

(2001) 07 GUJ CK 0104

In the Gujarat High Court

Case No : Company Application No. 173 of 2001 in Company Application No. 160 of 2001 praying to recall previous order dated 13-6-2001

Commerzbank Ag. and Another

APPELLANT

Vs

Arvind Mills Ltd.

RESPONDENT

Date of Decision : 09-07-2001

Acts Referred:

Bombay Relief Undertakings (Special Provisions) Act, 1958 — Section 3, 4, 4(1)
Companies Act, 1956 — Section 391 , 391(1), 391(6), 491

Citation : (2002) 110 CompCas 539 : (2002) 2 GLR 1182

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : Anil Diwan, for P.C. kavina, Nos. 1 and 2, for the Appellant; S.N. Sporkar, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Buch, J.—The applicants have taken out this Judge's summons for the relief that the order passed by this Court in Company Application No. 160 of 2001 dated 13-6-2001 needs to be recalled. Rest of the reliefs as prayed for by the applicants are ancillary. In the affidavit in support of this Judge's summons filed by Mr. A. Sekar, Power of Attorney holder of Singapore Branch of applicant No. 1-Bank, he has raised various contentions in support of the say that the order requires to be recalled otherwise the applicant Banks being a lender in foreign currency are likely to be prejudiced with the proceedings and the out-come. It is contended and submitted that some of the transactions of opponent Arvind Mills Ltd. (hereinafter referred to as "A.M.L." for short) have rendered A.M.L., inviable and under the strategy, A.M.L. got issued the notification under the Bombay Relief Undertaking (Special Provisions) Act, 1958 (hereinafter referred to as "the B.R.U. Act" for short) and A.M.L. under the legal umbrella of B.R.U. Act has tried to compel the applicants to accept the scheme. Bona fide of A.M.L. is also placed under the cloud of doubt by the applicants. It is submitted that the applicants-banks being members of Syndicate who have lent huge amount in foreign

currency to A.M.L. entitled to be treated as Members of separate class of secured creditors are quoted at par with other secured creditors who have lent the amount in the foreign currency. Certain mala fide is also alleged against the A.M.L.

2. The facts of pendency of civil suit for recovery of the amount in the London Court and the criminal proceedings initiated against the A.M.L. and the officers of the I.C.I.C.I. are also brought to the notice of the Court. It is pointed out that A.M.L. has tried to transfer the huge fund to the sister concern (i.e. its subsidiaries) and has tempted I.C.I.C.I., a trustee to be his partner in causing huge loss or damage to the members of the Syndicate including the applicants-Banks under the sale and lease-back transactions which have taken place with the I.C.I.C.I. The arguments advanced by the applicants can be divided into five main parts :

(i) maintainability of the proceedings initiated by the A.M.L. and the jurisdiction of the Court as to the recalling of the order;

(i) the suppression of the material facts and the fraud played by the A.M.L., and therefore, no equitable reliefs can be granted and the scheme be dismissed in embryo.

(ii) improper classification in calling the meeting is apparent, and therefore, calling of the meeting should be postponed and the Court should reclassify the groups or should issue such other or further, directions by recalling the order. It is submitted that the members of the Syndicate should be treated as separate class and the Chairman of the meeting be directed to call a meeting of the off-shore secured creditors.

(iii) the scheme proposed offends commercial and public morality and even an attempt of approval of such a scheme would impliedly validate the material illegality which has taken place in the transactions between the A.M.L. and I.C.I.C.I.

(iv) it is salient and ambiguous mainly as to the payment to Government dues and the dues of the financial institutions and also as to bringing back the funds transferred to its subsidiaries.

3. Mr. Anil Diwan learned Senior Counsel appearing for the applicants has tried to clarify the status of the applicant-Banks and has pointed out that the applicants can legitimately asked to convene the separate meeting for the secured creditors who have lent the amount in foreign currency.

3.1 Undisputedly, the applicants are off-shore lenders. While arguing for the applicants, Mr. Diwan has submitted that this Court though passed an ex-parte order to convene the meeting in view of the provisions of Section 391 of the Companies Act read with Rules 67, 68 and 69 of the Companies (Court) Rules, 1959, still however, this Court is competent enough to recall the order passed ex-parte and the scheme in embryo can be turned down if particular set of facts is

brought to the notice of the Court. Accordingly, the applicants are obliged to appear before this Court before convention of the meeting as per the order of the Court, and it is endeavour of the applicants to see that material irregularity or patent illegality can be taken care of, and unnecessary exercise, wastage of time, and huge financial expenses also can be avoided. The applicants averred that the secured creditors are part of the Syndicate who have lent foreign currency to A.M.L. and are to be repaid in the same currency. The Syndicate who have lent in foreign currency constitutes a separate class and A.M.L. has at all material times has treated the Syndicate as a separate class. The A.M.L. conveniently in the proceedings initiated before this Court has put the members of the Syndicate at par with all order secured creditors and also with unsecured creditors. The I.C.I.C.I. who is one of the accused in the criminal complaint tiled for the breach of trust and fraud played, is also put in the same group with the complainant (applicants) while constituting a class qua the proceedings which vitally affect their interest. The applicant No. 2 was initially working as Facility Agent for the Syndicate but because of the tactics adopted by A.M.L. and under the insulation available to A.M.L. under the B.R.U., notification some of the members of Syndicate of foreign off-shore lenders are not hacking the applicants. According to Mr. Diwan, irrespective of this contingency, the applicants have an independent interest and locus to file and maintain the proceedings.

3.2 It is not the say of the applicants that along with other dissenting creditors of their class formed a separate and distinct class of creditors who have lend the amount in foreign currency. In other words, it is not the say of the applicants that all secured creditors who were members of the Syndicate at one point of time should be and ought to have been treated as separate class for the purpose. As A.M.L. does not have requisite majority, the members of the Syndicate are clubbed with all secured creditors including the Indian Bankers and Financial Institutions. The dues of the applicant Nos. 1 and 2 as on 31-5-2001 was Rs. 48.34 crores and Rs. 47.05 crores respectively. By giving various examples and observations of reported cases relevant and important for classifications of me members who have to vote in the meeting called for the purpose, learned Senior Counsel has drawn attention of this Court on various salient features emerging from the record whereby he has tried to demonstrate that how and in what manner the foreign lenders need to be treated as a separate class.

3.3 Exhibit-A attached to the application is the list of the members of the Syndicate and amount disbursed by the respective members to A.M.L. in two tranches. For the purpose of disbursement of the amount, the Syndicate had appointed the applicant No. 2 as Facility Agent to represent the entire body of the Syndicate and it was operating from Singapore. Under the term loan facility, the entire bulk was to be disbursed segregating 75 million US \$. The tranche-I was for 50 million US \$ and tranche-II was for 60 million US \$. As per the loan agreement, the A.M.L. has executed security document creating security in favour of he Syndicate and the said security was created from the properties enlisted in Part-II of Schedule-II of the loan agreement. It provides that the first

ranking pari passu charge on both present and future assets shall be affected. Security Agents and Trust Agreement between the I.C.I.C.I., and the Syndicate was treated as separate class and that class was to deal with A.M.L, through I.C.I.C.I. As a part of the condition subsequent mentioned in the loan agreement, the security documents were executed between the A.M.L. and I.C.I.C.I, as Security Agent and trustee for the Syndicate. Mr. Diwan has drawn the attention of this Court to an unattested memorandum of hypothecation dated March 1997, whereby the I.C.I.C.I. in the capacity as Security Agent and Trustee on behalf of the Syndicate had entered into a transaction and thereby A.M.L. hypothecated by way of first charge over movable assets enlisted in the schedule including the plant, machinery, machinery parts, tools, assessories and other movables, both present and past in A.M.L.'s premises, godowns at Naroda road, Ahmedabad, village Khatraj and village Santej ranking pari passu with other institutions. An independent mortgage-deed dated 30-12-1997 of immovable properties, both present and future situated at Naroda road, Alimedabad, village Khatraj and village Santej were also mortgaged in favour of the I.C.I.C.I. as an Agent. According to Mr. Diwan, the documents referred by the applicants including the deed of additional security dated 25-6-1998 executed between the A.M.L. and I.C.I.C.I. and the registration of first charge widi Registrar of Companies, Gujarat at Dadra and Nagar Haveli on 22-4-1997 and 22-1-1998 show that Syndicate and its members were in a different groups of lenders than the other secured creditors including the I.C.I.C.I.. It was the duty obligatory on the part of the I.C.I.C.I. to see that the applicants' dues under the aforesaid facility are made good in U.S. dollars. The applicants were not exposed to any financial exchange risk and fluctuation in the exchange rate in the U.S. dollar and Indian rupee would be on account of A.M.L. On various occasions and even while calling the meeting of the secured creditors, the A.M.L. had treated the members of the Syndicate a separate and distinct class. For the purpose of the meeting of the secured creditors the members of the Syndicate are asked to sit, negotiate and deliberate on the issues reflected in the scheme proposed with all other secured creditors including I.C.I.C.I. It is specifically contended mat A.M.L. as a final step to fortify its position to deny its creditors of their legitimate dues under the cover of B.R.U. Notification, has initiated these proceedings u/s 391, and therefore, A.M.L. should not be allowed to proceed further and the original order should be recalled.

3.4 While, enlarging the arguments Mr. Diwan has drawn the attention of this Court on various transaction which has taken place between the A.M.L. and I.C.I.C.I., A.M.L. and subsidiary companies and the transactions of sale of garment business. It is contended that the members of the Syndicate were kept in dark qua certain transactions including the sale and lease-Back transactions between A.M.L. and I.C.I.C.I. Mr. Diwan has also hammered on the aspects of funds diversion. Exhibit "B-I" and "B-II" are the documents on which Mr. Diwan has based his arguments. These undisputed documents indicate that financial viability has been brought under clouds with deliberation. He has impliedly

impeached I.C.I.C.I. for its conduct which is reflected in more than one agreement entered into by A.M.L. and I.C.I.C.I. in its individual capacity. According to applicants, till then they were informed under a memorandum of information dated 29-2-2000 prepared by Jardine Fleming for A.M.L., first time in the month March 2000 that in the year 1998-99 A.M.L. has sold and leased back from the I.C.I.C.I. certain assets valued at Rs. 361.9 crores, they were completely in dark. The properties sold and leased back from I.C.I.C.I. are mortgaged and hypothecated properties to the Syndicate pursuant to the security documents. According to Mr. Diwan as per Security Agent and Trustee Agreement, the I.C.I.C.I. was otherwise required to hold all these properties on behalf of the Syndicate, it was required to hold open any amount received by sale of assets mortgaged as a part of loan transaction. It is also prohibited from operating proceeds on the sale. It is contended by the applicants that as per the notes of Exh. "B-I" this is also a case of diversion of funds in the last two years to the extent of Rs. 395 crores and this diversion of funds was taking place at the time when the A.M.L. was defaulting in payment.

3.5 According to Mr. Diwan, A.M.L. has acted mala fide and suppression of some material facts should be viewed seriously. Lack of bona fide where apparent and approach of the Court should not be casual. While giving examples as to suppression of material facts, Mr. Diwan has pointed out that filing of criminal case against the A.M.L. and officers of the I.C.I.C.I. was not brought to the notice of the Court when proceedings were initiated some days or hours prior to the filing of the Company Application No. 160 of 2001. The process of criminal case was served. It is contended that if this fact would have been brought to the notice of the Court, the Court might not have passed ex-parte order without affording an opportunity of hearing to the complainant of the criminal case. By referring files of paper-book prepared and supplied to the Court for ready reference, learned Counsel has tried to point out that at various stages of correspondence between the applicant No. 2 in the capacity of Facility Agent, the lack of bona fide on the part of the A.M.L. is reflected. He has referred contents of the letter addressed to the applicant No. 2. While submitting that applicants as member of Syndicate represent distinct class, Mr. Diwan has taken this Court through the minute details reflected in the various documents executed between the I.C.I.C.I. and A.M.L. as an Agent of Syndicate and contents of the agreement between the Syndicate and I.C.I.C.I. By pointing out the mode of payment and repayment, type of indemnity and its nature, certain special contents reflected in the documents, he submitted that it would be unfair to ask the members of the Syndicate to sit in a meeting with the other secured creditors where the I.C.I.C.I. is also to participate as one of the secured creditors.

3.6 I have considered the documents attached to the application especially Exhs. B, G and H and their relevance qua the dispute agitated by the applicants. Correspondence of Jardine Fleming as to divestment is also considered. According to Mr. Diwan where there is an elements of distinct commercial interest apparent on record, the members of the Syndicate by themselves ought

to have been treated as a separate class. Mr. Diwan has drawn attention of this Court to the various type of test to be considered by the Court to appreciate the arguments advanced on determination of class and has submitted that these tests can be divided into two main parts, viz. positive and negative tests. The members forming a homogeneous group and able to consult each other effectively should be called separately. The common commercial interest is also a relevant factor. According to Mr. Diwan even there may be some sub-groups and while deciding the sub-groups or sub-class, the elements of interest, conflict of interest and competing interest can be considered. While passing the ex-parte order by this Court, all these aspects have not been taken care of because material facts were not brought to the notice of the Court and some facts were deliberately suppressed. In furtherance of the submissions, Mr. Diwan has also argued that off-shore lender should not be put at par with other secured creditors who have lent in Indian currency because the off-shore lenders while lending the amount do consider various ratings and other political contingencies. Some of the Indian Banks have also lent in foreign currency and there is nothing wrong if the members of the Syndicate are treated as separate class. He has further submitted that with a view to defeat the say of the off-shore secured creditors, A.M.L. has tried to put the applicants in thin minority by clubbing the members of the Syndicate with other secured creditors. The contents of the application is also against attitude of the A.M.L. in treating the secured creditors at par with unsecured creditors in the repayment structure proposed.

3.7 According to Mr. Diwan, when recalling of the order is permissible and the Court has jurisdiction to recall the order passed earlier ex-parte, then this is a fit case wherein the said order should be recalled. So far as the jurisdiction of this Court as to recall the order is concerned, learned Counsel Mr. Diwan has placed reliance on four different judgments and has submitted that in view of the facts and circumstances of the case, this Court should allow the application. I would like to refer some of the judgments relied upon by Mr. Diwan firstly on the point of jurisdiction of this Court to recall the order passed earlier and the scope.

1. 103 Com Cas 389 = SCLR 18 471 (Moiorol (India) Ltd.)
2. 1986 (59) CompCas 956 (In Re. Bengal National Textile Mills Ltd.)
3. M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise,
4. S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others,

3.8 These judgments do deal with the cases where the Courts have held that the orders passed by the Court can be recalled. However, the ratio propounded is required to be appreciated in the context of the facts of each case. I would deal with these judgments at the time of appreciation of the arguments advanced by the learned Counsel appearing for the other side. At this juncture, it is important to note that the learned Counsel appearing for A.M.L. has not submitted that the orders passed by this Court cannot be recalled. The arguments of other side is

that the principle needs consideration at the time of reviewing the earlier order passed by Court shall have to be applied strictly. Merely because there is some scope to find fault with the earlier order passed, the Court should not exercise its jurisdiction in revoking/recalling the order. So, in principle, the jurisdiction of this Court of recalling the order passed earlier has not been challenged.

3.9 Relying upon Motorola's case (supra) it is argued that this Court has jurisdiction to dismiss the application preferred u/s 391(1) at initial stage and while enlarging this arguments, learned Counsel appearing for the applicants has placed reliance on some other judgments and has submitted that if this Court takes the view that class determination for the purpose of calling/asking the meeting is faulty or erroneous, then to avoid huge expenditure and other complications, this Court should recall the order and dismiss the application. For this purpose, learned Counsel has placed reliance on number of judgments and I would like to refer some of them.

1. 1970 CLJ 300 (M/s. Indequip Ltd. v. Mis, Maneckchowk And Ahmedabad Manufacturing Co. Ltd., By Provisional Liquidator)
2. 2000 (38) CLA 97 (Cal.) (Hindustan Development Corporation Ltd. v. Shaw Wallace and Co. Ltd.)
3. Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.,
4. 1994 (79) Comp. Cas 27 (D. A. Swamy and Ors. v. India Meters Ltd.)"
5. United India Insurance Co. Ltd. Vs. Rajendra Singh and Others,

I have considered the ratio propounded in aforesaid judgments, but I would try to deal with these judgments at the appropriate stage.

4. It is also argued by Senior Counsel Mr. Diwan that this Court exercises equitable jurisdiction, and therefore, if the Court is satisfied- that the applicant (A.M.L.) of Company Application No. 160 of 2001 had suppressed material aspect or fact then the equitable relief could be refused and the application can fail only on this count.

5. Pendency of winding-up proceedings against A.M.L. should be considered when the point of material suppression is to be appreciated. The A.M.L. has not approached this Court with all fairness is also one of the grievance. It is alleged that A.M.L. intends to defeat the cause of the creditors under insulation of B.R.U. Notification. If the scheme of B.R.U. Act is looked into and clause (iv) of Section 4 is considered then it could be held that the right to file an application u/s 391(1) of Companies Act was under suspension because of the notification, and therefore, A.M.L. was not entitled to move such an application. The A.M.L. intends to initiate remedial measures and the same is not permitted in view of the ratio propounded by the judgment reported in D.S. Patel and Co. v. Gujarat State Textile Corpn. Ltd. 1971 (41) Comp. Cas 1098 : 1972 GLR 33. Impliedly, the maintainability of Company Application No. 160 of 2001 is also challenged by

the applicants. Learned Counsel has ultimately tried to convince the Court as to how and why the meeting to be held is illegal or contrary to law, and therefore, the arrangement proposed should be turned down in the embryo.

6. The opponent A.M.L. and the applicant of Company Application No. 160 of 2001 has resisted this application from all corners. Affidavit-in-reply is filed by Mr. C. K. Yagnik, Chief Manager and Secretarial Department of A.M.L. He has tried to assail the allegations contained in the affidavit filed by the applicants. It is the say of A.M.L. that the applicant-Banks have tried to get some additional advantages for better return from the beginning, the day on which A.M.L. had disclosed its mind to restructure the debt. While dealing with the say of the applicants, it is submitted that A.M.L. had never treated Syndicate or any of its member as a separate class and the applicants are under wrong notion that they are the different category of secured creditors or subclass. It is also submitted that these proceedings are initiated with a view to cause as much delay as possible to the scheme proposed by or moved by A.M.L.

6.1 The [earned Senior Counsel Mr. S. N. Soparkar appearing for A.M.L. has tried to point out that the scheme proposed by the company in reality is the wish or desire of all class of creditors. Very large majority of creditors are anxious and waiting for the scheme to be sanctioned, so that it can be implemented and the creditors would start receiving funds. The off-shore secured creditors or say members of the Syndicate who have lent in foreign currency are to get their repayment in their respective currency. The applicant-Banks are going to get the amount in US dollar.

6.2 The scheme of compromise moved u/s 391 is the result of some earlier deliberation and the directions issued by this Court while dealing with a writ petition filed challenging the notification issued u/s 4 of B.R.U. Act by Government of Gujarat. Mr. Soparkar learned Counsel has taken me through the relevant portion of the order passed by this Court in Special Civil Application No. 9188 of 2000 (Coram : D. A. Mehta, J.) dated 22-2-2001 wherein this Court has observed and held that :

In view of what is stated hereinabove, following the judgment and order dated 8th December, 2000 of this Court in Special Civil Application No. 6324 of 2000, this petition is disposed of for the reasons stated in the said judgment and order and subject to the following conditions : In view of the above discussions, the following order is passed :

(I) within two months from today, respondent No. 2- company shall make an application to respondent No. 1 i.e., the State Government for consideration by the Gujarat Board for Industrial and Financial Reconstruction (G.B.I.F.R.).

(i) with a proposed rehabilitation scheme that envisages repayment of loans and interest to the petitioners as well as other creditors of the respondent No. 2- Company and also repayment of dues, if any of the State Government/Gujarat Electricity Board and all other authorities.

(ii) accompanied by the audited accounts of the respondent No. 2-Company for the preceding two years with the necessary explanation for the auditor's remarks, if any, accompanying the accounts;

(iii) accompanied by a demand draft/pay order for an amount of Rs. 1,00,000/- (Rupees One lac only) in favour of the Gujarat Board for Industrial and Finance Reconstruction for meeting with the administrative costs of the G.B.I.F.R. including the costs of publication of notices in widely circulated newspapers;

(II) (i) The G.B.I.F.R. shall consider the application of the respondent No. 2-Company within four months from the date of receipt of such application after giving public notice in at least two widely circulated daily newspapers in the State and after giving an opportunity of hearing to the petitioners and other creditors of the respondent No. 2-Company and also the representatives of the employees and officers of the respondent No. 2-Company.

(ii) The G.B.I.F.R. shall be guided by one supreme consideration that of putting the respondent No. 2-Company on a sound footing;

(iii) It will be open to the G.B.I.F.R. to recommend to the State Government and to all other concerned authorities and creditors to grant appropriate reliefs and concessions as are contained in the Government of Gujarat, Industries and Mines Department Resolution No. SIU-1098-668-CH dated 13-8-1998 and such other and further reliefs and concessions as may be required to be granted to the respondent No. 2-Company.

(iv) The scheme as approved by the G.B.I.F.R. shall thereafter be implemented in accordance with the provisions of the aforesaid Government Resolution dated 13-8-1998 and subject to such other and further modifications as may be made by the G.B.I.F.R..

(v) The G.B.I.F.R. shall follow such procedure as it may deem fit, for considering, monitoring and reviewing the rehabilitation scheme from time to time and in any case the G.B.I.F.R. shall monitor and review the scheme till continuance of operation of the notification/s under the B.R.U. Act;

(vi) During the stages of preparation, consideration and/or implementation of the scheme as aforesaid, the G.B.I.F.R. shall also consider whether the creditors of the respondent No. 2-Company may be permitted to file suits or other proceedings before the appropriate forum for adjudication/quantification of the dues of the concerned creditors subject to any condition which the G.B.I.F.R. may, in its discretion, impose against execution of the decree, award or order which may be passed by the appropriate forum in such proceedings;

(vii) During the period as aforesaid, the G.B.I.F.R. may also consider whether the respondent No. 2-Company may be required to pay dues of secured and/or unsecured creditors or some or any of them or upto a particular amount or percentage of dues looking to the amount/s involved and/or for such reasons as the G.B.I.F.R. may consider just and proper which shall be recorded in writing;

(viii) It will be open to the G.B.I.F.R., after giving the affected parties an opportunity of hearing, to come to a conclusion that the respondent No. 2-Company in question is not a viable sick unit.

III. (i) The G.B.I.F.R. shall submit report/s to the State Government at least once in every six months from the date of receiving the application of the respondent No. 2-Company, reporting about progress of the rehabilitation scheme and recommending whether to extend or curtail the period of operation of the notification/s under Sees. 3 and 4 of the B.R.U. Act.

Provided that the G.B.I.F.R. shall not make any recommendation for granting or refusing such extension without giving an opportunity of hearing to the respondent No. 2-Company and to the secured creditors, a representatives of unsecured creditors and the representative of workers, employees and officers of the respondent No. 2-Company;

(ii) It is hereby directed that the State Government shall not hereafter renew the declaration u/s 3 or directions u/s 4 of the B.R.U. Act in respect of the respondent No. 2-Company beyond 15-7-2001 without considering the report of the G.B.I.F.R. to be submitted to the State Government as per the aforesaid direction. If the State Government does not accept the report of the G.B.I.F.R., the reasons for not accepting the report shall be recorded in writing.

IV. If the respondent No. 2-Company does not make an application as per direction I(i) hereinabove within two months from today, the respondent shall be restrained from acting upon or pursuant to the notification dated 13-6-2000 in favour of the respondent No. 2-Company and the said

notification shall cease to have any effect whatsoever upon expiry of the said time-limit.

6.3 Mr. Soparkar has accepted that the classification of the creditors or the members who have to participate in such meeting is very relevant and determination of class may go to the root of the ultimate result of the scheme proposed. However, it is contended that unless extraordinary exceptional circumstances are brought on record, the grievance of one or some group of persons finding fault, under personal perception, with the classification or determination of class should not be considered by this Court because it is the privilege of the Company or the applicants to classify the group and to convene the meeting. It is the case of A.M.L. that protection granted impliedly under a notification issued under B.R.U. Act for a limited period, was challenged before this Court and it was one of the say of the petitioners of the writ petition that A.M.L. must come out with the scheme of compromise. A.M.L. was directed to appear before the Gujarat Board for Industrial and Financial Reconstruction (hereinafter referred to as "G.B.I.F.R.") and after due deliberation, after the report of G.B.I.F.R., A.M.L. come out with a scheme under which all secured creditors" debts is restructured in a harmonious way.

6.4 The say of A.M.L. is that when the scheme is moved, impliedly, at the instance of the lenders and at the end of deliberations made before the G.B.I.F.R. than it would not be open for the objectors to contend that the meeting should not be permitted to be convened. At the time, when the ex-parte order was passed by this Court, certain queries were raised and Mr. Soparkar on the relevant point, prima-facie, had satisfied the Court about the institution of the proceedings u/s 391(1) of the Act. During the course of oral arguments, Mr. Soparkar has taken me through the report of the G.B.I.F.R. Opening paragraph of the report, which is at Annexure-E of Company Application No. 160 of 2001 says that rehabilitation scheme of A.M.L., Ahmedabad is the result of the order passed by the High Court vide judgment dated 22-2-2001, whereby certain directions were issued and A.M.L. in response thereof had approached the Board i.e., G.B.I.F.R. Six, including applicant no. 1 had challenged the validity of the notification dated 13-6-2000 issued by the Government of Gujarat conferring the status of "Relief Undertaking" to A.M.L. under the provisions of the B.R.U. Act, 1958. The operative part of the order of the High Court is the opening part of the report prepared by the G.B.I.F.R. I have considered the contents of the report and the endeavour made by the members of the Board and the persons who had appeared before the Board during the proceedings. The say of the opponent-A.M.L. is that A.M.L. being one of the largest textile mill in the country and the fact that it has taken over many sick textile industries in past, the last efforts are made by the G.B.I.F.R. to see that A.M.L. survives and repays the loans to each creditors irrespective of the fact whether they are secured creditors or unsecured creditors. It is not a matter of dispute, according to Mr. Soparkar, that A.M.L. was required to propose a rehabilitation scheme with a view to comply with the order passed in Special Civil Application No. 9188 of 2000. The paramount consideration before the G.B.I.F.R. was to see that company survives and the second important consideration was that by restructuring the debts, reasonable good amount in a harmonious way and in proportionate, is paid to its creditors by A.M.L.

6.5 Mr. Soparkar has placed reliance on some of the documents including various meetings held by A.M.L. at Ahmedabad or Bombay or Singapore and has argued that practically at all stages applicants have tried to get a better treatment and terms qua other creditors. On some occasions, they have participated in meetings. The applicants were invited to join as members of steering committee constituted for special purpose as reflected in the report of G.B.I.F.R.. However, the applicants without joining the steering committee, participated in some of the meetings where other members of steering committee including off-shore secured creditors have participated. Back-bone of the contentions of A.M.L. is that having failed in coercing A.M.L. in getting better treatment or return in terms, they had started taking harsh steps against A.M.L. and the present application is one more attempt in this regard. A suit is filed in the High Court of Justice, Chancery Division, at London and a criminal complaint in (be Court of Metropolitan Magistrate, Ahmedabad containing some allegations is also filed. It

is prayed before the London Court that the Court should declare that the transactions between A.M.L. and I.C.I.C.I. are invalid. The jurisdiction of the Court is challenged by A.M.L. and resistance is already tiled in the London Court. A.M.L. is facing three major simultaneous proceedings. It is contended that one more Special Civil Application is also moved challenging the recommendations of the G.B.I.F.R. and the consequent notification issued by the State of Gujarat under the B.R.U. Act.

6.6 Reply affidavit filed by the A.M.L. bears some serious allegations as to the bona fide of the applicants. It is denied by the A.M.L. that Syndicate or any of its members are or were treated as distinct or separate class and most of the members of the Syndicate are supporting the scheme. The documents related to various meetings of off-shore lenders with the other correspondence, according to Mr. Soparkar, do not reveal that the Syndicate was treated as a separate class. Merely because the members of the Syndicate have lent in foreign currency, their status is not altered and same remains of secured creditors. The structuring of meeting when is a matter of privilege of the applicant, the classification cannot be made on different perception. When same terms are offered then the creditors can be clubbed in the same group or class. If there is some difference of opinion then that situation may give rise to a fruitful discussion. Inier-se dispute of persons of some class need not be recognised. Three meetings are classed because according to the applicants, the terms of offer are in three different sets and common terms of offer by options offered to secured creditors. It is contended that if a group is treated differently, then such group can say that it forms a separate class. In short, it is submitted that when some terms are there, the persons who are offered that terms can be clubbed and invited to attend the meeting called for that class. Terms of offer is the real test and not personal perception or inter-se difference between the members of a group. In this case, according to A.M.L., this test is applied and the classification is not at all feasible to any of the members of the Syndicate including the applicant. According to Mr. Soparkar this is one of the reason that many members of the Syndicate are backing A.M.L. for the scheme proposed and circulated for approval. The role of this Court, according to Mr. Soparkar is limited and ratio of judgments in the cases of *In Re: Sakamari Steel and Alloys Ltd., or Motorola (India) Ltd.* (supra) would not apply because the decision in both these cases are in reference to a particular set of facts. If institution of such proceeding is under erroneous classification than the scheme may fail. Therefore, this issue, according to Mr. Soparkar, need not be decided at this stage. It is contended by A.M.L. that majority members from the Syndicate itself do not want separate class otherwise they would have been joined by the applicants. Objectors themselves have never demanded, during the course of deliberation that they should be treated as separate class for the purpose. So the off-shore creditors are not entitled to a separate meeting treating them as a separate class.

6.7 Mr. Soparkar has taken me through certain facts reflected from the correspondence from which he has tried to point out that the existence of

criminal complaint was not suppressed. The existence of the criminal complaint, even according to the applicants, was not relevant. It is in the affidavit filed by the objectors that they themselves treat this fact as irrelevant.

7. So far as the allegations of sale and lease-back transaction, sale of garments business and diversion of funds, etc. are concerned, it is contended in the affidavit that the applicants were aware about these transactions, as two competent Courts namely civil and criminal Court were required to adjudicate all these relevant issues on merits. However, it is the say of A.M.L. that the charge of the Syndicate is floating charge on movables, excluding the properties sold and transferred to I.C.I.C.I. and taken on lease under agreement. By putting a table on record, at page 45, it is contended that the security value has increased. The asset ratio of the units at Naroda road, Khatraj and Santej are shown to have been increased from 2.25 to 2.90 between 31-7-1996 and 31-12-1999. On this aspect, there was a serious debate between the learned Counsel of the parties on the issue as to how even after sale of some assets this ratio would increase. But I am doubtful whether it would be relevant or necessary to record finding since the otherside i.e. A.M.L. has submitted that new assets, between this period, are acquired by A.M.L. Though, no positive documents as to purchase of such assets is produced, it is however, also on record that valuation report prepared by the expert was sent to the Syndicate through applicant No. 2 being representative of Syndicate and the genuineness or correctness of the report was never challenged by any of the members of the Syndicate. The entire report is not before this Court, but the covering letter sent to applicant No. 2 is brought before this Court. It is likely that the report of the expert might be containing the details as to the assets newly purchased. Mr. Soparkar has made a statement at Bar that this ratio has not increased on account of revaluation of the assets of A.M.L., and as the report of the expert runs in some hundreds of pages, therefore, the same is not brought before the Court, is the say of A.M.L. At summons stage, this would be larger question. It would be difficult for this Court to comment upon as to whether if some irregularity is found or noticed by this Court could be said to be any wrong, a civil wrong or a criminal wrong because it may seriously prejudice the proceedings pending in two competent Courts. It is not the say of the applicants that any immovable properties mortgaged and registered have been sold by a particular deed of transfer.

7.1 The contentions as to siphoning of the funds to subsidiary company or companies is resisted in reply affidavit which reads as under :-

"In this connection, I point out that precisely to examine the accounts of A.M.L. and to verify these allegations of diversion of funds a sub-committee was appointed by the S.C. The objectors were requested to join the said subcommittee, but they declined to do so. The said sub-committee held its meeting for 2 full days in the month of August 2000. At the said meeting, the accounts, all the disputed transactions as also the financial projections made in the scheme were scrutinised in great detail by the members of the sub-

committee. However, they did not find anything whatsoever objectionable in any transaction and approved the financial projections which were (as is pointed out hereinafter) at the relevant point of time alleged to be conservative and now, conveniently, alleged to be optimistic. It is too much to believe that all other lenders, including the lenders to whom a much larger amount is due, would take no action whatsoever if the allegations of the objectors were true. The issue can be examined from a slightly different angle. The proposed scheme has been formulated by the S.C. (Steering Committee). The said committee consists of all major lenders. They have scrutinised the accounts of the company very thoroughly. If the S.C. would have found the alleged illegality in the accounts of the Company, it would have not only not proposed the compromise of these terms, it would have immediately taken action against the company."

8. The above contention raised by A.M.L. is the back-bone of the submissions of Mr. Soparkar that all these issues can be deliberated upon in the meeting and any class of three different classes can disapprove the entire scheme or any part thereof. This Court is not evaluating the genuineness or nitty-gritty of the scheme. The applicants of Company Application No. 160 of 2001 shall have to come before the Court for approval of the scheme and irrespective of the decision or resolution taken at the meeting, this Court is competent to disapprove the scheme or to modify it, considering the say of the objectors.

8.1 It is the say of A.M.L. that considering the historical back-ground as to the formulation of the scheme and the fact that a larger industrial undertaking, a going concern providing employment to around 10,000 persons directly or indirectly to many thousands, when makes such an endeavour, on account of the order passed by this Court while dealing with the writ petition and on the strength of a report prepared by independent body like G.B.I.F.R. should not be turned down in embryo.

8.2 While developing the arguments on behalf of the A.M.L., Mr. Soparkar has placed reliance on some of the judgments on which applicants have also placed reliance. Over and above, Mr. Soparkar has pointed out that the decision of Hawk Insurance Company Limited is relevant because it touches the basic issue as to the role of the Court at the stage of order on summons issued under Sec., 391(1) of the Act. By referring various authors who have commented upon the equivalent provisions of Section 425(1) of the English Companies Act and some observations of Australian Court he has pointed out certain limitations of the Court. He has placed reliance on the following decisions : (i) 87 Comp Cas 705 (Guj.) (Mafailal industries Ltd.); (ii) 92 Comp Cas 692 (Ramkrishna Mills Ltd.); (iii) 9 Comp Cas 14 (Travancore National and Quilon Bank); and (iv) 23 Comp Cas 549 (Manakkil Paily v. Kaimathuruthil Sebastian Joseph and Ors.), and submitted that this is not a case where a ratio of Sakamari Steel and Alloys Ltd. (supra) or Motorola (India) Ltd. (supra) would apply. While replying the contentions as to deferring the meeting by recalling the order, Mr. Soparkar has placed reliance on three decisions and has submitted that the postponement of meeting by recalling

the order would lead to irreparable prejudice and complications and further debts. Reliance is also placed on the decisions : (i) 40 Comp Cas 118, (ii) 84 Company Cases 230, and (iii) 87 Comp Cas 705 (supra) for the purpose. Placing reliance on three consecutive decisions in the case of Mafatlal Industries Ltd., Mr. Soparkar has argued that accepting the ratio of the decisions in the case of Mihir H. Mafatlal 1987 C.C. 792, the Syndicate is not a separate class of creditors and it is not necessary to call a separate meeting for the members of the Syndicate. In furtherance of his submission, he has placed reliance on Hawk Insurance Company Limited and a decision reported in 1999 (2) BCLC 675, He has also pointed out that the ratio of the case reported in 1956 (59) CC 956 (supra) also should be considered before passing an order for recalling of the earlier order as it would amount to reviewing the speaking order passed by this Court at the end of some deliberations.

9. I would like to anxiously consider the legal aspect agitated because the finding on the legal points may bring the logical end to the dispute at preliminary or say first stage of the proceedings.

9.1 While raising preliminary objection qua maintainability of the Company Application No. 160 of 2001, I was taken through Section 4(1)(a)(iv) and Section 3 of the B.R.U. Act. In support of the logic developed by the learned Counsel, he has placed reliance on some part of the judgment reported in 1971 (41) Comp Cas 1098 : 1972 GLR 33 (supra).

Learned Counsel appearing for A.M.L. has also placed reliance on the same judgment but in reference to the subsequent portion of the paragraph of the judgment cited. First, I would like to quote provisions of B.R.U. Act referred by the learned Counsel for A.M.L.

Section 4 :- Power to prescribe industrial relations and oilier facilities temporarily for relief undertakings :- (I) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, order or other provision whatsoever, the State Government may by notification in the Official Gazette, direct that -

(a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under Sub-section (2) of Section 3 -

(i) xxx xxx (ii) xxx xxx (iii) ,xxx (iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking, and any remedy for the enforcement, thereof shall be suspended and all proceedings relative thereto pending before any Court, Tribunal, officer or authority shall be stayed."

On more than one occasions, the provisions referred are scrutinised by this Court, but I would like not to go into the detailed exercise by referring all relevant judgments as the observations in the judgment reported in and relied upon is sufficient to deal with the preliminary objection raised. The Court while

dealing with the case was simultaneously considering the constitutional validity of a particular provision and was also evaluating as to whether restrictions contemplated by Section 4 of B.R.U. Act are reasonable and whether they are in public interest. The following observations or say findings as to the effect of the provision is the direct answer to the point agitated by the applicant-Banks, which read as under :

"It is undoubtedly true that Sub-clause (iv) is so worded that on a plain reading it gives an impression that what is suspended is not only the remedy for the enforcement of the right to hold but also the right itself. But we find that on a true construction of this sub-clause the right itself is not suspended but only the remedy for the enforcement of the right is suspended. In our opinion, this appears to be the true construction of Sub-clause (iv), because if this Sub-clause is interpreted as suspending the very existence of the rights covered by the notification issued u/s 4, the very object of the statute would be frustrated. This will be evident from the discussion which follows.

It is evident from the wording of this sub-clause that it contemplates the suspension of "any" right, privilege, obligation or liability accrued or incurred in the past. The sub-clause, therefore, covers within its wide compass even the rights accrued in favour of the relief undertaking itself- Now, if this Sub-clause is construed as putting a temporary halt to the very existence of the rights covered by the notification issued u/s 4, the result would be that even the rights of the undertaking accrued in the past would have no existence for the temporary period in question. If this happens, it would be totally impossible for the undertaking to function at all because, it cannot use its machinery or premises for running its industry. This would obviously destroy the very object for achieving the statute as enacted."

9.3 It is not the case of the applicants that A.M.L. is not entitled for double insulation. However, it is simultaneously argued that if Courts hold that A.M.L. is entitled to pursue the remedy u/s 391(1) of Companies Act, then this application would not have been entertained as the company is pursuing second parallel remedy. There cannot be and should not be double insulation or cover of protection. If we consider the provisions of Section 391(1) and 391(6) of the Act, the protection is resultant effect of the entire scheme of the Act. It is not a relief or remedy granted to a company who comes forward with a particular scheme or agreement of compromise, but it is the implied effect because of the endeavour made till that exercise is completed. The company who is facing any suit or other proceedings like winding-up can proceed with the entire exercise smoothly and effectively. This enactment is also with a purpose to avoid multiplicity of proceedings and further complications including prejudices. Even for the sake of arguments, it is considered as a remedy granted to the applicants company, then unless there is an express or implied bar against such remedy being double, the applicant company can pursue such proceeding simultaneously, especially where proceedings are of civil nature. The parallel civil proceedings are permitted under

some contingency where there is no implied or express statutory bar. Notification u/s 4 of B.R.U. Act is dependent on the subjective satisfaction of the State Government, if Sees. 3 and 4 of B.R.U. Act are read simultaneously. The undertakings who are offered some privilege or insulation is on account of the satisfaction of the State Government that particular undertaking needs some help or assistance. Notifications u/s 4 of B.R.U. Act are not issued on the prayer made by undertaking who feels that some help or assistance from the State Government is required. State Government does not offer/issue such notification on the prayer made by any undertaking, but such notifications are issued to fulfill the object reflected in the preamble of the B.R.U. Act, if State Government is of the view that to conduct or provide loan, guarantee or financial assistance for the conduct of the certain industrial undertaking as a measure of preventing unemployment or unemployment relief may ascertain about the necessity of issuance of notification and decides whether a particular undertaking requires to be declared as Relief Undertakings. Relief Undertaking is defined as sub-clause (2) of Section 2 of B.R.U. Act and it is said that an Undertaking in respect of which a declaration u/s 3 is in force can be said to be a relief undertaking. Section 4 of B.R.U. Act authorises the State Government for issuance of notification in relation to any relief undertakings. The protection or insulation provided under the Act is for the limited period. Of course, the State Government may continue to issue such notification qua particular relief undertakings, on satisfaction, if it is so necessary. But it would not be legal to accept that such protection is availed by undertaking on persuasions with the Government or any statutory authority. It is likely that on account of prayer from the association of workers or if that undertaking is manufacturing any material or parts or machinery which might be very essential by Government or the Armed Forces, the Government can suo motu issue such notification to provide immediate assistance. The submission by learned Counsel appearing for the applicant-Banks is on assumption that the notification u/s 4 was issued by the State Government is at the request or on the prayer made by A.M.L. Even for the sake of arguments, if this proposition is accepted, it would not be legal to hold that the issuance of the notification was a grant of relief by State in a legal proceeding. So, the submission that A.M.L. is not entitled to prosecute two remedies simultaneously is not acceptable.

9.4 Scheme of arrangement u/s 391 of the Act is a scheme which requires sanction of the Court. Obviously, therefore, the Court insists on certain formalities being followed so that it can check that the matter is dealt with in a manner which the Court approves. Issuance of summons is the first step where the Court asks to convene the necessary meeting. The Court does not itself consider at this first step the point what as to class of creditors or members should be made parties to the scheme. That is for the company to decide. If the meeting of the proper class has not been held, the Court may not sanction the scheme. "Class point" mainly touches procedural affairs. This similarity and conflict of interest within the group of secured creditors is high-lighted, by

referring certain provisions of Indian Trusts Act and the status of I.C.I.C.I. as trustee vis-a-vis, fiduciary relationship between the members of the Syndicate and I.C.I.C.I.. The applicants could not have been asked to sit with the accused of complaint of criminal breach of trust i.e. I.C.I.C.I.. A.M.L. intends to restructure its debts with most of the creditors, so the meeting of the class affected has to be called and great care must be taken in considering what constitutes a class for the purpose of the Section 391 of the Act. In this context, class right can arise by reasons of difference in interest. All preferential creditors if are to be paid uniformly or in full, they will be single class.

9.5 The Bombay Reliefs Undertaking (Special Provisions) Act, (for short the "B.R.U. Act") is enacted by the State Legislature with the dominant object of preventing unemployment and other hardship. The provisions of the State Act are complementary. The object to provide umbrella to particular class of undertaking may have similarity with the insulation provided by other State or Central Act or Regulation. But the same would not disentitle a particular undertaking from invoking the jurisdiction vested with this Court u/s 391 of the Companies Act, 1956. According to me, this is not a case of prosecuting two remedies simultaneously. If an undertaking is getting some more advantageous position on account of issuance of such notification would not drive him out of this Court for the remedy which is prayed by it.

10. So far as the jurisdiction of this Court qua recalling the order passed by very Court is concerned, I am in agreement with the submission of learned Counsel appearing for the applicants to the effect that this Court is competent to recall the order passed earlier. Undisputedly, the order passed in Company Application No. 160 of 2001 is an ex-parte order and the same is passed considering all the relevant statutory provisions. So, unless if any intervener or the party affected is able to satisfy this Court that the order passed ex-parte is patently illegal, erroneous and the same is passed under misconception or misrepresentation, the order cannot be recalled because recalling of the order amounts to reviewing the earlier order passed on merits of the case, prima facie. Applicant-Banks have mainly relied upon two decisions : firstly, on 51 Comp Cas 266 (supra) and secondly, on *Motorol (India) Ltd.* (supra). The case of *Ramkrishna Mills Ltd.*, reported in 1998 (92) Comp Cas 692 is also brought to the notice of this Court. The cases of *M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise*, and *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs.* and others, , are relied upon in support of the logic advanced during the course of arguments. But according to me, the judgment in the case of *Sakamari Steel and Alloys Ltd.* (supra) rather helps A.M.L. than the applicant-Banks, because the circumstances which are to be taken into account would vary from case to case. When the prayer to recall the order passed earlier is made, various factors shall have to be examined at the threshold.

10.1 The Bombay High Court has enumerated around seven such factors. But let me say that this list is descriptive and not exhaustive. In the case on hand, the

order is prayed to be recalled on three major counts; firstly, for wrong classification made with ulterior and malice intention; secondly for fraud played by A.M.L. under the pretext of sale and lease back transactions, sale of garment business and diversion of funds to subsidiaries, and thirdly, suppression of many material relevant facts like pendency of criminal complaint etc. So unless the Court is satisfied to the cause with all sensitivity and gravity that the case pleaded by the applicant-Banks is acceptable to a substantial extent only than it would give rise to exercisable jurisdiction. Next question thereafter would be whether the same should be exercised or not. Looking to the purpose and the scheme of Companies Act, here the equity has a role to play. Even if such plea is found acceptable even than this Court can reject the prayer of recalling the order keeping all questions open permitting the applicants to pursue the same issue after making due deliberation in the meeting called. Undisputedly, this is not a case where winding up order by competent Court was about to pass or the proceedings initiated for the purpose was at the verge of completion. There are more than one circumstances on record which suggest that it was necessary for A.M.L. to move a scheme tender which the payment of debts can be restructured. The restructured scheme proposed seems to has been drafted in presence of or with the help of interveners and some of them are creditors to A.M.L. If the exercise undertaken by A.M.L., G.B.I.F.R. and Steering Committee prior to formulating the scheme is considered, than it would be wrong to accept that this Court has passed earlier order in a casual manner or the approach while issuing directions to convene three meetings for three different debts of creditors was mechanical. The decision in Sakamari's case (supra) dismissing the Company Application at the threshold is a decision on a particular set of facts, and therefore, the ratio propounded by the decision would not help the applicants. The learned Judge of the Bombay High Court has noted in the said judgment that "these factums destroy my confidence in the proposal". So, the Company Judge was moved by the facts subsequently brought to the notice. This sentence itself is an indicative of the fact that order of recall should not be issued mechanically merely because some arguable points are brought to the notice of the Court. Satisfaction must be to the core.

10.2 In the case of Motorola (India) Ltd., (supra) this Court (Coram : M. S. Shah, J.), found that the scheme in question was not bona fide. In affidavit-in-reply filed in Malawi's case (supra) had raised question as to bona fide of the scheme and the facts stated in the affidavit proved to be an eye opener to the Court. Mr. Soparkar while referring this judgment during the course of his submissions has drawn attention of this Court to the order passed by the Division Bench of this Court dealing with the O.J. Appeal filed in the case of Motorola (India) Ltd., (supra). It was dismissed by the Division Bench accepting the say of the objectors that the application for issuing direction to convene the meeting of the creditors has been made is bona fide. The Division Bench has observed that :

"application for issuing direction to convene [he meeting of the creditors has been made is not bona fide, particularly keeping in view the fact that the same

has been made soon on the heels when order for appointment of provisional liquidator was made and large number of unsecured creditors whose total debts outstanding against the company according to their claims is over Rs. 10.00 crores representing substantial amount of unsecured creditors have filed winding-up petition are opposing, the same is justified. It is not disputed that the Court is not bound to direct convening of a meeting when such application is being made when the Court is satisfied that the proposed arrangement is not bona fide."

Suppression of material facts had not weighed with the Court at the relevant point of time, but at the time when the application was made and the intention behind moving such an application was appreciated in perspective of the facts of that case where opposing creditors had successfully pointed out the conduct of the company in relation to major creditors from whom it had taken loan for the purchase of four machines, but until two machines were purchased and the company mala fide tried to show that the machines were purchased. So, considering the gravity of all relevant circumstances the Court thought it fit to dismiss the application. So, the decision of the Motorot's case (supra) also would not help the applicants.

11. Issues of sale and lease-back transactions, sale of garments business and diversion of funds to subsidiaries are three important vital issues on which the applicants can make deliberation during the meetings because all these three aspects are on record and were brought to the notice of the Court. These issues may bring some modifications in the scheme during the course of deliberations made in the meeting, but ultimately the scheme is to be examined by the Court before its final approval. These aspects were discussed even before G.B.I.F.R.. While dealing with the case of Bengal National Textile Mills Ltd., (supra), the Calcutta High Court was also called upon to decide whether the scheme needs to be rejected at the threshold and it was prayed that the meeting directed to be called may not be called and the Court should reject the scheme in embryo. Various issues including the wrong classification of the groups called for the meeting were raised and argued before the Calcutta High Court, but after considering number of decisions the Court refused to recall the order on certain observations and had kept vital issues open so that proper deliberation during the meeting can be made and Court at the time of finalization of the scheme can also appreciate all the relevant aspects afresh in light of the deliberations. Non-disclosure of the pendency of the criminal case whether would go to the merits of the matter may not be treated as a larger question. The stand taken by applicants qua criminal case against A.M.L. and I.C.I.C.I. officials is not of much relevance. I am not in agreement that mention of this fact would have affected A.M.L. adversely.

11.1 The decision of M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise, would not help the applicants at this stage because in that case it was held that a fraud was played on Court and the decree obtained by playing fraud is nullity, is a finding of the Apex Court. So the finding was at the end of all deliberations and

not at very early stage of proceedings. The decision in the case of J. K. Synthetics Ltd. (supra) propounds that any Court or Tribunal has inherent power to do justice and where sufficient cause is established to the satisfaction, the order passed ex-parte can be set aside, The Apex Court was dealing with the case of the appellant who had filed refund claim before the CIGAT. The ratio of this judgment would not help the applicant-Banks at this stage. I have considered the ratio of the judgment in the case of G.T. Swamy and Anr. v. Goodluck Agencies and Anr., reported in 1990 (69) Comp. Cas 819 propounded while appreciating the case of the applicants to appreciate the arguments as to recalling the order. But it would not help the applicants. In the cited case, Karnataka High Court has propounded the ratio that the Company Court in exercise of its inherent powers in order to do justice between the parties can recall the order. In that case, the Company Court had recalled the order of winding-up passed earlier. The decision says that the Company Court has to exercise inherent powers in the manner provided u/s 151 of C.P.C. In the case on hand, when the scheme is moved by the company on account of the order passed by this Court and mostly as per the report of G.B.I.F.R. it would not be proper to say that moving of such an application itself is an attempt to invoking the jurisdiction improperly or mala fide. When no apparent legal or jurisdictional error on record while passing the ex-parte order is established nor the same are brought to the notice of this Court to the satisfaction by the objectors, the judgment of G. T. Swamy's (supra) case would not help the applicants. The role of the Court at the stage of summons is undisputedly limited and considering this proposition, I do not find any merits in the say of the applicants that the ex-parte order passed by this Court needs to be recalled.

11.2 So far as the role of this Court in proceedings u/s 391(1) of the Act is concerned, in special reference to class point raised by the applicant-Banks, I have considered the observations made by various Courts in number of decisions brought to the notice of this Court including three decisions in the cases of Miheer Mafarlal and Shaw Wallace and Co. Ltd. (supra). I have also considered the decision in the case of the Travancore National and Quilon Bank, reported in 1939 (Vol. IX) Comp. Cases 14 and the decision of Indequip Ltd. reported in 1970 (2) CLJ 300 along with comments of some English Jurists.

12. I have narrated the facts and circumstances emerging from the record in nut-shell. While recording the submissions of the learned Counsels appearing for the parties, in most of the decisions of this Court, the High Courts of other States and the Apex Court have considered number of English decisions. It is rightly argued that the role of the Court at summons stage is very limited. Mr. Soparkar has drawn my attention to the decision in the Supreme Court of Judicature, Court of Appeal (Civil Division) on Appeal from Mrs. Justice Arden. The Court while appreciating the provisions of Section 425(1) of the Companies Act, 1985 has analysed the scheme of the Act and the learned Judge has referred a decision of Mr. Justice Eve reported in (1934) WN 142. At the relevant point of time, the relevant provision was Section 153 of the Companies Act, 1929 (provision just

similar to Section 391(1) of Companies Act) and it is held that determination of class, what creditors are summoned for any meeting " constituting a class is the privilege of the applicant, and if the meetings are incorrectly convened or constituted or an objection is taken to the presence of any particular creditor as having interests competing with the others the objection must be taken on the hearing of the petition for sanction of the scheme and the applicant must take the risk of having it dismissed.

12.1 Palmer while dealing with Section 425 (= Section 391) of Companies Act, says :

"A scheme of arrangement u/s 425 is a scheme which requires the sanction of the Court. For this reason, the Court insists on certain formalities being followed so that it can check that the matter is dealt with in a manner which the Court approves.... The first step is a summons to the Court asking the Court to convene the necessary meetings. This would be an exercise of the Court's discretion and not a limit on its power.... If the meetings of the proper classes have not been held, the Court may not sanction the same." He has further said : "If all preferential creditors are to be paid in full, they will be a single class whether or not some are secured and some unsecured."

Secured creditors are, however, in a more complicated position. Those who have a common security, e.g. holders of debentures ranking *pari passu*, will comprise a class; but where each of a number of creditors has a similar though not common security the position may not be the same. It is, however, submitted that provided that the meaning of the word "class" given by Bowen L.J. is applicable, and where the rights of the creditors concerned are not so dissimilar as to make it impossible for them to consult together with a view to their common interest, such creditors can be treated as a single class. It can only be decided in the circumstances of each case whether a group of creditors fall within the meaning of a class as defined by Bowen L.J.

All that need be considered is whether the classes of creditors are properly constituted. So, in *Re : English, Scottish and Australian Chartered Bank*, creditors were treated as a single class whether their debts arose in Australia or in England, and this, it is submitted, is the correct approach."

12.2 According to Gore-Browne on Companies (44th Edition, Vol. 2) says that :

"the responsibility for determining what creditors or members are to be summoned to any meeting, as constituting a class, rests upon the applicant. If the meeting is incorrectly convened or constituted....the petition can be dismissed."

12.3 Shackleton on The Law and Practice of Meetings says that :

"Where the proposed arrangement is one between the company and its members, meetings of creditors are not necessary u/s 391. No meeting is required of any class that is not involved in the proposed scheme. A meeting

should be convened, however, of any class that is affected, and great care must be taken in considering what constitutes a class for the purpose of the Section-. In this context, class rights can arise by reason of difference in interest.....The important point is that each class should be so defined as to compromise those, and only those, whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. It is for the company not the Court, to decide on what constitutes a class {although if the company gets it wrong, the Court may eventually not approve the scheme). The members of any class can assent individually to the scheme (to save the inconvenience of calling a meeting) but there must be at least one class meeting for the Court to have jurisdiction under the Section."

12.4 Gower's commentary on Section 425(1) of the Companies Act (Principles of Modern Company Law) says that :

"But it will not, at this stage, give directions or make any decisions on what is a class for this purpose. That is the responsibility of the applicants to determine - and it can be a difficult task, particularly so far as creditors are concerned. Apart from the obvious distinctions between secured debenture-holders, unsecured lenders and trade creditors, what precisely determines whether or not creditors are of the same "class"? Nor is it necessarily simple even so far as members are concerned; for in this context "class" seems to mean something different from what it means elsewhere. The consequences of failing to make a correct determination are serious; the Court may refuse to sanction the scheme even though all the meetings have approved it by the requisite majority."

Above comment indicates the scope and role of the Court at summons stage.

13. Learned Counsel appearing for the parties have taken me through various observations made by different Judges in different decisions cited. It is an accepted proposition that the classification must be harmonious but the classification is to be made by the applicant who approaches for the purpose and he should be ready for the result if erroneous decision in carving out a class or classes is taken. Even for the sake of the argument, the say of the applicant is accepted, the Syndicate, once upon a time was treated a separate class and has been deliberately clubbed with other secured creditors though terms are equal then also it would not help the applicants in getting the scheme turned down at this stage.

14. In the case of *Manakkil Paily v. Kaimathuruthil Sebastian Josesph and Ors.* (reported in 1953 (23) Comp. Cas 549), it is observed that :-

"the scheme proposed by the official liquidator may or may not be accepted by the members of the company. According to the petition of the liquidator the meeting is to be convened "for the purpose of considering and, if thought fit, approving, with or without modifications, a scheme or arrangement given in the schedule" submitted along with the petition. Objections relating to the scheme will have to be discussed at the meeting. The fact that 74 members have now

opposed the scheme does not necessarily mean that some of them may not change their views when all aspects of the question are discussed in the meeting. In view of the fact that a large sum of money belonging to the company is in Court and that there are no subsisting liability, it is only proper that an attempt is made to reconstruct the company. It was submitted on behalf of the respondents that u/s 20A of Companies Act, no alternation can be made in the memorandum or association so as to increase the liability of the members of the company and that the reconstruction of the company will revive the personal liability of the members which has been extinguished according to the provisions of the memorandum of association. This objection also is one that can be raised to the meeting. Even if the scheme is approved by not less than 3/4th of the members, it can come into effect only if it is sanctioned by the Court, and the Court will have to consider all objections relating to the scheme at the time of according sanction. The Court below rejected the petition of the official liquidator as if it were one for sanctioning the scheme proposed by him. The prayer in the petition- is only for a direction to convene a meeting for considering the proposal. We find no reason why such permission should not be granted. We, therefore, set aside the order of the lower Court and direct the appellant to convene a meeting of the members of the company as prayed for by him."

14.1 In the case of *Re Osiris Insurance Ltd.*, reported in (1999 (1) (BCLC) 182), Chancery Division (Companies Court), Mr. Neuberger, J., has accepted the principle of *Bowen L.J.*, and has said that

"In my judgment the decision and observations in *Sovereign Life* have to be judged in relation to the facts of that case. The point can, I think, be best understood by reference to the judgment of *Bowen L.J.* After referring to the class of persons whose policies had matured and the class of persons whose policies were still extant, he said (at 583) :

"The word "class" is vague, and to find out what is meant by it we must look at the scope of the Sec., which is a Section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term "class" as will prevent the Section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

Applying those observations to the present case, while it is true that those who were summoned to attend the meeting might be said to have been in different classes", in the sense that they had different types of insurance, it does not seem to me that, bearing in mind the nature of the proposed scheme, their interests could be said to be different, let alone positively to conflict with each other, as was held to be the case in *Sovereign Life*."

14.2 Where Court called upon to appreciate an argument of sub-group on conflict of interest at the first (early) stage, the following observations of Mr. Jonathan

Parker, J., in case of Re BTR PIC 1999 (2) BCLC 675 Chancery Division (Companies Court) needs consideration :

"the relevant test is that of differing rights rather than differing interests. Nor do I agree with Mr. Northcote that "interest" in this connection is synonymous with right. Shareholders with the same rights in respect of the shares which they hold may be subject to an infinite number of different interests and may therefore, assessing their own personal interests (as they are perfectly entitled to do), vote their shares in the light of those interests. But that in itself, in my judgment, is simply a fact of life; it does not lead to the conclusion that shareholders who propose to vote differently are in some way a separate class of shareholders entitled to a separate class meeting. Indeed a journey down that road would in my judgment lead to impracticability and unworkability. In the course of his submissions, Mr. Northcote accepted that in the instant case it may well be that (if he is right) a very large number of separate class meetings would be required in order properly to reflect the differing interests of shareholders. The question then arises how the company could possibly reach an informed decision as to the division of shareholders into separate classes without first requiring a considerable amount of personal information from individual shareholders; a wholly unworkable and highly undesirable situation."

14.3 Ratio of the judgment in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., , also relevant and important qua the facts of the case on hand. I would like to quote the following observations as under :

"However, it is vehemently contended by learned Counsel for the appellant that because of the family arrangement of 1979 on which he relies he was a special class of minority equity shareholder who had separate rights against the director of the company and whose special interest because of the pending litigation between him and the director Shri Arvind Mafatlal was likely to be adversely affected by the scheme, therefore, a separate meeting had to be convened as he represented a class within the class of equity shareholders. It is difficult to agree with this contention. Even though the Companies Act or the Articles of Association do not provide for such a class within the class of equity shareholders, in a given contingency it may be contended by a group of shareholders that because of their separate and conflicting interests vis-avis other equity shareholders with whom they formed a wider class, a separate meeting of such separately interested shareholders should have been convened..."

"..In fact that entire proposal of the Scheme of Arrangement was one affecting equally and in the like manner all the existing equity shareholders of the respondent-company. In this connection it is profitable to refer to what the learned author Palmer in his treatise Company Law-24th Edition, has to say :

What constitutes a class :

The Court does not itself consider at this point what classes of creditors or

members should be made parties to the scheme. This is for the Company to decide, in accordance with what the scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking the risk that the classes which are fixed by the Judge, unusually on the applicant's request are sufficient, for the ultimate purpose of the Section, the risk being that if in the result, and we emphasise the words "in the result" they reveal inadequacies, the scheme will not be approved. If e.g. rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be treated differently under the Scheme, such groups must be treated as separate class for the purpose of the scheme. Moreover, when the company has decided what classes are necessary parties to the scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the scheme. In that case, but to make the class a party to the scheme and to obtain the consent of all its members to be bound. It is however, necessary for at least ? one class meeting to be held in order to give the Court jurisdiction under the Section...."

"It is, therefore, obvious that unless a separate and different type of Scheme of Compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such subclass of the main class of members or creditors is required to be convened. On the facts of the present case, the appellant has not been able to make out a case for holding a separate meeting of dissenting minority of equity shareholders represented by him. The fourth point for determination, therefore, is answered in the negative."

14.4 I would like to quote following para from the case of *Gujarai Kamdar Sahakari Mandal and Ors. v. Ramkrishna Mills Ltd.*, reported in 1998 (92) Comp. Cas. 692, which according to me is relevant.

"(vi) Keeping the aforesaid factors in mind the Court shall have to proceed to examine the scheme. However, the examination of the scheme at this stage is not like a harping critic, like hair-splitting expert or like a meticulous accountant. The Court has initially to see as to whether the scheme is fair or not. Unless the - scheme is effectively shown to be unfair, the Court shall be slow to reject the scheme at the outset as its approach should be in favour of reviving industry rather than closing it down. The Court also shall have to keep in mind that by granting an application u/s 391(1) initially it is opening a ground of negotiation, discussion and deliberation and exchange of views about the scheme, arrangement or compromise thereby providing an opportunity to affected interests to ventilate and exchange their views. Beyond exchange of views, discussion and deliberation, if any interest affected remains adamant and opposes the scheme, the Court cannot and is not going to impose the scheme on the interests affected. In that view of the matter while substantially agreeing

with the proposition of law laid down by the learned single Judge of the Bombay High Court, I do not agree with the final conclusion that once a class of creditors object or oppose the scheme there is no charm in making order for convening the meeting of secured creditors. Unfortunately, it is not a question of charm but it is a question of opening the doors for negotiation, discussion and deliberation, and if any discussion, deliberation may bring about a change of mind or heart the Court's action shall not shut it by rejecting the application outright."

15. This Court also cannot ignore the facts brought to the notice of the Court that the present applicants though are members of the Syndicate are not backed by most of the members of the Syndicate. They may back-up applicants of the meeting but in absence of affidavit on record in support of the applicants by any other members of the Syndicate that they were treated on a different footings and a different class, and therefore, at least they should be given an opportunity to put their deliberation as distinct separate groups, it would not be legal or proper to even modify the order passed by this Court or direct the Chairman to call a separate meeting carving out a sub-group from the group of the secured creditors who are called to give their deliberations on the scheme proposed. As it is reflected in the various decisions when the scheme proposed has to be appreciated by the Court at the time of confirmation or approval barring that view, no full-proof scheme acceptable to all can be carved out. Scheme is after all a document an arrangement of settlement or agreement which can be interpreted on personal perception of each group or members of group of creditors. So, it would not be legal to say at this stage that a particular group of creditors should be repaid in foreign currency or who had lent in foreign currency should be considered as a separate class. The nature of the charge created on the properties of A.M.L. under the agreement shall have same legal effect that the documents executed by any other secured creditors who have first *pari passu* charge on the movable and/or immovable properties of the A.M.L. It would not be proper to comment upon at this stage as to whether sale and lease-back transactions which have taken place between the A.M.L. and I.C.I.C.I. on interpretation of nature of charge, after obtaining legal opinion was correct or not, otherwise it may seriously prejudice the interest of either of the parties. I would like to quote certain observations from the cases of Travancore National and Quilon Bank (*supra*) and M/s. Indequip Ltd. (*supra*). In the first decision, the jurisdiction of British Court was considered when the application for sanction of the scheme was moved and the maintainability of the scheme was challenged. Ultimately, the wish of the creditors is to be ascertained. Statutory requirement as to the ratio of majority takes care of entire all other relevant aspects. While dealing with the facts of the case, the Madras High Court has observed that :

"there are other minor objections raised such as the differentiation between creditors, that is, those whose demands have to be immediately met and those whose demands can be deferred. But they are all matters of detail which the body of creditors can consider and suggest appropriate modifications. It is open to any of the creditors to dissent and the Court will not sanction or force a

scheme upon a minority, if they are going to be seriously affected by such a provision being retained."

"None of the objections, therefore, if closely examined, is such as to enable a Court to decline to circulate the scheme because almost all the defects are such as can be remedied at a meeting of the creditors. It is open to the creditors to reject the scheme in toto or adopt it with or without modifications, a clause may even be inserted in the scheme as finally passed by the majority of creditors reserving power to the Court to modify it in the best interests of the creditors—vide *In re English, Scottish and Australian Chartered Bank*. The object of Section 153(1) is to ascertain the wishes of the creditors or members and not to get a verdict from the Court as to the feasibility or practicability of the proposed scheme. That is reserved for the Court under Clause 2 of Section 153. The principle underlying Section 153(1) is plain. In *re English, Scottish and Australian Chartered Bank* at 392, Justice Vaughan Williams observed thus :

I do not think that any one who has followed the subsequent decisions -whether under the Companies Act or the Bankruptcy Acts - will hesitate to say that the tendency of late has been rather to favour the power of the majority of creditors to impose their will upon the minority and to construe the legislation upon the subject with some freedom.

In all concerns of the company whether in the matter of winding-up or in the matter of a scheme, the policy of the Act seems to be to ascertain the wishes of the creditors as expressed by the majority of them subject to the rights of the minority being safeguarded. But no Court is entitled to say that it will not ascertain the wishes of the majority in regard to a proposed scheme. I quite perceive under Clause 1 of Section 153 a certain discretion is vested in Court. But the scope of that discretion is limited. A Court ought not to decline to order a meeting unless the proposals are illegal as being in contravention of the provisions of the Companies Act or incapable of modification in view of ascertained facts so that it would be a waste of time and expenditure to circulate them. I am not prepared to say that for this scheme because the scheme is open to modification. But the Court has always got a duty to see that before the scheme is approved such correct information as is available should be placed before the creditors before they come to a decision."

I would also like to quote the observations of this Court in the case of *Indequip Ltd. v. Maneckchowk And Ahmedabad Manufacturing Co. Ltd.*, by Provisional Liquidator, reported in (1970) CLJ 300, which reads as under :

"It is always a moot question what constitutes a class, Backley on the Companies Act, 13th edition, page 406, has observed that it is a formidable difficulty to say what constitutes a "class" of creditors. The creditors composing the different classes must have different interests. When one finds a different state of fact existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes. "Class" must be

confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (vide *Sovereign Life Assurance Co. v. Dodd*), Speaking very generally, in order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest. If people with heterogeneous interest may ride roughshod over the minority representing a distinct interest. One test that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or classes. The company will ordinarily be expected to offer an identical compromise to persons belonging to one class, otherwise, it may be discriminatory. At any rate, those who are offered substantially different compromises each will form a different class. Even if there are different groups within a class the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. Broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. This will provide rational indicia for determining the peripheral boundaries of classification. The test as stated earlier would be that a class must be confined to those persons whose rights are not so similar as to make it impossible for them to consult together with a view to their common interest...."

"...It is further observed that "if the meeting is not properly convened, the scheme approved at such meeting cannot be sanctioned. If two distinct classes of creditors are grouped together in one class and if there is no material for finding out who belonged to one class and what was the result of their voting and who belonged to the different and distinct class and what was their voting, the only course open to the Court would be to direct separate meetings of those two classes. But if the report of the chairman provides ample material for finding out the number of preferential creditors who attended the meeting of unsecured creditors and what was the number and value of their votes, then it can be separated from the number and value of the votes of the remaining unsecured creditors and the Court may proceed to examine the result of the voting as if two separate meetings are called. A view was taken by me in the case of *Anant Mills Ltd.* If any creditor present at the said meeting would have said that the presence of the distinct class of creditors was either oppressive or not inclusive to their deliberations all such objections could have been examined on merits. No such objection is raised. The defect as far as the meeting of unsecured creditors is concerned, appears to be that the preferential and other unsecured creditors have been grouped together. The workers are preferential creditors in winding-up, but not otherwise who would form a separate class. Instead of remitting the scheme to separate meetings of unsecured and preferential creditors in my opinion, there is ample material in the report of the Chairman from which the

votes in number and value representing the preferential creditors can be separated from the votes and value of the votes representing the other unsecured creditors. As this is quite possible and which would be worked out while considering the group of attack that the scheme is not approved by a statutory majority in each class, it is not necessary to direct a separate meeting of preferential creditors and other unsecured creditors...."

15.1 Above observations and discussion are the direct answer to the dispute raised by the applicants on class point at the early stage where this Court has propounded very valuable ratio as to the powers of the Court in rejecting, modifying or sanctioning the scheme. The validity of the resolution passed was also challenged. So, after applying various test, this Court has carved out relevant principles and has defined method identifying distinct or separate class. This judgment has to be read in reference to the context of the comments made by renowned authors referred in para Nos. 12.1 to 12.4 hereinabove.

16. So, the above set of legal proposition and facts of present case available on record, prima facie has taken me to a conclusion that the application filed by the applicant-Banks (secured creditors from the groups of off-shore lenders) for recalling the order passed by this Court on 13-6-2001 requires to be rejected and accordingly is disposed of without granting the prayers as prayed in this application with an observation that the applicants may agitate all the issues at the time while participating in the meeting, if so desire. However, it will be open for the applicants to raise all the issues which are raised and argued before this Court afresh as and when the scheme proceedings come up for confirmation before the Court. There shall be no order as to costs.

17. Mr. Kavina learned Counsel appearing for the applicant-Banks has submitted that the applicant-Banks have no time which can be termed as sufficient for preferring an appeal to avoid serious prejudice, so the Chairman may be - directed to call a separate meeting of secured foreign lenders. But, as I have observed something in this regard in the order passed, I do not accept the prayer advanced by learned Counsel Mr. Kavina. Obviously, as the Chairman is going to register the vote of each lenders separately stating the value of his debts, I do not see any need to direct such fourth meeting. The request, therefore, is not accepted.