
(2009) 02 GUJ CK 0015

In the Gujarat High Court

Case No : Company Petition No's. 275, 276 and 277 of 2008 and Company Applications No's. 446, 447 and 448 of 2008

In Re: Rajeev S. Mardia and Rasik S. Mardia

Date of Decision : 02-02-2009

Acts Referred:

Companies (Court) Rules, 1959 — Rule 148
Companies Act, 1956 — Section 10(2), 102, 291, 390, 391

Citation : (2010) 153 CompCas 306

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Amee Yajnik, Harin Raval, Assistant Solicitor General, S.N. Soparkar and Swati Soparkar, for the Appellant;

Judgement

K.A. Puj, J.—All these three petitions are filed seeking sanction of this Court to the scheme of arrangement at annexure C to each of the petitions. Company Petition No. 275 of 2008 filed by the ex-promoter of Mardia Steel Ltd. (in liquidation) seeking sanction of the scheme so as to be binding on all the unsecured creditors, equity shareholders and secured creditors of the company and Mardia Steel Ltd. (in liquidation).

2. The petitioners of Company Petitions Nos. 276 and 277 of 2008 are Atithi Dwelling P. Ltd. and Karnavati Dwelling P. Ltd., the wholly owned subsidiary companies to whom the assets of Mardia Steel Ltd. (in liquidation) are sought to be transferred. They are, therefore, virtually the transferee companies.

3. Before the court proceeds to consider the issue regarding sanction of the scheme, it is necessary to have a close look at the historical background of the company in liquidation.

4. The company was established in the year 1974 at Vatva, Ahmedabad and it started its operations at a very small level with one refining Mill. In the year 1995, the company decided to modernise, extend and diversify into other projects at an estimated cost of Rs. 200 crores. The company decided to have two locations, one at Mardia Nagar, District Surendranagar and second at

Changodar, near Ahmedabad for the projects of expansion of steel producing activities and production of industrial gases at Mardia Nagar and for the production of aluminum foil and plexiglas glass at Changodar. At Mardia Nagar, the company proposed to set up an oxygen plant having capacity of 120 MT per day with liquid argon system plant. At Changodar, the company proposed to set up an imported plant for manufacturing aluminum foil with a capacity of 1,400 MT p.a. manufacturing facilities for plexiglas with a capacity of 5,000 MT p.a. was also planned at the same site. The company had enjoyed leadership position in the State industry up to the year 1996 and achieved highest sales turnover of Rs. 250 crores approximately in the year 1995-96.

5. The operations of the company, in the financial year 1996-97, however, were adversely affected due to the development of various macro and micro economic factors in the Indian economy which had a deleterious impact on the steel industry. Operations of the furnished division of the Vatva and Ratlam units were suspended in the year 1996 and February, 1997, respectively. In October 1998, operations of Mardia Nagar Unit were temporarily suspended and limited operations which were going on at Vatva after registration with the BIFR were also discontinued from May, 2002. The main reasons for the losses in respect of the industry could be briefly enumerated are that reduction in import duty, demand recession in steel industry, high energy cost, availability of power at Ratlam (MP), pressure on selling price, technical problems in DC Arc Furnace, labour interest, working capital constraints, legal problems, delay in implementation of projects, etc. The company had made many revival efforts. However, those efforts could not be succeeded. Owing to continued losses, networth of the company was fully eroded as on March 31, 1998 and hence, reference was made before the BIFR on April 21, 1998 and the same was registered as Case No. 100 of 1998 by the BIFR. During May 2001, the BIFR ordered for change in management of the company and the operating agency IFCI advertised as per the direction of the BIFR. The company made an offer for one-time settlement. However, no other scheme or proposal was received by the operating agency. The banks and financial institutions in October 2001, rejected the offer made by the company and sought for the directions from the BIFR. The BIFR in April 2002, recommended this Court for winding up of the company. Based on this recommendation, winding up petition was registered and ultimately, this Court vide its order dated July 23, 2003, appointed the provisional liquidator and thereafter final winding up order was passed by the court.

6. Thereafter, an attempt was made by the ex-promoters by proposing a scheme of compromise to its secured and unsecured creditors in the year 2005. Company Applications Nos. 45 and 312 of 2005 and Company Petitions Nos. 158 and 172 of 2005 were filed before this Court. However, the same could not be implemented as it could not get the sanction of this Court for want of requisite statutory majority of the creditors. Hence, this Court vide its order dated September 18, 2006, directed the official liquidator to have a fresh valuation of

properties of the company and to invite fresh tenders for the auction to be completed by January, 2007. Advertisements were issued inviting tenders and auction took place on January 23, 2007 and June 13, 2007, aggregating the total bidding amount of Rs. 63.67 crores.

7. The ex-promoters of the company once again proposed the scheme of revival/restructure of the company vide Company Application No. 557 of 2006 to this Court. This Court vide its order dated January 22, 2007, ordered for convening a meeting of secured creditors, unsecured creditors and shareholders of the company on March 10, 2007 and also directed the official liquidator to proceed further for the auction of the property, but the auctions were not to be finalised by the official liquidator with a view to see that the irreversible situation may not arise or new equities may not be created in the event the court considers the question for according sanction to the scheme. The Bank of Rajasthan, the secured creditor of the company, moved the Division Bench of this Court to stay the operation of the order dated January 22, 2007 and accordingly, on March 5, 2007, the Division Bench stayed the operation of the order of the learned single judge dated January 22, 2007, to convene the meetings of shareholders, secured and unsecured creditors of the company. The ex-promoters moved the apex court against the order of the Division Bench of this Court and the apex court redirected the matter to this Court vide its order dated November 10, 2007, to decide within one month from the date of communication of the said order. The said OJ appeal is still pending before the Division Bench of this Court.

8. During the pendency of the said appeal before the Division Bench, the present proceedings are initiated by the ex-promoters of the company. It is averred in the petition that in view of the present proceedings, the earlier scheme shall be abundant and the Division Bench of this Court shall be accordingly informed about the same.

9. It is the say of the petitioners that the present scheme is proposed with the improved terms of settlement with the creditors. Moreover, the manufacturing units forming two separate divisions are proposed to be transferred to two separate entities in order to make the revival feasible. The main objects of reviving Mardia Steel Ltd., are settlement of liabilities, generation of employment, utilisation of the idle assets for effective business operation and in turn giving economic advantage, restructuring capital to reflect the new economic value of the business, transfer of properties and assets in favour of 100 per cent, subsidiary companies in order to make each unit operate as a private center, streamline operations through new management, initiatives of which to make the networth positive within a reasonable time frame. A composite scheme of arrangement in the nature of compromise with its creditors and reconstruction of its share capital as well as the transfer of assets and liabilities to the wholly owned subsidiaries is placed on the record of this petition for the consideration of this Court.

10. This Court vide its order dated August 11, 2008, directed the petitioners to

convene separate meetings of the unsecured creditors, equity shareholders and secured creditors of the company for the purpose of considering and if thought fit, approving with or without modifications, the said arrangement and also appointing the chairman of the meetings and directed the chairman to report results thereof to this Court. The notices of the meetings were sent individually to all the unsecured creditors, equity shareholders and secured creditors, as required by the order together with the copy of the scheme of arrangement and the explanatory statement required u/s 393 of the Act and a form of proxy. The notice of the meetings was also advertised as directed by the said order in The New Indian Express English daily and Jansatta Loksatta Gujarati daily both Ahmedabad editions of September 4, 2008. On September 29, 2008, the said meetings of the unsecured creditors, equity shareholders and secured creditors of the company were duly convened in accordance with the said order and the chairman has reported results of the meetings to this Court. The meeting of the unsecured creditors was attended to by 39 unsecured creditors entitled together to Rs. 9,25,29,202.28. Out of the 39 votes cast, one was found to be invalid and remaining 38 unsecured creditors have voted in favour of the scheme. None of the unsecured creditors voted against the scheme. Thus, the resolution approving the proposed scheme of arrangement was approved unanimously by the unsecured creditors of the company present and voting at the meeting.

11. The meeting of the equity shareholders of the company was attended to by 27 equity shareholders of the company entitled together to Rs. 16,92,60,230 being the value of 1,69,26,023 equity shares of Rs. 10 each. Out of the 27 ballots cast, two were held to be invalid and all the remaining equity shareholders voted in favour of the scheme. None of the equity shareholders voted against the scheme. Thus, the resolution approving the proposed scheme of arrangement was approved unanimously by the equity shareholders of the company present and voting at the meeting.

12. The meeting of the secured creditors was attended to by 9 secured creditors entitled together to total dues of Rs. 188,04,00,000. All the 9 secured creditors present at the meeting participated in the meeting and voted in favour of the scheme. Thus, the resolution approving the proposed scheme of arrangement was approved unanimously by the secured creditors of the company present and voting at the meeting.

13. u/s 394(1) of the Companies Act, 1956, notice of this petition was also given to the Central Government. As observed earlier, scheme also contemplates reconstruction including reduction of capital as an integral part of the proposed scheme of arrangement. The proposed reduction does not involve any diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid-up share capital and the order of the court sanctioning the scheme would be deemed to be an order u/s 102 of the Companies Act, 1956, confirming reduction. Hence, the procedure prescribed u/s 10(2) of the Companies Act, 1956, was not required to be followed.

14. Pursuant to the order passed by this Court on August 11, 2008, in Company Application No. 446 of 2008, notice of the petition has been got advertised in Loksatta Jansatta and The New Indian Express both Ahmedabad editions dated October 28, 2008. Notice of the petition was also served upon the Regional Director and the official liquidator attached to this Court since the company is under liquidation. Relevant extracts from the newspaper as well as the acknowledgments are placed on the record of this petition along with the affidavit of publication dated November 10, 2008.

15. Pursuant to the notice issued on the official liquidator, he filed his report dated November 25, 2008. Ms. Amee Yajnik, learned advocate appearing for the official liquidator has submitted that the scheme as proposed does not contain any provision for settlement or payment of statutory preferential claims of the Government like the Income Tax, sales tax, customs, excise, Municipal Corporation, Gujarat Electricity Board, Revenue dues, etc. She has further submitted that the statutory claims of the Government dues u/s 530(1)(a) of the Companies Act, 1956, is a separate class of creditors and no compromise or arrangement is proposed in respect of such claims in the proposed scheme. She has, therefore, submitted that the scheme, if sanctioned may not bind the preferential creditors as a class and the company shall have to honour its liabilities towards them for which there is no express provision in the scheme as proposed. This becomes important since certain assets of the company with certain specified liabilities shall stand transferred to two separate private limited companies, whereas the liabilities of the company towards preferential creditors shall remain with the company. The statutory preferential claims of the Government dues shall be then enforceable against the remaining assets of the company. To this extent, the scheme appears to be detrimental to the interest of the Government dues being statutory claims.

16. Ms. Yajnik has further submitted that the claim of the workers and employees are not invited by the official liquidator so far. Therefore, the estimate of liabilities towards the workers and employees is unilateral assessment of the promoters of the company. The workers and employees of the company are creditors of a separate class as per Section 529A of the Companies Act, 1956 and since no meeting of the workers and employees is convened and held for consideration of the scheme, the provisions of the scheme contained in paragraph 13.3 may not bind the ex-workers and employees of the company in respect of their claims. On sanctioning of the scheme, the company shall have to honour all the legitimate claims of the workers and employees as may be legally enforceable against the company. She has, therefore, submitted that a specific direction in the order to this effect is necessary.

17. She has further submitted that the scheme of revival of the company has been approved by the requisite statutory majority of the creditors and shareholders. However, before sanctioning the scheme, it would also be necessary to issue suitable directions in the order in respect of the expenses

incurred by the official liquidator right from the date on which the company was ordered to be wound up. She has further submitted that during the course of winding up proceedings of the company for the period from April 1, 2003 to October 30, 2003, the official liquidator has received certain funds and realisation and has also incurred certain expenses. An amount of Rs. 12,43,960 has been paid to the security agencies for safeguarding the assets of the company for the period from June, 2003 to August, 2004 and an amount of Rs. 55,84,402 is outstanding to be paid to M/s. United Security Organisation for safeguarding the assets of the company for the period from September, 2004, to May, 2008. Further, an amount of Rs. 8,75,348 is outstanding to be paid to M/s. Surya Security Services and M/s. Deepak Security Services for safeguarding the assets of the company for the period from May, 2008 to October, 2008. The official liquidator is also required to remit an amount of Rs. 54,807 for the years 2006-07 and 2007-08 to the credit of the Central Government as Central Government's fees u/s 291 of the Companies (Court) Rules, 1959. The valuation of various assets of the company was obtained by the official liquidator from Government approved valuers. The aggregate amount outstanding to be paid to the Government approved valuers is Rs. 4,11,817. Thus, the outstanding bills of valuation as per the details, the total outstanding bills/expenses including the Central Government fee paid aggregate to Rs. 69,24,452. The official liquidator has also incurred the expenses of Rs. 12,66,724 for making payment of security charges and advertising charges. Some of the amount was deposited by the secured creditors and the ex-promoters of the company. However, the official liquidator requires an amount of Rs. 81,91,178 to clear the outstanding bills and expenses. As against that, an amount of Rs. 57,44,215 is available in the company's account. Therefore, an amount of Rs. 24,46,963 is the short-fall. She has, therefore, submitted that this Court should issue direction in terms of Section 394(1)(iv) of the Companies Act, 1956, to the petitioners to deposit an amount of Rs. 1 crore with the official liquidator to demonstrate their bona fides.

18. On behalf of the company, affidavit-in-reply is filed by Shri Rajiv S. Mardia, one of the petitioners, in response to the report filed by the official liquidator. Mr. S.N. Soparkar, learned senior counsel appearing with Mrs. Swati Soparkar, while dealing with the objections raised by the official liquidator, has submitted that the outstanding statutory dues of the company being preferential claim, are not very significant in value. He has submitted that the said outstanding dues will be paid by the company on its revival in accordance with law. On revival, the company shall, as is duty bound, on or all legitimate claims of statutory liabilities, preferential claims as may be legally enforceable against the company. All the assets of the company are not proposed to be transferred to the two subsidiary companies. The company shall still be in possession of all the assets and properties situated at Mardia Nagar, District Surendranagar. As against the aforesaid statutory liability of Rs. 69.07 lakhs, Rs. 23.42 lakhs is lying with the Vijaya Bank as an amount of unclaimed dividend deposited by the company leaving a net liability of Rs. 45.65 lakhs which is fully secured against the

remaining assets of the company as aforesaid. He has, therefore, submitted that upon the scheme being effective, the company shall be in a position to meet with the said statutory liabilities.

19. With regard to the workers/staff dues, Mr. Soparkar has submitted that the company has paid to all workers, staff of their dues. An amount of Rs. 3,39,747 remains unpaid as some of the workers/members of the staff have not come to collect the same. Upon scheme being effective, the same will be paid by the company in accordance with law, by depositing the same amount in a separate bank account. On revival, the company shall, as is duty bound to honour all legitimate claims of workers and employees as may be legally enforceable against the company. Mr. Soparkar has further submitted that upon scheme being effective and on verification of the amount submitted by the official liquidator for the receipts and payments made by him, on behalf of the company, during the period of winding up, the required payments in accordance with the law, not exceeding a sum of Rs. 25 lakhs as indicated in the official liquidator's report, shall be made by the company. Lastly, Mr. Soparkar has submitted that the company shall reimburse the amount as required by the court for the expenses incurred by the official liquidator since the proposed scheme is already approved by the concerned parties, at the respective meetings and that nobody has come forward with any objection to the proposed scheme, that itself is indicative of the bona fides of the petitioner as well as the scheme. He has, therefore, submitted that there is no justification for deposit of Rs. 1 crore as suggested by the official liquidator and no such direction is required to be given by this Court in this regard. Since all other legal compliances are made by the petitioner, the present scheme is required to be sanctioned.

20. On notice being issued on the Regional Director, an affidavit is filed by Shri R.K. Dalmia, Deputy Registrar of Companies, Ahmedabad along with the letter dated December 4, 2008, received by him from the office of the Regional Director. Mr. Harin P. Raval, learned Assistant Solicitor General appeared on behalf of the Regional Director. The Regional Director has raised the following objections:

I. M/s. Mardia Steel Ltd. (in liquidation) was ordered to be provisionally wound up by the Hon'ble High Court, Gujarat vide order dated April 29, 2003, and the official liquidator, Ahmedabad was appointed as provisional liquidator and finally the Hon'ble High Court vide order dated July 23, 2003, directed the said company to be wound up and the official liquidator has been appointed as liquidator of the company and the official liquidator has taken possession of the assets of the company in liquidation. Hence, the official liquidator is required to ascertain of the claims of secured creditors, unsecured creditors, workers and other liabilities in terms of Rule 148 of the Companies (Court) Rules, 1959, which have not been done.

II. The official liquidators expenses, i.e., security charges, Central Government fees are yet to be ascertained by the official liquidator.

III. The scheme is silent about re-employment of the ex-workers after revival of the company in liquidation.

IV. As per Clause 10.2 of the scheme, the sponsors will bring in Rs. 5 crores only by way of capital and the scheme is silent about the fund to be brought in the event of shortfall.

V. By virtue of the scheme, the properties of the company in liquidation, i.e., the demerged company will be vested in KDPL and ADPL whose paid-up capitals are Rs. 1 lakh each and that too by transferring the entire paid-up capital of KDPL and ADPL to the demerged company, i.e., the company in liquidation. As per Clause 8.1 of the scheme, outstanding debts at the time of winding up order is Rs. 19,623 lakhs and the same had been settled in the scheme at Rs. 10,530 lakhs. In this connection, the petitioner may be directed to clarify as to how Rs. 10,530 lakhs will be raised while the paid-up capital of KDPL and ADPL are Rs. 1 lakh each only, the sponsors of the scheme will bring in Rs. 5 crores only by way of capital. The scheme appears to be a ploy to dispose of the properties of the company in liquidation by taking out of liquidation.

VI. Moreover, the official liquidator at paragraph (5) of his report stated that O.J. Appeal No. 34 of 2007 filed by the Bank of Rajasthan Ltd., is pending before the Division Bench of High Court. The petitioners may be directed to clarify as to how the abovementioned petition can be moved before the company court for sanctioning of the scheme.

21. In response to the affidavit filed by the Deputy Registrar of Companies, one of the promoters of the scheme, Shri Rajiv S. Mardia has filed additional affidavit dealing with the objections raised by the Regional Director. Based on this affidavit, Mr. Soparkar has submitted that as regards the ascertainment of claims of secured creditors, the unsecured creditors, workers and other liabilities are concerned, the said exercise is not required to be undertaken by the official liquidator in the light of the present proceedings. The scheme of compromise has been proposed to the secured and unsecured creditors and they have approved the said proposal by requisite majority at the respective meetings convened for the purpose. With regard to the ascertainment of the liability of the workers and other statutory liabilities, he has submitted that the same are already listed out and explained vide the additional affidavit dated December 11, 2008, filed before this Court in reply to the report of the official liquidator. With regard to the second objection, Mr. Soparkar has submitted that the detailed accounts are furnished by the official liquidator vide its affidavit dated November 25, 2008, in respect of the security charges and other expenses incurred so far. The company has already undertaken to reimburse the same in accordance with the directions of this Court. With regard to the third objection, Mr. Soparkar has submitted that the scheme is not silent with regard to re-employment of ex-workers after revival of the company in liquidation. Clause 13.3 of Part VII of the scheme provides that the company will make endeavour to re-employ the workers/employees on fresh terms and conditions. With regard to the fourth objection, Mr. Soparkar has

submitted that Clause 10.2 of the scheme provides for issue of shares worth Rs. 5 crores to the sponsors for the funds infused by them. However, the scheme is not silent on the eventuality of short-fall. Vide Clause 10.1 of Part IV of the scheme, it has been provided that the applicants and/or sponsors and/or shareholders of the company shall arrange for and provide the funds for the scheme without any limitation. With regard to fifth objection, Mr. Soparkar has submitted that the present scheme is not a ploy to dispose of the properties of the company in liquidation. The scheme envisages transfer of assets along with specified liabilities towards the secured creditors to the wholly owned subsidiary of the company. The sponsors have undertaken to infuse funds as may be required. Further, Clauses 11 and 12 of the scheme along with the respective sub-clauses provide for satisfaction of all the parties over the said properties and discharge of all the liabilities. It also authorises the respective secured creditors to nominate their representatives as directors so long as these liabilities are fully satisfied in accordance with the scheme. The said proposal for settlement of outstanding dues of the secured creditors under the proposed scheme of compromise and arrangement has been unanimously approved by the secured creditors, unsecured creditors and shareholders in the respective meetings held on September 29, 2008. He has, therefore, submitted that the settlement of liability of secured creditors of 105.30 crores will be as per the conditions stipulated in the proposed scheme. Lastly, he has submitted that the notices of hearing of the petitions were duly advertised in the newspapers, inviting objections to the proposed scheme. Pursuant to the said publication, neither the petitioners nor their advocate have received any objection from any person. He has, therefore, submitted that the scheme is required to be sanctioned by this Court.

22. Over and above the objections raised by the Regional Director, Mr. Harm Raval, learned Assistant Solicitor General, in his arguments has also raised an issue that Maradia Steel Ltd., in respect of which the scheme of arrangement is proposed by the petitioners, is under liquidation and hence, as per the provisions contained in Section 391(1) of the Act, only the liquidator can file such application before the court seeking sanction of the scheme and since the present application is not filed by the official liquidator, and on the contrary, the liquidator is objecting to the scheme, the petition itself is not maintainable and hence, it deserves to be dismissed.

23. While dealing with this objection, Mr. Soparkar has invited the court's attention to the decision of the Hon'ble Supreme Court in the case of Meghal Homes P. Ltd. v. Shree Nizvas Girni K.K. Samiti [2007] 139 Comp Cas 418, wherein it is held that while defining a company for the purpose of Sections 391 and 393, Section 390 clarifies that the company means any company liable to be wound up under the Companies Act. When the scheme was originally presented in 1994, it was at a time when the winding up order was already in existence. The argument that Section 391 would not apply to a company, which had already been ordered to be wound up could not be accepted in view of the language of

Section 391(1) of the Act, which speaks of a company which is being wound up. In view of this judgment, the objection raised by Mr. Raval is, therefore, not sustainable.

24. Having heard learned advocates appearing for the parties and having considered the scheme with objections raised by the official liquidator as well as the Regional Director in light of the statutory provisions and decided case law on the subject, the court is of the view that though the scheme is approved by the requisite statutory majority of shareholders as well as secured and unsecured creditors, the court has to see the legality, validity, propriety and the fairness of the scheme. The fairness of the scheme has to be kept in view by this Court while putting its seal of approval on the concerned scheme placed before its sanction. The Act as well as the judicial pronouncements on the subject casts an onerous duty on the sanctioning court to satisfy itself that the members or class of members or creditors or class of creditors, as the case may be, are acting bona fide and in good faith. The court has also to see that the scheme as a whole must be found to be just, fair and reasonable from the point of view of prudent man of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant. The court has to also see as to whether the scheme is workable in future or whether it merely contains promises and assurances which can never be fulfilled as no concrete proposals or financial resources are emerged from the scheme.

25. Keeping the above aspect of the matter in mind, if the scheme is to be analysed or scrutinised, it appears that no provisions are made for satisfaction of the dues of the statutory creditors. It is true that no scheme is proposed to the statutory creditors and no arrangement or compromise is sought for in the scheme qua statutory creditors. It is equally important to note that under the scheme, two major units of the company in liquidation are sought to be transferred. Without making any provision for discharge of the liabilities of the statutory creditors, if the units are to be transferred, in that case, the statutory creditors will certainly raise an objection. Similarly, no concrete proposals are found with regard to the satisfaction of the dues of the workers or re-employment of such workers in case the scheme is sanctioned by the court and company is put to work.

26. Though the scheme is approved by the secured creditors, one of the secured creditors is Asset Reconstruction Company (India) Ltd. (ARCIL). Five secured creditors have assigned their debts to ARCIL, the details of which are as under:

(Rs. in crores)			
Outstanding debt Purchase con- Pax/able unde Sl. No. Particulars as per scheme sideration scheme			
48.80	1.	IFCI LTD.	90.99 50.00

2. Bank of Rajasthan	22.46	07.50	12.00
3. Axis Bank	22.69	03.96	12.20
4. Bank of India	13.12	02.45	07.00
5. JP Morgan Chase Bank	14.78	02.60	07.90

27. Assignment of debts is held to be invalid by the Division Bench of this Court in its recent judgment in O.J. Appeal No. 156 of 2007 and other cognate matters decided on January 12, 2009 Kotak Mahindra Bank Ltd. v. Official Liquidator of APS Star Ind. Ltd. [2010] 153 Comp Cas 107. Assuming for the sake of argument that ARCIL being a securitisation company, the said judgment is not applicable to the debt assigned to a securitisation company. It is, however, important to note that ARCIL was not a party before the Division Bench nor in any of the matters which are decided by the Division Bench, debts have been assigned to ARCIL. Even otherwise, one looks at the formation of ARCIL, many nationalised banks have jointly formed this securitisation company and it appears that what could not be done directly was sought to be done indirectly by formation of a company like ARCIL. Be that as it may, looking to the purchase consideration paid by ARCIL to the five banks for acquiring debts of the assignee banks, what ARCIL will get under the scheme is more than what they have paid by way of purchase consideration. Hence, ARCIL has not to sacrifice anything by agreeing to the scheme of arrangement. One more aspect which is required to be kept in mind is that under the scheme, the secured creditors are given two options and the crystallised amount is proposed to be settled and satisfied by the company, at the option of the secured creditor (a) by payment of Rs. 105.30 crores on or before January 31, 2009 or (b) by payment of Rs. 102.40 crores on or before January 31, 2009 and issued allotment (pro rata inter se) on or before January 31, 2009, of 3.26 crores fully paid-up equity shares of face value of Rs. 1 each of the company at par post reduction of equity capital. It is nowhere spelt out as to how this 105.30 crores or 102.40 crores are made available to the company for the purpose of making payment to the secured creditors as admittedly, the promoters of the scheme have agreed to bring forth an amount of Rs. 5 crores only. An attempt is made to convince the court that under the scheme, two units of the company are sought to be transferred. Transfer of liability of secured creditors to Kamavati Dwelling P. Ltd. (KDPL) of Rs. 80.50 crores and transfer of Changodar property and production and plant to KDPL at Rs. 97.32 crores is proposed in the scheme. Similarly, transfer of Vatva and Ratlam undertaking at Rs. 14 crores to Atithi Dwelling P. Ltd. (ADPL) is proposed in the scheme. However, KDPL is formed only on April 6, 2006 and its authorised share capital is of Rs. 1 lakh only. It has no assets except cash on hand of Rs. 77,320 as on March 31, 2008. It is also very important to highlight the fact that the promoters and first directors of this company are none else but Mrs. Prem

Rasiklal Mardia, wife of Rasiklal Mardia and Neena Rasiklal Mardia, the daughter of Shri Rasiklal Mardia, one of the promoters of the present scheme.

28. Similarly, ADPL is also formed on April 6, 2006 and its authorised share capital is Rs. 1 lakh only. It has also no assets except cash on hand of Rs. 72,320 as on March 31, 2008. One of the promoters and first directors of this company are also none else, but Mrs. Prem Rasiklal Mardia, wife of Rasiklal Mardia, one of the promoters of the present scheme. The court is, therefore, of the view that the only object of proposing the scheme is to transfer the assets of the company to close relatives of the promoters of the scheme. There is no concrete proposal nor any trust-worthy resources are found so as to inspire the confidence in the court to successfully implement the scheme if the court grants its sanction. As a matter of fact, this is the third attempt made by the ex-directors and promoters of the scheme to propose the scheme and it has been strenuously urged before the court that it is the better scheme as compared to earlier one. However, on the face of it, the court gathers an impression that not only any satisfactory provision is made to discharge the liabilities towards the secured or unsecured creditors, but the assets of the company in liquidation are sought to be transferred under the guise of this scheme which was not there in earlier two schemes. The court is, therefore, of the view that the scheme is not just, fair or proper and the court cannot grant its sanction to such a scheme. It is not bona fide moved by the petitioners. The court further forms an opinion that by proposing the schemes one after another, the petitioners are creating legal hindrances in the way of the official liquidator to proceed with the disposal of the assets of the company in liquidation. As a matter of fact, in the past, auctions were held, offers were invited and accepted, part consideration was received by the official liquidator and it is only by virtue of the scheme proposed, the entire transaction was given a go-bye. The company went into liquidation in 2003 and even in 2009, the assets could not be sold. They have been getting deteriorated day by day. The court, therefore, outrightly refuses to grant its sanction and the resultant effect thereof is that all the three petitions are dismissed.

29. Since the petitions are dismissed and since a statement was made before the court during the course of arguments and even in the petition that earlier application moved for convening the meeting is of no consequence in view of the present scheme, the official liquidator can proceed with the disposal of the assets of the company in liquidation.

30. All the three petitions are accordingly disposed of.