

(2005) 03 BOM CK 0028

In the Bombay High Court

Case No : Appeal No"s. 521, 527 and 534 of 2004 Notice of Motion No"s. 1241, 2380, 2381, 2482, 2490 to 2492 of 2004 and 505 of 2005

Shree Niwas Girni Kamgar Kruti Samiti

APPELLANT

Vs

Rangnath Basudev Somani

RESPONDENT

Date of Decision : 21-03-2005

Acts Referred:

Companies (Amendment) Act, 1913 — Section 153
Companies Act, 1956 — Section 235, 236, 237, 238, 239
Development Control Regulations, 2001 — Regulation 58
Urban Land (Ceiling and Regulation) Act, 1976 — Section 10(5), 20

Citation : (2005) 4 BomCR 708 : (2005) 127 CompCas 752 : (2005) 6 CompLJ 246 : (2005) 62 SCL 175

Hon'ble Judges : S.J. Vazifdar, J;A.P. Shah, J

Bench : Division Bench

Advocate : D.R. Mehta, K.F. Merchant, P.G. Rao, Official Liquidator, Darius Khambata, Riyaz Chagla, Molina Thakur, B.R. Zaveri, Aspi Chinoy, A. Ramkrishna, S. Subramanian, Mukul Taly and S.J. Kadam, Rafiq Dada and T. Cooper, Virendra Tulzapurkar, Anirudh Joshi, I. Chagla and Hiralal Thakkar, for the Appellant; Rohit Kapadia, Hutoxi Tavadia and Mahesh Thorat and, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Shah, J.—Appeals admitted.

2. By consent of the learned counsel for the parties, appeals were taken up for hearing. We have heard the learned counsel for the parties. Appeals are being disposed of by this judgment.

3. These appeals arise out of the judgment and order of the learned Company Judge in Company Petition No. 315 of 2004 decided on 23-7-2004. The learned Company Judge by the impugned judgment rejected a scheme of revival of Shree Niwas Cotton Mills Ltd. (now in liquidation), hereinafter referred to as the "Company". The scheme has been approved by the overwhelming majority by the shareholders and creditors, both secured and unsecured and the Union

representing about 4500 workmen. Not a single creditor including any workman or shareholder or any person connected with the company or affected by the scheme opposed it either before the learned Company Judge or before us. The State Bank of India withdrew its consent only temporarily and that too only after the present Appeals were fully heard by another Division Bench. Before us finally even the SBI, after certain modifications, has consented to the scheme. The learned Company Judge has, however, held that the scheme submitted for sanction is not for revival of the Company, but for disposal of its assets and if the scheme is for disposal of assets by undertaking its development then it is better that the Official Liquidator disposes of the property. The shareholders, sponsors of the scheme and Kruti Samiti of workers have preferred these appeals impugning the judgment of the learned Company Judge. In order to appreciate the grievance of the appellants ventilated before us by the learned counsel Mr. Iqbal Chagla, Dr. Virendra Tulzapurkar and Mr. Ravi Kadam, it will be necessary to glance through the relevant background facts.

4. This litigation has a chequered history spanning over two decades. This is the second attempt for revival of the Company, first having failed in 1995. The Company was incorporated on 5-2-1935. By order dated 25-7-1984 passed in Company Petition No. 642 of 1983 filed by Reliance Textiles Industries Ltd., the Company was ordered to be wound up and the Official Liquidator was appointed Liquidator of the Company. On such order being passed, the Official Liquidator has taken in his possession and custody all the assets of the Company. The principal fixed asset of the Company on the date of it being ordered to be wound up comprised of immovable property being land and building of the mills situated at Senapati Bapat Marg, Lower Parel, Mumbai. The said property is free hold property acquired by the Company in the year 1935. The building known as "Shree Niwas House" situated at Hazarimal Somani Marg, Mumbai is another fixed asset of the Company. The plant, machinery, fixtures and furnitures, an inventory of which has been prepared as per the directions of the Official Liquidator belong to the Company. The total liability of the Company as on the date of the order of winding up as per the statement of affairs dated 1-9-1989 filed with the Official Liquidator amounted to Rs. 18,81,52,844. The Company has the liability towards secured creditors, debenture holders, statutory creditors, sundry creditors, fixed depositors, preference shareholders and workmen.

5. The authorized share capital of the Company is Rs. 5,00,00,000 divided into 4,00,000 equity shares of Rs. 100 each and 1,00,000 preference shares of Rs. 100 each. The issued, subscribed and paid-up share capital of the Company is Rs. 1,14,80,000 divided into 1,10,000 equity shares of Rs. 100 each and 48,005.20% Redeemable cumulative preference shares of Rs. 100 each. At the time of passing of the winding-up order of the Company, Bangur family and Somani family were respectively holding 40% and 20% shares in the capital of the Company. The Life Insurance Corporation of India was holding 20% share capital of the Company and the remaining 20% shares were held by the sundry

shareholders. The members of the Somani family were managing the affairs of the Company till July 1984 when it was ordered to be wound up.

6. It appears that the Official Liquidator received certain offers to take over the said mills from one S.S. Bhandari and Kantikumar Kanoria and on the report of the Official Liquidator the learned Company Judge vide his orders dated 11-8-1994 and 18-8-1994 directed that anyone including said Bhandari would make offer to take over with a view to restart the mills so as to provide employment to the workers of the Company and not for the purpose of development or sale of the land or property belonging to the Company and the Official Liquidator would consider only those offers which were received within the prescribed time accompanied by pay order or demand draft of Rs. 1 crore. By order dated 1-9-1994 the learned Company Judge directed that the proposals be invited by advertisement in sealed covers in two categories, first category for the submission of the scheme for revival of the industry and absorption of dislodged workmen and another category for outright purchase of the assets of the company. In appeals which were preferred by Kantikumar Kanoria and Kruti Samiti of workmen, the Division Bench vide order dated 28-9-1994 modified the order of the learned Company Judge dated 1-9-1994 by directing the learned Company Judge to consider only the proposals for revival of the textile mills and directing the Official Liquidator to issue fresh advertisement making it clear that only the proposals and not any scheme u/s 391 of the Companies Act for revival of the mills would be considered. By further order dated 30-9-1994, the Division Bench directed the learned Company Judge to also consider the scheme for revival, if any, submitted by Somanis in accordance with the provisions of the Act.

7. Pursuant to the order of the Division Bench, Somanis presented a company application before the learned Company Judge for confirmation and approval of the scheme of compromise or arrangement to be arrived at between the Company and its creditors and members. It was proposed that if such a scheme is sanctioned, the Company would come out of liquidation by making payment of all liabilities in the manner set out in the said scheme and would revive and rehabilitate the Company so that the Company could thereafter continue to carry on its business and/or any business that may be permitted under the law. The scheme of compromise was opposed by the workmen, State Government and Banks on the ground that it was not bona fide and was made for extraneous reasons. The scheme was also opposed on the ground that Somanis did not have requisite financial strength to discharge the outstanding liability of the creditors and thereafter to restart the mills and provide employment to the displaced workmen. The learned Company Judge by his order dated 17-10-1994 directed that the general meeting of the shareholders of the Company be convened to consider the scheme submitted by Somanis and certain other directions were also issued by the learned Company Judge.

8. Against the order of the learned Company Judge dated 17-10-1994, appeals were preferred by Kantikumar Kanoria and Silvenia Sign Finance Ltd. The

Kamgar Kruti Samiti also preferred appeal challenging the order of the learned Company Judge. The said appeals were disposed of on 4-4-1995 by order passed by the Division Bench of Acting Chief Justice Pendse and Jhunjhunwala, J. The Bench noted that the scheme as proposed by Somanis is not based on any viable report. The Somanis, though required under the provisions of Section 391 of the Act, have not disclosed to the Court all material facts relating to the latest financial position of the Company. It was also noted that the estimate of the market value of the mill land of Rs. 200 crores given by the learned counsel appearing for Somanis was on a lower side more particularly when the prices in real estate in the metropolis continue to escalate unlimitedly. The estimate of liability of over 18 crores given by the learned counsel was on the basis of statement of affairs filed in September 1989. With lapse of over 5 years the liabilities of the Company, had multiplied, the workmen's liability itself was in the proximity of Rs. 60 crores. The deposit of Rs. 18 crores and bank guarantee of Rs. 12 crores therefore cannot be considered as adequate and sufficient resource to revive the Company. It was therefore held that the intention behind the prosecution of the scheme was to acquire huge land and other real estate belonging to the Company at a meagre throw away price ostensibly under the guise of reviving the mills with no real intention to revive the same.

9. Ultimately, the Division Bench issued the following directions :

"14. In the facts of the case, it is essential that a viability report is obtained before consideration as to whether it is possible to revive or re-open the mills and as such the orders passed on the said Report of the Official Liquidator earlier than the order impugned in these Appeals need not be given any effect. The Official Liquidator is directed to replace the said Report before the learned Company Judge may consider giving directions on the report after taking into consideration the undermentioned suggestions after inviting viability report. The learned Government Pleader has suggested that the viability report should be obtained from Industrial Development Bank of India and assured that if IDBI is requested to submit the viability report, IDBI would do so within a period of three months. The learned Company Judge may consider the suggestion of the learned Government Pleader and should call for the viability report before considering the following suggestions :--

- (1) Whether it is possible and viable to reopen the mills/or any portion of it and run it profitably and without disposing of immovable assets of the Company,
- (2) In case the mills cannot be re-started then whether any department or process of the mills could be started as viable;
- (3) In case any party who comes forward with an offer to pay off all the creditors, take the Company out of winding up and revive and restart the mills happens to be a shareholder of the Company, such party should surrender the shareholdings in the capital of the Company at the value to be determined by the Court;

(4) In case above courses are not workable then whether the mills can be restarted by disposing of part of its assets to generate finance after payment to all the creditors;

(5) In case even the course under Clause (4) above is not possible, then Official liquidator may sale the assets by public auction in which event the shareholders of the Company will be at liberty to bid.

It is open for the learned Company Judge to give any other suitable directions in the matter keeping in mind that the whole anxiety is to revive the Company and to restart the mills which is in the interest not only of the workers and creditors of the Company but also in the general interest of the public. Needless to say that the revival of the Company and restarting of the mills will generate more employment and will be for healthy economy of the Contrary."

[Emphasis supplied]

10. By further order dated 15-12-1995 the Division Bench appointed SBI Capital Markets Ltd. as the agency to make a viability report considering five options suggested in the order dated 4-4-1995 as well as the scheme of the Somanis. The SBI Capital Markets Ltd. submitted a report dated 13-6-1996 stating, inter alia, that option Nos. 1 and 2 were not viable. Option No. 3 was left to the discretion of the Court. Option No. 4 was found to be the only viable option, i.e., revival of the industry through part sale of the assets of the Company. Option No. 5, i.e., sale of the assets of the Company through Liquidator was considered not relevant since option No. 4 was viable. It appears that thereafter the Official Liquidator submitted his report dated 26-12-1996 in which after referring to the report of the SBI Capital Markets Ltd., he stated that out of 5 options suggested in the order of the Division Bench dated 4-4-1995, only 4th option was viable, i.e., part of the assets of the Company be sold off in order to revive the Company. He further submitted that the Somanis may be directed to modify their scheme in the light of the viability study conducted by SBI Capital Markets Ltd. By Government Resolution dated 7-11-1998 the State Government announced its Industrial Location. Policy. As per the above policy it is not possible to restart the shut down textile mill of the Company at its own location. In 2001, Regulation 58 of the Development Control Regulations was modified by the Government of Maharashtra whereby development of all mill land was permitted,

11. In December, 2003 the Somanis proposed a modified scheme for revival/rehabilitation of the Company. A company application being Company Application No. 4 of 2004 was filed for the purpose of having meetings of the shareholders, secured creditors, preferential creditors, fixed depositors, preference shareholders, debenture holders, sundry creditors and workers of the Company. By an order dated 31-1-2004, the learned Company Judge directed the aforesaid meetings to be held. In the meetings the scheme was approved with certain modifications by 100% majority of the shareholders, preference shareholders, secured creditors, fixed depositors, preferential creditors and unsecured creditors

and 99.94% majority of the staff and workers. Somanis thereafter moved Company Petition No. 315 of 2004 to sanction the aforesaid scheme along with modifications which have been approved in the above meeting.

12. At this stage, it would be necessary to note some salient features of the modified scheme. The scheme is one for revival of the Company and selling off one of the assets of the Company, i.e., the mill land, other assets of the Company including godown, office building "Shree Niwas House" are not for sale under the said scheme. Under Clause 5.1 of part 5 of the scheme, it is provided that after discharging the liability of all the creditors as per the scheme, the extra funds available with the Company will be used to start a viable industry in Maharashtra which will generate employment. Under the scheme, all classes of creditors, debenture holders, sundry creditors and preference shareholders are to be satisfied fully. The secured creditors, i.e., State Bank of India and Punjab and Sind Bank are being paid Rs. 38 crores plus interest and Rs. 7.94 crores plus interest respectively. Annexure 2 of the scheme provides the schedule under which secured creditors SBI and PSB are to be paid off fully within a period of 21 months from the date of sanction of the scheme. Under Clause 4.7 of the scheme, the workers are to be paid an amount of Rs. 45 crores in time bound programme. The entire payments of all the workers will be made within one year from the date of sanction. We may mention at this stage that upon liquidation, the workers would get much less than the amount payable under the scheme and according to Kamgar Kruti Samiti, the workers would be entitled to get only about Rs. 7 crores in liquidation. Under Annexure 3 to the scheme, it is mentioned that in addition to the money brought in by the sponsor, i.e., Lodha Builders Pvt. Ltd. (LBPL) to pay off the liability of the Company a revenue sharing arrangement between LBPL and the Company is envisaged. It is provided that the developable area of the property exceeding 7.5 lakhs sq. ft. will be shared between the LBPL and the Company in the ratio of 55 : 45 and that the construction cost will be borne only by the LBPL. The Official Liquidator by his report dated 6-6-2004 accorded his consent to the scheme submitted by Somanis to pay all the creditors and bring in additional funds if required.

13. The scheme was strongly supported by all the concerned parties, i.e., shareholders, secured creditors, unsecured creditors, preferential creditors as well as Kruti Samiti and the recognized Union, i.e., RMMS who represented the workmen's cause. It appears that pending consideration of the scheme propounded by the Somanis certain builders including Kantikumar Kanoria, K. Raheja Universal Pvt. Ltd. and M/s. Meghal Homes Pvt. Ltd. intervened in the matter and sought substitution of the sponsors of the scheme by offering better price for implementing the scheme. One of the interveners, namely, Kantikumar Kanoria has given offer to pay a sum of Rs. 150 crores to buy the assets of the Company. The learned Company Judge, however, rejected the scheme on two counts. First, that the option given to the Somanis by the order of the Division Bench dated 4-4-1995 was for submitting a scheme for revival of the Company whereas the scheme is not for reviving it and is for disposal of the assets.

Secondly, the sponsors have offered to pay Rs. 97.50 crores whereas the interveners have made offer to the tune of Rs. 150 crores and the scheme being for disposal of the assets, it is better that this Court itself disposes of the property in the course of liquidating the Company and not in a scheme u/s 391. Consequently, the learned Company Judge directed that the advertisements be issued in the leading newspapers inviting offers for sale of the assets of the Company. Being aggrieved the Somanis and LBPL have filed Appeal No. 534 of 2004 and Appeal No. 529 of 2004 respectively. Appeal No. 521 of 2004 is filed by the Kamgar Kruti Samiti.

14. When the above appeals were placed before the Division Bench of Gokhale and Mohite, JJ. an interlocutory order was passed directing the Somanis as well as interveners to submit fresh scheme if they so desired. Pursuant to the direction of the Division Bench, Meghal Homes and K. Raheja submitted their own schemes for revival of the Company. One M/s. Anand Agarwal and Associates who was never a party to the proceedings also submitted a scheme on 7-2-2005. Under the scheme submitted by M/s. Anand Agarwal the Company would acquire controlling interest in a cotton textile mill by name M/s. Suditi Industries Ltd. at Navi Mumbai. We shall discuss the rights of the interveners who have filed the schemes a little later but at this stage we may only state that it is revealed during the course of hearing that the said M/s. Suditi Industries Ltd. is declared as a sick industry under the SICA Act. It is also required to be stated that Mr. Aspi Chinoy, learned counsel appearing for M/s. Anand Agarwal candidly admitted that alternate schemes submitted by the interveners cannot be considered by the Court and even if a better scheme is submitted, that would not be a ground for refusing the sanction to the scheme, but he contended that the scheme of revival of a mere corporate existence of a Company is not envisaged by Section 391 read with Section 393 and the Court has no option to save and except to reject the scheme and the liquidation proceedings should be proceeded to its logical conclusion leading to the sale of the assets of the Company, whatever be the consequence on any of the creditors or workers.

15. In view of the direction dated 15-12-2004, the scheme submitted by Somanis has been also modified to the benefit of all the concerned persons and especially the workers. Under the modified scheme, the State Bank of India and Punjab and Sind Bank are being paid Rs. 45 crores and Rs. 8.59 crores respectively. It is also provided that till such time the entire amount is paid to SBI and PSB, the sponsors LBPL will be only entitled to create charge on the mill property which ranks lower in priority than the existing charge of the two banks. It appears that at one stage the SBI had withdrawn its consent to the scheme but after modification of the scheme as above the bank is fully supporting the scheme. The amount of two banks is payable within the time indicated in the affidavit filed by LBPL dated 21-3-2005. As far as the workers are concerned, the modified scheme reads as under :--

"I say that on implementation of the scheme sponsored by LBPL, benefits to the

tune of Rs. 120 crores will flow towards the workers as follows :--

(a) Payment of Rs. 45 crores to workers within 90 days of sanction of scheme - 22.50 crores immediately and balance within 90 days.

(b) Unit spread over approx. 1,00,000 sq. ft. to be set-up on the mill premises for the purpose of spinning and garment production at total cost of Rs. 40 crores.

(c) School and retail unit valued at over Rs. 15 crores to be set-up on the mill land and handed over to workers trust, free of cost.

(d) Unit to be set-up in rural Maharashtra at total outlay of over Rs. 20 crores by Shreeniwas Cotton Mills Ltd. (SCML).

5. I respectfully say and submit that the Hon''ble Court should choose between either of the following two options with respect to the benefits being given to the workers by LBPL :

Option A :

(i) Payment of Rs. 45 crores as detailed in Clause 3(a) hereinabove.

(ii) Unit on mill land spread over approx. 1,00,000 sq. ft. at cost of approx. 40 crores.

(iii) School and retail unit of 30,000 sq. ft. valued at over 15 crores to be owned by workers trust.

Option B :

(i) Payment of Rs. 45 crores as detailed in Clause 3(a) hereinabove.

(ii) Unit on mill land spread over 1,00,000 sq. ft. at cost of approx. 40 crores.

(iii) Payment of Rs. 15 crores to be given to the workers in lien of school and retail unit.

"In the event that Option B is selected by the Hon''ble Court, the sum of Rs. 15 crores will be deposited with the Hon''ble Court within 9 months of the sanction of the scheme. Utilisation of the said funds and their distribution will be at the sole discretion of the Hon''ble Court".

[Emphasis supplied]

We however considered it appropriate to permit the Workers Unions to exercise the option as they being adequately represented would be the best judges of their interest. Accordingly, the Kruti Samiti and recognized union of the workers have accepted option "B" indicated above.

16. Mr. Chagla; Dr. Tulzapurkar, and Mr. Ravi Kadam, learned counsels appearing for the appellants, submitted that reasoning of the learned Company Judge that the scheme is not for revival of the Company is factually not correct. All the assets of the Company are not being disposed of. Shareholders have decided to

continue to run the Company and carry on such other business as is permissible in law. Therefore, the second reason given by the learned Judge that the scheme is for disposal of the assets is also factually not correct. The learned counsel submitted that in view of the Industrial Location Policy of the State Government the only alternative to the Company was to carry out some other business which was permissible under the Memorandum of Association of the Company. The scheme was not opposed by any person interested in the scheme. The interveners have no locus to appear in the present proceedings for sanction of the scheme. The petition u/s 391 read with Sections 393 and 394 cannot be converted into free for all forum and in particular for the builders who intend to grab the property at any cost. According to the learned counsel the scheme has three distinct advantages, firstly, the Company in liquidation would be revived and thereby employment and revenue would be generated, secondly, creditors of the Company who are waiting for more than 20 years would be paid in full, and thirdly, workers who have been displaced as a result of the winding up in 1984 will receive an amount of Rs. 60 crores under the modified scheme whereas if the Company goes in liquidation the workers will get hardly Rs. 7 crores. Therefore, if the properties were put to auction it would be in nobody's interest. The learned counsel relying upon various judgments of the Supreme Court submitted that the court cannot sit in appeal over the commercial wisdom of the shareholders and creditors. It was submitted that in exercising its discretion in sanctioning a scheme of compromise or arrangement with members and creditors u/s 391(2) of the Act it is cardinal that the Court's function does not extend to usurp the views of the members or creditors and when it comes to choosing between a scheme for reconstruction and order for a winding up, after keeping all the circumstances of the case as also the question of commercial morality in view, and if the scheme appears to be feasible and workable, it should be preferred to compulsory liquidation. It was submitted that in considering a scheme u/s 391, the Court must attach importance to the wishes of the members and the Court cannot undertake exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether better scheme could have been adopted by the parties. The Court has power to make modification to the scheme only if the scheme is not workable and it is not the case of any of the interveners that the present scheme has become unworkable. The proposals in the nature of modification are not to make any unworkable scheme workable but to grab the property, which otherwise interveners have no right to lay their hands on.

17. Mr. Khambata and Mr. Zhaveri, learned counsels appearing for M/s. Meghal Homes Pvt. Ltd. and K. Raheja Universal Pvt. Ltd. respectively submitted that in a scheme for revival of a company which has been passed in accordance with Section 391 of the Companies Act, the Company Court is required to exercise winding up jurisdiction and powers under Sections 443 and/or 466 of the Companies Act. Therefore it was submitted that the considerations that would weigh with the Company Court whilst deciding whether to recall/set aside its

order of winding up and to sanction a scheme for revival of the Company would not necessarily be those u/s 391. The interest of the public, the workmen and general welfare and common good of the community constitute vital considerations in matters relating to winding up. It was submitted that u/s 392 of the Companies Act, a Company Court has the power to substitute the sponsor of the scheme and to make modification in a scheme which has already been sanctioned by the shareholders and creditors and that "any person interested in the affairs of the Company" would be entitled to be heard and considered as a sponsor of the scheme u/s 392. According to the learned counsel, the sponsor need not be a shareholder or a creditor of the Company and schemes of interveners being clearly superior and more beneficial to the workers and public interest, the Court should exercise discretion and substitute the interveners in place of the sponsors of the scheme, viz., LBPL.

18. Mr. Chinoy who is appearing for M/s. Anand Agarwal has fairly conceded that alternative schemes cannot be considered in exercise of power u/s 392(2) unless the scheme submitted by the sponsor has become unworkable. He has also conceded that Court cannot weigh merits or demerits of the scheme, but according to him a scheme which merely seeks to revive the corporate existence of the Company in liquidation and to sell and dispose of the assets of the Company to a select developer without any revival of the textile mills is a mere device adopted with the intent of selling the land to a particular developer/builder without a public auction and is not bona fide scheme under Sections 391 and 392 of the Companies Act and could not be said to be made in good faith. According to the learned counsel, the bona fide revival of the Company in liquidation must necessarily posit revival of its business and mere revival of the corporate existence is not permissible and the revival of the business should be such which the Company carried up to the date of the winding up.

19. The relevant provisions of the Companies Act, 1956 are found in Chapter V of Part VI dealing with "Arbitration, compromises, arrangements and reconstructions." In the present proceedings, we will be concerned with Sections 391, 392 and 393 of the Act. The relevant provisions therefore read as under :

"391. Powers to compromise or make arrangement with creditors and members.--

(1) Where a compromise or arrangement is proposed--

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

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

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

(2) If a majority in number representing three-fourths in value of the creditors,

or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made u/s 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall, be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under Sub-section (1) has disclosed to the court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251, and the like.

392, Power of High Court to enforce compromise and arrangements.--

(1) Where a High Court makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it--

(a) shall have power to supervise the carrying out of the compromise or arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the court aforesaid is satisfied that a compromise or arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made u/s 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act u/s 153 of the Indian Companies Act, 1913 (7 of 1913), sanctioning a compromise or an arrangement.

393. Information as to compromises or arrangements with creditors and members.--(1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called u/s 391,--

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular, stating any material

interests of the directors, managing directors, managing agents, secretaries and treasurers or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and insofar as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid."

20. By virtue of provisions of Section 391 of the Companies Act a scheme sanctioned by the court is statutorily binding on all its shareholders and creditors including those who dissented from or were opposed to the scheme being sanctioned. Since by law procedure has been prescribed by which every shareholder and creditor in the absence of individual agreement, gets bound by the scheme, which would otherwise be necessary to give it validity, the two provisos have been introduced casting a duty on the Court to satisfy itself that the affairs of the company were/are not being conducted in a manner prejudicial to the interest of its members or to the public interest. The basic principle underlying these provisos is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to the public policy, unconscionable or against the law. While exercising its power in sanctioning a scheme of agreement, the Court has to examine as to whether the provisions of the statute have been complied with. Once the Court finds that the parameters set out in Section 394 of the Companies Act have been met then the Court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the Court a better scheme could have been adopted.

21. In *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 87 Comp. Cas. 792, 10 SCL 70 the Supreme Court observed :

"...No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently, it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the concerned scheme

placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding on a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be post dated that even in the case of such a scheme of compromise and arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote.

However, the further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391, Sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire...."

[Emphasis supplied]

With regard to the power of the Court to modify the scheme u/s 392(2), the Court observed :

"Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot even be treated as the author or a policy-maker. Consequently, the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising

the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement...."

[Emphasis supplied]

22. The Court after conducting a vast survey of authorities, both from judicial side as well as from legal text side presented a summary of the scope and ambit of the jurisdiction of the Company Court as it has been earmarked in terms of the following broad contours :

"1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391, Sub-section (2).

3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391(1).

5. That all the requisite material contemplated by the proviso to Sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction".

[Emphasis supplied]

23. In J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, , Shelat, J. has observed thus :

"Though a scheme prepared by company to pay the creditors is not a mere agreement but has statutory force, it has to be construed as a commercial document that is, in the manner in which businessmen would read it."

[Emphasis supplied]

24. In Hindustan Lever Employees" Union v. Hindustan Lever Ltd. [1995] 83 Comp. Cas. 30 : [1994] 2 SCL 157, Sahai, J. in his concurrent judgment has made the following pertinent observations in this connection in para 3 of the report :

"But what was lost sight of is that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction...."

[Emphasis supplied] (P-37)

25. In a recent judgment of the Supreme Court in Hindustan Lever and Another Vs. State of Maharashtra and Another, , the Court after referring to judgment in Miheer H. Mafallal"s case (supra) observed as under :

"12. Two broad principles underlying a scheme of amalgamation which have been brought out in this judgment are :

1. that the order passed by the Court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and

2. that the jurisdiction of the Company Court while sanctioning the scheme is supervisory only, i.e., to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The Court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. The role of the Court is that of an umpire in a game to see that the

teams play their role as per rules and not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire."

[Emphasis supplied]

26. The main question that falls for our consideration is whether the learned Company Judge was right in holding that the scheme is liable to be rejected as it is not for revival of the Company but for disposal of its assets and, therefore, it would be desirable that the Official Liquidator himself disposes of the Company's property. u/s 391(1) only a creditor or a member of that company or liquidator in the case of a company being wound up, is entitled to move an application proposing compromise or arrangement. The scheme proposed in this case is for revival of the Company and for sale of the part of the assets of the Company. The scheme contemplates payment of the creditors including workers. The Company has entered into agreement with sponsors for development and transfer of the property. All the assets of the Company are not sold or disposed of. The scheme provides that after paying off the creditors, if funds are available to the Company, the Company will start a viable industry in any part of Maharashtra. The scheme involves development of the property of the Company. The other properties of the Company such as "Shree Niwas House" and the godown located at Senapati Bapat Marg, Mumbai are continued to remain the property of the Company. It is thus seen that the scheme as it stands contemplates revival of the Company. It is for the shareholders to decide as to what business they would carry out if the Company is revived. It is an admitted position that the textile mill cannot be revived in view of the Government policy. Even as per the report of the SBI Capital Markets Ltd., option 4 would be the only available option that is the revival of the industry through part sale of the assets of the Company.

27. The submission on behalf of the appellants is that it is not mandatory in law that a scheme has to be for revival of the very activity in which the Company was engaged at the time of winding up and that the anxiety of the Court while sanctioning the scheme which is approved by all classes, should be to see that the Company is permitted to continue its corporate existence. The reliance is placed on the Memorandum of Association of the Company to show that even the activity of developing land was permitted under the same. Our attention was also drawn to two decisions of this Court Vasant Investment Corporation Ltd., In re [1982] 52 Comp. Cas. 139 and also subsequent decision dated 6-7-1979 in the matter of the said Company, however, reported earlier Vasant Investments Corporation Ltd., In re v. Official Liquidator, Colaba Land & Mills Co. Ltd. [1981] 51 Comp. Cas. 20.

28. In Vasant Investments Corporation Ltd.'s case (supra) the facts before the learned single Judge of this Court (Sujata Manohar J., as she then was) were that the principal commercial activity of the Company consisted of dealing in immovable properties belonging to the Company, which originally also had a textile mill but the same was sold sometime before the commencement of the

winding up proceedings against the Company. After the winding up order, the Official Liquidator disposed of several immovable properties of the Company. After paying the creditors it was found that there was surplus fund left. Some creditors proposed a scheme by which the Company could utilize the surplus fund for carrying out the business of manufacturing activities. The Official Liquidator objected to the scheme on the ground that under the scheme the Company proposed to carry on business which was not contemplated under the existing object clauses of the Memorandum of Association of the Company. The amended Clause 7(a) of the scheme of compromise provided that the Company will continue to carry out the business which it was doing prior to winding up, namely, dealing in immovable properties, and that, in the event of the Company desiring to carry on any other business, it would act in accordance with the provisions of the Companies Act, and if necessary, would take steps to amend the Memorandum of Association in accordance with law. Overruling the objection raised by the Official Liquidator, the learned Judge held as under :

"This clause, therefore, cannot be said to contemplate something which is ultra vires either the memorandum of association of the company or the provisions of the Companies Act. Once the company is reconstituted, it will be open to the company to carry on such business as its memorandum of association warrants, and it would be open to the company - as it is open to any other company - to get its memorandum of association altered in accordance with the provisions of law. The scheme, therefore, does not require sanctioning any ultra vires act on the part of the company."

[Emphasis supplied]

29. The decision in Vasant Investment Corporation Ltd.'s case (supra) was approved in a judgment of another learned single Judge (Vyas, J.) Smt. Sara; G. Poddar, In re [1996] 22 CLA 2000, although ultimately it was held that the scheme submitted in that case was not in good faith and was not fair and bona fide. Sections 391 and 393 of the Companies Act permits any reasonable form of arrangement between the company and shareholders and its creditors and leave the nature of the arrangement to the realm of the commercial wisdom of the concerned parties. The scheme for revival of the Company, therefore, need not necessarily be for functioning of the same activities that were carried on prior to the starting of liquidation proceedings and it is always open for the shareholders to revive the company and carry on business in accordance with law. The scheme of this nature cannot be rejected merely on the ground that it envisages sale of part of the assets of the company for paying off the creditors and workers.

30. Mr. Chinoy, however, submitted that the order of the Division Bench dated 4-4-1995 stipulated only two options: (i) the scheme for revival and restart of the mills or any part thereof, and (ii) if this was not possible disposal of the assets of the Company by public auction by the Official Liquidator. According to the learned counsel even the amended scheme is not a scheme for reopening or restarting the mill and does not comply with the directions in the judgment dated

4-4-1995. Secondly, Mr. Chinoy submitted that the scheme for sale and disposal of the assets of the Company without revival of the mill or the main business cannot be said to be in good faith. He submitted that the Division Bench of this Court in Smt. Saroj G. Poddar, In re (Appeal No. 480 of 1996, dated 3/4-12-1997 decided by Tipnis and R.P. Desai JJ. has clearly laid down that a scheme which provides revival of mere corporate existence of the company, without providing for revival of its production/restarting of its mill, is in fact nothing but a scheme for selling the company's assets without public auction and such a scheme is not a bona fide scheme and is not propounded in good faith,

31. We find absolutely no merit in the submission of Mr. Chinoy. In the first place the submission of the learned counsel that the judgment of the Division Bench dated 4-4-1995 has stipulated only two permissible options is totally misconceived. The Division Bench has merely indicated in para 14 that the Company Judge may consider the suggestions of the learned Government Pleader and should call for viability report before considering the suggestion Nos. 1 to 5 mentioned therein. In the same para it was also clarified that it would be open for the learned Company Judge to give any other suitable directions in the matter, keeping in mind that the whole anxiety is to revive the company and to restart it which is in the interest of all concerned. As per the decision of the Division Bench the SBI Capital Markets Ltd. has submitted a viability report on 5 options suggested in the order dated 4-4-1995. The option 4 was found to be the only viable option that is revival of the industry through part sale of the assets of the Company. In view of the commencement of new industrial policy it is not possible to revive the textile mill and consequently a modified scheme was submitted for revival of the Company by sale of part of the assets of the Company. This scheme has been supported by all concerned parties. Therefore, the argument that sanctioning of the scheme would be contrary to the judgment dated 4-4-1995 is liable to be rejected.

32. In our opinion the reliance placed on the unreported judgment of the Division Bench in the case of Smt. Saroj G. Poddar (supra) is equally misconceived. In that case, 2 schemes were submitted, one by the shareholders, i.e., Poddars and the other by a gentleman called Mathew. The learned single Judge rejected both the schemes on the ground that they were not genuine and bona fide. In appeal the only issue before the Division Bench was whether Poddar scheme was a genuine scheme for revival at all which would give employment to several workers. The Official Liquidator and a few workers had opposed the scheme strongly. It was observed by the Division Bench that exact entitlement of the workers was not finalized. Even the exact number of workmen was not determined and the initial scheme suggested that there were 77 workers, which number had ultimately grown to more than 600 to 700. No settled list of creditors of the property was submitted and exact liability of creditors as well as workers was not determined. It was further observed that the scheme could not be approved on the hypothesis that all lawful claims of everybody concerned

would be satisfied. It was observed that all the plant and machinery and other equipment necessary for revival were sold out and after everything was exhausted, the only asset which remained was the land cleared of all the machinery, etc. Under the circumstances the Division Bench concluded that, "In the facts and circumstances of the case, we are satisfied that the findings recorded by the learned Judge that the scheme as propounded by Poddars is not a genuine scheme for revival and is not made in good faith is clearly sustainable...". There is nothing in the judgment of the Division Bench to suggest that the court has laid down that there cannot be revival of corporate existence and the scheme for sale of part of the land of the company to pay off creditors and workers cannot be said to be a scheme made in good faith. It is trite law that observations of the Court must be read in the context in which they are made and the judgments of the Courts are not to be construed as statutes. Each case depends upon its own facts and close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect (See Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others, .

33. In Smt Saroj G. Poddas case (supra) the Division Bench came to the conclusion that the scheme for revival of the mill was only a camouflage to grab the assets and property of the Company defeating the claims of the creditors and workers whereas in this case the modified scheme contemplates sale of land of the Company and out of the sale proceeds all the statutory creditors, secured creditors, unsecured creditors and other creditors and workmen are being paid their dues to the fullest extent. In our opinion the judgment of the learned Company Judge proceeds on entirely wrong premise that the scheme is not for revival of the Company. In our opinion the scheme having been sanctioned by more than the requisite majority of different classes consisting of members and creditors, function of the Court was limited to examine the validity thereof as enumerated in Miheer H. Mafatlal's case (supra).

34. Mr. Chinoy also placed reliance on a judgment of the Supreme Court in State of West Bengal v. Sri Pronab Kr. Sur and particularly observations in paragraph 13 of the judgment. According to Mr. Chinoy, it is clearly laid down in this case that the property of the Company cannot be sold to a developer without calling for bids by public advertisements. We shall presently show that this judgment has no application to the facts of the present case and the observations in para 13 of the judgment rather supports the case of the appellants than Mr. Chinoy. In the case before the Supreme Court the Company owned landed properties and had filed a declaration under ULC Act in 1976. In 1991 the Company totally suspended its operation on account of financial and marketing problems. The Company thereafter filed an application u/s 20 of the ULC Act seeking exemption of excess vacant land on the ground that part of the vacant land had to be necessarily sold for discharging the dues and for revival of the Company. In the meantime a creditor of the Company filed a petition for winding up on the ground of its inability to discharge the debts. The said petition was admitted. The

Company was directed to pay the dues in instalments, but the instalments could not be paid by the Company. While so, the Company came forward with a scheme u/s 391(1) and also sought relief u/s 391(6) of the Companies Act. The scheme envisaged payment being made to the creditors by sale of a portion of the Company's land measuring 20 bighas. While this application was pending, one Chatterjee Management Services (P.) Ltd. gave an offer to purchase 15 bighas of vacant land at the consolidated price of Rs. 3.90 crores provided it was transferred free from all charges and encumbrances and necessary permissions/approvals from the Court, secured creditors and the Urban Land Ceiling authorities were obtained. The learned Company Judge dismissed the said application. In appeal preferred by the Company the Division Bench directed the State Government to consider the application for clearance under ULC Act and ordered the State Government to pass appropriate orders in that behalf. While this application was under consideration of the State Government, the Company filed a writ petition challenging the notice issued u/s 10(5) of the ULC Act and the subsequent notice issued by the Calcutta Improvement Trust. The application filed u/s 20 of the ULC Act was rejected by the State Government. The Division Bench by the impugned judgment set aside the order of the State Government rejecting the exemption and directed the Special Officer, appointed by the Court to transfer and hand over the vacant possession of the land declared surplus under the ULC Act to Chatterjee Management Service (P.) Ltd. on receipt of Rs. 3.90 crores and laid down the modality of utilization of the said amount for revival of the Company. In appeal filed by the State of West Bengal the question before the Supreme Court was whether the directions given by the Calcutta High Court were supportable in law and the Court observed in para 13 as follows :

"13. The aforesaid question calls for a discussion on the jurisdiction of the Court to pass an order approving the proposed sale as well as the propriety of such order. Coming to the first aspect, it is difficult to comprehend, under what jurisdiction the Court had passed the order and issued the directions referred to supra. The High Court did not refer to any provision of the Companies Act under which the order in question was passed nor did the 2nd Respondent mention any provision under which the application was filed. The only provision which could possibly be invoked to pass an order of this nature is Section 394 read with Sections 391(1) and 392 of the Companies Act. But there is definite procedure prescribed for sanctioning a scheme or arrangement sought to be entered with the creditors and for facilitating the revival of the Company. Various steps required to be taken by the Court are enumerated in Sections 391 to 393. Section 394A obligates the Court to give notice of every application u/s 391 or 394 to the Central Government and Court considerations the representation, if any, made by the Government before passing the order. Admittedly, this was not done. None of the creditors except the secured creditors, namely, The United Bank of India and Eastern Coal Agency, which filed the winding up petition, were involved in the so-called arrangement or scheme. It does not appear that the latest financial position or the report on the account of the Company was placed before the

Court as required by the provision to Section 391(2). Though the Court was exercising special jurisdiction under the Companies Act, the relevant provisions were completely disregarded and the Court was only guided by its own notions of justice. The prerequisites laid down under the Companies Act for passing order u/s 391 or 394 cannot be treated as empty formalities which can be thrown to winds and the whim of the Judge. The most objectionable part of the impugned order is to consider one or two offers placed before the Court by the Company without giving due publicity. If the peculiar circumstances of the case required that the normal procedure of calling for bids through advertisement or other means of publicity was to be dispensed with the Court should have at least recorded reasons for the same. But, nothing of that sort was done. Division Bench should have acted with the awareness that there could be no arbitrary selection of the prospective purchaser, even assuming that an order for sale could be lawfully made. Above all, if the purpose was to rehabilitate or revive the Company, definite proposals for revival should have been insisted upon and the High Court should have passed appropriate orders to ensure that industry was put back on its wheels and started the production within a time frame, but the only direction given in the order was to pay the amount of one crore or so to the 2nd Respondent-Company ostensibly for the purpose of restarting the industry. How to ensure proper utilization of that money - nothing is mentioned in the order. No provision for monitoring the revival has been made. At the same time all the pending proceedings were terminated. There can be no doubt that the Division Bench out-stepped the limits of its jurisdiction and passed orders of the extraordinary nature."

[Emphasis supplied]

35. We fail to appreciate as to how the above decision supports the submission of Mr. Chinoy. In fact in a way the underlying observations of the Supreme Court support the case of the appellants that there can be a scheme for revival of a Company by sale of the part of its assets. On this aspect the Court has clearly observed that a scheme for sale of the part of the assets of the Company could be passed only under Sections 391, 392 read with Section 394 of the Companies Act in which a definite procedure prescribed for sanctioning the scheme or arrangement is mandatory and that procedure was not followed in the above case. The Court has nowhere stated that the assets of the Company cannot be sold for revival of the Company.

36. Coming to the case of the other interveners M/s. Meghal Homes Pvt. Ltd. and K. Raheja Universal Co. Ltd., their submission is that the court has power u/s 392(2) to substitute the sponsor of the scheme and to make modification in the scheme which has been sanctioned by the shareholders and creditors and the interveners should be considered as persons interested in the affairs of the Company and the Court should accept the scheme of the interveners in lieu of the scheme of Somanis or the interveners be substituted as sponsors for the scheme and be permitted to modify the scheme to bring it in line of the

interveners scheme. In support of this submission strong reliance is placed on the judgment of the Supreme Court in *S.K. Gupta v. K.P. Jain* [1979] 49 Comp. Cas. 348 and the decision of the Gujarat High Court in *Tungbhadra Industries Ltd. v. National Dairy Development Board* 1983 TLR 2557. It is true that Sub-section (2) of Section 392 gives the Court power to modify a compromise or arrangement and this power can be exercised even suo motu without calling a meeting of all the member's or creditors and this power can be exercised at the time of sanctioning the scheme and at any time thereafter during the period the scheme is being implemented. However, on a plain reading of section itself it is clear that the power could be exercised only when such modification is necessary for proper working of the compromise or arrangement. In other words, the provisions to the extent can only be exercised so as to provide smooth working of the compromise or arrangement. It is nobody's case that the scheme submitted by Somanis with LBPL as sponsor is not workable or substitution of sponsor is necessary for the proper working of the compromise or arrangement. Therefore, the decisions in *S.K. Gupta's* case (supra) and *National Dairy Development Board's* case (supra) can have no application to the facts of the present case.

37. In *S.K. Gupta's* case (supra), the Supreme Court was dealing with a situation of modification of a scheme by substituting the sponsor after it was sanctioned by the Court. In that case, IHI Limited (hereinafter referred to as the "sick company"), a subsidiary of DFM Ltd., came to a halt and had incurred huge debts. Pending an application for winding up of creditors, the holding company propounded a scheme in respect of sick company which was sanctioned by the Court, after the same was approved by the unsecured creditors with which arrangement/compromise was sought. The appellants, i.e., Guptas, had opposed the scheme being sanctioned. After the sanction, the Guptas acquired controlling interest in the holding company (i.e., original sponsor) and, therefore, the Guptas moved an application before the Court for being substituted for the holding company as sponsor. This was opposed by the Jain group who did not have the controlling interest in the holding company although they supported the scheme when the scheme was sanctioned and they prayed that the sick company should be wound up. The Court held that Guptas had a subsisting and vital interest in the fate and future of the sick company and they were the appropriate persons who could be substituted in place of the holding company. The Court did this as it was found necessary for proper working of the scheme earlier sanctioned. This is clear from the following observations of the Court:

"When a scheme is being considered by the Court, in all its ramifications, for according its sanction, it would not be possible to comprehend all situations, eventualities and exigencies that may arise while implementing the scheme. When a detailed compromise and/or arrangement is worked out, hitches and impediments may arise and if there was no provision like the one in Section 392, the only obvious alternative would be to follow the cumbersome procedure as provided in Section 391(1), viz., again by approaching the class of creditors or

members to whom the compromise and/or arrangement was offered to accord their sanction to the steps to be taken for removing such hitches and impediments. This would be unduly cumbersome and time-consuming and, therefore, the Legislature in its wisdom conferred power of widest amplitude on the High Court u/s 392 not only to give directions but to make such modification in the compromise and/or arrangement as the Court may consider necessary, the only limit on the power of the Court being that such directions can be given and modifications can be made for the proper working of the compromise and/or arrangement. The purpose-underlying Section 392 is to provide for effective working of the compromise and/or arrangement once sanctioned and over which the Court must exercise continuous supervision [see Section 392(1)], and if over a period there may arise obstacles, difficulties or impediments, to remove them, again, not for any other purpose but for the proper working of the compromise and/or arrangement. This power either to give directions to overcome the difficulties or if the provisions of the scheme themselves create an impediment, to modify the provision to the extent necessary, can only be exercised so as to provide for smooth working of the compromise and/or arrangement. To effectuate this purpose the power of widest amplitude has been conferred on the High Court and this is a basic departure from the scheme of the U.K. Act in which provision analogous to Section 392 is absent. The sponsors of the scheme u/s 206 of the U.K. Act have tried to get over the difficulty by taking power in the scheme of compromise or arrangement to make alterations and modifications as proposed by the Court. But the Legislature, foreseeing that a complex or complicated scheme of compromise or arrangement spread over a long period may face unforeseen and unanticipated obstacles, has conferred power of widest amplitude on the Court to give directions and, if necessary, to modify the scheme for the proper working of the compromise or arrangement. The only limitation on the power of the Court, as already mentioned, is that all such directions that the Court may consider appropriate to give or make such modifications in the scheme, must be for the proper working of the compromise and/or arrangement."

[Emphasis supplied]

38. The decision of the Gujarat High Court in National Dairy Development Board's case (*supra*) is also clearly distinguishable on facts. There the Company, viz., Bhavnagar Vegetables Pvt. Ltd. had incurred huge loss and one of the creditors instituted a petition u/s 434, read with Section 439 of the Companies Act, for winding up of the said Company and the petition was admitted. In the course of proceedings, a scheme for compromise/arrangement was submitted by the appellant Tungabhadra Industries Ltd. (TIL). Before the said scheme could be sanctioned u/s 391 of the Act, National Dairy Development Board (NDDB) proposed a scheme of its own and thus there were in the field two Schemes. The scheme submitted by TIL was accepted by requisite majority and a petition was instituted for sanctioning the scheme. Before the final order could be passed by the Court on the said scheme, the NDDB had proposed its own scheme. The learned Company Judge issued a direction to consider the scheme proposed by

NDDDB and it appears that this was opposed by equity shareholders though under the scheme, they were getting 10 paise per share as against Rs. 10 per share offered by NDDDB. The NDDDB revised its offer by offering Rs. 15 per share in place of Rs. 10 per share. The TIL also increased its offer from 10 paise per share to Rs. 10 per share as against the Rs. 15 per share offered by NDDDB. The Banks to whom the Company owed a very large sum by way of secured loans of the order of Rs. 80 lakhs withdrew their support to TIL scheme. In view of the withdrawal of the support by the Banks, the scheme as put forward by TIL was withdrawn by its sponsor. In these circumstances, the NDDDB took out judges summons for substitution of its name in place of sponsor of TIL scheme and for modification of the said scheme to bring it in line with the NDDDB scheme. The scheme was opposed by (1) equity shareholders; (2) a section of the workers; and (3) TIL which itself not made any application for sanctioning the scheme. Ultimately even the workers and shareholders also accepted the NDDDB scheme and it came to be sanctioned by the Company Judge. Against the decision of the Company Judge an appeal was filed by TIL which had no interest save and except the satisfaction that the NDDDB scheme is frustrated and injury is caused to secured creditors, unsecured creditors and workers, all of whom stand to lose and an industrial unit which had started functioning will have to be closed down. The only submission urged on behalf of the TIL was that the order for substitution of the sponsor in original scheme, as modified subsequently is contrary to law inasmuch as no such application for substitution could have been made unless the original scheme was sanctioned. The Division Bench following the law laid down in S.K. Gupta's case (supra) held that, in exercise of powers under Sections 391 and 392 of the Companies Act it is competent for the Company Court to substitute one party as sponsor in place of some other party as sponsor and omission of the original sponsor of the scheme of compromise or arrangement and substitution of another one in its place would not change the basic fabric of the scheme. It was held that there is nothing in S.K Gupta's case (supra) which would go to suggest that sanctioning of a scheme of the original sponsor is a condition precedent for exercising power of substitution u/s 392 of the Act and that such substitution can only fall on the heels of sanction accorded to the scheme proposed by the original sponsor in which original sponsor figures as party to the compromise. The power of modification by substituting one sponsor by another could be exercised by court at any point of time when the question of sanction of a scheme arises. It is thus seen the Court allowed substitution as the original sponsor withdrew from the scheme and without substitution the scheme would have failed leading to closure of the Unit.

39. In the instant case, the scheme was not opposed by any person interested in the scheme even before this Court and all concerned parties have supported the scheme. Once the court is satisfied that the requisite statutory procedure has been followed and the scheme is backed by requisite majority and majority decision is just and fair and the scheme is not found in violation of any provisions of law, it is not permissible for the Court to permit third parties to intervene and

seek substitution in place of the original sponsor. The plea that the interveners should be allowed to intervene in the public interest is only to be stated to be rejected. Public interest is dynamic concept and cannot be put in a straitjacket. That the market value of property is more and the interveners are prepared to pay more money is certainly not the issue concerning public interest. In fact the interveners under the guise of public interest are following their own private agenda. The workers have been deprived of their legitimate dues for more than 20 years. It is not only the shareholders who have supplied capital are interested in the scheme but the workers who have invested their sweat and toil, in fact their life itself have greater stakes in the scheme. The scheme provides a lumpsum payment of Rs. 60 crores to the workers, whereas if the scheme is not sanctioned and liquidation continues, the workers may get virtually nothing. The workers have waited for their dues for last 20 years. None of these interveners at any time till the present scheme was approved, came forward with any scheme or proposal. If the interveners are allowed to intervene, this would virtually result in negation of the rights of the workers who are waiting for last two decades for their dues.

40. The reliance placed by the learned counsel for the interveners on Sections 443 and 466 is also completely misplaced. The scheme contemplates revival of the Company and for that purpose, it is necessary to revoke winding up order. The Court while sanctioning the scheme has a power to revoke winding up order u/s 394 of the Companies Act, [(see (1) Shankarlal Bansal, In re [2004] 118 Comp. Cas. 602 and (2) Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others, . In this regard, the following observations of Srikrishna, J. (as he then was) in PHP Auto Industries Ltd., In re [1994] 80 Comp. Cas. 289 are also pertinent :

"Thus the position in law appears to be clear. Section 391 invests the Court with powers to approve or sanction a scheme of amalgamation/ arrangement which is for the benefit of the company. In doing so, if there are any other things which, for effectuation, require a special procedure to be followed - except reduction of capital - then the Court has powers to sanction them while sanctioning the scheme itself. It would not be necessary for the company to resort to other provisions of the Companies Act or to follow other procedures prescribed for bringing about the changes requisite for effectively implementing the scheme which is sanctioned by the Court. Not only is Section 391 a complete code as held by the Courts, but, in my view, it is intended to be in the nature of a "single window clearance" system to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the Court for various other alterations or changes which might be needed effectively to implement the sanctioned scheme whose overall fairness and feasibility has been judged by the Court u/s 394 of the Act."

41. In our opinion the interveners have no locus standi in the present proceedings u/s 391 read with Section 393 of the Companies Act. The

interveners are neither the shareholders nor the creditors of the Company and there is nothing to show that they are interested in the affairs of the Company. In a scheme under Sections 391 and 393 of the Act, the person who is not a creditor or a shareholder of the Company, has no right to appear in the proceeding - SEBI v. Sterlite Industries (India) Ltd. [2003] 113 Comp. Cas. 273 and N.H. Shegal Ltd. v. Sanmati Trading Investment Ltd. [1997] 3 Comp. LJ 80.

42. In view of the foregoing discussion, and in the result, the appeals filed by the appellants are allowed. The impugned order of the learned Company Judge is set aside. The scheme propounded by Somanis as modified in the meetings and as further modified by two affidavits of Abhishek Lodha, Director of the Company dated 21-3-2005 and which modification we sanction u/s 392(2) read with Section 394 of the Companies Act. Company Petition No. 315 of 2004 is accordingly made absolute in terms of prayers (a), (b) and (c). The amount of Rs. 60 crores payable to the workers shall be deposited in this Court to be disbursed by the Official Liquidator and/or officer appointed by him to the workers. The learned Counsel for the appellants makes a statement before us that the amount of Rs. 60 crores is minimum amount payable to the workers and no refund thereof shall be sought by any of the appellants for any reason. The bank drafts shall be drawn in favour of the Prothonotary and Senior Master of this Court, who after receipt of draft shall invest the amount in fixed deposit of any nationalised bank initially for a period of three months and thereafter for the period of three months each subject to further orders. The Official Liquidator is directed to prepare a list of the employees and the recognized union as well as the Kruti Samiti shall extend necessary co-operation for the purpose of preparing/ finalising the list. The amount shall be calculated on the basis of the date of entry in service and last drawn salary as available with the office of the Official Liquidator and the work of distribution of money be started within a period of three months from today. The Official Liquidator is directed to issue advertisement in Marathi and Hindi newspapers, one in Mumbai and other having circulation throughout the State inviting claims of the workers. The cost of the publication shall be borne by the Company. Liberty to the appellants and the recognized Union and secured creditors to apply to this Court in case of any difficulty. The appeals along with all Notices of Motions stand accordingly disposed of.

The learned counsel appearing for the interveners make an oral application for stay of this order. Application is rejected.