the sponsor agrees to pay the decretal amount as decreed in the High Court Suit No. 3290 of 1986 and in the event of there being a decree and the decree remaining unsatisfied by the sale of the properties of the company, the sponsor will bring in or make good the shortfall amount, if any, to satisfy the decree. The sponsor shall be entitled to be brought on record in the said suit for the defendants in order to contest the said suit. The record indicates that the secured creditor has granted his approval subject to the satisfaction of his claim in the High Court Suit No. 3290 of 1986. In addition to that the sponsor of the sabha has agreed to deposit the full value of the company's properties claimed by the petitioner to be Rs. 52,07,50,000 and not controverted by the secured creditor in this Court within any reasonable period from the date of the sanction of the scheme by this Court.

Though Bali Properties and Investments (P.) Ltd., have opposed both the scheme as well as the modification, it can be seen that the modified scheme propounded by the sabha agrees to settle the entire decretal amount and also contemplates an immediate down payment of the value of the company's properties as mentioned in the petition, which value has never been controverted by the secured creditor in the various affidavits which have been filed in this Court on its behalf. It can also be seen from the Official Liquidator's report dated 11-10-2006, that apart from the factory premises at Thane, the company has several other properties which are yet to be sold and which are also a part of the security available to the secured creditor. It cannot be lost sight of at this stage that the secured creditor claimed to have got executed an assignment deed in its favour from the Central Bank of India. They claimed to have purchased the rights of the Central Bank of India for a settled amount of Rs. 17 crores in the year 1995. Though an affidavit dated 15-12-2006, was filed on behalf of the secured creditor, they have chosen not to place before this Court the said deed of assignment, so that the details of their alleged transaction with the Central Bank of India could be perused by the court. It can be seen from paragraph 11 of the petition that the petitioner has admitted that the said Bali Properties and Investments (P.) Ltd., have been acting at the request of the petitioner since 1994 and the petitioner admits that it was his request that Bali Properties and

Investments (P.) Ltd., paid to the bank by 30-9-1994, a sum of Rs. 6,05,43,723. This amount was added to the amount of Rs. 3,24,56,277 which were the company's existing fixed deposits and were directed by the court to be endorsed to the bank by an order dated 19-9-1994. That thereafter according to the petitioner, to make up the settlement amount of Rs. 17 crores the balance amount of Rs. 7,75,00,000 was paid by Bali Properties and Investments (P.) Ltd., to the bank. It thus appears that Bali Properties and Investments (P.) Ltd., has only paid an amount of Rs. 12,80,43,723. They have not disclosed to this Court as to how they now have a claim of Rs. 123 crores. No particulars of any such claim have been given and the claim as yet remains unproved. In the affidavits filed on their behalf they nowhere contended the value of the company's properties valued by the petitioner as Rs. 52,07,50,000 was less. They have given no separate valuation of the properties of the company which are a part of the mortgaged security and it cannot be lost sight of that there are 30 cases u/s 630 of the Companies Act against workmen residing on the property which are pending before the Magistrate and wherein the workmen are claiming tenancy rights. The modification as suggested by the "sabha" clearly mentions that they will pay the amount as decreed by this Court in the suit filed against the company. In my view, this statement coupled with the down deposit of Rs. 52,07,50,000 provides sufficient security and coupled with the fact that if in fact, the value of the company's property is more, then a decree in excess of Rs. 52,07,50,000 with accruing interest can be realised in execution, sufficiently safeguards the interest of the secured creditor.

(D) Amount due to shareholders: (i) The scheme of the petitioner envisaged that the shareholders would borrow an amount of Rs. 14,21,12,595 (which amount will now stand increased to Rs. 14,34,71,743 in view of the offer to pay interest at 11 per cent instead of 10 per cent to make payment to the workers, unsecured creditors and statutory creditors.

(ii) The scheme as modified by the sabha proposes to raise without taking a loan, an amount of Rs. 13,27,99,395 for down payment to workers (which amount will now stand increased to Rs. 14,36,37,497 in view of the acceptance of payment of interest at 11 per cent to the workers) and to give a further bank guarantee for an additional amount of Rs. 13,27,99,395 by way of performance guarantee for opening and running a textile unit. In this regard the shareholders who had agreed to taking on a liability by incurring further loans can have no grievances against the bringing in of amounts for payment to the workers, unsecured creditors and statutory creditors without taking a loan. Similarly, an amount of Rs. 1,16,83,738 is to be raised and paid by the sponsor of the sabha without taking any loan. The modification of the sabha saves the equity holders from these additional burdens as proposed by the scheme of the petitioner and the shareholders can have no grievance if they are divested of the burdens as are proposed by the petitioner to be borne by the company and consequently the shareholders, by taking such loans. The company also gets to retain the name/brand name/mark Modella.

34. From the aforesaid comparative table, it is clear that the scheme as "modified by the sabha is clearly equal to, in two respects and more advantageous to all parties in several other respects, than the scheme as proposed by the petitioner. The scheme as proposed by the petitioner is now opposed by both the unions and their member workers. There is no disapproval to it by any other individual worker. The scheme is also more advantageous to the secured creditor particularly as it contemplates down payment of the entire value of the property as calculated by the petitioner of the land and structures at Thane which is the subject-matter of the scheme, it is more advantageous to the shareholders as it reduces their burden of taking further loans.

35. Faced with this situation, no serious argument was made by the counsel appearing for the petitioner to contend that the scheme as proposed by the petitioner was superior to the scheme as sought to be modified by the "sabha". Counsel, however, submitted several legal propositions to contend that in any case, the modifications as proposed by the "sabha" ought not to be granted and these submissions are now dealt with hereinbelow.

36. The first submission made on behalf of the petitioner was that the company court's jurisdiction while exercising powers under Sections 391 and 392 was not appellate in nature but was peripheral and supervisory. He relied upon paragraph 28 of the judgment in the case of *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 87 Comp. Cas. 792 : 10 SCL 70 (SC); 519 to expound the scope of the jurisdiction of the company court. The settled legal position relating to the jurisdiction of the company court was laid down by the Apex Court in the said case in the following terms:

In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the company court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedures for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
2. That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by Section 391, Sub-section (2).
3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391, Sub-section (1).
5. That all the requisite material contemplated by the proviso to Sub-section (2)

of Section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

7. That the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

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

9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in view of the court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the company court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the court's jurisdiction. (p. 818)

37. Relying on these observations, counsel for the petitioner contended that the Apex Court had laid down that the company court has no jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who, with their open eyes have given their approval to the scheme, even if, in view of the court, there could be a better scheme for the company and its members or creditors for whom the scheme is framed. In this regard, I find that insofar as the scheme of the petitioner was concerned, the requisite statutory procedure was duly followed. The scheme of the petitioner did not find approval from the workmen and this is evident from the report of the chairman of the meeting of workmen which is on record. Some of these workmen are residing on the company's property in question. It is clear that the scheme as propounded by the petitioner in the absence of approval by the workmen and now also disapproved by the secured creditor, is clearly rendered unworkable and cannot be sanctioned.

38. However, after the petition was admitted, all concerned parties, have by a notice, been given a further opportunity to appear at the stage of the final hearing of this petition. The two unions representing the erstwhile workers of the company, the sponsor of the "sabha" and the secured creditor have chosen to appear through advocates and have been heard extensively. All the workers now support the scheme as modified on behalf of the "sabha". The modifications as suggested by the "sabha" are now supported by the "mahasangh". No worker has appeared in any individual capacity to express his disapproval of the scheme as modified. The unsecured creditors have granted their approval to the scheme and in spite of the notice, no unsecured creditor has appeared at the stage of the hearing of the petition to oppose the modifications as suggested by the "sabha". As far as the statutory creditors are concerned, since 3/4th of the statutory creditors in value approved of the original scheme, all of them are deemed to have granted their approval. The modifications of the "sabha" make no change in the amounts payable to them as proposed in the petitioner's scheme. After notice to statutory creditor has appeared before me to indicate that they are withdrawing their approval or that there is any change in their stance. The modifications as suggested by the "sabha", in my view, takes adequate care of the interest of the secured creditor insofar as it not only offers to deposit the entire market value of the land and structure as calculated by the petitioner and left uncontroverted by the secured creditor but also further offers to pay the entire decretal amount if and when the suit of the secured creditor is decreed

39. It was contended by the counsel appearing for the petitioner that it would be desirable to again send the matter for reconsideration in a fresh meeting of the workers. To counter this argument, it was contended by the counsel appearing for the "sabha" and "mahasangh" that all the workers of the company are represented at the hearing. Both the existing unions had accepted the scheme with the modifications as suggested by the "sabha" and it was pointless to send the matter back to the stage of holding a meeting of the workers. Counsel for the sabha further contended that the powers of the court for modifying the scheme under 392 was couched in wide terms and that such powers could be exercised even suo motu without calling the meeting of all the members or creditors and that this power of modification could be exercised at the time of sanctioning the scheme. He relied upon the judgment of the Division Bench of this Court in the case of *Shree Niwas Girni Kamgar Kruti Samiti v. Rangnath Basudev Somani* [2005] 127 Comp. Cas. 752 : 62 SCL 175 (Bom.) in which a Division Bench of this Court explained the powers of this Court u/s 392(2) of the Companies Act, 1956, in the following words:

....it is true that Sub-section (2) of Section 392 gives the court power to modify a compromise or arrangement and this power can be exercised even suo motu without calling a meeting of all the members or creditors and this power can be exercised at the time of sanctioning the scheme and at any time thereafter during the period the scheme is being implemented. However, on a plain reading of section itself it is clear that the power could be exercised only when such

modification is necessary for proper working of the compromise or arrangement.

In other words, the provisions to the extent can only be exercised so as to provide smooth working of the compromise or arrangement. It is nobody's case that the scheme submitted by Somalis with LBPL as sponsor is not workable or substitution of sponsor is necessary for the proper working of the compromise or arrangement....(p. 781)

40. In my view, on a plain reading of Section 392(l)(b) read with Section 392(2) wide powers have been given to the company court to modify the scheme of a compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. In the case before the Division Bench, the compromise/arrangement which was proposed by the Somalis with LBPL as sponsor was approved by all the concerned parties before the petition was filed. It was nobody's case that the scheme submitted by the Somalis with LBPL as sponsor was not workable or substitution of sponsor was necessary for the proper working of the compromise or arrangement. The Division Bench rejected the schemes of the interveners who were rank outsiders and were not persons who could propose a scheme of compromise or arrangement within the scope of Section 391(1) of the Companies Act and also concluded that the schemes of such interveners did not serve public interest. In the present case however, the situation is entirely different. The scheme of the petitioner is rendered completely unworkable due to opposition by the two unions representing the workers and even the secured creditor. In view of such a situation, to ensure the working of the scheme, the more beneficial modifications suggested by the "sabha" can be sanctioned. As laid down by the Division Bench, the powers of this Court can be exercised even suo motu without calling the meeting of all the members or creditors at the time of sanctioning the scheme. In fact, the Division Bench reached its conclusion about what was stated in the above quoted paragraph after referring to and relying upon an earlier judgment of the Apex Court in the case of S.K. Gupta v. K. P. Jain [1979] 49 Comp. Cas. 342 and a judgment of the Gujarat High Court Tungabhadra Industries Ltd. v. National Dairy Development Board [1984] 55 Comp. Cas. 107.

41. In the case of S.K. Gupta's case (supra) the Apex Court dealt with the question as to whether the scope of modification could include the making of additions and omissions and the substitution of the sponsor or propounder of a scheme. The Apex Court concluded that the substitution of the sponsor or propounder of a scheme or arrangement could be made by way of modification. The relevant observations of the Apex Court are as under:

Strictly speaking, omission of the original sponsor and substituting another one would not change the "basic fabric" of the scheme. The scheme in this case is one by which a compromise is offered to the unsecured creditors of the company and whoever comes in as sponsor would be bound by it. Undoubtedly, a sponsor of the scheme enjoys an important place in the scheme of compromise and/or arrangement but basically the scheme is between the company and its creditors

or any class of them, or the company and its members or any class of them, and not between the sponsor of the scheme and the creditor or member. The scheme represents a contract sanctified by court's approval between the company and the creditors and/or members of the company. The company may as well be in charge of directors and the implementation of the scheme may come through the agency of directors but that would not lead to the conclusion that during the working of the scheme the directors cannot be changed. If the scheme has to be ultimately implemented by the company as part of its contract and yet its directors can be changed according to its articles of association, we see no difference in the situation where a sponsor is required to be changed in the facts and circumstances of a case. Therefore, it is not possible to accept the submission that as and by way of modification one sponsor of a scheme cannot be substituted for another sponsor. (p. 359)

42. In the case of Tungabhadra Industries Ltd. (supra), the Gujarat High Court relied upon the judgment of the Apex Court in S.K. Gupta's case (supra). The Division Bench of the Gujarat High Court concluded that the very birth of Sections 391 and 392 had a purpose. These provisions had been designed with a view that a productive unit was saved from economic disaster and was brought back to life. That there was no warrant for interpreting these two provisions in a restricted fashion. It concluded that in pursuance of the said power of modification, the court has power to deal with the scheme of compromise or arrangement for the purpose of making it workable and it has power to substitute, by way of modification, one sponsor for another. That the identity or the sponsor is not something basic in the structure of the scheme. Whether or not it is of the essence of the scheme or a basic element in the scheme, is a question of fact depending on the circumstances of each case. Even if one has to proceed on the assumption in certain cases it may be a basic element in the scheme, whether or not it is a basic element is a question which can be examined by the court.

43. It was next sought to be contended that the modifications suggested by the sabha was effectively a scheme by the sponsor who was not a person who could propose a compromise or arrangement u/s 391(1) of the Companies Act, 1956, insofar as the sponsor was not the company, its creditor or member. This submission must be stated to be rejected as the modification to the scheme is not put by the sponsor but in fact, it is put up by the union which represents the workers. It was conceded that the workers who are yet to be paid are creditors of the company and in fact, the Companies Act by virtue of Section 529A puts them at pari passu with secured creditors. The scheme as such has not been put up by the sponsor who is merely to bring in the finance and start a textile unit but has been put up by the workers who are creditors and therefore, persons entitled to propose a scheme u/s 391 and are also persons interested within the meaning of Section 392.

44. It was then contended that the sponsor of the scheme was not financially

solvent. In this regard, counsel for the secured creditors through an affidavit dated 26-12-2006, sought to bring to my notice the auditor's report dated 31-8-2006. It was stated in the affidavit that the share capital of the sponsor is Rs. 7 crores, whereas its current loans and liabilities aggregate to Rs. 29,39,05,329. The current net assets aggregate to Rs. 16,85,99,581 and hence the net worth of the sponsor company is negative. In my view, these figures may not reflect the borrowing capacity or the real capacity of the sponsor to raise the amount through other sources. The sabha and the sponsor have both filed affidavits promising to bring in amounts under the scheme within a short period of time. The proof of the pudding is in its eating. If they fail to do so, they are not outside the jurisdiction of the company court and this Court has the power, jurisdiction and ability to pass further orders if thought necessary. A reference must also be made to the "document being a letter dated 12-12-2006, said to have been written by the director of the sponsor, Sanjay Dalmia to his advocate Shri Rajesh Shah and the advocate for the sabha Shri Sanjay G. Udeshi informing them that the sponsor will not be interested to implement the textile unit. Both the advocates who were present in the court denied that they have received such a letter. Counsel appearing with such advocates submitted that this was a privileged document. They contended that even assuming that such a letter was in fact written, the same must be read along with another letter written by Sanjay Dalmia dated 12-12-2006, which is annexed in the original to the affidavit of Mr. Krishna Mokal dated 22-12-2006, and by which Mr. Sanjay ay Dalmia has informed the same advocates that the textile unit as per the scheme will be started in the name of BLR Knits and Mr. Anand Agarwal the authorised signatory on behalf of BLR Knits was hereby authorized to appoint advocates, counsel, affirm affidavits, and to do all such acts and deeds as may be required for giving effect to the aforesaid matter. In my view, what is important from the point of view of the workers is that the textile unit is established and run. The scheme as modified by the sabha offers a bank guarantee to the tune of Rs. 13,27,99,395 to secure the performance of this promise. The scheme envisaged the opening of a textile unit within a maximum period of 18 months from the date of possession including construction of factory building and installation of plant and machinery. The sponsor and the sabha has undertaken to reemploy all the eligible workers who opt for re-employment and commence operations within 18 months from the date of the final sanction of the scheme. The bank guarantee can be enforced by the Official Liquidator in case of default. They have agreed to furnish this bank guarantee to the Official Liquidator within 90 days by the sanction of the scheme by the High Court and in my view the giving of such a guarantee secures the performance of the promise to revive a textile unit.

45. In the net result, the following order is passed:

Order

(A) The scheme as proposed by the petitioner is rejected;

(B) The said scheme with the modifications as proposed by the Shramik Utkarsha

Sabha and as incorporated in the document at exhibit A to the affidavit of Mr. Krishna Mokal on behalf of the Shramik Utkarsha Sabha dated December 19, 2006, and filed in this Court on 20-12-2006, is sanctioned with the following clarifications (as expressly given in various affidavits of Mr. Krishna Mokal on behalf of the Sabha) and with further modifications as specified hereunder;

(i) That the amount of Rs. 1,16,83,738 and Rs. 14,36,37,497 will be deposited by the sponsor with the Official Liquidator within 15 days of the sanction of the scheme;

(ii) That a further amount of Rs. 52,07,50,000 will be deposited by the sponsor by a pay order in favour of the Prothonotary and Senior Master with the Official Liquidator within a period of 60 days of the sanction of the scheme by this Court;

(iii) In addition to the amount mentioned in Clause B(i) for down payment to the workers, the sponsor will furnish a bank guarantee to the Official Liquidator for an amount of Rs. 13,27,99,395 to fulfil their obligations of starting and running a textile unit as contemplated by the modified scheme of the Sabha as sanctioned by this Court. This textile mill will not use the name, brand name or mark "Modella";

(iv) If the textile unit is not started by the sponsor within the period of 18 months from the date of this order according final section to the scheme or if the textile unit is not kept running for a minimum period of three years after it has been started, then the Official Liquidator will be at liberty to encash the bank guarantee and distribute the amounts realised to the eligible workers in the same proportion in which the down payment is distributed to them;

(v) That the textile unit which should be started by the sponsor will be housed on an approximate area of 20,000 sq. feet;

(vi) The textile unit will employ approximately 300 workers and all the workers who have not reached the age of superannuation will be offered employment in the textile unit and after providing employment to the eligible workers, if there are vacancies then the employment to the other nominees of the erstwhile ex-workers will be considered as mentioned in paragraph 3(b) of the affidavit of Mr. Krishna Mokal on behalf of the Sabha dated 22-12-2006;

(vii) That the sponsor will be responsible for meeting any contingent liability that may arise from the setting up of the textile unit;

(C) After the deposit of Rs. 52,07,50,000, on the filing of a further affidavit by the secured creditor M/s.,Bali Properties and Investments (P.) Ltd., accepting the modified scheme as sanctioned by this Court, the secured creditor will be at liberty to withdraw the said amount unconditionally if he withdraws Suit No. 3290 of 1986, and subject to giving solvent security to the satisfaction of the Prothonotary and Senior Master, if he chooses to peruse Suit No. 3290 of 1986. It is made, clear that withdrawal of this amount on furnishing solvent security will not prevent the secured creditor from perusing Suit No. 3290 of 1986 or

from executing any decree for an amount exceeding Rs. 52,07,50,000 with interest accruing thereon as on the date of the decree against the properties of the company. If, however, there is no affidavit accepting the sanctioned scheme filed within 30 days from the date of deposit then this amount of Rs. 52,07,50,000 will be transferred by the Prothonotary and Senior Master to the account of Suit No. 3290 of 1986 and invested in a fixed deposit with a nationalised bank, initially for a period of three years. Further, disbursement of this amount will be in accordance with the orders which may be passed in the said suit. If, however, the suit is ultimately dismissed or decreed for an amount lesser than the deposited amount, the deposited amount or the excess balance, if any will be repayable to the party depositing this amount;

(D) The Official Liquidator should commence the payment of the adjudicated claims of workers/their heirs or legal representatives after 30 days, without any further order of this Court expeditiously. It is made clear that the heirs/legal representatives of any deceased worker will be entitled to receive a share as due to them under applicable law. Liberty to the Official Liquidator to apply in case of any difficulty relative to disbursement;

46. Company Petition No. 472 of 2006 stands disposed of accordingly. All parties, the Official Liquidator and the Prothonotary and Senior Master to act on a copy of this order duly authenticated by the associate of this Court. Certified copy expedited. Advocate for the petitioner applies for stay. A blanket stay is refused but the Official Liquidator is directed not to make final disbursement of any amount deposited for a period of 45 days from the date of this order.

47. Liberty to the parties to apply for orders in case any default is committed including seeking of rejection of the modified scheme. If any such application is made, the same will be considered by the regular court on merits. It is made clear that this clarification will not preclude the petitioner for asking extension of time in accordance with law. If any such application is made, such application will also be placed before the regular court for consideration on merits.

48. On deposit of all the amounts, furnishing of a bank guarantee and compliance of directions given in this order, Company Petition No. 404 of 1986 also to stand disposed of without any further orders of this Court.