
(2001) 12 DEL CK 0002

In the Delhi High Court

Case No : Company Petition No. 48 of 2001

DCM Financial Services Ltd.

APPELLANT

Vs

NEMO

RESPONDENT

Date of Decision : 20-12-2001

Acts Referred:

Citation : (2001) 12 DEL CK 0002

Hon'ble Judges : Madan B. Lokur, J

Bench : Single Bench

Advocate : Rajiv Nayar and S. Ganesh, Manali Singhal, Ruchi A. Mahajan, Ujjawal Banerjee, P.N. Anand, K.K. Rohtagi, Sanjeev Sabharwal, A.K. Kapur, Shyamlal Gupta, V.C. Dogra, Anil Kumar Misra, Usha Chhabra, S.K. Gupta, Radhey Kishan Gupta, Shalini Varandani, H.S. Oberoi, Arvind Kumar Shukla, J.P. Goel, R.K. Gupta, Sant Lal, S. Raman, Sardari Lal, Sheela Rani, R.K. Mathur and Rakesh Sharma, Mona S. Johns, for Indus Ind Bank Ltd., Vijay Gupta and J. Das for the Central Bank of India, Geeta Sharma, for Official Liquidator, Saud Ahmad, Asstt. Registrar in person for Regional Director, Dept. of Company Affairs, Kanpu, for the Appellant;

Final Decision : Dismissed

Judgement

Madan B. Lokur, J.—A petition under the provisions of Section 391(2) of the Companies Act, 1956 (for short the Act) would normally have been disposed of without much ado. However, in this case, many depositors voiced their objections to the "Modified Scheme of Arrangement for Re-organization of the Share Capital of DCM Financial Services Limited and for Compromise with its Secured and Unsecured Creditors". This Scheme is hereafter called the `modified Scheme" and the DCM Financial Services Limited is called the `Company".

2. The modified Scheme of the Company was approved by its Board of Directors in a meeting held on 18th December, 2000. Initially, the Company was incorporated on 13th February, 1991 as Tanvi Leasing and Finance Private Limited. The name was subsequently changed to DCM Financial Services Private Limited on 28th February, 1992. Eventually, the word "Private" was dropped with

effect from 22nd July, 1993. The Company is said to be a Non-Banking Financial Company (or NBFC) engaged, inter alia, in the business of hire purchase and leasing. It appears that the Company faced a liquidity crunch sometime in 1997 which resulted in a mismatch of its assets and liabilities. Several uncontrollable factors are said to have caused this crisis, but I am not really concerned with them. The consequence, however, of these factors was that the Company began to default in returning the deposits to its creditors.

3. It appears that from 17th November, 1997, the Reserve Bank of India (RBI) restrained the Company from taking any further deposits. The Company was also restrained from alienating or dealing in any manner with its property and assets without the prior written permission of the RBI, except for the purposes of meeting the obligations of its depositors. According to the Company, its activities then became limited to the recovery of its past dues for lease rentals or hire purchase and the application of these amounts to repay the creditors. Quite obviously, the Company was not very successful in this venture also.

4. Taking all these aspects into account, the Company proposed to restructure itself. The intention was to "remain a viable entity with substantial accretion to shareholder value over time." The restructuring plan was based on the strategy of:-

"(i) continued aggressive recovery plans for recovering arrears of lease rentals and hire purchase installments and other miscellaneous assets;

(ii) engaging in Information Technology and IT training, the Sunrise Industry in India at the moment;

(iii) induction of new capital by the promoters DCM International Ltd. to the extent of Rs.16 Crores (after the creditors have approved the Scheme);

(iv) non-fund based business permissible and allowed to a Non-Banking Finance Company;

(v) restructuring of debts in a just and equitable manner."

5. The secured creditors of the Company are its debenture holders, SBI Home Finance Ltd., Small Industries Development Bank of India (SIDBI), Punjab and Sind Bank (PSB) and finally the IndusInd Bank. The total amount payable to the secured creditors was Rs.4953.59 lakhs as on 30th September, 1999. The amount payable to them on sanctioning of the modified Scheme is Rs.5580.09 lakhs.

6. The unsecured creditors of the Company are its various fixed deposit holders and equity shareholders whose dividend remained unpaid. There are also some inter-corporate deposits and one unsecured creditor called M/s Pressman Leasing. The total amount payable to the unsecured creditors was Rs.8431.82 lakhs as on 30th September, 1999 and the amount payable to them on the sanctioning of the modified Scheme is Rs.7174.69 lakhs.

7. Learned counsel for the Company and some parties in person placed all the relevant facts and made their submissions on 26th, 27th and 28th November, 2001 and on 3rd, 4th, 5th, 7th, 11th, 12th and 13th December, 2001 when judgment was reserved.

8. The relevant Sections of the Act are Sections 391 and 393 and they read as under:

"391. Power to compromise or make arrangements with creditors and members -

(1) Where a compromise or arrangement is proposed -

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made u/s 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class as the case may be, and also on the company, or in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

(3) to (7) xxx xxx xxx

9. Information as to compromises or arrangements with creditors and members. -

(1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called u/s 391, -

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular, stating any material

interests of the directors, managing director, or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by the advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Where the compromise or arrangement affects the rights of debenture holders of the company, the said statement shall give the like information and Explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the meeting, every creditor or member so entitled shall, on making an application in the manner indicated by the notice, be furnished by the company, free of charge, with a copy of the statement.

(4) & (5) xxx xxx xxx

10. It will first be first convenient to see whether the procedural parameters were met before any decision or voting took place on the modified Scheme.

11. The Company initially filed CA 811/2000 which was an application u/s 391(1) of the Act for a direction to convene meetings of its secured and unsecured creditors for the purpose of considering a "Scheme of Arrangement for Re-organization of the Share Capital of DCM Financial Services Limited and for Compromise with its Secured and Unsecured Creditors" (for short the original Scheme). A copy of the original Scheme was annexed to the application, as also the resolution dated 18th May, 2000 of the Board of Directors of the Company according its consent to the original Scheme. This application was allowed on 24th May, 2000 and the requisite meetings were directed to be held on 8th July, 2000.

12. The date for holding the above meetings was changed from time to time, on the request of the Company. Eventually, an order was passed on 29th September, 2000 in CA 1369/2000 to the effect that a meeting of the secured creditors of the Company shall be held on 16th December, 2000 and that of the unsecured creditors on 18th December, 2000.

13. It was stated in CA 1369/2000 that the Company had been holding discussions regarding the original Scheme with some banks, which were its secured creditors. It was submitted that it would be futile to hold the meetings before the negotiations with the banks/financial institutions are concluded.

14. Learned counsel for the Central Bank of India opposed the frequent change of dates, which had resulted in delays in the proceedings initiated by the creditors against the Company in different fora. Particular mention was made of Suit No.6284/1999 filed by the Central Bank of India in the Bombay High Court for the recovery of a sum of Rs.44 crores from the Company. In that suit, the said bank had applied for the appointment of a receiver. In view of the pendency of the proceedings in this Court, the said bank had little or no option but to request the Bombay High Court to adjourn the hearing on its application for the appointment of a receiver.

15. These, and other submissions were considered by this Court which then gave the directions mentioned above.

16. It may be mentioned, en passant, that learned counsel for the said bank later stated before this Court on 21st April, 2001 that his client had no objection to the modified Scheme.

17. Finally, on the basis of CA 1510/2000 in CP 73/1999, the date fixed for the meeting of the secured creditors was changed from 16th December, 2000 to 19th December, 2000. This was because of the non-availability of the venue (the banquet hall of Centaur Hotel) on 16th December, 2000. This final change of date was made by an order dated 6th November, 2000.

18. In other words, the meeting of the unsecured creditors was scheduled for 18th December, 2000 and for the secured creditors, it was scheduled for 19th December, 2000.

19. In the order dated 24th May, 2000, Mr.Chander Mohan Baweja, Advocate and Ms.Sangeeta Chandra, Advocate were appointed as the Chairman and the alternate Chairman respectively for the meeting of the secured creditors. Mr.S.S.Rana, Advocate and Ms.Sujeeta Srivastava, Advocate were appointed as the Chairman and alternate Chairman respectively for the meeting of the unsecured creditors. This portion of the order was not varied, at any point of time. In terms of the Companies (Court) Rules, 1959 (for short the Rules), the procedure has been laid down for issuing a notice of a meeting such as those postulated in this case. In this regard, Rules 73 and 74 of the Rules are relevant and they read as follows:-

"R.73. Notice of meeting. - The notice of the meeting to be given to the creditors and/or members, or to the creditors or members of any class, as the case may be, shall be in Form No.36, and shall be sent to them individually the Chairman appointed for the meeting, or if the Court so directs, by the company (or its liquidator), or any other person as the Court may direct, by post under certificate of posting to their last known address not less than 21 clear days before the date fixed for the meeting. It shall be accompanied by a copy of the proposed compromise or arrangement and of the statement required to be furnished u/s 393, and a form of proxy in Form No.37.

R.74. Advertisement of the notice of meeting. -

The notice of the meeting shall be advertised in such newspapers and in such manner as the Judge may direct, not less than 21 clear days before the date fixed for the meeting. The advertisement shall be in Form No.38."

20. The notice sent to the creditors has been placed on record and is in accordance with Form No.36. Notices were also sent individually to each of the creditors under certificate of posting not less than 21 clear days before the date fixed for the meetings. Apart from this, as required by Rule 74 of the Rules, three advertisements were issued in Form No.38 in an English newspaper and three advertisements were issued in a Hindi newspaper. The creditors were also supplied with copies of the proposed compromise (the original Scheme) and an Explanatory Statement thereto.

21. It is now necessary to consider whether the meetings were actually conducted in accordance with law.

22. Mr.Baweja, Advocate filed an affidavit dated 16th January, 2001 in CA 811/2000. It was stated in the affidavit that the secured creditors were served with notices of the meeting by post (under postal certificate or UPC) up to 24th November, 2000. The original UPC/receipts were filed with the affidavit as Exh.A to the affidavit (4 registers marked as A-1 to A-4 in one trunk). Notice of the meeting was published in "The Statesman" (English) and in "Veer Arjun" (Hindi) on 18th, 23rd and 24th November, 2000. Copies of these newspapers were filed as Exh.B (colly.) to the affidavit. Although it is not categorically stated so in the affidavit of Mr.Baweja, but it does seem that a notice dated 15th November, 2000 convening the meeting, the original Scheme, an Explanatory Statement u/s 393 of the Act and a form of proxy were sent to all the secured creditors.

23. A more or less similar affidavit was filed by Mr.S.S.Rana, Advocate. He, however, did not give the last date for sending the notice by post, but he did categorically say in his affidavit that 21 clear days notice for holding the meeting was sent to all the unsecured creditors.

24. Mr.Baweja, Advocate filed another affidavit dated 16th January, 2001 enclosing therewith his Report as Chairman of the meeting and the Minutes of the Meeting of the secured creditors.

25. In the Report, it is said that the meeting was attended by 119 secured creditors in person and by 2503 through proxies amounting to a total of 2622 secured creditors. These secured creditors represented Rs.2,877.34 lakhs of the secured debt.

26. Reference is made in the Report to a Scheme of Arrangement for Re-organization of the Share Capital of the Company and to a modified Scheme of Arrangement for Re-organization of the Share Capital of the Company. Although the difference between the two Schemes is not spelt out, it is quite clear that the original Scheme is what was circulated along with the notice dated 15th

November, 2000 convening the meeting, while the modified Scheme is what was eventually approved by the Board of Directors of the Company in its resolution of 18th December, 2000. Obviously, Therefore, the modified Scheme was not circulated to the creditors of the Company in advance.

27. Be that as it may, the Report goes on to say that "the Scheme as modified by the management was introduced at the meeting and was distributed, placed and prominently displayed at vantage points at the meeting. The Notice sent to the secured creditors, the Modified Scheme as well as the Company Statement on the modifications that had been carried out was read by the Company Representative with my permission." Three further (but insignificant) modifications were read out, proposed and carried out in the modified Scheme. These were the deletion of the word "any" and its substitution by the word "such" in two places, and the addition of the words "if any" at one place.

28. The "Company Statement" referred to above was some ex cathedra statement prepared by the Company and was not the Explanatory Statement required by the Act.

29. The Report says that objections to the modified Scheme were then invited and received. These are annexed to the Report. Scrutinizers for the meeting were appointed and the following resolution was then put to vote:

"RESOLVED THAT the arrangement embodied in the scheme of arrangement, as modified by the management, modifications introduced at the meeting, for re-organization of the share capital of DCM Financial Services Ltd., and for compromise with its Secured and Unsecured Creditors, be and is hereby approved."

30. During the voting process, a person claiming to represent SIDBI (a secured creditor representing 0.88% of the secured debt of the Company amounting to Rs.45.37 lakhs) sought the permission of the Chairman to attend and vote on behalf of SIDBI. This was declined because that person had no authorization/document (except a visiting card) to attend the meeting or vote on behalf of SIDBI.

31. Voting was closed at 12.30 pm after regular announcements on the public address system.

32. After the close of voting and sealing of the ballot boxes, a duly authorised representative of PSB (a secured creditor of the Company representing 18.4% of the secured debt amounting to Rs.951.50 lakhs approximately) approached the Chairman and handed over a positive vote to him. This vote was not allowed for submission of counting since the voting had already been closed and the ballot boxes sealed. This vote has been filed with the Report. Although the vote was in favor of the resolution, it had a handwritten note "Subject to terms and conditions of compromise sanctioned by Banks Board of Directors and deviations if any subject to approval of Board of Directors."

33. Since a large number of proxies had voted at the meeting, two firms of Chartered Accountants were (already) appointed to verify the records and other relevant material. These firms were authorised to carry out an audit of the proxy forms, attendance sheets, registers and verification of signatures. Thereafter, the ballot boxes were opened in the presence of the alternate Chairman and Scrutinizers and the votes were scrutinised and counted.

34. The Chartered Accountants verified and certified the relevant records and gave their report. The conclusions given by the Chartered Accountants are as follows:-

"(a) That the Counting Sheets are in agreement with the Attendance Register presented to us.

(b) The Attendance Register of the meeting maintained by the company is in agreement with the Attendance Slips.

(c) The Proxy register maintained by the company is in agreement with the Proxy Forms submitted with the company subject to observation in (d) below.

(d) On the basis of sample verification of creditors signatures representing more than 94% of value of votes cast (as reported in Annexure I enclosed) where the voting has been exercised signature mismatch were observed in 70 cases representing a value of Rs.22.64 lacs (as reported in Annexure II enclosed)."

35. On the basis of the voting, the Chairman reported his conclusions and also placed the result in a Tabular Form which is as under:

S.No.		Particulars	Total
%age of Nos.	%age of Secured value	Nos. Debt represented (Rs.)	(in lacs)
99.81	2512	99.45	1896.04
14	0.55	1. For the reso- lution approv- ing the modified scheme	3.57
2526	100.00	2. Against the resolution approving the modified scheme	0.19
Invalid Votes	10.89	Total valid	1899.61
46			100.00
			3.

36. The Chairman finally concluded that:-

"The Resolution as referred to in para 2 of this Report was Therefore adopted by Secured Creditors. The modified Scheme of Arrangement for Re-organization of the Share Capital of M/s DCM Financial services Limited and for compromise with its Secured and Unsecured Creditors stands duly approved and adopted by the Secured Creditors by requisite majority.

After declaring the Results, I declared the meeting closed.

The minutes of the meeting of the Secured Creditors along with following related papers are annexed hereto and marked as ANNEXURE - II (Colly).

i. Minutes of the Meeting of the Secured Creditors held on 19.12.2000 ii. Proxy Forms iii. Attendance Slips iv. Proxy Register v. Attendance Register vi. Counting Sheets vii. Ballot Papers"

37. The Minutes of the Meeting were signed by both the Chairman and alternate Chairman on 16th January, 2001.

38. The Report of Mr.S.S.Rana, Advocate was filed along with his affidavit dated 16th January, 2001. This, of course, pertained to the meeting of the unsecured creditors. The procedure followed by Mr.Rana, Advocate was the same as that by Mr.Baweja, Advocate (including inviting objections) and the contents of his affidavit and Report are also, more or less, on similar lines.

39. The meeting of unsecured creditors was attended by 398 unsecured creditors in person and 6269 through proxies, amounting to a total of 6667 unsecured creditors. They represented Rs.1765.87 lakhs of the unsecured debt.

40. The resolution put to vote in the meeting chaired by Mr.Rana, Advocate was as follows:-

"RESOLVED THAT the arrangement embodied in the scheme of arrangement, as modified by the management, modifications introduced at the meeting, for re-organization of the share capital of DCM Financial Services Ltd., and for compromise with its secured and unsecured creditors, be and is hereby approved."

41. The result of the voting at the meeting was placed in the following Tabular Form:-

S.No.		Particulars	Total
%age of Nos.	%age of Unsecured value	Nos. Debt represented (Rs.)	(in lacs)
98.93	4314	98.81	1335.56
52	1.19	14.47	1.07
4366	100.00	1350.03	100.00
Invalid Votes	20.74	126	

42. I find it a little odd that even though 6667 unsecured creditors attended the meeting (either in person or through proxies) only 4492 cast their vote (including invalid votes). Therefore, over 2000 unsecured creditors did not cast their vote. This is being mentioned only because the figure is unusually high, and not with a view to draw any adverse inference.

43. Be that as it may, the final conclusions of the Chairman were:-

"The Resolution as referred to in para 2 of this Report was Therefore adopted by Unsecured Creditors. The modified Scheme of Arrangement for Re-organization of the Share Capital of M/s DCM Financial Services Limited and for compromise

with its Secured and Unsecured Creditors stands duly approved and adopted by the Unsecured Creditors by requisite majority.

After Declaring the Results, I declared the meeting closed.

The minutes of the meeting of the Unsecured Creditors along with following related papers are annexed hereto and marked as ANNEXURE - II (Colly).

i. Minutes of the Meeting of the Unsecured Creditors held on 18.12.2000. ii. Proxy Forms iii. Attendance Slips iv. Proxy Register v. Attendance Register vi. Counting Sheets vii. Ballot Papers viii. Sheet containing signatures of proxy holder."

44. The Minutes of the Meeting were signed by both the Chairman and alternate Chairman on 16th January, 2001.

45. The same set of Chartered Accounts were appointed to scrutinise and verify the documentation with regard to the meeting of the unsecured creditors. The Chartered Accountants reported as follows:-

"(a) That the Counting Sheets are in agreement with the Attendance Register presented to us.

(b) The Attendance Register of the meeting maintained by the company is in agreement with the Attendance Slips submitted by the participants.

(c) The Proxy Register maintained by the company is in agreement with the Proxy Forms submitted with the company subject to observation in (d) below.

(d) On the basis of sample verification of creditors signatures representing more than 90% of value of votes cast (as reported in Annexure I enclosed) where the voting has been exercised, signature mismatch were observed in 85 cases voted in favor representing a value of Rs.20.24 lacs.

(e) We are not in a position to verify or comment upon the 3 proxies representing a value of Rs.1.8 lacs bearing creditor's Thumb impressions, due to the matter being technical in nature."

46. Mr.Baweja, Advocate and Mr.Rana, Advocate filed affidavits on 13th and 16th February, 2001 respectively seeking condensation of delay in filing their respective Reports. The delay was condoned by this Court by an order dated 20th February, 2001.

47. CA 811/2000 was actually disposed of on 24th May, 2000 but since all kinds of applications and objections came to be filed in CA 811/2000, I passed the following order on 26th November, 2001:-

"This is an application filed under the provisions of Sections 391 to 393 of the Companies Act, 1956 for directions to convene meetings of the secured as well as unsecured creditors of the Applicant company, namely, M/s DCM Financial Services Ltd.

I am told by learned counsel for the company that meetings of the secured as well as unsecured creditors have since been held and reports have been filed by the Chairmen of the meetings.

Nothing, Therefore, survives in CA 811/2000.

In view of the above, it appears that the application was already disposed of 24th May, 2000.

It, however, appears that some objections have been filed in CA 811/2000. These objections, strictly speaking, relate to CP 48/2001. Learned counsel for the company agrees that for all practical purposes, all these Case may be treated as having been filed in CP 48/2001 and that he will raise no technical objections in this regard."

48. Coming back to the main case in hand, it may be mentioned that the Company had approximately 19,000 secured creditors as on 31st March, 2000 with a total debt value of Rs.47.22 crores. There were approximately 54,000 unsecured creditors as on 31st March, 2000 with a total debt value of Rs.71.26 crores. It was stated at the Bar that there were another 30,000 unsecured creditors falling in the category of equity shareholders whose dividend remained unpaid. This unpaid dividend was about Rs.1.75 crores as per the modified Scheme. (This amount has been stated in the modified Scheme with the effective date being 31st March, 2001). Consequently, the total number of unsecured creditors was approximately 84,000 with a total debt value of approximately Rs.73 crores.

49. As against these figures, 2526 valid votes were cast at the meeting of secured creditors on 19th December, 2000 (that is, about 13.3% of the total secured creditors) representing a total debt value of approximately Rs.19 crores (that is, about 40.3% of the total secured debt).

50. Similarly, 4366 valid votes were cast at the meeting of unsecured creditors on 18th December, 2000 (that is, about 5.2% of the total unsecured creditors) representing a total debt value of approximately Rs.13.5 crores (that is, about 18.5% of the total unsecured debt).

51. These figures are mentioned because many of those appearing in person had contended that a very small per cent age of creditors were actually imposing their will (as it were) on the majority of creditors. Things may have been different if a larger number of creditors had turned up - but they didn't. That many creditors chose not to attend the meetings is referred to later. In any case, aberrations of this nature (if they can be called so) cannot be helped in a democratic set-up like ours. It was also submitted that many creditors did not receive the notice convening the meeting. That the notice was sent is clear from the Reports given by the Chairmen of the meetings. This has not been questioned, nor have the bona fides of the Chairmen of the meetings been doubted. Why they were not received could be for a variety of reasons, including

a change of postal address, which may not have been intimated or due to a postal strike with effect from 5th December, 2000. It is really not possible to hazard any guess on this score. In any case, a notice of the meeting was advertised three times in two newspapers each. Somebody said that these newspapers are not commonly read or subscribed to in Delhi. It is difficult to judicially act on these impressions. There are also some creditors who live outside of Delhi, where these newspapers are perhaps not circulated. Some creditors may be living abroad while some may be illiterate so they cannot even read a notice or an advertisement. One cannot go on taking notice of each such objection because they can be infinite. Such permutations and combinations can always be there, and at the end of the day, some creditor can allege some technical inappropriateness in the mode of service.

52. So far as I am concerned, the legislature has prescribed a manner of service, which has been adhered to. The manner of service prescribed is neither irrational nor illogical. Therefore, I am not inclined to give much weightage to the allegation that many creditors were not served as per the prescribed procedure.

53. The Company has also shown from the record that it has filed its latest balance sheet and auditors report; it has averred that no proceedings are pending against it under the provisions of Sections 235 to 251 of the Act. The Annual Report up to 31st March, 2001 was handed over in Court during the course of hearing.

54. Learned counsel for the Company drew my attention to the salient features of the modified Scheme.

55. It is stated in the preamble that in the last two to three years, the Company has faced a severe liquidity crisis. Several factors (which are mentioned) were said to be responsible for this. It is admitted that the Company has defaulted in payment to fixed depositors due to fund constraints.

56. In this connection, it may be mentioned that the Company Law Board (CLB) had invoked its suo-motu powers under the provisions of Section 45-QA(2) of the Reserve Bank of India Act, 1934 and had passed an order dated 17th July, 1998. This was necessitated, as stated by the CLB, because aggrieved depositors started sending applications to the CLB when the Company began to default in making repayments to the fixed depositors. Moreover, on an earlier occasion arising out of similar complaints, the Company had admitted that there were overdue deposits including interest and the Company was not in a position to meet all the claims. Consequently, the CLB exercised suo-motu powers to order payment of all matured deposits. Some of the depositors brought to my notice a letter dated 31st August, 1998 issued by the Company which indicated that the Company was prepared to act on the order of the CLB. They alleged that thereafter the Company did a volte face.

57. The order of the CLB was not fully implemented by the Company partly because of the pendency of the earlier proceedings in this Court. Furthermore,

an order dated 28th September, 2000 was passed by this Court in CA 891/2000 in CA 811/2000 which stated, inter alia, that "It is also directed that no judgment or decree shall be executed against the applicant (the Company in this case) till the next date." This order was confirmed on 23rd April, 2001 till the disposal of CP 48/2001.

58. Chapter I of the modified Scheme gives the definitions and the financial position of the Company from its audited balance sheet as on 30th September, 1999. A tabular statement is given with respect to the proposed re-arrangement and the cash flow identified by the Company, which will enable it to make the payments. The promoters of the modified Scheme are to invest Rs.16 crores in equity shares @ Rs.40/- per share (that is at a premium of Rs.30/- per share). In addition to this amount, the promoters agreed to underwrite the shortfall in projected cash flows subject to a maximum of Rs.5 crores. Paragraph 7 of Chapter I of the modified Scheme deals with the revised equity share capital of the Company. This is based not only on the fresh issue of equity shares to the promoters, but also a conversion of a part of the creditors debt (both secured and unsecured) into equity shares @ Rs.30/- per share (that is at a premium of Rs.20/- per share). The available funds are to be applied under the supervision of Ernst & Young, Chartered Accountants (paragraph 8). Future fund flows are to be monitored by the Chartered Accountants with the assistance of Canara Bank or any other scheduled bank (paragraph 3 of Chapter II). This Court, of course, also has the power of supervision under the provisions of the Act.

59. Chapter II of the modified Scheme deals with debt settlement and this is really the heart and soul of the modified Scheme. This Chapter concerns itself with the five major creditors: (a) SBI Home Finance. (b) Fixed depositors, ICD lenders and creditors for unpaid dividend excluding promoters. (c) Debenture holders. (d) Banks and institutions. (e) M/s. Pressman Leasing.

60. The original Scheme postulated a settlement with SBI Home Finance in the following terms:

"SBI Home Finance

(i) The Company is entering into a settlement with SBI Home Finance whereby the Company shall

(A) pay Rs.2.9 Crores to SBI Home Finance by 30th October, 2000; and

(B) issue shares worth Rs.45 lacs (at a premium of Rs.20) to SBI Home Finance within 90 days of the Effective Date.

(ii) Immediately upon receipt by SBI Home Finance of the payment mentioned in A above, SBI Home Finance will release the title deeds of the NBCC building.

(iii) Within one week of the release by SBI Home Finance of the title deeds of the NBCC building, the Company shall file the requisite discharge certificate and forms with the Registrar of Companies, Delhi for satisfaction of the charge."

61. The modified Scheme pertaining to SBI Home Finance reads as follows:

"SBI Home Finance

(i) The Company has entered into a compromise settlement and a consent decree has been awarded by the Delhi High Court in Civil Suit No.234 of 2000 "SBI Home Finance Ltd. Vs. DCM Financial Services Ltd. and another". Pursuant thereto the Company has agreed to:-

(A) pay Rs.2.90 Crores to SBI Home Finance on or before 31st March, 2001 under a monthly schedule of payments commencing from December, 2000: and

(B) discharge the sum of Rs.25,00,000 by issuance of equity shares of the face value of Rs.10/- in accordance with the terms of the scheme, at the rate as approved for all secured creditors and unsecured creditors pursuant to the Scheme within 90 days of effective date.

(ii) Upon the receipt of the sum of Rs.2.90 crores as above by SBI Home Finance Ltd., the immovable property mortgaged comprised in the NBCC building and owned by the Company, shall stand released without any further act or deed on the part of either SBI Home Finance Ltd. or the Company, and the mortgage shall stand discharged, released and set aside and the Company shall be enabled to sell the same for achieving the cash flow streams as set out in clause 6 in chapter I hereinabove

(iii) Subsequent to (ii) above, the Company shall be permitted to file the relevant forms with the Registrar of Companies. Delhi and confirm the discharge by certification, for the purposes of satisfaction of charge.

(iv) In the event of default in payment of Rs.2.90 crores on or before 31-3-2001 in terms of the consent decree, the entire suit amount of Rs.4.07 crores together with pendent lite and future interest @ 22% p.a. and costs shall become due and payable.

In so far as fixed depositors etc. and debenture holders are concerned, there is no major change between the original Scheme and the modified Scheme, except for the addition of two new Clauses in the modified Scheme. The relevant portion of these Clauses (to the extent they were objected to in this Court) read as under:-

(v) For any delay in payment on due date to the fixed Depositors under this scheme, they shall be entitled to receive delayed interest at the rate of 10% p.a., for any delay in payment on due dates, in accordance with the due dates as provided in the Scheme. Default interest, if any, as above, as computed in accordance with this rate, shall at the end of each 30th June be aggregated, and shall be subject to conversion into equity shares in accordance with the SEBI formula applicable for pricing for preferential issuance as prevalent at the relevant time. The Board of Directors shall amount due.

(vi) The Company shall ensure that adequate authorised capital is available for

conversion of interest in arrears to equity and shall, if required, pass appropriate resolution from time to time for increasing its authorised share capital, if the need arises."

62. As regards the banks and institutions, a huge change has been made in the modified Scheme. In fact, it was submitted by one of the creditors that to this extent, the change was not a modification but a substitution.

63. The original Scheme postulated a debt settlement with banks and institutions in the following terms:-

"d. Banks and Institutions (Punjab & Sind Bank, Indusind Bank, SIDBI).

The amounts due as on 30th September 1997 together with simple interest payable @ 10% per annum on the principal debt for the period 30th September 1997 till 21st March 2000 as adjusted for any payments made during the period shall constitute the entire debt owed to such banks/institution. The payment of such amounts (the debts) will be made as follows:-

(i) Within 90 days of the Effective Date, on approval of the Scheme the Banks and Institutions will be paid 15% of the amount computed as above;

(ii) Within 180 days of the Effective Date, on approval of the Scheme the Banks and Institutions will be paid 10% of the amount computed as above;

(iii) Within 730 days of the Effective Date, on approval of the Scheme, the Banks and Institutions will be paid 25% of the amount computed as above.

(iv) Within 3 years of the Effective Date, on approval of the Scheme, the Banks and Institutions will be paid 25% of the amount computed as above.

(v) Within 4 years of the Effective Date, on approval of the Scheme, the Banks and Institutions will be paid the residual 25% of the amount computed as above.

The present security of receivables and current assets of the Company will continue to secure payments to be made to the Banks/Institutions as above. However, on final payment as above, the security shall stand released and debt shall stand satisfied and discharged by the Company without any act or further deed and the Company shall file the appropriate forms for notice of satisfaction of the debts due and release of the security charged to the Banks/ Institutions."

64. In other words, the settlement with the three banks and institutions was uniform. However, in the modified Scheme, these banks and institutions have been segregated into two categories, that is, SIDBI (on the one hand) and PSB and IndusInd Bank on the other.

65. The basic settlement with SIDBI remains the same as in the original Scheme.

66. However, in so far as PSB and IndusInd Bank are concerned, the original Scheme is completely given up. Instead, about two and a half printed pages of a totally new and different scheme is propounded. The modified Scheme, in so far

as it relates to PSB and IndusInd Bank is concerned, has no relation or connection whatsoever with the original Scheme. The modified Scheme pertaining to these two banks is too vast for quotation and so is not being incorporated in this judgment. Suffice it to say that a completely new scheme is formulated by the Company with respect to PSB and IndusInd Bank.

67. The original Scheme with M/s. Pressman Leasing remains virtually unchanged (except for the amount of the debt and the Installments for clearing this debt). There is, however, an addition in the modified scheme in Clause (i) pertaining to M/s. Pressman Leasing. The original arrangement with the "further" arrangement reads as follows: "(i) within 90 days of the Effective Date, on approval of the Scheme, Pressman will be paid Rs.1.08 crores. Further, equity shares of the face value of Rs.10 each shall be issued to them at the issue price of Rs.30 per share or at any other price as approved pursuant to the Scheme for the aggregate value of Rs.8 lacs. Such allotment and delivery of the dematerialized share receipt shall be made to Pressman upon their furnishing the particulars of their Depository Participant Account."

68. Chapter III is the final Chapter in the modified Scheme. This contains some general terms and conditions.

69. Looking at the modified Scheme as a whole, it was submitted on behalf of the Company that there is sufficient material to show that the modified Scheme will be duly and faithfully implemented. It is said that the Chartered Accountants are of world-wide repute and will file a report on the implementation of the modified Scheme, semi-annually, in this Court. The Chartered Accountants will also operate a no-lien escrow account in the name of the Company into which account the Company's receipts will be deposited and payments made for the purposes of the modified Scheme. Monitoring of the modified Scheme will be with the assistance of Canara Bank (or any other scheduled bank). This Court can also supervise the implementation of the modified Scheme and take care of any grievance of any aggrieved creditor. According to the Company, there is enough cash flow available for repayment of the debts. It was submitted at the Bar, that the accounts with SBI Home Finance have since been squared up. Consequently, an asset worth Rs.13 crores is available because the NBCC building, which was mortgaged to SBI Home Finance has since been released. The Company has receivables of Rs.36 crores; the promoters are putting in Rs.16 crores in cash in terms of equity shares besides underwriting up to Rs.5 crores in the event of a shortfall in the projected cash flow. They are also giving up the unpaid dividend on their equity shareholding. The Company will engage itself in the business of information technology, which undertaking has already generated orders of Rs.60 lakhs which are under execution. The Company expects a cash infusion or cash availability of about Rs.33 crores from the new project. In other words, the total funds available to the Company are about Rs.103 crores while the total payable to the creditors on the sanctioning of the modified Scheme would be only Rs.84 crores.

70. The banks, particularly PSB and IndusInd Bank have accepted (or at best not opposed) the modified Scheme. These banks have agreed to forego huge amounts due towards interest and have agreed to invest in the shareholding @ Rs.30/- per share. As regards the "small creditors", it was submitted that they are classified as fixed deposit holders, debenture holders and ICD lenders (where the principal amount is Rs.5,000/- or less). They will be paid their principal amount in its entirety within 90 days of the effective date of the modified Scheme. Therefore, in monetary terms, the modified Scheme was said to be quite viable apart from being just, fair and equitable.

71. On the other hand, it was pointed out that if the Company does not abide by the terms of the modified Scheme, it loses a lot financially. The secured creditors that is PSB and IndusInd Bank will:-

"In the event that the Company fails to make the allotment of shares in accordance with the terms provided herein, or fails to make payment of interest and principal, as provided herein, the concessions made by PSB, shall stand withdrawn and the amount claimed in Civil Suit No.OA-244 of 2000 together with interest as claimed therein, in the Debt Recovery Tribunal, would stand accelerated and payable with immediate effect, subject to adjustments for payments already made.

The Company has agreed to enter into consent decree with PSB to record the above settlement with the Debt Recovery Tribunal, New Delhi."

(The above applies, mutates mutatis, equally to IndusInd Bank).

72. The creditors who appeared before me had a variety of grievances, not only against the modified Scheme but even generally. Some of these objections have already been dealt with above.

73. Some non-legal objections raised by the creditors are being mentioned only for completing the record. I am of the view that they require the recording of evidence to be substantiated, and include

(a) Presence of strangers at the meeting of unsecured creditors.

(b) Failure of the Company to send proxy forms with the notice convening the meeting. (c) Creditors were coerced into signing the proxy forms at the site of the meeting - some creditors were lured into signing the proxy forms by giving them 10% of the principal amount of the deposit on their doing so.

74. Apart from this, it was submitted that many creditors had earlier approached the Consumer Forum for relief. They had obtained favorable orders from the concerned Forum. These creditors naturally wanted the implementation of the orders of the Consumer Forum. Others had obtained a favorable order dated 17th July, 1998 from the CLB. They wanted the implementation of this order. Both sets of creditors wanted penal action to be taken against the concerned persons for not adhering to the order of the Consumer Forum or the CLB, as the

case may be. Basically, all of them wanted their money back and some punishment meted out to those who had hoodwinked them in the past and were allegedly continuing to do so. Some creditors also pleaded for orders in their favor either because of their old age or on medical grounds or for reasons of financial stringency. I do not consider it obligatory to deal with each of these submissions since they were, more or less, emotional in nature, rather than legal. Insofar as the implementation of the orders of the Consumer Forum or the CLB is concerned, that will depend on what orders are passed in this case.

75. The modified Scheme was criticised by the unsecured creditors as being vague, unworkable, inequitable, unconscionable and downright fraudulent.

76. Some of the submissions made in this regard include the following:

(a) It was stated by the Company before the CLB that its total aggregate assets were of the order of Rs.138 crores whereas the liability was only Rs.76 crores as on 31st March, 1998. In other words, the Company was financially sound and stable. Under these circumstances, there is no reason why the amounts could not have been paid to the creditors. Suddenly, as per the annual report for the year 1998-99, the Company showed a loss of about Rs.70 crores which, in the context, is not only inexplicable but is also far too high a figure.

(b) The valuation of the NBCC building has been shown to be Rs.13 crores but as per the annual report for the years 1996-97 and 1998-99, the fixed assets of the Company have not been revalued. Therefore, the value of Rs.13 crores cannot be taken for the purposes of calculating the assets of the Company. In this context, it was further submitted that the value of the building as on date is not known. Learned counsel for the Company responded by saying that revaluation of the fixed assets is not obligatory and indeed, on some occasions, it may lead to allegations of concocting figures to enhance the value of the assets.

(c) The subsidiary in which the Company proposes to make an investment of Rs.1 crores has not been identified.

(d) In the cash flow statement for repayment of debts, issue proceeds of equity shares to the extent of Rs.2 crores has been shown to "others". Who these persons are has not been identified. The submission in this regard is that the share of the Company is worthless in the market and there is no reason why anybody would want to purchase the shares of the Company. (e) In case of delay in payment of the principal amount to the fixed depositors, they will only be entitled to interest at 10% per annum. Since the quantum of interest is eventually to be converted into equity shares, the Company can very well stop paying the principal amount and convert the 10% per annum delayed interest into equity shares at Rs.30/- per share.

(f) In the annual report for the year 1998-99, even the auditors have criticised the Company by stating that "Adequate documents and records have not been maintained by the Company for grant of inter-company deposits and bill

discounting activities conducted in the past and nor have adequate records been maintained for dealing or trading in shares, securities, debentures and other investments conducted in the past and consequently it is not possible to certify whether timely entries have been made, or not, or whether the investments held by the Company are in its own name except to the extent of the exemption granted u/s 49 of the Companies Act, 1956". The submission is that if full facts are not disclosed to the Company's auditors, it is unlikely that full facts would have been disclosed to the creditors and this Court.

(g) Investment in the information technology business was totally unsafe given the present economic scenario and any venture by the Company into this is bound to fail and cause further detriment to the creditors.

77. All these submissions are really on the nuts and bolts of the modified Scheme and need not ordinarily be looked into. These are matters of commercial wisdom and judgment best left to those voting for or against the modified Scheme. This does not mean that the High Court is expected to accept the view of the majority of creditors without much ado, nor does it imply that the High Court has to analyze the modified Scheme with a magnifying glass. The High Court has only to see if the modified Scheme is fair and reasonable and for the benefit of the Company.

78. In *re Alabama, New Orleans, Texas and Pacific Junction Railway Company*, [1891] 1 Ch. 213, it was stated at page 239 as follows:-

"The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it."

79. It is essential, Therefore, to appreciate whether in this background, the modified Scheme should be sanctioned or not.

80. The starting point of a discussion in all such cases is the following passage from Buckley on the Companies Act (14th Edn., 1978), Volume 1, pages 473-474:-

"Function of the court In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

The court does not sit merely to see that the majority are acting bona fide and

thereupon to register the decision of the meeting; but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."

81. This passage has been cited with approval by the Supreme Court in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, .

82. While considering Sections 391 and 393 of the Act, the Supreme Court held in paragraph 28 of the Report as follows:-

"On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favor of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the scheme concerned placed for its sanction."

83. Thereafter, in paragraph 29 of the Report, it was stated as under:

"However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority

vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate."

84. Eventually, after discussing the case law on the subject, the Supreme Court laid down the following contours of the jurisdiction of the Company Court in such matters. It was held:-

"In view of the aforesaid settled legal position, Therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

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

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

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

(See also *In re IPCO Paper Mills Ltd.*, (1984) 55 Comp.Cas. 281.

85. In this context, it would also be useful to refer to the following passage from *Re Ratners Group plc*, [1988] BCLC 685 :-

"The court has over the years established, as counsel for the company has submitted, three principles on which the court will require to be satisfied. Those principles are, first, that all shareholders are treated equitably in any reduction. That usually means that they are treated equally, but may mean that they are treated equally save as to some who have consented to their being treated unequally, so that counsel's word 'equitably' is the correct word, which I adopt and accept. The second principle to be applied is that the shareholders at the general meeting had the proposals properly explained to them so that they could exercise an informed judgment on them. And the third principle is that creditors of the company are safeguarded so that money cannot be applied in any way which would be detrimental to creditors."

86. The matter has, in my opinion, to be looked at in this case from two different points of view, namely, from the point of view of those creditors (primarily unsecured) who attended the meeting and from the point of view of those who did not, because they too are equally bound by the decision taken at the meetings.

87. It might be easy to ignore the person who did not attend the meeting and to say that he (or she) stayed away at his (or her) own peril. It appears to me that this may be a rather simplistic (and erroneous) way of looking at the matter. Every unsecured creditor is, I think, entitled to a fair and candid Explanation as to why he is being called to a meeting. He (or she) is entitled to a proper and valid notice of the meeting. I can do no better in this regard than cite a passage from *Tiessen v. Henderson*, [1899] 1 Ch. 861, which expresses best what I have in mind:-

"The man I am protecting is not the dissentient, but the absent shareholder - The man who is absent because, having received and with more or less care

looked at this circular, he comes to the conclusion that on the whole he will not oppose the scheme, but leave it to the majority. I cannot tell whether he would have left it to the majority of the meeting to decide if he had known the real facts. He did not know the real facts; and, Therefore, I think the resolution is not binding upon him."

88. Why is it necessary for a shareholder or creditor to know the "real facts"? Because, he can then properly apply his mind to the question that he has to answer, namely, should I or should I not support the modified Scheme. This disclosure enables him to take an "informed decision", or an "informed view", or to vote in an "informed manner", or to be "properly consulted". In other words, full and true disclosure enables him to make an informed business judgment. In *Bank of Baroda Ltd. v. Mahindra Ugin Steel Co. Ltd.*, (1976) 46 Comp Cas. 277, it was stated as follows:-

"The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to reduce it to a mere registering agency and to prevent it from seeing whether there is such an objection to it as that any reasonable man might say that he could not approve it. So to use these principles would in reality be to misuse them and it would tantamount to abdication of a statutory function and duty imposed on the court and a breach of faith reposed in it by that class of small shareholders who for obvious reasons cannot and do not participate in the meeting or in the proceedings before the court and also by the dissident members who look upon the court to protect their interests even if they are not present before it having regard to the costs and inconvenience involved. The court cannot, Therefore, adopt a *laissez faire* attitude of the kind suggested by counsel merely because the requisite majority has passed the scheme and no discordant voice is heard in the court."

89. It is, I think, for this reason that the law provides (Section 393(1)(a) of the Act) that a notice convening a meeting should be accompanied by an Explanatory Statement - a document which explains to the lay person in a manner which is intended to be intelligible to him, what the modified Scheme is all about. It is not everybody, and surely one has to be realistic about it, who can (or would even attempt to) understand a dry document such as a scheme of arrangement. An Explanatory Statement is really addressed to such people, so that they may understand the modified Scheme without much of a fuss. They may, even then, choose not to attend the meeting, but that is a separate matter. They should, however, be enabled to first comprehend what they are called upon to answer and thereafter decide whether they are motivated enough to attend the meeting (in person or through proxy), or leave the decision making to others.

90. The facts of the present case admittedly show that no Explanatory Statement was sent to the creditors explaining the modified Scheme. What was sent to them was an Explanatory Statement dated 15th November, 2000 which explained the original Scheme. An Explanatory Statement pertaining to the modified Scheme was not, and indeed could not have been sent to the creditors

because the Board of Directors of the Company accepted and approved the modified Scheme only on 18th December, 2000, that is, the day of the meeting. Admittedly also, no Explanatory Statement was drawn up pursuant to this decision of the Board of Directors. Learned counsel for the Company was specifically asked if there was any reason why, out of 6667 unsecured creditors (both in person or by proxy) only 4492 cast their votes. More than 2000 unsecured creditors or roughly one-third did not vote at the meeting. He frankly stated that he could only hazard a guess and that was that they decided not to vote after hearing the discussions; perhaps, they were not able to make up their mind one way or the other. It was, however, emphatically submitted that no one was prevented from voting and there was no allegation to this effect. Therefore, why such a large number did not vote at the meeting must always remain a mystery. On my part, I would suspect that these unsecured creditors did not vote because they were completely taken aback by the modified Scheme which was quite different (in some material aspects) from the original Scheme and the Explanatory Statement in their possession. This is not of much consequence and so I leave it at that.

91. In any event, the Company failed to abide by one of the requirements of the law, namely, to circulate an Explanatory Statement to the unsecured creditors. The relevant facts were not adequately disclosed to the unsecured creditors to enable them to take an informed decision on whether or not to accept the modified Scheme. Since it was not contended on behalf of the Company that circulating the Explanatory Statement was not a mandatory requirement of the law, I am not venturing into this controversy. But, I am also not basing my decision only on this aspect of the case.

92. The problem has also to be looked at from the point of view of the absent unsecured creditor. He was given notice of the original Scheme and a Statement explaining this Scheme. He was perhaps willing to go along with the original Scheme, or in any event, was prepared to let the majority at the meeting take a decision. He was, unfortunately, not given notice of or even made aware of the modified Scheme, let alone explained what it was all about. He did not have the full facts when he decided not to attend the meeting. If the full facts or the "real facts" were disclosed to him, he may have attended the meeting (in person or through proxy) and affected the overall decision one way or the other. No one can say anything about this in any definitive way. But, what is of significance is the absence of disclosure of all the relevant material to him and others Constituting a vast majority of the unsecured creditors, who may have altered the course of the debates and discussions in the meeting held on 18th December, 2000. It is for this reason that the absent unsecured creditor assumes importance.

93. While the failure of the Company to circulate the Explanatory Statement was bad enough, the failure to circulate the modified Scheme was even worse. Not a single unsecured creditor could have ever imagined in his wildest dreams that he

was called upon to or was going to attend a meeting where he would be asked to accept a scheme other than the original Scheme that was given to him and advertised in the newspapers. One can well imagine the plight of such an unsecured creditor. He is handed over a document at the meeting which contains several terms and conditions which are disclosed to him for the first time; he is not properly explained the consequences or the impact of the modifications insofar as he is concerned, and yet he is asked to decide whether to accept them or not.

94. Contrast this with the dealings that the Company had with the banks and institutions. The latter were given sufficient time running into months to decide and negotiate an acceptable compromise with the Company. This resulted in several applications being moved by the Company in this Court for changing the date of the meetings. The banks and institutions who are assumed to be well-versed in financial matters needed months to make up their corporate mind whether to accept the offer made by the Company (with or without modifications) - but the unsecured creditor is given a few minutes or hours to take a decision on the modified Scheme.

95. In this context, no distinction can be made on the basis of the quantum invested by the banks and institutions on the one hand and the unsecured creditor on the other. A few thousand rupees is as much (if not more) important to a small investor as a few crores or lakhs would be to a bank or institution. Learned counsel for the Company, quite fairly I think, did not seek to draw any distinction on the basis of the quantum of investment.

96. What was submitted instead was that no unsecured creditor asked for the meeting to be adjourned to enable him to study the implications of the modified Scheme. In literal terms, this may be so. But if one reads the protest letters handed over to Mr. Rana, Advocate, a different picture emerges. The Company is alleged to be playing a fraud, committing a crime, swallowing the hard-earned money of the depositors and so on. A request is made for a postponement of the meeting for various reasons such as non-receipt of the notice convening the meeting, strangers being brought in to vote, innocent depositors being unfairly lured to sign the proxy form on payment of 10% of the principal amount, the goings-on at the meeting were alleged to be "totally uncontrolled" and so on. All this leads me to believe that a substantial number of unsecured creditors who were present physically had no faith in the impartiality of the meeting and did not want it to go on. If this does not mean asking for an adjournment of the meeting, I wonder what will.

97. It was not suggested that in view of these protests, a vote was taken whether the meeting should be adjourned or not. Surely, this is the least that could have been done.

98. One has also to consider another aspect concerning the protest letters. It is that those present at the meeting seemed to believe (and rightly so) that the

meeting was being held under the orders of the High Court. In that case, there was little that the depositors could expect Mr.Rana, Advocate to do other than obey the orders of the High Court and go ahead with the meeting. The common man would most likely believe that little else could be done but to voice his objections and grievances to this Court - which he has done, either through protest letters handed over to Mr.Rana, Advocate or by appearing in this Court.

99. Again coming back to the absent depositor, he was effectively and completely prevented from protesting against, objecting to or seeking an adjournment of the meeting. He was absolutely clueless about the shenanigans of the Company - for no apparent fault of his - due to the acts and omissions of the Company. When I consider the plight of the absent creditor in this connection, it is not with regard to a few or many of them - it is with regard to tens of thousands of them.

100. Applying the law laid down by the Supreme Court in Mafatlal, the conclusion is inevitable that the unsecured creditors were not disclosed the relevant or the necessary facts. This prevented them from taking an informed decision or an informed view with regard to accepting or rejecting the modified Scheme. Consequently, the decision taken on 18th December, 2000 is not binding on the unsecured creditors as a whole.

101. It was contended by learned counsel for the Company that the modifications in the original Scheme caused no prejudice to the unsecured creditors. That may be what the Company feels. But, it is the unsecured creditor who is the best judge to decide whether he is prejudiced or not, and the decision of the unsecured creditor is best expressed by his vote in favor of or against the modified Scheme. Was he given a fair opportunity to come to any informed conclusion? Was he given the relevant or necessary material or even the time to conclude that he was not prejudiced? The answer to these questions has to be in the negative. The 'no prejudice' theory has to be rejected.

102. Learned counsel then submitted that modifications to the original Scheme were not only postulated by law but permitted by the orders of this Court passed on 25th May, 2000 and 29th September, 2000. There can be no doubt that the original Scheme could have been modified at the meeting held on 18th December, 2000. But, modifications such as those postulated by law are ones which are arrived at after a debate or a discussion. Such modifications evolve through a dialectical process. But this is not what happened at the meeting. The Company came out with a scheme which was referred to by the Company itself as a modified Scheme. It was this document that was sought to be voted upon. It was not a document or a scheme which took birth at the meeting. Had that been the position, it may have been possible to accept what was contended on behalf of the Company. What was given to the unsecured creditor was a document or a scheme that had taken birth the same morning (assuming the Board of Directors met before the meeting was convened). The unsecured creditor was then asked to accept the modified Scheme as it is or leave it, or to partially modify it. It was not suggested to the unsecured creditor, and it was

surely not the suggestion of the Company, that he could revert to the original Scheme.

103. I am afraid it is not possible for me to read the statute or the orders of this Court as permitting the Company to place, in the first instance, a modified Scheme in the meeting of the creditors, as was done in this case and ask them to vote upon it.

104. Learned counsel for the Company (once again quite fairly) did not contend that the modifications were inconsequential and, Therefore, permissible. A bare reading of the modifications extracted in this decision shows that the modifications were substantial. In any event, the modifications concerning PSB and IndusInd Bank were such that it would not have been possible for learned counsel to contend that the changes were not material ones.

105. This leads me to a rather disturbing feature of this case. It is not as if only the unsecured creditors were kept in the dark about what was going on behind the scenes. Even this Court was not given the full, material and correct facts by the Company. Some important facts came to light only on the first date of hearing, that is, on 26th November, 2001. The rest of the facts came to light only on the last date of hearing, that is, on 13th December, 2001.

106. It may be recalled that SBI Home Finance is one of the secured creditors of the Company. The original Scheme faithfully stated that the Company is entering into a settlement with SBI Home Finance whereby the Company shall pay Rs.2.9 crores to it by 30th October, 2000 and issue shares worth Rs.45 lakhs (at a premium of Rs.20/-) within 90 days of the effective date. The modified Scheme circulated on 18th December, 2000 stated that the compromise had been entered into and SBI Home Finance will be paid Rs.2.9 crores on or before 31st March, 2001 under a monthly schedule of payments. Instead of allotting shares of the value of Rs.45 lakhs, SBI Home Finance would now be allotted shares of the value of Rs.25 lakhs.

107. In actual fact, SBI Home Finance had already been paid Rs.50 lakhs by the Company by a Pay Order dated 8th December, 2000. This was not disclosed to the unsecured creditors. This Company Petition was filed on 31st January, 2001 on which date another Rs.75 lakhs was paid to SBI Home Finance. The balance payment of Rs.1.65 crores was made before 31st March, 2002 during the pendency of this Company Petition and without anyone being told about it. In other words, except for the allotment of shares, the entire liability of the Company towards SBI Home Finance was discharged by the Company even before the modified Scheme could be taken up for consideration by this Court.

108. As regards the dues of PSB and IndusInd Bank (both secured creditors), the original Scheme informed the creditors that they will be paid gradually over a period of several years. The first such payment of 15% of the calculated amount of debt was to be paid within 90 days of the effective date of the original Scheme. In the modified Scheme, it was stated that PSB would be paid Rs.50

lakhs on or before 31st March, 2001 and IndusInd Bank would be paid Rs.1.375 crores on or before the above date and another amount of Rs.91.66 lakhs on or before 30th June, 2001. During the pendency of this Company Petition, all three payments totalling about Rs.2.80 crores were made to these banks without informing any of the unsecured creditors, much less this Court.

109. The modified Scheme also requires the Company to issue shares to these banks before 31st March, 2001 and issue share certificates or dematerialised share receipts on or before 31st May, 2001. I suppose this has also been done by the Company. There is no way of knowing for sure, one way or the other, in the absence of the Company coming out clean before this Court.

110. Similarly, the Company entered into an out of Court settlement with Federal Bank (an unsecured creditor). With effect from 29th January, 2001 onwards, the Company began to discharge its liability to Federal Bank. By 29th August, 2001, the entire liability of Rs.52.53 lakhs was discharged during the pendency of this Company Petition and before the modified Scheme could be considered by this Court.

111. The Company has another huge creditor, the Central Bank of India (debenture trustee) which has filed a suit against the Company for the recovery of about Rs.44 crores in the Bombay High Court. Initially, this bank vehemently opposed the frequent change of dates for holding the meetings of the creditors. Suddenly, on 23rd April, 2001 this bank stated before this Court that it was supporting the modified Scheme. One can only wonder why.

112. During the pendency of the Company Petition for sanctioning the modified Scheme by this Court, the Company made payments of about Rs.6.2 crores to its secured and unsecured creditors. This is the figure that has been disclosed during the hearing of this case. One cannot say if any other payments, not disclosed to this Court, were made by the Company. In addition, the Company has, in all probability, issued shares of an undisclosed amount to PSB and IndusInd Bank.

113. All this goes to show that not only did the Company deprive its unsecured creditors of a fair and reasonable opportunity of stating their point of view at the meeting held on 18th December, 2000, but also that the unsecured creditors were deprived by the Company of making a fair representation in this Court also.

114. Some of the unsecured creditors who appeared before me objected to being "coerced" to pay Rs.30/- for a share (out of the interest on their money) to the Company which share, according to them, is now quoted at less than Rs.2/-. I asked learned counsel for the Company whether the figure of Rs.30/- per share had been arrived at on the basis of some scientific or empirical material or evaluation of data. He candidly answered in the negative. The figure of Rs.30/- per share seems to have been (figuratively speaking) pulled out of a hat.

115. A somewhat similar question arose before the Supreme Court in *Mafatlal*. In

paragraph 40 of the Report, the Supreme Court stated as follows:-

"It was submitted that the exchange ratio of equity shareholders so far as the transferee- Company is concerned works very unfairly and unreasonably to them. ... M/s C.C.Chokshi & Co., a reputed firm of chartered accountants, having considered all the relevant aspects suggested the aforesaid exchange ratio keeping in view the valuation of shares of respective companies. It must at once be stated that valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy. Pennington in his Principles of Company Law mentions four factors which had to be kept in mind in the valuation of shares:

(1) Capital Cover, (2) Yield, (3) Earning Capacity, and (4) Marketability.

For arriving at the fair value of share, three well-known methods are applied:

(1) The manageable profit-basis method (the Earning Per Share Method).

(2) The networth method or the break value method, and

(3) The market value method.

So many imponderables enter the exercise of valuation of shares. M/s C.C.Chokshi & Co. considering all the relevant aspects and obviously keeping in view the accounting principles underlying the valuation of shares suggested the said ratio which was found acceptable both by the Board of Directors of the respondent-Company as well as the Board of Directors of the transferor-Company."

116. One has to, Therefore, assume that some acceptable principles ought to have been considered by the Company before valuing its shares at Rs.30/- each. (See also Jindal (India) Limited Vs. Cold Rollings India Pvt. Ltd.,). This was admittedly not done.

117. Reliance placed by learned counsel for the Company on *In re Maneckchowk and Ahmedabad Manufacturing Co. Ltd.*, [1970] 40 Comp.Cas. 819 is inapposite. The question is not whether, in principle, shares can be allotted in lieu of a verified claim, nor is the question about the adequacy of the consideration. The question is whether the decision to arrive at the figure of Rs.30/- per share is based on some material or is it an arbitrary decision. According to learned counsel for the Company, there was no material for valuing the shares of the Company at Rs.30/- per share. The figure was, Therefore, arbitrarily arrived at. To this extent, the unsecured creditors are justified in making a grievance of their interests being jeopardised by the Company. Incidentally, in *Maneckchowk*, the shares were given at a discount, while in this case, the Company is giving the shares at a premium.

118. The next question that arises for consideration is whether the creditors were validly classified. It was the contention of the unsecured creditors that putting all the unsecured creditors in one class was a mistake since there were several

kinds of unsecured creditors. Consequently, it was submitted that one meeting of the unsecured creditors was not the appropriate way of having that broad class consider the modified Scheme.

119. How does one define a class? In *Sovereign Life Assurance Co. v. Dodd* [1892] 2 QB 573, it was stated as follows:-

"The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, 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."

120. Palmer's *Company Law*, 24th Edn., pp.1140-1142 discusses what constitutes a class, particularly of creditors. Broadly speaking, it has been said that "Creditors can be divided into three categories (which may themselves overlap) of preferential creditors, secured creditors and unsecured creditors".

121. There is no doubt that in the present case, the broad classification of "secured creditors" and "unsecured creditors" was adhered to. However, the differences between the class of unsecured creditors as a whole was sought to be highlighted. In other words, what was contended was that many unsecured creditors did not have a common interest with other sets of unsecured creditors and, Therefore, could not be put in the same class for holding a meeting, and the interests of the various sets of unsecured creditors were not similar.

122. A somewhat identical question came up for consideration in *Re BTR plc* [1999] 2 BCLC 675. In that case, which concerned shareholders, it was held as follows:-

"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."

123. This view of the Court was considered in appeal in *Re BTR plc*, [2000] 1 BCLC 740. The Appellate Court accepted the view of the Trial Judge and considered the suggestion made by learned counsel therein that if his averment was accepted, the company in that case would have to call almost 40 separate meetings. It was held that this approach could not be accommodated within the structure of the law.

124. This issue was also raised before the Supreme Court in *Mafatlal*. The question raised before the Supreme Court is stated in paragraph 26 of the Report as follows:-

"Whether separate meeting of minority shareholders represented by the appellant was required to be convened on the basis that the appellant's group represented a special class of equity shareholders".

125. After quoting *Palmer's Company Law*, the Supreme Court said:-

"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 sub-class 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 equity shareholders represented by him. The fourth point for determination, Therefore, is answered in the negative."

126. So far as the facts of the present case are concerned, various categories of unsecured creditors were sought to be identified. One category consisted of those who had made deposits of less than Rs.5,000/-, as considered in the modified Scheme itself. Another category consisted of those who had approached the CLB and got an order in their favor. Yet another category consisted of those who had approached the various consumer fora and had obtained an order in their favor. In other words, the classification suggested on behalf of the unsecured creditors springs from different motivations such as the amount of the deposit or the amount of interest awarded by the CLB/Consumer Forum on the principal amount or the time frame within which the deposit has to be returned. It is difficult to accept that all these sub-categories had an interest which was so dissimilar as to preclude their being placed in one class or to say that heterogeneous groups were being treated alike. The interest of each unsecured creditor is the same, namely, the return of his deposit with interest as soon as possible. How this result is to be achieved is a different matter altogether. But, this does not necessarily indicate that the interest of each sub-category of unsecured creditors is different from that of another because of a motivation for achieving a partially dissimilar result.

127. In *Hindustan Development Corporation Ltd. v. Shaw Wallace & Co.*, (APO Nos.16, 829 and 212 of 1998, decided on 15th June, 1999), a Division Bench of the Calcutta High Court is said to have considered the entire case law and come

to a similar conclusion. Learned counsel for the Company handed over a computer printout of this decision of the Calcutta High Court but since the computer printout refers to it as a decision of the Kerala High Court, I am not inclined to accept the printout as a correct version of the decision of the Court. There may be other errors in the computer printout. However, assuming what learned counsel for the Company says is correct, (and I have no doubt about that) this decision also lends support to the conclusion that I have drawn in this regard. It may be mentioned that SLP (C) No.8788-90/1999 directed against the decision of the Calcutta High Court was dismissed by the Supreme Court on 31st August, 1999 by saying that ".....the view expressed by the Division Bench in its order dated 16.6.1999 is a fair and reasonable view which suffer (sic) from no error."

128. Accordingly, putting all the unsecured creditors into one class cannot be said to be an invalid classification, on the facts of this case.

129. Another submission of learned counsel for the Company is required to be considered. This was to the effect that the activities of the Company were not detrimental to the public interest. It was contended that it is for this reason that the Reserve Bank of India (RBI) did not exercise its powers under the Reserve Bank of India Act, 1934 for winding up the Company. On the other hand, with regard to similarly placed companies, it was pointed out that the RBI had taken far more stringent action. In support of this contention, reliance was placed upon an unstarred question raised in the Rajya Sabha on 28th August, 2001. In answer to that question, the Hon"ble Minister had given a chart indicating what action, if any, has been taken against NBFCs holding public deposits of more than Rs.20 crores as on 31st March, 2001. With reference to the Company, it was stated that an Observer had been appointed and that the Company had submitted plans for re-organisation in this Court.

130. In this context, it is worth noticing that the Regional Director, Northern Region, Department of Company Affairs, Kanpur has filed an affidavit dated 10th August, 2001 in this Court (in Volume V of the paper book) pursuant to a notice issued to the Central Government. In paragraph 3 of the affidavit, it is stated that "The Reserve Bank of India contemplated action but action could not be taken in view of the present re-structuring scheme pending in the Hon"ble High Court."

131. Learned counsel for the Company stated that there was no material for stating this and that this was merely the ipse dixit of the Regional Director. Quite apart from this, the allegations made against the Company were for the violation of certain provisions of the Act which were compoundable and applications for compounding these offences had already been made and requisite fees deposited. It could not, Therefore, be said that the Company had acted against the public interest. Moreover, there was no allegation of diversion of funds or any such material or serious illegality.

132. One need not get into this controversy whether the Company had acted contrary to the public interest or not, but it should be made clear that no order was passed by this Court preventing the RBI from taking suitable action as it thought fit under the law. Assuming what the Regional Director says is correct, if the RBI chose to restrain itself, it was entirely its own decision and this Court did not prevent the RBI from taking any action permissible in law.

133. Finally, learned counsel for the Company submitted that if the modified Scheme is not sanctioned by this Court, then the Company will die a civil death. This will mean that the unsecured creditors will get virtually nothing - while under the modified Scheme they will get at least something. Consequently, it was submitted that the modified Scheme should be sanctioned. Reliance was placed on *Maneckchowk and In re Navjivan Mills Co. Ltd.*, [1792] 42 Comp.Cas. 265. It is true that winding up a company should really be the last option exercised by a Company Court. The question presently is whether the modified Scheme propounded by the Company should be accepted or not. If the modified Scheme is accepted, then it has to be implemented. If the modified Scheme is not sanctioned, then the law will take its course. Ultimately, if this results in winding up the Company, it cannot be helped. As and when the question whether the Company should be wound up or not arises, it will be dealt with. Otherwise, if this submission of learned counsel is to be accepted, then the provisions regarding winding up of a company deserve to be deleted from the Act. Surely, this cannot be.

134. In view of the above discussion, I am of opinion that the creditors (particularly the unsecured creditors) were effectively prevented by the Company from taking an informed decision on the acceptability of the modified Scheme. Under the circumstances, I regret my inability to accord sanction to the modified Scheme.

135. The Company Petition is dismissed. All interim orders stand vacated. All pending applications in this case and in CA 811/2000 are disposed of in the light of the above.

136. No costs.