

(2006) 12 RAJ CK 0017
In the Rajasthan High Court
In Re: Modern Syntex (India) Ltd.

Date of Decision : 01-12-2006

Acts Referred:

COMPANIES ACT, 1956 — Section 235, 236, 237, 238, 239

Constitution of India, 1950 — Article 12

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 18, 19

Citation : (2009) 148 CompCas 843 : (2007) 76 SCL 157

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shiv Kumar Sharma, J.—This petition u/s 391(2) of the Companies Act, 1956 (in short "Act of 1956") has been filed seeking sanction of scheme of compromise to be binding on all the secured creditors of the petitioner-company Modern Syntex (India) Ltd.

2. The petitioner-company was incorporated on 23-5-1989 under the provisions of Companies Act, 1956 as a part of Modern Group of Companies. The authorised share capital of the petitioner-company is Rs. 12,500 lakhs (Rupees twelve thousand five hundred lakhs) divided into 12,50,00,000 equity shares of Rs. 10 each. The issued, subscribed and paid up share capital of the petitioner-company is Rs. 15,821.66 lakhs (Rupees fifteen thousand eight hundred and twenty one lakhs) divided into 11,34,98,333 equity shares of Rs. 10 and 15,00,000 16 per cent cumulative redeemable preference shares of Rs. 100 each fully paid up).

3. The petitioner-company is presently engaged in the manufacture and sale of polyester filament yarn, blended yarn and man-made fabrics. The company operates its business through three separate divisions viz. Modern Syntex, Modern Suitings and Modern Petrofils. Presently, Syntex and Suitings division are lying closed due to labour problem, shortage of working capital and adverse market conditions etc. The petitioner-company states that as a whole it had a good track record of generating profits, rewarding the shareholders and servicing the debts till 1997 since inception. Due to global recession coupled with stiff

competition in Textile Industry the petitioner-company suffered significant losses since 1997-99. On account of Gujarat earthquake in January, 2001 the Petrofils division of the petitioner-company also adversely affected. On account of these problems the petitioner-company submitted a reference before the Board for Industrial and Financial Reconstruction, which was registered by the Board. The petitioner-company further given out that on account of various difficulties faced by it, a necessity was left for rescheduling and restructuring of the existing debts of the company and an elaborate scheme of compromise was prepared in order to enter into a compromise with the secured creditors of the company. On 18-7-2005 the Board of Directors of the petitioner-company approved the proposed scheme of compromise by passing a resolution to this effect. The petitioner-company stated in the petition that the yarn and suiting divisions of the petitioner-company were declared as relief undertaking by the State Government of Rajasthan by way of Notification dated 1-3-2004 under sections 3 and 43 of the Rajasthan Relief Undertaking Act, 1961 for the period commencing from 15-2-2004 to 1-2-2005. The petitioner applied for extension of the period of relief undertaking status for a further period of one year by the application dated 31-1-2005. The Government of Gujarat also declared the Petrofils division of the petitioner-company as a relief undertaking by the Notification dated 17-6-2004 for a period of one year from 17-6-2004 to 16-6-2005. The petitioner-company also applied for extension of the period of relief undertaking status and the same is under active consideration of the State of Gujarat.

4. Vide order dated 12-8-2005 passed in Company Application No. 47 of 2005 filed by the petitioner-company meeting of secured creditors was convened on 20-9-2005. The notice of the meeting was published in two newspapers Rajasthan Patrika and Times of India on 26-8-2005 and 27-8-2005. The meeting was attended by 25 secured creditors. One secured creditor Bank of Baroda abstained from voting. The compromise was read and explained to the meeting and the scheme was approved by majority of 18 votes representing 77.27 per cent in value of the total value of debts as against 6 votes representing 22.73 per cent in the value of the total value of debts. It appears that the scheme of compromise has been approved by the requisite majority of the secured creditors representing more than 3/4th in value of the total debts as required under the Companies Act.

5. The notice of this petition was sent to the Official Liquidator and the Regional Director, Ministry of Company Affairs, New Delhi and simultaneously also published in daily newspapers Rajasthan Patrika and Times of India. The notices were published in the newspaper on 2-12-2005.

6. Upon receiving the notice of this petition the Regional Director, Northern Region filed affidavit and submitted that out of 25 secured creditors who participated in voting, six secured creditors having their debts aggregating to Rs. 107.83 crores voted against the scheme and one secured creditor namely Bank of Baroda Branch abstained from voting. Prayer was made for deciding the case

on its merits.

7. Two objectors namely M/s. Indusind Bank Ltd. and Mashreq Bank filed objections. M/s. Indusind Bank Ltd. advanced fund based facility of Rs. 550 lakhs and non-fund based facility of Rs. 554 lakhs in February, 1997 to the Petrofils Division of the petitioner-company. The accrued outstanding principal and interest till date of filing of objection is Rs. 1,508.14 lakhs with future interest @ 20 per cent p.a. The objections filed by the Indusind Bank Ltd. in relation to meeting of secured creditors are as under:

(a) The notice dated 24-8-2005 convening the meeting of secured creditors stated that the said meeting was to be held for the purpose of considering and if thought fit, approving with or without modification, compromise proposed to be made between the said companies and secured creditors of the company. No opportunity whatsoever was given to any of the attending secured creditors to voice their objections to the scheme.

(b) The ballot papers did not mention the value of the vote of individual secured creditors. Hence it is not possible to say that more than 75 per cent of the value of secured creditors present and voting at the meeting approved the scheme.

(c) The ballot box was not sealed after completion of voting.

(d) The ballots were not counted at the meeting. This coupled with the fact that the ballot box was not sealed, clearly shows that there has been gross manipulation at the meeting.

(e) Many of the secured creditors who have approved the scheme were not present for voting. Hence, it cannot be said that the scheme was approved by more than 75 per cent of the value of creditors present and voting. The objector suspects that the ballots of some secured creditors may have been cast after completion of the meeting and the ballot box was not sealed to facilitate the manipulation.

(f) u/s 391(2) of the Companies Act the scheme must be approved by a three-fourths majority in value of the creditors present and voting either in person or in proxy.

(g) The objector company pointed out lacunae to the Chairman but the said objections were brushed aside and not considered.

8. The objector company averred that the secured creditors of Petrofils Division constituted a separate sub-class and even amongst them, the secured creditors who were offered options 2 or 4 constituted a separate sub-class with separate interests. Hence separate meetings ought to have been held for the different sub-classes. The proposed scheme involves excessive sacrifice and is oppressive to the minority secured creditors and thus not just fair and equitable to all the secured creditors. If the objector opts for option 3, it would receive Rs. 1,104 lakhs over a seven year period i.e., a present value of only Rs. 743.27 lakhs. In

this case the sacrifice involved on behalf of the objector would be Rs. 764.87 lakhs i.e. 50.71 per cent of the present outstanding. If the objector opts for option 4, it would receive Rs. 276 lakhs in 2006-07 i.e. a present value of Rs. 237.63 lakhs. The sacrifice involved in this case would be Rs. 1,270.51 lakhs which comes to 84.24 per cent of the present outstanding. The objector also submitted that the proposed scheme is vitiated by fraudulent preference to selected creditors and oppression of minority creditors by the majority. The copy of scheme given to objector stated that options 1 and 3 have already been filled up and only options 2 and 4 are available. The majority of the secured creditors have by back door negotiations with the petitioner-company secured an unfair advantage for themselves. The minority creditors are being forced to comply with the decision so taken. This constitutes a clear case of oppression of minority creditors by the majority. The objector is being forced to forego a substantial sum towards outstanding principal, accrued interest and future interest. Para E(c) of the proposed scheme states that the availability of the option shall be determinable on first come first basis. The objector has had no access to options 1 and 3 which were privately negotiated and determined by the petitioner-company to the full extent of capping, even before the scheme was circulated to the secured creditors. No procedure has been laid down regarding distribution of options. The scheme fails to satisfy that the members or class of members of creditors or class of creditors as the case may be were acting on a side and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class to whom they purported to represent. The contention that Petrofils Division can be made viable is wholly without basis and made merely with a view to dupe the creditors.

9. The objector further submitted that the proposed scheme vitiated by inadequate disclosure by not submitting the requisite material contemplated under the proviso of Section 2 of Section 391 of the Act:

(i) The notice of the scheme did not disclose the following documents:

(a) Copy of the last audited balance sheet.

(b) The latest audited report on the accounts of the company.

(c) Details regarding pendency of any investigation proceeding in relation to the company under sections 235 to 251.

(d) Details of various winding up petitions pending against the company and the various proceedings pending before BIFR/ AAIFR/High Court etc. which are all material facts relating to the company.

(e) The viability study/report basis on which the Petrofils Division of the petitioner-company is sought to be restructured and the manner in which the options 1 to 4 have been formulated.

(ii) Several other material facts pertaining to the company have also been deliberately suppressed thereby rendering the proposed scheme a sham and

nullity. The fact that in view of serious objections raised by all creditors regarding accounting practices adopted by the company for its audited balance sheet for the year 1999-2000 the BIFR vide its order dated 17-7-2001 directed the independent special investigative audit of the accounts of the petitioner and further fact that such investigative audit was never carried out, has been conveniently suppressed. It has also been suppressed that in the year 2000 AF Ferguson and Co. had conducted a viability study and suggested that Petrofils Division could be retained only if the promoters brought in interest-free funds of Rs. 90 crores, which the promoters expressed inability to bring. There is no explanation as to how the present viability study vis-a-vis the Petrofils Division is different from the said viability study conducted by AF Ferguson and Co.

10. The objector further stated that the contention that the Petrofils Division can be made viable is also wholly without basis and made merely with a view to dupe the creditors. The management has been guilty of fraudulent accounting and cannot be trusted to make a bona fide attempt to revive the Petrofils Division.

11. The objector M/s. Mashreq Bank Psc, Mumbai pleaded that it has sanctioned working capital facilities funded Rs. 6.8 crores + LCS Rs. 3.5 crores + Forex contracts by Rs. 6 crores to the Petrofils Division of the petitioner-company. The petitioner-company defaulted in repayment of outstanding and accordingly the objector issued demand notice for repayment of dues. The objector also sent a winding up notice to the company. The total outstanding of the objector-company against the petitioner-company as on 31 -3-2000 was Rs. 11,39,36,396.62 with interest of 22 per cent from 31 -3-2000. The principal amount due as on 31 -3-2000 is Rs. 9.5 crores along with interest. The objector-company taken almost objections raised by M/s. Indusind Bank and also submitted that all loans advanced to the petitioner-company are secured by the personal guarantees of its Director, Management personnel. The loan advanced by objector-Bank is secured by" personal guarantees of Mrs. H. S. Ranka and Mr. Kamal Ranka. The scheme specially envisages that all personal guarantees shall stand discharged on payment being made in accordance with the schemes. Since the Directors have given personal guarantees and the scheme envisages discharge of the personal guarantees therefore it is misstatement that no Director or any managerial personnel has any interest in the proposed scheme of the compromise. The objector submitted that the scheme has been made in order to oppress the minority secured creditors and the proposed scheme would harshly affect the interest of the objector-Bank and the same should not be approved.

12. The petitioner-company filed rejoinder to the objections and reiterated the facts stated in the company petition.

13. Mr. Paras Kuhad, learned Counsel for the petitioner-company, submitted oral as well as written submissions thus:

(a) The petitioner-company is operating its business through three separate divisions viz. Modern Syntex, Modern Suitings and Modern Petrofils. Till 1997, the

petitioner-company was running into profits and rewarding the shareholders by paying them dividends. Till that period, the petitioner-company was also regularly servicing its debt due to various banks and financial institutions on time. However, since 1997-98 on account of the following factors, the petitioner-company suffered significant losses leading to the non-fulfilment of its financial commitment towards the financial institutions.

(i) Global recession coupled with stiff competition in the textile industry.

(ii) Inadequate protection to the domestic industry as the incidence of excise duty was 54.5 per cent on PF which was much higher than that on cotton yarn @ 8 per cent.

(iii) Increase in raw material prices.

(iv) Overcapacity in the industry.

(v) Higher domestic interest rates as compared to interest rates abroad.

(vi) High Cost of Power.

(b) Due to the above-mentioned factors, not only the petitioner-company but also other domestic producers in the textile industry incurred heavy losses and ran into difficulties.

(c) Apart from the aforementioned difficulties, the normal working of the Petrofils Division was also adversely affected by the devastating earthquake that occurred in 2001 in Gujarat. Due to the said problems, the petitioner-company went into losses and as of 31-3-2000, the accumulated loss exceeded its net worth making the petitioner-company a sick industrial company. It is further submitted that the yarn division of the petitioner-company has been lying closed since October, 1996 because of the lock-out put up after prolonged labour problems due to inter-union rivalry. Similarly, the operations of the suiting division have also been discontinued since October, 2001 due to unfavourable market conditions and the erosion of the entire working capital.

(d) As the net worth of the petitioner-company had become negative, a reference of the petitioner-company was registered with the Board for Industrial and Financial Reconstruction of India (BIFR) based on the audited accounts for the year ending on 31-3-2000. The petitioner-company incurred further losses and the net worth was further eroded. Therefore, the petitioner-company filed a fresh reference based on the audited accounts for the year ending on 31-3-2004 which came to be registered with BIFR on 12-1-2005.

(e) In the light of the aforesaid background and with a view to carry on its business effectively, it was necessary to bring down the burden of debts of the petitioner-company from an unserviceable level to a serviceable level. As at 31-3-2004, the company's financial position was in doldrums as is reflected by the details set out hereunder:

Accumulated losses Rs. 563.80 crores Amount payable towards outstanding loans Rs. 726 crores The losses for the current year Rs. 96.73 crores

(f) As a result of the accumulated losses, the net worth of the company stood totally eroded. In fact, the net worth was in negative by hundreds of crores.

(g) The company was consistently in default with respect to financial institutions. Banks, debenture-holders, respectively, from the year 1999-2000 onwards (See note 11 at page 5 of Annexure-A to the petition for sanction). The amount in default since 1999-2000 was Rs. 325 crores approx.

(h) With a view to address the existing financial crisis, the company had, in the year 2000, attempted a restructuring exercise. The said restructuring exercise however, failed, on account of several reasons.

(i) During the years 2003-04 and 2004-05, the company was managed by the Board of Directors consisting of ten Directors. Out of these ten, five of the Directors were nominees of IDBI, IFCI, LIC, UTI, HBI.

(j) Since the company's net worth stood completely eroded and the accumulated losses of the company existed at Rs. 600 crores and in addition thereto, it was incurring annual losses excess of Rs. 75 crores, the Board of Directors acting in consultation with the creditors, explored multiple alternatives towards resolving the financial crisis.

(k) After protracted consultations and negotiations spread over a period of two years, the Financial Institutions concluded that the best chance of recovery was that of restructuring the debt rather than attempting closure of operations. Owing to accumulated losses of more than Rs. 600 crores and the complete erosion of its net worth, any attempt of winding up would have resulted in writing off of the total debt amount. Under this option, the institutions would have lost the total amount and would not have recovered any amount whatsoever.

(l) Under the aforesaid circumstances, as is set out under the scheme, the creditors, acting through their predominant voice on the Board (the aforementioned five Directors) as also acting independently as creditors to the company, worked out the present rehabilitation scheme, sanction whereof, is being sought by way of this petition.

(m) Para 10 of the scheme thus sets out that "the scheme has been worked out after protracted negotiations with the secured creditors" and that the majority of the secured creditors have already approved the restructuring settlement of their debts. Para 13 states:

13. Creditors will benefit through the channel of recovery as the same shall stand to be on the higher end if the company remains a running concern and the same is not put under liquidation. On the other hand, if the liquidation proceedings are initiated, the returns would be at the lower end for the creditors.

14.

15. The continued operation will ensure the employment to the direct work force of about 1,000 workmen and about 4,000 indirect employment.

(n) As a result of the acceptance of the rehabilitation scheme by the financial institutions, the company was able to commence repayment by 31-3-2005, and this is reflected under the aforesaid Annexure A para 5 (page 2) of the balance sheet, which states as under:

The company is making continuous efforts for sanction of restructuring settlement of its all secured lenders and glad to report that many of the secured lenders have approved settlement of their dues. This has resulted into write back of principal and interest during the year under review and have been included in the exceptional items shown under financial results. The company is making payment as per approval to these lenders and trying for settlement with the remaining.

(o) The balance sheet for the year ended 31-3-2005 recorded that if full effect was to be given to the notes set out under the Directors' report, the correct financial position of the company would emerge as under:

Accumulated losses Rs. 641.74 crores Loans, funds and liabilities Rs. 765.21 crores Net fixed assets Rs. 409.72 crores

(p) It is submitted that the reasonableness of the scheme deserves to be examined in the context of the aforestated factual position.

(q) That the scheme of compromise with the secured creditors was passed by the Board of Directors of the petitioner-company in its meeting dated 18-7-2005. It is pertinent to recall that the petitioner-company has five nominee directors of various financial institutions namely-IDBI, IFCI, LIC, UTI and HBI on its Board. It is, therefore, clear that the scheme has been de facto worked out by the financial institutions themselves.

(r) Pursuant to this Court's direction dated 10-8-2005, the secured creditors' meeting was held under the Chairmanship of Mr. Manoj Pareek, Advocate, appointed by this Hon'ble Court. During the meeting, the creditors were called upon to exercise their votes in relation to the debt held by them. The result of the voting was computed by the three scrutinizers appointed by the Hon'ble Chairman, the said Scrutinizers being.

(i) Shri A. K. SrivastavaIFCI

(ii) Shri B. S. MakeejaBank of Baroda

(iii) Shri H. L. SharmaPetitioner-company

(s) A total of 24 secured creditors participated in the voting and 18 of them representing 77.22 per cent of the total voting voted in favour of the scheme. Six creditors representing 22.73 per cent value of debt voted against the scheme.

1.18.1 The names of the secured creditors who voted in favour of the scheme are as under:

1. Industrial Finance Corporation of India Ltd., Mumbai
2. State Bank of Bikaner and Jaipur, Alwar
3. Union Bank of India, Alwar
4. Bank of India, Corporate Branch, Mumbai
5. Dena Bank, Mumbai
6. Life Insurance Corporation of India, Mumbai
7. Bank of India, Nariman Point, Mumbai
8. Trishul Traders Pvt. Ltd., Mumbai
9. UFJ Bank Ltd. (Sanwar Bank), Delhi
10. State Bank of India, Delhi
11. Invitation Investment Pvt. Ltd.
12. UTI Bank Ltd., Mumbai
13. BOI, Mutual Fund, Mumbai
14. Mehrauli Traders Pvt. Ltd., Mumbai
15. Deutsche Bank, Mumbai
16. SBI Mutual Fund, Mumbai
17. Vulvan Traders Pvt. Ltd., Mumbai
18. Canbank Mutual Fund, Mumbai

(t) Based on the result of said meeting this petition was submitted for sanction by the company before this Hon"ble Court. Pursuant to the notices issued by the Hon"ble Court, the Regional Director has filed his affidavit. In his affidavit the Regional Director has not raised any objection whatsoever against any feature of the scheme.

(u) As is seen, all the 18 secured creditors who voted in favour of the scheme were either public financial institutions ("authority" within the meaning of article 12 of the Constitution of India) nationalised banks, foreign banks or private sector bank. The institutions in question are some of the finest financial institutions of the country.

(v) In case of the public financial institutions, nationalised banks, foreign banks and private sector banks, the decision as to the manner in which the voting right is to be exercised in the creditors' meeting for approval of scheme, is decided by the Board of Directors of the said financial institutions. Obviously, such Boards,

which are manned by some of the finest financial experts, arrive at their decisions based on a most critical and detailed evaluation, of the commercial terms and the commercial desirability of approving such scheme, both in the interest of the institutions involved, as also in the context of the larger public interest.

(w) The affidavit filed by the Regional Director, Company Law Department, Government of India also brings out the Government of India's approval to the scheme in question. It also brings out that upon a comprehensive scrutiny carried out by the Government of India none of the features or the payment terms have been found to be objectionable in any manner whatsoever.

(x) That subsequent to the filing of the petition for sanction before this Hon'ble Court the rest of the secured creditors also appear to have decided to act in concurrence with the decision of the majority, and as a result thereof, and except for Indusind Bank and Mashreq Bank representing a total of 4.26 per cent of the value of debts, none of the other secured creditors have raised any objection against the sanction of the Scheme. Thus as of this date, the creditors in favour of the scheme and against the scheme de facto and effectively, translate to what is stated hereinafter.

Creditors currently in favour of the scheme 95.74 per cent Creditors opposing the scheme 4.26 per cent

14. Mr P. K. Mullick, learned Counsel for the objector-Indusind Bank, raised the following objections to the Scheme of compromise:

(i) The first objection was with regard to the accounts submitted by the petitioner-company. He raised the objection that the Scheme of compromise provides that Rs. 45 crores shall be brought in by way of equity of the promoters. He submitted that this statement is a false statement which is not substantiated by the balance sheet submitted by the petitioner-company. He further submitted that as per the report of M/s. A. F. Ferguson and Company given in the year 2000, the company could be revived if the promoters of the petitioner-company were to bring in Rs. 90 crores as contribution. Mr. Anant Kasliwal, counsel appearing along with Mr. Mullick for the Indusind Bank raised objections regarding the relevance of Director's report. Auditor's report and the notes on accounts attached to the balance sheet.

(ii) The second objection was that the meeting of the secured creditors was not convened in a proper manner and thus it was an invalid meeting. He specifically pointed out that the ballot boxes were not sealed, the result of the meeting was not decided immediately and the values of the outstanding amounts was not given in the ballot papers.

(iii) The third objection was that since the petitioner-company's reference is registered with the Board for the Industrial and Financial Reconstruction (BIFR), therefore this Court ought not to exercise its discretion towards sanctioning the

petition u/s 391 of the Companies Act, 1956. The counsel for the objector relied upon the judgment given by the Hon'ble Apex Court in the matter of NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another,

(iv) The fourth objection was that the scheme is oppressive to the minority secured creditors as the same involves excessive sacrifices.

(v) The fifth objection was that since different options have been offered to the different secured creditors therefore they constitute separate classes amongst themselves.

Apart from the above objections, learned Counsel also urged that there is no proposal in the scheme for ensuring the continuous employment of the employees, and that the accounts of the company are not properly drawn, etc. He also submitted that the petitioner-company has not been able to revive itself from 2000. Since then, it is registered with the BIFR, therefore, its revival after 6 years is doubtful.

15. Mr. A.K. Bhandari, learned senior Advocate, appearing for Mashreq Bank, raised issue about maintainability of the petition, on the ground, that since BIFR is seized of the matter, this Court has no jurisdiction to entertain and decide the petition u/s 391 of the Companies Act, 1956. It was contended by Shri Bhandari that in the matter of rehabilitation of sick companies, the Company Court has no competence to act except with the sanction of the Board for Industrial and Financial Reconstruction.

16. I have reflected over rival submissions and weighed the material on record. Before responding to the individual objections raised by the objector-Banks, it would be desirable to set out, in the first instance, the parameters that have been laid down by the Hon'ble Supreme Court in relation to exercise of jurisdiction u/s 391(2) of the Companies Act, 1956.

A. Hindustan Lever and Another Vs. State of Maharashtra and Another,

Para 11: While exercising its power in sanctioning a scheme of agreement, the Court has to examine as to whether the provisions of the statute have been complied with. Once the Court finds that the parameters set out in Section 394 of the Companies Act have been met then the Court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the Court a better scheme could have been framed. This aspect was examined in detail by this Court in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* AIR 1997 SC 519. The Court laid down the following Board contours of the jurisdiction of the Company Court in granting sanction to the scheme as follows:

(1) The sanctioning Court has to see to it that all requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

(2) That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391, Sub-section (2).

(3) That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

(4) That all necessary material indicated by Section 393(l)(a) is placed before the voters at the meetings concerned as contemplated by Section 391, Sub-section (1).

(5) That all the requisite material contemplated by the provisions of Sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

(6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not unconscionable, nor contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

(7) That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

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

(9) Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors

and members of the company who have ratified the scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392. Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. The supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as *sui juris* with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement.

Para 12 : Two broad principles underlying a scheme of amalgamation which have been brought out in this judgment are:

(1) That the order passed by the Court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and

(2) That the jurisdiction of the Company Court while sanctioning the scheme is supervisory only i.e. to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The Court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. The role of the Court is that of an umpire in a game, to see that the teams play their role as per rules and do not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire.

Both these principles indicate that there is no adjudication by the Court on the merits as such.

Para 13 : In *Hindustan Lever Employees' Union case* (AIR 1995 SC 470) it has been held by this Court that Section 394 casts an obligation on the Court to be satisfied that the scheme for amalgamation or merger was not contrary to the public interest; the basic principle of such satisfaction is none other than the broad and general principle inherent in any compromise or settlement entered between the parties that it should not be unfair or contrary to public policy or unconscionable or that the scheme should not be device to evade the law. (p. 332)

B. Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.,

Para 29 : However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through

or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391, Sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a Court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.... It is obvious that the supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as *sui juris* with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. The exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement.... (p. 597)

In the above-mentioned judgment of Miheer H. Mafatlal's case (*supra*), Their Lordships referred the judgment of Hon'ble Supreme Court in the case of *Employees' Union v, Hindustan Lever Ltd.* in the following terms:

Section 394 casts an obligation on the Court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between parties that it should not be unfair or contrary to public policy or unconscionable.... (p. 519)

The Court will decline to sanction a scheme of merger; if any tax fraud or any other illegality is involved. But that is not the case here. A company may, on its own, grow up to capture a large share of the market. But unless it is shown that there is some illegality or fraud involved in the scheme, the Court cannot decline to sanction a scheme of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of sharp decline in the business of TOMCO.

Dr. Dhawan has argued that TOMCO is not yet a sick company. That may be right, but TOMCO at this rate will become a sick company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The shareholders, the employees, the creditors will all suffer.... (p. 519)

After referring to the above para, the Hon'ble Supreme Court laid down broad contours of such jurisdiction of the Company Court. The said contours have already been referred in the judgment of Hindustan Lever Ltd. v. State of Maharashtra.

C. Administrator of the Specified Undertaking of the Administrator of the Specified Undertaking of the Unit Trust of India and Another Vs. Garware Polyester Ltd.,

Para 30 : The parties to the agreement are commercial concerns. Each party would indisputably try to protect its interest when advancing loans or making investment but it must also be conceded that they were aware of the risk factor involved therein. The factors which are responsible for sufferance of loss by the respondent herein to the extent of Rs. 228.58 crores was as a result of market situation then prevailing ie., steep devaluation of currencies of Korea and Indonesia who were the major suppliers of film in the international market as a result whereof they started dumping the materials at cheap prices in Europe, and the levy of anti-dumping/anti-subsidy duties by the European Union as a result whereof sales to European countries came down drastically.

Para 31: A restructuring package was evolved at the instance of Industrial Development Bank of India, which was largest lender and the trustee upon obtaining a report in that behalf from KMPG, a reputed concern. A scheme envisaged u/s 391 of the Companies Act, it is well settled, is a commercial document.

Para 33 : The scope and jurisdiction of the Company Court has been examined at some length by Division Bench of this Court in Miheer H. Mafatlal AIR 997 SC 506 wherein the broad contours of such jurisdiction have been enumerated indicating.

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

Para 35 : It is not the case of appellants that the learned Company Judge exceeded his jurisdiction and acted in violation of the said guidelines. Once it is held that the normal rule, namely, the principle of majority in corporate democracy or in other words, governance of the company by majority, is accepted, the appellants could not be heard to say that they had an absolute right to exercise veto power and thereby scuttle a bona fide attempt to revive a company. Efforts to keep a company from becoming insolvent and even to revive

an insolvent corporate have been receiving legislative and executive support, as would be evident from several Parliamentary Acts, as for example the Sick Industrial Companies (Special Provisions) Act, 1985 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Para 38 : In view of our findings aforementioned, we are of the opinion that the appellants herein having failed to establish that they could hold the entire scheme to ransom so as to stall the proceedings as a result whereof the majority of debenture-holders would be deprived, the purpose or object motivating the appellants to advance such a huge amount to the respondent against issue of debentures is a matter of little or of no concern to the respondent-company or other debenture-holders. A special or a new right cannot be found in favour of the appellants in the agreement when it creates none. The scheme applies equally to all debenture-holders and as such the appellants cannot be treated as a separate class. Once the respondent-company prima facie showed that the scheme is fair and reasonable and also that the requisite majority of the debenture-holders recorded their decision in its favour, the Court in the absence of any unforeseen unjustness or unreasonableness therein ought not to reject the same.

17. The following principles of law clearly emerge from the extracts of the aforestated judgment of the Hon''ble Supreme Court:

A. The Scheme is a commercial document and once a finding is arrived at that the legal requirements have been met, the Company Court has no jurisdiction to sit in appeal over the commercial wisdom of the class of persons who approve the Scheme.

B. The jurisdiction of the Company Court in this matter is not appellate, but restricted to that of the over-seeing that the meetings are properly held and the voting is properly exercised therein. The Company Court neither has the expertise nor the jurisdiction to delve into the commercial freedom exercised by the creditors. The Company Court merely acts like an umpire in the game of cricket and sees that both the teams play the game according to rules.

C. Propriety or the merits of the compromise have to be judged by the parties who have, sui juris, with their open eyes and fully informed about the pros and cons of the scheme, arrived at their own reasoned judgment. The exercise is in the realm of commercial democracy permeating the activities of concerned creditors and members of the company, who, in their best commercial and economic interests by majority, agree to give a green signal to such a compromise or arrangement.

D. A minority cannot be allowed to exercise veto power and thereby scuttle a bona fide attempt to revive a company as the revival is the predominant intention as is reflected in a series of Parliamentary legislation.

E. The Court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved.

[Emphasis supplied]

18. In the instant case, there is no controversy in relation to the manner in which the meetings were convened, the disclosures were made, notices were sent to the creditors and the voting was exercised.

19. The only issue that has been raised in relation to the manner of conducting a meeting is that the ballot boxes were not sealed and the ballot boxes were not opened in the presence of the creditors present at the meeting.

20. Admittedly, the voting was evaluated by independent scrutinizers appointed by the Chairman and the said scrutinizers were officials of two prominent public financial institutions. Also, the objectors, have not been able to point out any error in the matter of counting of the ballot boxes. It is nobody's cases that a vote cast against the scheme has been erroneously counted in favour of the scheme or vice versa. All the creditors who exercised the vote were present. They have also approved the counting as the results were communicated to all of them and subsequently also they had an opportunity to file objections, if they were to so choose, before this Court, I do not therefore find any merit in this objections.

21. It also appears that the Scheme has not only been designed by the financial institutions themselves but has also been overwhelmingly approved by the secured creditors. The Boards of each of the 18 secured creditors who approved the scheme initially and the remaining of the total 31 of secured creditors who are virtually or impliedly now supporting the scheme, manned by financial experts and Government of India representatives. Obviously, prior approval, the scheme was scrutinised by the Board members of each of these supporting 31 secured creditors.

22. Coming to the first objection it may be noticed that it is about the discrepancy between two different parts of the scheme. It is contended that the contrary to what is set out under para 15, Clause (b) of the Scheme, namely "Fresh funds by the promoters by way of equity depending upon the requirement to be paid for restructuring settlement to the extent of Rs. 45 crores (page 115 of the petition), according to the projected cash flow contained under page 122, the company is actually infusing Rs. 15 crores only."

23. A look to the Schedule I of the Balance Sheet (Annexure A) at page 8 of the Annual Report, goes to show that a sum of Rs. 30 crores stood inducted into the company as on 31-3-2005. The remainder sum of Rs. 15 crores is reflected under the projected cash flow statement as liable to be inducted in the year 2006. Thus, in all the whole of Rs. 45 crores are being inducted by the promoters towards equity capital.

24. So far as Ferguson report is concerned, I notice that it was drawn in the year

2000. Under the said report while Rs. 45 crores were required to be induced by way of equity and Rs. 45 crores were to be brought into the company by way of sale proceeds of the defunct spinning and weaving units of the company (Modern Suitings and Modern Syntex), lying closed at Alwar for the last 5 to 10 years. Under the current scheme also, the said assets are proposed to be sold, in order to realize the proceeds from the sale of the said assets and to bring them into the company and the balance Rs. 45 crores as shown above are being brought in as equity.

25. The issues relating to commercial complexity, in my opinion, cannot be gone into in the course of scrutiny u/s 391 of the Companies Act.

26. That takes me to the prime contention of the objector that since the matter is pending before the BIFR, the scheme u/s 391 ought not to be approved. Learned Counsel for the objectors in support of this contention, placed reliance on NGEF Ltd.'s case (supra).

27. In reply to the said objection, learned Counsel for the petitioner-company contended that the objection has no substance since there is no bar u/s 391 to entertain and sanction the Scheme of Compromise/Arrangement. It is further submitted that Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 (for short "SICA") bars the continuation and maintainability of following proceedings against the industrial company with respect to which an inquiry is pending u/s 16 or scheme is under preparation u/s 17 or wherein appeal is pending u/s 25 of the said Act namely:

- (i) winding up proceedings;
- (ii) proceedings for execution, distress or the like;
- (iii) proceedings for the appointment of a Receiver;
- (iv) a suit for recovery; or
- (v) proceedings for the enforcement of any security or any guarantee.

Clearly enough, proceedings u/s 391 relating to Scheme of Compromise/Arrangements is not barred by the said Section 22 and not covered thereunder.

28. In support of his contention learned Counsel placed reliance on the following judicial pronouncements-

- (i) National Organic Chemical Industries Ltd. v. NOCIL Employees Union [2005] 126 Comp. Cas. 922 : 62 SCL 373 (Bom.)

The only issue which arises in the present case for my determination is whether in view of the provisions of Section 32 of the SIC A once the reference having been registered u/s 16 whether this Court is entitled to exercise power under sections 391 to 394 of the Act or by virtue of the overriding effect u/s 32 the provisions of sections 16 to 18 which also provide for preparation and finalisation of the scheme of the sick industrial companies would override the provisions of

sections 391 to 394 of the Companies Act. (p. 925)

In support of the aforesaid contention that the provisions of Section 22 of the SICA have no application to the facts of the present case, learned Counsel has relied upon an unreported judgment of the Division Bench of the High Court of Himachal Pradesh, Shimla, in the case of Gontermann-Pipers (India) Ltd [2005] 57 SCL 225, decided on 12-7-2004, reversing the judgment of the learned Single Judge which has taken the view that by virtue of the provisions of Section 22 the proceedings under sections 391 to 394 would stand suspended in view of the provisions of Section 22 of the SICA. The Division Bench has reversed the view taken by the learned Single Judge in the case of Gontermann-Pipers (India) Ltd. [2005] 57 SCL 225 (HP). Insofar as the aforesaid argument is concerned, I find that on a plain and simple reading of Section 22 of the Act it is clear that the suspension of legal proceedings is only in respect of winding up of the industrial company or for execution or attachment of any of the properties of the industrial company for appointment of the Receiver. Insofar as the guarantors are concerned, the limited protection is granted that is no suit for recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loan granted to the industrial company shall lie. In my view on a plain and simple reading of Section 22 the law did not contemplate the suspension of any proceedings under sections 391 to 394 of the Companies Act, 1956.... (p. 926)

...However, the moot question, which requires to be considered in the present case, is the effect of Section 32 of the SICA. The provision of Section 32 is an overriding provision.... (p. 927)

If the provisions of sections 391 to 394 of the Companies Act are inconsistent with the provisions of sections 15 to 19 of the SICA then in that event by virtue of Section 32 of the SICA the said provisions will have an overriding effect and shall prevail notwithstanding anything inconsistent under the provisions of sections 391 to 394 of the Companies Act. In my opinion the answer to this question lies in the fact whether there is any inconsistency between the said provisions of Section 32 and the provisions of sections 391 to 394 of the Act which are the relevant provisions of the Act.... (p. 928)

Mr. Chagla, learned Counsel for the petitioner has contended that there is no inconsistency between the aforesaid two provisions. He has drawn my attention to the Statement and Objects and Reasons of the SICA to indicate that the whole idea to introduce the provisions of SICA is to make the company financially viable and independent. He has contended that the provisions providing for merger and demerger of the companies under sections 391 to 394 of the Companies Act also similarly has the same object of making the company viable and more efficient. Thus, he has contended that the provisions of both the statutes are supplemental to each other and not inconsistent therewith and, therefore, this Court would have power to sanction the scheme under sections 391 to 394 of the Companies Act irrespective of the provisions of Section 32 of the SICA. I have considered

the aforesaid contention and I find considerable substance and merit therein. The provisions of sections 15 to 19 of the Act is a scheme where a company which has become sick can register itself with the BIFR which is vested with the power under the provisions of the said Act which shall thereafter after making enquiry may provide for package for rehabilitation of the company and/or make the company viable so that the business of the company can continue. The provisions of sections 391 to 394 of the Companies Act, 1956, also similarly provide for rearrangement of the company's business by way of granting amalgamation, demerger and/or by sanctioning of the scheme of compromise which also has the very same purpose and object to revive and/or make the company more viable and efficient. The provisions of the Act though provide for different methods of doing so, they are not inconsistent with each others. Apart therefrom, I find that the provisions of the SICA operate in slightly different sphere, i.e., the case where the net worth of the company has become negative, whereas the provisions of sections 391 to 394 have no such requirement as condition precedent and this provision can even operate in cases where the companies are doing quite well and are seeking to re-arrange their business for the efficient management or better business prospects and thus seek to amalgamate or demerge their business operation of the company. In my view, since there is no inconsistency between the provisions of Section 32 of the SICA and the provisions of sections 391 and 394 of the Companies Act, there is no question of the provisions of Section 32 of the SICA being made applicable to the present case. In my view, therefore, the Court has power and jurisdiction to grant sanction of the scheme under sections 391 and 394 of the Companies Act, 1956. In view thereof, I make the present petition absolute in terms of prayer Clauses (a) to (d). (p. 931)

(ii) Bombay High Court in *Sharp Industries Ltd., In re* [2006] 131 Comp. Cas. 535 : 67 SCL 353, relied upon the above judgment and held as under:

Reverting to the first objection taken on behalf of the intervenors that pendency of BIFR proceedings would constitute bar for entertaining the present proceedings. In my opinion this objection will have to be only stated to be rejected. Counsel for the petitioner has rightly placed reliance on the unreported decision of the Single Judge of our High Court in the case of *National Organic Chemical Industries Ltd. v. NOCIL Employees Union*, Company Petition No. 104 of [2005] 62 SCL 373 (Bom.) and connected case decided on 8th June, 2005.... (p. 550)

I am in agreement with the view expressed by Justice S.U. Kamdar in the above decision. To get over this position, counsel for the intervenors had placed reliance on the decision in the case of *K. Sitaram Raju* (supra), wherein, it is observed that as soon as the reference u/s 15 is made to the BIFR, the BIFR is seized of the matter and in that case by virtue of Section COMPANIES AC of SICA, the provisions of the Act would prevail notwithstanding anything contained in the Companies Act, 1956. In my opinion, this decision is of no avail to the

intervenors. In the first place, the limited question that was considered by the Andhra Pradesh High Court in exercise of writ jurisdiction was : whether the BIFR has the power to restrain the company from effecting any change in the composition of the Board of Directors, including top managerial personnel pending decision on the question of rehabilitation of the Company. The statement of law occurring at page 31 Placitum (H) of the said decision as referred to above will, therefore, have to be considered in that limited perspective. In any case, I would prefer to agree with the view expressed by Justice S. U. Kamdar which is the correct statement of law. Viewed in this perspective, the objection that this Court has no jurisdiction to entertain the present proceedings in view of the pendency of the BIFR reference will have to be rejected. Anticipating this situation, perhaps, counsel for the intervenors would then argue that even if the two proceedings were to be held as independent proceedings, even in that case, the present petition will have to be rejected unless the petitioner were to elect one of the available two remedies. There is no substance even in this objection. The question of election of remedy would arise when both the remedies provide for same relief. That is not the case on hand. Besides, as mentioned by Justice S.U. Kamdar, the scheme of two enactments operates indifferent spheres, though not inconsistent with each other. If it is so, the question of electing one of the two remedy does not arise.(p. 552)

(iii) Gountermann-Peipers (India) Ltd. v. UOI [2005] 126 Comp. Cas. 489 (HP).

(iv) Phlox Pharmaceuticals Ltd., In re [2005] 63 SCL 237 (Guj.).

(v) Pharmaceutical Products of India Ltd., In re-High Court of Bombay [decided on 13-2-2006 : reported in 2007 (1) AIR Bom. R (NOC) 1251

29. It is further stated that the judgment of the Hon"ble Supreme Court in the case of NGEF Ltd. (supra) has no application in the facts and circumstances of the present case. The facts that lead to the issue that arose in that particular case are as under:

NGEF Limited (the company) became a sick company and consequently a reference was made to the BIFR. The BIFR having opined that the company cannot be revived, recommended the winding up of the company and sent the said recommendation to the High Court. Upon receipt of the recommendation, the High Court registered the same as Company Petition No. 154 of 2002. During the pendency of such a petition and before the petition could be admitted (See para 55), the respondent filed an application before the Company Judge under rules 6 and 9 of the Companies (Court) Rules praying for a direction upon the company to execute a deed of sale in its favour in respect of the land measuring 40.45 acres relating (sic) on or on the basis of the resolution dated 25-2-2002 alleging that the same constituted a concluded contract.

In the course of the hearing, it was noticed that, Section 20(4) of contains introduces a non obstante clause, and this provision seeks to empower BIFR to sanction sale of assets prior to the commencement of winding up. However, that

under the Companies Act, 1956, the jurisdiction to order the sale was available to Company Court but only after the company stood wound up. Also, that it was only in the course of dissolution (post-winding up) that the Company Court was empowered to order the sale of assets (section 457 of the Companies Act).

In that case, two separate applications came to be filed before the Company Court, before the company was ordered to be wound up. The first application was dismissed by Company Court stating that since the sick company was yet to be wound up, therefore, the Company Court has no jurisdiction under the Companies Act, 1956 to order the sale of the company's assets (para 8 at page 226). The second application was, however, upheld and the Company Court took a diametrically opposite stand and ordered the sale of the assets.

Upon the order of the Company Court being challenged, the validity of the said order was sought to be sustained on the ground, that although the Company Court had no jurisdiction to order the said sale at pre-winding up stage under any explicit provision of the Companies Act, the order of sale can be sustained with reference to its implicit power to order such sale. The said implicit power was sought to be traced u/s 536(2) of the Companies Act, 1956. The said plea of implicit power with the Company Court was found to be unfounded, as BIFR was found to be explicitly vested with this power by virtue of Section 20(4) of the Sick Industrial Companies (Special Provisions) Act. It was also found that the power which was vested under SICA was an overriding power. The Parliament having explicitly conferred the said power upon BIFR rather than upon Hon''ble Company Court, as long as the Company was not wound up, the Hon''ble Supreme Court held that the act of the Company Court was invalid.

Given the concept of limited jurisdiction of High Court, u/s 20(4) of SICA as against Section 536(2) of Companies Act, Hon''ble Supreme Court held, that on a correct reading of the Companies Act, 1956, the Company Court cannot be accepted to be possessed with the power to order sale, and that by law, prior to the winding up of the company, the power of sale, was by virtue of the explicit provisions of Section 20(4) of SICA, available only with BIFR and not with Company Court. It was also noted that:

- (a) winding up petition not having been admitted as yet, the Company Court was not even seized of the matter;
- (b) The Company Court itself had taken a diametrically opposite interpretation in relation to the first application which was absolutely identical.
- (c) That on the merits also it could not have been sought to be a concluded contract since the approval of the sale by company was a conditional approval subject to consent of Central Government and such consent was not available.

It was in this background that the Hon''ble Supreme Court held that it was not a Company Court but BIFR, which was in the facts of that case, vested with the power to order the sale at a stage prior to winding up of the company.

30. Having carefully analysed the material on record, I notice that on 17-11-2005 the BIFR had declared the petitioner a Sick Industrial Company u/s 3(l)(o) of SICA and appointed IFCE as the Operating Agency to devise a scheme for rehabilitation of the Company. Their Lordships of the Supreme Court in NGEF Ltd 's case (supra) indicated (paras 39 to 46 and 49) that SICA is a complete Code in itself and being a later enactment, it would prevail over the Companies Act in case of any inconsistency in view of Section 32 of SICA. The High Court should not interfere where the matter of rehabilitation of a sick company is pending before the BIFR under SICA.

31. In *International Finance Corporation v. Bihar State Industrial Development Corporation* [2005] 10 SCC 179, it was propounded that the BIFR is the expert body to deal with rehabilitation of sick industries and the High Court should not interfere in the process.

32. Coming to the facts of the instant case, I find that in para 16 the petitioner averred that sanctioning of compromise will be for the benefit of the Company as the same will result into revival of it. The Company admitted that as many as five winding up petitions were pending in this Court against the petitioner company.

33. Admittedly the petitioner-company got itself registered with the BIFR in the year 2000 but could not revive itself as yet. In view of the fact that five winding up petitions are pending against the petitioner-company, I am of the opinion that there does not exist any chance of revival of the petitioner-company. Even the petitioner-company did not make bona fide attempt of its revival.

34. Even though this Court does not have the expertise to delve into the commercial freedom exercised by the creditors, and this Court acts like an Umpire in the game of Cricket, yet this Court can at least command the parties to follow the rules of the game. Since the BIFR is the expert body to deal with the rehabilitation of the sick company like the petitioner, I find myself unable to interfere in the matter under the powers vested in this Court u/s 391 of the Companies Act.

35. There is yet another reason to decline the relief to the petitioner-company. To my mind the proposed scheme is not just, fair and equitable to all the secured creditors. It appears from the record that outstanding principal and interest of the objector IndusInd Bank as in December, 2005 itself is more than 1,508.14 lakhs. If objector opts for option 2, it would receive Rs. 1,104 lakhs over a seven year period i.e. a present value of only Rs. 743.27 lakhs. In such a situation the sacrifices of objector would be Rs. 764.87 lakhs i.e. 50.71 per cent of the present outstanding. If the objector opts for option 4, it would receive Rs. 276 lakhs in 2006-07 i.e. a present value of 237.63 lakhs. The sacrifice would be Rs. 1,270.51 lakhs which comes to 84.24 per cent of the present outstanding. Such a high sacrifice is oppressive to the objector and is unconscionable and unreasonable even from the point of view of prudent man.

36. For these reasons, the prayer sought by the petitioner-company in the

instant petition cannot be granted. The petition accordingly stands dismissed without any order as to costs.