

(2011) 01 CAL CK 0032

In the Calcutta High Court

Case No : C.P. No. 384 of 2007 and C.A. No's. 785 of 2007 and 328 of 2008

In Re: Singhal Enterprises P. Ltd. and Another

Date of Decision : 17-01-2011

Acts Referred:

Companies Act, 1956 — Section 192, 391, 391(1), 391(5), 393

Citation : (2011) 3 CHN 837 : (2011) 101 CLA 375 : (2011) 162 CompCas 265

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : S.B. Mookherjee, S.N. Mookherjee, Ratnanko Banerjee, D.N. Sharma, A. Agarwal and R. Saha, P.C. Sen, Manju Bhutoria, Suchismita Ghosh and Aditi Roy, for Intervenor, for the Appellant; Anindya Mitra, S.K. Kapur, Pratap Chatterjee, Debangshu Basak and Sakya Sen, for the Respondent

Judgement

I.P. Mukerji, J.

Facts:

1. Two companies are the Petitioners before me. One is Singhal Enterprises P. Ltd. (SEPL). The other is Singhal Enterprises (Jharsuguda) P. Ltd. (SEJPL). Each seek sanction of a scheme of arrangement, described as a demerger, between themselves and their members. This application is marked as C. P. No. 384 of 2007. The scheme is appended to the petition.
2. Another application has been taken out by a judge's summons dated May 7, 2008, by Parmanand Agarwal and Sulochana Agarwal, numbered as C. A. No. 328 of 2008 opposing sanction. An affidavit is filed by B. S. Sponge P. Ltd., also opposing such sanction.
3. The Petitioner companies and B. S. Sponge P. Ltd., are controlled by a certain Agarwal family. SEPL was incorporated on February 14, 1997. Its registered office is at 303 Century Towers, 45 Shakespeare Sarani, Kolkata-700 017. Its principal objects are to carry on the business of manufacturing, processing, selling and buying sponge iron.
4. SEJPL was incorporated on April 2, 2007. Its registered office is at 34A

Metcafe Street, Kolkata-700 013.

5. SEPL has four manufacturing units. Three are situated in the State of Chattisgarh. One is in the state of Orissa. The one in Orissa is situated in district Jharsuguda. The unit at Jharsuguda is a relatively new one having commenced commercial production in April, 2005.

6. By this proposed scheme of demerger this unit in Jharsuguda is to be demerged from SEPL and vest in SEJPL. This is broadly the effect of the scheme.

7. These two companies SEPL and SEJPL made an application before this Court. It was numbered as C. A. No. 785 of 2007. In that application written consent of all the shareholders of these two companies, saying that they approved the scheme, was appended. It was urged before the court that a formal meeting of the shareholders be dispensed with.

8. An order was passed on November 27, 2007. The court allowed the application. It said that the applicants were family companies, all members had signified their consent. Therefore it dispensed with the formal meeting. The order was in the following terms:

In view of the above, the meetings of the two companies required to be held u/s 391(1) of the Companies Act are dispensed with subject to the condition that an application for sanction of the scheme should be filed within a period of fortnight from date.

It is also made clear that notwithstanding Clauses 11.2 and 11.3 of the proposed scheme, the difference between the book value of the assets and liabilities of the Jharsuguda units shall be a capital reserve in the transferee company and not to be made available for distribution of dividend or bonus or the like.

9. Now, the Petitioners apply before this Court for sanction of the scheme and for consequential orders. Those orders are that the Jharsuguda unit is to vest from the appointed date in SEJPL together with all assets and rights. The "debts liabilities debts and obligations" of SEPL relating to that unit are also to be taken over by SEJPL. SEJPL is to allot to the shareholders of SEPL, shares in it in accordance with the scheme within thirty days from the date the scheme becomes effective.

10. In the other application that has been made it is mainly contended that the order dated November 27, 2007, was erroneously passed as the court could not dispense with the meeting. Submissions have been made, even to the extent that the order is a nullity. No notice is to be taken of the consent said to have been accorded by the shareholders to the scheme recorded in the order.

11. Before proceeding further with this judgment a few more essential facts need to be noted. The family is of three brothers. The eldest is Parmeswar Das Agarwal, the others are Radha Krishan Agarwal and Paramanand Agarwal. Three memorandum of understanding were signed by them. Each brother signed it on

behalf of his family group.

12. The first one is undated and annexed at page 37 of the application made by Parmanand Agarwal and Sulochana Agarwal being C. A. No. 328 of 2008. It is signed by Parmeswar Das Agarwal and Radha Krishan Agarwal. That memorandum noted that SEPL along with its manufacturing units at Raigarh would belong to the Parmeswar Das Agarwal group. The Jharsuguda unit would belong to Radha Krishan Agarwal group. It envisaged demerger of Jharsuguda unit from SEPL and its merger with SEJPL with effect from April 2, 2007. Certain modalities to effect this arrangement were provided. On such arrangement Parmeswar Das Agarwal and his group would make a payment of about Rs. 1,75,00,000 to Radha Krishan Agarwal and his group.

13. The second and third memoranda of understanding are also undated and at pages 39 and 41 of the same affidavit. All three brothers signed these memoranda. Parmanand and his group would get B. S. Sponge P. Ltd. Parmeswar Das Agarwal and his group would transfer their shares in this company to Parmanand Agarwal and his group. This memorandum also provided for transfer of shares of Parmanand Agarwal and his group in SEPL to Parmeswar Das Agarwal and his group. Parmanand Agarwal group would resign from the directorship of SEPL.

14. Coal, iron ore, etc., of SEPL would be given to SEJPL and B. S. Sponge P. Ltd.

15. Paramanand Agarwal and Sulochana Agarwal filed a suit in this Court which is numbered as C. S. No. 47 of 2008 for cancellation of the family settlement and for adjudging invalid all acts done and steps taken in furtherance of it. The Plaintiffs there also claimed partition of the family assets of the Agarwals and for other consequential decrees in the event of cancellation of the family settlement. As far as this Court has been apprised, there is no order so far disturbing the family settlement.

The scheme:

16. At this stage, some details of the scheme have to be noticed. The Jharsuguda unit of SEPL was described as the undertaking of SEPL in village Hirma, in district Jharsuguda, Orissa. It was said to be manufacturing sponge iron. By transfer of the said unit, transfer of its assets, rights and liabilities was to be effected from the appointed date which was December 1, 2007. The Jharsuguda unit would be demerged from SEPL and transferred to SEJPL. All benefits enjoyed by the Jharsuguda unit of SEPL under any licence, registration, approvals or scheme of any Government would be enjoyed by SEJPL. All the employees of SEPL in the said unit would become employees under SEJPL. All profits and losses of SEPL on the appointed date relating to the Jharsuguda unit would be treated as that of SEJPL.

17. The shareholders of SEPL would be issued and allotted seven equity shares of Rs. 10 each in SEJPL credited as fully paid-up for every one hundred equity

shares of Rs. 10 each held by them in SEPL. The difference between assets and liabilities of the said Jharsuguda Unit would be provided from the reserves of SEPL.

Sanction petition and objections:

18. This application for sanction of the scheme was moved in court on December 12, 2007. It was thereafter duly advertised as will appear from an affidavit of service affirmed on January 11, 2008, on behalf of the Petitioner. The Central Government has filed its affidavit. However, none have appeared for them either to support or oppose the scheme. But, I will duly deal with their affidavit for the ends of justice.

19. Apart from the members of the family group headed by Paramanand Agarwal whose application has been mentioned by me above, none have come forward to challenge the sanction of the scheme.

20. Therefore, I make it absolutely plain that in this judgment I am only dealing with the objections to sanctioning of the scheme actually raised before me. When this kind of a petition for sanction of a scheme is advertised, an opportunity is granted, to persons who are so entitled by the Companies Act, 1956, to come forward and object to its sanction. In the absence of any objection other than those made by persons mentioned above, I take it that no other person has any objection to sanction of the scheme. I proceed on that footing and will decide only those issues which are raised before me.

21. The affidavit of the Central Government affirmed by one UC Nahata, the Region Director, Eastern Region, Ministry of Corporate Affairs on January 24, 2008, does not disclose any significant objection to the scheme. There are only two usual observations. The first, is that the authorised share capital of the transferee company is not sufficient to enable it to allot shares to members of the transferor company. The second, is with regard to accounting standards. I dispose of both these objections by directing the Petitioners to increase the authorised share capital of the transferee company expeditiously, so as to allot shares to members of the transferor company in accordance with the scheme. I direct the Petitioners to comply with the applicable Accounting Standard 14.

22. Before discussing the submissions made by learned Counsel for the Petitioners. I would briefly recount the principal objection of the said members of the Agarwal family and of B. S. Sponge P. Ltd., controlled by one branch of the Agarwal family. I do so because usually in these applications for sanction of the scheme there is little opposition. But, since there is a lot of opposition in this application, the points in opposition may be first mentioned, so as to appreciate the argument made by learned Counsel for the Petitioners.

23. The first objection is that the said order of this Court dated November 27, 2007, dispensing with the meeting of the shareholders was an erroneous order for not convening a formal meeting of the shareholders and should be set aside.

It is also contended that such order is a nullity. Therefore, no sanction of the scheme in question is called for.

24. The second point is that the scheme does not recite that it seeks to implement the family settlement.

25. Thirdly, the scheme does not take into account the modification directed to be made in the scheme by the order dated November 27, 2007.

26. Next, arguments were advanced that formulation of the scheme, obtaining orders of the court for dispensing with meetings and then applying for sanction is an action by one group in the family, acting behind a corporate veil. Such veil should be lifted.

Discussion

27. The detailed submissions of learned Counsel for the parties will become evident as I proceed with this discussion.

28. Chapter v. of the Companies Act, 1956, deals with compromises, arrangements and reconstructions of companies. In this case all three elements are wholly or partly involved. The shareholders of each of the two companies came to a compromise or arrangement which took the form of consent letters appended to the application made to this Court for dispensing with the meetings. They prepared a scheme on such compromise or arrangement for transfer of the Jharsuguda Unit of SEPL to SEJPL. There were other arrangements contemplated in the scheme for the re-arrangement of shareholding and vesting of assets and liabilities of the two companies. All these were with a conceived view to reconstruct these two companies.

29. The question is: What are the provisions of law governing such compromise or arrangement between these two companies ?

30. Section 391(1) of the said Act, inter alia, says that when such compromise or arrangement is proposed between a company and its members, the company or any member may make an application before the court to order a meeting of the members or class of members. This meeting is to be conducted in such manner as directed by the court.

31. Sub-section (2) says that if in such meeting a majority of them representing three-fourths in value of the members or class of members present and voting, in person or by proxy agree to such a compromise or arrangement, it would be binding on such class.

32. Now, this order of November 27, 2007, is attacked by the parties opposing this application. It is said that the proper procedure u/s 391 was not followed ; the court could not have dispensed with the holding of meetings. Therefore, the order is not only bad but it is a nullity.

33. At the outset Mr. S. B. Mookerjee, learned senior counsel for the Petitioners

has brought on record numerous orders passed by this Court at least from 2003 dispensing with meetings. I have seen those orders. I do not think that any of these orders was ever challenged on the ground that the court did not have the power to dispense with the meetings. In all probability each of these orders has attained finality.

34. Now, the question which has to be answered by the court is whether ordering a meeting of shareholders is mandatory before any compromise or arrangement is considered or agreed upon by members of a company ?

35. I have been taken through the Companies Act, 1956 and the Companies (Court) Rules, 1959, extensively.

36. It has been held by this Court on an interpretation of the word "may" in Section 391(1) that it has been used so as to recognise the power of the court to dismiss such applications u/s 391 at the initial stage. Only when the court does not dismiss the application is the court to proceed further u/s 391 of the Act (see Hindustan Development Corporation Ltd. v. Shaw Wallace and Co. Ltd. reported in [2002] 1 CHN 353).

37. The first paragraph of Section 391 of the Act says that the court is to order a meeting of members or creditors as the case may be.

38. The second paragraph, inter alia, states that such compromise or arrangement, agreed to by the said requisite majority, if sanctioned by the court, is binding on all members.

39. Section 393 provides quite detailed provisions regarding issuance of notice of meetings and the particulars of such compromise or arrangement to be contained or appended to it, including the interest of directors. Breach of this requirement visits the company and its officers with consequences.

40. Section 394 makes a provision for orders to be passed in an arrangement like the one before me, for vesting of assets and liabilities of the transferor company in the transferee company.

41. The Act provides safeguards against sanction of these schemes being obtained from the court, dishonestly. Section 391 enjoins the applicant to disclose to the court the latest financial position of the company backed by the auditor's report and a declaration regarding pendency of any investigation by the Central Government under Sections 235 to 251 of the Act. The first proviso enjoins the Registrar of Companies to furnish a report before the court, prior to sanction of the scheme, that its affairs were conducted not prejudicial to its members or the public. A further safeguard is provided in the next proviso of Section 394 that before dissolution of the company, the official liquidator has to file a similar report.

42. Now, let us see what the Companies (Court) Rules, 1959, say about this kind of an application and meetings, which were cited in detail by Mr. Anindya Kumar

Mitra, learned senior advocate, for Parmanand Agarwal and his group.

43. Rule 67 prescribes that an application for an order convening a meeting has to be made by judge's summons supported by an affidavit, to which should be appended a copy of the proposed compromise or arrangement. Rule 69 says that upon hearing of such summons the judge shall give directions with regard to the class of members or creditors whose meeting is to be held, fixing the time and place for it, appointing a chairman for conducting such meeting, fixing a quorum and procedure for it and so on. Under Rule 74 the judge may direct advertisement of such proposed meeting in such manner as he may think fit. The notice should not be less than 21 days. Rule 75 entitles every creditor or member to attend such meeting. A member or creditor is to be supplied with a copy of the proposed compromise or arrangement together with the statement required to be furnished u/s 393, upon such requisition being made by him. Rule 77 is very important. It says that the decision in the meeting or meetings held in pursuance of such order shall be ascertained only by taking a poll.

44. Now, let us see what the authorities say as to the power of the court to dispense with such meetings.

45. For many years, from time to time, a question has been raised before the courts as to whether meetings of the shareholders or creditors as the case may be were to be held and their consent obtained before approval of the proposed scheme or arrangement, by the court.

46. I will start with the case of *Mazda Theatres P. Ltd. v. New Bank of India Ltd.* reported in [1975] ILR 1 (Delhi) 1, cited by learned Counsel for the Petitioner. This is a decision of the Division Bench of the Delhi High Court. It said as follows:

Let us examine whether the second part of the arrangement relating to the subsidiary and its members complies with the requirements of Section 391. Ordinarily a company acts by its board of directors and the shareholders act in a general meeting of the shareholders. The meeting contemplated in Section 391 is analogous to an extraordinary general meeting of the members of the company inasmuch as a three-fourths majority is required to pass the required resolution. The normal rule is that the consent of the shareholders whether it is unanimous or by a three-fourths majority must be obtained in a meeting summoned on the orders of the court u/s 391. This is in accordance with the general principle that the members must act in a general meeting.

Inroads have, however, been made on this formal doctrine. Firstly, the consent of all the shareholders given even outside a meeting is sufficient to comply with the requirement of a meeting. After this principle was established by judicial decisions, a legislative recognition was given to it by paragraph 5 of Part II of Table A of the English Companies Act, 1948, which applies to the management of a private company limited by shares and is relevant for our purpose. It runs as follows:

Subject to the provisions of the Act, a resolution in writing signed by all the members for the time being entitled to receive notice of and to attend and vote at general meetings (or being corporations by their duly authorised representatives) shall be as valid and effective as if the same had been passed at a general meeting of the company duly convened and held.

Further, Section 143 of the English Companies Act, 1948, now expressly enables written resolutions which are not passed at a general meeting to be registered. This change is reflected in India also. u/s 82 of the Indian Companies Act, 1913, special and extraordinary resolutions passed at general meetings alone were capable of being registered. But Section 192 of the Companies Act, 1956, enables written resolutions not passed at general meetings to be registered.

The second inroad on the requirement of a formal meeting is that the consent of the shareholders may be ascertained without calling any meeting at all. Further, the doctrine of lifting the veil of incorporation and looking at the reality of the action of the members of the company enables us to hold that the consent of the overwhelming majority of the shareholders outside a meeting is sufficient to show that the resolution was supported virtually by all the members of the company. Professor L. C. B. Gower calls this as an informal ratification by the members of the acts done on behalf of the company. He draws the distinction between the formal and the informal acts as follows:

The law normally insists that only a resolution duly passed at a meeting of the company can be regarded as an act of the company itself. In a number of cases, however, the question has arisen whether something less formal than a resolution passed at a duly convened meeting will suffice. In other words, can the veil be lifted so as to equate a decision of the members with a decision of the company itself ?

(The Principles of Modern Company Law, 3rd edition, pages 206-209).

Decisions on this subject may be classified into (a) those requiring a formal compliance, and (b) those requiring only a substantial compliance.

47. In that case the court approved an arrangement between the company and its creditors and members. The first part of the arrangement was backed by appropriate resolution. The second part was not and it was only an agreement between the holding company, the subsidiary and its members. Applying the above principles the court upheld such arrangement.

48. This decision was supported by the said learned Counsel by relying on a passage from Buckley on the Companies Acts (Fourteenth edition). A part of it reads:

Meetings.--This section provides that the meeting shall be "summoned in such manner as the court directs", but contains nothing to give the court control over the proceedings at the meeting. The gap, however, is filled, in the case of a company in liquidation, by the words of Section 346, post, "held and conducted

in such manner as the court directs", and without this, semble the court would have an inherent power to give directions on the subject. The court can waive non-compliance with the directions given by it as to convening the meetings.

49. Further, reliance was placed on the following passage in Halsbury's Laws of England (Fourth edition), volume 7, page 348 to argue that:

Decisions reached without meetings.--Although the members, as a body, can in general only act through a general meeting, nevertheless this requirement is relaxed in cases in which each and every shareholder assents to the course of action proposed to be followed, in which case the formalities of a meeting need not be complied with, and it is not in fact necessary for the members to meet together:

Provided such assent is clearly proved, the individual assents of the members may be given at different times. Where, therefore, it is shown that all members who have a right to attend and vote at a general meeting of the company assent to any matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. This principle applies as well to extraordinary and special resolutions as it applies to ordinary resolutions, and to resolutions of a class of members.

50. In *Cane v. Jones* reported in [1981] 1 All ER 533 (Ch. D), the shareholders of the concerned company made an agreement in 1967, with the requisite majority, but without holding a meeting. The case concerned a family company. By the agreement the chairman lost the casting vote and the parties to the agreement were to appoint a chairman. The effect was deadlock in the company. This case was also cited by learned Counsel for the Petitioner. Applying the above principle, the Chancery Division of the High Court of England and Wales held that it was a basic principle of company law that all the cooperators of the company acting together could do anything intra vires the company. It went on to say that even though the 1967 agreement was not drafted as a resolution and though not signed by the signatories in each other's presence, yet it was a meeting of all the shareholders' minds. Since a meeting of the shareholders' minds was the essence of a general meeting and the passing of a resolution, the 1967 agreement was effective.

51. A very important case in this field is *Hindustan Development Corporation Ltd. v. Shaw Wallace and Co. Ltd.* [2002] 1 CHN 353, along with other allied cases cited by learned Counsel for the Petitioner. This is a Division Bench judgment of our court. The company filed an application under Sections 391(1) and 393 of the Act for convening a meeting of the creditors to approve a scheme of compromise/arrangement concerning a defined class of creditors. The meeting was convened on April 7, 1998. In the notice for convening the meeting modifications were proposed to the originally proposed scheme of arrangement. This would affect a class of creditors excluded from the original scheme. The modified scheme was put to vote. 49.16 per cent. voted for the modification. In

May, 1998 the company filed an application for approval of the modified scheme. The scheme was sanctioned by this Court on December 24, 1998. Some creditors filed an appeal from the judgment. The Appellants challenged the validity of the meeting held.

52. The ratio of this judgment is indeed very interesting. I will try to summarise it now. When an application comes before the court, the court has to examine whether it should be dismissed outright. If it comes to such a conclusion the court must do so and there is no need to order a meeting. Otherwise, a meeting has to be ordered and the scheme advanced in the application is to be passed by the requisite majority. The court has to satisfy itself about such an approval by the shareholders. Such meeting is required considering the language of Section 391 read with the Companies (Court) Rules, 1959. Then it goes on to say that when there are a few creditors (should in all probability include a case where the company has few members) the court may not take recourse to the elaborate procedure of a meeting being supervised by the chairman. The court may itself hold the meeting and ascertain the views of those creditors or members. Then it holds further on the basis of *Mazda Theatres P. Ltd. v. New Bank of India Ltd.* [1975] 1 ILR (Delhi) that when the number of creditors or members is small, a written resolution adopted by the members or creditors, u/s 192 of the Companies Act, 1956, or consent of all the members, was sufficient and a meeting may not be necessary. But the court was cautious to say that such dispensing with formalities was only concerned with companies the membership of which was small or which had few creditors.

53. A landmark judgment in this area of the law is *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, cited by Mr. A. K. Mitra, senior advocate. Before discussing that case, I would like to point out that the question of dispensing with members' or creditors' meetings was not in issue before the court. The issues which were before the court are tabulated in paragraph 26 of the judgment as follows (page 810 of 87 Comp Cas):

In view of the aforesaid rival contentions the following points arise for our determination:

(1) Whether the Respondent-company was guilty of hiding the special interest of its director, Shri Arvind Mafatlal, from the shareholders while circulating the explanatory statement supporting the scheme and whether thereby the voting by the equity shareholders got vitiated.

(2) Whether the scheme is unfair and unreasonable to the minority shareholders represented by the Appellant.

(3) Whether the proposed scheme of amalgamation was unfair and amounted to suppression of minority shareholders represented by the Appellant and hence liable to be rejected.

(4) Whether a separate meeting of minority shareholders represented by the

Appellant was required to be convened on the basis that the Appellant's group represented a special class of equity shareholders.

(5) Whether the exchange ratio of two equity shares of MIL for five equity shares of MFL was ex facie unfair and unreasonable to the equity shareholders of MIL and, consequently, the scheme of amalgamation on that account was liable to be rejected.

54. This case was unfortunately not cited in *Hindustan Development Corporation Ltd. v. Shaw Wallace and Co. Ltd.* [2002] 1 CHN 353. But while dealing with those issues the hon'ble Supreme Court discussed almost the entire law dealing with applications under Sections 391 and 393 of the Act, convening of meetings, taking of resolutions and the effect of such resolutions on the shareholders or on creditors. The hon'ble Supreme Court was concerned with the argument made by a body of equity shareholders that they constituted a special minority class and had special interest, to ask for a separate meeting. Hence, a separate meeting ought to be called. In that context the Supreme Court said the following (page 833 of 87 Comp Cas):

On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly pre-supposes that if the scheme of arrangement or compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive.

55. In *A.W. Figgis and Co. P. Ltd., In re and Queens Park Property Co. P. Ltd., In re* reported in [1980] 50 Comp Cas 95, cited on behalf of the Petitioner this Court said that a scheme of arrangement for transfer of a portion of a company's properties to any other company was valid. In *Vitari Distilleries Ltd. v. McDowell Spirits Ltd.* reported in [2003] 5 Comp. LJ 299, cited by learned senior counsel for the Petitioner the Madhya Pradesh High Court after examining the consent letters of the equity shareholders dispensed with the meetings of the members. Such was also the view of the Karnataka High Court in *Kirloskar Electric Co. Ltd., In re* reported in [2003] 116 Comp Cas 413 ; [2003] 4 Comp. LJ 13, also cited by him. The Karnataka High Court said that the court was able to dispense with such meeting if the number of shareholders was small and had signified their consent. Learned Counsel for the Petitioner cited a judgment of Denning L. J. for the Court of Appeal in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham and Sons Ltd.* reported in [1956] 3 All ER 624. This is what his Lordship had to say (page 630):

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the

people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705 (HL) at pages 713 and 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty. This is shown by *R. v. I. C. R. Haulage Ltd.* [1944] 1 All ER 691 (KB), to which we were referred this morning. The court said (*ibid.*, at page 695):

Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company. must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case.

So here the intention of the landlord company can be derived from the intention of their officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. Approaching the matter in that way, although there was no board meeting, nevertheless, having regard to the standing of these directors in control of the business of the company, having regard to the other facts and circumstances which we know, whereby plans had been prepared and much work done, it seems to me that the judge was entitled to infer that the intention of the landlord company was to occupy the holding for their own purposes. I am of opinion, therefore, that the judge's decision on this point was right.

56. This passage was cited by him to say that the consent of the shareholders as appended to the petition reflected the real mind of the shareholders and the court should proceed accordingly.

57. I do not know for what purpose *Rainbow Denim Ltd. Vs. Rama Petrochemicals Ltd.*, was cited by learned Counsel for the objecting members as I am at a loss as to how to apply this decision to the facts of this case.

58. A so far unreported judgment passed by me in C. A. No. 459 of 2010 in the matter of *In Re: Callidora Merchantiles P. Ltd. and Another*, on July 1, 2010, was cited by the said learned Counsel. In that case there were only two shareholders who had given their consent which was appended to the petition. On a consideration of the Companies Act, 1956, I had said that a meeting could not be dispensed with. Under the said Act and Companies (Court) Rules, 1959, read

with our Original Side Rules certain formalities could be dispensed with to avoid causing hardship to the parties or for the ends of justice.

Conclusions:

59. It is quite true that when an application for convening a meeting of the shareholders or creditors is presented before the court, the court has the option to reject it summararily. If it does not, the court has to pass orders in that application (see *Hindustan Development Corporation Ltd. v. Shaw Wallace and Co. Ltd.* [2002] 1 CHN 353.

60. Can it pass orders dispensing with the meeting altogether ?

61. When Sections 391 and 393 of the Act provide for sending notices, a statement of the compromise or arrangement, disclosure of any material interest of the directors and other officers of the company, convening and holding of meetings and taking of resolutions and so on, I am of the opinion that Section 192 of the Act or the provisions of the English Act for acting on agreements entered into by all the shareholders cannot be applied to those provisions of the Act. The language and intent of the Act is that a meeting of the shareholders or creditors has to be held and cannot be dispensed with. Particularly so, when Sub-section (5) of Section 391 and Sub-section (4) of Section 393 provide for penalty for any failure. Therefore, in my considered opinion, the court has no power of dispensing with meetings altogether. The authority for this view is in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, and I would respectfully follow it.

62. However, I notice that Section 391 provides that such meeting may be "held and conducted in such manner as the court directs."

63. Interpretation of this phrase was not before the hon"ble Supreme Court in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, . In my view, in case of closely held companies or family companies or in case of companies involving a small number of shareholders or creditors there is scope for the court to exercise its discretion under this phrase of the first sub-paragraph of Section 391. *Hindustan Development Corporation Ltd. v. Shaw Wallace and Co. Ltd.* [2002] 1 CHN 353, says that at times the court could hold a meeting of creditors or members before it, when such creditors or members are small in number.

64. In the case of *In Re: Callidora Merchantiles P. Ltd. and Another*, , decided on July 1, 2010, I had said the following (page 262):

Applicant No. 1 submits that the holding of the meeting of its equity shareholders may be dispensed with as there are only two shareholders who have signified their consent, which is appended to the petition. I have considered Section 391, which empowers the court to convene a meeting in such manner as the court thinks fit. Thereafter, Sub-section (2) provides for a procedure to hold such a meeting. I have also considered Rule 6 of the Companies (Court) Rules, 1959, which recognises the practice or procedure followed by the court or by the Code of Civil Procedure, 1908. Rule 9 retains the inherent power to the court to

prevent an abuse of process. Chapter XL, Rule 3 of the Original Side Rules of our court says that the practice followed by the court, which is not provided by or contrary to the Rules be continued. Our court on its original side does follow the practice of dispensing with the formalities in appropriate cases, when the facts of the case so demand or when justice so requires. We often dispense with the formalities in getting an appeal ready for hearing. In winding up applications, we ask the parties to serve a copy of the petition upon the company, thus dispensing with service by the court; we dispense with drawing up and service of Writ Rules, and so on. Therefore, on a reading of Section 391 with the aforesaid provisions the court has the power in appropriate cases to dispense with some formalities prescribed in the Rules. However, the court does not have the power to dispense with the mandate of the statute. The meeting cannot be dispensed with as it is a statutory requirement. A meeting has to be held, even if informal u/s 391 for the purpose of adopting the scheme.

I am inclined to dispense with all formalities regarding convening, e.g., notice and advertisements, in this case, as there are only two shareholders. Such dispensation is necessary in the interests of justice and to avoid unnecessary costs, delay and hardship.

65. I would like to elucidate on that decision. The court has no power to dispense with holding of meetings in view of *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, But Section 391, itself vests a power in the court to call, hold and conduct meetings in such manner as it thinks fit. Therefore, the section itself arms the court with the power to dispense with some requirements when the case requires, but not to dispense with holding of meetings altogether.

66. Therefore, the Act empowers the court to relax the procedure for convening and holding meetings provided in the Companies (Court) Rules, 1959, without dispensing with them, altogether.

67. Rule 6 of the Companies (Court) Rules, 1959, says that the rules in the Code of Civil Procedure, 1908 or of any High Court which are not contrary to the Companies (Court) Rules, 1959, may be followed. Moreover, Rule 7 of the said Rules 1959 gives power to the court to enlarge or abridge time. Rule 9 retains the inherent power of the court to prevent an abuse of the process of court. Chapter 40, Rule 3 of the Original Side Rules of our court provides that the practice followed by the high court which is not provided by or contrary to the rules be continued. Our court on its Original Side Rules does follow the practice of dispensing with the procedural formalities as observed by me in the case of *In Re: Callidora Merchandiles P. Ltd. and Another*, above. Section 391 of the Act read with the Rules do not take away the power. In fact it gives the court the power to dispense some of the formalities, in the Act and the Rules when the case so demands.

68. Therefore, in case where a company is closely held or is a family company or has a small number of shareholders or creditors who have signified their consent

in the petition, or when the financial position of the company is such that it would be unable to bear the expenses for advertising, convening and holding of a meeting, strictly according to the Rules, the court may call a meeting on such terms as it thinks fit dispensing with some of the formalities, considering each case on its merits.

69. Now, the next question arises whether this Court has the power to set aside the order dated November 27, 2007, by Sanjib Banerjee J. In my opinion it does not have such power. First of all Under Rule 79 of the Companies (Court) Rules, 1959, an application for sanction has to be made by a separate application. The application for convening a meeting has to be made separately (see Rule 67). In that application the said order was passed by Sanjib Banerjee, J. That application is disposed of. No appeal has been preferred from that order. It has become final and binding. Therefore, in the second stage of the proceedings which is this application for sanction I cannot touch the order, on the ground that it is erroneous.

70. Now, the next question is: Is the order passed by Sanjib Banerjee, J. dated November 27, 2007, a nullity ? In my opinion, it is not. The justification to pass such an order is there in the case of Mazda Theatres P. Ltd. v. New Bank of India Ltd. reported in [1975] 1 ILR (Delhi) the case of Kirloskar Electric Co. Ltd., In re reported in [2003] 116 Comp Cas 413 ; [2003] 4 Comp. LJ 13 and in the case of Vitari Distilleries Ltd. v. McDowell Spirits Ltd. reported in [2003] 5 Comp. LJ 299 (MP) and our Division Bench judgment in Hindustan Development Corporation Ltd. v. Shaw Wallace and Co. Ltd. [2002] 1 CHN 353.

71. As I have said earlier, at least from 2003, this Court passed several orders dispensing with meetings altogether by accepting the consent of the shareholders signified in the petition. These orders were passed in appropriate cases where the number of shareholders was small or shareholding confined to a family. When the hon"ble judge followed this practice of dispensing with meetings, it cannot be said that the order is erroneous.

72. Therefore, when the hon"ble judge has followed a precedent to dispense with meetings such an order cannot be called a nullity. Such an order is not even erroneous, considering the unsettled state of law then, on this particular issue.

73. Sri Ramnik Vallabhdas Madhvani and Others Vs. Taraben Pravinlal Madhvani, and the other Official Trustee, Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another, cited by learned Counsel for the Respondent on the point of nullity can thus have no application.

74. Therefore, the point that the order of Sanjib Banerjee J. should be set aside by me fails.

75. There is no substance in the other points namely, lifting the corporate veil or the submission that the family settlement was not mentioned in the scheme. Such family settlement need not be mentioned in the scheme, in my opinion. No

case has been made out so that the court can enter into an exercise of lifting the corporate veil.

76. Moreover, no member has come up before me to challenge the scheme. The scheme has been unanimously passed by the shareholders which is reflected in the consent letters appended to the petition for convening a meeting. Further, the objectors are not even shareholders in the Petitioner companies.

77. One point remains to be answered.

78. What, if there is only one preference shareholder or one creditor ? Who is to hold a meeting with whom ? This point was raised on behalf of the Petitioner.

79. A meeting is to held, in my opinion, when there is plurality of members or creditors to be bound by it. If there is one preference shareholder or one creditor there is no possibility of a meeting to bind him. He takes his own decision. But if his decision is to bind another group, then that decision has to be approved by them. Say there is one creditor. He enters into an arrangement with the company. There is no scope for any meeting. But, if that decision, affects the members, it has to be placed before them for approval in a meeting.

80. In this circumstance the application for sanction, C. P. No. 384 of 2007 is allowed. I pass orders in terms of prayers (a) to (g) of the petition, subject to incorporation of and compliance with the directions in the order dated November 27, 2007 and the directions at page 8 of this judgment. C. A. No. 328 of 2008 is dismissed. No. order as to costs.

81. In the event the Petitioners supply a legible computerised print out of the scheme and the schedule of assets in acceptable form to the Department, the Department will append such computerised print out, upon verification, to the certified copy of the order without insisting on a handwritten copy thereof.

82. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

Later:

83. Mr. D. Basak prays for stay of operation of this judgment and order. I am of the opinion that some important questions of law are involved, which may be decided in the court of appeal. In these circumstances, I stay operation of this judgment and order for a period of ten days from date.

84. All parties concerned are to act on a signed photocopy of the operative part of this judgment and order on the usual undertakings.