

**(1994) 04 GUJ CK 0011**  
**In the Gujarat High Court**  
**Case No : Company Application No. 54 of 1994**

Gujarat Kamdar Sahakari Mandal and Others

APPELLANT

Vs

Ramkrishna Mills Ltd.

RESPONDENT

**Date of Decision :** 07-04-1994

**Acts Referred:**

Companies Act, 1956 — Section 100, 101, 102, 103, 104

**Citation :** (1998) 92 CompCas 692 : (1995) 2 GLR 1619

**Hon'ble Judges :** S.D. Shah, J

**Bench :** Single Bench

**Advocate :** B.R. Shah, H.V. Chhatrapati, S.M. Singhi, S.I. Nanavati and D.S. Vasavada, for the Appellant;

## Judgement

S.D. Shah, J.—By this application, the Gujarat Kamdar Sahakari Mandal and two other individuals claiming to be the workers of Ahmedabad Shree Ramakrishna Mills Co. Ltd. (In liquidation) have taken out a judge's summons for directions to convene meetings of the members, creditors and the employees of the company in liquidation u/s 391 of the Companies Act, 1956. Affidavit in support of the summons is filed.

2. From the averments made in the affidavit in support of the summons it becomes clear that applicant No. 1, Gujarat Kamdar Sahakari Mandal Ltd., is a registered co-operative society under the provisions of the Co-operative Societies Act, and applicants Nos. 2 and 3 are the workers of the company in liquidation. It is their case that as workmen they are entitled to receive their dues, i.e., retrenchment compensation, gratuity, etc., and such dues of applicants Nos. 2 and 3 and other class of workers would approximately work out to Rs. 6 crores and, therefore, they have stated that in their capacity as creditors they have filed the present summons.

3. The applicants have proposed the scheme of compromise and arrangement for the revival of the Ahmedabad Shree Ramakrishna Mills Co. Ltd. with or without modification provided that such scheme is approved by secured and unsecured

creditors, preferential creditors of the company and provided that it is also approved by the equity shareholders. The authorised share capital of applicant No. 1 society is stated to be Rs. 10 lakhs divided into one lakh shares of Rs. 10 each while its issued, subscribed and paid-up capital is Rs. 4,06,000 divided into 40,600 shares of Rs. 10 each. The paramount object of applicant No. 1 is to remove unemployment of the members and to revive or restart the closed units and thereby to generate employment opportunities for its members. The applicant society claims to have a membership of 4,060 persons out of which 3,700 members are workmen of different textile mills. The company in liquidation was engaged in the business of textile manufacturing. Since 1983, the company ran into financial difficulties and ultimately in the year 1987, it came to be closed down. By order, dated April 23, 1987, of this court in Company Petition No. 57 of 1987, the company was ordered to be wound up and the official liquidator has taken over the custody of the assets of the company. It is the case of the applicant that because of the closure of the company in liquidation and because of closure of a large number of textile mills in Ahmedabad city, a large number of employees or workers working in such mills are rendered jobless and unemployed. Some of the sick textile units were nationalised by the State Government. It is its case that a number of other measures are taken and concessions granted by the State and Central Governments with a view to restarting sick units and with a view to encouraging the healthy units to take over such sick or closed units. It is further stated that the Central Government has also recently announced its policy of helping the sick units of various mills so that they can restart and, therefore, the applicant company has thought of reviving the opponent company and in that direction a step was taken by filing Company Application No. 771 of 1993. In such application, at the oral request of applicant No. 1-company, the learned company judge permitted the applicant-company to carry out the work of cleaning the premises of the opponent-mill company and of oiling and greasing the plant and machinery of the company and that such work was carried out by employing 42 workers. It is the case of the applicant society that it requested the Ahmedabad Textile Industries Research Association (ATIRA) to carry out the study as to the feasibility of reviving the closed undertaking of the opponent company and a report is submitted by the ATIRA. Based on such report the executive committee of the applicant decided to take necessary steps for revival and rehabilitation of the opponent company and for that purpose it has formulated, a scheme of compromise and arrangement which is produced at annexure "C" to the application. The object of the scheme is to revive and rehabilitate the Ahmedabad Shree Ramakrishna Mills Co. so that the jobless workers could be provided jobs and some job opportunities could be generated. It would be necessary to refer to the various proposals of the scheme and at appropriate places reference thereto shall be made.

4. The aforesaid schemes proposed by the applicants and the company application seeking directions to convene meetings of various affected interests is seriously opposed by the secured creditors of the company in liquidation. The

secured creditors of the company are (1) Industrial Finance Corporation of India Ltd., (2) ICICI, (3) Central Bank of India, and (4) the Executors and Trustees Department of the Central Bank of India.

5. The Industrial Finance Corporation of India Ltd. has filed a detailed affidavit of S. R. Patel, Manager (Law) and he has set out various reasons as to why no directions as prayed for in the summons should be issued and as to why the company application should be rejected. Similarly, the Central Bank of India has also filed an affidavit-in-reply of H. N. Bhatnagar, chief manager and has opposed the request for issuance of any directions as prayed for in the judges' summons.

Objections from secured creditors :

(1) After going through the affidavits-in-reply filed by two of the secured creditors, and after hearing the submissions made by learned counsel for the parties, i.e., H. V. Chhatrapati, S. M. Singhi and S. I. Nanavati, the objections could be summarised as under :

(a) The company application is filed by a co-operative society-applicant No. 1. It is purely a private party having no locus standi to move such an application. It is alleged that applicant No. 1 society is totally unconnected with the workers of the mill company in liquidation, therefore, also such an application u/s 391 is not maintainable.

(b) Applicant No. 1-society is neither a creditor nor a shareholder of the company in liquidation. The applicant society is not comprising workers of the mill company in liquidation and, therefore, also the summons deserves to be rejected.

(c) The present summons is taken out in Company Application No. 771 of 1993, which in its turn was taken out in M.C.A. No. 37 of 1988. The proceedings of Company Application No. 771 of 1993 were thus, incompetent for the reasons stated in the two affidavits-in-reply filed in such proceedings and, since the present summons is taken out in the said incompetent proceedings this summons is also liable to be rejected.

(d) Summons is taken out at a belated stage inasmuch as by various orders which are passed by the company judge of this court, Industrial Finance Corporation of India Ltd. was authorised to appoint a recognised valuer and to obtain a valuation report with respect to the properties and assets of the company; that after obtaining such report even advertisements were issued in English and Gujarati newspapers inviting offers for the movable and immovable assets of the company clearly stipulating that an offer which is for an amount lower than Rs. 8,47,22,000 will not be considered and that was also done under the order dated April 20, 1991, of the court. It is further submitted that since the upset price was fixed in the advertisement and no party came forward to make any offer for purchasing the assets of the company, another attempt was made by issuing a further advertisement without setting out the upset price, in response to which seven offers were received. It is further submitted that when

sufficient progress is made in the direction of disposing of the assets and properties of the company in liquidation so that the dues of the secured creditors could be realised such an application is filed at a belated stage after expiry of approximately more than six years, and, therefore, it should not be entertained.

(e) The proposed scheme by applicant No. 1-society is no scheme of arrangement in the eye of law as there are no concrete proposals. The scheme is very vague. The scheme is both technically and economically not viable. The scheme does not stipulate starting of the entire unit but it merely stipulates starting of the processing unit without starting the weaving unit. The scheme makes no provision for proper finance to start with and in the absence of financial soundness of the applicant the scheme is bound to fail. The scheme, in fact, is based on the possibility of waiver of liabilities of the closed unit by the Government of India, and as such, the possibility is once again based on some nebulous and platitudinous statement made by a Member of Parliament, it cannot be said to be based on any reliable foundation. In fact, no Government's policy or positive stand of the Government is annexed to the scheme which may justify an inference that the Government would definitely waive the liabilities of the company in liquidation. The scheme is, therefore, stated to be hollow and absolutely impracticable and defective on almost every count. It is submitted that since the secured creditors unanimously objected to the scheme no useful purpose will be served by issuing directions as prayed for because by filing these very objections the secured creditors have pointed out their objections to the scheme and, therefore, convening of meetings would be nothing but an exercise in futility and the court should not direct such an exercise to be undertaken.

Case of the applicant :

Mr. B. R. Shah, learned advocate for applicant, has very strenuously urged before this court that this application is in the nature of an experiment as the workers' participation in the industries is an avowed object of the Constitution of India, and, therefore, if the workers' co-operative come forward with a proposal to restart the closed unit, the same should not be discouraged or denied the opportunity of consulting the affected interests. He submitted that the secured creditors or other affected interests are not bound by the proposed scheme and they have full freedom and liberty either to accept or reject the same with or without modification, but simply because objections are filed it cannot be said that there should not be any discussion, deliberation or expression of views by the affected interests on the proposed scheme. The scheme is only a proposal and it may be that after discussion, deliberation and consultation a totally new scheme might emerge which may be acceptable to the affected interests including the secured creditors, and therefore, on such a rigid and recalcitrant attitude of the secured creditors the opportunity of consulting affected interests should not be denied to the applicant. He submitted that too technical objections should not be permitted to be raised as the ultimate objective is to restart the closed unit by the workers themselves and such an attempt would be a trend-

setter heralding a new era of revival of industries by the workers themselves so as to provide job opportunities to themselves. He submitted that at this stage the merits of the scheme are not required to be gone into as the merits and demerits will be discussed elaborately at the meeting sought to be convened by the shareholders and even if the secured creditors may have a final voice, they should not be permitted to take an adamant stand so as to exercise power of veto thereby denying an opportunity to the applicant to hold the meeting and to put forth their points of view on the scheme so that the unit might restart. Such power of veto can be exercised even thereafter by the secured creditors, and therefore, also the relief prayed for in the application should be granted, submits Mr. B. R. Shah, learned advocate for the applicant.

Re-objection (a) and (b) :

(i) It is true that initially an application was filed by Gujarat Kamdar Sahakari Mandali Ltd. It is also true that the original applicant is a registered co-operative society. It is also true that the said applicant is neither a creditor nor a shareholder of the company in liquidation. This objection to the maintainability of the application, as it stood prior to its amendment, would have been a strong technical objection. However, leave to amend the company application was granted to the applicant during the course of hearing and applicants Nos. 2 and 3 were permitted to be added as party applicants. From the cause title of the application as it stands now Chhalashankar D. Shukla and Kalyanbhai Ramchandra Sharma are applicants Nos. 2 and 3, who were the workers of the company in liquidation. It is their case that as workers of the company in liquidation they are entitled to retrenchment compensation, gratuity, etc., on closure of the mill company. According to them, the total outstanding dues of the entire class of workers would be in the vicinity of Rs. 6 crores, and, therefore, in their capacity as creditors of the company they have filed this application. If the aforesaid submission made in the application is taken into consideration the objections shall have to be overruled. Mr. H. V. Chhatrapati, learned advocate for one of the secured creditors, has, however, submitted that such a belated amendment at the fag end of the conclusion of hearing should not have been allowed and even if allowed the statement sought to be inserted by the proposed amendment should not be relied upon. He has submitted that there is no evidence worth the name to show that applicants Nos. 2 and 3 were the workmen of the company in liquidation and that they were retrenched and that they were entitled to retrenchment compensation and gratuity. He further submitted that no affidavit-in-support of the said assertion is made, and, therefore, also the objection of the secured creditors against the maintainability of the application should be upheld. In order to bring home the said technical objection a further affidavit is filed in the registry of the court which is also taken on record. The burden of the song of the said affidavit is that an attempt to amend the application at the fag end of the hearing was a crude attempt and any statement sought to be introduced by the said amendment should not weigh with the court.

(ii) Once amendment is granted by this court and applicants Nos. 2 and 3 are permitted to be joined as party applicants, and once necessary assertions are made by applicants Nos. 2 and 3 that they are the creditors of the company in liquidation in the sense that they are entitled to recover retrenchment compensation, gratuity and other benefits from the company in liquidation, in the opinion of this court, a foundation is laid and it can be said that applicants Nos. 2 and 3 as representing the class of workers can maintain such application u/s 391.

(iii) It is further submitted that the scheme was sponsored by applicant No. 1-society and that the scheme remains one which is sponsored by applicant No. 1-society. Since applicant No. 1-society is neither the creditor nor member/shareholder of the company in liquidation, the application is not maintainable and would remain to be not maintainable. In my opinion, once applicants Nos. 2 and 3, who are members of applicant No. 1-society are impleaded as party applicants, and once it is asserted that they are the creditors of the company in liquidation, in the sense stated hereinabove, the objection has no foundation to stand and it shall have to be rejected. The objection would pale into insignificance the moment it is established that applicants Nos. 2 and 3 who are the members of applicant No. 1-society are in law entitled to maintain such application. If the application is maintainable at the instance of a single creditor and if it is filed by such single creditor for and on behalf of himself as well as by the society of which he is the member it cannot be said that such application is not maintainable. In that view of the matter, the aforesaid objections (a) and (b) are overruled.

Re-objection (c) :

(i) The objection as set out hereinabove itself makes clear that it is once again a technical objection. The objection is, to say the least, not expected of a banking institution or financial institution. To say that the present summons is taken out in Company Application No. 771 of 1993, which in its turn was taken out in M.C.A. No. 37 of 1988 would make the present company application incompetent is nothing but to put to the forefront a purely technical objection. In the opinion of this court this company application without stating in which proceedings it is filed could have been filed in this court in view of the fact that winding up proceedings are pending in this court. In winding up proceedings if a company application of this nature is filed one fails to understand as to how such application becomes incompetent simply because it is stated to have been filed in some other proceedings such as Company Application No. 771 of 1993 and M.C.A. No. 37 of 1988. This objection does not go to the root of the matter nor does it make a proceeding taken out by applicant No. 1-society incompetent, and, therefore, this objection is overruled.

Re-objection (d) :

(i) Two of the secured creditors in their affidavits-in-reply have taken up the stand that the application of this nature is taken out belatedly at a stage when

various orders are already passed by the learned company judge of this court so as to take steps for effecting sale of properties. It is submitted that in fact public advertisements were also issued and offers were also invited from the prospective buyers. The court has also taken steps to dispose of the assets of the company in liquidation and when the court has taken such steps an application of this nature should not be entertained.

(ii) It is true that towards sale of assets of the company in liquidation some attempts are made by this court. With a view to ascertain the possible market value of the assets of the company in liquidation the valuation report of the properties was called for. Thereafter, advertisements were issued in newspapers setting out the upset price of the assets of the company in liquidation and inviting offers from the prospective buyers intimating to them the upset price so that they can quote a price higher than the upset price. The outcome of such advertisement was that no party came forward to make any offer for purchasing the assets of the company, and thereafter another attempt was made by issuing advertisements without setting out the upset price in response to which seven offers were received. It is at that stage that the application is filed by the society proposing the scheme. It is, therefore, submitted that when sufficient progress is made towards sale of the assets and properties, an application of this nature by the aforesaid workers is belatedly filed and is filed solely with a view to defeating the process of sale already commenced by this court. At this stage it is required to be noted that in the absence of any scheme and the arrangement to revive or restart the textile unit, and in view of the fact that the secured creditors wanted to enforce their securities by remaining outside the winding up proceedings they approached the court for necessary permission. In the absence of any scheme from any quarter the judge of the company court was expected to take some reasonable step on such application. It was with a view to processing such application and with a view to knowing the price which the assets of the company could fetch that this court has taken various steps. However, taking of such steps by this court would not militate against an application proposing a scheme to restart a closed unit. At this stage, this court has simply received seven offers which are far below expectation and the market price at which the properties are valued by the valuer of this court. It is in the light of the aforesaid that the court is required to decide as to whether the application which is moved by the applicants can be thrown out solely on the ground that it is filed belatedly. It is required to be noted that unemployed jobless workers ordinarily would try to wait for some time till attempts are made by the old or any other management to restart the closed unit. When such attempts have failed and when the jobless workers have found themselves in a helpless situation a society of such workers has come forward with the proposed scheme. Some of its members are ex-workmen of the company in liquidation. If such a scheme is put forward at a stage when no concrete step is taken by this court towards completing any sale, in the opinion of this court it cannot be said that such an application is belatedly filed. Even otherwise to decide as to whether a proceeding is initiated belatedly

or not the court shall have to keep in mind as to whether any such delay has adversely affected the party which is putting forth the ground of limitation, delay and/or laches so as to defeat the cause of the other party. In the opinion of this court the delay caused in filing application by the applicants has in no way defeated any of the rights of the secured creditors and even otherwise rights of the secured creditors are not in any way likely to be defeated by the proposed scheme or any other scheme or even if ultimately the proposal for the scheme fails the right of the secured creditors would remain intact though it shall have to be stated that the enforcement of the right over the assets of the company which they have already resorted to would be postponed and/ or delayed for some time. As against such delay, the possibility of restarting the unit shall have to be kept in mind, and, therefore, this court is of the opinion that this objection also cannot be accepted and the same is, therefore, overruled.

Re-objection (e) :

(i) It is submitted that the proposed scheme annexed to the application is no scheme or proposal in the eye of law as it is absolutely vague and unworkable. It is submitted that the scheme is neither technically nor economically viable. It is further submitted that even under the proposed scheme, the entire unit is not to be started, but the proposal is to start only the spinning unit while there is no proposal to start the weaving unit. In fact, there is a tacit admission that the applicant-society is not in a position to start weaving unit at this stage. It is further submitted that financially also the applicant-society is not in a position to fulfil its obligation inasmuch as the entire scheme is based on possibility of waiver of above liabilities of the closed unit towards the Government and semi-Government organisation and financial institutions. It is submitted that the scheme is so hollow and so truncated that it is not likely to be accepted by any reasonably prudent and rational class of creditors much less by a conscientious class like that of the secured creditors, the financial institutions. Lastly, it is submitted that on consideration of the provisions of the scheme the financial institutions are not likely to accept the scheme. The scheme should be rejected as unworkable, unreasonable and impracticable. In this connection, reliance was placed upon the decision of the learned single judge of this court in the case of *In Re: Krishnakumar Mills Co. Ltd. (In Liquidation)*, .

(ii) While deciding the aforesaid objection on the merits of the scheme this court shall have to keep in mind the fact that section 391 of the Companies Act, 1956, gives the widest discretion to the court to approve any sort of arrangement and/ or scheme. Ordinarily and practicably the court will also be in favour of reviving the industry rather than closing it down, but at the same time, the court shall have also to be conscious of the fact that a class of creditors, more particularly, the secured creditors, cannot be asked to wait indefinitely so as to render their securities meaningless. In fact balancing of views and adverse interest is the function which the court shall have to perform. While performing the said function various factors shall have to enter into consideration of the court but the

paramount object would be to see that, if possible, the industry would revive and is not forced to close down despite possibility of revival. It is true that any scheme which is presented to the court is not to be examined in the way a harping critic, hair-splitting expert, a meticulous accountant or fastidious counsel would do. It must be tested from the point of view of an ordinary reasonable shareholder acting in a businesslike manner and taking within his comprehension and, bearing in mind, the situation prevailing at the time when the meeting is convened and when the scheme is presented to the court. It is also true that the scheme proposed may be open to criticism, may be one which is not acceptable to the class of secured creditors, but unless it is effectively shown to be unfair and unjust and is thrown out unanimously or by majority to be absolutely unworkable, unreasonable and irrational, it would be wrong to shut out the scheme at the threshold by rejecting it on the ground that the secured creditors have taken a rather stubborn and adamant attitude toward the working of the scheme, and on the secured creditors at the threshold even the meetings of the concerned interests cannot be convened.

(iii) Mr. H. V. Chhatrapati, learned counsel for the Industrial Finance Corporation of India has in this connection placed reliance upon the decision of a learned single judge (B. K. Mehta J.) of this court in *In Re: Krishnakumar Mills Co. Ltd. (In Liquidation)*, . In the aforesaid case, an application was moved u/s 391(1) of the Companies Act, to convene meetings of the shareholders and creditors to consider the arrangement of the scheme of compromise between Krishnakumar Mills Co. Ltd. (In liquidation) and the creditors and members of the said mills. The applicant before the court was one Ratilal Manilal Shah who was the creditor of the company. The scheme was opposed at the initial stage of issuing directions by two secured creditors, namely, the Gujarat State Financial Corporation and the State Bank of Saurashtra. On behalf of the secured creditors affidavits-in-reply were filed setting out the reasons why they have opposed any order being issued for convening the meetings of the shareholders and the creditors. The principal reason stated by them was that the scheme was neither reasonable nor practicable of being implemented and that a similar scheme was in the past rejected by the court summarily. It was in the aforesaid fact situation that the court was called upon to decide as to whether the meetings of the shareholders and the creditors be convened or not. The court noticed that in the case before it the process was already initiated by the official liquidator for sale of movable and immovable properties of the company by public auction. The sale was advertised and the tenders were invited. However, before the tenders could be received an application was filed u/s 391 for obtaining leave to convene the meetings. The court also noticed that total payment due and payable to the secured creditors was a very huge amount and that the secured creditors were stoutly objecting even to convene the meeting to consider the proposed scheme. It was in this context that reference was made to the oft-quoted dictum in *Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re* [1891] 1 Ch D 213, which reads as under (page 252 of 45 Comp Cas) :

"Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interest of those whom they represent, take a view which can be reasonably taken by businessmen. 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."

(iv) Keeping the aforesaid observations in mind, undoubtedly this court shall have at the outset to satisfy itself that the scheme proposed is a reasonable one and capable of being implemented by the applicant-society. In the case of Krishnakumar Mills Co. Ltd. (In liquidation), In re [1975] 45 Comp Cas 248 (Guj) , the court noticed that the total value of the debts of the two secured creditors would be in the vicinity of about Rs. 22 to Rs. 23 lakhs out of the total value of debts of Rs. 40 lakhs. The court, therefore, felt that as the total value of the debts of the secured creditors was more than half of the total value of debts who opposed the scheme, it would be an exercise in futility to convene the meeting of the creditors. It would never be a practicable measure to give directions to hold the meetings of the creditors in view of the aforesaid factual situation obtaining before the learned single judge of this court. It is thus clear that the paramount factor that has weighed with the court in In Re: Krishnakumar Mills Co. Ltd. (In Liquidation), in rejecting the application was that more than half of the total value of the creditors were opposing the scheme and, therefore, the scheme cannot be said to be practicable for implementation. The submissions made by the sponsor of the scheme before the court that the court should not turn down the scheme at the initial stage and must give an opportunity to the shareholders as well as creditors to consider what is best in their interest and to have discussion, deliberation and exchange of views about making the scheme workable was negated by the court solely because the secured creditor opposed the scheme. Based on the aforesaid finding reached by the learned single judge of this court, it is submitted before this court that the ratio of the decision is that when the secured creditors are opposing the scheme as one which is not reasonable and capable of being implemented, the court should at the threshold reject the application for convening the meeting of shareholders and creditors as no useful purpose would be served and as convening of meeting of shareholders and creditors would be an exercise in futility. Such a broad proposition of law, in the opinion of this court, does not flow from the aforesaid decision. It can be said that in the facts of the case, the learned single judge was convinced that since the total value of the debts of the creditors was more than half and since they were opposing the scheme as not capable of being implemented the application for convening the meeting was required to be rejected. In the opinion of this court, the purpose of the meeting

u/s 391 of the Act is to consult the interests likely to be affected by the scheme of arrangement and/or compromise. The provision has the object of consulting the affected interests before any decision adverse to them is taken, namely, the decision of either amalgamating the company, transferring the company or of handing over the company to others, for the purpose of running the unit. In all possible contingencies, the interests affected, namely, the shareholders, creditors (secured and unsecured) are required to be consulted. It is required to be mentioned here that if a majority of shareholders or a majority of secured creditors oppose the scheme even after discussion and deliberation the scheme cannot be imposed or thrust upon them and, therefore, since the object of section 391(1) is consultation, the said section is required to be construed liberally so as to advance the object of consulting all affected interests. In the opinion of this court even in cases, where at the threshold serious objections are raised by a class of creditors, the court may issue directions to convene the meetings of shareholders and creditors because the discussion and deliberation of various proposals, with or without modification, and exchange of views may ultimately result in evolving some such scheme which may become acceptable to a class of interests which opposed the scheme initially. The very purpose of this consultation would be frustrated if the sponsor of the scheme is denied the opportunity of consulting the affected interests by convening the meeting. In that view of the matter, this court is of the opinion that the decision of the learned single judge of this court in *In Re: Krishnakumar Mills Co. Ltd. (In Liquidation)*, cannot be read as laying down the widest proposition that when there is opposition to the scheme by a class of secured creditors an application for convening the meeting of shareholders and creditors shall have to be rejected by the court.

(v) Mr. S. M. Singhi, learned counsel appearing for the Industrial Credit and Investment Corporation of India has invited the attention of this court to the decision of the Bombay High Court in *Sakamari Steel and Alloys Ltd., In re* [1981] 51 Comp Cas 266. Before the Bombay High Court, the company has a mini-steel plant at Nagpur. Within two years of its commissioning the business, it closed down in the year 1976. The financial position of the company as emerging from the audited balance-sheet was very poor. Two secured creditors of the company, namely, the State Industrial and Investment Corporation of Maharashtra Ltd. and Bank of Maharashtra had also instituted suits and the company had failed to pay its debts. In exercise of powers under the respective mortgages both the State Industrial and Investment Corporation of Maharashtra Ltd. and Bank of Maharashtra entered into possession of the factory premises and took possession of the plant and equipment. They thereafter proceeded to advertise sale of the company's factory and invited offers. The offer of one party was accepted at the price of Rs. 71 lakhs and even earnest money was received. It was at this stage that the Bombay High Court was moved by taking out summons for directions for convening meetings of secured and unsecured creditors to consider the scheme of compromise proposed by the company for

the discharge of their dues. Such scheme was opposed by both the secured creditors. The learned single judge of the Bombay High Court in the aforesaid context considered the provisions of rules 67 and 69 of the Companies (Court) Rules, 1959, and also the provisions of section 391(1) of the Act. It also considered the jurisdiction of the court as and when an application was made for convening meetings of the creditors (secured and unsecured) as well as shareholders u/s 391(1) of the Act. In this connection, after reading rules 67 and 69 of the said Rules of 1959, it is observed that when an ex parte motion is made it cannot be said that the court has not applied its mind or the court is not required to be prima facie satisfied about the merits of the application. It is not compulsory for the court to direct to convene the meetings contemplated u/s 391(1). The court has to consider a number of relevant circumstances before giving its approval. The fact that a substantial number of creditors have agreed to accept the scheme undoubtedly is a relevant factor, but that alone cannot be determinative. The circumstances to be taken into account would vary from case to case. Having so noticed, the Bombay High Court has enumerated some of the outstanding circumstances as under :

- (a) The proposal for the scheme was made in good faith.
- (b) The scheme is fair and reasonable.
- (c) The scheme will yield to a smooth and satisfactory working.
- (d) The scheme does not offend public or commercial morality.
- (e) The scheme is not detrimental to the interest of the creditors or members of public interest.
- (f) The scheme does not violate the Companies (Acceptance of Deposits) Rules, 1975, or nullify the protection afforded under those Rules.

It is not possible and desirable to make an exhaustive list of factors which must enter into consideration of the court while considering the application u/s 391(1). As stated hereinabove, circumstances may vary from case to case and different fact situations may call for different approaches. It is also not possible to undertake the exercise of enumerating exhaustively the factors which the court must take into consideration. Totally new factors may arise and may be legitimately taken into consideration by the court. Therefore, without undertaking the exercise of exhaustively enumerating the factors which the court may take into consideration while considering the application u/s 391(1), some of the relevant factors which can be considered at the threshold as set out by the Bombay High Court can be enumerated. They are :

- "(i) Whether the company is qualified to sponsor a scheme, that is, if it is liable to be wound up as defined in section 390(a).
- (ii) The motive of the company or creditors in sponsoring a scheme.
- (iii) Whether the company is really intending to save itself from liquidation or it

wants to eat up a part or whole of the principal amount or interest of a particular class of its creditors.

(iv) Whether all creditors who are similar in that class are covered under the proposed scheme. Persons whose rights are not so dissimilar should be covered by the same scheme as otherwise it would be impossible for them to consult together and protect their common interest. The preferential creditors must receive preference unless they agree to bear with the company and postpone their demand and recovery, otherwise, they can always hinder the execution of the scheme. Very often a company comes out with a draft scheme when faced with a large number of winding up petitions. In order to buy peace with such class of creditors alone a draft scheme is sponsored to cover them leaving out the other class or classes of creditors. A straight forward scheme would take care of all classes of creditors.

(v) Whether the company is ready with the statutory information under the proviso to sections 391(2) and 393(1)(a). Experience shows that the companies are not ready with such statutory information. This delays matters, while the benefit of section 391(6) continues.

(vi) Whether the proposed scheme is contrary to the Companies (Acceptance of Deposits) Rules, 1975.

(vii) Whether the company has made any firm commitment to arrange for payment of instalments or there are reasonable prospects of the company making profits to honour the instalments, otherwise, the scheme is bound to misfire."

(vi) Keeping the aforesaid factors in mind the court shall have to proceed to examine the scheme. However, the examination of the scheme at this stage is not like a harping critic, like hair-splitting expert or like a meticulous accountant. The court has initially to see as to whether the scheme is fair or not. Unless the scheme is effectively shown to be unfair, the court shall be slow to reject the scheme at the outset as its approach should be in favour of reviving industry rather than closing it down. The court also shall have to keep in mind that by granting an application u/s 391(1) initially it is opening a ground of negotiation, discussion and deliberation and exchange of views about the scheme, arrangement or compromise thereby providing an opportunity to affected interests to ventilate and exchange their views. Beyond exchange of views, discussion and deliberation, if any interest affected remains adamant and opposes the scheme the court cannot and is not going to impose the scheme on the interests affected. In that view of the matter while substantially agreeing with the proposition of law laid down by the learned single judge of the Bombay High Court, I do not agree with the final conclusion that once a class of creditors object or oppose the scheme there is no charm in making order for convening the meeting of secured creditors. Unfortunately, it is not a question of charm but it is a question of opening the doors for negotiation, discussion and deliberation,

and if any discussion, deliberation may bring about a change of mind or heart the court's action shall not shut it by rejecting the application outright.

(vii) This would require this court to consider one another objection put forth by the IFCI, and it is to the effect that the applicant-co-operative society has no experience of textile business and is not economically and financially sound so as to manage the business of the company in liquidation. It is further submitted that the company in liquidation has three departments, namely, spinning, processing and weaving and the proposal is to restart only the spinning/processing unit while there is no proposal to restart the weaving department. It is further submitted that the applicant-society has been doing small or petty jobs of altogether different nature of work such as scheme of gutter or drainage laying, scheme of water-pipelaying and other sundry works which can be done on contract basis. The applicant-society is, therefore, not having any experience in textile industry and, therefore, it is not in a position to revive the sick unit of the magnitude of the company in liquidation.

(viii) Appreciation of the above submission, at this stage, would necessarily require the court to go into the merits of the scheme. However, from the statement of objects for which the applicant-society is established and from the statement that it has got a large number of members who were working in the closed textile units it can be said that though the members of the applicant-society may not be expert managers or management personnel they are persons who have some working knowledge of textile industry. Secondly, it is not necessary that the applicant-society must have such experience as for the purpose of running such a big industry, expert personnel shall have to be employed. The way and the manner in which the industry is to be run is yet to be discussed and deliberated upon and at this stage the scheme cannot be turned down by this court on the ground that the applicant is lacking experience to run the textile mill. Even otherwise, the workers' scheme for running the sick unit or workers' co-operative coming forward with a scheme to restart the sick unit is a step towards fulfilment of one of the Directive Principles of State Policy which came to be introduced by the 42nd Amendment in the Constitution. Article 43A provides that the State shall take steps by suitable legislation or in any way to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. This constitutional mandate has found executive assent as it is reported that the Minister of State for Labour has on behalf of the Government of India informed the Rajya Sabha that it was willing to hand over the sick industrial units to employees' co-operatives for their revival and that it would provide all possible encouragements. It is also reported that the Finance Ministry had even indicated that it could consider writing off liabilities of the sick units if they were taken over by the employees' co-operatives. Even the Board for Industrial and Financial Reconstruction has sanctioned four schemes for revival of sick industries through workers' co-operatives, one of the terms and conditions of the proposed scheme inter alia stipulates that secured creditors (financial institutions) shall waive their

dues as per the policy of the Government of India. It is, no doubt true that as on date no concrete policy of the Government of India is made known to this court or to the financial institution. But the applicant-society consistent with the underlying policy of the constitutional provision and with the statement made on the floor of the House on behalf of the Government has submitted before this court that the court should, at this stage, permit the applicant to go to the interests affected by convening meetings with them. Even otherwise, by making reference to the Companies (Amendment) Bill, 1985, whereby section 529 came to be amended it can be said that the resources of the companies constitute a major segment of the material resources of the community; and common good demands that the ownership and the control of resources of every company are so distributed that in the unfortunate event of its liquidation, workers whose labour and effort constitute an invisible but easily perceivable part of the capital of the company are not deprived of their legitimate right to participate in the product of their labour and effort. With such objective section 529 came to be amended. Even otherwise, the right of workers to participate in the management of the company is now so well accepted that to deny a scheme proposed by an applicant-society without giving opportunity of being considered by the interests affected would, in substance, amount to negating the right of workers' participation in the management. By article 41 of the Constitution, the State is directed to make effective provision within the limits of its economic capacity and development for securing the right to work. Article 42 requires the State to make provision for securing just and humane conditions of work. Article 43 provides that the State shall endeavour to secure by suitable legislation or economic organisation or in any other way a living wage, conditions of work ensuring a decent standard of living, of life and full enjoyment of leisure and social and cultural opportunities. Then comes the provisions of article 43A intended to herald industrial democracy and in the words of Krishna Iyer J., it marks the "end of industrial bonded labour". The Constitutional mandate is, therefore, clear that, the management of the enterprises should not be left entirely in the hands of suppliers of capital, but the workers should also be entitled to participate in it because in a socialist pattern of society the enterprise, which is the centre of economic area, should be controlled not only by suppliers of capital but also by labour, The workers, therefore, have a special place in a socialist pattern of society. They are not mere vendors of toil. They are not a marketable commodity to be purchased by the owners of capital. They are producers of wealth as much as capital. They supply labour without which the capital would be impeded and they are at the least equal partners with capital in the enterprise. It is in the light of the aforesaid Constitutional philosophy, that the scheme which is put forward by the society of workers is required to be approached. It is idle to contend that the workers would have no voice in the determination of question whether the enterprise should continue or be shut down under an order of a court. Similarly, if a class of workers come forward with a scheme and when it is opposed by those who contribute capital, the right of at least consultation envisaged by section 391(1) cannot be denied so as to reject the application for convening the

meeting at the threshold on the ground that the workers do not possess managerial expertise. The plight of such workers is very pithily described by M. P. Thakkar J., speaking on behalf of the Supreme Court in *Navnit R. Kamani and Others Vs. R.R. Kamani*, , 135, as under :

"More than a thousand brimming eyes are waiting to replace the tears of despair by tears of relief. No less than 600 wronged workers of a once prosperous industrial unit induced or reduced to "sickness" are on their toes to resort to self-help to restore the last source of their butterless bread. Their pens are quivering to write a new chapter in the saga of workers" struggle for finding their true "identity" and "dignity". Their dream is coming true with the enlightened and refreshing approach of the Central and State Governments, and the concerned Nationalised Banks, coupled with prompt, efficient and swift decision making on the part of the BIFR and IDBI."

(ix) It is with the aforesaid approach that the application is required to be approached, and in the opinion of this court the approach of examining the essential nature of the scheme at the stage when it is launched and to satisfy the conscience of the court about the viability of the scheme is one which is required to be discouraged. The approach of reading section 391(1) as one providing a "check-post" and not as a "sign-post" so as to examine the scheme at its very threshold is required to be properly understood and in the opinion of this court what is expected of the court hearing an application u/s 391(1) is simply to see as to whether the scheme is fair, reasonable and workable. Even if some of the provisions of the scheme may appear to be not workable or unworkable the possibility of such provisions being deleted and/or suitably amended after deliberations and exchange of views at the meeting of the concerned interests cannot be ruled out, and, therefore, the approach of rejecting the scheme at the threshold, especially when it is sponsored by worker's co-operative is inconsistent with the constitutional philosophy.

(x) Consistent with the aforesaid approach the principal objection put forth by some of the secured creditors before this court is required to be appreciated. Mr. H. V. Chhatrapati, learned counsel for the IFCI and Mr. S. M. Singhi, learned counsel for the ICICI have mainly relied upon the provision in the scheme which, inter alia, provides that the financial institution shall waive their dues as per the policy of the Government of India announced in Parliament (see clause 5(A)(a) of the scheme). It is very vehemently submitted before this court that reliance is placed upon some statement alleged to have been made in the Rajya Sabha by the Minister of State for Labour and that based on such statement financial institutions cannot accept that it is the policy of the Government of India. The financial institutions have not received any communication about the aforesaid policy of the Government of India. It is, therefore, submitted that this court should not permit the applicant to base the entire scheme or the very foundation of the scheme on avowed policy of the Government of India, especially when there is no cogent proof in support of such a policy of the Government of India.

As the secured creditors of financial institutions cannot and would not like to agree to a scheme which stipulates waiver of all the dues of the financial institutions, it is submitted that in the absence of any other concrete alternative proposal there is no possibility of financial institutions agreeing to such scheme, and, therefore, the scheme is required to be rejected at the threshold. It is no doubt true that at present the applicant-society is not possessed of any other cogent material to support its claim that the Government of India has taken such a policy decision but it is submitted before this court that in case such support is not coming forth from the Government of India as per its policy, the scheme stipulates that the sponsor will work out a package deal in consultation with the financial institutions on the lines of packages offered by the sick industrial undertaking while permitting the scheme for revival and rehabilitation. The possibility of working out such packages by discussion or deliberation could not be ruled out but it is submitted by learned counsel for the financial institutions that there should be a concrete proposal or concrete package deal and in the absence of any proposal in the alternative, the scheme deserves to be rejected. It is submitted by them that in the absence of any concrete proposal no useful purpose will be served by convening the meeting of secured creditors as secured creditors cannot discuss or deliberate upon the alternative proposal. At this stage, the applicant is pitching its case on the policy of the Government and on the hope that the Government would stick to the said policy and would make the necessary offer to relieve the applicant of financial obligations towards the financial institutions by waiving their dues. If the Government is not in a position to relieve the applicant of its financial dues towards the financial institutions there are various packages which could be worked out and it is submitted that at this stage to expect the applicant-society to opt for one or other possible packages would amount to compelling them to choose one option when a large number of options are available to them. On this count alone the scheme cannot be rejected at the threshold. It is true that the financial institutions may not agree to such scheme but the court shall have to keep in mind the fact that the financial institutions in their turn would be bound to at least respect the policy decision of the Government. If the Government of India formulates and takes a policy decision as aforesaid, even the financial institutions shall have to much against their wish accept the desirability of providing opportunity to the workers' co-operative to restart the sick unit, and, therefore, in the opinion of this court at this stage much importance cannot be given to the fact that the proposed scheme does not provide for dues of its secured creditors.

(xi) One another objection was raised by Mr. H. V. Chhatrapati, learned counsel appearing for the Industrial Finance Corporation of India. The submission is that by the proposed scheme the share capital of the mill company is sought to be reduced and reorganised. Such reduction and/or reorganisation of the share capital is without following the special procedure prescribed by sections 100 to 107 of the Companies Act and that by such reduction the applicant-society wants to usurp the assets of the mill company. In para. 30 of the affidavit-in-reply filed

by the IFCI it is agreed that the reduction in the share capital is normally resorted to if the share capital is not represented by available assets. There can be reduction of share capital but whether it is justifiable or not is required to be examined and it is submitted that reduction of share capital has to be undertaken so as to safeguard the rights of the creditors. The proposal in the scheme is as under :

"4A. Reduction and reorganisation of share capital of Ramkrishna. - (i) The issued, subscribed and paid-up share capital of Ramkrishna shall be reduced from Rs. 45,16,500 divided into 4,07,050 equity shares of Rs. 10 and 89215.71 per cent. redeemable cumulative preference shares of Rs. 50 each Rs. 4,51,655, divided into 4,07,959 equity shares of Re. 1 and 89215.71 per cent. redeemable cumulative preference shares of Rs. 5 each, such reduction to be effected by cancelling the capital paid-up to the extent of Rs. 9 per equity share and Rs. 45 per preference share.

(ii) Forthwith upon such reduction of capital taking effect, the 4,07,050 equity shares of Re. 1 each and 8,921 preference shares of Rs. 5 each consolidated in such manner that every 10 equity shares of Re. 1 each shall constitute one equity share of Rs. 10 and every 20 preference shares of Rs. 5 each shall constitute one preference of Rs. 100 fully paid-up"

(xii) It thus becomes clear that the share capital stands reduced to 4,07,050 equity shares of Re. 1 and 8,921 preferential shares of Rs. 5. However, it is submitted by the sponsor of the scheme that when the value of share of the company in liquidation is eroded either by lapse of the company or closure of the company because the company is rendered sick, accepting the nominal value which such shares may fetch would in substance amount to accepting the market value of the share. In fact that would be the value at which the share capital is required to be assessed or valued. By such reduction the share capital will be reduced but that will have no repercussion on the other assets of the company which are available to the creditors (secured or unsecured). It is further submitted that the scheme stipulates in para. 4(v) the issue and allotment of 5 lakhs equity shares of face value of Rs. 10 each at par on payment of Rs. 50 lakhs to the sponsor or its nominees. This would mean that the sponsor is going to bring an amount of Rs. 50 lakhs and, therefore, also the proposal of reduction of share capital cannot and should not result in rejection of this application at this stage as this is simply a proposal in the scheme. In my opinion, at this stage, the application cannot be rejected solely on such ground as the value of share capital is eroded by the closure of the mill company and if the share capital is proposed to be reduced to actual or nominal value which shares of the company might fetch as on date the proposed exercise cannot be said to be totally unwarranted or impermissible. However, these observations may not be considered as observations upholding the proposal contained in the scheme but the observations are made solely with a view to answer the objection raised by one of the secured creditors.

6. The aforesaid were the only objections raised to the application. Since the objections are overruled this application under sections 391(1) shall have to be granted and is granted. The application accordingly stands disposed of with no order as to costs. It is directed that :

(i) A meeting of equity shareholders of the opponent company shall be convened and held at the Gujarat Chamber of Commerce at Ashram Road, Ahmedabad, on July 23, 1994, at 11 a.m. for the purpose of considering and if thought fit, approving with or without modifications the scheme of compromise and arrangement proposed by the applicant-society for the revival of the opponent-company.

(ii) That a meeting of 5.71 per cent. redeemable cumulative preference shareholders of the opponent company shall be convened and held at the Gujarat Chamber of Commerce Hall, Ashram Road, Ahmedabad, on July 23, 24, 1994, at 11 a.m. for the purpose of considering and if thought fit approving with or without modifications the scheme of compromise and arrangement proposed by the applicant society for the revival of the opponent-company.

(iii) That a meeting of employees of the opponent-company shall be convened and held at the Gujarat Chamber of Commerce Hall, Ashram Road, Ahmedabad, on July 23, 1994, at 11 a.m. for the purpose of considering, and if thought fit, approving with or without modifications the scheme of compromise and arrangement proposed by the applicant-society for the revival of the opponent-company.

(iv) That a meeting of preferential creditors of the opponent-company shall be convened and held at the Gujarat Chamber of Commerce Hall, Ashram Road, Ahmedabad, on July 23, 24, 1994, at 11 a.m. for the purpose of considering and if thought fit approving with or without modifications the scheme of compromise and arrangement proposed by the applicant-society for the revival of the opponent-company.

(v) That a meeting of 13.5 per cent. partly convertible debenture holders of the opponent-company shall be convened and held at the Gujarat Chamber of Commerce Hall, Ashram Road, Ahmedabad, on July 24, 1994, at 11 a.m. for the purpose of considering and if thought fit approving with or without modifications the scheme of compromise and arrangement proposed by the applicant-society for the revival of the opponent-company.

(vi) That a meeting of unsecured creditors of the opponent-company shall be convened and held at the Gujarat Chamber of Commerce Hall, Ashram Road, Ahmedabad, on July 24, 1994, at 11 a.m. for the purpose of considering and if thought fit approving with or without modifications the scheme of compromise and arrangement proposed by the applicant-society for the revival of the opponent-company.

(vii) That a meeting of secured creditors of the opponent-company shall be

convened and held at the Gujarat Chamber of Commerce Hall, Ashram Road, Ahmedabad, on July 24, 1994, at 11 a.m. for the purpose of considering and if thought fit approving with or without modifications the scheme of compromise and arrangement proposed by the applicant-society for the revival of the opponent-company.

(viii) That at least 21 clear days before the day appointed for the meetings, an advertisement convening the same and stating that copies of the said scheme of compromise and arrangement and of the statement required to be furnished pursuant to section 393 and forms of proxy can be obtained free of charge at the registered office of the company or at the office of the advocate, be inserted once in each of Gujarat Samachar and Times of India, both Ahmedabad edition, while the publication in the Government Gazette shall be dispensed with.

(ix) That in addition, at least 21 dear days before the meetings to be held as aforesaid a notice convening the said meetings at the time and place aforesaid together with a copy of the said compromise and arrangement a copy of the said statement required to be sent u/s 393 and the prescribed form of proxy shall be sent by prepaid letter post under certificate of posting addressed to each equity shareholder, preference shareholder, 13.5 per cent. partly convertible debenture holders, secured creditor, unsecured creditor, preferential shareholder and employees at their respective registered or last known addresses.

(x) That the advocate for the company abovenamed do file in court the form of the advertisement, the notice and the statement accompanying the notice and the same shall be settled by the chairman appointed for the meetings.

(xi) That, Mr. R. R. Jain, Registrar, Gujarat High Court, and failing him, Mr. Dholakia, Deputy Registrar, shall be the chairman of the meetings to be held on July 23, 24, 1994, as aforesaid.

(xii) That the chairman appointed for the meetings do issue the advertisement and send out the notices of the meetings referred to above.

(xiii) That the quorum for the said meetings shall be decided by the chairman for the respective meetings.

(xiv) That voting by proxy be permitted, provided that a proxy in the prescribed form duly signed by the person entitled to vote at the meetings is filed with the applicant-company at its registered office at Gandhi Majoor Sevalaya, Bhadra, Ahmedabad, not later than 48 hours before the respective meeting.

(xv) That the value of each member or creditor shall be in accordance with the books of the company and where the entries in the books are disputed, the chairman shall determine the value for the purpose of the meeting.

(xvi) The chairman is directed to report to this court the result of the said meetings within seven days of the conclusion of the meetings and the said report shall be verified by his affidavit.

(xvii) It is directed that the representative of the Central Bank of India shall be at liberty to remain present at the aforesaid meetings of convertible debenture holders. In case the applicant needs a list of names of convertible debenture holders the same shall be supplied to the applicant at the cost of the applicant by the Central Bank of India.