
(2012) 10 AP CK 0020

In the Andhra Pradesh High Court

Case No : Company Petition No. 240 of 2011

IL and FS Engineering and Construction Company Limited

APPELLANT

Vs

Wardha Power Company Limited

RESPONDENT

Date of Decision : 17-10-2012

Acts Referred:

Companies Act, 1956 — Section 100, 100(1), 101, 101(2)

Citation : (2013) 113 CLA 39 : (2013) 176 CompCas 156 : (2013) 117 SCL 385

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : S. Ravi, for the Appellant; Ch. Ramesh Babu for the Central Government and Sri Ponnamm Ashok Goud, Asst. Solicitor General, for the Respondent

Judgement

Ramesh Ranganathan

1. This petition is filed by IL&FS Engineering and Construction Limited, (hereinafter called the "petitioner"), under Sections 391 to 394 read with Sections 78, 100 to 104 of the Companies Act, seeking sanction of this Court for the scheme of arrangement between them and their shareholders and creditors. The petitioner was incorporated on 06.05.1988 as a Private Limited Company under the name and style of "Satyam Construction Private Limited". On its conversion into a Public Limited Company, its name was changed to "Satyam Construction Limited" on the 1st of July, 1993. Its name was again changed to "Maytas Infra Limited" on 09.02.2007 and, thereafter, its name has now been changed to its present name. The registered office of the petitioner is situated at Hyderabad. The objects of the petitioner company is to take over the business, carried on by "Satyam Construction Company Limited", as a going concern with all its existing assets and liabilities; to continue to carry on the existing construction activity of Satyam Construction Company; to carry on the business of undertaking all types of civil contracts, to act as consultants and fabricators, to carry on electrical and mechanical works, civil construction, project

construction, dam construction, supply works, railway works and other engineering works; to carry on activities of construction, execution, undertaking, running, acquiring, developing, taking on lease, purchasing or acquiring, on any other terms and conditions, any hospitals, clubs, tanks, hotels, schools, restaurants etc; to promote and develop infrastructure projects within the country or outside in various areas like State and National Highways, Auto Bahns, Flyovers, Elevated Roads etc; to construct transmission lines, and take over distribution of power, purchase power from generators and distribute it to their consumers over the distribution network etc, to take up turnkey contracts within the country and outside involving engineering, consultancy, procurement, construction, project management etc; and to compete in various sectors like power, onshore oil & gas, refinery, fertilizers, chemicals, petrochemicals, etc.

2. The authorized share capital of the petitioner company, as at 31.03.2011, was Rs. 500 crores divided into 15 crore equity shares of Rs. 10/- each for Rs. 150 crores, and 3,50,00,000 preference shares of Rs. 100/- each for Rs. 350 crores. Its issued, subscribed and paid up capital, as at 31.03.2011, was Rs. 384,86,50,250 divided into 7,73,70,025 equity shares of Rs. 10/- each fully paid up for Rs. 77,37,00,250/-; 57,49,500 6% optionally convertible cumulative Redeemable Preference (OCCRPS) Shares of Rs. 100/- each fully paid up for Rs. 57,49,50,000/-; and 2,50,00,000 6% cumulative redeemable Preference Shares (CRPS) of Rs. 100/- each fully paid up for Rs. 250 crores.

3. The Board of Directors of the petitioner, by way of a resolution by circulation, approved the proposed scheme of arrangement on 27.07.2011. The petitioner, thereafter, filed C.A. No. 1649 of 2011 before this Court praying that a meeting of the equity shareholders (38351 in number) be convened and held for the purpose of considering and, if thought fit, approving the scheme of arrangement. This Court, by order dated 04.11.2011, directed that the meeting, of the equity shareholders of the petitioner, be convened on 09.12.2011. The quorum of the said meeting was fixed at 20. Individual notices were issued to the equity shareholders, and a notice of the meeting was published in Business Standard (English daily), and Andhra Prabha (Telugu daily) news papers. The Chairperson of the meeting, in his report dated 09.12.2012, informed this Court that the meeting was attended by 57 members in person, holding shares valued at Rs. 51,80,37,430/- divided into 5,18,03,743 equity shares of Rs. 10/- each; and five members, through their proxies, holding shares valued at Rs. 47,28,830/- divided into 4,72,883/- equity shares of Rs. 10/- each, together aggregating to Rs. 52,27,66,260/- divided into 5,22,76,626 equity shares of Rs. 10/- each and, on a poll being conducted, all the shareholders had unanimously approved the said scheme of arrangement.

4. By order in C.A. No. 1650 of 2011 dated 04.11.2011, this Court directed that the meeting of the preference shareholders of the petitioner be convened on 09.12.2011. The quorum of the meeting was fixed at five. Pursuant thereto, individual notices were issued to the preference shareholders, and notices of the

said meeting was published in Business Standard (English daily) and Andhra Prabha (Telugu daily) newspapers. The Chairman of the meeting, in his report dated 09.12.2011, stated that nine members had attended in person, holding preference shares valued at Rs. 319,59,90,500/- divided into 3,19,59,905 preference shares of Rs. 100/- each; and the scheme of arrangement was unanimously approved by all the preference shareholders.

5. C.A. No. 1651 of 2011 was filed before this Court seeking a direction for convening a meeting of the secured creditors of the petitioner company (twelve in number) to approve the scheme of arrangement. This Court, by order dated 04.11.2011, directed that the meeting of the secured creditors of the petitioner-company be convened on 09.12.2011 at 12.00 noon. The quorum for the meeting of the secured creditors was fixed at five. Pursuant to the directions of this Court, notices were issued individually to all the secured creditors. Notices were also published in Business Standard (English daily) and Andhra Prabha (Telugu daily) newspapers. The Chairperson appointed by this Court, in his report dated 09.12.2011, stated that the meeting was convened on 09.12.2011; it was attended by ten secured creditors in person to whom the company owed Rs. 706,20,53,642/-; and the secured creditors, who attended the meeting, had unanimously approved the scheme of arrangement.

6. C.A. No. 1652 of 2011 was filed by the petitioner requesting this Court to direct that a meeting of the unsecured creditors of the petitioner company be convened for approving the scheme of arrangement. This Court, by order dated 4.11.2011, directed that a meeting of the unsecured creditors of the petitioner-company be convened on 9.12.2011. The quorum for the meeting of the unsecured creditors was fixed at 20. Notices were issued individually to the unsecured creditors, and a copy of the notice was published in Business Standard (English daily) and Andhra Prabha (Telugu daily) newspapers. The Chairperson, in his report dated 9.12.2011, has stated that the said meeting was convened on 9.12.2011; it was attended by 53 unsecured creditors in person, to whom the company owed an aggregate sum of Rs. 279,63,25,741/-; 50 unsecured creditors, to whom the petitioner owed Rs. 278,33,87,502/-, had voted in favour of the resolution approving the scheme of arrangement; three unsecured creditors, to whom the petitioner-company owed Rs. 1,29,38,239/-, had voted against the resolution; while 99.54% of the unsecured creditors, who participated in the meeting, had voted in favour of the resolution, unsecured creditors holding 0.46% of the unsecured debt had voted against the resolution. The Chairperson has also reported that, if the figures mentioned by the unsecured creditors on the ballot papers are taken into consideration (as there are differences in the amounts as per the company's records and as per the ballot papers of the unsecured creditors), the total number of votes polled against the resolution, approving the scheme of arrangement, would increase to Rs. 70,10,40,648/-; and even then the percentage of unsecured creditors, voting in favour of the scheme was 79.89%, while the votes polled against the scheme was only 20.11%. The Chairperson further reported that, from out of all the

unsecured creditors, Wardha Power Company Limited (hereinafter called the "respondent-objector") had alone addressed a letter to him seeking adjournment of the meeting pending adjudication of C.P. No. 199 of 2010 filed before the High Court by them; however, as the meeting was convened under the directions of this Court, he had turned down the request of the said unsecured creditor.

7. The Company Petition was admitted on 26.12.2011, and notice of the hearing of the petition was published in Business Standard (English daily) and Andhra Prabha (Telugu daily) Hyderabad main editions. The petitioner was also permitted to take out notice to the Central Government represented by the Regional Director, South Eastern Region, Ministry of Corporate Affairs, Hyderabad, and the Registrar of Companies, Hyderabad.

8. Pursuant thereto only the respondent-objector has filed its objections, to the scheme, before this Court. Oral submissions were made by Sri S. Ravi, Learned Senior Counsel appearing on behalf of the petitioner, Sri Ch. Ramesh Babu, Learned Counsel for the respondent-objector, and the Learned Asst. Solicitor General for the Central Government. Sri Ch. Pushyam Kiran, Learned Counsel for the petitioner and Sri Ch. Ramesh Babu, Learned Counsel for the respondent-objector, have also placed their written submissions before this Court. The judgments cited by Counsel on either side, and those of Courts in England interpreting provisions similar to those of the corresponding provisions of Companies Act, 1956, shall be referred to hereinafter.

I. Scheme of Arrangement Involving Reduction of Share Capital: Scope of Enquiry:

9. Either in the case of a reduction of capital or a scheme of arrangement or both, the Court cannot interfere with the discretion and commercial wisdom of the stakeholders and the Board of Directors. (Re Ratners Group Plc 1988 (BCLC) 685; In Re: Hindalco Industries Ltd., If the reduction is one which is properly passed by the shareholders who are treated equitably, have had the facts explained, and provided the creditors are safeguarded, the court will habitually sanction reductions and exercise its discretion in favour of them unless the act is a pointless and hollow act. Provided those requirements are satisfied, the company may reduce its capital in any way that it thinks fit. (Re Rafter Group plc (1988) Ch.D. 685; Re Ratners Group plc 1988 (BCLC) 685; In Re: Hindalco Industries Ltd., The court does not exercise any appellate power over the decision of the Company or its management. The Court is required to satisfy itself and see that the procedure, by which the resolution is carried through, is legally correct and the shareholders and creditors are not prejudiced. It is also the duty of the Court to see that the scheme is fair and equitable between the different classes of shareholders In Re: Hindalco Industries Ltd.,) In Re: Hyderabad Industries Limited, the arrangement is such as a man of business would reasonably approve, (Hindustan Lever Employees" Union Vs. Hindustan Lever Limited and others, Custina Re Haare 1933 AER Gh. 105 and Butfe Press LIC 1961 Chancery Division 270), and the proposed reduction is within the

powers of the company, and for the purposes allowed by the statute. The courts have a "discretion" to confirm or not to confirm, which it is their duty to apply in "every proper case," and this discretion is to be exercised by reference to whether the scheme would be "fair and equitable," "just and equitable," "fair and reasonable" or "not unjust or inequitable". (Gower's Principles of Modern Company Law (Fourth Edition) Chapter 10; *Scottish Insurance Corpn. v. Wilson & Clyde Coal Co.* 1948 S.C. 360). Petitions, for approval of such schemes, are usually matters where the court can sanction the scheme without more than a careful check that all the correct steps have been taken. Although the court must be satisfied that "the proposal is such that an intelligent and honest man, a member of the class ... might reasonably approve"-yet the underlying commercial purposes need not be investigated. The court will not be concerned with their commercial reasons for approval. (*Re M B Group plc* (1989) BCLC 672; *In re Dorman, Long and Company Limited v. In re South Durham Steel and Iron Company* (1934) 1 Ch. 635).

10. Where the reduction of capital forms part of the scheme of arrangement, the overall duty of the Court is to satisfy itself that the scheme of arrangement, together with the reduction of capital, is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve and might reasonably consider to be fair and equitable. *Hindusthan Commercial Bank Ltd. Vs. Hindusthan General Electrical Corporation Ltd.*, ; *Scottish Insurance Corporation Ltd.* 1948 S.C. 360; *Re: Dorman Long and Co. Ltd.* (1934) 1 Ch. 635). The principles upon which the Court will require to be satisfied are, 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. The next 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 upon them; that the creditors of the company are safeguarded so that money cannot be applied in any way which would be detrimental to creditors, (*Re Ratners Group plc* 1988 (BCLC) 685; *In Re In Re: Hindalco Industries Ltd.*, and the reduction is for a discernible purpose. "Discernible" means something which is demonstrated by evidence to the court and is something sufficiently solid and near in expectation to be a real prospect. Once those tests have been satisfied the court, which has a discretion whether or not to confirm a reduction, will normally exercise its discretion in favour of confirming the reduction. (*Re Thorn EMI plc* (1988 (4) BCC 698). The discretion conferred by the section will, however, only be exercised in favour of confirmation of the reduction where the court is satisfied that the cause of the reduction (capital in excess of wants; capital lost; capital not represented by available assets, or as the case may be) was properly put to the shareholders so that they could exercise an informed choice; the cause is proved by the evidence before the court; (*Re Jupiter House Investments (Cambridge) Ltd.* (1985) BCLC 222 (Ch.D); *In Re Grosvenor Press Plc.* [1985] 1 W.L.R. 980); the proposal is

one that ought to be sanctioned; and the proposal is fair and equitable to the shareholders as a whole. (Re Ransomes Plc (1999) 2 BCLC 591 (CA)).

11. Subject to confirmation by the court, which is required and which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority, and the Act leaves the company to determine the extent, the mode, and the incidence of the reduction and the application of any capital moneys which the reduction may set free. (Buckley on the Companies Acts (14th edn, 1981, Butterworths), Vol. 1, p. 180; Re Ransomes plc (1999) 2 BCLC 591 (CA). The power of confirming or refusing to confirm the special resolution of a company to reduce its capital is conferred on the court to enable it to protect the interest of persons who dissented or even ` of persons who did not appear In Re: OCL India Ltd., ; Re Rafter Group plc (1988) Ch.D. 685; In Re In Re: Hindalco Industries Ltd., In Re: Indian National Press (Indore) Ltd.,

12. Sections 101 and 102 of the Act, and Rule 85 of the Rules, are attracted only in case of a compromise or arrangement involving reduction of capital. In Re In Re: G.V. Films Ltd., ; In Re: Asian Investments Ltd. and others, . Rule 85 requires the prescribed procedure, for effecting reduction of share capital, to be gone through even though it forms part of such a scheme. (Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re Judgment of Gujarat High Court dated 10.12.1969; In Re: In Re: G.V. Films Ltd., These provisions envisage a reduction in capital in the context of an existing or a continuing company. The object of seeking confirmation from the Court, for reduction of capital, is to safeguard the interests of the creditors of the company, and other obligations or rights coming into existence in the light, or on the strength, of the existing capital structure T. Durairajan and Others Vs. Waterfall Estates Ltd. and Others, In Re: Asian Investments Ltd. and others, . In such schemes, the special provisions relating to reduction of capital must be complied with. Hindusthan Commercial Bank Ltd. Vs. Hindusthan General Electrical Corporation Ltd., In Re Cooper, Cooper and Johnson Ltd., 1902 W. N, 199; In re Indian National Bank Ltd., 53 Cal WN 207 at p. 210 and Bengal Bank Ltd. Vs. Suresh Chakravartty and Others, Sections 100 to 103 of the Act, being special provisions, limit the generality of the power conferred on the Court by Section 391 to sanction a scheme of arrangement. Where the Court, called upon to sanction the scheme, finds that it is also called upon to confirm a reduction of capital, the Court is bound to follow and observe the formalities which it ought to follow and observe in cases of confirmation of reduction of capital. Hindusthan Commercial Bank Ltd. Vs. Hindusthan General Electrical Corporation Ltd.,

13. What is share premium? A company may issue its shares at a price exceeding their nominal par value, that is, at a premium. (Gower's Principles of Modern Company Law (Fourth Edition) Chapter 10). Share premium is a new class of capital of a company, not being share capital, but not being distributable as income any more than any capital asset. On a winding up, the surplus moneys in the share premium account would be returned to the shareholders as capital

and, so long as the company is a going concern, these same moneys can ordinarily be returned to the shareholders through the medium of a reduction petition or, in other words, except under more or less the same conditions under which any capital asset can reach the shareholders' hands. (In *Re Duff's Settlement National Provincial Bank Ltd. v. Gregson* 1951 (1) Ch. 923. Where shares are issued at a premium, whether for cash or otherwise, the premium is to be carried into a share premium account in the books of the company issuing the shares, and the premium can only be distributed if the procedure for reduction of capital is carried through. (*Shearer (Inspector of Taxes) v. Bercain Ltd.* (1980) 3 All ER 295: (Ch.D)).

14. The Scheme of arrangement envisages the petitioner undertaking a suitable capital restructuring scheme whereby it proposes to utilize the balance in the securities premium account to wipe off its losses to enable it to present a correct picture of itself in the market, and explore opportunities for the benefit of the shareholders of the company. Clause A (c) of the Scheme states that the debit balances standing in the profit and loss account, as on 31.3.2011, include losses incurred by the petitioner for the financial years 2008-09 and 2009-10 aggregating to Rs. 739.42 Crores; the loss for the financial year 2008-09 was Rs. 489.788 Crores, and it was Rs. 249.64 Crores for the financial year 2009-10; the aggregate losses for both the financial years 2008-09 and 2009-10, after setting off Rs. 11.05 Crores against the general reserve account for the year 2008-09, was Rs. 728.379 Crores which is the "Gross debit balance in the profit and loss account"; the gross credit balance, in the profit and loss account of the company, was Rs. 295.958 Crores comprising of the balance of Rs. 293.48 Crores as on 31.3.2008, and Rs. 2.91 Crores being the profit made in the year 2010-11; and it was felt that the Balance sheet of the company needed to be restructured by writing off past losses.

15. The profit and loss account, for the year ending 31.3.2011, reveals a profit after tax of Rs. 2.91 Crores which was adjusted against the accumulated losses, carried forward from the previous years, of Rs. 435.33 Crores and the deficit of Rs. 432.42 Crores, representing the net accumulated losses, was carried over to the Balance Sheet as at 31.3.2011. The earlier Balance Sheet of the petitioner, as at 31.3.2010, shows that the balance in its "securities premium account", was Rs. 289.92 Crores. The security premium received during the year 2010-11 was Rs. 340.89 Crores. As a result, the balance in the "securities premium account" as at 31.3.2011, after deducting the sums utilized for share issue expenses of Rs. 1.21 Crores, was Rs. 629.60 Crores. From the balance remaining in the "securities premium account", as at 31.3.2011, of Rs. 629.60 Crores, Rs. 17.36 Crores was utilized on 29.6.2011 for issue of bonus preference shares to the preference shareholders resulting in the balance in the "securities premium account" being reduced to Rs. 612.24 Crores.

16. Instead of adjusting the accumulated losses as on 30.3.2011 of Rs. 432.42 Crores, against the balance in the "securities premium account" of Rs. 629.60

Crores, the petitioner seeks to now revive the profits, hitherto carried over to the Balance Sheet as at 31.3.2008, of Rs. 293.048 Crores. (This profit for the year 2007-08 of Rs. 293.048 Crores was, hitherto, adjusted in the petitioner's books against the losses for the year ending 31.3.2009 of Rs. 489.79 Crores; the net loss of Rs. 185.69 Crores had been carried over the Balance Sheet as at 31.3.2009 which was later added to the losses for the financial year ending 31.3.2010 of Rs. 249.64 Crores; the resulting accumulated losses of Rs. 435.33 Crores had been carried forward to the Balance Sheet as at 31.3.2010; the profit of Rs. 2.91 Crores, for the financial year ending 31.3.2011, was adjusted against the accumulated losses for the previous year of Rs. 435.33 Crores, and the deficit of Rs. 432.42 Crores was carried over and shown, as deficit in the profit and loss account, on the assets side of the Balance Sheet as at 31.3.2011.)

17. What the petitioner now seeks to do, by way of the present scheme of arrangement, is to add the net loss suffered for the year ending 31.3.2009 of Rs. 478.74 Crores, (loss after tax of Rs. 489.79 Crores minus the amount transferred to the "general reserve" of Rs. 11.05 Crores), to the loss for the year ending 31.3.2010 of Rs. 249.64 Crores; and adjust the total loss of these two years of Rs. 728.38 Crores against the entire balance in the "share premium account", of Rs. 612.24 Crores which would result in reducing the accumulated losses to Rs. 116.14 Crores. This accumulated loss is sought to be adjusted against the profit, for the year ending 31.3.2008, of Rs. 293.05 Crores. Through this process of reverse adjustments, the petitioner intends to reflect, in their books, the net profit as Rs. 176.91 Crores which, coupled with the net profit for the year ending 31.03.2011 of Rs. 2.91 crores i.e., a total of Rs. 179.82 Crores, is sought to be freed for utilization later in any manner they choose, including for declaration of dividend to their shareholders.

18. If, instead, the petitioner had adjusted the accumulated losses, for the year ending 31.3.2011, of Rs. 432.42 Crores against the "securities premium account" of Rs. 612.24 Crores, then the remainder in the "securities premium account" would still have been Rs. 179.82 Crores. The scheme, in effect, is to make Rs. 179.82 Crores available as profits to enable the petitioner to adjust it against its future losses, if any, or to declare dividend to their shareholders without the need of obtaining sanction from this Court again. On the other hand, if the accumulated losses for the year ending 31.3.2011 of Rs. 432.42 Crores had, in its entirety, been adjusted against the balance in the "securities premium account" of Rs. 612.24 Crores, then the net balance in the "securities premium account" of Rs. 179.82 Crores would not be available for utilization for any purpose, except those specified in clauses (a) to (d) of Section 78(2), without the sanction of this Court.

19. Whether, as contended by Sri S. Ravi, Learned Senior Counsel, the purpose of utilizing the share premium is to write off past losses resulting in revival of the profits for the year 2007-08, or the purpose is to utilize the entire share premium account to write off the accumulated losses, and the remainder for

payment of dividend to their shareholders, application of the share premium account is not for the purposes specified in clauses (a) to (d) of Section 78(2) and, as such, the provisions of the Companies Act, 1956, relating to reduction of share capital, apply. As the petitioner seeks sanction of this Court to a scheme of arrangement for reduction of capital, the statutory requirements of Section 78, 100 to 104 of the Companies Act, relating to reduction of capital, and Sections 390 to 394-A of the Companies Act, relating to a scheme of arrangement, must be satisfied.

20. Where share premium is to be applied for purposes, other than those specified in clauses (a) to (d) of Section 78(2), Section 78(1) of the Act requires the provisions of the Act, relating to reduction of capital, to be applied as if share premium is the paid up share capital of the company. Section 100(1) enables a company to reduce its share capital by cancellation of any paid up share capital which is lost or is unrepresented by available assets, or by paying off any paid-up share capital which is in excess of the wants of the company. This power is hedged by the need to comply with the requirements of (a) the Articles of Association of the company authorizing the company to reduce its share capital; (b) a special resolution being passed for such reduction; and (c) such reduction in capital being confirmed by the Court.

21. The principles upon which the court will sanction a reduction of share premium are similar in all respects to those upon which the court will sanction the reduction of share capital. The Section provides that share capital can be reduced "in any way". Those words are extremely wide and general. There are then given three particular instances of ways, but they are expressly given without prejudice to the generality of the foregoing "in any way". (*Re Ratners Group plc* 1988 (BCLC) 685). The statute has not prescribed the manner in which the reduction is to be carried out nor has it prohibited any method of effecting that object. (*In Re In Re: OCL India Ltd., British American Trustee and Finance Corporation Ltd v. Couper* 1894 AC 399; *Re: Westburn Sugar Refineries Ltd.*, (1951) 1 All ER 881; *Re Rafter Group plc* (1988) Ch.D. 685; *In In Re: Hindalco Industries Ltd., Comp. Cas 446 (Bom)*). The law authorises a company to reduce its capital in any manner, and to any extent, authorised by its articles of association and decided upon by the prescribed majority of its shareholders. (*In Re Grosvenor Press plc* [1985] 1 W.L.R. 980; *Westburn Sugar Refineries Ltd.* (1951) 1 All ER 881.

II. Articles Of Association: How Should Its Clauses Be Interpreted?

22. For a company to reduce its share capital, in any manner set out in Section 100, it must have the power given to it under its articles to do so. Subject to confirmation by the Court, as required u/s 101 of the Act, a company may, if authorized by its articles, effect a reduction of its share capital in any way it thinks fit by a special resolution. *In Re: OCL India Ltd., e Rafter Group plc* (1988) Ch.D. 685; *In Re In Re: Hindalco Industries Ltd.*,

23. Clause 10 of the Articles of Association of the petitioner enables it :-

Subject to the provisions of Sections 100 to 104 of the Act, the company may, at a General Meeting, from time to time, by special resolution, reduce in any manner for the time being authorized by applicable law, its share capital.

24. Clause 10 does not, specifically, provide for reduction of share premium. Sri S. Ravi, Learned Senior Counsel, would submit that, except where share premium is utilized for the purposes stipulated in Section 78(2), the procedure for reduction of capital is to be followed; for this purpose share premium is equated with the paid-up share capital of the company; the requirement of an enabling clause in the Articles of Association of the company is in Section 100, and not in Section 78; so long as the company is empowered under its Articles to reduce the capital, its entitlement to seek the sanction of the Court u/s 100 is undisputed; for the limited purpose of utilizing the securities premium account, it is equated with paid up share capital; and a power to reduce the capital includes the power to reduce the share premium. The submission, in effect, is that this Court must read "share capital" in Article 10 to include "share premium", as Section 78(1) enables the petitioner to reduce its "share premium" as if it were a reduction of share capital. The legal fiction u/s 78(1), requiring this Court to deem "share premium" to be "paid up share capital", is limited only to the application of the provisions of the Act relating to reduction of share capital, i.e., Sections 100 to 104, and not to the Articles of Association of a company.

25. How then should Clause 10 of the Articles of Association of the petitioner be interpreted? The Articles of Association of the company should be so construed as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable, unless constrained to do so by the terms of the Act and the articles. (Palmer's Company Law, Volume 1, Page Nos. 2166 and 2167, para 2.1108; and Holmes v. Keyes [1959] Ch. 199. The proper way to construe the articles of association of a company is as a "commercial" or "business" document. (Rayfield v. Hands [1960] Ch. 1). Articles of association should not be interpreted as meticulously as, e.g. conveyances. In interpreting them, the maxim *ut res magis valeat quam pereat* should be applied which directs to "validate if possible". (Palmer's Company Law, Volume 1, Page Nos. 2166 and 2167, para 2.1108; *Re Hartley Baird Ltd.* [1955] Ch. 143; *Rayfield* [1960] Ch. 1). In cases where some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying", some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended, the implication must arise inevitably to give effect to such intention. (*Luxor (Eastbourne) Ltd. v. Cooper* 1941 AC 108 *Someshchandra Manilall Nanavati Vs. Jivanlal C. Chinai and Others*, As share premium is also a class of capital, and the Articles of Association are required to be read as a "commercial document" giving its terms a liberal construction, reduction of share capital, as empowered by

clause 10, must be so interpreted as to include reduction of "share premium" also.

26. The second condition stipulated by Section 100(1) is that a special resolution should be passed by the company. u/s 189(2), a resolution shall be a special resolution when (a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling for the general meeting, or other intimation, to the members of the resolution; (b) the notice, required under the Act, has been duly given of the general meeting; and (c) the votes cast in favour of the resolution by members are not less than three times the number of votes cast against the resolution. The notice given to the members of the petitioner company does not specify that the resolution to be passed by them must be a special resolution.

27. While it would have been desirable for the petitioner to specifically state in the notice, that the resolution to be passed in the meeting should be a special resolution, failure to do so would not, by itself, necessitate refusal to sanction the scheme, as all the shareholders were made aware of the contents of the scheme; all those who attended the meeting have voted in favour of the resolution approving the scheme of arrangement involving reduction of capital; and the requirement of setting out the intention to move a resolution as a special resolution in the notice cannot be said to be such a mandatory requirement that failure to comply with it would invalidate the resolution. However passing a special resolution is mandatory. (Maneckchowk and Ahmedabad Manufacturing Co. Ltd. Judgment of Gujarat High Court dated 10.12.1969; In re Novopan India Limited; In Re. In Re: Novopan India Limited, In Re: Sumitra Pharmaceuticals and Chemicals Ltd., Raasi Cement Limited In re, ; V.G. Balasundaram and others Vs. New Theatres Carnatic Talkies Pvt. Ltd. and others,); In Re: Self Help Private Industrial Estate Private Ltd., In Re: Parikh Engineering and Body Building Co. Ltd., It is open to the shareholders to waive the notice if, in their opinion, the resolution, though it was passed without satisfying the requirement of the notice, is for the benefit of the company. The only requirement is that the shareholders should give their consent with full knowledge of the implications of the resolution. (In Re: In Re: Self Help Private Industrial Estate Private Ltd.,

28. In examining whether Section 189(2)(b), (which requires the notice under the Act being duly given of the general meeting), is satisfied, it is necessary to bear in mind that Section 172(1) requires every notice, of a meeting of a company, to specify the place, the day and the hour of the meeting, and to contain a statement of the business to be transacted thereat. Section 173(2), which stipulates that the statement annexed to the notice must set out all material facts concerning reduction of capital (read "share premium"), including particulars of the nature of the concern or interest, if any, thereof, of every director, is mandatory. Firestone Tyre and Rubber Co. Vs. Synthetics and Chemicals Ltd. and Others, Vardhaman Publishers Limited, Dharmayug Investments Limited and Madhava Das Nalapat and Others Vs. Mathrubhumi

Printing and Publishing Co. Ltd. and Others, As Section 393(1) also requires particulars of the interest of directors to be made known to the members, the requirements of both these sections can, conveniently, be examined together.

29. The object of enacting section 173 is to secure that all facts, which have a bearing on the question on which the shareholders have to form their judgment, are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. Having regard to the purpose and scope of the provision, Section 173 is mandatory and not directory V.G. Balasundaram and others Vs. New Theatres Carnatic Talkies Pvt. Ltd. and others, Mohanlal Ganpatram Vs. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd., ; Laljibhai C. Kapadia and Another Vs. Lalji B. Desai and Others, Any fact which would influence them in making up their minds, one way or the other, would be a material fact u/s 173(2), and has to be set out in the explanatory statement to the notice of the meeting. (Firestone Tyre & Rubber Co. [1971] 41 CC 377 (Bom) Gopal Das Gujarati Vs. Titagarh Paper Mills Co. Ltd. and Others, . It is not, however, the function of an Explanatory Statement to travel beyond the proposed resolution. Material facts have to be given, but not detailed particulars East India Commercial Co. Private Ltd. Vs. Raymon Engineering Works Ltd., . If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are much better judges of what is to their commercial advantage than the Court can be. The Court has only to see that the creditors have been properly convened and have been properly consulted, and have considered the matter. The Court ought to be slow to differ from them. (In re Dorman, Long and Company Limited (1934) 1 Ch. 635; In re English, Scottish, and Australian Chartered Bank (1893) 3 Ch 385.

30. The court, before approving a scheme of arrangement or sanctioning a reduction of capital, must be satisfied that the body of persons, entitled to vote at the scheme meeting, has been properly informed by an explanatory statement which is required to be sent to all persons entitled to vote setting out the matters which they should take into account when considering how to cast their votes. (Re M B Group plc (1989) BCLC 672. All relevant facts must be properly set out in the explanatory memorandum before the scheme meeting; and all known and relevant circumstances, being both accurate and kept upto date, should be disclosed. (Re Jessel Trust Ltd. [1985] B.C.L.C. 119; Re M.B. Group plc (1989) BCLC 672. Full disclosure required to be made of all material facts, begs the question of the nature of the scheme which is being propounded. The extent of the disclosure required must depend on the nature of the scheme. (In Re National Bank Ltd. 1966 (2) ch 193. It is easy to overstate the requirement of Section 173 of the Companies Act, 1956. (Sitaram Jaipuria and Others Vs. Banwarilal Jaipuria, . Any breach of the provisions of Section 173 does not, necessarily, have the effect of invalidating a meeting and nullifying the proceedings thereof. Gopal Das Gujarati Vs. Titagarh Paper Mills Co. Ltd. and Others, Surajmull Nagarmull Vs. Shew Bhagwan Jalan,

31. Section 393 is mandatory in terms. The statement, in strict conformity with section 393(1), must be annexed to the notice convening the meeting, and sent to the members or creditors. (In Re: Navjivan Mills Co. Ltd., Kalol Judgment in Company Petition No. 12 of 1970 with Company Application Nos. 136 of 1969, 38 of 1970 and). Unlike the explanatory statement u/s 173(2), Section 393(1)(a) does not ordain disclosure of all material facts. Clause (a) not only enumerates the categories of particulars, but it deliberately makes a departure by omitting any reference to material facts. As the Legislature has used a different phraseology in the said two provisions, it must be held that the legislative intent, u/s 393, was not to provide for disclosure of all material facts. (United Bank of India Ltd. Vs. United India Credit and Development Company Ltd., Khandelwal Udyog Ltd. and Acme Mfg. Ltd., In re In Re: Khandelwal Udyog Ltd. and Acme Mfg. Ltd., In Re. In Re. Tata Oil Mills Co. Ltd. and In Re. Hindustan Lever Ltd.,

32. Sri Ch. Ramesh Babu, Learned Counsel for the respondent-objector, would submit that clause 6 of the statement circulated to the creditors, along with the notice, u/s 393 of the Companies Act, was bald and its correctness could not be examined in the absence of details of the assets and liabilities of the petitioner being furnished. Sri S. Ravi, Learned Senior Counsel, would submit that Section 393 does not require a winding up petition, pending against the petitioner company, to be disclosed in the explanatory statement; the objector, in the present case, is trying to confuse the disclosure requirements under the proviso to Section 391(2) with the disclosure requirements u/s 393; and the petitioner has made all the relevant disclosures u/s 393 to the shareholders, secured and unsecured creditors.

33. Section 393 (1)(a) requires particulars to be given of any material interests of some persons connected with the company, including the directors and the managing director. The interest, contemplated in Section 393(1)(a), is interest material for consideration of the scheme by the shareholders. Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others, Every kind of interests is not to be mentioned. Only material interests are to be so done. All that clause (a) to section 393(1) requires is that the material interests which every person concerned possesses not only in the company, but also in the scheme, should be stated. (In re In Re: Sidhpur Mills Co. Ltd., Section 393(1)(a) does not require that the statement should contain the effect of the compromise and arrangement on the material interests of the directors if it is not different from the effect on the like interest of other persons. Once the material interests are set out, the effect on those interest, if it is not different from the effect of the scheme on the like interest as of other depositors and shareholders, is not specifically required to be set out. (In Re: Navjivan Mills Co. Ltd., Judgment in Company Petition No. 12 of 1970 with Company Application Nos. 136 of 1969, 38 of 1970 and). The requirement is to state and explain the effect, and not the details or particulars of the consequence or result. The basis of working, on which a certain consequence or result would flow from the scheme, is not required to be stated. It is only the resultant effect of the scheme which is

required to be stated. *Jitendra R. Sukhadua Vs. Alembic Chemical Works Company Ltd.*, The legislature has contemplated that, in general, shareholders ought always to be informed of the directors' material interests. The onus on a company or directors of a company, who are placing a scheme before the court and have failed to disclose to the court the material interests of the directors, is a very heavy one. (*In Re Jessel Trust Ltd* ([1985] B.C.L.C. 119).

34. u/s 393(1)(a) the special interest of the director, which is required to be brought home to the voters, must satisfy the following requirements before it can be treated to be a relevant special interest: (1) the director's interest must be a special interest different from the interest of other members who are the voters at the meeting; (2) the compromise or arrangement, which is put to vote, must have an effect on such special interest of the director; and (3) such effect must be different from the effect of compromise and arrangement on similar interest of other persons who are called upon to vote at the meeting. (*Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*,

35. The explanatory statement, enclosed along with the notice, refers to Section 78, 100 to 104 and 390 to 394 of the Companies Act. All that the petitioner stated, in Clause 6 of the explanatory statement, is that the aggregate assets are more than sufficient to meet all their liabilities; the scheme will not adversely affect the rights of any of the creditors in any manner whatsoever; and due provision had been made for payment of all liabilities as and when the same fell due in the usual course. The petitioner has placed copies of all its balance sheets upto the year 2010-11. Sri Ch. Ramesh Babu has not been able to show, from the said balance sheets, as to how the statement in Clause 6, of the assets being more than sufficient to meet the liabilities, is erroneous.

36. Though the explanatory statement does not refer to the material interests of the Directors, the notice of the meeting, (published in the Business Standard (English daily) dated 12.11.2011), refers to the entitlement of all persons to copies of the scheme of arrangement free of charge at the registered office of the petitioner company. Under clause 18 of the Scheme it is stated that the Board of Directors of the company, involved in the scheme of arrangement, have no material interest in the proposed scheme of arrangement except as shareholders in general. No material interest of theirs, which is unlike the interest of others in the scheme, and which necessitated disclosure, has been brought to the notice of this Court either by the respondent-objector or anyone else.

37. In their affidavit filed in support of C.A. No. 31 of 2012, the respondent-objector has alleged that the petitioner suppressed material facts, and made misleading statements in the scheme of arrangement as circulated for voting, by showing and reflecting incorrect values of the debt due to its creditors in their books for the purpose of the proposed scheme of arrangement; the effect of adjusting the debit balance in the profit and loss account may enable the company to pay dividend which otherwise it may not be able to; and the petitioner was not entitled for grant of any equitable relief, more so as they had

approached this Court with unclean hands.

38. In the explanatory statement, annexed to the notice, the petitioner stated that there was no cash outflow pursuant to approval and implementation of the scheme though it amounted to reduction of capital to the extent of setting off of accumulated losses against the securities premium account. The aforesaid statement, as is evident from the affidavit dated 10.09.2012 filed before this Court, is, to put it mildly, erroneous. In the affidavit dated 10.09.2012, it is stated that the petitioner was under an obligation to pay dividend, on preference shares of Rs. 324.85 crores, aggregating to Rs. 34.65 crores (including dividend tax thereon) for the financial year 2011-12 (as extended upto 30.09.2012), failing which the preference share capital investment would become a non-performing asset which would hamper the ability of the company to carry on its business operations. The explanatory statement annexed to the notice, and the scheme of arrangement enclosed thereto, make no reference to the facts stated hereinabove, including that the petitioner was obliged to pay dividend to its preference shareholders aggregating to Rs. 34.65 Crores. The obligation to pay dividend to the preference shareholder banks by 30th September, 2012 will, undoubtedly, result in cash outflow. The petitioner's attempt to treat it as a mere write-off of losses, for the years 2008-09 and 2009-10, is but a disguised effort to utilize "share premium" to pay "dividend". The material misstatement in the explanatory statement has resulted in the shareholders being kept in the dark, and their being led to believe that utilization of share premium was only to write off accumulated losses. (Though Clause 10 of Part III of the Scheme, which relates to "dividends and corporate benefits", makes a vague reference to the entitlement of shareholders to dividend and corporate benefits, on the shares, that may be declared or accrue on the equity shares or preference shares out of the credit balance in the profit and loss credit balance remaining after the adjustments mentioned in Part I of the scheme). Does this non-disclosure of "material facts", disabling the shareholders from taking an informed decision whether or not to approve the scheme of arrangement, necessitate refusal by this Court to confirm reduction of capital?; and would doing so be against public interest?. We shall examine these questions later.

39. The requirement, u/s 189(2)(c) and Section 391(2) of the Act, is that the votes cast by members/creditors in favour of the resolution are not less than three times the number of votes cast against it. The Chairman's report does show that this requirement is satisfied as all the shareholders and secured creditors, and more than 3/4th of the unsecured creditors, who attended the respective meetings, had voted in favour of the scheme of arrangement involving reduction of capital.

40. Sri Ch. Ramesh Babu, Learned Counsel for the respondent-objector, would submit that the Chairperson's report dated 09.12.2011 indicated the particulars of unsecured creditors who had participated in the meeting; the creditor at serial No. 8 therein was not a creditor of the petitioner; even otherwise, they were

given voting rights for Rs. 11.00 crores though, in the intervenor petition filed by them in C.P. No. 199 of 2010, they had claimed only Rs. 2.47 crores; the creditors at serial Nos. 13 and 53 were none other than the petitioner's associates; though they had shown their value as Rs. 199.79 crores, they were creditors only for Rs. 55.00 crores; as such the requisite statutory majority obtained in the meeting was doubtful; the credit status of each creditor with their value, vis-?-vis the value shown in the books maintained by the petitioner, should be examined; if any discrepancy is found, it should be construed that the Chairperson was mislead, and had held the meeting based on the inflated or the scaled down value of the debt due to the creditors of the petitioner; the respondent had attended the meeting on 09.12.2011, and had submitted a representation expressing their grievance; the Chairperson had neither considered nor examined the correctness of the value of the credit given to the respondent under the entry pass, vis-?-vis the debt confirmation letter dated 03.04.2009; the Chairperson had also not examined the other grievances pointed out in paragraphs 8 and 9 of the representation; as such, his report is vitiated; and the correctness of the majority votes shown in favour of the scheme is doubtful.

41. The creditor at Sl. No. 8 is Sarala Projects Works Pvt Ltd to whom a sum of Rs. 11,18,64,757/- is said to be due; the creditor at Sl. No. 13 is IL&FS Financial Services Ltd to whom the petitioner company claimed to be due Rs. 144,79,22,472/-; and the creditor at Sl. No. 53 is Infrastructure Leasing and Financial Services Limited to whom the petitioner claimed to be due Rs. 55,00,00,000/-. The contention of Sri Ch. Ramesh Babu, in short, is that the aforesaid figures are inflated only to ensure that more than 75% of the unsecured/sundry creditors of the petitioner are shown to have voted in favour of the scheme of arrangement involving reduction of capital. While these allegations may well have necessitated a detailed enquiry for, if they are true, it may have resulted in the unsecured creditors, who voted in favour of the scheme, not being 3/4th of those present and voting, it cannot be lost sight of that these contentions are raised for the first time during the hearing of the petition, and in the written submissions filed thereafter. Neither in their representation dated 8.12.2011 submitted to the Chairman of the meeting, nor in their objections filed before this Court, has the respondent-objector taken any such plea.

42. In their representation filed before the Chairman dated 8.12.2011, reference is made by the respondent to their claim of being due Rs. 70.02 Crores; to C.P. No. 199 of 2010 filed by them against the petitioner company; and to the hearing of the said petition. In their intervenor application filed before this Court, in C.A. No. 31 of 2012, the respondent-objector has referred in detail to the dispute between them and the respondent which is the subject matter of C.P. No. 199 of 2010. Neither the respondent-objector's representation dated 8.12.2011, nor their intervenor application, refer to the claims now made across the Bar of the aforesaid debts, due to the aforesaid creditors, being inflated. Vague and bald allegations, and the absence of particulars being furnished by the

respondent-objector, in their pleadings has disabled the petitioner from rebutting such allegations by way of a reply thereto. In such circumstances, it would be wholly inappropriate for this Court to examine these contentions.

43. According to Sri Ch. Ramesh Babu, learned Counsel, reduction of securities premium is permissible only when the company is financially viable, and the company meets its financial commitments as and when they fall due; the petitioner was not able to meet its financial commitments as and when they fell due; they could not be permitted to reduce the capital by reducing the share premium account; the scheme is prejudicial to the interests of the creditors; the effect of adjusting the debit balance (losses) in the profit and loss account with the paid up share capital (share premium), as proposed in the scheme of arrangement, was to enable the company to pay dividends, which was otherwise impermissible in law i.e., u/s 205 of the Act; and, as the necessary statutory compliances were not fulfilled, this Court should not grant approval. Section 205(1) of the Act stipulates that no dividend shall be declared or paid for any financial year except out of the profits of the company for that year, arrived at after providing for depreciation, or out of the profits of the company for any previous financial year arrived at after providing for depreciation. The statutory prohibition in Section 205 is for companies not to declare dividend when there are accumulated losses. Subject to an order of confirmation by this Court, what the petitioner seeks to do is to utilize the balance in the securities premium account to write off all its accumulated losses for the years 2008-09 and 2009-10, and to revive the profits for the year 2007-08. It is from out of the revived profits for the year 2007-08 that the petitioner intends to pay dividend to its preference share holders. It cannot, therefore, be said that payment of dividend to preference shareholders is in violation of Section 205 of the Act. Though all the Balance Sheets of the petitioner upto the financial year 2010-11 were made available, Sri Ch. Ramesh babu has not been able to substantiate therefrom the petitioner's inability to meet its financial commitments as and when they fell due.

III. Utilising A part Of The Share Premium for Payment of Divident-Does It Amount To Payment Of Paid-Up Capital To The Shareholders?

44. Where the scheme of compromise and arrangement comprises, within its ambit, reduction of the share capital, the procedure for reduction must be gone through, but if it is shown that the procedure prescribed u/s 100 onwards has been carried out simultaneously, while submitting the scheme for approval of the creditors and members, the court can, while sanctioning the scheme, sanction reduction of share capital. The important thing to be found out would be whether the procedure for reduction of share capital, wherever it is mandatory, has been strictly carried out and, wherever it is directory, has been substantially carried out. (Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re Judgment of Gujarat High Court dated 10.12.1969; In Re In Re: G.V. Films Ltd.,

45. Sections 100 and 101, and Section 391(2), require the Court to confirm the

reduction in capital, and sanction the scheme of arrangement respectively. Reduction of capital, in the present case, does not involve diminution of liability in respect of any unpaid share capital. What the scheme of arrangement envisages is utilization of the share premium account, in its entirety, to write off past losses, and a part of the revived profits for the year ending 31.03.2008, (arising as a consequence of the aforesaid adjustments), for payment of dividend to the preference shareholders.

46. According to Sri S. Ravi, Learned Senior Counsel, what is being reduced is share premium; its consequences are a resultant "freeing" or "unmasking" of past profits; what is being paid to the financial institutions is not a part of capital or even share premium; it is payment of dividend on capital from profits; and Section 101(2)(ii) of the Act has, therefore, no application.

47. As clauses (a) to (c) of Section 101(2) would necessitate compliance, in case any paid up capital is paid to any shareholder, I must examine the submission of Sri S. Ravi, Learned Senior Counsel, that, in the present case, payment of "dividend", to the preference shareholders of the petitioner, is not payment of paid up share capital of the company to its shareholders. "Capital" has become a rigid yardstick fixing the minimum value of the net assets which must be raised initially and then, so far as possible, retained in the business. While they are primarily intended for the protection of creditors, they are also designed to protect shareholders, present and future, against action by the directors which might covertly diminish the value of their shares as long-term investments. (Gower's Principles of Modern Company Law (Fourth Edition) Chapter 10). A Company, as a going concern distributing profits of the year or accumulated profits, is regarded as distributing dividend among the shareholders. (Commissioner of Income Tax, Gujarat Vs. Girdhardas and Company Private Ltd., . The ordinary meaning of "dividend" is the receipt by the shareholder, by reason of his being a shareholder, of a part of the profits of the company of which he is a shareholder. Kantilal Manilal and Others Vs. Commissioner of Income Tax, Bombay North, Kutch and Saurashtra Ahmedabad,

48. One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. The effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business T.

Durairajan and Others Vs. Waterfall Estates Ltd. and Others, Trevor v. Whitworth 12 AC 409 (HL)). A limited company, not in liquidation, can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it, by means of which it parts with moneys to its shareholders, must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus", or any other name, it still must remain a payment on division of profits. (Re Sechiari (deceased). Argenti v. Sechiari (1950) 1 ALLER 417; 128 Ind. Cas. 641 (Privy Council) A company, having an artificial person, can make a distribution amongst its members (otherwise than in a winding up) in one of two ways-but only in one of two ways: that is, by a distribution of divisible profit, that is, by way of dividend; and by way of a return of capital pursuant to an order of the court upon a petition for reduction of capital in accordance with the Act. The question whether a given distribution lawfully made by a company is of the former or the latter description may thus justly be determined by reference to the method or mechanics of distribution, permitted or enjoined by the Act 128 Ind. Cas. 641 (Privy Council) In re Duff's Settlements National Provincial Bank Ltd. 1951 (1) Ch. 923). Section 78 statutorily provides for the application of premium, received on the issue of shares, which has been transferred to the share premium account. Distribution of the share premium as dividend is not permitted, (save sanction of the Court), and is taken out of the category of divisible profits. Additional Commissioner of Income Tax, Delhi Vs. Om Oils and Oil Seeds Exchange Ltd., ; First National City Bank Vs. Commissioner of Income Tax, Hekett Engineering Co. Vs. Commissioner of Income Tax, . The statutory restrictions which apply to the share premium account prevent sums, held at credit of that account, from being distributed as distributable profits of the company. But once they have been released from the share premium account, following upon its cancellation, they are available to be distributed, as profits distributable by way of dividend. Once the statutory requirements for the cancellation of share premium account have been satisfied, the funds transferred to any reserve will be available for all purposes to which distributable profits may be applied. (Quayle Munro Ltd, Petitioners (1994) 1 BCLC (Court of Session) : 1992 SC 24; Drown v. Gaumont British Picture Corporation 1937 Ch 402). This Section, which is a new departure in legislation, and was intended to make compulsory that which had long seemed to be desirable, namely, the practice of putting aside as a reserve, and treating in the ordinary way as capital, cash premiums received on the issue of shares at a premium. Consequently, the share premium account can be distributed in the same restricted way, and with the same leave of the court, as if paid up share capital was being returned to the shareholders. (Henry Head & Co. Ltd v. Ropner Holdings, Ltd. (1951) 2 All ER 994 (Ch.d).

49. The Section does not, in terms, convert the share premium account into paid up share capital, but merely makes the provisions of the Act relating to the reduction of share capital apply as if the share premium account was paid up

share capital. But the provisions thus made applicable are the essential provisions on which the distinction between share capital and divisible profit depends, and on which the implied prohibition against the distribution of paid up share capital, otherwise than in pursuance of a duly authorized reduction of capital, is based. The Section does take the share premium account out of the category of divisible profit and prevent it from being distributed by way of dividend. The terms of the Section shows that, where the transaction in question is a distribution amongst shareholders of the share premium account, or a part thereof, that transaction is to be treated as if the company was reducing its capital by paying off paid up share capital. The company being thus, by force of the section, deemed to have paid off notionally paid up capital, the sum distributed must clearly be deemed to have left the company as paid up share capital returned to the members, and not as distributable profit divided amongst the members by way of dividend. The law requires that the distribution should be treated from the point of view of the payer, that is, the company, as a distribution by way of return of capital. The effect of the Section is to make a distribution, amongst shareholders, of the share premium account, or a part thereof, equivalent in law to an actual return of paid up share capital, and capable of being validly effected only through the medium of precisely similar reduction proceedings. The Section recognizes the essentially capital character of premiums received on the issue of shares, and gives effect to it by investing any distribution of the share premium account with the character of a capital distribution carried out by means of a notional reduction of paid up share capital. (In Re Duff's Settlement National Provincial Bank Ltd. 1951 (1) Ch. 923.

50. The scheme of arrangement, now under consideration, envisages (albeit through a circuitous route) utilization of a part of the share premium account for payment of dividend to the preference shareholders. Where share premium is utilized for payment to the shareholders, Section 78(1) requires the provisions of the Companies Act, relating to reduction of share capital, to be applied as if the share premium were the paid up share capital of the company. The legal fiction in Section 78(1) would require this Court to deem reduction in share premium as reduction of capital, and apply the provisions of the Act relating thereto. A conjoint reading of Section 78(1), with Section 101(2) of the Act, would require this Court to deem that such payment of share premium to the shareholders is the payment of paid-up share capital to the shareholders necessitating compliance of clauses (a) to (c) of Section 101(2) of the Act.

51. Sri S. Ravi, Learned Senior Counsel, would submit that, while it is mandatory to follow the procedure u/s 101 of the Companies Act where there is diminution of liability in respect of unpaid share capital or payment to a shareholder of any paid up share capital, it is in the discretion of the Court "in any other case"; the expression "in any other case if the Court so directs" should be construed ejusdem generis; and, in other words, only if it affects the creditors' interests by depletion of the capital of the company being paid off to the shareholder, or the future legal obligation of holders of partly-paid up shares being diminished,

would the Court have to exercise discretion. On the other hand, Sri Ch. Ramesh Babu would submit that, as sanction of the scheme by this Court would also bind the minority creditors, the debt claimed by the respondent, in C.P. No. 199 of 2010, i.e., for Rs. 70.02 crores, should be enquired into, and the petitioner should be directed to secure the said claim in case this Court proceeds to allow C.P. No. 240 of 2011 in their favour.

52. While the Court, undoubtedly, has the discretion "in any other case" also to direct that the provisions of clauses (a) to (c) of Section 101(2) shall have effect, it is unnecessary to examine whether or not this Court should exercise its discretion to do so, as what, in effect, the scheme envisages is utilizing a part of the share premium for payment of paid-up share capital to the preference shareholders, and Section 101(2) requires compliance with clauses (a) to (c) in such cases, save when the Court chooses to exercise its discretion u/s 101(3) of the Act.

53. Apart from the shareholders having material interest, the creditors are a class of persons having interest in the assets of the company as the only source for the satisfaction of their debt. (In Re: G.V. Films Ltd. (2009) 150 CC 415 (Mad)). The Court must be satisfied that the consent of the creditors, who had objected to the reduction, has either been obtained or their debts or claims have been discharged or settled or secured. (In Re In Re: OCL India Ltd., Meux's Brewery Co. Ltd., (1919) 1 Ch 28; Re Rafter Group plc (1988) Ch.D. 685; In Re In Re: Hindalco Industries Ltd., Poole v. National Bank of China Ltd (1907) AC 229). Section 101(2) of the Act enables every creditor of the company to object to the reduction of capital. The word creditor for this purpose means a person who has a debt or any claim against the company of such a nature as would have been provable in winding up. (Dicido Pier Co., Re, (1981) 2 Ch. 354; Meux's Brewery Co. Ltd., (1919) 1 Ch 28; Eastern & Australian S.S. Co., Ltd & Reduced, Re, (1893) 68 LT 321. Clauses (a) to (c) of Section 101(2) require the Court to settle a list of creditors so entitled to object, and to ascertain the names of the creditors and the nature and amount of their debts and claims; to cause publication of a notice, and fix the date or dates within which the creditors, not entered on the list, are to claim to be so entered, or are to be excluded from the right of objecting to the reduction; and in cases where the creditor entered on the list, (whose debt or claim is not discharged or has not been determined), does not consent to the reduction, to dispense with his consent on the company securing payment of his debt or claim, by appropriating an amount to be fixed by the Court, after a like enquiry and adjudication as if the company were being wound up by the Court.

54. As noted hereinabove, pursuant to the directions of this Court, in C.A. Nos. 1651 and 1652 of 2011 dated 04.11.2011, meetings of the secured and unsecured creditors of the petitioner company were convened and held. In the affidavit dated 05.09.2012, the authorized signatory of the petitioner would state that the Chairperson, appointed for the meeting, had issued individual notices to

all the 2624 unsecured creditors, as on the date of filing of C.A. No. 1652 of 2011, dated 24.10.2011, to whom the petitioner was due Rs. 362,48,50,210 (including creditors under the head "current liabilities"); publication of the notice of the meeting was also made in the newspapers; and the Chairperson had filed proof of service and publication before this Court. While the secured creditors, in their meeting, unanimously consented to the scheme of arrangement involving reduction in share capital (share premium), amongst the 53, who attended the meeting of the unsecured creditors, three, including the respondent- objector, voted against the scheme. On the company petition being admitted, the petitioner was directed to cause publication of the date of hearing of the petition, and publication was effected in Business Standard (English daily) and Andhra Prabha (Telugu daily) newspapers on 07.01.2012. In the affidavit dated 10.09.2012, the authorized signatory of the petitioner would submit that neither the petitioner nor the office of their Counsel received any objections from any creditors, (other than from the respondent-objector), regarding either the scheme of arrangement or reduction of capital. Even among the three unsecured creditors, who voted against the scheme, it is only the respondent-objector which has approached this Court opposing the scheme of arrangement involving reduction of capital. It would, therefore, be a needless exercise for this Court to now settle a list of creditors entitled to object to the reduction, or to again cause publication of a notice intimating the creditors that they are entitled to make their claims, and object to the reduction of capital.

55. The respondent-objector filed C.P. No. 199 of 2010 seeking winding up of the petitioner-company. They also filed C.A. No. 1552 of 2010 and C.A. No. 1094 of 2010 seeking attachment of the properties of the petitioner company, and for a direction that it not be permitted to change its name. On the Company Applications being dismissed, the respondent-objector filed O.S.A. Nos. 26 and 27/11 which were also dismissed by the Division Bench by its order dated 23.3.2011, and the matter was posted for admission and hearing. The petitioner's version, of the claim of the respondent-objector regarding the debt due to them, is detailed in the Company Petition, and needs no reference in this order as they are matters for consideration in C.P. No. 199 of 2010. Suffice to note that the petitioner filed O.S. 687 of 2010 before the III Additional Judge, City Civil Court, Hyderabad seeking damages for Rs. 16,00,20,000/- against the respondent-objector which has filed its counter claim thereto.

56. While the respondent-objector claims that the petitioner has neither discharged nor secured their debt of Rs. 70.02 Crores, the petitioner would dispute the claim and contend that it is not Rs. 70.02 Crores, but only Rs. 1.21 crores which is due and payable by them to the respondent. Section 101(2)(c)(ii) enables this Court to dispense with the consent of a creditor on the company securing payment of his debt or claim as the Court may direct. In cases where the company does not admit the full amount of debt or claim, the enquiry this Court is required to make, u/s 101(2)(c)(ii), is a like enquiry and adjudication as if the petitioner is being wound up by the Court. The respondent-objector has

filed C.P. No. 199 of 2010 which, learned Counsel on either side admit, is pending on the file of, and has been heard in part by, another bench of this Court. Since the bonafides of the respondent-objector's claim, of their being due Rs. 70.02 crores, would be examined in C.P. No. 199 of 2010, any enquiry by this court, in the present proceedings, would not only be a repetitive exercise, but may also result in adjudicating C.P. No. 199 of 2010 on its merits which, to say the least, would be wholly inappropriate.

57. The legislature has made Section 101(2) subject to the provisions of Section 101(3) of the Act which enables this Court, having regard to the special circumstances of the case and if it thinks proper so to do, to direct that the provisions of Section 101(2) shall not apply as regards any class of creditors. The court has a complete discretion under the Section whether to confirm a reduction, and on what terms. One of the factors it will take into account in all cases is whether the reduction proposals have been properly explained. (Re Ratners Group Plc 1988 (BCLC) 685; Re Thorn EMI plc (1988 (4) BCC 698; Re Campaign Holdings Pty (1989 (15) ACLR 762; Re Heron International NV (1994 (1) BCLC 667; Re Ransomes plc (1999) 2 BCLC 591 (CA); Palmer's Company Law (Vol. I); 25th Edition para 4.313).

58. According to Sri S. Ravi, Learned Senior Counsel, even if payment of dividend, in the present case, is held to be payment of share premium, the circumstances, in their entirety, will have to be looked into; convertible and non-convertible preference shares have been issued to ten Banks/financial institutions on conversion of their existing debts; the petitioner has a legal obligation to service the preference shares and pay dividend on the preference capital; the petitioner's failure to do so would result in the entire preference capital, held by the financial institutions and banks, being treated as non-performing assets frustrating the very object with which ILFS stepped into the petitioner company; in reality, what is being paid is only a return on the secured creditors' lendings, now converted into preference shares; and the petitioner has filed an affidavit of undertaking to utilize this amount only for payment of dividend to financial institutions on such preference capital; and the motive is only to save the company from ruins for the benefit of all the shareholders and creditors.

59. The court will not, in the absence of special circumstances, give any direction, under the section, but it will do so if it is satisfied that, having regard to the value of the company's liquid assets, or for any other reason, no creditor, who might otherwise be entitled to object to the reduction, will be prejudiced by it. If it is established that the company has cash and securities of a sufficient value to cover all the provable liabilities as well as any amount proposed to be returned to the shareholders with a reasonable margin of safety to cover oversights or contingencies, this will usually be regarded by the court as a special circumstance justifying exemption under the section, or if the discharge of all the company's provable debts is guaranteed to the court's satisfaction, this may be regarded as a sufficient special circumstance. Some recognition of

reality must be admitted in the exercise of the court's discretion under the section. (Re Lucania Temperance Billiard Halls (London), Ltd. (1965) 3 All ER 879 (Ch.D)).

60. In his affidavit dated 20.9.2012, the authorized signatory states that the petitioner's annual turnover is in excess of Rs. 1500.00 Crores; as on 31.3.2011, the depreciated fixed assets of the company was valued at Rs. 295.92 Crores; it has Rs. 158.37 Crores worth investments in pass through certificates, and in equity share capital of subsidiary companies and joint ventures; the current assets include sundry debtors of Rs. 566.45 Crores; this amount largely represents the monies due from NHA and the Government of Andhra Pradesh for works already executed; the current assets also include Rs. 689.40 crores of loans and advances which are considered good; the total assets as per the balance sheet, after netting off the current liabilities and after writing off depreciation of fixed assets on straight line method of accounting at the rates applicable, are Rs. 1429.51 Crores; the current value of the fixed assets on replacement cost basis would be much more than the historical value reflected in the balance sheet; the liabilities to the secured and unsecured lenders are only Rs. 847.46 crores and, even if the claim of the respondent-objector is held to be valid, there are substantially more assets that the company has, as compared to the liabilities, and the petitioner would be able to meet its obligations.

61. While the assets of the petitioner may well be sufficient to meet its liabilities, including the sum of Rs. 70.02 crores claimed as due to them by the respondent-objector, the special circumstances which would justify a direction for dispensing with the creditors' objections must be such as would satisfy the court that, so far as could be reasonably foreseen, the relevant creditors would not be adversely affected by the proposed reduction. But if the creditors did actually appear and object, the court would dispense with a creditor's assent only if the company secured payment of his claim by appropriating a sufficient sum. (Re Rafter Group plc (1988) Ch.D. 685; In Re In Re: Hindalco Industries Ltd., ; Lucania Temperance Billiard Halls (London) Ltd. In re (1965) 3 All ER 879 (Ch.D); In Re In Re: OCL India Ltd., Proceeding on the premise that the respondent-objector's claim, of being due Rs. 70.02 crores, has some basis, this Court must ensure that such a claim is adequately secured. Though the other two creditors who opposed the scheme, in the meeting convened and held for the said purpose, have not chosen to appear before this Court in the present proceedings, their interests must also be secured as they are amongst the minority who have opposed the reduction. In the affidavit dated 10.09.2012, the authorized signatory of the petitioner states that the petitioner undertakes to furnish a bank guarantee for Rs. 1.21 crores to secure the admitted liability subject to the outcome of the civil suit in O.S. No. 687 of 2011 pending before the III Additional Chief Judge, City Civil Court, Hyderabad. The petitioner shall, within two weeks of this order, furnish an unconditional bank guarantee from a Nationalized bank for Rs. 1.21 crores in favour of the respondent-objector, and deposit the guarantee with the Chief Judge, City Civil Court, Hyderabad to be retained to the

credit of O.S. No. 687 of 2011. The bank guarantee shall be renewed periodically till the final outcome of the suit.

52. The bonafides of the remaining dues, as claimed by the respondent-objector for Rs. 68.81 crores, (i.e., 70.02 crores less the admitted liability of Rs. 1.21 crores), is disputed by the petitioner. The dues of the other two unsecured creditors (who voted against the scheme) is Rs. 8,38,239, and is not in dispute. Securing the interests of the minority creditors for Rs. 68.90 crores (i.e., Rs. 68.81 crores + Rs. 8,38,239) is all that this Court needs to do. While I was initially inclined to direct that this sum of Rs. 68.90 crores be retained in the "share premium account" itself, I decided not to do so as, in case C.P. No. 199 of 2010 is dismissed later, the petitioner would have to undertake the expensive, elaborate and needless exercise of convening and holding meetings, and to seek confirmation of reduction of capital from this Court, all over again. Instead, it would suffice if the petitioner is directed to set apart Rs. 68.90 crores as a "special reserve" during the pendency of C.P. No. 199 of 2010. After the final outcome of the said case, or pursuant to any order passed therein, Rs. 68.81 crores may be available, for utilization by the petitioner, later. The remaining balance of Rs. 9.00 lakhs shall be retained in the "special reserve" till the dues of the other two creditors are settled. This would not only secure the interests of the respondent-objector, even if they were to succeed later in C.P. No. 199 of 2010, but would also enable the company to forthwith utilize the remaining balance in the profit and loss account of Rs. 110.92 crores for the purposes specified in their affidavits dated 10th and 18th September, 2012. It is reiterated that this Court has not expressed any opinion on the merits of the respondent-objector's claim of the debt due to them, from the petitioner, to be Rs. 70.02 crores, as they are the subject matter of proceedings, before another bench of this Court, in C.P. No. 199 of 2010.

63. In the affidavit dated 10.09.2012, the authorized signatory would state that Rs. 34.65 crores is to be paid as dividend to the preference share holder banks for the financial year 2011-12 (extended upto 30.09.2012); and the petitioner was giving an undertaking that the surplus, available in the profit and loss account of the company of Rs. 179.82 crores, would not be utilized for the purposes of payment of dividend to the shareholders. As this Court has merely directed Rs. 68.90 crores to be retained in a "special reserve", of which Rs. 68.81 crores is to be retained only during the pendency of C.P. No. 199 of 2010, Rs. 76.27 crores would still be available, after payment of dividend of Rs. 34.65 crores to the preference share holders, which the petitioner can, as stated in the affidavits dated 10.09.2012 and 18.09.2012, utilize for the purposes of payment of dividend to its preference shareholders later, and/or for adjustment against losses, if any, in the normal course of its business operations from April, 2011 onwards.

64. The court ought not, usually, to require that a reserve be set aside indefinitely to safeguard the interests of future creditors and shareholders.

Anyone who gives credit to or acquires shares in the company after the reduction takes effect is, prima facie, adequately protected by existing statutory safeguards. (In *Re Grosvenor Press Plc.* [1985] 1 W.L.R. 980). It is unnecessary, therefore, to set apart any further sums in the "special reserve".

65. Section 102(2)(a) of the Companies Act enables this Court, if it makes an order confirming reduction of capital on such terms and conditions as it thinks fit, and if for any special reasons it thinks proper so to do, to make an order directing that the company shall, during such period commencing on or at any time after the date of the order, add to its name as the last words thereof, the words "and reduced". Rule 62(b)&(c) of the Rules stipulate that, when the Judge makes an order confirming a reduction, the order shall include directions as to the period commencing on or after the date of the order, during which the words "and reduced" shall be added to the name of the company as the last words thereof, in case the Court thinks fit to direct u/s 102(2)(a)&(b) that the words shall be so added; and as to the publication, if the Judge so directs, of the reasons for reduction or the causes that led to it, or such other information in relation thereto, as the Judge may require u/s 102(2)(b).

66. Sri S. Ravi, Learned Senior Counsel, would submit that the distinctive character of share premium, as being apart from the paid-up share capital, is not destroyed since what is being reduced is the share premium, and not the share capital; although the procedure for reduction of capital is being followed as mandated by law, the said requirement of adding the words "and reduced" would not apply; however, if this Court is of the opinion that the same should be added, it may be for a restricted period as may be directed by the Court.

67. Section 78 (1) requires the provisions of the Act, relating to the reduction of the share capital of a company, to apply as if the securities premium account were the paid-up share capital of the company. The provisions of the Act relating to reduction of capital are those in Sections 100 to 104, including Section 102(2) (a)&(b) of the Act. As such, even in the case of reduction of share premium, this Court has the power to direct the company to add the words "and reduced" as the last words to its name, and to require the company to publish the reasons for reduction.

68. In *In Re: Novopan India Limited*, this Court held:

...Clause (a) of sub-section (2) of section 102 of the Act also provides that the court may, if for any special reason it thinks proper so to do, direct the company to add the words "and reduced" to its name as the last words thereof during the period commencing from the date of the court's order till such time as the court specifies in its order. In the instant case, no special reason is shown by the Central Government to be existing which may call for giving such direction to the company. Nothing has also come to the notice of the court which may give rise to exercising such discretion vested in the court. I, therefore, do not find any necessity for giving such direction...

69. In *In Re: Parrys Confectionery Ltd.*, the Madras High Court observed:

....The next question that arises is whether the words "and reduced" shall be added to the name of the Petitioner company from the date of the Order. Since there is no cash flow from the Petitioner Company to the shareholders and the Secured Creditors of the Petitioner have given their consent to the proposed reduction, I am of the view that the words "and reduced" need not be added to the name of the Petitioner company from the date of this Order. Therefore, I dispense with the requirements to comply with the provisions of Rule 62(b) and (c) of the Rules...

70. Adherence to the statutory prescription, u/s 102(2) of the Companies Act, would necessitate examination by the court whether there are special reasons requiring it to make an order directing that the company add to its name, as its last words, the words "and reduced", and to make an order requiring the company to publish reasons for reduction of capital or such other information in regard thereto as the court may think expedient with a view to giving proper information to the public. What are the matters which are required to be examined by the court to decide whether special reasons exist for so directing the company? While passing an order, confirming reduction of capital, the court must primarily satisfy itself that the interests of the creditors are safeguarded, that the interests of the shareholders are secured and that such reduction is in public interest. The petitioner is a listed company, and its shares are listed in both the National Stock Exchange and the Bombay Stock Exchange. Since the shares of the company are listed, and are being traded, in the stock exchanges, public interest would necessitate the prospective investors being informed of the reduction of capital. This Court has the option of directing the company to add the words "and reduced" as the last words of its name (either permanently or for a certain duration), and/or direct it to cause publication of the reasons and the causes for such reduction, in order to give proper information to the public. While publication of the reasons in the newspapers can only be on a particular day, directing the company to add the words "and reduced" to its name for a certain duration would caution prospective investors and inform them that the company has reduced its capital, which would enable them to make further enquiries in this regard. (*In Re In Re: On Line Media Solutions Ltd.*,

71. Instead of directing publication, of the causes and the reasons for reduction of capital, in the newspapers I consider it appropriate to direct the petitioner to add to its name, as its last words, the words "and reduced" for the period upto and until the end of the financial year 2012-13, and in the balance sheet, the profit and loss account, and the annexures thereto for the said year. Such usage would suffice to protect the interests of prospective investors and would safeguard public interest.

IV. Sections 390 to 394-A: Have The Conditions Stipulated Therein Been Complied With?

72. As reduction of capital, in the present case, is by way of a scheme of arrangement, the requirements of Sections 390 to 394-A of the Companies Act must also be satisfied. The Court has to see that the provisions of the Act have been duly complied with; the statutory majority has acted bonafide and in good faith and are not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purport to represent; and the scheme, as a whole, is just, fair and reasonable from the point of view of a prudent and reasonable businessman taking a commercial decision. *Sesa Industries Ltd. Vs. Krishna H. Bajaj and Others*, . Likewise, if the transaction is itself competent the court should only refuse its confirmation if what is proposed to be done is somehow unfair or inequitable; and the consideration of what is unfair or inequitable cannot well extend beyond consideration of the interests of creditors, shareholders and the general public, by which term is meant persons who may in the future have dealings with the company or may be minded to invest in its securities. (*In Re Grosvenor Press Plc.* [1985] 1 W.L.R. 980; *Poole* (1907) AC 229. On the issue of fairness, the burden of proof devolves on those supporting the reduction to prove that it is fair. Unless this burden is discharged, confirmation of the reduction will be refused. (*Re Holders Investment Trust Ltd.* (1971) 2 All ER 289 (Ch.d).

73. Section 391(1) enables the Court, on the application of the company, to order a meeting of the creditors/members, as the case may be, to be held and conducted in such a manner as the Court directs. Section 391(2) stipulates that, if a majority of 3/4th in value of the creditors/members agree, at the meeting, to any compromise or arrangement the scheme, on its sanction by the Court, would be binding on all the creditors/members as the case may be and also the company. When a scheme of arrangement is placed before this Court for its sanction, the Court should, in the first instance, direct holding of the meeting in the manner stipulated in Section 391 of the Act. As noted hereinabove, this Court had directed meetings of the shareholders of the petitioner company, its secured creditors and its unsecured creditors to be convened and held. Pursuant thereto, such meetings were convened and the Chairmen of the said meetings, in their respective reports, have reported that more than the required majority of 3/4th, of those who attended the meeting, had voted in favour of the scheme of arrangement. The requirements of Section 391(1) and (2) are satisfied.

74. Sri Ch. Ramesh Babu, learned Counsel for the respondent-objector, would submit that the petitioner had failed to furnish the information and/or documents, as stipulated in Section 391(2) and Section 393; they had submitted incorrect information to this Court; the respondent had filed C.P. No. 199 of 2010 seeking winding up of the petitioner on the ground that they had failed to pay their dues of Rs. 70.02 crores; this information was withheld in the proposed scheme of arrangement circulated to the creditors for the purpose of casting their vote to support or oppose the scheme of arrangement; as against the credit value of Rs. 70.02 crores due to the respondent, (Rs. 50.00 crores towards principal and Rs. 20.02 crores towards interest), the principal debt was

confirmed by the petitioner, in their debt confirmation letter dated 03.04.2009; the respondent was given an entry pass only for a value of Rs. 1.21 crores on the specious plea that the petitioner had forfeited the Rs. 50.00 crores deposit of the respondent on 30.11.2010, and was entitled for Rs. 16.00 crores as damages for which they had filed a suit in O.S. No. 687 of 2010 which is pending on the file of the Civil Court; non-furnishing of the requisite information/documents, and/or furnishing incorrect information, has resulted in this Court not being able to properly adjudicate the disputes brought before it; and this amounts to suppression of material facts which, in turn, may amount to fraud being played on the Court.

75. On the other hand Sri S. Ravi, Learned Senior Counsel, would submit that the debt of the objector is seriously disputed; there is a petition for winding up (C.P. No. 199 of 2010) pending and being contested; the petitioner has filed O.S. No. 687 of 2010 on the file of the II Additional Chief Judge, City Civil Court, Hyderabad, claiming damages from the objecting creditor, in which the objector has filed a written statement and a counter claim; and that is pending adjudication.

76. Under the proviso to Section 391(2), no order sanctioning any compromise or arrangement shall be made unless the Court is satisfied that the company 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. In every case the court needs to know at least the general purpose of what is proposed. Since many applications are unopposed, and the Company Court hears only from the applicant company, it would be undesirable to dilute in any way the applicant's duty of full and frank disclosure to the court. (Buckley on the Companies Acts (14th edn, 1981, Butterworths), Vol. 1, p. 180). The proviso appended to Sub-section (2) of Section 391 is mandatory in nature. It is incumbent upon the Court to satisfy itself about the financial soundness of the company before it puts its seal of imprimatur on the scheme of arrangement. (In re, Maneckchowk Judgment of Gujarat High Court dated 10.12.1969, Premier Motors (P.) Ltd. Vs. Ashok Tandon and Others, , In re Navjivan Mills Co., Ltd. Judgment in Company Petition No. 12 of 1970 with Company Application Nos. 136 of 1969, 38 of 1970 and 37 of 1971. Dated: 11.09.1970, Bhagwan Singh and Sons P. Ltd. Vs. Kalawati and others, , Bharat Synthetics Ltd. Vs. Bank of India and another, In re Aradhana Beverages and Foods Co., Ltd., 1998 (93) CC 899 (Del), and K.E.C. International Ltd. v. Karmik Employees 2000 (1) CLJ 351; In Re In Re: Deepika Chit Fund (P) Ltd. and Others,

77. The audited balance sheet, as at 31.3.2011, has been placed before this Court. Sri S. Ravi, Learned Senior Counsel, would submit that the balance sheet, for the subsequent year, has neither been finalized nor have the auditors submitted their report thereon; and, as such, the latest financial position of the

petitioner is as reflected in its balance sheet as at 31.3.2011 only. It is evident, therefore, that the latest financial position of the company, (as reflected in its balance sheet as at 31.3.2011 and its annexures), and the latest auditors report on the accounts of the company have been placed before this Court. Both the National stock Exchange, vide letter dated 18.10.2011, and the Bombay Stock Exchange, vide letter dated 17.10.2011, have conveyed their non-objection to the scheme of arrangement. With regards pendency of investigation, the petitioner states, in the company petition, that the Ministry of Corporate Affairs, Government of India, had ordered for inspection of the books of the company u/s 209A and Section 234 of the Companies Act, and appointed the Serious Fraud Investigation Office (SFIO) to carry out this inspection; accordingly, the SFIO carried out inspection and issued show cause notices to the company and to its past directors and past company secretary on March 10, 2011 for alleged violations u/s 58A, 211, 217, 292, 295, 297 and 372A of the Companies Act, 1956; the company had filed its detailed replies on April 25, 2011 and May 31, 2011 explaining its stand and requesting SFIO to drop penal proceedings against the company; the company also filed compounding applications, for the above alleged violations, u/s 621A of the Companies Act, 1956 which are pending before the Company Law Board for disposal; and that, apart from these proceedings, there are no other proceedings pending against the petitioner company under Sections 235 to 251 and 398 of the Companies Act, 1956. The petitioner has also disclosed the pendency of the winding up petition, filed by the respondent-objector in C.P. No. 199 of 2010, to this Court in C.A. No. 1652 of 2011 and in C.P. No. 240 of 2011. It is thus evident that the petitioner has made all the relevant disclosures, including pending investigations, as required under the proviso to Section 391(2). The requirement of the proviso to Section 391(2) is satisfied.

78. Section 394A of the Act requires this Court to give notice of the application, made to it under Sections 391 to 394, to the Central Government, and to take into consideration the representation, if any, made to it by the Government before passing any order under any of these Sections. In his affidavit, filed on behalf of the Central Government, the Regional Director, South East Region, Ministry of Corporate Affairs, Hyderabad states that, as per the report of the Registrar of Companies dated 28.3.2012, the petitioner is regular in filing the statutory returns; the scheme is an arrangement between the company and its shareholders and creditors; hence, winding up of the company does not arise; and, on reference of the petition to the Ministry, they had conveyed their no objection to the scheme of arrangement of the petitioner.

79. While the Court, called upon to sanction a scheme of arrangement, would not act as a Court of appeal and sit in judgment over the informed view of the concerned parties to the scheme, as the same is best left to the corporate and commercial wisdom of the parties concerned, it is clear that the Court, before whom the scheme is placed, is not expected to put its seal of approval on the scheme merely because the majority of the shareholders have voted in favour of

the scheme. Since the scheme, which gets sanctioned by the Court, would bind the dissenting minority shareholders or creditors, the Court is obliged to examine the scheme in its proper perspective together with its various manifestations and ramifications to find out whether the scheme is fair, just and reasonable to the concerned members, and is not contrary to any law or public policy. The expression "public policy", though incapable of precise definition, connotes some matter which concerns the public good and the public interest. (Sesa Industries Ltd. Vs. Krishna H. Bajaj and Others, Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others, (SC); Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, If the transaction is itself competent the court should only refuse to sanction the scheme for reduction of capital if what is proposed to be done is somehow unfair or inequitable; and the consideration of what is unfair or inequitable cannot well extend beyond consideration of the interests of creditors, shareholders and the general public, by which term is meant persons who may in the future have dealings with the company or may be minded to invest in its securities. (Westburn Sugar Refineries Ltd. (1951) 1 All ER 881; In Re Grosvenor Press plc [1985] 1 W.L.R. 980.

80. All that this Court is required to do, in an application seeking its sanction for a scheme of arrangement involving reduction of capital, is to ensure that the statutory provisions have been complied with, and the scheme as a whole is fair and reasonable. The wisdom or otherwise of the scheme is for the shareholders to decide and, since all the shareholders, all the secured creditors, and around 80% of the unsecured creditors, who attended the respective meetings, have supported the scheme, it is not for this Court to go into the merits of the scheme or to sit in judgment over the wisdom of the shareholders of the company in seeking reduction of capital.

81. It is convenient to examine together both the questions (1) whether failure to disclose the material facts to the shareholders/creditors would necessitate refusal by this Court to confirm the reduction of capital?; and (2) whether the scheme of arrangement (involving reduction of capital) is in public interest?

82. It is for the first time, by way of the affidavit dated 10.9.2012 filed before this Court, that the petitioner has explained the purpose of seeking to have the entire share premium account written off and, thereby, freeing Rs. 179.82 crores for their utilization in future. The petitioner would state that, under the present management, the petitioner was sanctioned a corporate debt restructuring (CDR) scheme by the CDR Cell of the secured creditors; on the basis of the CDR Scheme, Rs. 250 crores of the principal term loan, and Rs. 57.50 crore of Funded Interest Term Loan (FITL), were converted into Optionally Convertible Cumulative Redeemable Preference Shares (OCCRPS) and Cumulative Redeemable Preference Shares (CRPS) of Rs. 100/- each carrying a coupon rate of 6%; the actual allotment of OCCRPS were made on 31.03.2011 and 06.12.2010, after completing necessary statutory compliances; the secured loans, after conversion,

stood at Rs. 703.90 crores as on 31.03.2011; the company had issued 17.36 lakh 6% bonus preference shares of Rs. 100/- each to the said preference shareholders aggregating to Rs. 17.36 crores in June, 2011 to maintain the yield of 6% from the date of conversion of the loan upto the date of allotment of preference shares; the actual allotment of bonus preference shares was on 29.09.2011; and ICICI Bank had sold off its original CRPS to IL&FS Trust Co. Ltd after the bonus issue was completed on 29.09.2011. The affidavit details the bank-wise break-up of the converted OCCRPS and CRPS in the form of a tabular statement:

83. The petitioner has also furnished, in the very same affidavit, details of the share holdings of the preference shareholders till date in the form of a tabular statement:

84. It is evident from the aforesaid tables that all the ten institutions are Schedule Banks, of whom eight are public sector banks. In the very same affidavit, the petitioner has given an undertaking (subject to approval of the scheme by this Court) that the surplus available in the profit and loss account of Rs. 179.88 crores (Rs. 179.82 crores ?) would not be utilized for the purpose of declaration of dividend to its equity shareholders; the said surplus would be used only for the purpose of payment of dividend on preference shares; and adjustment against losses, if any, in the normal course of its business operations or for redemption of preference shares; but not for payment of dividend to the equity shareholders.

85. The petitioner company could well have furnished the aforesaid details to, and informed, their shareholders/creditors of the need to pay dividend to the preference share-holder banks, both in the explanatory statement and in the scheme, instead of making this information available to this Court later by way of affidavits.

86. Faced with a similar situation, of failure of the company to disclose material facts to their shareholders, a Division bench of the Delhi High Court, in Idea Cellular Limited v. Union of India Judgment of the Delhi Court in Company Appeal No.67 of 2011, dated 13.07.2012, observed:

....Further, Mr. Chandhiok is right in his submission that the appellant itself understood the implication of Licence Agreement and Merger Guidelines, 2008 as per which prior permission of DoT for merger of the companies was mandatory and for this reason simultaneously with the decision of amalgamation of Spice with the appellant, the appellant itself had started communicating with the DoT seeking such prior permission. Whether the action of DoT in refusing to grant such a permission is valid or not is not the question. What is important is that all this becomes relevant information and material information casting an obligation upon the appellant to have disclosed the same. It is rightly pointed out by the learned Company Judge that sanction u/s 391 to 394 of the Companies Act is a single window clearance" for the purpose of said Act.It is well settled that

Section 391 of the Companies Act is a complete code under which the Court can sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out in the structure of the company for the purpose of carrying out the scheme, except reduction of share capital which requires a special procedure. The whole purpose of Section 391 is to reconstitute the company without the company being required to make a number of application under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme. The learned Company Judge also rightly observed that if the same permission is required under separate statute or licence for completely affecting the amalgamation/merger, that would not mean that it is not to be obtained. These facts were relevant from one point of view. Had these facts been placed before the Court at the time of seeking sanction of the scheme, the Court could have put a stipulation by making conditional order namely the scheme will come into effect when other statutory permission have been obtained.

...While dealing with this plea, it would now be necessary to examine the effect of non-disclosure of the material facts namely whether it would amount to fraud thereby vitiating the very order sanctioning the scheme...

...We are of the opinion that had this fact been disclosed it would not have resulted in non sanction of the scheme of amalgamation of the two companies. Instead, the company Judge would have passed a conditional sanction order...

(emphasis supplied)

87. In this context it is necessary to note that C.P. No. 3 of 2009 was filed, before the Company Law Board (CLB), Principal Bench, New Delhi, by the Government of India under Sections 388B, 397, 398, 401, 402 and 403 read with Sections 406 and 408 of the Companies Act, 1956 to declare that none of the then Directors of the petitioner-company should be eligible for appointment as a Director in any other Company; and the Central Government be empowered to appoint 10 nominee directors on the Board of the petitioner company u/s 408 of the Companies Act. The Company Law Board, by its order dated 5.3.2009, authorized the Central Government to appoint four nominees on the Board of the petitioner-Company making it clear that one of them shall be chairman, and the Board would have complete powers in regard to the affairs of the company. The Government of India appointed four nominee-directors on the Board of the petitioner-company in March/April, 2009. Two of the erstwhile Directors continued as Directors of the Board.

88. On the application of the petitioner, the CLB passed an order dated 31.8.2009 directing that M/s. Infrastructure Leasing & Financial Services Ltd (IL&FS) shall be the new promoter of the company; that IL&FS should hold 37.01% of the shares of the petitioner; it should appoint four of its nominees on the Board of the petitioner-company including the Chairman of the Board; it

would be in control of the management of the affairs of the petitioner-company; the Government should withdraw two of its four nominees, and the remaining two government nominees would continue for a period of two years; Sri Teja Raju and Sri B. Narasimha Rao (who continued as Directors of the old management) should resign immediately thereafter, and cease to be the directors of the petitioner-company; IL&FS should, for a period of not less than two years, hold a minimum of 26% of the shares in the petitioner-company, and should keep control of the management during that period; and IL & FS nominees shall not be liable for any acts of commission or omission in respect of past acts of the erstwhile promoters/directors in the affairs of the petitioner-company. Consequent thereto, IL & FS became the new promoter of the company from September, 2009 onwards.

89. It is asserted in the petition that IL & FS is currently holding 34.58% of the total shares of the company; both Sri Teja Raju and Sri B. Narasimha Rao resigned as Directors; the Raju family ceased to be the promoters and directors of the petitioner-company from September, 2009 onwards; the petitioner-company is currently under the management of IL & FS who are also the promoters of the company; under the new management, the petitioner has taken several steps including corporate debt restructuring, and bringing in strategic investors into the company; the petitioner is now undertaking the present scheme of arrangement to wipe off past losses, and to enhance shareholder value; and C.P. No. 3 of 2009 is still pending before the CLB, New Delhi.

90. The Scheme for reduction of capital, in effect, is to write off past losses and to pay dividend to the preference shareholders (erstwhile secured creditors). It would not have been impossible to say a little bit more to explain what was going on, and the reasons in particular, rather than have that information dragged out in the course of the proceedings on the petition. This conduct on the part of the company does not help to commend their petition to the court. The question is whether it is fatal, given the reality of the position procedurally and the view taken on the substance of the matter. Whether production of the information would have made any difference is, however, a material consideration. Although the information furnished by the petitioner to their shareholders/creditors was far from forthcoming as to the true nature and background of the proposed course of action as a whole. Nevertheless, because the scheme as a whole is fair, and there is a legitimate degree of urgency in the case, the scheme can be upheld. (Re Ransomes plc (1999) 2 BCLC 591 (CA); Palmer's Company Law (Vol. I); 25th Edition para 4.313 page: 4.313).

91. As part of the corporate debt restructuring scheme, the secured creditors converted Rs. 250.00 crores of their principal term loan, and Rs. 57.50 crores of their funded interest term loan, into OCCRPS and CRPS. Conversion of a part of their secured debt as preference shares is a sacrifice by the secured creditors, (most of whom are public sector banks/financial institutions), only to ensure revival of the petitioner and put it back on rails. Retention of the debt, as it is

and without conversion, by the secured creditors would have enabled them to realize their security to recover their dues. Conversion of the term loan, into redeemable preference shares, has resulted in these public sector banks standing lower in priority to the secured debt, workmen's dues, and even unsecured creditors, in winding up proceedings. Their sacrifice appears not to have been in vain, as the petitioner made a profit of Rs. 2.91 crores during the financial year 2010-11. The debt restructuring scheme obligates the petitioner to pay dividend to the preference share holders (erstwhile secured creditors) of Rs. 34.65 crores by 30th September, 2012. The efforts to revive the petitioner was initiated by the Government of India. The public sector banks and other banks/financial institutions have also made substantial sacrifices. Payment of dividend on shares, converted as a part of the debt-restructuring scheme, cannot be said to be unwarranted. In view of the embargo u/s 205, no dividend can be paid if the company has accumulated losses. Hence the need to write off losses, and then pay dividend to the aforesaid preference shareholders. Considering the precarious position in which the petitioner finds itself in, it is doubtful whether furnishing these details to the equity and preference shareholders, and the creditors-both secured and unsecured, would have made them change their mind, and refrain from according their approval to the scheme. The scheme as a whole is just, fair and reasonable to the members and the creditors. It is also not contrary to any law or to public policy nor is it against public interest. This Court may not, therefore, be justified in penalizing the petitioner to the extent of refusing to either sanction the scheme or confirm reduction of capital as that would only result in the petitioner defaulting in payment to these banks; their debts being treated as non-performing assets; and the disastrous consequences that would, automatically, follow therefrom.

92. I consider it appropriate, therefore, to sanction the scheme of arrangement involving reduction of capital subject to fulfillment of the following conditions:

- i. the petitioner shall, within two weeks of this order, furnish an unconditional bank guarantee for Rs. 1.21 crores in favour of Wardha Power Ltd, and deposit the guarantee with the Chief Judge, City Civil Court, Hyderabad to be retained to the credit of O.S. No. 687 of 2011. The Bank Guarantee shall be renewed periodically till the final outcome of the suit.
- ii. The petitioner shall set apart of Rs. 68.90 crores as a "special reserve" of which Rs. 68.81 crores shall be retained therein till the final outcome of C.P. No. 199 of 2010, or any directions passed therein, and the remainder Rs. 9.00 lakhs shall be kept in the said reserve till the dues of the other two creditors are settled.
- iii. the petitioner shall add to its name as its last words, the words "and reduced" for the period upto and until the end of the financial year 2012-13; and in the Balance sheet, the profit and loss account, and the annexures thereto for the said year.

93. Order Confirming Reduction of Capital And Approving Minute

Upon the petition of IL & FS Engineering and Construction Limited, presented on the 20th day of December, 2011 (upon hearing Sri. S. Ravi, Senior Advocate appearing for the Petitioner, and upon reading the said petition and the affidavit in support thereof filed on the 20th day of December, 2011) and the exhibits therein referred to, the order on the summons made on the 4th day of November, 2011 in C.A. Nos. 1649 of 2011, 1650 of 2011, 1651 of 2011 and 1652 of 2011 convening the meeting of the equity shareholders, preference shareholders, secured creditors and unsecured creditors of the Petitioner Company respectively, the reports of the Chairpersons appointed for the meetings of the equity shareholders, preference shareholders, secured creditors and unsecured creditors of the Petitioner Company, upon perusing "Business Standard" and "Andhra Prabha" (Hyderabad Editions) containing the notice of the date of hearing of this petition, and the Court being satisfied with respect to every creditor entitled to object to the reduction that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined; and on the claims of the three unsecured creditors, who voted against the reduction of capital, being secured in the following manner:-

- i. the petitioner shall, within two weeks of this order, furnish an unconditional bank guarantee for Rs. 1.21 crores in favour of Wardha Power Ltd, and deposit the guarantee with the Chief Judge, City Civil Court, Hyderabad to be retained to the credit of O.S. No. 687 of 2011. The Bank Guarantee shall be renewed periodically till the final outcome of the suit.
- ii. The petitioner shall set apart Rs. 68.90 crores as a "special reserve" of which Rs. 68.81 crores shall be retained therein till the final outcome of C.P. No. 199 of 2010, or any orders passed therein, and the remainder of Rs. 9.00 lakhs shall be kept in the said reserve till the dues of the other two creditors are settled.
- iii. the petitioner shall add to its name, as its last words, the words "and reduced" for the period upto and until the end of the financial year 2012-13; and in the balance sheet, the profit and loss account, and the annexures thereto for the said year.

This Court Doth Order:

1. That the reduction of the share capital of the above company resolved on and effected by the special resolution passed at the court convened meetings of the Petitioner Company held on the 9th day of December, 2011, which resolution was in the words and figures following viz.:

Resolved That, subject to the sanction of the Hon''ble High Court of Andhra Pradesh of the annexed Scheme of Arrangement between IL & FS Engineering and Construction ("the Company") and its members and creditors u/s 391-394 read with Sections 78, 100-104 and other applicable provisions, if any, of which is duly initialed by the Chairman of the Meeting for the purpose of identification,

be and is hereby approved, subject however, to such alterations and modifications thereof, if any, as may be directed by the Hon"ble High Court of Andhra Pradesh, Hyderabad.

Resolved Further That the Board of Directors of the Company be and is hereby authorized to implement the Scheme once sanctioned by the Hon"ble High Court and to do everything that may be necessary in connection therewith."

be and the same is hereby confirmed.

2. That the minute set forth in the schedule hereto be and is hereby approved.

3. That a certified copy of this order including the minute as approved be delivered to the Registrar of Companies within 30 days from the date of receipt of the order.

4. That notice of the registration by the Registrar of Companies of this order and of the said minute be published once each in "Business Standard" and "Andhra Prabha" (Hyderabad Editions) within 14 days of the registration as aforesaid.

Dated this the Seventeenth day of October, 2012

SCHEDULE

The securities premium account of IL & FS Engineering and Construction Company Limited of Rs. 612.40 crores shall be adjusted against the gross debit balance of the Profit and Loss Account of IL & FS Engineering and Construction Company Limited for the financial years 2008-09 and 2009-10 in a sum of Rs. 728.379 crores. The unadjusted debit balance of Rs. 116.139 crores shall be adjusted against the gross credit balance of the Profit and Loss Account of IL & FS Engineering and Construction Company Limited, leaving Rs. 68.90 crores in a special reserve, and the net credit balance of Rs. 110.92 crores in the Profit and Loss Account of IL & FS Engineering and Construction Company Limited as on the Appointed Date pursuant to the Scheme of Arrangement.

REGISTRAR

As required u/s 394(3) of the Companies Act, read with Rule 81 of the Companies (Court) Rules, 1959, the petitioner shall file a certified copy, of the Order of this Court sanctioning the scheme of arrangement, confirming reduction of capital and the minute, with the Registrar of Companies for its registration within thirty days from the date of the order.