
(2005) 07 DEL CK 0106

In the Delhi High Court

Case No : CA No's. 797 of 2000, 1852 of 2002, 855 of 2004 and 306 of 2005,
CP No. 385 of 2003 and CCP (Co) No. 2 of 2002

Modiluft Limited and Others

APPELLANT

Vs

S.K. Modi and Others

RESPONDENT

Date of Decision : 15-07-2005

Acts Referred:

Aircraft Rules, 1937 — Rule 134
Companies Act, 1956 — Section 321, 391, 80(1), 81, 81(1A)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 1 CompLJ 472

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

Bench : Single Bench

Advocate : A.M. Singhvi and S.S. Mahmood, Adv Rajiv Sawhney and Neeraj Sharma, Jasleen K. Oberoi and Roopali Singh, Rajiv Nayar and Sandeep Mittal, Adv Vikram Bajaj, Adv Rakesh Sawhney, Adv H.K. Gulati, for the Appellant;

Judgement

A.K. Sikri, J.—On 9th February, 1984 a company with the name of Genius Leasing Finance & Investment Company was incorporated under the provisions of the Indian Companies Act, 1956 (for short "the Act"). Name of this company was changed to M.G. Express vide certificate of incorporation dated 17th February, 1993 and thereafter to Modiluft Limited vide certificate of incorporation dated 12th April, 1994. This name has again been changed to M/s. Royal Airways Ltd. with effect from 31st December, 2001 although there are some disputes over this, as would be noted hereinafter. However, for the sake of convenience, it is hereinafter referred to as the company. The authorized share capital of the company was Rs. 100,00,00,000/- divided into 10,00,00,000/-equity shares of Rs. 10/- each. The issued capital of the company as on 28th February, 1999 was Rs. 63,40,00,000/- divided into 6,34,00,000 equity shares of Rs. 10/- each.

2. The company started its operation as domestic airlines in the year 1993 after entering into technical collaboration agreement with M/s. Lufthansa of Germany and by utilizing aircrafts leased to it by Lufthansa. Thereafter Lufthansa

terminated all its agreements with the company and through Court took back all its aircrafts. The result of this was that operations of the company came to a standstill. There were many creditors of the company who demanded back their money. As the company was unable to repay their debts, these creditors filed company petitions under Sections 433 and 434 of the Act for winding up of the company. In one such petition, being CP No. 68/1997, this Court passed orders dated 12th January, 1998 admitting the said petition. This Court also appointed the official liquidator as the provisional liquidator on 29th April, 1998. Thereafter pursuant to the orders passed by this Court in the said petition on different dates, the company deposited certain amounts from time-to-time and in this manner by 31st December, 1999 it had deposited Rs. 9 crores with the Registrar of this Court. With a view to restart its operations, the company obtained an approval dated 26th December, 1997 from Foreign Investment Promotion Board (FIPB), Government of India for relaunch of the airline and for issuance of 50 million dollars worth of Cumulative Redeemable Convertible Preference Shares (CRCPS) for financing the said relaunch. In the meantime, the company was also making an attempt to relaunch its airline. Thereafter, further approval dated 11th February, 2000 was received from the Government of India, Ministry of Commerce & Industry, Secretariat for Industrial Assistance whereunder the company had been provided a specific approval to raise through a rupee denomination 14% CRCPS having face value of Rs. 100/- each with total amount equivalent to US \$ 17.50 million in collaboration with Verus Group, Canada through their company, Royal Holdings Services Limited (hereinafter referred to as "RHSL") for relaunching the airline. It also obtained no objection dated 29th February, 2000 from the Government of India, Ministry of Civil Aviation to operate scheduled air transport services i.e. to operate an airline.

3. Pursuant to the grant of aforesaid approvals by the Government of India, RHSL took out an issue outside India for private placement of 16,00,000 shares of the company. RHSL also secured and entered into investment agreements with investors who agreed to subscribe to the said shares of the value US \$ 17.5 million. After the deposit of Rs. 9 crores with the Registrar of this Court as aforesaid, order dated 2nd January, 2000 was passed by this Court directing that the company shall submit a scheme/proposal for settlement of dues of various creditors of the company.

4. On the aforesaid premise, CA No. 797/2000 was filed in May, 2000 by the company under Sections 391(1) and 393 of the Act proposing the scheme of arrangement with the creditors. It was, inter alia, stated that pursuant to the opening of the private placement offer, numerous subscription agreements had been entered into between RHSL and the investors and a sum of US \$ 15,462,246.10 had been deposited in the Escrow account with Citibank. Pursuant to the efforts of RHSL, another bank, namely, Allied Boston Bank San Francisco, United States had also agreed to advance to the company a long term debt of US \$ 22.5 million and committed for provision of these funds on the terms contained in the letter of commitment dated 28th April, 2000. The memorandum was

entered into between the company and RHSL and the said memorandum as well as addendum thereto prescribed a 60 days cooling off period during which the company has to provide proof to RHSL of satisfaction of the conditions precedent set out therein. Settlement with major creditors of the company was a condition precedent for release of funds to RHSL by the escrow agent, namely, Citibank. It was mentioned that the Board of Directors of the company in their meeting held on 28th April, 2000 had unanimously approved the scheme of compromise with the creditors mentioning that the company would be having sufficient funds to meet its liability under the said scheme. Direction was sought for convening holding and conducting the meetings of the creditors. While this application was pending and the matter was heard from time-to-time, on 17th October, 2000, the company allotted 810,77,500 CRCPS to RHSL which were convertible, at the option of RHSL into equity shares. Return of allotment of these CRCPS was also filed with the Registrar of Companies.

5. In the board meeting dated 27th/28th February, 2001 these shares were converted into equity shares. In the meantime, the company settled the dispute with Indian Oil Corporation by making full and final payment of its dues from the funds inducted by RHSL, and vide orders dated 31st May, 2001 passed in CP No. 68/1997 whereby appointment of the provisional liquidation was recalled. The company was also able to settle the dispute with M/s. Hindustan Petroleum Corporation Limited which was recorded in CP No. 237/1998 filed by the said creditor and order dated 12th September, 2001 was passed in this behalf. On 23rd November, 2001, in CA No. 797/2000 this Court passed orders for convening and holding meetings of the creditors. It was noted therein that there five classes of creditors. Counsel for the company was directed to inform on the next date, time and venue on which each of these meetings could be held. However, before the next date when the schedule could be intimated and the meetings could be held, it appears that some differences started brooding between RHSL and other group headed by Mr. S.K. Modi (hereinafter referred to as "S.K. Modi Group").

6. Various developments took place which shall be taken note of in detail at appropriate stage. Suffice is to state that Annual General Meeting was held on 31st December, 2001, pursuant to the orders passed by this Court in CA No. 1916/2001 wherein it was decided to change the name of the company to M/s. Royal Airways Limited and Mr. S.K. Modi ceased to be a director. Thereafter, the Board of Directors of the company in its meeting held on 29th January, 2002 passed a resolution withdrawing with immediate effect, all authorities, executive powers delegated by the Board in whatever form at any point of time to former directors/officers/employees in whatever capacity. The Board also authorized only Mr. Ashok Maheshwary, Company Secretary, Mr. Kishore Gupta and Mr. Sidhhantha Sharma, directors to represent the company. Under the orders 17th April, 2002 passed by this Court in CA No. 396/2002, the Annual General Meetings were convened on 18th April, 2002 and on 6th March, 2003 this Court directed the company to file an amended scheme for compromise taking note of

that fact that there two rival claimants to the management of the company. After this order CA No. 606/2003 was filed together with the amended scheme for compromise. It is clear from the aforesaid narration that it is RHSL, which claims to be in control of management of the company on 31st December, 2001 and this application was also filed in the name of the company by this group. In this application, after hearing the parties at length, including objections of S.K. Modi Group as well as various petitioning creditors whose winding up petitions were pending in this Court, the Court passed a detailed order opining that the updated scheme sought to be submitted by the applicant is bona fide and reasonable and prima facie feasible as well as in public interest and in the interest of all the creditors and, Therefore, it should be sent for consideration u/s 391(1) of the Act. Requirement of convening and holding meetings of Lufthansa and trade creditors was dispensed with as Lufthansa had already given its consent to the updated scheme and consent of the trade creditors representing 82% of the total value of these classes of creditors was also filed. It was directed that meetings of the Inter Corporate Depositors as well as Staff Creditors of the company be convened and necessary modalities thereof were delineated in that order.

7. Pursuant to the aforesaid orders, meetings of the Inter Corporate Depositors and Staff Creditors were held and the scheme was approved by the Staff Creditors unanimously and by Inter Corporate Depositors by a majority of more than 3/4th. Both the Chairpersons, appointed for these meetings, have filed their reports confirming this. As a consequence thereof, CP No. 385/2003 is filed under Sections 391-394 of the Act seeking approval/sanction of the scheme for compromise with the creditors on the ground that all the classes of the creditors have approved the said scheme. Notice in this petition was directed to be issued to Central Government through the Regional Director, Department of Company Affairs, Kanpur and the Official Liquidator attached to this Court. The Regional Director as well as the Official Liquidator have given their no objection to the proposed scheme. However, three objectors have filed their objections: They are S.K. Modi Group, Malanpur Steels Ltd. and Paradise Credit Pvt. Ltd. Before coming to the objections filed by S.K. Modi Group, let me first have the account of disputes that erupted between RHSL and S.K. Modi group qua the company.

8. As noted above, CA No. 797/2000 was filed in May, 2000 when the groups were working in unison. That application was in fact a result of joint effort between the parties. S.K. Modi Group had approached RHSL for financial help and to bring the company out of woods. Scheme of arrangement with creditors was, accordingly, filed. This matter kept pending for some time because of various winding up petitions filed against the company and the petitioning creditors were heard in the matter. RHSL was also allotted 810,77,500 CRCPs on 17th October, 2000. In the board meeting held on 27th/28th February, 2001 these shares were allowed to be converted into equity shares. If this move is treated as correct, RHSL's shareholding in the company would be 56.87% and the company virtually becomes a subsidiary of RHSL. In the meantime, some rift started between the two groups. First salvo was Suit No. 1829/2001 filed by an

independent director, Mr. Kishore Gupta of the company in which order dated 5th September, 2001 was passed restraining Mr. S.K. Modi, Mr. A.K. Gupta and Mr. D.K. Babbar from making any representation to the stock exchanges, banks, Government authorities and others that they are authorized to act on behalf of the company or that they have any authority to issue instructions on behalf of the company, unless so specifically authorized by the Board of Directors of the company. Thereafter, the company issued a notice to convene its Annual General Meeting on 31st December, 2001. S.K. Modi Group tried to obtain an order of injunction, against holding of this Annual General Meeting, from this Court. However, it failed in its attempt to get such an order from a Single Judge or in appeal from a Division Bench. An employee of S.K. Modi Group, however, obtained an injunction from the Court of Civil Judge, Ghaziabad staying the said Annual General Meeting. However, this Court stayed the order of Civil Judge, Ghaziabad vide its order dated 31st December, 2001 observing "the company is entitled to go ahead with its meeting notwithstanding any order passed by any Court subordinate to any High Court in the country". According to the petitioner, the said Annual General Meeting took place. S.K. Modi Group and two of its directors retired and were not re-appointed. They, Therefore, ceased to be the directors. Thereafter, another Annual General Meeting was held on 18th April, 2002, after obtaining orders of this Court in CA No. 396/2002 and some more decisions were taken. S.K. Modi group has filed Suits No. 1961/2001, 237/2002, 350/2002 and 820/2002 inter alia, challenging the Annual General Meetings held on 31st December, 2001 and 18th April, 2002 as well as conversion of CRCPS into equity shares held by RHSL. However, there are no restraint orders passed in these suits so far.

9. Certain company applications were also filed in these proceedings and orders passed from time-to-time. Apart from applications to which reference has already been made, it may be useful to take note of two such applications. CA No. 1852/2001 was filed by one creditor, Macho Foods Pvt. Ltd. alleging misappropriation of certain amounts by S.K. Modi Group and two other directors associated with the group. Allegations made were that the Board of Directors in its meeting held on 30th July, 1996 made allotment of 1,16,24,472 shares at a face value of Rs. 10/- for Rs. 40/-(Rs. 10/- + Rs. 30/- premium). Out of this 1,15,49,272 shares were valued at Rs. 33,31,70,880/- which were allotted to three investment companies belonging to S.K. Modi group, namely, Modi Overseas Investment Pvt. Ltd., Kesha Investments Pvt. Ltd. and Paradise Credits Pvt. Ltd. An innovative and deceitful methodology was introduced for making payment against these shares, without at the same time affecting the pockets of the three investment companies. The company entered into a lease agreement with M/s. Agache Associates agreeing to take the premises at Calcutta at a monthly rent of Rs. 10,000/-. However, it also agreed to give security deposit of realisation amount of Rs. 36 crores. This artificial liability towards Agache was created in the books of Modiluft Ltd. so as to assign the liability of payment of security deposit to the investment company of S.K. Modi group. This liability of

Modiluft was manipulated and shown to be taken over by the said investment companies and consequently the partly paid shares held by the investment companies remained wrongly shown as fully paid up shares. In this application, after hearing the parties, the Court passed a detailed interim order dated 28th January, 2003 attaching property bearing No. 15, Ratan Babu Road, Cossipore, Calcutta and directing that it shall not be disposed of in any manner or its possession parted with without the leave of the Court and also observing that if the amount of Rs. 36 crores given as security by the company minus the rent up to date at Rs. 10,000/- per month is deposited in this Court, the attachment would be liable to be lifted forthwith. While giving these directions, the Court noted about the transaction in question as under:

"It is clear that the convoluted transaction entered into by the Company with Agache Associates prima facie appears to be a stratagem devised to account for the allotment and call money payable for 1,15,49,272 shares valued at Rs. 33,31,80,880/- by three investment companies belonging to the S.K. Modi Group i.e. Modi Overseas Pvt. Limited, Kesha Investments Pvt. Limited and Paradise Credits Pvt. Limited. The very fact that the rental for the premises is only Rs. 10,000/ per month and the security deposit as large as Rs. 36 crores is sufficient in my view to taint the transaction. No rational Explanation has been given in the reply for this extraordinarily high security deposit given by the company. No company acting prudently and guided by any sense of commercial acumen would pay a such a disproportionately large security deposit for a property with such low rental. The transaction is further rendered suspicious by the fact that the Agache Associates is a related party. The reply of the S.K. Modi Group does not explain this huge discrepancy but attempts to give a facile reply not answering the germane issue. The reply waxes eloquent about the conduct of (RHSL) and further terms this application as mala fide and instigated and inspired by RHSL. The reflection of the lease agreement as one with a related party in the company's record is not sufficient to make the transaction bona fide. No satisfactory Explanation has been given as to why this particular property was so valuable so as to invite a security deposit higher than its estimated purchase value even according to the S.K. Modi Group. Generally the security deposit has some relation to the rent for a year or at best two years but it is unheard of that the security deposit is higher than as the estimated value of the property. The Explanation about the August 2001 agreement in writing giving a long term lease with an option to purchase to the company is clearly an afterthought as no rational Explanation has been given by the company and Agache for not having entered into such an agreement contemporaneously."

10. With regard to other prayers, application is still pending.

11. CA No. 265/2003 is also filed by Mr. Siddhanta Sharma u/s 534 read with Section 441 of the Act which concerns the issue of the aforesaid shares by the Board of Directors vide its resolution dated 30th July, 1996 and the prayer made, inter alia, is to declare that the said Board resolution is void.

12. The aforesaid narration of disputes between these two groups gives a glimpse of the nature of controversy having arisen between the parties and bearing thereof in the present petition shall be considered at the appropriate stage.

13. I may also, at this stage and before considering the objections of the these objectors, state that as per the averments by the petitioner in CP No. 385/2003, the efforts which it has made for relaunching the company apart from deposit of Rs. 9 crores in this Court, it has settled the matter with many creditors by making them payments. These creditors include Indian Oil Corporation settlement with which was duly recorded in CP No. 68/1997 vide orders dated 30th May, 2001; M/s. Hindustan Petroleum Corporation Limited with which settlement was recorded in CP No. 237/1998 vide orders dated 12th September, 2001. Settlements are also reached with Bharat Petroleum Corporation Limited, Mahanagar Telephone Nigam Limited and the Department of Customs. As far as Department of Customs is concerned, it is mentioned that as many as 11 assessment orders were passed by it against the company which were not disclosed by S.K. Modi Group and they came to the knowledge of the present management only during the proceedings in CWP No. 6611/2000 against another assessment order. Various legal steps were taken and in the process, matter was also settled with Air UK Leasing Limited which became necessary to clear the decks insofar as assessment orders passed by the custom authorities were concerned and ultimately the Department of Customs also granted no objection certificate dated 13th August, 2003 subject to certain conditions which were complied with and thereafter the Department of Customs issued another no objection certificate on 1st September, 2003 for relaunch of the airline operations of the company. As per the petitioner, it has accordingly paid Rs. 40,95,18,433/- to 7 creditors till 15th September, 2003. Thus, according to the petitioner, while on the one hand it has taken positive steps for relaunch of the airlines by coughing out approximately Rs. 41 crores to certain creditors and taking all necessary permissions for relaunch, on the other hand, the company suffered losses on account of various fraudulent acts of the erstwhile management. Significant among these facts is the issue of share capital in the year 1996 and rental agreement with Agache Associates with payment of Rs. 36 crores as security deposit.

14. I may also note at this stage itself the caveat put by the petitioner insofar as objections of S.K. Modi Group are concerned. It is contended that S.K. Modi Group is specifically restrained from representing the company vide order dated 5th September, 2001 passed in Suit No. 1829/2001 as noted above. It is also pointed out that the said order passed by this Court was reaffirmed by the Bombay High Court in Suit No. 702/1997 and authority of S.K. Modi Group to issue instructions on behalf of the company was held to be bad and vocative of the said order. This order was upheld in appeal by the Bombay High Court in Chamber Summons No. 188/2003 vide order dated 6th June, 2003. Therefore, the contention is that insofar as S.K. Modi Group is concerned, it has no right to

represent the company. It shall have no locus standi to file the objections also inasmuch this group is not a "creditor". Present petition seeks approval of a scheme which is a scheme of compromise with the creditors and not a scheme of amalgamation or merger. Mr. S.K. Modi and/or his group not being the creditors, cannot file objections.

15. There appears to be substance in the aforesaid preliminary submission made by the petitioner. As would be discussed in detailed at appropriate stage while dealing with the scheme, the scheme proposes to have compromise with the creditors. In a scheme of this nature, it is the creditors who would be concerned and not the shareholders. I may note at this stage that it was contended by learned Counsel for the objector that the scheme is motivated and mala fide with an attempt to take over the management of the company by the petitioner and to oust the S.K. Modi Group and, Therefore, this group had right to file the objections and point out these mala fides. It was submitted that although order dated 5th September, 2001 in Suit No. 1829/2001, there have been no substantial hearing thereafter even when the S.K. Modi Group was present for the same. It was also submitted that by means of illegal and invalid purported Annual General Meeting and Board meetings, S.K. Modi Group was ousted and S.K. Modi Group and other two directors were treated as having ceased to be the directors and all these issues were pending in the suits filed by this group. However, in these suits also no progress was made and the petitioner was delaying the hearing of those suits and it was necessary to go into those aspects as in case S.K. Modi Group succeeds in those suits ultimately the present petition would be liable to be dismissed on this ground itself. This argument, however, is not at all convincing. Admittedly in those suits applications for interim injunction are also filed but the objector has not been able to obtain any orders so far. Dr. A.M. Singhvi, learned Senior Counsel appearing for the petitioner is right in his submission that in the present petition seeking sanction of the scheme of compromise with the creditors, the scope and encompass of the proceedings u/s 391 of the Act cannot be enlarged to decide the disputes which are outside the scope of Section 391 of the Act. At this same time this Court cannot wait till the disposal of the aforesaid suits preferred. Merely because there is a litigation pending between the two groups would not mean that consideration of the scheme has to be kept on hold. Precisely, this very contention was rejected by this Court in the case of Bharati Mobinet Limited, CP No. 167/2003 decided on 7th May, 2004, after relying upon the judgment of the Supreme Court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., of the said judgment, the Court held as under:

"Para 10: Having held thus, let me now examine the merit of the other submission of the Counsel for the objector. It was submitted that it was necessary for the petitioner to discharge at the time of convening the meetings of shareholders and creditors the informations regarding pendency of the litigations in the various Courts. The meetings were convened in terms of the orders of this Court. In the said meetings the scheme was approved by the

required majority. The dispute which is sought to be raised by the objector, being a shareholder, is in the nature of inter se dispute between two groups of shareholders. The objector was fully aware of the pending litigations in the various Courts. In *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, the Supreme Court has held that the fact that there exists a family dispute regarding shareholding is not at all relevant for taking a decision to approve the scheme. In the said judgment the Supreme Court has held as under--

"...The equity shareholders of the transferee company had to decide in their commercial wisdom whether it is worthwhile to have a larger body of shareholders on account of the merger so that apart from the shareholding of the transferee company its objects would also get diversified and its field of operation would be enlarged with the prospect to hike in the dividend available to these shareholders after the economic and industrial activities of both the companies so amalgamated would get elongated and whether the value of their shares in such consolidated companies were likely to get a boost in the stock market. This was the commercial decision which the equity shareholders of the transferee company had to take. For taking this informed decision they were least concerned whether 5% shareholding of appellant in the company remained or did not remain within him in future. Consequently, if Arvind Mafatlal's suit ultimately succeeded before the Bombay High Court and the appellant lost in his counter-claim that would have no effect whatsoever on the informed decision which the equity shareholders were called upon to take while approving the scheme in question."

Para 11: The objector was present in the meeting of the shareholders and raised objection against the scheme. However, even in spite of such objection the required majority approved the scheme in the meeting of the shareholders. Section 393(1)(a) of the Companies Act does not ordain disclosure of all material facts. Clause (a) not only enumerates the categories of particulars, but if deliberately makes a departure by omitting any reference to materials facts. Informations regarding pending litigations between shareholders were not such informations which were required to be specifically mentioned in the communications issued to the shareholders and creditors. Non-mentioning of such informations, in my considered opinion, did not vitiate the scheme. No case of fraud is made out in the facts and circumstances of the present case. This Court found the scheme as a whole to be just, fair and reasonable and, accordingly, granted sanction to the scheme."

16. Since this is a scheme of arrangement with the creditors, if it is sanctioned, this Court would only be approving the proposal of the company to pay the creditors in the manner suggested. The Court in no way pronouncing upon the disputes over the management of the company which can always be adjudicated upon in those proceedings and, Therefore, order in this petition can be passed subject to the outcome of the proceedings in the said suits and without prejudice to the contentions of the two groups over the management of the company. Thus

there is a merit in the objection about the locus standi of the S.K. Modi Group to file such objections. However, notwithstanding the same, since certain legal objections are also raised, it would be apposite to deal with the same.

17. The first objection highlighted by Mr. Rajiv Sawhney, learned Senior Counsel appearing for the S.K. Modi Group was that the propounder of the scheme, in the name of the company, is RHSL. It is admittedly a foreign company and it is impermissible for a foreign company to invest in its airlines business in India. Therefore, it has no locus standi to file such a scheme. Reference in this connection was made to Civil Aviation Requirement Section 3 Air Transport Series "C" Part II dated 1st March, 1994 which deals with minimum requirements for grant of permit to operate scheduled passenger air transport services. It spells out that as per Sub-rule 1 of Rule 134 of the Aircraft Rules, 1937 no person shall operate any scheduled air transport services from, to, in, or across India except with the permission of the Central Government, granted under and in accordance with and subject to the provisions of Schedule XI of the Aircraft Rules. It is further mentioned that the requirements contained in this section are in addition and compulsory to the requirement contained in Schedule XL As per the eligibility requirements stated in this document, a scheduled operator's permit can be granted only to a citizen of India or a company or a body corporate provided that its substantial ownership and effective control is vested in Indian nationals. Apart from other eligibility requirements, the procedural requirements are also stated as per which the applicant has to apply for initial no objection certificate and in the application the information which is to be disclosed would include the particulars of the Directors or Chairman/CEO of the firm seeking NOC for security clearance as well as ownership pattern of the applicant. It is also provided that foreign equity up to 40% and NRI/OCB investment up to 100% would be permitted in the domestic air transport services and equity from foreign airlines will not be allowed, directly or indirectly, in domestic air transport services. As per the general requirements contained in para 10 of this document, any change in the Board of Directors/Chairman/CEO has to be intimated to the Ministry of Civil Aviation and DGCA along with the details of new chairman or directors and new chairman and directors are to be appointed only after their security clearance. Another general requirement contained in para 10.7 is that prior permission of DGCA/Ministry of Civil Aviation shall be required for change in the name of the company.

18. Based on the aforesaid provisions, it was submitted that in May, 2000 when CA No. 797/2000 was filed, both the groups were in unison with the Indian group in majority and was fulfilling the requirements. However, in case the petitioner now alleges that it has the control over the management and is the majority shareholder, it cannot get any clearance for operating domestic airlines in India as that would offend the aforesaid legal provisions. This argument is nothing but red herring. No doubt any applicant who seeks to operate airlines in India has to first obtain necessary permissions from the Government of India. Before such permissions are granted by the Government of India, the Government of India is

also to satisfy itself that the applicant fulfills all eligibility conditions and as conformed to all procedural and other requirements. However, that is the domain of the Government of India while granting such permissions. It may be noted that before investing in the company, RHSL had sought permission from the Ministry of Industry as per the applicable Government policy and due approval was given on 11th February, 2000 for investment by RHSL for relaunching Royal Airways Limited. In the said approval, permission was given to issue 14% CRCPS having face value of Rs. 100/- each with total amounting to equivalent of US \$ 17.5 million. It was also stated in the approval that the conversion of preference shares into equity would be at the option of the investors within 17 months or redemption at par after 5 years. The Secretariat of Industrial Assistance, Ministry of Industry also noted, in the said approval, shareholding pattern after the proposed issue of CRCPS. This approval was partially modified on 28th September, 2000 wherein certain formal amendments approved and denomination of shares was reduced from Rs. 100 to Rs. 10 per share. On receipt of the said approval of the Secretariat of Industrial Assistance, Ministry of Industry, Ministry of Civil Aviation issued a conditional NOC to the company vide letter dated 29th February, 2000 which was conditional upon fulfillment of certain conditions. No doubt at the time of grant of these approvals, honeymoon between S.K. Modi Group and RHSL was still on, fact remains that these approvals are extended from time-to-time and even after purported acquisition by RHSL of over 57% equity stake on 28th February, 2001 as would be clear from the following table:

Date of extension	In favor	Period of Extension
4.9.2001	Modiluft Limited	Up to March 31, 2002
28.3.2002	Royal Airways Ltd.	Up to June 30, 2002
29.7.2002	Royal Airways Ltd.	Up to September 30, 2002
13.2.2003	Royal Airways Ltd.	Up to December 31, 2002
27.2.2003	Royal Airways Ltd.	Up to March 31, 2003
21.5.2003	Royal Airways Ltd.	Up to September 30, 2003
17.11.2003	Royal Airways Ltd.	Up to March 31, 2004
15.4.2004	Royal Airways Ltd.	Up to September 30, 2004

19. The last extension was granted by the Ministry after specific information about the foreigner issue was given to it by Royal Airways Limited when it was specifically sought by the Ministry. The Government of India has, Therefore, granted a NOC to Royal Airways Limited after satisfying itself that its requirements regarding the said issue are fully met.

20. It may be noted that in this behalf that the Ministry of Civil Aviation had written a letter dated 11th March, 2004 to the company i.e. M/s. Royal Airways Limited, seeking certain information including on the following aspects:

- (i) The details of existing Board of Directors of the Company i.e. name, address, nationality, no. of shares held, etc.
- (ii) Whether the Chairman and two-third Members of the Board are Indians?
- (iii) The share-holding pattern of the Company, the number/percentage of Shares

held by various individuals, financial bodies, other entities, etc.

21. Reply to this was given by the company vide letter dated 15th March, 2004. Therefore, it is clear that the developments which have taken place, including stakes of RHSL, are within the knowledge of the Government of India and repeatedly permissions are given and extended from time-to-time thereby maintaining the continuity. There is yet another reason to repel this argument. No person including S.K. Modi Group has challenged these permissions by filing any writ petition or other proceedings or seeking annulment of these permissions. Objection of this nature viz. consideration of the validity of these permissions issued by the Government would be outside the bounds of Section 391 of the Act where we are concerned with the scheme of compromise with the creditors. I may note here that Dr. Singhvi had tried to demonstrate that his client satisfies all the legal conditions and there is no infringement of any of the provisions while granting such permissions to the company/Royal Airways Limited. He sought to argue that RHSL is an NRI-OCB which stands on an altogether different footing than a foreign company not allowed to invest and in this behalf he referred to definition of OCB and NRI as well as person of Indian origin contained in the Foreign Exchange Management (Deposit) Regulations, 2000. He pointed out that RHSL is owned, to an extent of 90%, by Mr. B. Kansagra and Mr. R. Kansagra, both of whom are persons of Indian origin and, Therefore, NRI and there is no prohibition of such NRIs to make these investments and seek permission as civil aviation requirements specifically permit and provide for investment by NRI-OCB in domestic air transport services up to 100%. Reference was made to many other legal provisions. He even took pains to demonstrate that the fact of ownership of over 57% equity shares capital of the company by RHSL was acknowledged and represented to the concerned authorities by S.K. Modi Group itself while applying for grant of initial no objection certificate from the Government of India and referred to various letters/communications in this behalf. He also pointed out that at present members of the Board of Directors of Royal Airways Limited had been duly security cleared; the then Vice-President (Corporate Communications) had intimated the Director General Civil Aviation (DGCA) about the change of Board of Directors vide letter dated 20th March, 2001. However, it may not be even necessary to go into all these aspects in the present proceedings. Therefore, it is not necessary to discuss the judgment in the case of The State Trading Corporation of India Ltd. and Others Vs. The Commercial Tax Officer, Visakhapatnam and Others, cited by the objector in any detail which is not relevant in the present context either.

22. The other objection of S.K. Modi Group is that CRCPS were never converted into equity shares. Terms of conversion were changed at the Board meeting held on 17th October, 2000 and further amended at the 15th Annual General Meeting held on 24th November, 2000 by a resolution passed u/s 94 of the Act. It was further argued that the petitioner has fabricated the documents to mislead this Court in this regard. It was submitted that when S.K. Modi Group entered into

arrangement with RHSL and CA No. 797/2000 was filed, RHSL was controlled by Verus Group who were NRIs and, Therefore, as far as their investment in the company is concerned, it was not to pose any problem, that too when the methodology adopted was the issue of CRCPS as per which RHSL had to remain a foreign investor. It was for this reason that in August, 1999 the Memorandum and Articles of Association of the company were amended to permit issuance of CRCPS u/s 81 of the Act and it is this amendment which was approved by FIPB which was obtained for the investment of Verus Group and the Board also approved in February, 2000 this particular scheme which became the basis of CA No. 797/2000. However, the Court had asked the company to amend the scheme as by that time the Verus Group had gone out and RHSL was owned and controlled by Kansagra brothers. This led to arriving at a revised arrangement between S.K. Modi Group and RHSL as per which entire US \$ 35 million was to be arranged by RHSL. Accordingly, on 9th October, 2000 a Board meeting was held and this proposal was accepted and pursuant thereto notice was given for convening of Annual General Meeting for 24th November, 2000. The purpose was to amend Articles of Association so as to change capital clause regarding preferential shares. Before the proposed Annual General Meeting, Board meeting was held on 17th October, 2000 wherein the Board was informed that on 13th October, 2000 RHSL had remitted US \$ 17.75 million as subscription money as part of US \$ 42 million agreed to be contributed by it. The nominee Directors of RHSL assured the company that after the allotment of CRCPS the balance amount of US \$ 24.25 million would be infused in the company for which arrangements had been made. In the said meeting, it was also noted that if CRCPS are now issued and if the shareholders amend authorised capital Clause (to enable the company to issue equity shares to RHSL by converting the CRCPS as proposed) there would be contradiction and confusion and CRCPS would not be convertible unless the shareholders pass further resolution subsequently to enhance the equity capital from Rs. 64 crores to Rs. 150 crores. Accordingly, following resolution was passed:

"The Board discussed the matter and passed the following resolution unanimously--

RESOLVED that the agreement of 16th October, 2000 initialled by Mr. Satish Kumar Modi and Mr. Bhupendra S. Kansagra be accepted subject to the following modifications and conditions--

(i) That the allotment of CRCPS will be subject to Shareholders not approving the amendment to the Authorized Capital Clause as proposed in the notice dated 9th October, 2000 already dispatched to all shareholders. In the event of amendment being approved then the allotment now made shall be deemed to be of only non-convertible preference shares.

(ii) That the rights of conversion would accrue to RHSL only after it becomes a company substantially owned, controlled and managed by Indian nationals and an undertaking is furnished to the Company to this effect and the prior

permission for conversion is taken from the Government including of FIPB, Civil Aviation Ministry and DGCA."

23. In the Annual General Meeting held on 24th November, 2000 the shareholders allegedly amended the Articles of Association and according to the objector there was no such decision taken in the said Annual General Meeting and thereafter disputes started which led to filing of Suit No. 1829/2001 against S.K. Modi Group and Suit No. 1961/2001 by S.K. Modi Group. Therefore, it was contended by the objector that there was no proper and valid decision for conversion of CRCPS into equity shares.

24. It may be stated at the outset that for allotment of CRCPS to RHSL, special resolution was passed at the Annual General Meeting in its 14th meeting held on 27th August, 1999 u/s 81(1A) of the Act for preferential allotment. The explanatory statement given therein contained a specific assertion that post conversion RHSL would own 57.28% of shares in the company. Thus conversion was contemplated even when decision was taken at the 14th Annual General Meeting in the year 1999 for allotment of CRCPS to RHSL. The annual report for the year 1999 which was circulated for the 14th Annual General Meeting, there were disclosures about the RHSL and proposed investments, etc. as well. The Board, when it decided to allot CRCPS to RHSL in its meeting held on 17th October, 2000, recorded that the same was in accordance with the shareholders resolution passed in the Annual General Meeting held on 27th August, 1999 and that these shares would be convertible. Conversion terms were never changed. In fact, thereafter Mr. D.K. Babbar, director belonging to S.K. Modi Group himself wrote letter dated 17th October, 2000 to Delhi Stock Exchange informing about the allotment of CRCPS to RHSL and stating that it was in accordance with the terms of approval given by the shareholders u/s 81(A) of the Act. Form II was also enclosed therewith which was signed by Mr. S.K. Modi himself. Thereafter, letter dated 16th November, 2000 was also addressed by the company to the General Manager, Exchange Control Department, RBI annexing therewith certified copies of the approval of shareholders in the meeting held on 27th August, 1999 and the Board resolution dated 17th October, 2000. Interestingly, these resolutions were certified by Mr. A.K. Gupta of S.K. Modi Group to be true and correct. Thus even after the allotment of CRCPS to RHSL, S.K. Modi Group confirmed the same and the aforesaid correspondence would show that not only it was a party to this decision, it had no objection about the issue of CRCPS to RHSL.

25. Insofar as conversion of CRCPS into equity shares is concerned, the petitioner has placed on record notice dated 17th November, 2000 issued to the Board of Directors as per which RHSL gave notice of three months of its intention for opting to convert 81,077,500 CRCPS into equity shares. This was signed by Mr. B.S. Kansagra, President of RHSL. After the lapse of three months, another notice dated 27th February, 2001 was given to the Board of Directors of the company proposing the board to CRCPS into equity shares with immediate effect.

The petitioner has also placed on record minutes of the meeting of the Board of Directors held on 27th February, 2001 and 28th February, 2001 at the Corporate Office of the company and as per Item 8 thereof following resolution was passed on 28th February, 2001:

"RESOLVED THAT subject to such approvals as may be required, the consent of the Board be and is hereby accorded to convert the 8,10,77,500 Cumulative Redeemable Convertible Preference Shares of Rs. 10/- each, fully paid up, into 8,10,77,500 Equity Shares of Rs. 10/- each, fully paid, of the company.

RESOLVED FURTHER THAT consequent to above conversion, 8,10,77,500 Equity Shares of Rs. 10/- each, fully paid up, be and are hereby allotted as per following details:

Name & address of allottee No. of equity shares Distinctive numbers Royal Holding Services Ltd. 8,19,77,500 63394001 to 144471500

RESOLVED FURTHER THAT the share certificates in relation to above allotment be issued under the Common Seal of the Company in the presence of any two Mr. S.K. Modi, Mr. Atul Sharma and Mr. Kishore Gupta, Directors of the Company, who shall sign the same in token of their presence and they be counter signed by Mr. A.K. Maheshwary, Company Secretary.

RESOLVED FURTHER THAT Mr. A.K. Maheshwary, Company Secretary or Mr. Kishore Gupta, Director be authorised to file return of allotment with the Registrar of Companies (NCT of Delhi) within the statutory time and he further authorised to complete all formalities to get these shares listed on stock exchanges where the equity shares of the Company are listed and to sent intimation of allotment to such other agencies as may be required under applicable laws."

26. The aforesaid decision taken in the Board meeting was communicated by the company through its Company Secretary to the Delhi Stock Exchange vide letter dated 27th February, 2001 and to the Manager-Listing of Delhi Stock Exchange Association Ltd. vide letter dated 28th February, 2001. Form II in this behalf was also filed with the Registrar of Companies on 20th March, 2001, vide letter dated 15th September, 2003 the Delhi Stock Exchange informed the company that the securities/equity shares issued to RHSL had been listed and admitted to dealings on the stock exchange with effect from 18th September, 2003 and that the members of the exchange were being informed accordingly. In the meeting of the Board of Directors held on 6th March, 2001, minutes of the meeting held on 28th February, 2001, were read and confirmed. Significantly, this meeting was attended by Mr. S.K. Modi as well. Therefore, it is neither permission nor proper for S.K. Modi Group to contend that no Board meeting took place on 27th/28th February, 2001 when he himself accepted that such a meeting took place and the minutes of that meeting were confirmed by the Board on 6th March, 2001 in his presence.

27. In view of the aforesaid documents coming on record, prima facie, I am convinced that RHSL was issued and duly allotted CRCPS and thereafter the Board had taken a decision to convert the said CRCPS into equity shares and acted upon that as well and this decision of the Board was in tune with the decision taken by the shareholders in its 14th Annual General Meeting. However, this is a tentative expression for the purpose of present proceedings and without prejudice to the rights and contentions of the parties in the suits pending between them.

28. It was also contended by Mr. Sawhney that the scheme of arrangement with the creditors is the one which is projected in CA No. 797/2000. The Court had only permitted the company to update the said scheme. Instead of doing so, altogether a new scheme has been filed which could not have been done. This argument is far from sonorous when judged in the light of the orders of this Court permitting the petitioner to file the scheme CA No. 606/2003 was thus, filed giving the details of the scheme. In this CA order dated 29th July, 2003 was passed not whereof has already been taken above. This scheme was found by this Court to be bona fide and the Court directed meetings of two categories of creditors and dispensed with the meetings of other two categories of creditors. While passing this order, the Court had considered the objections of S.K. Modi Group and rejected the same. It is this scheme regarding which two creditors had stated that they had no objection and, Therefore, the meetings of the said categories of creditors was dispensed with. Other two categories of creditors in the meetings have resolved in favor of the scheme. Therefore, all the categories of creditors have approved the scheme on the basis of which CP No. 385/2003 is now filed. With Court orders dated 6th March, 2003 passed in CA No. 797/2000 and 29th July, 2003 passed in CA No. 606/2003 it is this scheme which is under consideration now and the scheme propounded in CA No. 797/2000 has to be read with these amendments.

29. I am also unable to agree with the submission of S.K. Modi Group that the scheme seeks to achieve oblique/collateral purposes to justify its purported illegal take over of the management. It is reiterated that we are examining the scheme of compromise with the creditors and not dealing with the inter se dispute of these parties about the management of the company. Once this scheme is approved the company will have to pay the creditors in accordance with the arrangement propounded in the scheme. The disputes of the two groups, dubbing the same as disputes relating to management, can be taken care of in the various suits by the two groups against each other pending in different Courts. It is, however, clarified that the entire matter is examined only with reference to the scheme of compromise with the creditors and approval of the scheme will have no bearing on the respective contention of the parties in pending suits.

30. It was also the contention of S.K. Modi Group that RHSL had an obligation to secure US \$ 17.5 million as secured debt from Allied Boston Bank which it has

failed to do. However, this submission was refuted by Dr. Singhvi, learned Senior Counsel for the petitioner as factually incorrect as entire amount had been secured. It was also pointed out that in any case the statement made in CA No. 797/2000 was only to the extent that:

"Pursuant to the efforts of the Applicant Royal Airways Limited (formerly Modiluft Limited) and Royal Holding Services Limited through its placement agents, a Bank namely Allied Boston Bank, San Francisco, United States has also agreed to advance to Modiluft Limited a long term debt of US \$ 22.5 million and has committed for provision of these funds on the terms contained on the letter of commitment dated 28th April, 2000."

31. Thus although RHSL was permitted to invest US \$ 17.5 million towards equity shares and it was the responsibility of the company to arrange for the secured debt of US \$ 22.5 million from Allied Boston Bank and securing necessary approval in this regard, S.K. Modi Group failed in its attempt to do so and thereafter RHSL agreed to provide assistance to the company to raise the loan indirectly by securing the loan from Allied Boston Bank in its own name and thereafter transferring it to the company. RHSL then entered into CRCPS purchase agreement with the company and remitted the said funds of US \$ 17.5 million to the company. It was also pointed out that RHSL has also deposited Rs. 9 crores in this Court in the present scheme.

32. Some of the objections are scheme specific i.e. these objections question the workability of the scheme itself and contention of the objectors is that the scheme is neither feasible nor practicable or workable. We may now take note of these objections.

1. A total of approximately Rs. 80 crores was to be infused by RHSL for the revival of the airlines. The present Scheme states that about Rs. 51 crores have/will be paid to meet Government liabilities. There is no Explanation regarding the balance amount.

2. There is no Explanation in the scheme about how aircrafts will be purchased/leased, how many and then.

3. Means of finance for the first Installment proposed under the scheme seeks to utilize an amount of Rs. 9 crores lying in this Court which was deposited by the S.K. Modi Group in the scheme propounded by them and not by the new investors under this scheme. The same is, thus, the money of the S.K. Modi Group and cannot be utilized by RAL as part of the present scheme.

4. Means of finance for the second Installment proposed under the scheme is preposterous. It is premised entirely upon forfeiture of shares of the S.K. Modi Group which are subject matter of dispute in CA 265/2003. In any case, a scheme cannot be founded on finance, the receipt of which is contingent upon successful adjudication of a pending litigation. Unless CA 265/2003 is decided, means of finance (2) cannot be gone ahead with. Further, assuming that RAL has

the power to forfeit the shares, why has it not done so till now?

5. Conditions precedent to the release of the first Installment payment envisage the support of the creditors to any reorganization in the capital structure of RAL including reduction of capital if such reorganization is initiated within the moratorium. This, in effect, means that RAL is trying to purchase support and dictating to its creditors that it will not pay them off unless they support the said reorganization.

6. The scheme lays down a moratorium of 12 months from the effective date or date of reissue and allotment of partly paid shares, on a rights basis, whichever is earlier. The concept of this moratorium is a farce because conditions precedent to payment of second Installment envisage Governmental approvals for relaunch, which may never be given, especially in view of the fact that the management is disputed.

7. Terms of the scheme have been changed after it has been approved by the creditors at the meetings ordered by this Court. This has been done without informing the Court, much less seeking its leave. The second motion petition does not disclose the fact that the terms have been altered. RAL is, Therefore, guilty of suppressio veri and misleading this Court.

33. Dr. Singhvi gave vitriolic defense and submitted that same were totally frivolous and were taken for the sake of such objections. Regarding first objection, his submission was that the RHSL had already spent Rs. 98 crores and the statement giving details of such expenditure was filed. With respect to second objection, it was pointed out by Dr. Singhvi that presently the company has a valid NOC from the Ministry of Civil Aviation, Government of India. The company has its own business plans regarding purchase/lease of aircrafts and will abide by them. He explained that the present scheme is a scheme of compromise with the creditors and not a scheme of rehabilitation where such business plans ought to be disclosed. Since the creditors would not be concerned with these future business plans for running the airlines, the same have not been divulged in the scheme.

34. Third objection also appears to be far-fetched. It is clear from the facts already noted above that in respect of deposit of Rs. 9 crores, this money was deposited for payment to the creditors in view of various petitions filed by the petitioning creditors seeking winding up of the company and proposal of the company to pay the creditors. The money was deposited pursuant to the orders passed by this Court. Therefore, money would belong to the company and if the scheme of arrangement is ultimately sanctioned by this Court, the company shall have every right to seek repayment of the creditors in terms of the scheme out of the aforesaid funds. It is untenable on the part of the objector to contend that the said money is deposited pursuant to the orders passed in CA No. 797/2000 and, Therefore, cannot be touched by the petitioner in the scheme propounded now which is alleged different from the one propounded in CA No. 797/2000. I

have already noted above that this Court had given permission to update the said scheme contained in CA No. 797/2000 and pursuant thereto CA No. 606/2003 was filed in which orders dated 29th July, 2003 were passed. In this argument, the objector conveniently glosses over an important fact, namely, the money of Rs. 9 crores is deposited by none less but RHSL and it represents part of the amount which RHSL was supposed to bring in.

35. In response to objection No. 4, Dr. Singhvi gave a fair suggestion that his client would not have any objection if CA No. 265/2003 is decided by this Court before the due date of payment of second Installment. He also gave an undertaking on behalf of the company to pay the second Installment in any case. He submitted that this was without prejudice to his contention that the company had necessary power under the Articles of Association to forfeit the tainted shares and Mr. S.K. Modi had himself wanted these shares to be forfeited. Therefore, this objection also cannot detain me to proceed further in the matter.

36. In reply to objection No. 5, answer of Dr. Singhvi was as under:

(i) It does not lie in the mouth of a shareholder to take this objection when the creditors--whose support is envisaged and to whom this condition is addressed -- have accepted it.

(ii) In his limited right as a shareholder, Mr. S.K. Modi may object to this as and when such re-organization shall proceed in accordance with law.

37. I am in agreement with the aforesaid submission of Dr. Singhvi.

38. As far as objection No. 6 is concerned, it was clarified by Dr. Singhvi that the "approvals" envisaged under para 4 of the scheme under the heading "conditions precedent to payment of second Installment" are not the remaining Government approvals for relaunch of the airlines. In fact these approvals were already there. The approvals mentioned in para 4 were the foreign exchange approvals from "regulatory authorities" and approvals for re-issue of partly paid shares that are required in each given case. Such approvals are necessary as without these approvals no payment can be passed on. It is clear that this provisions is added to state what would be the legal position regarding necessity of having these approvals. The petitioner is right in its submission that at this stage when we are concerned with the question of sanction of the scheme, it cannot be presumed that such approvals would not be forthcoming more so when till now all approvals sought for have been granted by the Government. The petitioner cannot be compelled to first seek approvals even of the nature mentioned in para 4 of the scheme and only then approach the Court. It would, in that case, be a chicken and egg situation. It is possible that if the propounders approach the Government seeking these approvals at this stage, the Government may state that without sanction of the scheme seeking all these approvals is premature. These are niggling doubts about the scheme. Mere on surmises and uncalled for apprehensions of S.K. Modi Group that all such approvals may not be forthcoming, the consideration of the scheme cannot be delayed or postponed.

39. It is also not correct on the part of the objector that terms of scheme have been changed after it has been approved by the creditors at the meetings ordered by this Court. It may be noted that the only modification proposed in the scheme relates to issues of shares of RAL on a rights basis, which has been necessitated by a subsequent change in the policy of the Reserve Bank of India which derecognizes OCBs as an investor class and directs that OCBs shall not purchase equity of preference shares or convertible debentures offered on a rights basis by an Indian company, unless specifically permitted. The modification proposed in the scheme is that in case at the time of the rights issue, RHSL is not permitted by law to subscribe to the shares offered to it on a rights basis by RAL, RHSL will renounce its right to subscribe in favor of NRIs who control nearly 90% of RHSL and/or any other NRIs. The NRIs who control RHSL have conveyed their willingness to deposit the entire share allotment money in respect of the rights entitlement pursuant to the rights issue with this Court as share application money at least 30 days prior to the second Installment date. The second motion petition specifically discloses the proposed modification and its reasons. This is only a particular clause introduced to take care of a specific eventuality, namely/ if RHSL is ultimately not permitted by law to subscribe to shares offered to it on rights basis by the company, in that eventuality RHSL is to renounce its rights to subscribe in favor of the NRIs who controlled approximately 90% of RHSL. Such renunciation is permissible u/s 80(1)(c) of the Act. By doing so, RHSL is ensuring, in all eventualities, its commitment to the compromise being offered and to settle with the creditors in any event. Therefore, I am of the view that the proposed modification does not alter the essential features of the scheme in any eventuality.

40. I do not find that the scheme is inherently incapable of performance and unworkable. I would take note of some of the case law cited at the Bar, which would throw light on the approach to be adopted in such cases.

41. Dealing with such aspects, the Gujarat High Court (speaking through D.A. Desai, J. as His Lordship then was) and considering the matter in all its length and breadth in *re. Maneckchowk and Ahmedabad Manufacturing Co. Ltd.* reported (1970) 40 Comp. Cas. 819 made the following observations which would equally apply to the present fact situation:

"Even at the cost of repetition, it must be mentioned that the scheme is opposed by a very few creditors and an infinitesimally small number of shareholders. The fact that the scheme has been approved by a requisite majority of shareholders is undoubtedly a strong argument in its favor, unless it is shown that their approval was not obtained fairly and the terms of the scheme are not such as a reasonable man may accept. The approval of a scheme by statutory majority of creditors and members is not decisive of the matter. But it is equally true that due weight should be attached to the choice indicated by the creditors and members who are vitally interested in the company and the scheme affecting the company. Further, on the analysis of the votes cast at the meeting, the salient

feature that comes out to the surface is that the scheme was opposed especially by those who, apart from the merits of the scheme, are personally opposed to Gopaldas Parikh and Linubhai Banker. The feud appears to be more between the blood relations rather than between the creditors and members who have offered their best commercial judgment to the scheme on its merits. It is an inescapable conclusion that Chandulal Banker as a power of attorney holder of Shardaben, and Shantaben who is the principal contender, opposed the scheme tooth and nail not because he had the interest either of the company or creditors and members at heart but because he had to leave the active management when Gopaldas Parikh and Linubhai Banker stepped in and because of his personal vendetta against both of them. In this view of the matter it is not possible to accept the submission of Mr. Vakil that the scheme should not be imposed upon dissentient members."

42. In this very judgment, the approach to be adopted by this Court in considering such a scheme was also delineated and the discussion on this aspect makes the following reading:

"How should the Court approach a scheme of compromise and arrangement submitted for its sanction which is shown to have been approved by a statutory majority of creditors and members who are directly affected by the scheme. The burden, of course, of showing that the scheme is a fair and reasonable one initially lies on the petitioner. The petitioner must *prima facie* show that the scheme is pre-eminently fair and reasonable as a prudent and reasonable shareholder would approve of and not object to. In order to show *prima facie* that the scheme is fair and reasonable, it is open to the petitioner to submit that due weight must be accorded to the fact that the majority has recorded a decision in favor of the scheme and the Court must not lightly ignore or set aside that decision. In *re. Sidhpur Mills Co. Ltd.* Miabhoy, J. (as he then was), in this connection, observed as under:

Therefore the scheme has not got to be scrutinised by the Court with that much care with which an expert will scrutinise it, nor will it in a carping spirit with a view to pick holes in it. If the majority is acting in a bona fide and honest manner and in the interests of the class that it purports to represent, then, if the scheme is such as a fair-minded person, reasonably acquainted with the facts of the case, as prevailing at the time when the scheme was sponsored seeks to represent, then, unless there are some strong and cogent grounds to show that the scheme was conceived, designed or calculated to cause injury to others, the Court will ordinarily sanction it, rather than reject it."

This must be the approach of the Court while examining the scheme and the Court should, keeping in view all the aspects of the matter, prefer a living scheme to compulsory liquidation bringing about an end to a company. Reference may be made to *Lawrence Dawson V.J. Hormasji*, AIR 1932 Rang.154, *Cunliffe J.* has observed as under:

"The Court is of course not a mere machine for registration. It will look into the proposed scheme much as a Court of appeal will canvass, if asked to do so, the decision of a jury, to ascertain if there was reasonable evidence to support their verdict; but it will, I think, always also prefer a living scheme to a compulsory liquidation bringing about an end to a company, and usually without any hope of payment in full."

The Court in exercising its discretion u/s 321(2) must treat it as cardinal that its function does not extend to usurping the view of the members or creditors. It must look at the scheme to see that it is a reasonable one and while so doing, the Court will be strongly influenced by a big majority vote and the reasons which actuated the contesting creditors in opposing the scheme. None the less it is essential that the scheme must be a fair and equitable one though it is none of the business of the Court to judge upon the commercial merits which in fact is the function of the creditors and members."

43. It is also trite law that the Court would not reject a scheme simply because there could have been a better scheme. In *re. Sussex Brick Co. Ltd.* reported as 1960 (1) ALL E.R.773, the Court brushed aside this type of criticism of the scheme in the following manner:

"The applicant set out certain criticisms in his affidavit which undoubtedly show that a good case could be made out for the formulation of a better scheme, of a fairer scheme of a scheme which would have been more attractive to the shareholders, if they could have understood the implications of the criticisms. I have no doubt at all that a better scheme might have been evolved; but is that enough? Is it necessary to establish the validity of such an offer as put forward in the present case? A better and fairer offer might have been made, but the fact that the offer that was made is not one hundred per cent, fair or right is not the kind of unfairness with which MAUGHAM, J., was dealing in *re. Hoare & Co., Ltd.* I think that the scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. I do not think that merely finding items in the scheme or details of the scheme which are open to valid criticism is enough. A scheme can be effective to bind a dissenting shareholder without complying to the extent of one hundred per cent, with the highest possible standards of fairness, equity and reason. After all, a man may have an offer made to him and, although he likes something better, may be prepared to accept it, because it is good enough in all the circumstances. It may well be that the grounds for criticizing the present scheme are not grounds of such a nature as to render the whole thing unfair in the sense intended by MAUGHAM, J., in *re. Hoare & Co. Ltd.* Where the statutory majority has accepted the offer the onus must rest on the applicant to satisfy the Court that the price offered is unfair. I have some information about the present share values. I have no information about what the present value of *Sussex Brick Co. Ltd.*'s shares is because they are no longer quoted, but there is no doubt that three shares in that company which were worth at the relevant dates something like 21s. 3d. have now been transposed into two shares in *Redland*

Holdings Ltd., which are worth 43s.1d. today on the Stock Exchange quotation. It is a rather curious result that a man who parts under compulsion with property, which all agree was worth something in the neighborhood of 22s. should both now find himself in possession of property which, according to Stock Exchange quotations, is worth nearly twice that amount i.e. 43s. and should say that the exchange is unfair. It is a little hard to see that he has driven such a bad bargain. True, the scheme offers specific grounds for criticism, but in this connexion, "unfairness" means patent unfairness, obvious unfairness, convincing unfairness, and that has not been established in the present case.

I am not satisfied that this scheme is unfair in the sense in which MAUGHAM, J., used that word in *re. Hoare & Co. Ltd.* and I decide that the application ought not to succeed."

44. Same thrust in the approach to be adopted by the Court was given by the Gujarat High Court in *Navjivan Mills Co. Ltd.*, Karol, In *re.* reported as (1972) 42 Comp. Cas. 265:

"There are certain well recognised limitations on the Court's power to sanction the scheme. First limitation is that the Court would not sanction a scheme which would be invalid without the Court's sanction if every creditor or member concerned agreed to it. In other words, the Court has no power to sanction something which the parties could not do by agreement. The second fetter on the Court's power is that the Court cannot sanction an act being done if the law permits it only subject to conditions and the agreement seeks to dispense with those conditions such as where the scheme of compromise and arrangement also includes within its ambit reduction in share capital in respect of which special procedure provided in the Act and the rules has not been carried out. Third known fetter on the Court's power is that the Court would not ordinarily sanction a scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. Within the limitations set out above, the Court will allow the companies the greatest freedom in devising schemes to suit their requirements and will approve those schemes if they are fair to all whose interests are affected. It has now been established that the "compromise and arrangements" covered by Section 391(1) which is in *pari materia* with Section 206 of the Companies Act, 1948 (United Kingdom) are of the wide character, ranging from a simple composition or moratorium to an amalgamation of various companies, with a complete reorganization of their share and loan capital. The discretion of the Court as spelt out above is within these limitations and, Therefore, even though I have sanctioned the scheme, I would re-examine it in the light of the objections put forth on behalf of the Central Government to find out whether there is anything in this scheme which is firstly detrimental either to the interest of shareholders and creditors of Kohinoor or to the interest of the creditors and shareholders of Navjivan or from a broader aspect of purity of administration of private sector and commercial morality and also to find out whether by sanctioning such a scheme the wealth and power flowing from wealth

would be concentrated in the hands of few to the detriment of many."

45. After examining the aspects outlined above, the Court came to the conclusion that the scheme in question should be approved and summarized in the following manner its reasons for doing so:

"I should now like to give my reasons why I had accorded sanction to the scheme. As stated at the outset, the Court, before according its sanction to the scheme of compromise and arrangement, must be satisfied that the provisions of the statute have been complied with; that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. That is the well recognised approach of the Court to a scheme of compromise and arrangement. The scheme should not be examined in the way a carping critic, a hairsplitting expert, a meticulous accountant or a fastidious Counsel would do it. It must be tested from the point of view of an ordinary reasonable shareholder acting in a businesslike manner taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question (vide *In re. In Re: Sidhpur Mills Co. Ltd.*, At no stage a dispute was raised that the provisions of the statute have not been complied with by the petitioner before coming to the Court u/s 391(1) and after the meetings were convened and the scheme was approved u/s 391(2). At no stage a dispute has been raised before me, now that the scheme has been very meticulously examined by the officer of the Central Government that even by a remote chance any provision of the statute was not complied with. The next question is whether the class was fairly represented. I should like to point out that because of the radical change made by Kohinoor in the ratio of ordinary shares, the meeting of the ordinary shareholders of Navjivan had to be called twice. At the first meeting of the ordinary shareholders, out of a total 45,000 equity shares, 41,710 shares were represented and the holders of the same voted in favor of the scheme. At the second meeting of ordinary shareholders, out of 45,000 shares, 40,132 shares were represented and the altered ratio was also unanimously voted upon, the reasons for which are not far to seek and to which I would presently advert. At the meeting of preference shareholders, out of the total of 7,000 preference shares, 4,144 shares were represented and the scheme was approved unanimously. At the meeting of unsecured creditors who were depositors and holders of loan accounts, out of a total debt under this head of Rs. 25,72,374, creditors, the value of whose deposits was Rs. 24,92,280 attended and unanimously approved the scheme. At the meeting of unsecured creditors who were suppliers of stores, etc., out of the total value of debt of Rs. 29,75,556 affirmative voting represented debt worth Rs. 18,18,370 and the negative voting represented the debt in the value of Rs. 1,22,575. These figures would at a glance show that the classes were fairly represented and the scheme

has been approved by an overwhelming majority far above the statutory majority. The last question is whether the scheme is fair and reasonable one which a man protecting his commercial interest and guided by reasonable expectation would approve. I need not dwell upon this aspect because the creditors and shareholders of Navjivan had hardly any choice. If one can say that between getting nothing and getting something there was a choice then there was of course a choice to get something. The position of the shareholders and especially the shareholders of Navjivan becomes apparently discernible from two important events that occurred during the progress of the scheme when the ball passed from the Court of Navjivan to Kohinoor and was hit back with altered ratio."

46. In the present case, the propounders have already got the requisite license to operate the airline. They have requisite funds also. For revival of the company, the only thing which was required was the payment to the creditors and the scheme deals with this very aspect whereby arrangement with the creditors proposing the manner in which these creditors are to be paid, has been laid down and the same has got the backing of the creditors who have agreed of their dues in the manner prescribed/proposed. There is no reason, Therefore, to hold that the scheme would not be workable.

47. It may be pointed out here that even learned Counsel for the objector referred to the same principles by relying upon *Hindustan Lever and Another Vs. State of Maharashtra and Another*, and the judgment of the Madras High Court in the case of *N.A.P. Alagiri Raja and Co. v. N. Guruswamy and Ors.*, reported as (1989) 65 Comp. Cas. 758 wherein the principles laid down in *Miheer H. Mafatlal (supra)* were reiterated. Therefore, there was no-dispute on the proposition of law which governs consideration of such cases. He also referred to the judgment of the Punjab & Haryana High Court in the case of *Ram Chand Puri Vs. Lahore Enamelling and Stamping Co. Ltd.*, therein the Court observed that the Court is not mere & conduit in sanctioning such schemes and motive of proposer is to be examined.

48. Learned Counsel for the Objector, in this behalf, referred to the Constitution Bench judgment of the Supreme Court in the case of *The State Trading Corporation of India Ltd. and Others Vs. The Commercial Tax Officer, Visakhapatnam and Others*, which draws a distinction between nationality and citizenship, However, in view of my above discussion this judgment may not come to the aid of the objector.

49. Let me now revert to the objections filed by Malanpur Steels Limited (hereinafter called as "Malanpur").

50. Objections filed by Malanpur would fall in two categories. In the first place it is contended that Malanpur is the decree holder and is thus wrongly classified as an Inter Corporate Depositor. It should have been classified as a decree holder and the decretal amount should have been treated as the principal amount.

Furthermore, it being a secured creditor of the company it has right to get the decretal amount. The second limb of objection relates to some of the clauses in the proposed scheme and it is contended that--

(a) funding of the scheme is moonshine as it is unworkable and akin to a jigsaw of puzzle insofar as its "sourcing of funding" is concerned.

(b) Even the payment of first Installment has been made conditional upon withdrawal of suits and other proceedings including criminal complaint u/s 138 of the Negotiable Instruments Act, 1881 and undertaking from respective creditors to support reorganization in the capital structure of the company. According to Malanpur the first condition is against its interest and second condition is vague and unworkable. Reference is made to the judgment of the Bombay High Court in the case of Uma Investments Pvt. Ltd., In re. reported as (1977) 47 Comp. Cas. 242 and judgment of this Court in the case of Sales Tax Officer, Central Circle, New Delhi v. Byford Ltd., reported as (1984) 55 Comp. Cas. 204.

(c) Likewise, payment of second Installment is made conditional upon various uncertainties, namely, receipt of approvals from regulatory authorities and requisite permissions and approvals for re-issue of partly paid shares. It is also contended that paragraph 6 of the scheme making provisions for "means of finance" is uncertain and unworkable.

(d) It is also the objection of Malanpur that the company has discriminated by entering into fraudulent preference between the creditors belonging to the same class. It is pointed out that in the settlement arrived at between the company and Leela Hotels the entire amount is paid to the said creditor but same treatment is not accorded to other creditors, including Malanpur.

(e) The scheme involves intractable disputes of fact and law and is inherently incapable of performance and unworkable because of disputes between the two sets of creditors, namely, S.K. Modi Group and RHSL.

51. The first objection flows from the fact that there is a decree in favor of Malanpur. It is not disputed, however, that Malanpur had advanced a sum of Rs. 5 crores to the company which was treated as Inter Corporate Deposit (ICD). It wants change of categorization only on the basis of decree obtained by it. It may be significant to mention that this decree is obtained on the basis of admission by the company and the admission relied upon was the one which was mentioned as principal amount due to Malanpur in earlier scheme of compromise with the creditors propounded by the company. Decree which is passed includes Rs. 5 crores as principal amount and interest plus future interest. Principal amount of Rs. 5 crores, Therefore, remains. Other component of the decree is the interest amount. It could not be disputed by the learned Counsel for Malanpur that in the scheme propounded by the company all the creditors are classified on the basis of "principal amount" owed to them. It may be mentioned that Deutsche Lufthansa also has a decree for an amount equivalent to US \$ 5 million. However, in the scheme what is offered is US \$ 1.20 million which has

even been accepted by Lufthansa. Further, merely because Malanpur has got a decree in its favor it would not become a secured creditor.

52. Even otherwise, nothing much would turn by seeking change in the categorization. If Malanpur is to be classified in Class I along with Lufthansa as contended by it and the decretal amount is to be taken into consideration, as against the decree of Rs. 5,83,96,465/- in its favor the decretal amount of Lufthansa is US \$ 5 million. In that case, Malanpur would have represented 18% of the said class and Lufthansa 82%. Lufthansa has given its consent to the proposed scheme and even if Malanpur had been included in that category and voted against the scheme, the creditors in that class with 82% stakes would have the approval of the scheme and the objection of Malanpur would not have made any difference.

53. It may not be out of place to mention that as per Malanpur's own admission even this decree passed in its favor is under challenge before the Division Bench of the Calcutta High Court. It may also be of significance to point out that Malanpur has right to recover a sum of Rs. 1.39 crores out of the decretal amount. If that is to be treated as payment against the principal amount, the principal amount would stand reduced by this amount.

54. The judgment of the Calcutta High Court in the case of *In the matter of In Re: Dewangunj Bank and Industry Ltd.*, as cited by learned Counsel for Malanpur would not be applicable in the instant case. That was a case where a depositor had obtained a decree against the company and subsequent to passing of that decree the company embarked upon a scheme for payment to the depositors. The meeting of the depositors was called for and notice was sent to all the depositors. The Court held that once a decree was passed in favor of a depositor, he ceased to be a depositor and became decree holder and, Therefore, was not bound to attend the meeting of the depositors. It was further held that where such meeting included decree holders as depositors and the Court sanctions the same per incuriam or because the circumstances are not sufficient explained to the Judge, the decree holders can get the scheme modified by the Court, by having such portion of scheme which affects them expunged from the scheme. In the present case, as noted above, even if the objector was to be treated as decree holder and club along with Lufthansa it would not have made any difference as the result in that eventuality would also have been to sanction the scheme by decree holder as separate category by majority of 82%. This very argument was negated by the Court in *re. Maneckchowk* (supra) in the following words:

"It was very vehemently contended that preferential creditors and unsecured creditors were grouped together in one class and, Therefore, the votes cast at such an illegal meeting approving the scheme cannot be taken into consideration by the Court. As stated earlier, the workers of the company would be preferential creditors; so also, the Employees' State Insurance Corporation would be a preferential creditor of the company and they should not have been grouped

together with the other unsecured creditors. For the reasons stated hereinabove, the creditors of the company would fall broadly into three distinct classes, namely, secured creditors, preferential creditor of the company and they should not have been grouped together with the other unsecured creditors. For the reasons stated hereinabove, the creditors of the company would fall into three distinct classes, namely, secured creditors, preferential creditors and other unsecured creditors. Separate meeting of secured creditors has been convened and they have approved the scheme. The error appears to have been committed in convening the joint meeting of preferential and unsecured creditors. But the report of the Chairman would help in finding out the debts represented by the preferential creditors and the debts represented by other unsecured creditors in the meeting of unsecured creditors. The report of the Chairman would show that out of 1955 creditors including both preferential and unsecured creditors, who attended the meeting, 1055 creditors inclusive of both the classes representing Rs. 94,94,502 voted in favor of the scheme. It would further appear from the report that the workmen of the company forming a class of preferential creditors who attended the meeting represented their claim to the tune of Rs. 36,33,400. The claim of the Employees' State Insurance Corporation against the company on that date was to the tune of Rs. 6,27,346. The workmen and Employees' State Insurance Corporation, being the preferential creditors, would form one class. It may be that as the compromise offered to the Employees' State Insurance Corporation is slightly different from the compromise offered to the workmen of the company, the workman and the Employees' State Insurance Corporation may each form a distinct class. The remaining unsecured creditors would comprise suppliers of cotton and stores and depositors. An entirely identical compromise is offered to the suppliers of cotton, stores and depositors and, Therefore, they can be conveniently grouped together in one class. Their rights are not so dissimilar as to make it impossible for them to consult each other for their own interest. Thus, the workers being preferential creditors would form one distinct class. Employees' State Insurance Corporation would form another class. The remaining unsecured creditors would form a class by themselves. The next thing is to find out the votes and value of votes cast in each class to ascertain whether in each class the scheme is approved by statutory majority. It is very easy from the report of the Chairman to find out the total number of workers present and the value of their votes. It is equally easy to find out the value of the vote of Employees' State Insurance Corporation. The composite value of the affirmative votes cast in favor of the scheme at the meeting according to the report was Rs. 94,94,502. This is inclusive of the claim of workers as preferential creditors which was to the tune of Rs. 36,33,400. If the votes of the workmen representing in value the claim to the tune of Rs. 36,33,400 is deducted from the votes representing the debt of other unsecured creditors to the tune of Rs. 94,94,502 the balance would be Rs. 58,61,202 out of which vote representing the value of the claim of the Employees' State Insurance Corporation to the tune of Rs. 6,27,346 should be deducted which would leave a balance of Rs. 52,33,756. The unsecured creditors being suppliers

of stores and cotton and depositors and excluding preferential creditors who attended the meeting and voted in favor of the scheme represented the debt in the value of Rs. 52,33,756. The value of the claim of the creditors who voted against the scheme was Rs. 9,82,185. It would immediately appear that the unsecured creditors excluding the preferential creditors, namely, the workmen and Employees" State Insurance Corporation have approved the scheme by more than the statutory majority."

55. Reliance by learned Counsel for Malanpur to the judgment of this Court in the case of Bhugwan Singh and Sons P. Ltd. v. Kalawati and Ors., reported as (1986) 60 Comp. Cas. 94 would also be of no help. Learned Counsel, on the basis of the aforesaid judgment, submitted that the claim of the creditors who had obtained decrees against the company could not be defeated by means of such schemes. However, that is not the proposition of law laid down in the said case. On going through the judgment, it would be clear that the proposed scheme was rejected on three grounds, namely (a) there was delay in filing the petition for sanction of the Court to the scheme as the petition was not filed within seven days of the meetings of the creditors; (ii) the company had not disclosed all material facts relating to it such as the latest financial position of the company, latest auditors" report, etc. All this information was not only necessary for ascertaining whether the so-called other creditors were actually shareholders but also for finding the current net annual profits and how far the past losses had been wiped off, and (iii) on the facts of that case a specific finding was recorded that the petition was mala fide and motivated primarily to defeat the claims of the three creditors who had obtained decrees against the company. It was found, as a matter of fact, that these three creditors were the only third party creditors, rest being shareholders or their relations. Thus, on the facts of the said case the scheme was found to be mala fide as it was motivated and had defeated the claims of three decree holders/creditors who had objected to the scheme. Factual position in the instant case does not bear any resemblance and the allegation of the Objector/Malanpur that simply because it is a decree holder and, Therefore, it should be treated that the scheme is mala fide as it seeks to defeat its claim as creditor, would be far-fetched. No substantial allegations of any mala fides are made. In fact all the creditors with whom the company seeks to enter into compromise are the third parties and there is an overwhelming support from these creditors in favor of the scheme.

56. Insofar as objection of Malanpur to this two conditions attached to making payment of first Installment are concerned, there may not be of any cause of worry inasmuch as it can be directed that the suits or other proceedings u/s 138 of the Negotiable Instruments Act shall be withdrawn only after the complete payment is made as per the scheme. Till that time, the complainant as well as the company may apply for adjourning of the pending matters. On the final payment being made a joint compromise application can be filed for disposing of the said pending proceedings. It has been pointed out by the petitioner that in the creditors" meetings, this term had been changed and it was decided that the

withdrawal of such complaints would be simultaneously with the payment of second Installment amount. Therefore, this objection is rendered negatory.

57. Objection regarding discriminatory treatment is untenable. If some of the creditors were settled earlier in a particular manner, that does not mean that the scheme propounded afterwards has to be on the same pattern. In the scheme now filed, the creditors who are to be paid are treated alike and there is no discrimination.

58. Insofar as other objections specific to the scheme are concerned, these were the objections by S.K. Modi Group as well which have already been considered and rejected.

59. Another party, namely, Paradise Credit Private Limited who claims to be a creditor and shareholder of the company, has also filed objections to the scheme. In these objections, apart from stating that there are disputes between the two groups which are subject matter of these suits, particulars whereof are already given, other objections are regarding the bona fides of the scheme alleging that the scheme does not disclose any cogent means of discharging the debts of the creditors. Since these aspects have already been dealt with above, it is not necessary to repeat the discussion. Another objection which is raised is that many creditors of the company whose debts were acknowledged in the original scheme of compromise filed by the company have been summarily and arbitrarily deleted from the list of creditors primarily on the ground that the debts were time-barred. It was submitted that limitation is to be seen on the date of filing of the petition and if during the pendency of the petition a debt becomes time barred that will not affect the winding up petition and for this proposition learned Counsel for the objector relied upon the judgment of this Court in the case of *Indian Turpentine and Rosin Co. Limited v. Pioneer Consolidated Co. of India Limited*, reported as (1988) 64 Comp. Cas. 169; Punjab & Haryana High Court in the case of *Ram Chand Puri Vs. Lahore Enamelling and Stamping Co. Ltd.*, and Madras High Court in the case of *S. Abdul Muthalibu Vs. K.M. Mohammed Abdul Khader*, . Principle of law which is laid down in the aforesaid cases is that when a creditor approaches the Court for winding up of a company on the ground that the company is indebted to the petitioning creditor and is unable, to pay the debt, the debt should be within limitation on the date of filing of the winding up petition and it is not a defense that such a debt has become time barred during the pendency of the petition. These cases, obviously, shall have no application as we are dealing with the scheme and not the winding up petition filed by any creditor u/s 433(e) read with Section 434 of the Act. That apart, no such creditor has come forward alleging that he is not included in the scheme although he is a creditor but is not acknowledged as a creditor on the purported ground that his debt has become time barred.

60. The inveigh of the objector is hollow. I do not find any merit in any of these objections which are shellacked by the petitioner convincingly. These objections are, Therefore, rejected.

61. I may take up, at this stage, prayer made in CA No. 306/2005 for consideration. Five applicants in this application are the registered shareholders of 12375400 shares of the company. Out of this, they had pledged 5140600 shares with various creditors of the company in the year 1996 to secured repayments of ICD taken by the company from those creditors, namely, DCM Daewoo Motors Limited, Taj Trade and Transport Limited and Reliance Capital Limited. In this application they have offered sale of their shares pledged with ICD creditors as may be required to satisfy the second Installment being 40% of the agreed amount due under the scheme for payment to the said ICD creditors. It is also prayed that balance shares be directed to be returned to the applicants and the applicants be recognised as creditors of the company for the amounts paid to the ICD creditors from the proceeds of the aforesaid shares. It is also stated that in terms of an arrangement arrived at between the applicants Agache Associates Private Limited, the applicants are agreeable to repay the security deposit of Rs. 36 crores to the company for and on behalf of the Agache Associates Private Limited. They have offered to repay this amount subject to certain adjustments stated in para 8 of the application. Dr. Singhvi, learned Senior Counsel for the petitioner submitted that he will have no objection for sale of the shares subject to the conditions that--

(i) The company pays the second Installment. However, it would accelerate the payment.

(ii) The applicants cannot be treated as creditors.

(iii) The sale should be without prejudice to the rights of the promoters.

(iv) The order of sale should not prejudice any company proceedings or other proceedings.

(v) Sale consideration to be deposited in this Court.

62. These aspects can be taken care of at the relevant stage. Suffice is to state the present applicants are not concerned with the main petition. They had only pledged their shares by way of security given on behalf of the company. They cannot be treated as creditors at this stage. Moreover, the proposed move of the applicants cannot affect the scheme as the scheme takes care of all the creditors and not only ICD creditors whereas the applicants want to pay off the second Installment to the ICD creditors alone and that too because of the reason that these shares are pledged with these creditors. Necessary orders regarding repayment of security deposited by Agache Associates Private Limited to the company, out of sale proceeds shall also be passed at that stage. Therefore, this Court proposes to appoint a Receiver which would be acceptable to both the parties.

63. To sum up, the scheme can be sanctioned subject to the following conditions:

(I) It is subject to decision in CA No. 265/2003 and, Therefore, Clause relating to forfeiture of shares will not be given effect to for time being. In case if it is

ultimately held that the RAL has no power to forfeit the shares, it shall bring the necessary finance for payment of the creditors.

(II) The disputes between the two sets of creditors, namely, S.K. Modi group and RHSL which are pending in different suits shall be adjudicated on their own merits without being influenced by the outcome of this petition.

(III) Payment of first Installment to the creditors would not be subject to the withdrawal of the proceedings u/s 138 of the Negotiable Instruments Act. Instead the parties may apply to the Courts where such proceedings are pending, for adjourning the matters till the payment as per the scheme to these creditors is made.

(IV) Insofar as different approvals from the Government, including Ministry of Civil Aviation are concerned which may still be required for relaunching of the airline, or any other foreign exchange approvals are yet to be given by the regulatory authorities, the said authorities shall consider the case in accordance with law.

64. Subject to aforesaid observations and aforesaid circumstances and having regard to the averments made in this petition and the materials placed on record and the affidavits filed by the Regional Director, Department of Company Affairs, Kanpur, and the Official Liquidator, I am satisfied that the prayers made in the petition deserve to be allowed. I also do not find any legal impediment to the grant of sanction to the Scheme of compromise. Hence, sanction is hereby granted to the abovementioned Scheme of compromise u/s 391(2) read with Section 394 of the Companies Act, 1956.

65. CA No. 797/2000 and CP No. 385/2003 are disposed of in the aforesaid terms. CA No. 1852/2002 also stands disposed of. CCP (CO) No. 2/2002

66. In view of what is discussed above, it is not necessary to go into the allegations made in this petition or to take any action. This petition is disposed of. Application also stands disposed of. CA disposed of.