

(1979) 04 BOM CK 0003

In the Bombay High Court

Case No : Company Applications No's. 60 and 61 of 1979

In Re: Sakamari Steel and Alloys Ltd.

Date of Decision : 03-04-1979

Acts Referred:

Companies Act, 1956 — Section 390, 391, 391(1), 391(2), 391(6)

Citation : (1981) 51 CompCas 266

Hon'ble Judges : R.L. Aggarwal, J

Bench : Single Bench

Judgement

R.L. Aggarwal, J.—M/s. Sakamari Steel and Alloys Ltd. (hereinafter referred to as "the company") have taken out this judge's summons for directions for conveying a meeting of its secured and unsecured creditors to consider a scheme of compromise or arrangement proposed by the company for the discharge of their dues.

2. The company has also taken out a judge's summons for stay of commencement of or continuance of all or any suits or proceedings against the company.

3. Both these applications do not remain ex parte since notices of these applications have been served upon M/s. Purnanand & Co., advocates for the State Industrial and Investment Corporation of Maharashtra Ltd. (hereinafter referred to as "SICOM") and the Bank of Maharashtra, who have acted for them in the sale of the company's factory at Nagpur. Mr. Bhatt, learned counsel, appeared for SICOM and opposed the applications. Mr. Mulay also appeared for the Bank of Maharashtra, but without notice, at the fag end of the hearing and adopted the arguments of Mr. Bhatt. Since I am dismissing the company's application at the threshold of s. 391(1) of the Companies Act, 1956, it is necessary that I should indicate my reasons for the same.

4. The brief background of the case is that the company is a mini-steel plant located at Nagpur. The company was incorporated on 21st June, 1972. It appears that the mini-steel plant which is the only business of the company was commissioned in May, 1974. From June, 1975 to December, 1975, it was

temporarily closed down. Subsequently, it resumed operations and again closed down from about September 1, 1976. The pro forma balance-sheet as at June 30, 1978, shows that the share capital of the company was Rs. 18,19,000; the reserves and surplus were Rs. 9,56,768; the secured loans were of the range of Rs. 97,67,697 and the unsecured loans stood at Rs. 3,87,694; the current liabilities including sundry creditors and deposits were Rs. 10,14,358. As against this, the fixed assets of the company stood at Rs. 66,96,736. The current assets, loans and advances came to Rs. 13,07,433. The loss sustained by the company is shown at Rs. 58,43,188. The picture with regard to the liabilities and assets for the year ending June 30, 1977, as per the audited balance-sheet was not very much different from the present pro forma balance-sheet.

5. It seems that the company, in order to augment its finances, had approached SICOM for a fixed term loan of Rs. 29,65,000 and obtained the same under a deed of mortgage dated May 10, 1973 (annex. B to the affidavit of Pradeep Laxminarayan Trivedi dated March 29, 1979, filed in support of the judge's summons). The company further obtained a short term loan from SICOM under a deed of further charge dated March 16, 1974, to the extent of Rs. 2,49,000 (part of the said annex. B).

6. The company has also obtained a loan from the Bank of Maharashtra by an agreement of hypothecation dated December 27, 1975, in consideration of the bank accepting 10 bills of exchange aggregating to Rs. 19,84,243 (part of the said annex. B).

7. The company has also obtained a loan from the Bank of Baroda to the extent of Rs. 36,88,672 against the hypothecation of raw materials, stores, fuel, stock, processed and finished goods. The Bank of Baroda has filed a suit in this court being Suit No. 259 of 1978 in which a receiver has been appointed.

8. It appears that the company committed defaults in the payment of the interest to SICOM and, therefore, SICOM by their attorney's letter dated November 8, 1974, recalled both the loans and called upon the company to pay the entire amount of the principal sum and the interest. The company, however, failed to repay the principal amount or the interest. The interest went on accumulating and as on December 31, 1978, the company's liability for interest rose to Rs. 15,19,773.03 in respect of the loan of Rs. 29,65,000. The liability for interest went up to Rs. 93,681.25 as on December 31, 1978, in respect of the loan of Rs. 2,00,000 taken from SICOM under a deed of further charge dated March 16, 1974. As regards the Bank of Maharashtra, the interest amounted to Rs. 75,405.23 as on December 31, 1978, on the principal sum of Rs. 19,84,243. The rate of interest payable to the Bank of Maharashtra is 15% per annum with quarterly rests and that to SICOM is 9 1/2% per annum with half-yearly rests.

9. SICOM did not satisfy merely by making demands for payment of the principal amount and interest, but in exercise of its powers under the deed of mortgage, it appointed a receiver without intervention of the court on or about

March 17, 1975, for collecting rents and profits. The receiver sought to give the factory on leave and licence. According to SICOM, the factory could be rented out on a monthly rent of the Rs. 1,00,011 and that it could obtain Rs. 10 lakhs by way of deposit from the hirer for the due performance of the agreement. This action of the receiver was resisted by the company on the basis that the receiver had no power to give the factory on leave and licence. The company was ultimately successful in this contention in the proceedings taken out by the company under s. 69A of the Transfer of Property Act. The judgment in favour of the company in these proceedings was delivered on August 24, 1978.

10. It is the case of the company that it made repeated representations to SICOM with proposals to restart the plant, rescheduling of installments and freezing of interest as contemplated by the various guidelines given by the Industries Development Bank of India, but SICOM acted in breach of those guidelines. The company also alleges in the affidavit of its director, Trivedi, that SICOM has singled out the company for hostile discriminatory treatment as in respect of many other steel plants in or around Nagpur who have been similarly financed by SICOM and who have defaulted in payment of their dues, SICOM has chosen not to take action against them.

11. On or about January 5, 1979, both SICOM and the Bank of Maharashtra, in exercise of their powers under their respective mortgages, entered into possession of the company's factory at Nagpur and also took possession of the plant and equipments. Thereafter, they proceeded to advertise for the sale of the company's factory and invited offers for purchase of interest in leasehold land bearing plot No. 39 in the Nagpur Industrial area of MIDC together with buildings and plant and machinery, etc., belonging to the company. The sale was advertised on January 15, 1979.

12. On February 5, 1979, a shareholder of the company named Rajesh Prasad Khaitan filed a writ petition in the Calcutta High Court under art. 226 of the Constitution of India challenging the purposed sale of the mini-steel plant of the company and by an order dated February 5, 1979, an interim order staying the sale of the mini-steel plant of the company for a fortnight was issued by the Calcutta High court. SICOM and the Bank of Maharashtra applied to that court for vacating the said interim order and made and filed their affidavits. Thereupon, it appears that the petitioner, Khaitan withdrew the petition.

13. Thereafter, another shareholder named Basantkumar Chimanlal Bhartia filed a suit in the court of the Civil Judge (Senior Division), Akola, and obtained an interim injunction against SICOM and the Bank of Maharashtra on February 20, 1979, from proceeding with the sale. It is important to bear in mind that the order granting interim injunction was served upon SICOM on March 13, 1979.

14. SICOM had received various offers, but the first two offerers chose to withdraw their offers in view of the above writ petition. The third highest offer was of M/s. Hariganga Steel & Alloys Ltd. of Rs. 68,11,111.11. It appears that in

view of the withdrawal of the first two offers, the third highest offerer was approached and he agreed to increase the offer to Rs. 71,00,000. Accordingly, SICOM and the Bank of Maharashtra, by their joint letter dated March 10, 1979, addressed to Hariganga Steel & Alloys Ltd., Nagpur, communicated their acceptance of the offer at the increased price of Rs. 71,00,000. I am informed that SICOM and the Bank of Maharashtra have not only received earnest money but part of the price also.

15. Before I stated with the judgment, I was informed that the Akola Civil Court has vacated the interim injunction of Friday, the 30, March, 1979.

16. The present summons have been taken out on March 29, 1979, and were placed for orders on March 30, 1979, when I heard counsel on both sides. Mr. Khambatta, learned counsel appearing for the company, took me through the proposed scheme. The draft scheme envisages the giving out of the factory on leave and licence basis for working for a period of 7 years on a monthly compensation of Rs. 1,00,000 and for a further period of 3 years on the same terms and conditions at the option of the parties. The licensee is to bear the municipal taxes and pay other outgoings in the respect of the factory and thus it appears that the amount of compensation of Rs. 1,00,000 is intended to be paid to the company in full without any deduction. The party's name is mentioned as M/s. Kontact International or their nominee. The giving out on leave and licence of the factory is made subject to approval of the mortgagees, i.e., SICOM and the Bank of Maharashtra. Out of the amounts received as and by way of compensation, the company proposes to pay it unsecured creditors whose claims aggregate to Rs. 13,34,721. The secured creditors under the proposed scheme are SICOM, Bank of Maharashtra and Bank of Baroda whose loans are shown at Rs. 80,33,101. These dues are proposed to be paid in a period of 7 years. It is further proposed that these three secured creditors are to waive their interest on their respective dues and that they are not to claim interest for the future. In other words, the secured creditors should be paid principal amount without past and future interest.

17. Mr. Khambatta submitted that the scheme proposed by the company is fair and reasonable and that the company should be given an opportunity to place the purposed scheme before the secured and unsecured creditors to ascertain their wishes. He also sought an order under sub-s. (6) of s. 391 of the Companies Act, 1956, for stay of the commencement or continuation of any suit or proceeding against the company and specially the completion of the sale by SICOM and the Bank of Maharashtra. Mr. Khambatta relied on rr. 67 and 71 of the Companies (Court) Rules, 1959, and submitted that both summonses - one for directions for convening a meeting of the creditors and the other for stay of proceedings - are to be moved ex parte and no hearing is intended to be given to the creditors at this stage. Mr. Khambatta stated that for abundant caution the company has given notice to the advocate for SICOM of both the summonses. The argument of Mr. Khambatta mainly concentrated on granting a stay of the

sale of the property of the company by SICOM and Bank of Maharashtra. Accordingly to the learned counsel, the company should be given a chance under s. 391(6) and the stay of the sale be postponed for a short period and if the company fails to do anything in the meantime, it fails. Another argument put forth by Mr. Khambatta was that the factory can fetch more than Rs. 71 lakhs and if time is granted to the company, the company can obtain a better price. This will also enable the company to show to the court that the price of Rs. 71 lakhs is inadequate and that it is in the interest of justice that a short relief under s. 391(6) should be given to the company, so that it can get better price.

18. Mr. Bhatt, learned counsel appearing for SICOM, earnestly urged that the proposed scheme is not bona fide and is unworkable, and so far as SICOM is concerned, it is not interested in the scheme at all, and having regard to the events which have transpired, third party's rights have intervened as the property has been sold and earnest money and part of the price is received. In the circumstances, there is no purpose in giving directions for holding a meeting of the secured creditors. Even otherwise, SICOM and the Bank of Maharashtra together represent three-fourths in value of the secured creditors and hence on that ground also I should dismiss the judge's summons.

19. The following are the relevant provisions relating to a scheme of compromise or arrangement with which we are concerned in this matter :

"390. Interpretation of sections 391 and 393. - In sections 391 and 393, -

(a) the expression "company" means any company liable to be wound up under this Act

"391. Power to compromise or make arrangements with creditors and members.
- (1) Where a compromise or arrangement is proposed ?

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules make u/s 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and

contributories of the company

(6) The court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the court thinks fit, until the application is finally disposed of"

20. Companies (Court) Rules, 1959.

"67. Summons for directions to convene a meeting. - An application u/s 391(1) for an order convening a meeting of creditors and/or members or any class of them shall be by a judge's summons supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed to the affidavit as an exhibit thereto. Save as provided in rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form No. 33, and the affidavit in support thereof in Form No. 34."

"69. Directions at hearing of summons. - Upon the hearing of the summons or any adjourned hearing thereof, the judge shall, unless he thinks fit for any reason to dismiss the summons, give such directions as he may think necessary in respect of the following matters :-

(1) determining the class or classes of creditors and/or of members whose meeting or meetings have to be held for considering the proposed compromise or arrangement;"

"71. Application for stay. - An application under sub-section (6) of section 391 for stay of the commencement or continuation of any suit or proceeding against the company may be moved by a judge's summons ex parte, provided that where a petition for winding up the companies or a petition u/s 397 or 398 is pending, notice of the application shall be given to the petitioner in such petition."

"72. Application to vacate or vary order of stay. - Where an order has been made staying the commencement or continuation of any suit proceeding under sub-section (6) of section 391, any person aggrieved by such order may apply to the court by a judge's summons to vacate or vary such order. Notice of the application shall be given to the applicant at whose instance the order of stay was made and to such other persons as the court may direct."

21. Mr. Khambatta has made point that the proposed scheme should be sent to the creditors for ascertaining their reaction and when the proposed scheme is returned by them with or without modification, then the court should scrutinize the same. But this is one aspect of the matter. If I were to accept Mr. Khambatta's submission, it would mean that at the stage of giving directions to convene a meeting, the court's function is merely to grant the prayers on the judge's summons for directions without taking any trouble to look into the application, except to make sure that there is a company, it has a class of creditors and they are not paid and the company desires to wipe off its liability to them by offering to pay a certain sum, in a certain manner and over a number of

years. In other words, the court's function would amount to just bringing the company and a class of its creditors or members together by ordering a meeting between them. It is true that r. 67 says that an application for such directions is to be made *ex parte*. But hearing a motion *ex parte*, does not mean that the court has not, to apply its mind or be *prima facie* satisfied about the merits of the application. The language of s. 391(1) is manifestly clear about the discretion resting with the court in granting an application. Surely, the court will not pass an order unless it is satisfied that it is a fit case to do so. Rule 69 is equally clear and points out that directions are to be given "unless he (the judge) thinks fit for any reason to dismiss the summons (for directions)". Thus, on the basis of the Act and the Rules made thereunder, it is not compulsory for the court to give directions to convene a meeting contemplated under s. 391(1). The summons can be dismissed at this stage.

22. The question of the duty of the court to scrutinise a scheme after it has met the approval of the creditors and the circumstances to be considered in approving a scheme has been the subject-matter of many cases. (See (i) *In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* [1891] 1 Ch D 213, (ii) *Pioneer Dyeing House Ltd. v. Dr. Shankar Vishnu Marathe* [1967] 37 Comp Cas 546, (iii) *In re Kril Standard Products P. Ltd.* [1976] 46 Comp Cas 203, and (iv) *Bank of Baroda Ltd. v. Mahindra Ugine Steel Co. Ltd.* [1976] 46 Comp Cas 227. The willingness on the part of a majority in number representing three-fourths in value does not affect the jurisdiction of the court to refuse sanction. It is not compulsory upon the court to grant sanction simply because three-fourths in value have accepted the scheme. The court has still to consider the circumstances before giving its approval, though the fact that three-fourths in value have agreed to accept the scheme would be a strong circumstance in favour of sanctioning the scheme by the court. The scope of inquiry by the court cannot be laid down by any rigid principles or formulae or on the basis of judicial decisions. The circumstances to be taken into account would vary case to case. Some of the outstanding circumstances are :

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

22. Thus the trend of the judicial decisions shows that the court must examine the scheme on its own merits and is not bound to treat the scheme as a fait accompli. In doing so, the court would not be substituting its judgment for the

commercial judgment, as it is often argued.

23. I confess that I had left the route of the present case marked under s. 391(1), and gone a stage ahead under s. 391(6). I have done this to demonstrate that if the court has jurisdiction to refuse to sanction a scheme approved by the company and the creditors concerned, it would have also jurisdiction to refuse to give directions to convene a meeting if the circumstances of the case so demand. Section 391(1) is not a sign-post but a check-post whereat it is the duty of the court to examine the scheme for itself. The obligation is greater because such application is *ex parte* and it is not practical to give notice to the numerous creditors or members of a company. A mere casual look is not enough. I think that a studied slowness and caution on the part of the court is necessary. Various factors can be examined at the threshold, for example, (i) whether the company is qualified to sponsor a scheme, that is, if it is liable to be wound up as defined in s. 390(a), (ii) the motive of the company or creditors in sponsoring a scheme, (iii) whether the company is really intending to save itself from liquidation or it wants to eat up a part or whole of the principal amount or interest of a particular class of its creditors, (iv) whether all creditors who are similar in that class are covered under the proposal scheme. Persons whose rights are not so dissimilar should be covered by the same scheme, as otherwise it would be impossible for them to consult together and protect their common interest. The preferential creditors must receive preference unless they agree to bear with the company and postpone their demand and recovery, otherwise they can always hinder the execution of the scheme. Very often a company comes out with a draft scheme when faced with a large number of winding-up petitions. In order to buy peace with such class of creditors alone, a draft scheme is sponsored to cover them leaving out the other class or classes of creditors. A straight forward scheme would take care of all classes of creditors. (v) Whether the company is ready with the statutory information under the proviso to s. 391(6) and s. 393(1)(a). Experience shows that companies are not ready with such statutory information. This delays the matters, while the benefit of s. 391(6) continues. (vi) Whether the proposed scheme is contrary to the Companies (Acceptance of Deposits) Rules, 1975. (vii) Whether the company has made any firm commitment to arrange for payment of installments or there are reasonable prospects of the company making profits to honour the installments, otherwise the scheme is bound to fissile.

24. The aforesaid are some of the circumstance to be borne in mind. Obviously, it is not possible to make an exhaustive list of the circumstances because they might differ from case to case.

25. I think that the court's role under s. 391(1) is no less important than under s. 391(2). A very special role is entrusted to the court under ss. 391 to 394 - more particularly after the amendment of these provisions in 1965. Section 392 enjoins the court to supervise scheme and, therefore, it is all the more necessary to examine the bolts and nuts of the scheme at the stage it is launched. At the

threshold, the court can satisfy itself of the viability of the scheme and if it has any doubt, it should not hesitate either to reject the scheme as proposed or asks for additional material to safeguard the interests of all concerned or even make necessary observations while giving directions, so that the creditors, members and the company can take note of the pit-falls, loop-holes and defects of the scheme. There cannot be a casual or mechanical approach at the time of the giving directions for convening a meeting under s. 391(1). The court's role under s. 391(1) is equally useful, vital and pragmatic as under s. 391(2) or s. 392 in a scheme of compromise or arrangement.

26. In the present case, a serious doubt arose in my own mind about the scheme when I had the opportunity to examine the draft scheme circulated to me before the hearing. The draft scheme refers to a proposal to give the company's factory to M/s. Kontact International or their nominee. The word "nominee" suggests uncertainty and can mean that the offerer may not himself enter into an agreement but substitute someone in his place or he is acting on behalf of someone else. If Kontact International in fact was anxious to take the factory of the company for running for a period of 7 years on payment of monthly compensation of Rs. 1,00,000 and to keep to itself the option for increasing the period by another 3 years, it would not make such a loosely worded proposal. In these circumstances, I requested Mr. Khambatta to disclose the agreement. Mr. Khambatta produced a letter dated 21st March, 1979, from Kontact International of New Delhi addressed to the company at its registered office at Nariman Point, Bombay. The subject-matter referred to in the letter is lease of Nagpur factory, but the contents relate to lease/leave and licence. This may be considered to be an inconsequential infirmity. Secondly, the clause relating to renewal stated that Kontact International shall have the option to renew the lease for a further period of three years at 25% higher compensation. Now, monthly compensation at a rate of 25% works out to Rs. 25,000 per month. There is no reference to this increase the initial period of 7 years by another 3 years. The nondisclosure about the increase in compensation at the rate of Rs. 25,000 per month, i.e., Rs. 3 lakhs per annum, cannot be said to be accidental or through inadvertence. No reason was given for this discrepancy. For a company which is in the red and is liable to be wound up and is initiating a proposal for settlement, it can ill-afford to ignore this valuable term of the offer. This discrepancy is of importance and makes me somewhat hesitant to believe or trust the company. Thirdly, the letter does not mention about any "nominee", but the draft scheme does. This is a strong circumstance affecting the credibility of the offer. Fourthly, in answer to a query as to how Kontact International happen to make the offer by the said letter, Mr. Khambatta, after taking instruction from the chairman, Shri R. B. Makharia, sitting in court, informed that the Kontact International had made the offer pursuant to the advertisement of SICOM and the Bank of Maharashtra and that the offer was personally made to the company by one Hirak Kasatia on behalf of Kontact International. Now, SICOM and the Bank of Maharashtra had advertised for the sale of the factory and not for leasing it out or giving it on

leave and licence basis. Furthermore, the advertisement appeared on January 15, 1979, and the last date of inviting offers expired on February 7, 1979. It does not stand to reason that a genuine party could act on a stale and expired advertisement in the manner suggested on behalf of the company. These factors destroy my confidence in the proposal. Fifthly, under the advertisement, the offers were to be addressed or made to SICOM at its office at Nariman Point, Bombay. Therefore, it is improbable that Hiram Kasatia would make the offer directly to the company without informing SICOM. All these circumstances accumulatively damage the credibility of the offer and the company's proposal.

27. Mr. Bhatt strongly urged that the company's past conduct in frustrating the efforts of SICOM and Bank of Maharashtra to give the factory on a monthly charges of Rs. 1,00,011, with a bank guarantee of Rs. 10,00,000 for due performance of the agreement, must be taken into consideration to judge its bona fides. It is true that the company has succeeded in vindicating its stand under s. 69A of the Transfer of Property Act. But all the same, the subsequent developments leading to the sale of the factory show that the company was imprudent and wanted to do things in its own way, ignoring the rights and interests of SICOM and Bank of Maharashtra.

28. Mr. Bhatt also pointed out that the proposed scheme in terms says that the giving out of the factory on leave and licence is subject to approval of mortgagee institutions. He submitted that neither SICOM nor Bank of Maharashtra is agreeable to consider the draft scheme and that he had instructions to state here that SICOM and Bank of Maharashtra both hereby reject the draft scheme and, therefore, no useful purpose will be served in giving directions for convening a meeting. There is considerable force in this argument because if the financial institutions are not inclined to bless the proposed scheme, there is no charm in making an order for convening a meeting of the secured creditors, as SICOM and Bank of Maharashtra together represent more than three-fourths in value of the class of secured creditors.

29. Another point of great significance is the public interests. Public interest has to be borne in mind in sanctioning a scheme of compromise or arrangement as in the case of a scheme of amalgamation or reconstruction. Court can take notice of public interest and it need not act only on a representation from the Central Govt. under s. 394A, if facts and circumstances of the case show that the public interest is likely to be prejudiced. Under the draft scheme, the company aims at not paying past and future interest to its secured creditors. These are financial and banking institutions. The money in their coffers is public money. The past interest, as indicated above, of SICOM is of the order of Rs. 16,24,000 as on December 31, 1978, and that of Bank of Maharashtra stood at Rs. 75,405.23 as on December 31, 1978. The future interest payable to SICOM for seven years works out to Rs. 80.23 lakhs as per the statement handed over by Mr. Bhatt. The future interest for seven years in respect of Bank of Maharashtra and Bank of Baroda is likely to be not less than Rs. 100 lakhs on the basis of their

outstanding dues stated above. Thus the company desires not to pay about Rs. 180 lakhs. This is not a moratorium but confiscation of public money. I agree that the soundness of the scheme is not to be judged from the fact whether creditors will receive full payment or not. To my mind, this aspect of the scheme is clearly detrimental to public interest. The amount of Rs. 71 lakhs realised from the sale can be ploughed back into the main stream of economic development and future loss of about Rs. 180 lakhs, eliminated or at least minimised.

30. The above discussion shows that the scheme is not workable with regard to the class of secured creditors. As regard the class of unsecured creditors who are also sought to be covered by the draft scheme, the same conclusion has to follow. The draft scheme hinges on the giving out of the factory of the company on hire. The factory stands sold and, therefore, the source of income of the company has dried up. However, I had asked Mr. Khambatta if the company was in a position to pay the unsecured creditors from some other income of the company. He frankly stated that there is no such possibility. Hence the scheme is not viable at all in respect of both the secured and unsecured creditors.

31. Turning to other judge's summons under s. 391(6), for stay of the sale by SICOM and Bank of Maharashtra and the commencement or continuation of any suit or proceeding against the company, these summons are bound to fail since I have refused to grant directions under s. 391(1). Order under s. 391(1) is a condition precedent to the making of an order under s. 391(6). Mr. Khambatta vigorously urged for stay of the completion of the sale by SICOM and Bank of Maharashtra. Now, what is done by them is realisation of their securities under their respective mortgage and/or hypothecation. They have not brought any suit or adopted any proceedings nor any proceedings are pending which could be stayed. This court be done only by way of injunction against them. I think that there is no power under s. 391(6) to issue an injunction.

32. It is useful to bear in mind the meaning of the expressions "action" and "proceedings" :

"Action :- An "action", according to the legal meaning of the term, is a proceeding by which one party seeks in a court of justice to enforce some right against, or to restrain the commission of some wrong by, another party. More concisely it may be said to be "the legal demand of a right", or "the mode of pursuing a right to judgment". It implies the existence of parties, of an alleged rights, of an alleged infringement thereof (either actual or threatened), and of a court having power to enforce such a right." (See Halsbury's of Law England, 3rd Edn., Vol. 1, p. 2).

"Proceeding :- The term "proceeding" is frequently used to denote a step in an action, and obviously it has that meaning in such phrases as "proceeding in any cause or matter". When used alone, however, it is in certain statutes to be construed as synonymous with, or including, "action"." (See Halsbury's Laws of England, 3rd Edn., Vol. 1, pp. 5 & 6). The word "suit" takes its colours and forms

its pattern from the above definition of "action". Both words are synonymous. Conceptually also there is no difference between them. "Proceedings" mean legal proceeding and not private action. Thus the sale by SICOM and Bank of Maharashtra is not in a "suit" or "proceeding" within the meaning of s. 391(6), but by virtue of the rights created in their favour by the company.

33. In support of this summons, a point was made by Mr. Khambatta that the price obtained is inadequate and that I should grant stay under s. 391(6) so that proper value can be fetched. I am not impressed by the bare assertion. The company's own case is that the fixed assets of the company are valued at Rs. 66,96,736 as per the pro forma balance-sheet as at 30th June, 1978. Even on the basis of the audited balance-sheet as on June 30, 1977, the fixed assets were valued at Rs. 67,06,236. SICOM has taken care to obtain the valuation report of the fixed assets of the company from M/s. M. N. Dastur & Company Pvt. Ltd., Calcutta. Mr. Khambatta pointed out from the report the observation made by the valuers that the fair value of the fixed assets of the plant has been estimated at about Rs. 67 lakhs after providing for depreciation and expenses that may have to be incurred for repairing and reconditioning and considering the favourable market for mini-steel products, a higher price than the fair value estimated by them may be realised on sale of the assets. These observations are general in nature and the price of Rs. 71 lakhs fetched by SICOM and Bank of Maharashtra cannot be side to be inadequate.

34. In the result, I dismiss the judge's summons for directions under s. 391(1) and also the judge's summons for stay under s. 391(6) of the Companies Act, 1956. The company to pay to SICOM and Bank of Maharashtra costs quantified at Rs. 500 in two sets.