(2008) 08 BOM CK 0020

In the Bombay High Court

Case No : Criminal Writ Petitions No''s. 2770, 2771, 2781 to 2784, 2786 to 2789 of 2006, 288 and 290 of 2007, 710 to 719 of 2008, 1424 to 1433 of 2008

JIK Industries Ltd. and Another APPELLANT

Vs

Sunil Ranchorlal Bajaj and Another RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Companies Act, 1913 — Section 153
Companies Act, 1956 — Section 391, 391(1), 391(2), 391(3), 391(6)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Evidence Act, 1872 — Section 40
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 147
Penal Code, 1860 (IPC) — Section 120, 420, 500
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22A

Citation : (2010) 159 CompCas 485 : (2012) 2 CompLJ 67

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : Amit Desai, Mili Thakkar and Shital Thakkar, instructed by Amit P. Ghag, S.V. Marwadi, Sushant S. Murthy and Sunita Sharma, Y.S. Shinde, P.P. Shinde and D.P. Adsule, for the Appellant; M.S. Mohite, A.R. Kapadnis, Ashish Sawant, Dharmendra Rohra, Ashok Sahani, M.D. Mati and P.O. Verghese, instructed by K. Balkrishnan, Darius Khambatta and Arif Doctor, instructed by Hina G. Acharya, R. Satyanarayanan and Ravindra Sharma, for the Respondent

Judgement

A.S. Oka J.

1. The submissions of learned Counsel appearing for the parties were heard earlier. These petitions are being disposed of by a common judgment as the following issues are involved in all these petitions:

(1) Whether a compromise or arrangement sanctioned u/s 391 of the Companies Act, 1956 (hereinafter referred to as ''the said Act of 1956'') relating to the accused-company amounts to compounding of the offence u/s 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as

''the said Act of 1881'') ?

(2) What is the effect of an order of sanction of compromise or arrangement u/s 391 of the said Act of 1956, in relation to the accused company on a pending complaint alleging commission of offences u/s 138 read with Section 141 of the said Act, 1881, against the company and its directors ?

Facts of the cases

2. Learned Counsel appearing for the parties have made submissions on the aforesaid issues. Shri Desai, learned Counsel appearing for the Petitioner in Writ Petition No. 2770 of 2006 has made elaborate submissions. The other learned Counsel appearing in the connected matters have also made elaborate submissions. Before referring to the submissions, it will be necessary to briefly refer to the facts of the case.

3. In so far as Criminal Writ Petitions Nos. 2770, 2771, 2781 to 2789 of 2006, 288 and 289 of 2007 are concerned, the facts can be summarised as follows:

(a) In these writ petitions, the first Respondent is the complainant who filed separate complaints u/s 138 read with Section 141 of the said Act of 1881. The Petitioners are the accused in the said complaints filed by the first Respondent. The first Petitioner (first accused) is a company registered under the said Act of 1956. The first Petitioner-company had issued a cheque in favour of the first Respondent towards repayment of a loan advanced by the first Respondent to the first Petitioner. The said cheque was dishonoured.

(b) The first Petitioner filed a company application in this Court along with a scheme of arrangement. In the said company application, an order was passed by this Court on May 6, 2005, directing the first Petitioner-company to hold a meeting of the equity shareholders, unsecured creditors, fixed deposit holders, etc. Accordingly, a meeting was held on June 25, 2005. A report of the meeting was submitted to this Court. On the basis of the report, a company petition u/s 391 of the said Act of 1956 was filed and by order dated September 16, 2005, the scheme of arrangement was sanctioned by this Court.

(c) According to the case of the Petitioners, as per the scheme of arrangement approved by this Court, the first Petitioner was required to issue its equity shares to all its unsecured creditors, fixed deposit holders, etc., as against its liability as existing on February 28, 2005. On the basis of the scheme of arrangement approved by this Court, an application was made by the Petitioners in the complaints filed by the first Respondent. In the said applications, a contention was raised that the liability of the first Petitioner stands discharged by issuing equity shares to the first Respondent-complainant. A contention was raised in the said application that the first Petitioner has complied with the order of this Court by issuing letters of allotment of its equity shares to the first Respondent-complainant. The prayer in the application was that the offences u/s 138 read with Section 141 of the said Act of 1881 may be compounded.

(d) The said application was contested by the first Respondent-complainant by contending that a complaint u/s 138 of the said Act of 1881 was not a recovery proceeding. It was contended that the application filed by the Petitioner for compounding of the offence was not maintainable and therefore, the application be dismissed. By an order passed by the learned Magistrate on September 19, 2006, the said applications made by the Petitioners were rejected. The learned Magistrate while rejecting the applications came to the conclusion that the parties will have to adduce evidence and before evidence was adduced, it was premature to declare that the offence was compounded. The revision applications were preferred by the Petitioners before the Sessions Court for challenging the orders of the trial court. The revision applications were dismissed by the learned Additional Sessions Judge. While dismissing the revision applications, the learned Additional Sessions Judge observed that an order of compounding an offence cannot be passed against the wishes of the first Respondent-complainant and he cannot be compelled to enter into a compromise. The learned judge held that compounding of an offence is a bilateral act. He observed that an offence cannot be compounded on the basis of the unilateral Act on the part of the accused.

(e) The prayers originally made in this group of petitions were of a declaration that the alleged offence was compounded and for setting aside the order of the Sessions Court in revision. During the course of submissions, on the prayer made by Shri Desai, learned Counsel appearing for the Petitioners, a prayer for quashing u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") was allowed to be incorporated by carrying out an amendment to the prayer clause and he was permitted to argue on the said prayer.

4. The second group of petitions consists of Criminal Writ Petitions Nos. 710 to 719 of 2008. These petitions have been filed by original accused Nos. 1 to 5 in complaints filed by the first Respondent in the said petitions u/s 138 read with Section 141 of the said Act of 1881. In the said complaints, process was issued by the learned Magistrate. After the process was issued by the learned Magistrate, an application was made by the Petitioners invoking Section 147 of the said Act of 1881 for recording compounding of the offence on the basis of the scheme of compromise and arrangement relating to the first Petitioner-first accused-company u/s 391 of the said Act of 1956 which was approved by this Court under order dated September 17, 2005. The learned trial judge rejected the application by holding that the Petitioners had not produced any receipt showing the payment of the amount to the original complainant. The prayer in these petitions is for quashing the order of the learned Magistrate passed on the said application and for allowing the application made by the Petitioners for compounding of the offences.

5. The third group of petitions (W. P. Nos. 1424 to 1433 of 2008) is again filed by the accused in a complaint filed by the first Respondents therein u/s 138 read with Section 141 of the said Act of 1881. The process was issued by the learned

trial judge on the complaints filed by the first Respondent. Here also an application was made by the Petitioners for terminating the proceedings or for compounding of the offence on the basis of an order u/s 391 of the said Act of 1956 in relation to the first Petitioner-first accused-company. The prayer made in these petitions is for quashing the complaints on the ground that the order passed u/s 391 of the Companies Act, 1956, sanctioning a scheme amounts to compounding the offence u/s 138 of the said Act of 1881.

Submissions

6. As pointed out earlier, detailed submissions have been made by learned Counsel for the parties and especially by learned Counsel for the parties in the first group of petitions (W. P. No. 2770 of 2006 and other connected matters). The submission of Shri Desai, learned Counsel for the Petitioners in the said first group is that once a scheme of arrangement or compromise is sanctioned by the company court in exercise of the powers u/s 391 of the said Act of 1956, the scheme supersedes all earlier contracts between the accused-company and its unsecured creditors. His submission is that there is no legally enforceable liability de hors the scheme sanctioned by the court. Learned Counsel for the Petitioners submitted that after the scheme of arrangement is sanctioned by the company court, even if the company wishes to pay the amount payable under the dishonoured cheque, the company will be prohibited from paying the said amount except in a manner provided under the sanctioned scheme. His further submission is that once the scheme is sanctioned after obtaining the support of the requisite majority, it amounts to a deemed consent of the unsecured creditors. It is submitted that the scheme binds all the unsecured creditors whether they have supported the scheme or opposed the scheme and the sanction of the scheme amounts to compounding the offence u/s 138 read with Section 141 of the said Act of 1881.

7. It was submitted that in essence Section 391 of the said Act of 1956 was enacted as a social measure so as to prevent the winding up of the companies. Learned Counsel submitted that after the company court is satisfied that the scheme is fair, reasonable and is not opposed to the public policy, the scheme is approved/sanctioned and once the scheme is sanctioned, it binds all the unsecured creditors as if each of them had entered into a new contract with the company. Relying upon the decision of the apex court in the case of J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, , he submitted that in view of the sanctioned scheme, the original debt becomes payable only in the manner and only to the extent provided in the scheme. Relying upon another decision of the apex court in the case of S.K. Gupta v. K.P. Jain [1979] 49 Comp Cas 342 : AIR 1979 SC 734, he submitted that the scheme u/s 391 of the said Act is essentially a compromise between the company and its unsecured creditors and it binds not only the company but the dissenting unsecured creditors or members. He also placed reliance on a decision of this Court in the case of Vasant Investment Corporation Ltd. v. Official Liquidator,

Colaba Land and Mill Co. Ltd. [1981] 51 Comp Cas 20, and submitted that u/s 391 of the said Act of 1956, the scheme becomes binding upon all the members of the company, irrespective of the fact whether they have expressly consented to it or not. He submitted that once the scheme is sanctioned and is brought into force, the creditors of the company can demand repayment of their dues only in terms of the scheme and not otherwise than in terms of the scheme.

8. Learned Counsel for the Petitioners after referring to the scheme which was subject-matter of the first group of petitions submitted that on the said scheme being sanctioned, the same amounts to cancellation of all earlier contracts between the company and its creditors and would amount to novation of the earlier contract within the meaning of the Indian Contract Act, 1872. He submitted that in essence the scheme supersedes all the agreements between the company and its creditors and therefore, once the scheme is sanctioned, the debt for which the dishonoured cheque is issued ceases to be a legally enforceable debt.

9. He submitted that while sanctioning the scheme, the company court always considers whether the scheme is fair and reasonable and only after duly recording its satisfaction, the scheme is sanctioned by the company court and that is the reason why it binds all the creditors, shareholders, members, etc. He placed reliance on a decision of the apex court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., .

10. Turning to the facts of the case in the first group of petitions, he submitted that the arrangement or compromise which is approved by the court relates back to the appointed date and therefore, all the debts in existence before the appointed date have ceased to be legally enforceable debts. After referring to the decision of the Lahore High Court in Hargopal v. People''s Bank of Northern India Ltd. [1934] 4 Comp Cas 352, learned Counsel submitted that the order sanctioning the scheme operates as a judgment in rem and therefore, the company is entitled to raise a defence based on the scheme.

11. Referring to Section 147 of the said Act of 1881, he submitted that the offence u/s 138 read with Section 141 of the said Act of 1881 is compoundable without the sanction of the court. He submitted that u/s 147, the offence can be compounded at any stage. His submission was once there was a compromise recorded between the parties, the same automatically results in acquittal of the accused. He submitted that as the offence u/s 138 of the said Act of 1881 is compoundable without sanction of the court, once there was a compromise which is binding on the parties, what remains to be done by the court is only to pass a consequential order of closure of proceedings. He submitted that the legislative intent of making the offence compoundable by the amendment of the year 2002 cannot be ignored by the court. He relied upon the decision of the apex court in the case of NEPC Micon Limited and Others Vs. Magma Leasing Limited, .

12. A submission made by him in the alternative is that once there is a scheme

of compromise or arrangement sanctioned u/s 391 of the said Act of 1956, it is binding on all the concerned parties. On the basis of the scheme, this Court can exercise power u/s 482 of the said Code of quashing the proceedings. He placed reliance on the decision of the apex court in the case of Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta, . He submitted that in view of the law laid down by the apex court in the said decision, not only that the scheme amounts to compounding, as the debt covered by the concerned cheque ceases to be a legally enforceable debt, the continuation of the prosecution cannot be allowed as it will amount to abuse of the process of law. He also invited my attention to the decision of the apex court in the case of Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi, .

13. Learned Counsel also dealt with the contention raised by the original complainant on the basis of certain judgments dealing with the exercise of the powers u/s 391 of the said Act of 1956. He submitted that Sub-section (6) of Section 391 operates pending the proceeding for sanction of the scheme. He submitted that Sub-section (6) of Section 391 operates only at the interim stage and the same does not operate after the conclusion of the proceeding as a result of the order of the court sanctioning arrangement or compromise. He pointed out that the intention of the Legislature is to ensure that criminal proceedings are not stayed merely because proceeding u/s 391 is pending for adjudication before the company court. Relying upon the decision of the apex court in the case of State of Orissa Vs. Debendra Nath Padhi, and All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, , he submitted that the judgment of this Court sanctioning the scheme u/s 391 of the said Act of 1956 can be looked into for considering the prayer for quashing the criminal proceeding in a petition invoking Section 482 of the said Code. He submitted that the judgment sanctioning the scheme will be certainly relevant in view of Section 40 of the Indian Evidence Act, 1872.

14. He placed reliance on the decision of the apex court in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, . He relied upon that part of the said decision where the effect of the order passed u/s 22A of the Sick Industrial Companies (Special Provisions) Act, 1985, has been considered by the apex court.

15. Adverting to the facts of the case, in the first group of petitions, he pointed out that as per the order of this Court a meeting of the creditors was convened on June 25, 2005, which was chaired by an officer appointed by this Court. He pointed out that the scheme was approved by overwhelming majority in the meeting. He pointed out that in the case of the Petitioners in seven petitions out of the first group, the cheques were deposited after the meeting was held. He submitted that the complaints in the said seven cases were filed on September 16, 2005. He submitted that as the scheme relates back to the appointed date, i.e., February 28, 2005, the complaints filed after the said date were not maintainable. He pointed out that in one case, though the cheque was deposited

before the date of meeting, notice period expired after the meeting. He pointed out that in the said case the shares have been accepted by the complainant in terms of the arrangement sanctioned by the court. He pointed out that in case of two petitions, the cheques were dishonoured on April 6, 2005 and the appointed date of scheme is February 28, 2005. He pointed out that even in the two remaining cases, the cheques were dishonoured after the appointed date. Lastly, he submitted that the provisions of said Act of 1881 cannot override the provisions of the said Act of 1956.

16. He also dealt with the submission made on behalf of the complainant on the basis of the element of mutuality in compounding. He submitted that though it may be true that the compounding of an offence involves an element of mutuality between the parties, once the scheme u/s 391 is approved, element of mutuality must be presumed to exist as a matter of law and as a matter of legal inference. He pointed out that u/s 138, a civil wrong is made an offence by a legal fiction and therefore, once the scheme is approved, an agreement not to prosecute will come into existence as a consequence of the arrangement or compromise u/s 391 of the said Act of 1956 providing for repayment of the debt. He submitted that in substance the offence u/s 138 is an offence arising on account of non payment of legally enforceable debt. After a scheme is approved, the debt can be recovered only in the manner provided in the scheme.

17. He concluded by submitting that allowing the complainants to prosecute a complaint u/s 138 of the said Act of 1881 will amount to allowing the unsecured creditors to back out from the scheme though they are bound by the scheme.

18. In the first group of petitions (W. P. No. 2770 of 2006 and other connected matters), Shri Mohite, learned Counsel for the Respondents (complainants) has made detailed submissions. His first submission is that in the facts of the case the scheme submitted is of an arrangement and not of compromise. He submitted that in any event, the compounding of an offence is not an unilateral but is a bilateral Act. He submitted that there is no provision under the said Act of 1956 which provides for compounding of the criminal proceeding without the consent of the complainant.

19. He submitted that Section 391 of the said Act of 1956 and Section 138 of the said Act of 1881 operate in altogether different fields He placed reliance on the decision of this Court in the case of Ion Exchange Finance Ltd. v. Bombay Mills Co. P. Ltd. (101) 1 Bom. LR 150, as well as the decision of this Court in the case of Uma Investments P. Ltd., In re [1977] 47 Comp Cas 242. Relying upon the decision of the Kerala High Court in the case of Jose Antony Kokkad Vs. Official Liquidator and Another, , he submitted that the said Act of 1881 being a special Act overrides the provisions of said Act of 1956. In this behalf, he relied upon a decision of this Court in the case of Orkay Industries Ltd. v. State of Maharashtra [1999] 4 Comp. LJ 491 : [2000] DoCh 484. He submitted that the arrangement u/s 391 is essentially for revival of the company and therefore, the arrangement will not absolve the company from its penal liability.

20. Coming to the facts of the case, Shri Mohite pointed out that even before the scheme was sanctioned by this Court, the complaints subject-matter of this group of petitions were already filed and the offences in these cases were already completed. He submitted that even if the scheme of compromise or arrangement is sanctioned, the original debt continues to exist and the scheme or arrangement provides only for modality of discharge of the debt. Relying upon the decision of the apex court in the case of NEPC Micon Limited and Others Vs. Magma Leasing Limited, , he submitted that the submission based on the scheme u/s 391 is nothing but an effort to defeat the objects of Section 138 of the said Act of 1881 and submitted that the said effort is to be discouraged.

21. He submitted that except for making an amendment to the prayer clause, there are no averments made in the petitions in the first group in support of the prayer for quashing u/s 482 of the said Code. He submitted that there is nothing placed on record to show that the Petitioners have complied with their obligations under the scheme. He submitted that apart from the fact that there is no automatic compounding, no case is made out for quashing as the Petitioners have not complied with their obligations under the scheme. He also pointed out that Section 392 of the said Act of 1956 provides for the consequences if the company fails to abide by the scheme.

22. In Criminal Writ Petition No. 710 of 2008 and other connected matters in the second group, Shri Marwadi, learned Counsel for the Petitioner submitted that the complainant was fully aware about his claim and was fully aware about the offer given by the first Petitioner-company in the meeting of the creditors held on June 1, 2005. In W. P. No. 710 of 2008, he pointed out that in fact in the said meeting the Respondents/complainants were allowed to exercise options. He submitted that the offer for compromise was given by the first Petitioner which was accepted by the original complainant as the complainant has given implied consent by filling the ballot paper distributed in the meeting of the creditors. He invited my attention to the decision of the erstwhile Nagpur High Court in the case of Mt. Rambai v. Mt. Chandra Kumari Devi AIR 1940 Nagpur 181. He submitted that where a document of compromise regarding an offence capable of being compounded without permission of the court is signed by the parties who have understood its contents, it is incompetent for any party to withdraw from it. He submitted that as the scheme or compromise u/s 391 of the said Act of 1956 is binding on all the unsecured creditors including the complainant, he cannot back out from the compromise. He submitted that in such a case even if any party to the compromise withdraws from it, subsequent withdrawal does not affect the compounding of an offence inasmuch as the compounding has an effect of acquittal of the accused.

23. He also placed reliance on the decision of the apex court in the case of R. Rajeshwari v. H.N. Jagdish [2008] AIOL 307. He invited my attention to what is held by the apex court in paragraph 13 of its decision. He pointed out that the apex court held that while the settlement is arrived at in a complaint u/s 138 of

the said Act of 1881, it is not necessary to file any affidavit affirmed by the complainant or the accused and by reason of the authority granted by the litigant in favour of his advocate, he is empowered to enter into settlement on behalf of his client and such settlement will bind his client. He, therefore, submitted that the compromise or compounding of an offence need not be in the form of a writing signed by the complainant. He submitted that in any case when the complainant has consented to the scheme u/s 391 of the said Act of 1956, it will certainly amount to compounding. He submitted that as the scheme binds all the concerned including the complainant, the offence u/s 138 of the said Act of 1881 stands compounded. He also placed reliance on the decision of the apex court in the case of Tata Motors Ltd. v. Pharmaceutical Products of India Ltd. (decided on May 16, 2008) [2008] 144 Comp Cas 178.

24. Learned senior counsel, Shri Khambata appeared on behalf of some of the Respondents in the second group of petitions. He invited my attention to the decision of the Full Bench of this Court in the case of Abasaheb Yadav Honmane v. State of Maharashtra [2008] 2 Mah. LJ 856. He submitted that compounding of offence cannot be inferred with only on the basis of some settlement under which certain amount is agreed to be accepted by the complainant. He submitted that the concept of compounding is primarily based upon the mutuality between the parties. He submitted that an agreement not to prosecute the accused and knowledge of the actual commission of crime are necessary ingredients of the compounding. He submitted that unless it is proved that the complainant has expressly desired to put an end to the prosecution, the compounding cannot be inferred.

25. Shri Khambata, learned senior counsel invited my attention to the order dated November 17, 2005, passed by the learned company judge. He submitted that on plain reading of the said order, it is obvious that it will not affect the pending criminal proceedings. He pointed out that a specific submission was made before the learned company judge that while exercising the powers u/s 391, the company court has no jurisdiction to pass an order in respect of pending criminal actions. He pointed out that the learned company judge specifically accepted the contention that the criminal actions cannot be interdicted by the company court and to that extent, the relevant clause in the proposed scheme cannot be approved by the court. He also invited my attention to the order passed by the appeal Bench on April 13, 2006. He submitted that the order of this Court accepting the scheme by no stretch of imagination can be construed as compounding of an offence u/s 138 of the said Act of 1881. He also placed reliance on certain other decisions including the decision of the Madras High Court in the case of Shree Maruthi Yarns v. Sri Ramkrishna Mills (Coimbatore) Ltd.

26. I have also heard Shri Saryanarayanan appearing for some of the complainants. Reliance has been placed on the decision of this Court in the case of In Re: Scheme of Compromise/Arrangement between Sharp Industries Limited and its Secured, Unsecured Creditors and Equity shareholders, . The said

decision deals with the provisions of Sub-section (6) of Section 391 of the said Act of 1956. The learned judge of this Court held that the term proceeding used in Sub-section (6) of Section 391 does not include within its scope the criminal proceeding against the company and its directors. Reliance is also placed on the decision of the apex court in the case of Anil Hada v. Indian Acrylic Ltd. [2000] 99 Comp Cas 36.

Consideration of submissions on compounding

27. I have carefully considered the submissions made by learned Counsel for the parties. It will be necessary to consider Section 391 of the said Act of 1956. Section 391 forms part of Chapter V which deals with arbitrations, compromises, arrangements and reconstructions. Section 391 deals with the power to compromise or make arrangement with creditors and members. Sub-section (1) of Section 391 refers to proposal of compromise or arrangement between the company and its creditors or any class of them or between the company and its members or any class of them. In the cases in hand we are really concerned with Clause (a) of Sub-section (1). Clause (a) deals with compromise between the company and its creditors or any class of them.

28. Sub-section (1) of Section 391 provides that on 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 by the liquidator, the court may order a meeting of the creditors or class of creditors as the case may be to be called and conducted in such manner as the court may provide. Sub-section (2) provides that if a majority in number representing three-fourths in value of the creditors or class of creditors, as the case may be, present and voting, either in person or by proxies, at the meeting agree to any compromise or arrangement, such compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all members, or all the members of the class, as the case may be and also on the company. Sub-section (3) provides that the order made of sanction under Sub-section (2) shall have no effect until the certified copy of the order is filed with the Registrar. Sub-section (6) provides that the court may, at any time after an application contemplated by Sub-section (1) of Section 391 has been made to it, stay the commencement or continuation of suit or proceeding against the company on such terms as the court thinks fit until the application is finally disposed of. So Sub-section (6) incorporates the power to grant interim relief of stay to commencement and/or continuation of any suit or proceeding against the company until the application under Sub-section (1) of Section 391 is finally decided.

29. Section 392 of the said Act of 1956 may have some relevance. Sub-section (2) of the said section gives power to the court to make an order of winding up of the company if the court is satisfied that compromise or arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modification. Clause (b) of Sub-section (1) of Section 392 gives power to the court to make such modification in the compromise or arrangement as it may consider

necessary for the proper working of compromise or arrangement.

30. The argument which is advanced by the Petitioners is based on the legal effect of the order of sanction under Sub-section (2) of Section 391 of the said Act of 1956. The argument is based on legal effect of the binding nature of the scheme of compromise or arrangement once it is sanctioned by the court under Sub-section (2) of Section 391.

31. The question to be decided is whether the sanction of the scheme u/s 391 ipso facto amounts to compounding of the pending complaint u/s 138 of the said Act. Therefore, what is required to be considered is the legal effect of the order sanctioning the scheme in the light of the concept of the compounding of an offence. Therefore, before dealing with the submissions made on the legal effect of the sanction of the scheme, it will be necessary to ascertain the true meaning of the concept of the compounding of an offence.

32. In this behalf it will be necessary to refer to the decision of the Full Bench of this Court in the case of Abasaheb Yadav Honmane and Ashwini Abasaheb Honmane Vs. The State of Maharashtra, . While dealing with the scope of powers of this Court u/s 482 of the said Code, the Full Bench had an occasion to consider the legal meaning of the expression "compounding". The Full Bench relied upon the meaning of the expression compounding in the Law Lexicon of P. Ramanatha Aiyar, 1997 edition as well as in Black''s Law Dictionary, 6th edition. The relevant portion of the judgment reads thus:

The expression ''compounding has been explained in Law Lexicon by Ramanatha Aiyar (General Editor Justice Y.V. Chandrachud), 1997 edition as under:

Compounding : Arranging, coming to terms; condone for money; arranging with the creditor to his satisfaction.

The Black''s Law Dictionary, sixth edition, defines ''compound'' as under:

Compound : To compromise; to effect a composition with a creditor; to obtain discharge from a debt by the payment of a smaller sum. To put together as elements, ingredients, or parts, to form a whole; to combine, to unite. To form or make up as a composite product by combining different elements, ingredients, or parst, as to combine a medicine.

Compounding crime : Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. There are three elements to this offence at common law, and under the typical compounding statute :

(1) the agreement not to prosecute; (2) knowledge of the actual commission of a crime; and (3) the receipt of some consideration.

(emphasis1 added)

33. In paragraph No. 6.1 the Full Bench has held thus:

6.1 The concept of compounding is primarily based upon mutuality between the parties. Mutual desire to put an end to prosecution in certain offences may be settled by action of the parties while in certain other offences it has to be compounded only with the permission of the court....

(emphasis1 added)

34. Thus, there appears to be a difference between a mere compromise and an action of compounding a crime. An agreement between the complaint and accused under which the complainant agrees to receive some amount or receive some consideration by itself does not amount to the compounding of a crime. An agreement to receive consideration or an agreement recording receipt of consideration by way of settlement of the dispute will amount to compounding of an offence provided it can be shown that there is a knowledge of the actual commission of offence and there is an agreement not to prosecute. Reliance was sought to be placed in this behalf on the decision of the apex court in the case of Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta, . Reliance was sought to be placed on what is observed by the apex court in paragraph 29 of the said decision which reads thus (page 869):

In the facts of the case, it appears to us that there is enough justification for the High Court to hold that the case was basically a matter of civil dispute. The banks had already filed suits for recovery of the dues of the banks on account of credit facility and the said suits have been compromised on receiving the payments from the concerned companies. Even if an offence of cheating is prima facie constituted, such offence is a compoundable offence and compromise decrees passed in the suits instituted by the banks, for all intents and purposes, amount to compounding of the offence of cheating.

35. In the case before the apex court, in a civil suit between the bank and the borrower accused, consent terms were filed and a compromise decree was passed. The said compromise decree was treated by the apex court as amounting to compounding of the offence of cheating u/s 420 of the Indian Penal Code, 1860. This Court had an occasion to deal with the said submission in a judgment dated October 20, 2005, while disposing of Criminal Writ Petition No. 1339 of 2005 (Narendra L. Jain v. State of Maharashtra). This Court considered the decision of the apex court in the case of Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta, , and in particular what is observed by the apex court in paragraphs 28 and 29 thereof. This Court held that the said decision of the apex court cannot be read as laying down a proposition of law that in every case where there is a compromise in a money suit instituted by the bank against the borrower, the criminal prosecution against the borrower cannot be proceeded with. The aforesaid decision of the apex court does not lay down that a compromise in a civil suit amounts to compounding of an offence in every case. The observation of the apex court referred to above is in the facts of the case before it.

36. By a compromise in a civil suit or a civil proceeding between the complainant and the accused, the complainant may agree to accept certain amount or may agree to adjust the amount payable by the accused. The said compromise recorded in the civil proceeding will not amount to compounding of the pending prosecution unless an agreement on the part of the complainant not to prosecute the accused is incorporated in the compromise or is reflected from the compromise. Reliance was sought to be placed on the decision of this Court dated September 8, 2005, in the case of Usha Badri Poonawala v. K. Kurian Babu, in Criminal Writ Petition No. 1357 of 2005. It must be noted here that in the said case this Court found that the memorandum of understanding was entered into by and between the complainant and accused pending a complaint u/s 138 of the said Act of 1881 under which the complainant accepted certain payments and agreed to withdraw the complaint by making a suitable application. This was a case where after considering the admitted facts this Court exercised powers u/s 482 of the said Code and quashed the complaint. Therefore, this decision is of no help to the Petitioners.

37. Reliance was sought to be placed on the decision of the apex court in the case of Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi, . The apex court dealt with the appeals arising out of a decision of the Delhi High Court in the petitions filed by the Appellants before the apex court for quashing the FIR and the proceedings initiated on the basis of the FIR. This was a case where the offence alleged was u/s 120 read with Section 420 of the Indian Penal Code, 1860. The Appellant was a director of Gujarat Cancer Research Institute. The allegation against him was that by concealment of facts, he cheated the Government of India and obtained a customs duty exemption certificate in respect of certain machinery. Considering the provisions of Kar Vivad Samadhan Scheme, 1998, which provided for compounding of offence on the basis of certificate obtained under the said scheme, and considering the fact that the disputed demand was settled by the authority, the apex court held that the criminal liability also stands compounded due to the said settlement. Again this decision will not help the accused Petitioners as the said decision is rendered dealing with the provisions of a scheme which has a force of a statute. Shri Desai also placed reliance on the decision of the Allahabad High Court in the case of Naresh Chandra Jauhari v. State of Uttar Pradesh, wherein the learned single judge of the Allahabad High Court held that it is not necessary that the composition of offence should be in writing and it may be oral. In paragraph 14, the Allahabad High Court observed that if both the parties agreed that there is a compromise, it is not necessary that the compromise should be in writing. Thus, the Allahabad High Court also held that both the parties have to agree for compounding of an offence.

38. Reliance has been placed in this behalf on certain other decisions by Shri Marwadi, learned Counsel for the Petitioners appearing in Criminal W. P. No. 710 of 2008 and other connected matters. He placed reliance on the decision of the erstwhile Nagpur High Court in the case of Mt. Rambai AIR 1940 Nagpur 181. This was a case where offence alleged was punishable u/s 500 of the Indian

Penal Code, 1860, wherein the accused alleged that the case was compromised and an application in writing was made in the court for passing an order of acquittal. In the said application it was stated that the complainant and the accused had compromised the case out of the court and that the complainant was praying that the accused be acquitted and alleged defamatory letters be returned to the accused. There was some controversy as to the person to whom the impugned documents were to be returned. The learned Magistrate after recording evidence observed that there remains a doubt whether the compromise was really arrived at outside the court or not and therefore, it was not fair to accept that the case was compounded. The learned judge of the erstwhile Nagpur High Court observed that the real issue before the Magistrate was whether or not the case was compounded. The best evidence was the document a copy of which was produced in the court bearing the signature of the complainant and counsel of the accused. The learned judge held that if there was in fact a compromise that would oust the jurisdiction of the Magistrate for the reason that the offence complained of was capable of being compounded without the consent of the court. The submission made by Shri Marwadi on the basis of the said decision is that in the case in hand it was the duty of the learned Magistrate to ascertain and adjudicate whether there was a compromise. It must be stated here that the first issue to be decided is whether the sanction of the scheme of arrangement or compromise itself amounts to compounding of an offence u/s 138 of the said Act. For deciding the said controversy the said decision of the Nagpur High Court may not be useful.

39. Shri Marwadi also relied upon the decision of the apex court in the case of R. Rajeshwari v. H. N. Jagdish [2008] AIOL 307. The apex court has taken a view that the settlement could be arrived at by and between the parties and it is not necessary to file any affidavit affirmed by the complainant or by the accused. The contention based on this decision is that it is not necessary that there should be a document in writing or an affidavit by the complainant recording his desire to compound the offence and the compounding can be inferred from the settlement between the parties. The said case will not help the Petitioners-accused. In the case before the apex court, the issue was whether an advocate who was duly authorised could have agreed for settlement on behalf of his client.

40. Now it will be necessary to turn to the submissions made by learned Counsel appearing for the Petitioners on the effect of the order passed u/s 391 of the said Act of 1956. Shri Desai, learned Counsel appearing for the Petitioners has placed reliance on the decision of the apex court in the case of S. K. Gupta [1979] 49 Comp Cas 342; AIR 1979 SC 734. Reliance has been placed by learned Counsel on what is held by the apex court in paragraph 12 of the said decision which reads thus (page 350):

Section 391 envisages a compromise or arrangement being proposed for consideration by members and/or creditors of a company liable to be wound up under the Companies Act, 1956. Compromise or arrangement has to be between creditors and/or members of, the company and the company, as the case may be. It was always open to the company to offer a compromise to any of the creditors or enter into arrangement with each of the members. The scheme in this case is essentially a compromise between the company and its unsecured creditors. The scheme when sanctioned does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is ''to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which, would otherwise be necessary to give it validity'' (see J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others,). Further, Section 391(1) itself by a specific and positive provision prescribes who can move an application under it. Only the creditor or member of that company or a liquidator in the case of a company being wound up is entitled to move an application proposing a compromise or arrangement. By necessary implication any one other than those specified in the section would not be entitled to move such an application.

(emphasis1 supplied)

41. The view taken by the apex court is that the scheme u/s 391 which envisages a compromise or arrangement binds not only the company but even the dissenting creditors or members as the case may be. Reliance was also placed on a decision of the Lahore High Court in the case of Hargopal v. People''s Bank of Northern India Ltd. [1934] 4 Comp Cas 352, dated March 7, 1934, in which it is held that an arrangement with creditors approved by an order made u/s 153 of the Indian Companies Act, 1913, is a judgment in rem and can be pleaded against the creditor seeking to enforce his claim against the company. Reliance was also placed on a decision of the Calcutta High Court in the case of The Badarganj Loan Office, Ltd. Vs. Shahar Uddin Shah. . The Calcutta High Court held that a depositor of a company who had instituted a suit may obtain a decree between the date of the meeting in which the scheme is approved and the date when such a scheme is sanctioned by the court u/s 153 of the said Act of 1913. It was held that even in execution of such a decree, the company can point out that the decree holder was not entitled to execute the said decree as he was bound by the said scheme which is approved u/s 153 of the said Act of 1913.

42. A submission on the basis of the decision of the apex court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., , is that the fairness of the scheme is always considered by the company court at the time of sanctioning the scheme. Reliance was placed on what is observed by the apex court in paragraph 28A of the said decision. The apex court held that the court exercising powers u/s 391 of the said Act of 1956 cannot act as a Court of Appeal as the arrangement or compromise between the company and creditors or its members shows the commercial wisdom of the concerned parties. The apex court quoted with approval the following portion of a decision of Lindley L. J. of the Chancery

Division Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re [1891] 1 Ch. D 213, (copy from page 12 of written arguments bracketed portion) (page 238):

...what the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can reasonable be taken by businessmen. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such objection to it as that any reasonable man might say that he could not approve of it.

43. While dealing with this submission it is also necessary to refer to the decision of the apex court in the case of J. K. (Bombay) P. Ltd. [1970] 40 Comp Cas 689. It will be necessary to refer to paragraph 35 of the said decision relied upon by Shri Desai, learned Counsel appearing for the Petitioners which reads thus (page 711):

The principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties : it becomes binding on the company, the creditors and the shareholders and has statutory force, and therefore, the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of Section 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dissented from or are opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the court even if the shareholders and the creditors acquiesce in such alteration (of Smt. Premila Devi v. Peoples Bank of Northern India Ltd. (in liquidation) [1938] 4 All ER 337 : (1939) 9 Comp Cas 1 (PC)). The effect of the scheme is ''to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity'' (Palmer''s Company Law, 20th edition, page 664). Sub-section (2) of Section 391 of the Act allows the decision of the majority prescribed therein to bind the minority of creditors and shareholders and it is for that reason that a scheme is said to have statutory operation and cannot be varied by the shareholders or the creditors unless such variation is sanctioned by the court. The effect, therefore, of a scheme between a company and its creditors is that so long as it is carried out by the company by regular payment in terms of the scheme a creditor who is bound by it cannot maintain a winding up petition. But if the company commits a default, there is a debt presently due by the company and a petition for winding up can be sustained at the instance of a creditor. The scheme, however, does not have the effect of creating a new debt; it simply makes the original debt payable in the manner and to the extent provided in the scheme.

(emphasis1 supplied)

44. What is important is that in case of a creditor of the company, the scheme of arrangement or compromise will be certainly binding on him once there is a sanction u/s 391 of the said Act of 1956 though the concerned creditor may have opposed the scheme in the meeting. However, the apex court further held that so long as the scheme between the company and the creditors is carried out by the company by regular payment in terms of the scheme, a creditor cannot maintain a winding up petition, but if the company commits default there is a debt presently due by the company and a petition for winding up can be sustained at the instance of creditor. The apex court categorically held that the scheme does not have effect of creating a new debt and it simply makes the original debt payable in the manner and to the extent provided in the scheme. Thus, sanction of the scheme u/s 391 does not have effect of extinguishment of the debt and it only curtails the right of a creditor to recover the debt in the sense that the debt will be payable only in accordance with the sanctioned scheme.

45. An action u/s 138 of the said Act of 1881 contemplates the existence of a legally enforceable debt. The effect of sanction of the scheme is certainly not of the extinguishment of the debt payable by the company. The effect of the binding nature of the scheme is that the civil proceedings for recovery of debts may not proceed and it will not be open for a creditor to recover the debt in a manner which is contrary to the sanctioned scheme. After the sanction of the scheme, the debt becomes payable in the manner and to the extent provided in the scheme. The debt does not cease to be a legally enforceable debt merely because a scheme u/s 391 is sanctioned. The company becomes liable to discharge the debt in accordance with the sanctioned scheme of arrangement or compromise.

46. My attention was invited to the relevant clauses in the scheme which deal with the pending proceedings against the company. On this aspect it will be necessary to go the decision of this Court in the case of Uma Investments P. Ltd., In re [1977] 47 Comp Cas 242. This Court held that Section 391 of the said Act of 1956 is not meant for freezing criminal proceedings. Further, it is held that criminal proceedings cannot be held over and avoided or criminal process cannot be evaded by resorting to the scheme of compromise or arrangement u/s 391. What is observed by the learned single judge in the said decision reads thus (page 247):

In my opinion, criminal proceedings cannot be held over or avoided or criminal process evaded by resorting to a scheme of compromise or arrangement u/s

391. Section 391 does not provide an umbrella to a company and its directors and officers for a thing which is an offence or an infringement and violation of any law, rule and regulation punishable by imprisonment or fine or both. Offenders cannot be given refuge in this section, nor can it be a shield for delinquent directors for their misdeeds.

(emphasis1 added)

47. On a plain reading of the schemes which are subject-matter of these three group of petitions, it is impossible to accept that the relevant clauses in the scheme have the effect of automatic termination of the criminal proceedings pending against the company. Sanction of the scheme of arrangement or compromise u/s 391 of the said Act of 1946 does not have the effect of automatically terminating the criminal proceedings pending against the company u/s 138 of the said Act of 1881. Shri Mohite appearing for the complainants in the first group has placed reliance on a decision of the apex court in the case of Pankaj Mehra and Another Vs. State of Maharashtra and Others, . The apex court in the said decision has considered the provisions of Section 138 of the said Act of 1881 in the context of the provisions of the Companies Act relating to winding up. What is important is the observations in paragraphs 30 and 31 of the said decision which read thus (page 428):

We therefore feel that the Legislature has thoughtfully used the word ''fails'' instead of other expressions as failure can be due to a variety of reasons including disability to pay. But the offence would be complete when the drawer ''fails'' to make payment within the stipulated time, whatever be the cause for such failure.

The drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque. But no such explanation would be sufficient to extricate him from the tentacles of the offence contemplated in the section. Perhaps some kind of explanation would be sufficient to alleviate the rigour of the offence which may be useful to mitigate the quantum of sentence to be imposed. But that is no ground for consideration at this stage.

48. Counsel appearing for both the sides have relied upon certain observations made by the apex court in the case of M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., . The apex court had an occasion to consider the entire scheme of Section 138 of the said Act of 1881 and other connected sections. In paragraphs 3 and 4 the apex court has observed as under (page 474):

The Act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry with it the bulk of the currency in force. Negotiable instruments are in fact instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the Legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country.

Section 138 of the Act makes a civil transaction to be an offence by fiction of law. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person is returned by the bank unpaid either because the amount or money standing to the credit of that person being insufficient to honour the cheque or because it exceeds the amount arranged to be paid from that account, such person, subject to the other conditions, shall be deemed to have committed an offence under the section and be punished for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both.

49. In another decision of the apex court in the case of NEPC Micon Limited and Others Vs. Magma Leasing Limited, , in paragraph 15 thereof the apex court has observed thus (page 829):

In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above ''brush away the cobweb varnish, and shew the transactions in their true light'' (Wilmot C. J.) or (by Maxwell)''to carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, to an indirect or circuitous manner that which it has prohibited''. Hence, when the cheque is returned by a bank with an endorsement ''account closed'', it would amount to returning the cheque unpaid because ''the amount of money standing to the credit of that account is insufficient to honour the cheque'' as envisaged in Section 138 of the Act.

(emphasis1 supplied)

50. Some submissions have been made in one of the three groups by contending that the complainant supported the scheme in the meeting of the creditors and shareholders convened in terms of the order of this Court. It must be noted here that what is discussed in the meeting is whether the scheme of arrangement or compromise should be approved or adopted. When a creditor or unsecured creditor attends such meeting, he knows that if his opposition to the scheme is not successful and if majority supports the scheme, the same is bound to go through. A creditor who finds himself in a minority may support the scheme with the hope of recovering his dues. As stated earlier, the sanction of the scheme does not amount to extinguishment of a legally recoverable debt of the company. The scheme lays down the mode and the manner in which and the form in which the debt is to be repaid by the company so that the company can be revived. Therefore, the action of a complainant in a complaint u/s 138 of the said Act of 1881 of supporting the scheme in the meeting convened under Sub-section (1) of Section 391 does not amount to an agreement on his part not to prosecute the company u/s 138. Existence of such agreement can neither be presumed nor be inferred.

51. It will be also necessary to refer to the other provisions of the said Act of 1956. What is important to be seen is Section 392 of the said Act of 1956. Clause (b) of Sub-section (1) of Section 392 gives power to the court to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. Sub-section (2) of the said section provides that if a compromise or an arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications it may either on its motion or on application of any person interested in the affairs of the company make an order winding up the company and such order will be treated by legal fiction as an order u/s 433 of the Companies Act, 1956. Even after sanction of the scheme u/s 391, the scheme may not be implemented and ultimately the result will be winding up of the company under Sub-section (2) of Section 392. The submission of Shri Desai, learned Counsel appearing for the Petitioners was that even if an order is passed under Sub-section (2) of Section 392, it is of no consequence. The said argument cannot be accepted for the reason that in case the company is wound up, in so far as the payment to the unsecured creditors is concerned, it will be governed by the relevant provisions which deal with winding up of the company. Once there is a winding up order passed under Sub-section (2) of Section 392, the unsecured creditors Will have to follow the procedure of lodging the claim with the official liquidator and they may not get the amounts as provided under the scheme of arrangement or compromise u/s 391. This is one more ground on which the argument that scheme has the effect of compounding of an offence u/s 138 of the said Act of 1881 cannot be accepted.

52. The Full Bench of this Court has held that an element of mutuality is an essential ingredient of the action of compounding an offence. When the doctrine of mutuality is applicable, it is obvious that the action of compounding has to be a bilateral act and not an unilateral act. By sanction of a scheme u/s 391 of the said Act of 1956, an agreement on the part of the complainant not to prosecute cannot be presumed or inferred. Even if the complainant has voted in favour of the scheme in the meeting, the said consent will not amount to compounding.

53. Thus, the conclusion which can be drawn from the aforesaid discussion is that a scheme of compromise or arrangement sanctioned by the company court u/s 391 of the said Act of 1956 by itself will not amount to automatic compounding of an offence u/s 138 and/or Section 141 of the said Act of 1881.

Consideration of submissions on exercise of the powers u/s 482 of the said Code

54. The other limb of submission is that once there is a scheme approved by the court u/s 391, the company can never pay any amount to a creditor contrary to what is provided in the scheme. The submission is that the scheme binds all the creditors including the complainant, and therefore, it will be unjust to compel the directors of the company and the company to face a prosecution u/s 138 read with Section 141 of the said Act of 1881. Shri Desai appearing for the Petitioners has placed reliance on that part of the decision of the apex court in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, , which deals with a case where a cheque is issued after passing of an order u/s 22A of the Sick Industrial Companies (Special Provisions) Act, 1985. Reliance was also placed on the decision of this Court in the case of Usha Badri Poonawala (supra). It is not axiomatic that in every case where the scheme is sanctioned u/s 391, this Court is bound to exercise powers u/s 482 of the said Code. It will involve consideration of several factors. Whether the complainant has supported the scheme in the meeting and whether the company has acted upon the scheme by complying with all its obligations under the scheme in favour of the complainant are some of the factors which this Court may consider while exercising powers u/s 482 of the said Code. The fact that the cheque is deposited by the complainant after a meeting is held as provided in Sub-section (1) of section 391 which he has attended is also a factor to be considered. If the cheque is deposited by the complainant after the scheme is sanctioned, this aspect will have to be considered by this Court while deciding a petition u/s 482 of the said Code filed for quashing a complaint. Another factor to be considered will be what is the nature of compromise or arrangement arrived at under the scheme. Pendency of the proceedings either under Sub-section (2) of Section 392 of the said Act of 1956 will be again a relevant factor for consideration when this Court exercises jurisdiction u/s 482 of the said Code. It will involve consideration of several factors such as conduct of the company and the complainant after the scheme is sanctioned. This obviously is not an exhaustive list of factors which are required to be considered. These factors have been set out only by way of illustration. Therefore each case will have to be considered in

the light of its peculiar facts while this Court considers the prayer for exercise of power u/s 482 of the said Code.

55. Criminal Writ Petition No. 2770 of 2006 and other connected writ petitions in the first group, were originally filed for challenging the order dated September 19, 2006, passed by the learned Magistrate by which he declined to record the compounding of the offences. By amending only the prayer clause, a prayer for quashing has been added. Learned Counsel appearing for the Petitioners in the said group has placed reliance on certain factual details annexed to the written submissions. Inviting my attention to the relevant dates in each case, a submission was made that though the scheme is sanctioned on September 16, 2005, it will relate back to the appointed date, i.e., February 28, 2005, on which date the offence in only one of the cases was complete. However, perusal of the chart annexed to the written submissions shows that the offence in two cases was completed before the appointed date. Infact complaints were filed almost in all cases before the date on which the scheme was sanctioned. Certain particulars are sought to be given in the annexures to the written submissions for showing that in terms of the scheme sanctioned by this Court, allotment letters of shares were issued to the complainants (first Respondents) in the first group of writ petitions. It was sought to be contended that some of the complainants have accepted the letters of allotment. It must be stated here that apart from the annexures to the written submissions, there is no factual foundation in the petitions in support of the prayer for quashing u/s 482 of the said Code. The contention of the Petitioners is that in certain cases they have complied with the requirements of the scheme by issuing allotment letters and in certain cases allotment letters have been accepted and acted upon. The first Respondents complainants had no opportunity to meet the factual aspects which do not find place in the petitions. Therefore only on the basis of the amendment carried out to the prayer clause, the prayer for quashing cannot be considered in the absence of material averments in the petitions. If the said prayer is to be considered only on the basis of certain annexures to the written submissions, the same may cause prejudice to the first Respondent-complainant and therefore, I am not considering the said prayer for quashing on the merits. However, it must be stated that notwithstanding this judgment it will be open for the Petitioners to file separate petitions invoking the power of this Court u/s 482 of the said Code.

56. Now it will be necessary to turn to the second group of writ petitions, i.e., Writ Petitions Nos. 710 to 719 of 2008. The substantive prayer made in these petitions is again for quashing the order dated January 29, 2008, passed by the learned Magistrate. It is prayed that the applications made by the Petitioners for compounding the offences may be allowed. Incidentally, there are averments made in the petitions regarding options provided under the sanctioned scheme and alleged exercise of second option by the first Respondent. However, there is no substantive prayer in these petitions for quashing the complaints in exercise of the power u/s 482 of the said Code. There are some averments made on the basis of the alleged exercise of an option by the first Respondent during the

course of the meeting. But in the absence of specific prayer made, the request for quashing u/s 482 of the said Code cannot be considered and the Petitioners will have to file separate petitions in that behalf.

57. Now turning to the third group of petitions starting from Writ Petition No. 1424 of 2008, the substantive prayer made therein is for allowing compounding of the offence. Perusal of paragraph 9 of the petition shows that the case of the Petitioner is that it was incumbent upon the learned Magistrate to allow compounding and record dismissal/termination of the complaints on application of the Petitioners on the basis of orders of this Court. The averments made in the petitions show that the petitions proceed on the footing that the relevant clause of the scheme which provides for dismissal/termination of proceedings is also applicable to the pending complaints u/s 138 of the said Act of 1881. Therefore, the prayer simplicitor u/s 482 of quashing the complaint on the ground of the sanction of the scheme cannot be considered in these petitions and the Petitioners will have to file separate petitions in that behalf so that the first Respondent complainant gets an appropriate opportunity to deal with the prayer for quashing u/s 482 of the said Code. In this group also it must be observed that on the basis of leave granted to amend by order 2010] V. Noble Kumar v. A.O. Standard Chartered Bank (Mad) 515 dated July 16, 2008, an amendment is carried out only to the prayer clause. Hence, in all the petitions in these groups, a liberty deserves to be granted to file fresh petitions for quashing u/s 482 of the said Code on the basis of the scheme sanctioned by this Court.

Conclusions

58. Thus the questions framed in the first paragraph are answered as follows:

(1) The sanction of the scheme u/s 391 of the said Act of 1956 does not amount to compounding of an offence u/s 138 read with Section 141 of the said Act of 1881.

(2) The sanction of the scheme u/s 391 of the said Act of 1956 will not have the effect of dismissal/termination of proceedings of the complaint.

59. Hence, I pass the following order:

(i) Criminal Writ Petitions Nos. 2770, 2771, 2781, 2782, 2783, 2784, 2786, 2787, 2788, 2789 of 2006, 288 and 290 of 2007, 710 to 719 of 2008 and 1424 to 1433 of 2008 are dismissed by holding that the case for compounding is not established.

(ii) This judgment will not preclude the Petitioners from filing separate petitions/ applications invoking Section 482 of the Code of Criminal Procedure, 1973, for quashing the pending complaint and all contentions in that behalf are expressly kept open.

(iii) On prayer made by counsel appearing for the Petitioners it is directed that hearing of the complaints will not proceed for a period of 16 weeks from August

26, 2008.

