

(2012) 11 DEL CK 0126

In the Delhi High Court

Case No : Company Appeal No's. 1 and 2 of 2011 and Company Appeal No. 28 of 2010

Spice Jet Ltd. and Others

APPELLANT

Vs

Malan Pur Steel Ltd. and Another
 Malan Pur Steel Ltd.
and Another Vs Spice Jet Ltd.

RESPONDENT

Date of Decision : 09-11-2012

Acts Referred:

Companies Act, 1956 — Section 343, 390(c), 391, 391(1), 391(2)

Criminal Procedure Code, 1973 (CrPC) — Section 482

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2012) 10 AD 259 : (2013) 112 CLA 79 : (2013) 1 CompLJ 438 :
(2013) 134 DRJ 467 : (2013) 117 SCL 283

Hon'ble Judges : Sanjiv Khanna, J;S.P. Garg, J

Bench : Division Bench

Advocate : Atul Sharma, Mr. Milanka Chaudhary and Ms. Neeru Mehta and Mr. Rishi Agarwala, Mr. Ankit Shah and Ms. Misha Rohtagi in Company Appeal Nos. 1 and 2/2011 and Mr. Jayant Bhushan, with Mr. Ajay Bhargav, Mr. Diwakar Maheshwari and Mr. Vinam Gupta, in Company Appeal No. 28/2010, for the Appellant; Jayant Bhushan with Mr. Ajay Bhargav, Diwakar Maheshwari and Mr. Vinam Gupta, Advocates in Company Appeal Nos. 1 and 2/2011 and Mr. Atul Sharma, Milanka Chaudhary and Ms. Neeru Mehta, Advocates in Company Appeal No. 28/2010, for the Respondent

Judgement

Sanjiv Khanna, J.—These are two cross appeals. Spice Jet Limited (Spice Jet for short), Paradise Credit Private Limited, Kesha Investment Pvt. Limited and Modi Overseas Investments Limited (collectively referred to as Modi Group) have filed Company Appeal Nos. 1 & 2/2011 impugning the order dated 14th July, 2010 passed by the Company Judge in CA No. 1130/2005 in CP No. 385/2003 and the order dated 16th July, 2010 in Co. A. (SB) 2/2000 and CA 623/2000. The Company Appeal No. 28/2010 has been preferred by Malanpur Steel Limited (Malanpur, for short) impugning the decision dated 15th July, 2005 passed by the High Court of Delhi in CA No. 797/2000 and CA No. 1852/2002 in CP No.

385/2003, sanctioning the scheme u/s 391(2) read with Section 394 of the Companies Act, 1956 (C. Act for short) on the terms set out therein. Objections were raised by Malanpur before the Company Judge against the scheme, in the said Company Appeal. Malanpur in this appeal also impugns the order dated 14th July, 2010 passed in Company Application 1130/2005, as the said order rejects the Review Application. For the sake of convenience we have decided to first take up the appeal preferred by Malanpur. Primarily three contentions have been raised. First, it was submitted that Malanpur was wrongly treated at par with the unsecured creditors or the inter-corporate depositors. Shares pledged with Malanpur had been sold for recovery of their dues, and thus they formed a separate class. The second argument raised was that the principal amount claimed by Malanpur was not Rs. 5 crores i.e. the amount of inter-corporate deposit, but included Rs. 83,96,465/- payable as interest for which a decree on admission was passed by Calcutta High Court in CS No. 161A/1997 vide order dated 23rd April, 1997. Third, it was submitted that criminal prosecution proceedings u/s 138 of the Negotiable Instruments Act, 1881 (NI Act, for short) cannot be made the subject matter of the order u/s 391(6) of the C. Act. Neither the scheme nor the Company Court can sanction/direct, compulsory compounding of proceedings u/s 138 of NI Act. Reliance was placed on the judgment of the Division Bench of this Court in Krishna Texport Industries Ltd. Vs. DCM Ltd. 2008 (150) DLT 259 (DB) , and the judgment of the Supreme Court in JIK Industries Limited and Others Vs. Amarlal V. Jumaní and Another, .

2. Contentions of the respondent-Spice Jet Ltd. and the Modi Group are that:

(i) Malanpur was correctly treated and classified with the Inter-Corporate Depositors and not as a secured creditor.

(ii) A decree holder was not a secured creditor and did not form a separate class.

(iii) Malanpur had never claimed or urged that they formed a separate class because shares were pledged to them or they had sold the said shares. The aforesaid contentions are an afterthought and should not be allowed to be raised.

(iv) The Scheme was sanctioned on 15th July, 2005 and has been successfully implemented. The amount due and payable under the scheme has been paid to the creditors. Even the amount payable to Malanpur has been deposited.

(v) Similar or identical contention raised was negated in the order dated 29th July, 2003 passed in CA No. 606/2003 in CA No. 797/2000. The Division Bench of Calcutta High Court in their order dated 20th July, 2005 has also rejected the said contention in G.A. No. 2212/2005.

(vi) The proceedings u/s 138 of the NI Act have not been quashed but stayed. In the present case, the scheme has been sanctioned and the original debt of Rs. 5 crores would be satisfied on payment under the sanctioned scheme. The scheme is statutory in nature and binding on all creditors including Malanpur. It would be unfair and unjust to allow the proceedings u/s 138 of the NI Act to continue.

3. To appreciate the controversy, the basic and necessary facts may be noticed.

(i) A company Modi Luft Limited (Company for short) was incorporated vide Certificate of Incorporation dated 12th April, 1994. The said company started operations as a domestic airline after entering into a technical collaboration with Lufthansa of Germany who had also leased their aircrafts to it. Subsequently, Lufthansa terminated the agreement and the aircrafts given on lease were seized and taken back. The company was liable to pay debts to several creditors, including Malanpur. Malanpur, earlier known as Hindustan Development Corporation Limited, had advanced an inter-corporate deposit (ICD, for short) of Rs. 5 crores to the company in November, 1995. The deposit was repayable after one year with interest @ 20% p.a. In November-December 1995, three investment companies of Modi Group viz. Paradise Credit Pvt. Ltd., Keshu Investments Pvt. Ltd. and Modi Overseas Investments Limited pledged 34,00,000, 6,60,000 and 15,00,000 shares respectively (total 55,60,000 shares) as collateral security for the ICDs.

(ii) As there was default in payment, Malanpur filed Civil Suit bearing CS No. 161A/1997 before Calcutta High Court. The prayers made in the suit were, inter alia, (i) decree for a sum of Rs. 5,83,96,465/- being the principal amount and interest due and payable on the date of filing of the suit; (ii) Interim interest and interest on judgment at the rate of 20% per annum; and (iii) declaration that Malanpur was entitled to sell the said pledged shares by public auction and/or private treaty and to realize the sale proceeds and appropriate the same in satisfaction of its claim.

(iii) On an interim application vide order dated 8th September, 1997 in G.A. No. 1539 of 1997, decree upon admission of Rs. 5,83,96,465/- was passed by the Calcutta High Court. Suit for the other reliefs remained/remains pending.

(iv) In February 1997, another creditor, Indian Oil Corporation instituted winding up proceedings in Delhi High Court as CP No. 68/1997 against the Company, i.e. Modi Luft Limited. By order dated 29th April, 1998, the official liquidator was appointed the provisional liquidator of the Company.

(v) In May 1998, Malanpur filed an execution petition for recovery of dues payable under the decree dated 8th September, 1997. Calcutta High Court by order dated 23rd June, 1998, stayed the execution petition No. 1545/1998 as the provisional liquidator had been appointed by the Delhi High Court in the winding up proceedings.

(vi) By order dated 31st December, 1999, an amount of Rs. 9 crores was deposited with the Registrar of the High Court, on behalf of the Company, i.e. Modi Luft Limited. The order appointing provisional liquidator was recalled by the Company Judge on 30th May, 2001. The company had settled its dispute with Indian Oil Corporation by making full and final payment. The company also settled the claim of Hindustan Petroleum Corporation Limited, which withdrew CP No. 237/1998 vide order dated 12th September, 2001.

(vii) It appears that the aforesaid funds were made available, secured or paid by Royal Holding Services Limited, a company belonging to Verus Group, Canada.

(viii) CA No. 797/2000 was filed in May, 2000 under Sections 391(1) and 393 of the C. Act proposing a scheme of arrangement with the creditors. However, disputes arose between the Modi Group and Royal Holding Services Limited, and thereafter another application CA No. 606/2003 u/s 391 and 393 of the C. Act was filed.

(ix) By order dated 29th July, 2003, the first motion was allowed on the terms set out therein. Lufthansa of Germany had supported the scheme and had given their consent. It was noticed that approximately 82% of the trade creditors representing Rs. 6,00,84,229/- in value terms had consented to the scheme. The requirement to hold meeting of the trade creditors was, therefore, dispensed with. Since 75% of the inter-corporate deposits had consented but Malanpur had objected, it was directed that a meeting of the inter-corporate depositors should be held. A meeting of the staff creditors was also directed to be convened.

(x) Suffice at this stage to notice that Malanpur had filed objections at the time of first motion which were referred to and duly noticed in the order dated 29th July, 2003. The Company Court also examined the contention regarding classification of creditors for the purpose of meetings u/s 391/ 393 of the C. Act. It was observed that at the said stage it was for the company to decide what/ which class of creditors should be made parties to the scheme.

4. At the said stage Malanpur did not contest or state that they had been wrongly classified by being treated at par with, or in the same class as, the inter corporate depositors, neither did they contest that they constituted a separate class as they had sold the pledged shares.

5. The scheme was unanimously approved by the staff creditors and more than 3/4th of the inter corporate depositors, inspite of opposition and negative vote by Malanpur.

6. Malanpur thereafter filed objections to the second motion. By a detailed decision dated 15th July, 2005, the objections of Malanpur were rejected and the scheme was sanctioned by the same order.

7. Malanpur thereupon filed CA No. 1120/2005 which was essentially a review application. The application stands dismissed by the second impugned order, dated 14th July, 2010.

8. What constitute a separate class for the purpose of Section 391 and 392 of the C. Act, has been the subject matter of controversy and debate. In *Maneckchowk and Ahmedabad Manufacturing Co. Ltd.*, (1970) 40 Company Cases 819 (Guj), it has been observed as under:-

41. It is always a moot question what constitutes a class. Buckley on the Companies Acts, 13th edition, page 406, has observed that it is a formidable

difficulty to say what constitutes a "class" of creditors. The creditors composing the different classes must have different interests. When one finds a different state of fact existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

9. In Palmer's Treatise Company Law, 25th edition, it has been observed as under:-

What constitutes a class:

The court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the company to decide, in accordance with what the scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking the risk that the classes which are fixed by the judge, usually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, and we emphasize the words "in the result", they reveal inadequacies, the scheme will not be approved". If, e.g., rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be treated differently under the scheme, such groups must be treated as separate class for the purpose of the scheme. Moreover, when the company has decided what classes are necessary parties to the scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the scheme. In that case it is not the practice to hold a meeting of that class, but to make the class a party to the scheme and to obtain the consent of all its members to be bound. It is, however, necessary for at least one class meeting to be held in order to give the court jurisdiction under the section.

10. A class consists of creditors or members who form a homogenous group with commonality of interest. A class must be confined to members or creditors whose rights are similar. Their rights should not be dissimilar so as to make it impossible for them to consult together keeping in view their common interest. As defined by Bowen, L.J. "it seems plain that we must give such a meaning to "Class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest." (Sovereign Life Assurance Co. Ltd. v. Dodd 1892 (2) Q.B. 573 CA).

11. Creditors can normally be divided into three categories (which may themselves overlap), of preferential creditors, secured creditors and unsecured creditors. Unsecured creditors normally form a single class, unless there are circumstances that they must be treated differently, i.e. when they have different interests which may come into conflict. A background for the same must be

established. In *Miheer H. Mafatlal v. Mafat Lal Industries*, (1996) 87 Company Cases 792, it has been observed as under:

It is, therefore, obvious that unless a separate and different type of Scheme of Compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such subclass of the main class of members or creditors is required to be convened. On the facts of the present case the appellant has not been able to make out a case for holding a separate meeting of dissenting minority equity shareholders represented by him.

12. The object and purpose of classification of creditors is to ensure that the meetings of different classes of creditors are held in a manner that there should not be any injustice or confiscation, and persons dissimilar are not clubbed together with a view to take advantage of their conflicting interest.

13. According to Halsbury's Laws of India, 2007, Vol. 27, "Unsecured creditors who may have filed suits or obtained decrees must be deemed to be of the same class as other unsecured creditors, as per Section 390(c) of the Companies Act." Further, an unsecured creditor who has a decree does not become a secured creditor, and does not constitute a separate class (see *Haricharan Karanjai Vs. Ulipur Bank Ltd.* (1942) 12 Company Cases 110). After reference to the provisions and relying upon Section 511 of the C. Act, the Gujarat High Court, in *Ananta Mills Ltd. (In Liquidation) Vs. City Deputy Collector, Ahmedabad and Ors* [(1972) GLR 63] has held:-

The object of the winding up provisions of Companies Act, is to put all unsecured creditors upon an equality and to pay them *pari passu*. All the unsecured creditors form one class. The winding-up order made on the petition of a creditor or a contributory enures for the benefit of all creditors and contributories and that is why it is always styled as a representative action. When a company is in insolvent circumstances or in financial doldrums, it is quite likely that different creditors might try to secure a march over those similarly situated. Provision for the winding-up of companies are meant for just and equitable distribution of the assets of the company amongst various persons interested in it. Consequently, once a company is ordered to be wound up, a scramble for taking away its assets must be avoided. All the assets of the company must be available for just and equitable distribution amongst the various interests having claims against the company. If by some action of creditor this basic concept of just and equitable distribution amongst the various interests having claims against the company is sought to be defeated, the liquidator has to step in and resist such benefit going to some to the exclusion of rest similarly situated. To repeat the words of Lindley J., In *re Oak Pits Colliery Co.*, the object of the winding-up provisions of the Companies Act is to pay all unsecured creditors upon equality and pay them *pari passu*. This principle has secured statutory recognition in section 511 of the Companies Act, which provides as under:

Subject to the provisions of this Act as to preferential payments, the assets of a company shall, on its winding-up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles otherwise provide be distributed among the members according to their right and interests in the company.

What effect can then be given to an attachment levied by a creditor who, but for the attachment would stand in company with all other creditors similarly situated. In my opinion, the short answer to the question would be to ignore the attachment or, as a winding up court, raise the attachment with a view to remove an impediment in collection or realisation of the assets of the company which is being wound up, for its just and equitable distribution. If attachment is held subsisting giving some right to the attaching creditor, it would strike at the root of the principle whereby all unsecured creditors are to be paid in *pari passu*.

14. In view of the aforesaid position we are in complete agreement with the Company Judge that Malanpur cannot be treated as a distinct class of creditor on the ground that it was a decree holder. It was certainly not a secured creditor. We also reject the contention of Malanpur that the principal amount due and payable to them was not Rs. 5 crores but Rs. 5,83,96,465/-. Admittedly, the principal amount advanced was Rs. 5 crores. The fallacious argument of Malanpur on the said issue proceeds on the foundation that as they have a court decree, the amount mentioned in the court decree should be treated as the principal amount. If we accept the aforesaid contention, it will lead to an unwarranted distinction between a decree holder and other claimants, and gravely affect and upset the *pari passu* principle. Unsecured creditors form a separate class and have to be treated alike regardless of whether they have a court decree or have filed the court proceedings or proceedings for winding up proceedings. This is the underlining principle behind several provisions of the C. Act (see sections 441, 442, 446, 447, 448, 456, 511 and 537 of the C. Act). Observations in *Maneckchowk and Ahmedabad Manufacturing Co. Ltd.* (*supra*) are apposite. The aforesaid sections relate to winding up proceedings but underlying salutary principle of *pari passu* can be equally applied when it comes to the question of value of voting rights. Unsecured creditors cannot steal a march and claim a better right viz. another unsecured creditor in the same class on the ground that it has a court decree in its favour.

15. The Company Judge has also rightly pointed out that Lufthansa also had a court decree of US\$ 5 million. Malanpur, if treated as a separate category along with Lufthansa, would not have succeeded in their objection to the scheme. In that case, Malanpur would have represented 18% and Lufthansa would have represented 82% in value in terms the amount due and payable by the company to the decree holders. We may also note that the decree passed by the Single Judge of the Calcutta High Court is pending challenge before the Division Bench. Lastly, as per the case of Malanpur, they have sold the pledged shares for consideration of Rs. 1.39 crores. If this amount of Rs. 1.39 crores is reduced

from the debt, the principal amount of debt due and payable to Malanpur, i.e. their percentage in value term will come down by more than 25%.

16. The contention of the Malanpur that they should have been treated as a separate class because they were holders of pledged shares or had sold the same was not taken or raised before the learned single Judge in the objections or at the time of hearing/arguments resulting in passing of the order dated 15th July, 2005. It is apparent that this contention was taken subsequently only at the time of hearing of the review application. The plea, therefore, predicated on the pledged shares, cannot be permitted to be raised now. The scheme as noticed has been substantially implemented. Malanpur should not be permitted to belatedly, at this late stage, raise this plea, as it would cause grave and irreparable prejudice to the opposite side and other third parties who have benefited from the scheme. In fact, Malanpur appears to have benefited from the order sanctioning the scheme, and the present legal fight stems from, and is because of, the market price of the shares of Spice Jet.

17. This brings us to the second issue regarding proceedings u/s 138 of the NI Act. Malanpur has filed proceedings under the aforesaid section as cheques given by Modi Luft for encashment had bounced and had not been honoured. In the order dated 15th July, 2005, learned single Judge has observed as under:-

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 nugatory.

18. In the order dated 14th July, 2010, the single Judge has held as under:-

28. There is no order directing Malanpur to withdraw the proceedings. Only arrangement which is made is that Malanpur and/or the Company may apply for adjourning the pending matters which could be withdrawn only after payment as per the scheme is made. Malanpur has to accept the position that the scheme has since been sanctioned. The amount due to Malanpur is now payable as per the sanctioned scheme. Because of non-payment of this very amount due to Malanpur in respect of which Spice Jet has given the cheques and they are dishonoured, Malanpur has taken due proceedings u/s 138 of the NI Act. Naturally, once the amounts as per the scheme are paid, the Spice Jet shall be absolved of any liability in respect of the aforesaid ICDs given by the Malanpur to Spice jet. In such an eventuality, it would always be permissible to Spice Jet to

contend before the Court, where these proceedings are pending that amount in question stands paid. The consequence flowing there from can always be taken into account by the Court where these proceedings are pending. In this backdrop once the scheme has already been sanctioned, this ground seeking review of the order is not even available to Malanpur.

29. In *Krishna Texport* (supra), this Court was of the opinion that Company Court was not empowered to stay criminal proceedings against officers of the company involved in cheating, criminal breach of trust, misappropriation, forgery and dishonor of cheques. Likewise, provisions of Section 391 (6) of the Companies Act, could not be used to bring an end the prosecution arising from Income Tax Act or Foreign Exchange Control Act. Because of this reason, the court also opined that proceedings u/s 138 of the N.I. Act instituted against the company could not be stayed. That stage is long over. It is stated at the cost of repetition that scheme was sanctioned way back in the year 2005. But for the present review petition, said scheme has attained finality. That has even been substantially acted upon as well, inasmuch as, payment to most other creditors have already been given as per the scheme.

19. We are in agreement with the counsel for Malanpur that u/s 391(6) of C. Act, proceedings u/s 138 of NI Act cannot be stayed. We are also in agreement with the counsel for the Malanpur that even if the scheme has been sanctioned and payment to the creditors is to be made under the scheme, criminal proceedings u/s 138 of the NI Act cannot be stayed or quashed by the Company Court. In the *Krishna Texport Industries* (supra), the scheme was sanctioned and a question arose whether in exercise of power u/s 391(6) of C. Act, criminal prosecution u/s 138 of NI Act could be stayed or quashed. The Division Bench in *Krishna Texport Industries* (supra), after referring to several decisions of the Supreme Court and High Courts, observed that the word "proceedings" used in the said section would not include "criminal proceedings". The Division Bench referred to the observations of the Supreme Court in *BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc.*, , *Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others*, , *Rajneesh Aggarwal Vs. Amit J. Bhalla*, and observed that the expression "proceedings" can be interpreted differently depending upon the context in which it has been used by the legislature. In the context of Section 391 and 392 of the C. Act, it will exclude the criminal proceedings. It further observed as under:-

31. The matter may also be looked into from another perspective. The company court cannot call before itself the proceedings u/s 138 of the NI Act and quash the proceedings. The power to quash those proceedings rest only with the hierarchy of the criminal courts. Thus, what would be the intent to put such proceedings in abeyance by an order of a company court when the company court itself has no power at any stage to bring to an end these proceedings?

32. The sanctity of the proceedings u/s 138 of the NI Act must, thus, be preserved and those proceedings must continue as they arise out of the failure of

the company's Directors to honour the negotiable instrument duly signed by them like a cheque. The proceedings u/s 138 of the NI Act are not for recovery of claim of money by a creditor for which the remedy would be by filing a civil suit.

33. It can hardly be said that the object of Section 391(6) of the said Act is to prevent action against the officers of the company who may be involved in cheating, criminal breach of trust, misappropriation, forgery and for that matter dishonour of cheque. Again the provision cannot be used to bring to an end a prosecution arising from Income Tax Act or Foreign Exchange Control Act. The proceedings are clearly not of a pecuniary nature involving recovery of money. Interestingly, even the scheme stated to be approved at the behest of the respondent company does not envisage bar to any criminal proceedings or payment of any actual amount in the given facts of the case as discussed at the inception of this judgment, but only seeks to extinguish the liability of the appellant on the ground that the respondent is liable to pay a lesser amount, the interest not running, and the claim is alleged to have been extinguished by payment to a third party at the behest of the appellant for which there is no written document.

20. The aforesaid view finds resonance and acceptance in the judgment of the Supreme Court in JIK Industries Limited (supra). During the course of arguments before us, a copy of the decision of Bombay High Court, which was made subject matter of challenge before the Supreme Court in the said case, was produced. The factual position in the said case was that the scheme was approved in the meeting held on 25th June, 2005 and was sanctioned by the Court vide order dated 16th September, 2005. The appointed date as stipulated was 28th February, 2005. In the said case, prosecution u/s 138 of NI Act had been filed in some cases after the appointed date. In fact, in some cases, cheques were dishonoured after the said date. The scheme envisaged issue of shares to the creditors. Identical or similar arguments were raised but were rejected by the Bombay High Court observing that the scheme did not have the effect of creating a new debt but it simply makes the original debt payable in the manner and to the extent provided in the scheme. Thus sanction of the scheme did not result in extinguishing the debt but only curtailed the right to recover the debt in the sense that the debt would become payable only in accordance with the sanctioned scheme. Distinction was drawn between power of the Company Court and exercise of power u/s 482 of the Code of Criminal Procedure, 1973 (Cr. P.C., for short). The effect and the consequence once the payment was made under the Scheme and whether in such circumstances the proceedings u/s 138 of NI Act should be quashed u/s 482 Cr. P.C. was left open. It was, however, observed that the company court cannot quash, stay or compound the criminal proceedings u/s 138 NI Act. The Supreme Court in its detailed judgment held that the power of compounding requires consent or agreement of two parties. It is bilateral and must have an element of mutuality. It is not unilateral. There cannot be any deemed compounding or implicit consent on the basis that the scheme u/s 391 of the Act has been sanctioned.

21. In view of the aforesaid pronouncements, we do not think that the observations in the impugned orders for stay or proceedings of quashing of proceedings u/s 138 of NI Act can be sustained. The aforesaid observations will be treated as deleted. We clarify that we have not examined or stated what will be the effect in case payment is made under the sanctioned scheme. We have also not examined whether in the said situation the accused would be entitled to ask for quashing of the criminal proceedings. The said aspect will be examined in the criminal proceedings by the court(s) concerned and we express no opinion in that regard.

22. The aforesaid findings, dispose of the company appeal No. 28/2010 filed by Malanpur.

23. This brings us to the appeal filed by Spice Jet Limited and the others i.e. Company Appeal Nos. 1 and 2/2011. The issue raised pertains to 55,60,000 pledged shares which were given as collateral securities for the ICDs. The issue arises for consideration in view of the directions given by the Supreme Court in its order dated 6th July, 2009, passed in SLP(C) No. 17474/2005. The order reads as under:-

By order dated 16th January, 2009 the Delhi High Court in C.M. Nos. 1469-1470 of 2008 in Co. P. No. 385 of 2003 observed that the question regarding forfeiture of shares is pending in the Supreme Court and it would be open to M/s Malanpur Steel Limited to make its submissions before the Supreme Court.

Today when the SLP came before this Court the above order was shown to us. We are of the opinion that the High Court should decide the said question in accordance with law. In the meanwhile, status quo as regards the transfer of shares shall continue till the High Court decides the matter expeditiously.

Accordingly, the SLP stands disposed of.

24. The said order was passed in the SLP preferred by Spice Jet against the judgment and order dated 11th July, 2005 passed by the Division Bench of Calcutta High Court in G.A. No. 3152/2003 in APO No. 317/2001 in APOT No. 615/2001 & GA No. 2293/2001 in CS No. 161/1997. By the said order, the Division Bench of Calcutta High Court had set aside the order passed by the learned Single Judge in the execution proceedings and allowed the appeal in terms of prayers (a) and (b) of the application being GA No. 2293/2001. The prayer was for a direction upon the Company/Spice Jet to register transfer of 40,48,200 shares which were sold to three purchasers, and 15,11,200 shares, which were sold by the three purchasers, to various individuals.

25. We have already referred to the civil suit CS No. 161A/1997 which was filed by Malanpur against the Company, (Modi Luft Limited) in the Calcutta High Court. As noticed above, in the said suit a decree on admission in the sum of Rs. 5,83,96,465/- was passed on 8th September, 1997. The first Execution Petition 1545/1998 was stayed by the Calcutta High Court on 23rd June, 1998 upon

appointment of the provisional liquidator. Subsequently, Malanpur filed the second Execution Petition on 7th July, 2005, which was registered as Execution Petition No. 54/2005. On the same date itself, a single Judge of the Calcutta High Court passed an order attaching the accounts of Spice Jet to the extent of decreed amount. Spice Jet has filed an appeal against the said order, which is still pending. By another order dated 20th July, 2005 passed by the Division Bench Calcutta High Court, the order of the single Judge dated 7th July, 2005 has been stayed and it has been directed that Malanpur was in the category/class of unsecured creditors. The Division Bench had observed that the scheme passed by the Company court was binding on Malanpur and the second execution proceedings cannot be proceeded with. The result is that the said execution proceedings have been stayed. We, therefore, need not examine the orders passed in the second execution proceedings. This is not an aspect which should also be examined by this court. What has to be examined and gone into by this court in terms of the directions issued by the Supreme Court in their order dated 6th July, 2009, is the question relating to forfeiture of 55,60,000 pledged shares. We shall be only examining the said aspect.

26. The aforesaid shares were purportedly issued to Paradise Credit Pvt. Limited, Kesha Investment Pvt. Ltd. and Modi Overseas Investment Limited. These three companies are also appellants along with Spice Jet Ltd. in Co. A. Nos. 1 and 2 of 2011.

27. To decide the question raised some more facts have to be stated. These are:

(i) During the course of winding up proceedings before this court, C.A. No. 265/2003 was filed by Siddhantha Sharma, Chairman of Royal Airways Limited u/s 343/ 441 of the C. Act. The application pertained to allotment of the shares to the companies of Modi Group. The allegation was that these shares were tainted and not fully paid up. The holders in question had not paid consideration for issue of shares. These three companies were investment companies of "Modi Group" and were issued the said shares in deceitful manner. The Company, i.e. Modi Luft had entered into a lease agreement with Agache Associates for taking the premises at 15, Ratan Babu Road, Calcutta on rent @ Rs. 10,000/- per month. Agache Associates was also an associate company of the Modi Group. As per the alleged agreement the Company had to pay security deposit of Rs. 36 crores to Agache Associates. This amount, it was alleged, was paid by Paradise Credit Private Ltd., Kesha Investment Pvt. Ltd. and Modi Overseas Pvt. Ltd. to Agache Associates and in lieu thereof 55,60,000 shares were issued to the said companies. The allegation against the Company, the management, and Modi Group, was that this liability of Rs. 36 crores was artificial and the premises were never taken on rent.

(ii) In CA No. 265/2003, the prayer made was that resolution dated 30th July, 1996 by which the Board of Directors had allotted the shares to the aforesaid companies should be declared null and void.

(iii) As noticed above, disputes and differences had arisen between Modi Group and Royal Holding Services Limited.

(iv) Similar allegations were made against the Modi Group in the application under Sections 391-392 of the Companies Act enclosing therewith the scheme. It was stated:-

Royal Airways Limited has moved the application being CA 265/2003 as stated above and in the event, Mr. S.K. Modi is able to bring back the Rs. 36 crores embezzled by him, then Royal Airways Limited shall be able to repay its creditors effectively and early, and in the event, he fails to do so, the same shares shall be available for reissue after forfeiture and Royal Airways Limited would have to sue S.K. Modi for the balance amounts.

(v) In the order dated 15th July, 2005 sanctioning the scheme, decision of application CA 265/2003 was deferred. It was stipulated that the scheme stands sanctioned subject to the decision in CA No. 265/2003.

(vi) The Scheme of Compromise itself on the said issue, envisaged and stipulated in clause 6(II) and relevant portion of clause 6(III) as under:-

6(II) RIGHTS ISSUE

Royal Airways Limited has filed a Company application being CA 265/2003 u/s 536 read with Section 441 of the Companies Act, 1956 against S.K. Modi and his group investment companies, praying for directions inter-alia that the purported board resolution of Royal Airways Limited whereby the Partly Paid Shares were made fully paid up on July 30, 1996, after the institution of the first winding up petition on July 1, 1996, be declared void, as no previous sanction of the Court was taken. The Court vide its orders dated January 28, 2003 in CA 1852/2001 in CA 797/2000 moved by a Trade Creditor of Royal Airways Limited, held that the marking of the Partly Paid Shares as fully paid up, by the purported Board resolution dated July 30, 1996, was not a bona fide transaction and the alleged lease of a certain property was a stratagem device of the S.K. Modi Group to falsely and illegally make the Partly Paid Shares as fully paid up.

The articles of Association of Royal Airways Limited authorize Royal Airways Limited to forfeit shares for nonpayment of call money within the stipulated period and to reissue the same. Subject to the orders which may be passed in CA 265/2003, Royal Airways Limited proposes to give 30 (thirty) days' notice to the SK Modi Group Investment Companies, to pay the balance call money of Rs. 30 per share on the Partly Paid Shares and recover a part of Rs. 33.31 Crores not paid by the SK Modi Group in respect of the Partly Paid up Shares.

In case the SK Modi group investment companies fails to pay the Rs. 30 per share together with interest @ 18% p.a., Royal Airways Limited shall forfeit the Partly Paid Shares and reissue the same on Rights Basis to its present shareholders or their renounces. This Right Issue would yield about Rs. 11.60 Crores. The remaining amounts of nearly Rs. 22 Crores together with interest

18% p.a. would be recoverable from Mr. S.K. Modi and his group investment companies, jointly and severally, in case SK Modi Group investment companies fail to pay their call money and for which amount Royal Airways Limited reserves its right to initiate appropriate legal proceedings. The remaining amounts of nearly Rs. 22 crores together with interest at 18% p.a. shall as and when realized be utilized by Royal Airways Limited for its commercial operations.

Royal Holdings Services Limited shall subscribe to the shares offered to it on a Rights Basis, if permitted by law to do so. In the event of a Rights Issue and Royal Holding Services Limited (holding Company of Royal Airways Limited) not being permitted by law to subscribe to the Rights Issue, Royal Holding Services Limited shall, renounce its right to subscribe to the Shares of Royal Airways Limited offered on a rights basis in favour of Non-Resident Indians who control Royal Holding Services Limited, and who have conveyed their willingness to deposit the entire share allotment money in respect of its Rights entitlement pursuant to the rights Issue with the Court as share application money at least thirty (30) days prior to the Second Installment Date and/or any other Non-Resident Indians/Indian Nationals. In case there are any unsubscribed shares, pursuant to the proposed Rights Issue, the same shall be allotted by the Board of Directors in exercise of the powers granted to the Board of Directors u/s 81(1)(d) of the Companies Act, 1956 read with Article 3(b) of the Articles of Association of the Company in the best commercial interest of Royal Airways Limited.

(III) REALISATION OF PROCEEDS FROM PLEDGED SHARES

Presently, Royal Airways Limited has a right to recover Rs. 33.31 crores together with interest @ 18% p.a. from Mr. S.K. Modi and his group companies and in order to secure the said recovery, Royal Airways Limited has filed a CA 265/2003 praying for certain directions including a prayer for lifting of the Corporate Veil and attaching all the shares of the SK Modi Group.

The pledged shares detailed herein were pledged by the group companies of the SK Modi Group and accordingly, on the Effective Date and in order to recover the Rs. 33.31 crores due and outstanding from the SK Modi Group investment companies, Royal Airways Limited shall make an application for appointment of a Court Receiver in respect of the Clean Shares and the above Clean Shares shall be sold by the Court Receiver at least two months before the Second Installment Date and the proceeds realized therefrom would be available for meeting the Second Installment. Partly Paid Shares held by Reliance Capital Limited and Malanpur totaling to 88,92,900 as detailed hereinafter, shall also be kept in the safe custody of the Court Receiver and subject to the final outcome in CA 265/2003 shall be re-issued on a rights basis under the Rights Issue as stated hereinabove.

28. CA No. 265/2003, however, did not get decided on merit as the disputes between the Royal Holding Services Limited and "Modi Group" got settled subsequent to the sanction of the scheme. Thereafter, CA No. 634/2009 was filed

by both Modi Group and Royal Holding Services Limited, and application CA No. 265/2003 was dismissed as withdrawn vide order dated 16th January, 2009, which reads as under:-

Memorandum of Agreement dated 26.11.2008 has been entered into by the Director of the Company Mr. Siddhanta Sharma as well as the company with the respondents. This agreement records the terms and conditions on which the settlement has been arrived at between the parties. In view of this settlement, prayer is made for withdrawal of CA No. 265/2003 and 155/2002. The application is signed by all the concerned parties and is also supported by affidavits.

Prayers made in these applications are accordingly allowed and CA Nos. 265/2003 and 155/2002 are dismissed as withdrawn.

I may note the contention of Mr. Jayant Bhushan, learned senior counsel appearing for M/s. Malanpur Steel Ltd. that the settlement also stipulates that shares purportedly sold by M/s. Malanpur Steel Ltd. shall not be forfeited and, therefore, there is no impediment in transferring these shares in the name of the transferees. It is not in dispute that matter in this respect is pending in the Supreme Court and it would be open to M/s. Malanpur Steel Ltd. to make this submission before the Supreme Court.

These applications are disposed of in the aforesaid terms.

At this stage, I may note that while passing the orders in the main petition sanctioning the scheme, joint receivers were also appointed for disposal of 92,20,400 shares. Dr. Saif Mahood, Court Receiver, submits that these shares are in possession of Mr. Jhanji, other Co-Receiver. In view of this settlement arrived at between the parties, said order also requires modification inasmuch as in view of the said settlement, 12,20,400 shares go to Mr. S.K. Modi group and remaining 80,00,000 shares are to be given to the nominee of the company, namely, M/s. Grant Hotel. Since these shares have not been sold so far by the joint receivers, direction is issued to Mr. Jhanji, one of the Court Receiver, to handover 12,20,400 shares to counsel appearing for Mr. S.K. Modi group and 80,00,000 shares to the counsel appearing for the company for onward transmission to M/s. Grant Hotel. It would be open to M/s. Grant Hotel to deal with these shares in any manner it likes, including their disposal after opening a DEMAT account in this regard.

29. On the basis of the said settlement, CS (OS) No. 1673/2005 filed by S.K. Modi and others against B.S. Kansar and others, was disposed of on 12th December, 2008. The Memorandum of Settlement forms part of the decree and is binding on the parties. The relevant clause of the said MOS is as under:-

2. Terms of Settlement

2.1 The Parties agree and undertake to make a joint application in CA 797 of 2000 for recording the settlement before the Hon"ble High Court of Delhi at New Delhi in respect of the Company's shares issued and allotted and to be deemed

as fully paid and also the obligations of the Parties in the following manner.

(i) The Court Receivers appointed by the Hon"ble High Court vide orders dated July 15, 2005 in Company Petition No. 385 of 2003 are on date holding 92,20,400 (Ninety Two Lacs Twenty Thousand Four Hundred) shares of the Company that belongs to MGE, as set out in detail in Annexure C, MGE agrees that 80,00,000 (Eighty lakhs) of these shares be dealt with by the Company at its absolute discretion without reference or further confirmation from MGE. Towards this end, MGE undertakes to extend full cooperation to the Company including but not limited to execution of such documents, joint application, filings before the Court and other documents as may be required to transfer these shares to nominee of the Company towards consideration of this Settlement. Such nominee is irrevocably authorized by MGE to act on the instructions of the Company to dispose the said shares in such manner as the Company may deem fit and correct. It is clarified that such nominee shall hold the shares for benefit of the Company and no liability whatsoever under fiscal and other laws/regulations will accrue to the nominee and the same shall be the exclusive liability of the Company. MGE hereby acknowledges that such nominee is acting as an agent of the Company in respect of these shares and undertakes not to raise dispute/claim of any nature in this regard against the nominee;

(ii) The Company agrees that upon the court passing an order/direction to record the settlement as contemplated herein, all claims and objections of the Company against MGE with regard to the shares and mutual rights and obligations of the Parties against each other in relation to or arising out of the Lease Agreement dated September 11, 1995 ("Lease Agreement"), including any claim with respect to Rs. 33,00,00,000 (Rupees thirty six crores) stated as deposit in the Lease agreement shall stand satisfied. All amounts realized from the sale of 80,00,000 (Eighty lac) shares under Clause (i) above shall be in full and final satisfaction of all and any claims of the Company arising from or in respect of the above claims. Any shortfall or excess from such realization shall be to the benefit or account of the Company. It is clarified that this is not conditional upon or subject to the actual sale or realization of proceeds from sale of any shares but is effective on the passing of the order recording of the settlement by the Hon"ble Court to this effect.

(iii) The Company agrees that the balance 12,20,400 (Twelve lac Twenty Thousand Four Hundred) shares of the company, owned by MGE and currently in custody of the Court Receivers shall be restituted by the Court Receivers to respective registered owners of the shares free of any claim or encumbrance of the company and they shall be free to deal with the same without any claim or objection from the Company.

(iv) The company agrees that all claims, rights and obligations arising from or in respect of the Lease Agreement dated September 11, 1995 shall stand fully extinguished and Agache Associates, shall be free to deal with the lease property, without any claim or objection from the Company; and

(v) The parties shall withdraw and/or procure withdrawal of all its litigations/cases pending in various courts against each other in respect of matters being settled herein including C.A. No. 265/2003 challenging the validity of Board meeting dated July 31, 1996.

(vi) The Company shall request the Court that the injunction order passed by Justice Mukul Mudgal dated January 20, 2003 in C.A. No. 1852/2001 stands satisfied and be vacated accordingly.

30. In view of the aforesaid position, we do not think Spice Jet or Modi Group can urge and contend that 55,60,000 shares are liable to be forfeited or should be forfeited. The said contention would be contrary to the settlement and stand which they have taken before the company court in CA NO. 634/2009 as well as CS(OS) No. 1673/2005. The compromise and settlement between them clearly stipulates that these shares are not liable to be forfeited.

31. Learned counsel for the Modi Group and Spice Jet had argued and contended before us that sale and transfer of 55,60,000 pledged shares by Malanpur was null and void and contrary to law. Reference was made to the orders passed in the Civil Suit at Calcutta. It will not be appropriate and proper for us to go into and examine the said orders of the Calcutta High Court and proceedings as it is clearly beyond what is required and mandated by the Supreme Court in the order dated 6th July, 2009. We cannot examine or go into the question on merits relating to the proceedings pending before the Calcutta High Court and the orders passed therein. We express no opinion in this regard. We further clarify that we have not examined or gone into the question of and the effect of alleged sale of shares and purported receipt of consideration of Rs. 1.39 crores by Malanpur on the sale of said shares. This is not a subject matter in the impugned orders or in the appeal. If required and necessary this aspect/question, when raised, can be decided by the Company Judge. With the aforesaid observations the said two appeals are disposed of.