
(2003) 03 BOM CK 0136

In the Bombay High Court

Case No : Appeal No. 1116 of 2002 with Appeal (L) No. 953 of 2002

State Bank of India

APPELLANT

Vs

Alstom Power Boilers Ltd.

RESPONDENT

Date of Decision : 21-03-2003

Acts Referred:

Companies Act, 1956 — Section 165, 166, 167, 168, 169
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 3(1)

Citation : (2003) 5 BomCR 421 : (2003) 116 CompCas 1 : (2003) 43 SCL 449

Hon'ble Judges : S. Radhakrishnan, J; D.G. Karnik, J

Bench : Division Bench

Advocate : Gulam Vahanvati, Chetan Kapadia and Millind Vasudeo, for the Appellant; Aspi Chinoy and Rohit Kapadia, for the Respondent

Final Decision : Dismissed

Judgement

D.G. Karnik, J.—These appeals are directed against the common judgment and order dated 31st October, 2002 passed by the learned Single Judge in the Company Petition No. 337 of 2002 and the Company Petition No. 338 of 2002.

2. The Company Petition No. 337 of 2002 arose out of the Company Application No, 116 of 2002 filed by Alstom Boilers Private Limited (for short "ABPL" or the transferor Company) and the Company Petition No. 338 of 2002 arose out of the Company Application No. 117 of 2002 filed by Alstom India Limited (for short "APIL" or the transferee Company). Three companies namely (i) Alstom Transport Limited, (ii) Alstom Systems Limited and (iii) APBL belonging to the Alstom group sought to merge with another group company viz APIL under the Scheme of Arrangement which is challenged in this appeal. The Scheme of Arrangement of the two transferor companies namely Alstom Transport Limited and Alstom Systems Limited having their registered offices in Delhi has already been approved by the Delhi High Court. APBL and APIL have their registered offices within the State of Maharashtra and therefore, the approval of this court was sought by the aforesaid two Company Petitions.

Re the Meetings of APBL (Transferor Company)

3. Initially, Company Application No. 116 of 2002 was filed by APBL for directions of this court to convene the separate meetings of the equity shareholders, the preference shareholders, the secured creditors and the unsecured creditors of the transferor-company. By an order dated 22nd February, 2002, this court passed an order convening four separate meetings as above in the same manner as proposed by the company. As there were more than one type of preference shares issued by it at different times at different rates of dividend with different dates of maturity while granting ex parte request of the company to convene a single meeting in respect of all the preference shareholders, this Court observed :

"The issue as to whether different preference share holders form a same class or not is expressly kept open in view of the judgment of the Hon"ble Supreme Court of India in the case of Miheer Mafatlal v. mafatlal Industries reported in AIR 1997 SC 504 (Point No. 4)"

4. In pursuance of the directions given by this court by the aforesaid order dated 22nd February, 2002 in Company Application No. 116 of 2002, APBL convened four separate meetings of equity shareholders, preference shareholders, secured creditors and unsecured creditors on 28th March, 2002 to consider the Scheme of Arrangement. The meeting of equity shareholders was attended by 22 shareholders holding 2,53,94,336 shares of the value of Rs. 2,53,94,360. All but one, whose vote was declared invalid, cast their votes in favour of the Scheme. At the meeting of the preference shareholders, all the preference shareholders holding 3,73,00,000 shares of the value of Rs. 3,73,00,000 voted in favour of the Scheme. At the meeting of the secured creditors, six secured creditors having credit of Rs. 9,04,46,353 were present and all including SBI voted in favour of the Scheme. At the meeting of the unsecured creditors, 86 unsecured creditors of the value of Rs. 30.79 crores were present. 85 unsecured creditors of the value of Rs. 30,74,96,612 voted for the scheme and one unsecured creditors of the value of Rs. 4,48,090 voted against. Thus, the Scheme of Arrangement proposing merger of transfer of APBL with APIL was approved in all the meetings by an overwhelming majority of more than 98% in value and number of the shareholders and/or creditors attending in each case.

Re the meetings of APIL (Transferee Company)

5. APIL moved the court by the Company Application No. 117 of 2002 for directions to convene separate meetings of the equity shareholders and the unsecured creditors of the company for consideration of the Scheme of Arrangement. By an order dated 22nd February, 2002 this court directed convening of the separate meetings of the equity shareholders and the unsecured creditors on 28th March, 2002. In the meeting of the equity shareholders, 196 shareholders holding shares of the value of Rs. 2,36,00,785 equity shares attended; 189 shareholders holding 2,35,99,924 shares of value of Rs. 23,59,99,240 voted for the scheme and two equity shareholders holding 501

equity shares of the value of Rs. 5,010 voted against. The votes of 5 equity shareholders holding 360 shares were declared invalid. The Scheme was thus approved by 98.95% in number and 99.99% in value of the equity shareholders present. The State Bank of India (For short SBI) who is the Appellant No. 1 in Appeal No. 1116 of 2002 and an equity shareholder did not attend the meeting of equity shareholders. Industrial Development Bank of India (For short IDBI) who is the appellant No. 2 in Appeal No. 1116 of 2002 and an equity shareholder attended the meeting through an authorised representative but, did not vote at the meeting of the equity shareholders. The meeting of the secured creditors was attended by 115 creditors of the value of Rs. 38,35,28,596. 114 unsecured creditors of the value of Rs. 38,32,16,556 voted in favour of the scheme and the vote of one unsecured creditors of the value of Rs. 3,12,040 was declared invalid. No vote was cast against the resolution. Thus, the scheme was approved by a majority of more than 98% in value and number of the members as well as the creditors in their separate meetings.

6. On securing approval of the respective shareholders and creditors as above, APBL filed the Company Petition No. 337 of 2002 and APIL filed the Company Petition No. 338 of 2002 for approval of the Scheme of Arrangement by the court. At the hearing of the petitions, SBI, IDBI and one Mrs. Darshana Kenia her father Damji Ghalla, and her husband Mr. Praful kumar Kenia appeared and opposed the Scheme. The learned Single Judge considered all the objections raised by the objectors and by a detailed but common order dated 31st October, 2002 rejected all the objections and approved the Scheme of Arrangement under Sections 391-394 of the Companies Act (for short the Act). Being aggrieved by the said order, the appellants arc before us.

7. Though appeal Lodging No. 953 of 2002 was lodged on 1st November, 2002 and Appeal No. 1116 of 2002 was lodged on 13th November, 2002, no efforts were made by the appellants in either of the appeals till 20th November, 2002 to obtain a stay of the order of the learned Single Judge dated 31st October, 2002 approving the scheme. When the appeals came up for admission on 20th November, 2002, the learned counsel for APBL and APIL pointed out that all actions to give effect to the Scheme of Arrangement by way of merger were taken and the order of amalgamation was fully implemented. This fact was noted by us in the order dated 20th November, 2002 and parties were directed to maintain status quo as on 20th November, 2002, and the appeals were placed on board for final hearing on 4th December, 2002. We heard the learned counsel for the parties on 4th, 5th and 12th December, 2002 and the judgment was reserved which we pronounce today.

Facts relating to APBL

8. APBL was initially incorporated as ACC Vickers & Babcock Limited and in the year 1982. Its name was first changed to ACC Babcock Limited, before being changed to APBL. It remained closed for a period of 20 months in 1986-88 and proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985,

(for short "SICA") were initiated before the Board for Industrial and Financial Reconstruction (for short "BIFR"). The company was engaged in direct power projects and was considered strategic by the Government of India as engaged in infrastructural development. The Government of India granted an interest free loan of Rs. 26 crores and Financial Institutions (For short FIs) advanced term loans of Rs. 13 crores which were guaranteed by the Government of India which also had committed to procure orders for power boilers. But, according to the company, this commitment was not fulfilled and the company made substantial cash losses and repayment of the loans was not possible. As on 31st March, 1994 the company had accumulated losses of Rs. 10.9 crores and its cash losses were Rs. 107 crores. There were little hopes for FIs for recovery of the principal amount of loans leave alone the interest. Before the BIFR, efforts were made to find out a promoter who would infuse funds pay loans due to FIs subject of course to several concessions and revive the company. The ABB group being a multinational group agreed to take the management control and repay the principal sum due to the FIs and bring in additional funds for continuing the operations of the transferor company. In 1995, the ABB group acquired the management control of the APBL under a scheme sanctioned by the BIFR by an order dated 30th May, 1995. As per the said scheme, the ABB group inducted Rs. 60 crores, Rs. 24 crores as equity capital, Rs. 28 crores as preference share capital and Rs. 8 crores as loans. By this, the ABB group's holding in the equity share capital of the transferor-company was raised to 7696. The APBL group agreed to pay the principal sums of Rs. 45 crores due to the FIs who waived their over due interest of approximately Rs. 20 crores which was guaranteed by the Government of India. The Government of India's existing loan of Rs. 28 crores was converted into capital - Rs. 4.6 crores in equity and Rs. 25.4 crores in 10% cumulative preference shares redeemable in the year 2005. Due to infusion of funds and improved performance, the net worth of APBL turned positive, i.e. its assets exceeded the liabilities. As a result as on 31 st March, 1996, APBL ceased to be a sick company under the SICA. By an order dated 7th February, 1997 the BIFR recorded that APBL was no longer a sick company and was not required to be dealt with by the board and the case was closed and the special director appointed was discharged.

9. During the years 1997 to 2002, APBL continued to suffer losses due to the recession in the power sector, cancellation of existing orders and above all, the fact that other public sector companies like BHEL and others who were competitors were getting price preference of 15% or more being public sector undertakings which was denied to the company, it being a private sector company with 7696 equity held by multi national ABB group. In the meanwhile, the Indian assets of the ABB group were taken over by Alstom group which, to sustain the operations of APBL, brought in additional amount of Rs. 345 crores in the form of preference share capital. Accordingly, the total preference share capital of APBL was increased to Rs. 394.4 crores of which the Government of India held preference shares of Rs. 21.4 crores and Alstom group held preference

shares of Rs. 373 crores. The Alstom group found that despite their infusing hundreds of crores of rupees, the APBL was not viable. Therefore, by their letter dated 7th January, 2000 the Alstom group requested the Government of India to take back the management control of the company but there was no response. By the end of March, 2001 the net worth of APBL was only Rs. 24 crores as against its capital base (preference and equity) of Rs. 426 crores, showing erosion of more than 94% of the capital. According to the promoters, the preference shares were thus not worth more than 596 of their face value and that too assuming that in case of liquidation, the full value of the assets would be realised to without any diminution. As the Government of India did not come forward to take back the management control of the company, the Alstom group proposed the Scheme of Arrangement of merger of the APBL and other two group companies with APIL being another group company, instead of closing the shop. The merger would save costs, bring in synergies and make the merged entity viable and profitable.

Facts relating to APIL

10. APIL was incorporated in the year 1992 and its name was changed to Alstom Power India Limited with effect from 5th September, 2000. It is engaged in design engineering, manufacturing procurements, supply and commissioning services and renovating and modernising of power plants for utility and industrial users. It is a public limited company whose shares are listed on the Bombay Stock Exchange. The learned counsel states that presently the shares of the transferee company are quoted at around Rs. 44 per share. Mrs. Kenia, her husband and her father who are the appellants in Appeal (Lodging) No. 953 of 2002 are shareholders of APIL. The IDBI is also a shareholder of APIL. Under the proposed scheme of amalgamation, the Alstom Transport Limited, Alstom Systems Limited, and APBL are proposed to be amalgamated and merged with APIL. In these appeals, we are not concerned with the amalgamation of Alstom Power Limited and Alstom Systems Limited whose schemes for amalgamation have already been sanctioned by the Delhi High Court.

The Scheme of Arrangement

11. Under Scheme of Arrangement the entire business and undertaking of APBL (which is the transferor company) as a going concern together with all its assets, debts, liabilities and obligations, is to stand transferred and vested in APIL (which is the transferee company) with effect from the appointed date i.e. 31st March, 2001. The holders of equity shares of the transferor company (APBL) are to be issued 2.2 new fully paid equity shares of Rs. 10 each in the transferee company (APIL) in lieu of every 85 equity shares of Rs. 10 each held by them in the transferor company (APBL). The preference shareholders in the transferor company (APBL) are to be issued 22 fully paid up new equity shares of Rs. 10 each in the transferee company (APIL) in lieu of every 85 preference shares of 100 each held by them in the transferor company (APBL). New equity shares issued in the transferee company are to rank *par passu* in all respects with the

old equity shares in the transferee company from the appointed date. The Scheme of Arrangement also makes provisions regarding accounting adjustments; the employees of the transferor company are to become the employees of the transferee company with the provisions regarding their provident fund, gratuity, superannuation etc. All the business carried on by the transferor company from the appointed date till the implementation and sanctioning of the scheme is deemed to be carried out on account of and in trust for transferee company. The scheme is subject to being sanctioned by a requisite majority of the members and creditors of the transferor and transferee companies and being approved by the High Court. By the impugned judgment and order dated 31st October, 2002, the learned Single Judge of this court has granted the approval to the Scheme of Arrangement.

12. The learned Advocate General appearing on behalf of the SBI and IDBI being the Appellants in Appeal No. 1116 of 2002 contended before us that the learned Single Judge erred in sanctioning the Schemes of Arrangement. The points urged by him are :

Point No. 1: The Government of India holding 1096 cumulative preference shares redeemable in the year 2005 formed a separate sub-class distinct from other holders of preference shares. As a separate meeting of this sub-class of 10 96 cumulative preference shares redeemable in 2005 was not called, there has been no proper resolution approving the scheme by this sub-class. The single meeting of all the preference shareholders was not valid and therefore, there was no approval in law to the Scheme of Arrangement by this sub-class.

Point No. 2: Dividend in respect of the cumulative preference shares was not paid for a period of more than two years and therefore, the Government of India was entitled to vote in the meeting of equity shareholders as well as the meeting of the creditors. As this was not allowed, the meetings of the equity shareholders and the creditors were not properly conducted and the resolution approving the scheme passed in the meetings of equity shareholders and creditors was not valid.

Point No. 3: The provisions of SICA have an overriding effect. The Scheme of Arrangement proposed by the company under Sections 391 to 394 of the Companies Act was in the nature of modification of the terms and conditions of the Scheme of Rehabilitation sanctioned by the BIFR which was impermissible.

Point No. 4 : The Scheme of Arrangement was unfair to the members (holders of preference shares) of the transferor company viz APBL in as much as under the Scheme of Arrangement, for 85 preference shares of the paid up value of Rs. 100 (having total paid value Rs. 8500) the Government of India would be issued only 22 equity shares of the paid up value of Rs. 10 (having total paid up value of Rs. 220). Thus, the investment of Rs. 8500 of the Government of India would be reduced to Rs. 220 which was unfair and unconscionable. The swap ratio was too low for the equity and preference shareholders of the transferor company.

13. Mr. Vasudeo, learned Advocate appearing for Mrs. Darshana Kenia, her husband and father - appellants in Appeal (Stamp) No. 953 of 2002 also urged that the learned Single Judge erred in sanctioning the Scheme of Arrangement. The points urged by him are :

Point No. 5: The transferor and transferee companies had not disclosed to the court latest financial position of the companies as they had not produced the latest auditor's report and the latest balance sheet as required under proviso to Sub-section (2) of Section 391 of the Companies Act and therefore, the scheme ought not to have been sanctioned by the court.

Point No. 6 : The scheme of arrangement was unfair to the members (equity shareholders) of the transferee company viz APIL. Almost the entire substratum of the transferor company was lost. The net book worth of the transferor company was only about 596 of its share capital. Taking into consideration the discount at the time of realisation of the assets, the net worth would be negligible if not negative. Yet the equity and preference shareholders of the transferor company were given equity shares in the transferee company. The swap ratio was too high in favour of the equity and preference shareholders of the transferor company.

14. We will now proceed to examine the points raised by the learned counsel.

Re : Point No. 1

15. The proceedings before the company court usually begin with an application made by the company (in a rare case by a member or creditor) for directions for convening of a meeting or meetings, as the case may be, of the members and/or the creditors or both for approval of the Scheme of Arrangement between the company and its members and/or creditors or any class or classes of them. When such an application is made, the court does not ordinarily decide whether a particular group of members or creditors forms a separate class and the order for convening the meeting or meetings is usually passed on the basis of the averments made in the application and the classifications as proposed by the applicant. It is the applicant who proposes the classification at the risk of the Scheme being rejected ultimately if the court at the hearing of the petition which is filed subsequently for sanction of the scheme finds that classification proposed was improper and the separate meetings of the proper classes have not been held. It is precisely for this reason that while initially passing an order on the Application No. 1116 of 2002, this court kept the issue whether different preference shareholders form same class or not expressly open. It is therefore now necessary to consider this point. We would presently refer to the various authorities cited by both the sides on the issue of classification.

16. In *Sovereign Life Assurance Co. v. Dodd* [1852] 2 QB 573 the Court of Appeal considered whether in the case of the applicant life insurance company, the policy holders whose life policies had already matured formed a distinct class of creditors from those whose policies were yet to mature and whether a

separate meeting of such class of creditors ought to have been held in order to make the arrangement binding upon them. Lord Eishcr M.R. while holding that they did form a distinct class observed : (at page 583 of the report)

"The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a Section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term "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."

The judgment of the trial judge that it was necessary to call a separate meeting of policy holders whose policies had matured as they formed a different class or sub-class of the whole body of policy holders was upheld by the Court of Appeal,

17. *Osiris Insurance Ltd, In re* [1999] BCLC 182 the company had been carrying on two types of insurance business namely London Market Business and Personal Lines Business. From September 1992 the company had ceased to write London Market Business. On 3rd September, 1993 the company transferred its Personal Lines Business to another company. From that date, the company had thus been in run off. The Personal Lines Policies were all claims made policies. It appeared very unlikely that there could be any new valid claims on the Personal Lines Policies. The London Market Policies did not involve any long tail risks. Any claims in respect of such policies were likely to have been already made. The quantum of the company's liability was very small compared to the quantum of its assets. It was anticipated that the run off would take several years to complete. All policy holders present in person or proxy at the statutory meeting convened to consider the scheme voted in favour of the scheme. Although the number of those who voted was small compared to the number of those entitled to vote the value of the claims held by those who voted represented a substantial portion of those entitled to vote. The court held that the meeting was validly held because there was only one class of creditors. Whilst those summoned to attend the meeting had different types of insurance, given the nature of the proposed scheme, it could not be said that their interests were different or conflicted with each other.

18. *Hellenic & General Trust Ltd., In re* [1975] 3 All ER 382, *Hellenic and General Trust Ltd.* (for short the Company) carried on business as an investment trust. 53.01% of the ordinary shares of the company were held by another company namely *Merchandise and Investment Trust Ltd.* (for short MIT) and 13.95% shares were held by *National Bank of Greece SA* (for short NBG). All the shares of MIT were held by another bank viz-*Hambros Ltd.* and therefore MIT was a wholly subsidiary of *Hambros Ltd.* An arrangement was proposed under which the ordinary shares of the company were to be cancelled and new shares were to be issued to *Hambros Ltd.* and the company was thus to become a mighty fully owned subsidiary of *Hambros Ltd.* Former shareholders of the company were to

be paid by Hambros Ltd. 48 paise per share for the loss of their former shares. In the meeting summoned of all the ordinary shareholders, a resolution agreeing to the arrangement was carried by 91 % of the votes by value, of the shareholders attending and voting. NBG opposed the Companies petition for sanction contended that the MIT which was a subsidiary of Hambros Ltd. was a separate class and should have been excluded from the meeting of the shareholders of the company because the interest of MIT was synonymous with the interest of Hambros Ltd. which was interested in acquiring the shares of the company by purchase at 48 paise, interest of MIT was clearly in conflict with the interest of dissenting shareholders who did not wish to sell. While considering whether MIT, a wholly owned subsidiary of Hambros Ltd. formed a part of the same class as other ordinary shareholders, the court held that what was an appropriate class would depend upon the circumstances of each case. On facts it was held that interest of ordinary shareholders of the company were so different from the interest of MIT, a subsidiary of Hambros Ltd. that they formed a different class.

19. In *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, , the Apex Court noted (in para 38 of the judgment) that as per Section 86 of the Act, the share capital of a company formed after the commencement of the Act or issued after such commencement, shall be of two kinds only namely, equity share capital and preference share capital. While rejecting the contention that the appellant Mihir H. Mafatlal formed a separate and distinct class of a minority equity shareholder whose interest was likely to be adversely affected by the Scheme, the Apex Court observed:--

"...Even though the Companies Act or the Articles of Association do not provide for such a class within the class of equity shareholders, in a given contingency it may be contended by a group of shareholders that because of their separate and conflicting interests vis-a-vis other equity shareholders with whom they formed a wider class, a separate meeting of such separately interested shareholders should have been convened. But such is not the case of the appellant. It is not his case that his interest as an equity shareholder in respondent company is in any way conflicting with the general interest of the equity shareholders as a class. Consequently, it could not be urged by him with any emphasis that the General Body of equity shareholders acting as a class while considering the question of approval of the Scheme was likely to take a decision which would adversely affect the commercial interest of the appellant as an equity shareholder. His personal conflict of interests with the director was totally foreign to the scope of class meeting which was convened to consider the Scheme in question as we have seen earlier while considering earlier points for determination. It is also to be kept in view that the appellant would have urged with some justification his contention for convening a separate meeting representing from him and his group of dissenting equity shareholders if it was his case that the Scheme of Compromise and Arrangement as offered to him and his group was in any way different from the Scheme of Compromise and

Arrangement offered to other equity shareholders who also belonged to the same class in the wider sense of the term. On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any sub-class of members which has a separate interest and a separate Scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive...." (p. 528)

20. The cases which were cited before us do not give a comprehensive definition as to what constitutes a "class" of members or creditors. It is a formidable difficulty to define as to what constitutes a class. Whether a particular group of members or creditors would form a class distinct from other members or creditors would largely depend on the facts and circumstances of each case, the court being required to consider several factors. We would refrain from making an attempt to comprehensively define what constitutes a "class". We would however, so far as is necessary for the decision of this case, state the factors which would generally be taken into consideration by the court in deciding whether a person or group of persons form a separate class so as to require convening of a separate meeting of such class.

"(i) In case of shareholders, the Act recognises only two classes namely equity shareholders and the preference shareholders. Though further sub-classification amongst the equity shareholders or preference shareholders is not impermissible, the mere fact that the equity shares (equity or preference) are issued at different times would not make them a different class. Similarly, the mere fact that the preference shares are redeemable on different dates would not make them shares of different classes. However in some cases, the equity shares which are fully paid up and equity shares which are partly paid up may form a different class like where they are to be or exchanged for the shares of the transferee company to be issued in different proportions depending upon their paid up value.

(ii) One of the tests to determine whether the two or more groups of members or creditors form a different class is whether the same Scheme of Arrangement or Compromise offers the same terms to all or whether different terms are offered. If the Scheme offers to the two group of members or creditors different terms of arrangement, they would generally form a different class.

(iii) Another test is to see whether the rights of the two or more groups of members or creditors are so dissimilar that they cannot reasonably be expected to have a common interest and are not likely to consult together to have a common view of their common interest. If their interests are so dissimilar that they are reasonably unlikely to take the same view about the Scheme and would reasonably feel that any one view would unreasonably benefit one or unreasonably prejudice the other than they would form different classes.

(iv) The private interest of one or a group of members or creditors visa-vis the directors of the company or the persons in the management of the company are alien for the purpose of classification. As held by the Apex Court in *Mihir H. Mafatlal's* case (supra), the member or members or creditor or creditors claiming right against one or more directors of the company cannot claim that he or they constitutes a separate class only by reason of having a separate private right or interest.

(v) While in case of shareholders, the court would not generally favour a further sub-classification other than equity shareholders and preference shareholders, there may be need for making a further sub-classification in case of creditors of the company. Apart from the broad distinct classes like secured and unsecured creditors, there can be further sub-classes. In case of secured creditors, some creditors may have sufficient security of specific asset or assets which are greater than the amount of their debt while others may have security of other specific asset or assets which are not sufficient to meet their credits. Some secured creditors may have a first charge, some may have a second or subsequent charge. Some may have specific charge attached to a particular piece of property in existence on the date of creation of the charge and some may have only a floating charge hovering over and floating with the property intended to be affected, until it fastens on specific property on happening of some event. It would depend upon the facts and circumstances of each case, whether there would be any need for further sub-classification even amongst the secured creditors. Amongst unsecured creditors also there can be sub-classes. It was held in the case of *Sovereign Life Assurance Co.* (supra) that the creditors whose policies had matured and who had crystallised claim would form a different sub-class from the creditors whose policies had not matured and whose claims were not crystallised. Amongst unsecured creditors, some may be preferred like the government, or the workers who may have a statutory preference over others. It is difficult to enumerate the circumstances under which different creditors, secured or unsecured, would form a separate sub-class. But, the general principle would be the same namely whether the interest of the creditors who claim to belong to a different class are so dissimilar to the interest of the other creditors that it would be impossible for them to sit and consult together and take a common view of their common interest."

21. In the present case, we do not see any reason to make any further sub-classification of the preference shareholders. The Government of India did not form a separate sub-class amongst the class of preference shareholders. The rights of the Government of India as a preference shareholder were not so different from the other preference shareholders namely the Alstom group. The terms offered to both of them were identical, each was to be issued 22 fully paid up equity shares in APIL in lieu of 85 preference shares of Rs. 100 each held by them in ABPL. The preference capital of each of them was going to be eroded to the same extent and their rights were affected similarly. There is nothing on record to show that they could not have consulted together in furtherance of

their common interest. We therefore, reject the first contention that the Government of India formed a separate sub-class distinct from other preference shareholders.

Re Point No. 2

22. Dividend in respect of preference shares was unpaid for a period of more than two years. Under clause (b) of Sub-section (2) of Section 87 of the Companies Act, the preference shareholders were therefore, entitled to vote on every resolution at any meeting of the company. The Government of India was entitled to vote on the resolution seeking approval of the Scheme in any and every meeting of the company including (f) the meeting of the equity shareholders and (ii) the meeting of the creditors. We have no doubt that the meeting of the equity shareholders of the company was a meeting of the company and the Government of India was entitled to vote on every resolution placed before that meeting as a preference shareholder to whom dividend was not paid for more than 2 years. The Government of India which was a preference shareholder, and an equity shareholder entitled to vote in that capacity also, however did not send its representative to attend either of the meetings of preference shareholders or equity shareholders. It was never denied the right to vote in the meeting of the equity shareholders. It voluntarily chose not to exercise its franchise by not sending its representative to attend either of the meetings.

23. We are however unable to hold that the Government of India in the capacity of a preference shareholder with unpaid dividends for more than two years, had a right to attend and vote at the meeting of the creditors. Clauses (b) and (c) of Sub-section (2) of Section 87 of the Act, read as under :

"(b) Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid-

(i) in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting; and

(ii) in the case of non-cumulative preference shares, either in respect of a period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of an aggregate period of not less than three years comprised in the six years ending with the expiry of the financial year aforesaid.

Explanation: For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not,-

(a) on the last day specified for the payment of such dividend for such period, in the articles or other instrument executed by the company in that behalf; or

(b) in case no day is so specified, on the date immediately following such period.

(c) where the holder of any preference share has a right to vote on any resolution in accordance with the provisions of this Sub-section, his voting right on a poll, as the holder of such share, shall, subject to the provisions of Section 89 and Sub-section (2) of Section 92, be in the same proportion as the capital paid-up in respect of the preference share bears to the total paid-up equity capital of the company."

24. The right given under clause (b) of Sub-section (2) is "to vote on every resolutions placed before the company at any meeting." In our opinion, the words "before the company at any meeting" refer to a meeting of the company i.e. a meeting of the members of the company. A meeting of outsiders like the creditors of the company is not a meeting of the company. It is a special type of meeting of outsiders for a special purpose u/s 391 of the Act. Sections 165 to 197 of the Act grouped under the heading "Meetings and proceedings" in Chapter I of part VI of the Act contain certain provisions relating to the meetings. They also regard only the meetings of the members of the company (as opposed to the meetings of outsiders like creditors) as the meetings of the company. Another clue to this interpretation can be found by reference to clause (c) of subsection (2) of Section 87 which lays down that the voting right of a holder of preference share who has a right to vote under Sub-section (2) shall be in the same proportion as the capital paid up in respect of the preference share bears to the total paid up equity share capital of the company. For the purpose of determining the value of the vote cast by a preference shareholder, one has to find its proportion to the total paid up equity capital of the company and not to the total debts of the company. In the meeting of the creditors of the company to be held u/s 391 of the Act, the value of creditors vote for ascertaining requisite majority of 3/4th in value has a reference to the total debt of the company and not to the total paid up capital. A preference share is not a debt instrument. Preference share amount is a capital and not a debt. Thus, in the meeting of the creditors, it would not be possible to assign a value to the vote of a holder of preference share. If we were to hold that the preference shareholders who are not paid dividend for more than two years are also entitled to attend the meeting of the creditors u/s 391 of the Act and to vote thereat, then it would be impossible to determine what would be the value to their votes vis-a-vis the value of votes of creditors. It would be wrong to contend that preference shareholders have a right to vote but, valuation of their vote is unascertainable. We are therefore of the view that preference shareholders are not entitled to attend and vote at the meeting of the creditors convened u/s 391 of the Act even though dividend on the preference shares have remained unpaid for more than 2 years.

Re Point No. 3

25. Admittedly, the entire net worth of APBL was eroded and the company was referred to BIFR under SICA. The Scheme of Rehabilitation was approved by the BIFR under its order dated 30th May, 1995. Of the Rs. 26 crores owed to the Government of India, an amount of Rs. 4.6 crores was converted into equity share capital and balance of Rs. 21.4 crores was converted into 10% cumulative preference shares. In pursuance of the assurance given by it the ABB/Alstom group brought in money in the form of equity and preference shares capital as also debt. On account of the conversion of the loan by the Government into equity and preference share capital and bringing in of money by the ABB/Alstom group, the net worth of the company became positive, by the end of the year ending 31st March, 1996. The company thus ceased to be a sick company within the meaning of Section 3(1)(o) of SICA. The BIFR also passed a formal order to that effect on 7th February, 1997. The last part of the order reads as follows:--

"We are, therefore, of the opinion that the company has ceased to be sick industrial company within the meaning of Section 3(1)(o) of the Act and no longer requires to be dealt with by the Board. The case is therefore, closed. The Special Director last appointed by us hereby stand discharged."

26. We express no opinion on the question as to whether it would be legal and valid to implement a scheme under Sections 391 to 394 of the Act while the company is sick and governed by SICA or where the Scheme of Rehabilitation under SICA is under implementation under the supervision of BIFR. However, as the company had ceased to be a sick company and was no longer monitored by the BIFR, sanction of the BIFR was not necessary for making an application u/s 391 of the Act. We are unable to agree with the contention of the learned Advocate General that since the preference shares were issued in pursuance of the BIFR Scheme and they were not yet redeemed, the scheme continued to remain in force. The basic purpose of a scheme under the BIFR is to give protection to a sick company against the action by the creditors to enable it to reorganise its affairs and continue to remain in business. The protection would not continue indefinitely till every obligation undertaken by the company under the scheme is fulfilled. If we were to hold that a company continues to be governed by the SICA and the Scheme of Rehabilitation continues to be in force till the last preference share is redeemed or till the last debenture/bond issued in pursuance of the scheme is paid off, then a dishonest company may issue preference shares redeemable after a long time and/or may issue Yankee Bonds redeemable after number of years to claim protection and ward of the creditors till the last preference share is redeemed or the last bond holder is paid off. This cannot be the intention of the legislature. After the net worth becomes positive, the company ceases to be a sick company within the meaning of Section 3(1)(o) of the SICA. APBL was not a sick company when the scheme under Sections 391 to 394 of the Act was proposed and there was no bar for approval of the scheme.

Re Point No. 5

27. Proviso to Sub-section (2) of Section 291 of the Act requires that the

company or any other person who makes an application for sanction of a scheme to disclose to the court all the material facts relating to the company, the latest auditor's report on accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251 and the like. In order to ascertain whether the scheme is fair and just to all concerned or not, the court would necessarily have to look to the latest financial position of the company. The Balance Sheet, Profit and Loss Account and the Auditor's Report are important tools for the purpose of ascertaining the latest financial position of the company. It is for this reason that the court insists that the applicant must not only produce the latest Balance Sheet, Profit and Loss Account and the Auditor's Report as on the date when the application for sanction u/s 391 is made but, should also produce the latest Balance Sheet, Profit and Loss Account and the Auditor's Report as on the date when the matter is actually heard by the court, especially when there is long gap between the date of the application and when the court considers the scheme for sanction - Blue Star Ltd, In re [2000] 2 Comp. LJ. 245 at page 255.

28. In the present case, petitioner companies had initially produced the audited accounts together with the Auditor's Report for the year ending 31 st March, 2001 both in the case of APBL as well as APIL. Despite the fact that the petitions came up for hearing before the learned Single Judge sometime in the year October, 2002 when the latest audited accounts as well as the auditor's report for the year ending 31st March, 2002 were available, they were not produced by the company. We must however, mention that Mrs Darshana Kenia (Appellant in Appeal Stamp No. 981 of 2002) had produced the latest Balance Sheet and financial position of APIL after conclusion of the hearing before the learned Single Judge but, before pronouncing of the judgment. The learned Single Judge however, declined to look into the same for the reasons mentioned in paragraph 39 of its judgment. In the case of Zee Interactive Multi Media Ltd. [company petition No. 1096 of 2001, dated 1-2-2001] one of us (Kernik, J) has clarified that the latest Balance Sheet, Profit and Loss Account and the Auditor's Report must be produced up to the date of hearing of the company but, if they are not produced the court can call for them to obtain the latest possible information even at and during the course of the hearing. We are of the opinion that the learned Single Judge was entitled to call for and look into the said Balance Sheet which were produced before him. The fact that they were not produced by the company but, were produced by Mrs. Kenia was immaterial. They were produced before the court so that it could look into them and to ascertain the latest financial position. We have perused the latest financial position contained in the Balance Sheet produced before the learned Single Judge. We have also perused further financial results published by the company in newspapers in pursuance of a statutory/SEBI requirement of publishing the quarterly results (and filed before us by the appellants in the compilation). We do not find anything adverse in them. On the contrary, we notice improvement in the financial position in the post amalgamation results published by the transferee company pending

approval of the Scheme of Amalgamation by this court.

29. We are of the opinion that the requirement of placing before the court all material facts relating to the company including latest financial position is satisfied.

Re Point Nos. 4 and 6

30. The learned Advocate General submitted that the scheme was patently unfair to the preference shareholders of the transferor company namely APBL in as much as for 85 preference shares of Rs. 100 each (having paid up value of Rs. 8500) held in APBL, only 22 equity shares of Rs. 10 (having paid up value of Rs. 220) of APIL were to be issued. Thus, the investment of Rs. 8500 made by a preference shareholder of APBL was reduced to Rs. 220 which was ex facie unfair and unconscionable. According to him, the swap ratio was too low so far as the preference shareholders of the APBL was concerned. As against this, Mr. Vasudeo learned counsel appearing for the equity shareholders in APIL contended that the swap ratio was too high in favour of the preference shareholders of APBL. He pointed out that the new worth of APBL was almost eroded and in any event, not more than 596 of the total paid up share capital of APBL. Taking into consideration that in the event of winding up, on forcible or distress sale of assets, the value realised would be less than the book value. The net worth of APBL would be negative. The preference shareholders of APBL would not probably get any amount in the event of winding up. Issuing of 22 equity shares (of the paid up value of Rs. 220) in APIL in lieu of 85 preference shares of paid up value of Rs. 8,500 of APBL was too high as such preference shareholders would not have ever received any amount as contributory in the event of winding up of APBL. He further pointed out that the equity shares of APIL were traded at around Rs. 44 per share at the relevant time and therefore, the value of Rs. 22 equity shares would translate into market value of more than Rs. 1000 whereas 85 preference shares in APBL though had a paid up value of Rs. 8,500 had practically no market value. Thus the preference shareholders of APBL gained unfair advantage to the detriment of the equity shareholders of APIL. Though the learned Advocate General and Mr. Vasudeo are agreed that the scheme should not be sanctioned, their contentions are directly contradictory to each other. Both the contentions cannot stand together.

31. For considering the contentions of the learned Advocate General and Shri Vasudeo, we would refer to the decision of Apex Court in *Mihir H. Mafatlal's case* (supra). After considering the provisions of sections 391 to 394 of the Act and the decision of the Calcutta High Court *Maknam Investment Ltd., In re* [1995] 6 SCL 93 and a passage from *Buckley on Companies Act*, 14th Edition and the decision of the English Courts *Alabama New Orleans Texas & Pacific Railway Junction Co. In re* [1891] 1 Ch D 213 and *Anglo-Continental Supply Co. Ltd, In re* [1992] 2 Ch D 723 and its own earlier decision in *Hindustan Lever Employees' Union v. Hindustan Lever Ltd. AIR 1994 SCW 4701*, the Apex Court in *Mihir H. Mafatlal's case* (supra) laid down the broad contours of the jurisdiction of the

court in considering whether the scheme of arrangement should be sanctioned or not. The said broad contours are:--

"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 39(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 concerned meetings as contemplated by Section 391 Sub-section (1).

5. That all the requisite material contemplated by the proviso to subsection (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 of 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 requirement 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 would 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." (p. 520)

Of course the aforesaid parameters of the scope and ambit of jurisdiction of the Company Court are not exhaustive but, are broadly illustrative of the contours of court's jurisdiction.

32. In the light of the aforesaid legal position, we would now proceed to consider whether the Scheme of Arrangement as proposed in the present case should have been sanctioned by the learned Single Judge. In doing so, we must take note of the facts mentioned below :

(i) In their respective meetings of the equity shareholders, preference shareholders and creditors of APBL, the Scheme was sanctioned almost unanimously. Less than 296 in value as well as in number of the shareholders and creditors voted against the scheme in their respective meetings. In the meetings of the equity shareholders and secured creditors of APIL also, the scheme was approved almost unanimously. Less than 2% of the members/creditors only opposed the scheme.

(ii) State Bank of India, Appellant No. 1 in Appeal No. 1116 of 2002 who was a shareholder of APIL as well as creditor of APBL did not oppose the scheme in the respective meetings of the shareholders and creditors. It did not attend the meeting of members of APIL. It attended the meeting of the creditors of APBL and voted in favour of the scheme. The IDBI Appellant No. 2 in Appeal No. 1116 of 2002 who was an equity shareholder of the transferee company also did not oppose the scheme in the meeting of the members of APIL. Thus, at the time of the meetings of the members and creditors, both the appellants in Appeal No. 1116 of 2002 in their commercial wisdom thought that the Scheme was just and fair and in any event not opposed to the interest of the transferor or transferee company or their members or creditors. It is only later that they think that their individual interest are being harmed. In our opinion, "while sanctioning the scheme, the court has to see the general interest of the transferor and the transferee company as the case may be, and of different classes of their members and creditors in general and not to the interest of a particular member or creditors. The individual interest of a particular member or creditor or a group of members or creditors is to be distinguished from the interest of the class of members or creditors to which such individual or group belongs.

(iii) The Government of India which was a preference shareholder had sent a fax message just a day prior stating :

"In view of the above, I am directed to inform that the Government of India is not in a position to support the scheme of the proposed merger of APBL and APIL unless steps are taken to safeguard the interest and investments by the government institutions. It is requested that till then, the proposed merger may be differed."

The Government of India did not sent its representatives to attend the meeting and voice its concern or oppose the resolution. The underlined portion from the communication of the Government extracted above makes it clear that the

Government only thought that the Scheme was adverse to the interest and investments by the Government and financial institutions but, did not feel that the Scheme was adverse to the interest of the members or creditors or any class of them. The Government of India must be aware of the distinction between the individual interest of the Government and financial institutions as opposed to the interest of the company and its members and creditors and, therefore, did not rightly oppose the Scheme either in the meetings of the members and creditors nor in this court. At the time of voting, it did not send its representative to vote at the meeting because, it probably know that in the law its individual interest must yield to the greater interest of the company and its members and creditors.

(iv) We have also noticed that the business of APBL was in shambles. It is true that it had come out of sickness and was no longer dealt with by the BIFR but that was not on account of any improvement in the business but, on account of huge amount of several hundreds of crores of rupees brought in by ABB/Alstom group by way of additional share capital to make the net worth positive. Even after several hundreds of crores were brought in by way of equity and preference share of capital, APBL continued to make loss. Its capital was eroded to the extent of about 95%. There was no hope that the APBL would survive on stand alone basis. We have also noted from the letter dated 7th January, 2000 (at page 711 AA of the compilation) by the Country President of ABBL/Alstom power in the Secretary, Government of India, APBL proposed in the Government to take back APBL under the hold of Ministry of Power, to take back the management of APBL. The very said letter also makes an offer to transfer all its interest to the Government of India. The Alstom group had thus offered to cede the management control and transfer all its interest to the Government of India. We have no doubt in our mind that no person in management having any hope of success in the reasonable future offer would offer in cede the management control to any other person. The very offer to cede the management control itself shows that the management had lost all hopes of APBL being run successfully in any reasonable foreseeable future. It was in this light that the management of APBL decided to merge it with other group company when the Government did not come forward to take the management control. The decision was thus based on commercial wisdom.

(v) After the Scheme of Arrangement was approved in the respective meetings of APBL and APIL. Mr. Praful Kumar Kenia, husband of Ms. Darshana Kenia and son-in-law of Mr. Damji Gala the appellants in the Appeal (Lodging No. 953 of 2002 purchased 100 shares of APIL. If the contention of these appellants that the Scheme was harmful to the interest of the members of APIL and reduces the intrinsic value of its equity shares of its equity shares is to be accepted then we fail to see why appellants augmented their holdings and purchased a few more equity shares in APIL knowing fully well that their intrinsic value is going to be reduced by virtue of the Scheme of Amalgamation. The fact that Mr. Kenia, his wife and father-in-law did not attend the meeting of the equity shareholders either personally or through proxy to vote against the sanction of the Scheme of

Arrangement and his conduct of purchasing further equity shares after the resolutions were passed leaves no manner of doubt in our minds that commercially he was satisfied that the scheme was not against the interest of the members of APIL. We are of the view that the present opposition to the scheme is for collateral reasons. In his arguments, Mr. Vasudeo made allegations of threats and also of the inducement made to Kenia to win over their opposition which of course were denied by learned counsel for the respondent company. It is possible that either because of the offer of inducement or hopes of offer of inducement to withdraw his opposition in the collateral motive, we however, are not obliged to make an inquiry into the real motive but we are certainly satisfied that their conduct shows they did not think that the Scheme of Arrangement was against the interest of the equity shareholders of APIL as a class.

(vi) We have also noted that the Scheme of Arrangement is uniform to all the members of a class.

33. Nothing has been shown to us that the Scheme of Arrangement is in any way unfair and unjust to any class of members of creditors. Even though the court while sanctioning a scheme must not act merely as a rubber stamp to approve the scheme of enquiry is limited and contours of jurisdiction of the court are narrow. Court does not scrutinise the scheme as an appellate authority and respects the commercial wisdom of the members and creditors, unless the Scheme is shown to be unfair and unjust. Even if we were to sit in appeal over the scheme, we would not have come to the conclusion that the present Scheme was in any way unjust and unfair.

34. In the circumstances, we are satisfied that the learned Single Judge rightly sanctioned the Scheme. Both the Appeals are accordingly dismissed with costs.

35. After the above judgment was pronounced the learned Counsel for the Appellants in both the Appeals pray for stay of our order for a period of four weeks so as to enable them to approach the Hon'ble Supreme Court. Mr. Aspi Chinoy, the learned Senior Counsel appearing for the Respondent Company strongly opposes on the ground that the new shares have not still been listed. However, we feel that a short period of four weeks would be fair enough for staying our order. Accordingly, the order is stayed for a period of four weeks from today.

36. Ad-interim order granted on 20th November, 2002 by us in the above Appeals will continue for a period of four weeks from today.