

(2009) 06 BOM CK 0096

In the Bombay High Court

Case No : Company Petition No. 293 of 2009 and Company Application No. 234 of 2009

In Re: Hindalco Industries Ltd.

Date of Decision : 22-06-2009

Acts Referred:

Companies Act, 1956 — Section 100, 101, 101(2), 211, 211(3A)

Citation : (2009) 151 CompCas 446 : (2010) 1 CompLJ 219 : (2009) 94 SCL 1

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : C.J. Joy, Y.R. Mishra and V.B. Tiwari, Janak Dwarkadas and Sharan Jagtiani, Prashant Chavan and Suhas Patil, Simil Purohit, Vivek Khemka, Ram Niranjana, Shaunak Thakkar, Santosh Raje and Bhupendra Gandhi, for the Appellant;

Judgement

A.M. Khanwilkar, J.—This is a composite Petition by the Company to obtain sanction to the scheme of arrangement involving financial restructuring of Hindalco Industries Ltd. (hereinafter referred to as HIL or the Company) and its Equity Shareholders u/s 391, read with Section 100 of the Companies Act, 1956 (hereinafter referred to as the Act).

2. The Company is the flagship Company of the Aditya Birla Group and a leading manufacturer of aluminium and copper. It is stated that over the years, the Company has grown into the largest vertically integrated non-ferrous metal company in the country and among the largest primary producers of aluminium and copper in Asia. It is further stated that in 2007, the acquisition of Novelis Inc., a world leader in aluminium rolling and can recycling, marked a significant milestone in the history of aluminium industry in India. It is the case of the Company that an important element of HIL's growth strategy has been to seek out opportunities for acquisitions and strategic partnerships in India as well as overseas with a view to diversify its product portfolio, consolidation of customer base and to extend the presence of the Company in overseas markets. It is stated that such an endeavour by the Company would not only provide the Company with an opportunity to widen its international footprint but also enable

the newly acquired companies to increase their margins through reduction of labour and other costs. It is further stated that the Company has been successful in enhancing its presence in the international markets. However, this has resulted in HIL incurring various costs relating to organic as well as inorganic growth projects. It is also stated that in its endeavour to grow further, HIL would continue to incur these costs in the future. It is the case of the Company that the present global economic scenario especially in the commodity space has had an adverse impact on HIL's domestic and overseas operations, which may result in impairment/diminution in value of assets/investments of HIL and its subsidiaries. It is the case of the Company that these expenses/costs are inevitable for the growth of the Company and its shareholders. The Company now proposes to undertake the Financial Restructuring Exercise on terms and conditions spelt out in the proposed scheme, which is presented to this Court for approval with a view to provide greater level of transparency and openness and to secure full involvement of all the shareholders/stakeholders.

3. The composite scheme of arrangement is for undertaking financial restructuring exercise whereby HIL would create a "Reconstruction Reserve Account" from its Securities Premium Account balance to adjust expenses as defined in Clause 1.4 of the Scheme. It also provides that as and when the Board of HIL determines that a part or whole of the balance remaining in the Reconstruction Reserve Account is no longer required, the same can be transferred to the Securities Premium Account of the Company as per the terms and conditions of the Scheme.

4. Since the scheme is essentially in respect of adjustment of expenses as defined in Clause 1.4 of the proposed scheme, it may be apposite to refer to the definition of "Expenses" appearing therein, which reads thus:

1.4 "Expenses" means and without limiting the generality of the foregoing, includes inter alia the following items accounted for in the financial statements of HIL.

1.4.1. Impairment, amortization and/or write off of goodwill and other intangible assets, if any, arising on preparation of consolidated accounts of HIL.

1.4.2. Interest and other financial charges paid/payable on borrowings for acquisitions by HIL and/or any of its subsidiaries and interest and other financial charges paid/payable upon refinancing of such borrowings;

1.4.3. Impairment of assets/investments/intangibles in the Financial Statements of HIL and/or any of its subsidiaries;

1.4.4. Diminution in the value of investments in subsidiary companies in the Financial Statements of HIL and/or any of its subsidiaries;

1.4.5. Costs associated with existing projects/divisions in part and/or whole by HIL and/or any of its subsidiaries and financial costs associated with delay in projects;

1.4.6. Consultants/law firms fees and/or any fees payable towards professional services (say due diligence, etc.) in connection with financing/refinancing acquisitions.

Further, Part III of the Scheme provides for Financial Restructuring of HIL and Accounting Treatment. Clause 3 pertains to creation and utilization of Business Reconstruction Reserve Account and the modalities therefor. Clause 4 provides for alteration in the Articles of Association, which is stated to be an integral part of this Scheme. Article 71 of the Articles of Association of the Company are intended to be amended to read "The words "Share Premium Account" shall be substituted with the words "Securities Premium Account" in Article 71(c) of the Articles of Association of the Company." Clause 5 of the Scheme envisages that the Scheme would result in the Company improving its financial status for the benefit of all the shareholders/stakeholders. It mentions that the parties to the Scheme agree and acknowledge the adequacy and sufficiency of the consideration. It is further agreed and acknowledged that the Scheme involves the creation of Business Reconstruction Reserve Account in the books of the Company on account of Clauses 3.1 and 3.2 and utilization of the same against the expenses defined in Clause 1.4 and other terms and conditions of the scheme without any issue of shares or discharge of any consideration in cash or otherwise. Clause 6 of the scheme refers to the conduct of business. It envisages that nothing in the Scheme shall affect the conduct of business of HIL and/or any deeds, bonds, contracts, agreements and any other instruments to which HIL is a party and/or all legal or other proceedings by or against HIL. It further provides that nothing in the scheme shall affect the existing rights of the workers and employees of HIL. Part IV of the Scheme provides for General Terms and Conditions of the modification or amendments to the Scheme, conditionality of the Scheme, binding effect, application to the High Court, effect of non-receipt of approvals and costs, charges and expenses.

5. The Company asserts that at a Board meeting held on 14-2-2009, the Board of Directors of the Petitioner company passed a resolution by which it was resolved that the Scheme of Arrangement placed before the Board be submitted to the High Court for its sanction for the financial restructuring as mentioned in the Scheme. The Petitioner then refers to the circumstances and/or reasons that have necessitated and/or justify the propounding of the stated Scheme of Arrangement and advantages thereof. The salient features of the scheme are also highlighted in the Petition presented for approval of the scheme. It is stated that this Court by Order dated 27-2-2009 passed in Company Application No. 234 of 2009 filed by the Petitioner company, directed to hold meeting of its Equity Shareholders. Accordingly, on 2-4-2009 at 10.00 a.m. at Ravindra Natya Mandir, P.I. Deshpande Maharashtra Kala Academy, Prabhadevi, Mumbai, meeting of the Equity Shareholders was duly convened and held in accordance with the said Order, which meeting was chaired by Mr. A.K. Agarwala. In the said meeting 549 Equity Shareholders of the Petitioner Company representing 76,94,00,729 equity shares of Re. 1 each attended personally or through Authorised

Representatives or by proxy. After inviting debate on the proposed scheme, the resolution was put to vote by poll in the meeting, in which, 424 members holding 72,19,93,282 Equity Shares of Re. 1 each of the aggregate value of Rs. 72,19,93,282 voted in favour of the Scheme. 11 members holding 8,997 equity shares of Re. 1 each of the aggregate value of Rs. 8,997 voted against the said Scheme. Votes of 58 members for aggregate 4,73,90,050 shares cast were declared invalid. In other words, the resolution was passed by requisite majority of Equity Shareholders supporting the same. The Chairman of the said meeting has submitted report recording these facts. It is further stated that pursuant to the order of this Court an Extraordinary General Meeting was held on the same date i.e. 2-4-2009, at the same place at Ravindra Natya Mandir, P.I. Deshpande Maharashtra Kala Academy, Prabhadevi, Mumbai at 12.00 p.m. which was again chaired by Mr. A.K. Agarwala. In the said meeting a Special Resolution was proposed as per the provisions of Section 100 of the Companies Act for utilization of the Securities Premium Account of the Petitioner Company as stated in Clause 3 of the proposed scheme. The resolution was put to vote and carried out by the requisite majority by show of hands. It is stated that separate procedure u/s 101(2) for reduction of Securities Premium Account was dispensed with by an Order of this Court in Company Application No. 234 of 2009.

6. The Petitioner Company has asserted that the proposed scheme is arrangement between the Petitioner company and its Equity Shareholders only in accordance with the provisions of Section 391(1)(b) and not in accordance with the provisions of Section 391(1)(a), as there is no arrangement and/or Compromise with the Creditors as no sacrifice is called for under the proposed scheme. It is reiterated that the proposed scheme envisages creation of Business Reconstruction Reserve Account by transfer of Securities Premium Accounts balance as on 31-12-2008 to Business Reconstruction Reserve Account and utilisation of Business Reconstruction Reserve Account against the expenses defined in Clause 1.4 of the Scheme. It is stated that the proposed restructuring of deemed paid-up capital under the said scheme does not involve any financial outlay/outgo on the part of Petitioner and is only in the nature of a book entry. Besides, such reduction will not cause any prejudice to any of the creditors of the Petitioner. It is further stated that the financial restructuring proposed under the said scheme does not involve either diminution of any liability in respect of unpaid Share Capital or payment to any shareholder of any paid-up capital and the same shall be carried out as an integral part of the Scheme. That the Creditors will not be effected by the proposed financial restructuring as there is no reduction in the amount payable to any of the Creditors, no compromise or arrangement is contemplated with the Creditors. It is further stated that the proposed adjustment would not in any way adversely effect the ordinary operations of the Petitioner Company or the ability of the Petitioner Company to honour its commitments or to pay its debt in the ordinary course of business. It is the case of the Petitioner that the scheme is primarily entered into between the Petitioner Company and its Equity Shareholders and not between the

Petitioner and other class of shareholders or creditors. It is stated that insofar as Preference Shareholders of the Petitioner Company are concerned, under the Scheme their interest is not affected at all as they are entitled to a fixed rate of dividend under the terms of the issue and also under the provisions of the Act. It is stated that the meeting of Preference Shareholders was dispensed with by this Court vide order passed in Company Application No. 234 of 2009 on the basis of undertaking given by the Petitioner Company that all Preference Shares will be redeemed and fully paid off by 1-4-2009. It is stated that as per the said undertaking, all its Preference Shareholders have been redeemed by 1-4-2009 and the Petitioner company has no Preference Shareholders on the date of presentation of the Petition. It is also stated that meeting of secured creditors and unsecured creditors has also been dispensed with by this Court. As on 31-1-2009, the Petitioner company has had 57 Secured Creditors of the value of Rs. 5,741.73 crores and 11,646 Unsecured Creditors of the value of Rs. 4561.02 crores. It is stated that the Secured Creditors will continue to hold charge over the respective assets even after the proposed Scheme is sanctioned. Further, there will be no dilution in securities/charge created on the assets of the Petitioner. The Petitioner has also stated that individual notices have been given to the secured and unsecured creditors of the value above Rs. 10 lakhs.

7. In this background, the present Petition is presented by the Petitioner company on 4-4-2009. Notices were issued to the Regional Director, Department of Company Affairs and the Registrar of Companies. They have stated on affidavit before this Court that the Scheme is not prejudicial to the interest of shareholders and public, for which reason the Court may pass appropriate orders, as it deems fit. Even the RoC and the Bombay Stock Exchange have given its consent for approving the scheme. However, the Regional Director has filed further affidavit on 17-6-2009, in which he has referred to the objections raised by one Mr. Bhupendra Gandhi which were received under the cover of letter of Mr. Abani Roy, Member of Parliament for examination. After examining the grievance in the said complaint the Regional Director has opined that the objections were untenable. In paragraph 6 of the further affidavit, the Regional Director has, however, recommended that the Court may place time-limit for implementation of the scheme so as to assuage the apprehension of the objector that the scheme allows the Board of Director of the Company unrestricted discretion to keep adjusting the expenses against the Securities Premium Account without any time-limit. The Regional Director has recommended to limit write off of the expenses to the Securities Premium Accounts in the Books of Account upto 31-3-2009 and not thereafter. However, except observing this, no justification has been offered by the Regional Director as to why such restriction is necessitated. No provision of law has been relied to justify this recommendation.

8. Besides, two objectors have appeared before this Court. One Mr. Ramniranjan Kedia of Tourism Services Pvt. Ltd. has filed affidavit dated 5-5-2009 to oppose the proposed scheme. There is one more objection registered by one Mr.

Bhupendra Gandhi by filing affidavit dated 5-5-2009. Insofar as the first objector is concerned, he is neither a shareholder nor creditor of the Petitioner company. His objection is opposed by the Petitioner company, amongst others, on the ground of his locus. Insofar as objection filed by Bhupendra Gandhi, it is the case of the Petitioner company that he is not a bona fide complainant. In that, on the date of meeting of the Equity Shareholders to consider the proposed scheme, the second objector had only one share of the Petitioner company. He participated in the meeting and registered his objection. But the Resolution was passed with overwhelming majority. Moreover, on the one hand he objected to the proposed scheme and on the other hand, after the meeting of the Equity Shareholders, he has purchased additional 50 Equity Shares of the Petitioner company, which reflects on his bona fide. According to the Company, his objection should be thrown out on this count alone. Besides raising issue of locus and bona fide of the objectors, the Petitioner company has also countered the grievance of the objectors on merits. On merits the issue raised by the objectors are broadly that the scheme if approved would result in allowing the Petitioner company to violate accounting standards by providing for adjustment against the Reserve Account instead of profit and loss account. Besides, it would give wide and unguided discretion to the Board of Directors by keeping the scheme open ended. Moreover, the scheme does not disclose the figures of expenses to be adjusted in the Reserve Account. Nor does the Scheme defines the non-operating and extraordinary expenses. It was also emphasized on behalf of the objectors that the scheme intends to write off the liability and losses of the subsidiaries, which cannot be permitted. The principal argument of the objectors is that on making adjustment of the expenses against the Reserve Account it would not be a fair and accurate representation of the financial position of the Petitioner company. Inasmuch as, the stated expenses ought to be and are required to be shown in the profit and loss account and not against the Reserve Account. For that reason, the Court should not accord approval especially when such adjustment will also be in violation of accounting standards. It was also argued that the amount lying in Security if transferred would later on become unavailable for satisfying the direction to be issued in the pending proceedings.

9. If the aforesaid objections were to be overruled, the Petitioner company would be entitled for the relief claimed in this Petition and the proposed scheme of the Petitioner company will have to be approved. I shall straightaway examine the argument regarding locus of Ramniranjan Kedia. Admittedly, the said objector is neither a shareholder nor a creditor of the Petitioner company. If it is so, the Petitioner company is justified in contending that such person has no locus to raise objection in relation to the scheme propounded by the company u/s 391 of the Act. This issue is no more *res integra*. This Court in the case of *ICICI Ltd. v. Financial & Management Services Ltd.* [1998] 17 SCL 429 (Bom.) (see paragraph 21), after adverting to the relevant reported decisions has unhesitatingly held that it is clear that under the provisions of the Act, as they stand, the persons who are interveners who are neither shareholders, members nor creditors of the

company which is before the Court, have no locus to be heard in relation to the Scheme u/s 391 of the Act. The Petitioner has also relied on the decision of the Division Bench of our High Court in the case of The Securities and Exchange Board of India (SEBI) Vs. Sterlite Industries (India) Ltd., in which this Court has had occasion to dismiss the appeal preferred by SEBI against the order passed u/s 391 on the ground that it had no locus in a Petition u/s 391, not being shareholders or creditors of the company. Counsel for Mr. Kedia, however, placed reliance on the decision of the Apex Court in the case of S.K. Gupta v. K.P. Jain [1979] 49 Comp. Cas. 342. He placed emphasis on the observations in the said decision at page 353 of the reported Judgment to contend that if the Court can suo motu act, it is immaterial as to who drew the attention of the Court to a situation which necessitated Court's intervention. Reliance placed on this decision is inapposite. Inasmuch as, the observations in this decision are in the context of proceedings u/s 392 of the Act. As a matter of fact, the Supreme Court in the same Judgment has noted the distinction between the proceedings under Sections 391 and 392, as can be discerned from the observations at pages 350 to 352 of the reported decision. At page 352, the Apex Court has noted the distinction in the scheme of Section 391 in contradiction" to that of Section 392, as the Legislature has used the expression "any person interested in the affairs of the company" in Section 392, which has wider denotation unlike the expression "a member or creditor or liquidator of a company" used in Section 391. Having regard to the fact that this is a composite Petition u/s 391 as well as Sections 100 and 101 of the Act, the person who is neither a shareholder nor a creditor of the company would have no locus. However, since the objection is also taken by one of the shareholder, this Court would nevertheless address the objections on merits a little later.

10. Insofar as the second objector (Mr. Bhupendra Gandhi) is concerned, two fold grievance is made by the Petitioner company. Firstly, that he is not a bona fide complainant. He possessed only one share on the relevant date. He had participated in the meeting and his objections were overruled by the overwhelming majority of Equity Shareholders. Significantly, he procured 50 additional shares of the Company after the meeting in which he had raised objection to the proposed scheme. In my opinion, the grievance of the Petitioner company is well-founded. Inasmuch as, no prudent person who had opposed the proposed scheme, would think of acquiring additional shares of the same company. Indeed, the fact that the objector possessed only one share on the relevant date does not mean that he is denuded of his right of raising objection. Nevertheless, I find substance in the stand taken by the Petitioner company that the complaint filed by this objector is not bona fide. Counsel for the Petitioner has rightly relied on the observations of the Securities Appellate Tribunal in decision in the case of Sukumar Chand Jain v. SEBI [2008] 87 SCL 184 (Mum)). That a person who has not approached with clean hands and have traded in the shares of the target company, cannot be heard to make grievance about the scheme.

11. Be that as it may, revering to the merits of the issues raised, it is argued that the Regional Director in his further affidavit dated 17-6-2009 has opined that the scheme allows the Board of Directors of the company unrestricted discretion to keep adjusting the expenses against Securities Premium Account without any time-limit. The Regional Director has, therefore, recommended placing time-limit for implementation of the scheme and to limit write off of the expenses to Securities Premium Accounts in the Books of Account up to 31-3-2009 and not thereafter. I am in agreement with the stand taken by the Petitioner company that this changed opinion of the Regional Director inspite of having found that the objections taken by the objector Mr. Bhupendra Gandhi were untenable was on account of intervention of the Member of Parliament at the behest of the objector - Bhupendra Gandhi, who had forwarded the complaint for reconsideration. Significantly, the Regional Director has not adverted to any provision of law which obligates the Petitioner company to limit the period to write off all the expenses in the Books of Account. It would have been a different matter, if the law obliged the company to do so within a particular time. In absence of such requirement, the Regional Director ought to have assigned tangible reason as to why it was still necessary to impose the outer limit for writing off the expenses. Even during the argument advanced on behalf of the Regional Director or for that matter the objectors, I was unable to discern any tangible reason to justify such restriction. Understood thus, taking any other view would be interfering with the commercial wisdom or business decision of the overwhelming majority of stakeholders of the Company, who have reposed trust and confidence in the Board of Directors, who are expected to exercise their discretion with prudence. The Petitioner has justly relied on the observations of the Madras High Court in the case of Parrys Confectionery Ltd. In re [2004] 122 Comp. Cas. 900 : 56 SCL 34. In paragraphs 13 and 14, the Madras High Court observed thus:

13. The short question that arises for consideration is whether this Court should grant approval for the reduction of the Petitioner's Securities Premium Account as resolved by the Shareholders of the Petitioner in the Special Resolution at the meeting held on 23-6-2003 as set out in para 13 of the Petition.

14. The Special Resolution passed by the company clearly shows that the restructuring will not be prejudicial to the interest of the Petitioner's creditors as the reduction does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. Further, there is no reduction in the amount payable to any of the creditors and neither is any compromises or arrangement contemplated with such creditors. The asset cover ratio as covenanted by the Petitioner in their agreement with the various secured creditors will continue to be maintained even after such restructuring. In recognition of this position all such secured creditors have signified their consent to the restructuring. I find that it is purely a business decision arrived at by the shareholders on the basis of the commercial principles as the restructuring does not involve any cash outflow, the same will not affect the normal operations of

the Petitioner or its ability to honour its commitments and to pay its debts, in the ordinary course of business and the restructuring is in accordance with sound commercial and accounting practice and would enable the Petitioner to project a more realistic picture of the Petitioner's operations, which would be to the benefit of the Petitioner's shareholders and investors. In recognition of this position, the shareholders of the Petitioner have unanimously approved such restructuring.

[Emphasis supplied] (p. 40)

12. It will be also apposite to advert to the dictum of the Chancery Division pressed into service by the Petitioner in the case of *Re Ratners Group plc.* [1988] Ch.D. 685. This decision would also answer the objection raised by the objectors about unspecified expenses in the scheme. Dealing with that contention, the Court has noted the scope of interference by the Court while considering the proposal for approval of the scheme. The Court cannot interfere with the discretion and commercial wisdom of the stakeholders and the Board of Directors. The Court has considered the same in the following words:

Secondly it was said that there was a worry because the amount of goodwill to be written off could not be specified. It is said in the affidavit to be a sum in excess of ?140m. But at present, the balance sheet date not having arrived and the accounts not having been prepared, the amount is not clear and fixed.

In my judgment counsel for the company is again correct when he submits that that factor has no effect on discretion. Counsel wholly accepted that the court will not do anything in vain and that, if a reduction was applied for, approved by shareholders but on the evidence was not for any discernable purpose at all but simply an act in a vacuum, the court might well say that it would not in its discretion sanction it. That refusal by the court would not be because the reduction was not within the powers of the shareholders and the jurisdiction of the court, but as a matter of discretion: the court will not act in vain; the matter had not been shown to have any real purpose; it never was more than a hollow act, of no merit or purpose, and should not be troubling the court or wasting everybody's time; and for that sort of reason the court might exercise its discretion against sanctioning the proposed reduction. But, said counsel, accepting that limitation, as he fully did, that has nothing to do with this case. Here we have evidence by a man of substance, who is the finance director of this substantial company, that in his judgment the company is likely given its present policy and given the circumstances of its businesses, to have future substantial needs to write off goodwill following future hoped for, as yet undefined, acquisitions.

I myself have certainly approved reductions of share premium accounts for sums considerably in excess of any present goodwill to be written off. More to the point Peter Gibson J, in three different cases last sittings, *Re Hillsdown Holdings plc.* (7 December 1987, unreported), *Re Ladbroke Group plc.* (16 November 1987,

unreported) and *Re Smiths Industries plc.* (16 November 1987, unreported) all very large and well-known business, approved reductions of share premium accounts to make reserves available which would be suitable for use in writing off goodwill created on future acquisitions, as was intended and proved by the evidence to be contemplated. Indeed, it is to be believed that Mervyn Davies, J himself in *Re Exco International plc.* (8 July 1985, unreported) actually approved such reduction. In my judgment the fact that there is no presently intended write-off makes no difference in principle to the exercise of the court's discretion in favour of sanctioning a reduction, provided it is proved by evidence that the company is likely to need to use the reserve so created to write off "goodwill" in the future, so that the act is not a hollow act doing no good to anybody.

In my view the proposition in *Buckley on the Companies Acts* (14th edn., 1981) vol. I, P 181, where the subheading is "Motive for reduction", that the motive is immaterial is a correct general summary of the proposition which I think is not really perhaps best expressed as the "motive" for the reduction, since the reduction is the result of an extraordinary resolution which will have been voted for by multifarious persons, many of whom will have different private motives, all leading them to act the same way. But, if it can be seen that the reduction is one which is properly passed by 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 and the court will normally sanction those reductions.

[Emphasis supplied]

Applying the principle stated in the abovesaid decisions, if the grievance of the objector or for that matter opinion of the Regional Director were to be acted upon, it would trench upon the discretion of the stakeholders and the Board of Directors in propounding the Scheme for stated purpose. For, it is not a hollow act. It will be apposite to advert to another decision pressed into service by the Petitioner in the case of *In Re: Hyderabad Industries Limited*, . where the Court has noted that it is very well settled and needs no restatement that the court does not exercise any appellate power over the decision of the Company or its management. The Company Court in its equity jurisdiction is required itself to satisfy and see that the procedure, by which resolution is carried through, is legally correct and the shareholders and creditors are not prejudiced. Further it is also the duty of the Court that it has to see that the scheme is fair and equitable between the different classes of shareholders. In paragraph 18 of the decision, the Court has observed that nothing has been brought to the notice of the Court that special resolution affects the interest of the shareholders. Similar situation obtains in the present case. None of the objectors are in a position to point out as to what prejudice will be caused to the shareholders. On the other hand, the Registrar of Company as well as Regional Director including the Bombay Stock

Exchange have unambiguously opined that the proposed scheme is not prejudicial to the interests of the shareholders and public.

13. Significantly, Andhra Pradesh High Court in the abovesaid case, considered the proposal of the company to set off liability amount against the Share Premium Account. It has noted that with the said adjustment, the Company's accounting method in respect of investments would fall in line with the Accounting Standards of Institute of Chartered Accountants of India and represent the true shareholder value. That the set off will not cause any prejudice to the creditors of the company. It proceeded to record that the reduction of capital does not involve either result in the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. No compromise or arrangement is contemplated and there is no reduction in the value of the security, which the creditors have in the Company.

14. Reliance has rightly been placed on another decision of our High Court in the case of *In Re: Zee Telefilms Ltd.*, . In paragraph 12, the Court while considering the scheme for adjustment of the Books of Account, so as to reflect the true and fair value of the Company's investments in its subsidiaries, approved the scheme on the finding that the decision was within the framework of law, which is not illegal or contrary to the public policy. The Court then proceeded to observe that there was no reason to interfere with the said decision taken by the experts which includes business, financial experts, auditors and majority shareholders of the company. Suffice it to observe that no tangible basis is forthcoming as to why the proposed scheme should be approved with amendment of placing time-limit for implementation of scheme and to limit write off Securities Premium Account upto 31-3-2009 and not thereafter. If the equity shareholders or the stakeholders of the Company have resolved consciously and approved the proposed scheme, inspite of open ended scheme, they have exercised business discretion. It is not open for this Court to sit over the said view as an Appellate Court, unless the same was against the framework of law or public policy. There is nothing wrong in the decision to spread out or adjust and write off all the expenses. The fact that this may enable the Company to declare sufficient dividend as have been declared in the past, does not militate against the Company; so long as the Company makes necessary declaration of all the facts and figures in its Books of Account.

15. The next question is: whether there would be violation of accounting standards. The objection will have to be answered keeping in mind provisions of Section 211 of the Act. Sub-section (3A) thereof stipulates that every profit and loss account and balance sheet of the company shall comply with the accounting standards. Sub-section (3B) provides that where the profit and loss account and the balance sheet of the company did not comply with the accounting standards, the said Company shall disclose in its profit and loss account and balance sheet, the deviation from the accounting standards, reasons for such deviation and financial effects, if any, arising due to such deviation. On conjoint reading of Sub-

sections (3A) and (3B) of Section 211, it necessarily follows that deviation from the accounting standards is permissible subject, however, to compliance of the requirement of disclosure in the profit and loss account and balance sheet of such deviation and the reasons for such deviation and financial effects thereof, in other words, deviation of accounting standards is not wholly prohibited, but is regulated by the provisions of Section 211 of the Act. The Petitioner assures to abide by the said regime. So long as such disclosure is made, the Company cannot be faulted with regard to the profit and loss Account and balance sheet being in deviation from the accounting standards. Even the guidelines issued by the Institute of Chartered Accountants of India, copy whereof was produced at the time of hearing, restates this position. The same reads thus:

Announcement on Disclosures in cases where a Court/Tribunal makes an order sanctioning an accounting treatment which is different from that prescribed by an Accounting Standard.

Paragraph 4.2 of the "Preface to the Statements of Accounting Standards" (revised 2004) provides as under:

4.2 The Accounting Standards by their very nature cannot and do not override the local regulations which govern the preparation and presentation of financial statements in the country. However, the ICAI, will determine the extent of disclosure to be made in financial statements and the auditor's report thereon. Such disclosure may be by way of appropriate notes explaining the treatment of particular items. Such explanatory notes will be only in the nature of clarification and therefore need not be treated as adverse comments on the related financial statements.

In the case of Companies, Section 211(3B) of the Companies Act, 1956, provides that "Where the profit and loss account and the balance sheet of the company do not comply with the accounting standards, such companies shall disclose in its profit and loss account and balance sheet, the following, namely:

the deviation from the accounting standards;

the reasons for such deviation; and

the financial effect, if any, arising due to such deviation."

In view of the above, if an item in the financial statements of a Company is treated differently pursuant to an Order made by the Court/Tribunal, as compared to the treatment required by an Accounting Standard, following disclosures should be made in the financial statements of the year in which different treatment has been given:

A description of the accounting treatment made along with the reason that the same has been adopted because of the Court/Tribunal Order.

Description of the difference between the accounting treatment prescribed in the Accounting Standard and that followed by the Company.

The financial impact, if any, arising due to such a difference.

It is recommended that the above disclosures should be made by enterprises other than companies also in similar situations.

16. A priori, it is not as if deviation of the accounting standards per se can be a ground to reject the scheme propounded by the Petitioner company. In the present case, it is noticed that the scheme is the product of conscious act of the shareholders. It is their commercial wisdom or business decision. In their wisdom, they have approved the proposed scheme which bestows complete discretion in the Board in which they have full confidence. As aforesaid, there is no law which prohibits adjustment of loss by spreading it out including that of the subsidiary companies. There is no manifest unfairness to the shareholders in any manner. No creditor is affected by the proposed scheme.

17. To get over this position, it was argued by the Counsel for the objector No. 2 that the Petitioner should be thrown out on account of nondisclosure of material facts. It is the case of the objector No. 2 that the Petitioner company has not disclosed about the proceedings before the SEBI, Appellate Tribunal. Significantly, the said proceedings have no concern with the issue that arises for consideration. Moreover, the scheme clearly provides that the scheme would not affect the pending legal proceedings or any orders passed against the Petitioner company. It was then argued by the objector that once the Securities Premium Account was to be transferred, the amount presently lying in the said account would become unavailable in the event the objector were to succeed in his pending proceedings before the authority. The argument clearly overlooks that if the Authority were to so direct, the Petitioner company would be bound to pay the amount as per the said order. The fact that there would be no security premium account existing in future or that the amount in the said account was insufficient would not extricate the Petitioner company from obligation to pay as per the order of the competent authority or the Court. Accordingly, this apprehension is completely misplaced.

18. Counsel for the objector would then argue that the Petitioner company is a profit making company. The Accounts of the Petitioner company should reproduce a fair and accurate financial position and that the losses should necessarily be adjusted to the profit and loss account and not against the Reserve Account. All these objections will have to be only stated to be rejected for reasons already recorded in the earlier part of this Judgment. Similarly, argument of the objector that the scheme provides for wide and undefined discretion in the Board also does not commend to me. These matters would fall within the realm of commercial wisdom and sound business practice which the Petitioner company intends to adopt. The Court cannot sit over the said decision as Court of Appeal. The argument of the objectors that the scheme does not disclose the amount or for that matter non-operating extraordinary expenses, is also of no avail. The Petitioner Company has rightly pointed out that the Books of Account are prepared in accordance with the requirement of law. Not only the

Books of Account and the balance sheet of the Petitioner Company are duly prepared, but a separate consolidated statement of the Petitioner company and its subsidiary is also prepared and issued. Financial position of the Company is reflected from the consolidated accounts prepared in accordance with the requirement of law.

19. Counsel for the objector placed emphasis on Clause 58 of the Accounting Standard (AS) 28 (issued 2002). Clause 58 reads thus:

58. An impairment loss should be recognised as an expense in the statement of profit and loss immediately, unless the asset is carried at revalued amount in accordance with another Accounting Standard (see Accounting Standard (AS) 10, Accounting for Fixed Assets), in which case any impairment loss of a revalued asset should be treated as a revaluation decrease under that Accounting Standard.

Relying on this provision, it was argued that impairment loss should necessarily be considered as an expenses to be reflected in the profit and loss account of the company contemporaneously. However, on reading this provision, it is not possible to take the view that it completely prohibits adjustment of losses of Companies or that of subsidiary company. Assuming that the interpretation given by the objectors were to be accepted, it would result in deviation of the accounting standards. As aforesaid, provisions of Section 211 would answer this argument. Inasmuch as, Section 211 allows deviation of accounting standards subject to complying the parameters provided therein.

20. Counsel for the objectors would then argue that none of the expenses referred to in Clause 1.4 such as legal professional fees in connection with financing/refinancing acquisition or diminution in the value of investments in subsidiary companies can be adjusted against the Reserve Account. Besides, no justification is forthcoming as to why all the expenses referred to in Clause 1.4 of the Scheme should be adjusted from the Reserve Account and not in the Profit and Loss Account. Once again this argument would be of no avail having regard to the view already taken that observing accounting standards is a norm, but deviation is not impermissible. Deviation can be resorted to subject to complying with the requirement of Section 211(3B).

Moreover, the decision is expression of commercial wisdom or business decision of the shareholders, which cannot be lightly interfered with by this Court. Notably, the restructuring will not be prejudicial to the interest of the Shareholders, Creditors or Public. The reduction does not involve either diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. There is no reduction in the amount payable to any of the creditors. There is no compromise or arrangement with the creditors. The asset cover ratio as per the agreement with the creditors will continue even after the restructuring. The restructuring does not involve any cash outflow or affect the normal operations of the Petitioner. It will not impact

the ability of the Company to honour its commitments and to pay its debts. Whereas, it is intended to project a more realistic picture of the financial position of the Company.

21. Taking over all view of the matter therefore, there is no substance in the objections taken to the proposed scheme either by the two objectors or the recommendation of the Regional Director for placing time-limit upto 31-3-2009. In that view of the matter, the Petition should succeed.

22. Since all the requisite statutory compliances have been fulfilled. Company Petition No. 293 of 2009 filed by the Petitioner company is made absolute in terms of prayer Clauses (a) to (f).

23. The Petitioner in the Company Petition to pay cost of Rs. 7,500 to the Regional Director, Western Region. Costs to be paid within four weeks from today.

24. Filing and issuance of the drawn up order is dispensed with.

25. All authorities concerned to act on a copy of this Order along with Scheme duly authenticated by the Company Registrar, High Court, Bombay.