

(1976) 07 DEL CK 0012

In the Delhi High Court

Case No : Company Appeal No"s. 15 and 16 of 1976

K.P. Jain

APPELLANT

Vs

S.K. Gupta and Others

RESPONDENT

Date of Decision : 16-07-1976

Acts Referred:

Citation : (1978) 48 CompCas 774 : (1976) ILR Delhi 291

Hon'ble Judges : T.V.R. Tatachari, J;A.B. Rohtagi, J

Bench : Division Bench

Advocate : S.N. Chopra, R.L. Roshan, Satish Chander, K.K. Jain and A.N. Khanna, for the Appellant;

Judgement

Avadh Behari Rohatgi, J.

(1) These two conjoint appeals from the order of the learned company judge (D. K. Kapur J.) both dated April 26, 1976, mainly turn upon the meaning and interpretation of two sections of the Companies Act, 1956 -sections 391 and 392. The facts

(2) First the facts. Delhi Flour Mills Company Limited (DPM) was the holding company, It had a subsidiary. The subsidiary company is Indian Hardware Industries Limited (IHI). Now for some years past it has stopped working.

(3) It was incorporated in 1951 with a share capital of Rs. 8 lakhs. It floated 80,000 equity shares of Rs. 10 each. Since its formation 44,000 shares were held by the holding company, namely, DFM. They were the largest single share-holder having in their hands 55 per cent of the shares of IHI. The appellant K. P. Jain and his family hold 31,000 shares. That comes to 38.5 per cent of the entire holdings. 5000 shares are held by an outsider.

(4) Ihi was engaged in the manufacture of builders hardware, It has three sections:

1.Die-casting section. 2. Tool room section. 3. Hardware section.

The appellant Jain was a director of Ihi from 1955 till 1970. The company closed down in 1971 or 1972. Ihi is heavily indebted. The following are its main creditors-secured and unsecured:

1. Indian Smelling and Refining Company Limited Bombay. Unsecured creditor for about 4 lakhs. 2. DFM. Unsecured creditor for Rs. 23 lakhs. 3. Delia Bank. Secured creditor for about Rs. 40 lakhs, including interest. 4. Workers of the company. Unsecured creditor for about Rs.1 lakhs. 5. Other sundry unsecured creditors including Government etc. for about Rs. 75,000.00 . It will thus be seen that Dfm is the largest single creditor of the company. Ihi owed it a sum of Rs. 23 lakhs.

(5) Indian Smelting and Refining Company Limited brought a petition for the winding up of Ihi in 1971. The petition was made in the name of the company by the respondent S. K. Gupta styling himself as its authorised agent. While the petition was pending Dena Bank, the largest single secured creditor, became apprehensive about its securities. At its instance the Company Judge appointed a commissioner to take charge of the machinery of the three units and directed him to prepare an inventory. This was done.

(6) While the winding up petition was pending the Dfm proposed a scheme of arrangement. The statutory meeting of creditors and members was called under the orders of the Court. The scheme was approved by a majority in number representing three-fourths in value. S. K. Gupta was one of the dissentients. He opposed the scheme. He said that the scheme was impracticable and doomed to failure. On August 1, 1975, Dfm made an application to the company judge for sanctioning the scheme. On October 15, 1975, the court sanctioned the scheme despite Gupta's opposition. The scheme

(7) The scheme outlines a phased programme. Its broad features are these:

1. That the machinery of the two sections of Ihi, namely, die casting section and tool room section will be sold for payment to Dena Bank. Dena Bank had agreed not to take any action for a period of six months with regard to their debt. 2. The third section, namely, the hardware section was to be worked. Dfm agreed to invest Rs. 3 lakhs to revive the company. The scheme envisaged that there will be a profit of Rs. 4 lakhs a year by working the third section and so unsecured creditors will be fully paid within a period of four years. 3. The Dfm was to have priority over unsecured creditors only to the extent of their 3 lakhs rupees. For their debt of Rs. 23 lakhs they agreed that they may be paid in the end after everyone had been paid off. In other words Dfm was to remain a deferred creditor till the company had discharged its all other liabilities.

(8) The court sanctioned the scheme on October 15, 1975 in C.P. No. 86 of 1975, as we have said. The scheme has not been challenged before us. up to this stage the facts are undisputed. The dispute

(9) What gave rise to the dispute is this. Dfm, the largest single share-holder

and the creditor of Ihi transferred its 44000 shares as well as the debt of Rs. 23 lakhs to the respondents-Mr. and Mrs. S. K. Gupta. We are told by Mr. S. K. Gupta-and this is also stated by him in his affidavit-that he paid a sum of Rs. 12 lakhs to DFM. Rs. 11,56,000.00 he paid for the debt of Rs. 23 lakhs. Rs. 44,000.00 were paid for 44,000 shares at the rate of Re. 1.00 per share. The factum of the sale of shares and debt was admitted by Dfm before the learned company judge.

(10) On March 8, 1976, the appellant Jain made an application to the company judge u/s 392 of the Companies Act 1956 (the Act) read with Rule 9 of the Companies (Court) Rules 1959 (the Rules). In this application Jain said that since Dfm, the original propounder of the scheme, had staged an exit from the scene of action by transferring its holding and debt to Mr. and Mrs. S. K. Gupta, the sanctioned scheme could not be worked out and should be annulled. He prayed that Ihi be wound up.

(11) On March 9, 1976, Mr. and Mrs. Gupta moved their own petition in the company court u/s 392(1) of the Act read with Rules 9, 86 and 87 of the Rules for "appropriate modifications and directions in the scheme sanctioned" by the court on October 15, 1975. In this application Guptas said that as transferees of the entire share-holding and debt of Dfm they were entitled to have their names substituted in place of the original propounder of the scheme, that is," DFM. It was further alleged in the application that they were prepared to execute and implement the scheme as sanctioned by the court and comply with all its terms and conditions. They expressed their readiness to make an advance of Rs. three lakhs for the working of the scheme as had been agreed to be done by Dfm and also to "advance more money, if required."

(12) Now it will be seen that there were two competing claims before the court for entirely different reliefs. Jain in his application prayed for the winding up of the company. Guptas in their turn prayed for the substitution of their names in the scheme in place of the original propounder DFM. Both these applications were decided by the company judge on April 26, 1976. He dismissed the application of Jain with costs. This has given rise to C.A. No. 16 of 1976. The application of Guptas was allowed by him. Substitution was ordered. This is the subject matter of C.A. No, 15 of 1976. Against these two orders Jain appeals to this court. This order will govern both the appeals.

(13) On May 17, 1976, Gupta made a request that the appeal of Jain (CA 15 of 1976) should be heard immediately as the indebtedness of Ihi towards Dena Bank was increasing day by day on account of heavy interest. To this request we agreed. The other appeal (C.A. No. 16 of 1976) was brought before us while we were hearing C.A. No. 15 of 1976.¹ We admitted that appeal also and ordered it to be heard along with C.A. No. 15 of 1976. Locus standi : the first contention

(14) Two broad contentions were raised before us on behalf of the appellant Jain. The first is that Guptas have no locus standi to make an application u/s 392(1) of

the Act read with Rules 9, 86 and 87 of the Rules. The ground for this contention is that Guptas are neither members nor creditors of the company though they may be transferees. It was said that qua the company neither their transfer of shares nor the assignment of the debt in their favor has been recognised by the company. The company knows nothing about them. Therefore Gupta have no right to move the court until their names are brought on the register of members and notice is given to the company of the assignment of the debt in their favor by DFM.

(15) u/s 391 of the Act read with Rule 87 it appears that the following persons are entitled to move the court for a scheme of arrangement or compromise :

1.the company, 2. the creditors or any class of them, 3. members or any class of them, 4. the official liquidator if the company is wound up.

(16) The counsel for Guptas urged that Mr. and Mrs. Gupta are both shareholders as well as creditors of the company as they are the transferees of DFM. It is further submitted that the factum of sale of shares and debt in their favor was admitted before the company judge by Dfm and Therefore transfer cannot be questioned. It was argued that Guptas ought to be recognised as members as well as creditors of the company. This argument appealed to the learned company judge. He said this :

"IT is a case of succession by lawful transfer. As the transferor and the transferees accept the factum of transfer, I do not think it is open to any third party to object to the transfer."

In another passage he said :

"THE legal effect of the transfer of shares is that the same becomes effective as soon as the transfer is made and does not depend on the actual registration of transfer."

(17) Jain disputed the factum of transfer before the company judge. He denied that there was a valid transfer. This argument was rejected by the judge. He said :

"IN my view it is not for this court to find out how the transfer took place as long as the same is accepted both by the transferor and the transferees."

(18) The company judge took the view that u/s 94 of the Indian Trusts Act 1882 a constructive trust had come into existence between the transferor Dfm and the transferees Mr, and Mrs. Gupta, and even though the transfer may not have been recognised by the company the Dfm was holding the shares and the debt for the benefit of the beneficiaries, namely, Mr. and Mrs. Gupta.

(19) We are afraid we cannot agree with the learned company judge. We think he was in error and we say so with utmost respect. There is no doubt that as between the transferor and the transferees the transaction is complete. But as between the buyer and the company the transaction is incomplete until the

buyer's name is brought on the register of members. So far as the company is concerned the test of membership is whether the name of a person appears on the register of members of the company. A transferee of a share is not a member until his name is entered in the register. No right arises till such registration takes place. It is true that on completion of the transaction and his name being entered in the register, it relates back to the time when the transfer was first made (see *Howrah Trading Co. Ltd. Vs. Commissioner of Income Tax, Central, Calcutta.*,) . But .In established legal position is that a share-holder by a transfer is not a member until his name is entered in the register which every company is bound to maintain. A member and share-holder are interchangeable terms in a company limited by shares. (See *Howrah Trading Co.'s case*, supra).

(20) The procedure of a sale and purchase of shares is that the seller delivers to the buyer a validly executed document of transfer. The seller is also under an obligation to hand over to the buyer his document of title, the share certificate, for the company will not normally register the transfer until it is produced. The manner of transfer of shares for the purposes of the company law has to be provided as indicated in section 28, by the Articles of the company and in the absence of such specific provisions, special regulations contained in Table A of the first schedule of the Companies Act apply. In the Articles of Ihi we find that Article 31 deals with the procedure of transfer of shares. Under that Article as u/s 108 an instrument of transfer is to be produced. The transfer has to be approved by the Board of Directors. If approved the name of the transferee is brought on the register.

(21) The transfer of shares gives certain rights to the legally recognised shareholders and imposes some obligations on them with regard to the company in which they hold shares. The share certificate not merely entitles the shareholder, whose name is entered on it, to dividend in the share held but also to participate in certain proceedings relating to the company concerned : See *Vasudev Ramchandra Shelat Vs. Pranal Jayanand Thakar and Others*, .

(22) A member is entitled to move the court u/s 391 for he has an interest in the company. An outsider cannot move the court. He has no locus standi. A person must qualify himself as a member or creditor or any class or classes of them before he can be allowed to move the court. Merely because Mr. and Mrs. Gupta are transferees of shares or the debt that does not mean that they are entitled to move the court without their names being brought on the register of the company.

(23) There is a scramble for the control of the company between Jain and Gupta. Jain says that he and his associates are the directors. Gupta says that he and his men are the directors. The company judge recognised this state of uncertainty and confusion, if it cannot be said for certain who are the directors in control of the affairs of the company how can it be said that the transfer in favor of Guptas has been recognised by the company. Only the company, member or creditor can move the court for the modification of the scheme. Guptas who cannot be called

members or creditors qua the company cannot ask for the modification of the scheme. They have no right.

(24) The learned company judge relied on the following statement of the law in Palmer :

"ONCE the contract has been entered into the transferee has an equitable title to the shares and the transferor holds them, until registration, as trustee for the transferee. However, until the purchase price is fully paid the seller remaining on the register is entitled, vis-a-vis the purchaser, to vote in respect of the shares without reference to the wishes of the purchaser. (Palmer's Company Law, twenty first edition, page 332).

(25) This is true that so far as the buyer and seller are concerned, the transaction is complete. But as between the buyer and the company, the transaction is incomplete until the transfer is registered. At page 334 Palmer says :

"A transfer is incomplete until registered. Pending registration, the transferee has only an equitable right to the shares transferred to him. He does not become the legal owner until his name is entered on the register in respect of these shares. Prof. Gower emphasises this point when he says : "But the transaction is still incomplete as between the buyer and the company. Before the buyer can become a member and shareholder there must be an agreement between him and the company and he must be entered on the register."

(Modern Company Law, 3rd Edition, page 396).

(26) The theory of constructive trust employed by the learned judge is equally open to the objection that the beneficiary who is not entered as a holder of shares has no connexion with, or rights in a company in which shares are held in trust for him. This is because the Act prohibits any notice of a trust, express, implied or constructive, from being entered on the company's register of members. (See section 153 and Article 6 of Table A of the Act and Palmer's Company law, page 449).

(27) In re Perking`s (1890) 24 Q.B.D. 613 Lord Coleridge CJ. said:

"IT seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their cestui que trust in respect of shares of the company. If a trustee is on the company's register as a holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company has nothing whatever to do; they can look only to the man whose name is on the register. In that case Lord Esher M. R. said : "The law has given a company, the right to say "we do not care whether you are cestui que trust or not; if you are, we have a right to take no notice of you".

The powers of the court u/s 392 : the second contention

(28) This was sufficient to dispose of C.A. No. 15 of 1976. But there is a further point and this is the second contention raised on behalf of Jain. In this case what the company judge has done is that he has ordered the substitution of the name of Mr. and Mrs. S. K. Gupta in place of the original propounder, viz., DFM. Now section 392 reads:

"POWER of High Court to enforce compromises and arrangements- (1) Where a High Court makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it- (a) shall have power to supervise the carrying out of the compromise or arrangement ; and (b) may, at the time of making such order or at any. time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. (2) If the Court aforesaid is satisfied that a compromise or arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made u/s 433 of this Act.

(29) What is the meaning of the term "modification" as used in sub-section (1) (b) ? Is substitution of the name of a person in place of the original propounder a "modification" of the scheme ? Can substitution be ordered by the court itself without referring the matter to a statutory meeting as envisaged in section 391. These questions raise an important point of law. The propounder and sponsor

(30) The propounder of the scheme plays an important role. He is the motive force behind the scheme. He is the directing mind. He. holds a key position because he is the architect of the scheme. The scheme may be excellent but if its implementation is put in the hands of those who have neither business acumen nor expertise nor the wherewithal to work it the scheme may prove a total failure.

(31) The Dfm was not only the propounder but also the sponsor of the scheme. The propounder offers the scheme for deliberation and debate as a solution of the company's ills. The sponsor undertakes certain responsibilities in connexion with its execution and implementation as being its proponent and chief advocate. The sponsor of the scheme must Therefore of necessity be one in whom the creditors and members repose confidence and trust. They must be satisfied that their interests are safe in his hands and he will work the. scheme to their mutual advantage. They form an opinion about his business capabilities and feel assured that he will steer the ship of industry through troubled waters.

(32) If the sponsor is a financial wizard they may like to leave everything to him. Such a man can be trusted to take them from the road to ruin to path of prosperity. But if the creditors or members do not know the man from Adam, assuming that he is a transferee, and the proposal has not been put to them can it be said that they have put their trust in him to direct their destiny ?

(33) If the sponsor is gone the scheme itself becomes lifeless and inert. Whether

another person in place of the original sponsor who is willing to execute the scheme on the same terms as before should be entrusted with its implementation is a matter for the creditors and members to decide. They are the judges and not the court. The matter must necessarily be referred back to a meeting of the creditors and members where a decision will have to be taken whether the new comer by reason of his -credentials, his reputation, financial standing and technical skill should be entrusted with the implementation of the scheme. If they have no inward doubts on his ability and integrity they may agree to the change and hand over the business of the company to him for achieving economic recovery. If they find that he is a man of straw they will decline to vote in his favor. He may for all they know thoroughly mismanage the affairs and bring them to the brink of ruin.

(34) It was said that Mr. Gupta by reason of his opposition to the scheme and want of technical skill was not a fit person to be substituted. It is true that he was antagonistic to the scheme when the company judge was considering it. In him the scheme found a powerful opponent and an inveterate enemy He filed an appeal against the order sanctioning the scheme. The appeal was, however, later on dismissed as withdrawn. It was said that now by reason of the purchase of shares and the debt he had become the high priest and the patron saint of the scheme. Whether Mr. Gupta is a fit man to replace the original propounder of the scheme is essentially for the creditors and members to decide. The share-holders are much better judges of what is to their commercial advantage than the court can be. Mr. Gupta's past opposition may or may not weigh with the creditors and members at the meeting. His financial capacity and acumen may outweigh his demerits. We cannot decide this in this appeal, ill-equipped as we are. Meaning of the word "modification"

(35) What is the meaning of the term "modification" ? This is the question. The modification, to use the words of the statute, must be such as the court "may consider necessary for the proper working of the compromise or scheme of arrangement." If there are difficulties and impediments in the way of the implementation of the scheme the court obviously is empowered to give directions and make modifications with a view to solve the difficulties and remove the impediments. Every time the obstacle appears the matter need not be referred to the statutory meeting of creditors and members. Reference each time was found to be cumbersome and unworkable under the Act of 1913. The scheme could only be varied by the order of the court after the variation had been approved at the meeting of the creditors and the members. [See AIR 1929 256 (Privy Council) and Promila Devi v. Peoples Bank of Northern India Ltd., Air 1938 PC 289. The law was changed in the Act of 1956 in order to remove delay in the working of the scheme. The power was given to the court to make directions and modifications. [See In the matter of Dr. Ved Mitra v. Globe Motors Ltd., ILR (1975) Del 123.

(36) But modification does not mean a radical transformation of the scheme. A

basic change in the scheme is not covered by that expression. Under the thin guise of modification the court cannot fundamentally alter the scheme. If the essential nature of the scheme is changed it cannot be said to be a modification. Or to use a current phrase the "basic structure" must not be changed. Subordinate changes can always be made to effectuate the intention of creditors and members as embodied in the scheme. But the court does not transform the scheme or substitute one scheme for another in exercise of its power u/s 392(1) (b).

(37) One of the primary meanings of the word "modify" is "to limit" or "restrict" but it also means "to vary" and "to make partial changes in" (whether restrictive or extensive). There is authority that it may even mean "to extend" or "enlarge". [See Words and Phrases, Legally Defined (2nd edition) Vol. 3 page 278 where New Zealand decisions are cited].

(38) The judge may look up the meaning of a word in dictionary; but this ordinary meaning is controlled by the particular context. As everyone knows who has translated from a foreign language, it is no excuse for a bad translation that the meaning chosen was found in the dictionary; for the document may be its own dictionary, showing an intention to use words in some special shade of meaning. This rule, requiring regard to be had to the context, is sometimes expressed in the Latin maxim *Noscitur a sociis*, which Henry Fielding translated : a word may be known by the company he keeps. As in foreign language so in a statute :

"EACH word is the centre of a whole cluster of meanings and associations-The place of a word in the clause or sentence or even in a larger unit of thought will determine what aspect of its total meaning is in foreground."

(Introduction to the New Testament in the New English Bible p. vi published by Oxford University Press 1970).

(39) There is translation in every act of human speech, for to understand is to interpret. As Justice Frankfurter says :

"WORD Sin statutes are not unlike words in a foreign language in that they too have "associations, echoes and overtones", Judges must retain the associations, hear the echoes and capture the overtones."

(The Reading of Statutes reprinted in *Of Law and Men* by Felix Frankfurter p. 52)

(40) Words come from the legislative mint with some intrinsic meaning. An expression is coloured by the words with which it is in association. The collocation of particular words may be the same, but the contexts differ. In the last resort the judge has to arrive at the sense of a word from the context alone.

(41) In its context and setting, it appears to us that the word "modification" means a small adjustment, a minor or slight change, a qualification or limitation. "The act or action of changing something without fundamentally altering it" is

what is meant by "modification" (Webster : Third New International Dictionary).

(42) In Black's Law Dictionary 4th (1968) edition "modification" is defined as :

"A change; an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject matter intact."

"modification" is not exactly synonymous with "amendment" for the former term denotes some minor change in the substance of the thing without reference to its improvement or deterioration thereby, while the latter word imports an amelioration of the thing (as by changing the phraseology of an instrument so as to make it more distinct or specific) without involving the idea of any change in substance or essence. Modify. To alter, to change in incidental or subordinate features; enlarge, extend, limit, reduce." Black cites some American decisions in support of the above meaning.

(43) It seems to us that the court cannot make basic or fundamental changes to give a new orientation to the scheme or to serve a new end. A radical transformation or a drastic change of the scheme is not within the contemplation of the section. To do that will be to make it a thing other than it was. Any attempt to change the scheme would promptly-and not entirely unjustifiably-attract the charge of imposition. But a scheme is not to be imposed by the court. The court has only "to supervise the carrying out of the compromise or arrangement", as the section says. The scheme itself is agreed to by the creditors and the members in a meeting called for the purpose by the court. The sanction of the court to the scheme is essential u/s 391. The courts are clearly influenced by the high proportion of shareholders who must assent to the scheme. A dissenter is faced with the very difficult task of showing that "he being the only man out of step in the regiment, is the only man whose views should prevail." This is the democratic machinery laid down in section 391(2).

(44) The company judge took the view that the substitution of the name of Mr. and Mrs. S. K. Gupta in place of the original propounder was no modification of the scheme. In the course of his judgment he said:

"For instance, if the propounder of the scheme happens to die, it cannot be argued that the scheme has come to an end and cannot be carried out by his legal representatives. Similarly, in the case of voluntary transfer, I cannot see why the transferee of the rights "of the propounder cannot as effectively acquire the rights and obligations of its transferor as in any other case. So, I am of the view that as far as this case is concerned, there is in reality no modification in the scheme, but only a change in the identity of the person who has to carry out the scheme by reason of voluntary transfer."

(45) We cannot subscribe to this line of reasoning. A change whether by reason of death or transfer in the identity of the person who has to carry out the scheme is a fundamental change in the structure and substance of the scheme. The

scheme becomes materially different by substituting one person turn another. In other words it is to convert the scheme into something new or different. To substitute one person for another for the purpose of working out the scheme is to change the scheme both in composition and character.

(46) There is a difference between change and modification. The legislature has advisedly used the word "modification." Change, the inclusive term, denotes not only variation, alteration or modification in a thing (as in its form, substance or aspect) but also any substitution of one thing for another. (Webster's New Dictionary of Synonyms). Modification on the other hand means slight revision of something. It is "the action of making changes in an object without altering its essential nature". (Shorter Oxford Dictionary). It has the overtone of less extreme.

(47) The two words-modify and change-move from lesser to greater change. Take for instance this sentence from the Bible : "Can the Ethiopian change his skin or the leopard his spots Jer 13:23 (AV). It is impossible to use the word "modify" here in place of change. This is the beauty of English language. Every word in a living language has a distinctive flavour and a powerful vitality. Without common agreement on the meaning of most words, communication would cease.

(48) The legislature has here used the term "modification" in the sense of alteration of a subordinate character. That alteration may take the form of a supplement, an addendum, an errata or a postscript. But the contents of the volume-and that is the scheme-must remain unaltered in the main. The substance of the scheme has not to be changed. As it happens one cannot visualise all the problems that may crop .up from time to time. The provision for modification was made to attend to the new unforeseen problems. If any impediments are brought to the notice of the court in the implementation of the scheme it is obvious that necessary modification, emendation and adaptation will have to be made to subserve the original purpose.

(49) The conclusion we come to is that the sponsor, operator or the person who has to implement the scheme is its integral part. To change that person is essentially to change the scheme. It is not a mere modification of, the scheme. It is much more drastic than that. The court can modify the scheme but not radically change it. What is "basic", "fundamental" or "essential" in a given scheme cannot be answered in the abstract for all times. It has to be determined on the facts of each case in the backdrop of the scheme.

(50) The counsel for Guptas referred us to a recent Gujarat decision: Mansukh Lal v. M. V. Shah, Official Liquidator (1976) 46 Comp Cas 279. He submitted that this case supported him. As we read the ruling we think that it goes against him and reinforces the view we have taken here. At page 290 of the report D. A. Desai, J. expresses the view that the substitution of the sponsor is a "vital" change of a "basic nature" and cannot be ordered by the court and must be referred to a meeting of the creditors and members. On the facts of the case the

learned judge, however, felt satisfied that every interested person had accorded his approval to the proposed modification. He, Therefore, allowed substitution. In our opinion this decision has to be looked at in relation to its very special facts.

(51) But the instant case is different. It has not been shown to us that those who had given their approval to the scheme as originally propounded had also accorded their approval to the proposed substitution of the sponsor. Nor has the case been fought and decided on this ground. Maintainability of the appeals

(52) Lastly counsel for Guptas argued that the appeals of Jain were not maintainable. This argument need not detain us for long. Plainly the appeals are maintainable u/s 483 of the Act. The two orders under appeal were made "in the matter of the winding up of a company by the court". The words "in the matter of" used in section 483 are of the widest amplitude *Gokulchand Morarka v. Company Law Board* (1974) 44 CompCas 173.

(53) It will be recalled that in 1971 the Indian Smelting and Refining Co. Ltd. had made a petition for winding up of IHI. It was during the pendency of that winding up petition that Dmf proposed the scheme. The impugned orders were passed in relation to the scheme. The scheme itself was proposed as an alternative to winding up. A provision to avert a winding up will be a provision with respect to winding up. In *re Travancore Quilon Bank Ltd.*, Air 1939 Mad. 318.

(54) Sections 391 to 395 can have no application to companies. which are in good financial position. This is seen from the definition of the "company" given in section 390 which says that the company in these sections means only "a company liable to be wound up" (See *Seksaria Cotton Mills Ltd. Vs. A.E. Naik and Others*,) (10). But it was argued that section 390 does not mention section 392 under which the impugned orders were presumably passed. That section 390 does not refer to section 392 is true. But this does not make any difference. Section 392 is a new section. It was not there in the old Companies Act of 1913. It empowers the court to enforce schemes of arrangement sanctioned by it u/s 391. Sections 391 and 392 are of a piece. Section 392 is an appendage to section 391, an overflow, as it were. The company in section 392 cannot mean anything different from what it means in section 391 by force of section 390. Section 391 is itself a sort of little dictionary for the succeeding . section. The company in "these sections means a sick unit, to use a current jargon. When business goes to pieces and "things fall apart; the centre cannot hold;" an arrangement or compromise is proposed to revive, reconstruct and regenerate the company and to save it from being wound up, if possible.

(55) That this is the scheme and pattern of this group of sections (391 to 395) headed "compromises, arrangements and reconstructions"" (Chapter V) is also clear from the fact that u/s 392(2) the court is given power to make an order of winding up if it is satisfied that the compromise or arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications. The orders u/s 392 Sre in the "matter of winding up". We are, Therefore, not inclined to restrict

the meaning of the expression "in the matter of when the legislature has deliberately used it in a very wide sense of something having to do with the indicated field i.e. winding up.

(56) The Supreme Court has ruled that the expression "order or decision" used in section 483 does not mean every order or decision but only such order or decision as involves the determination of any right or liability (Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, and Golcha Investment Ltd. v. Shanti Chandra, 1970 CompCas 1128. See also Mazda Theatres v. New Bank, 2nd (1975) 1 Del 1. Applying this test it is plain that the impugned .Orders determine the rights and liabilities of the parties. The appeals are, Therefore, maintainable. Company Appeal 15 of 1976

(57) For these reasons we would allow Company Appeal No. 15 of 1976 and dismiss the application for substitution. Company Appeal 16 of 1976 Now we turn to Company Appeal No. 16 of 1976. This is an appeal from the order of the company judge refusing to wind up the company. Jain had made the application that since the propounder of the scheme had sold out its interest, the scheme be annulled and a winding up order be passed. The judge refused this application. He gave much the same reasons as in Company Appeal 15 of 1976. With those reasons we have, however, not agreed.

(58) But Company Appeal No. 16 of 1976 must be dismissed on the short ground that even though the order of substitution in favor of Guptas has been set aside, we, as an appellate court, are not in a position to say that the scheme cannot be- worked satisfactorily with or without modification. The company judge has to be satisfied about that u/s 392(2). What is the best course to adopt in the, interest of the company is primarily a matter for him. He may wind up the company or he may refuse, He is administering the company, not we. We, Therefore, leave it to him to decide what future course of action he would feel proper to take. For this reason we would dismiss Company Appeal No. 16 of 1976.

(59) In both the appeals the parties are left to bear their own costs.