

(1981) 08 GUJ CK 0016
In the Gujarat High Court

Tungabhadra Industries Ltd.

APPELLANT

Vs

National Dairy Development Board and Others

RESPONDENT

Date of Decision : 19-08-1981

Acts Referred:

Companies Act, 1956 — Section 391, 391, 392, 392, 439

Citation : (1982) 1 GLR 395

Hon'ble Judges : R.C. Mankad, J;M.P. Thakkar, J

Bench : Division Bench

Judgement

M.P. Thakkar, J.—At times an illustration can simplify a complicated question and can have a more telling effect than any other mode of communication. The present is an occasion to do so in order to bring into focus the real issue and in order to clearly hear the heart throbs of the real problem.

2. Visualize a patient on his death bed. A Doctor (Dr. NDDB) has a medicine which will cure him, is prepared to administer it to the patient, and to save his life. Another Doctor (Dr. TIL) who was consulted earlier is not in a position to offer any effective medicine or save the life of the patient and confesses that such is the case. A learned Judge permits Doctor-NDDB to go ahead and save the life of the dying man whose life is precious to his family as also to the society. The Doctor who admittedly is neither willing to save the life, nor has the capacity to do so. Dr. TIL, objects to the order of the learned Judge and prefers an appeal on the ground that the patient had consulted him earlier and had agreed to be treated by him (Dr. TIL) before Dr. NDDB was brought in. Such is the true scope of this appeal preferred by a Company Tungabhadra Industries Ltd. (hereinafter referred to as the TIL), which itself is not prepared to offer terms as good as the terms offered by its rival-National Dairy Development Board (hereinafter referred to as the NDDB) by way of a Scheme to resurrect an economically ruined oil & vegetable Products manufacturing unit. The appellant Company TIL in terms admits that it is not in a position to implement even its own less attractive scheme (offering something less to creditors, as also to shareholders) as the

secured creditors and nationalized banks do not support it. Not prepared to offer the terms offered by its rival, not prepared to implement its own scheme which is much inferior and is admittedly unworkable, what locus standi has the appellant to challenge by way of this appeal an order sanctioning a scheme by the learned Company Judge? What is the motivation? Dog in the manger philosophy? We are not told what interest the appellant has in challenging the impugned order. All that we are told is that on a microscopic examination of the relevant provisions (Sections 391 and 392 of the Indian Companies Act) in the light of the interpretation canvassed by (he appellant the learned Company Judge had no jurisdiction to order substitution of its rival in the place of the appellant (notwithstanding the law laid down by the Supreme Court in S.K. Gupta's case: 4) Company Cases 342) as sponsor of the Scheme to resurrect the Company whereby life is being infused in a dead industrial unit and hundreds of workers will get employment, consumers will get more consumer goods and the State will get more revenue. We are not prepared. So do it, but our rivals cannot be allowed to do it in view of the hair splitting technical pleas we have at our command-say the appellants. That is the crux of the question. So far as the legal contentions are concerned we see no substance in the same for reasons we shall presently indicate.

The Backdrop:

3. A company known as Bhavnagar Vegetable Products Limited, having a total paid up capital of approximately Rs. 30 lacs, incurred huge losses in the year ending on December 31, 1975. The profits and loss account of the company for the period ending December 31, 1975 reveals a loss of Rs. 201.71 lacs. And the total liabilities as and by way of secured and unsecured loans including current liabilities were around 315.75 lacs. Thus, the entire capital of the Company, its reserves and surpluses were washed away and its secured debts and other liabilities were so huge that neither the shareholders nor the creditors were likely to get any money. One of the creditors instituted a petition on February 2, 1976 u/s 433 read with Section 439 of the Indian Companies Act, 1956 (hereinafter referred to as the Act) for winding up the said company. The petition was admitted on February 16, 1976. In the course of the proceedings, an attempt was made to evolve a Scheme in order to prevent the Company from being wound up and in order that the shareholders, creditors and workers could retrieve a portion of what was due to them. A scheme was proposed by appellant TIL, the details of which are set out in paragraph 11 of the judgment of the learned Company Judge, which has given rise to the present appeal. Before the Scheme could be sanctioned u/s 391 of the Act, respondent No. 1-the NDDB proposed a Scheme of its own the details of which have been set out in paragraph 17 of the judgment of the learned Company Judge. Thus, there were in the field two competitive Schemes. It so transpired that before NDDB presented its scheme the TIL scheme came up for consideration before all classes of creditors, shareholders and workers. The meetings envisaged by the relevant provisions of the Act were called and the requisite majority voted in

favour of the acceptance of the TFL scheme. On October 4, 1976 the Chairman appointed by the Court to preside over this meeting submitted his Report, On October 21, 1976 the appellant (TIL) instituted a petition for sanctioning the scheme. Before final orders could be passed by the Court, NDDDB proposed its own scheme. Thus, the scheme proposed by the appellant-TIL, which was sanctioned by the requisite majority, remained unsanctioned. The learned Company Judge, who was seized of the matter at the relevant time, issued appropriate directions in Company petition No. 9 of 1978 filed by NDDDB for calling the meetings of the shareholders, creditors and workers in order to consider the scheme sponsored by the NDDDB. Strangely enough the equity shareholders who were prepared to accept 10 paise per share under the TIL scheme and had accepted the offer for payment at that rate in the course of the meetings called to consider the TIL scheme in 1976, refused to vote for the NDDDB Scheme whereby they were offered Rs. 10/- per share in place of 10 paise per share. In other words, though they were offered a price which was 100 times the price offered by TIL, they did not accept the offer. The NDDDB revised its offer upwards by offering Rs. 15/- per share in place of Rs. 10/- per share. The equity shareholders who were prepared to accept 10 paise per share from TIL in 1976 were not prepared to accept Rs. 15/- per share from NDDDB. Thus, the scheme as sponsored by NDDDB did not secure necessary majority as required by Section 391(2) of the Act. The resultant position was that the TIL Scheme which offered 10 paise per share to the equity shareholders, secured the requisite majority and could have been sanctioned, whereas, the scheme sponsored by NDDDB, whereby 100 times the price offered by TIL (which was subsequently raised to 150 times) could not secure the requisite majority from the equity shareholders. It appears that, meanwhile, TIL also increased its offer from 10 paise per share to Rs. 10/- per share as against Rs. 15/- per share offered by NDDDB. Thus, the appellant-TIL who had obtained consent of the equity shareholders and secured the requisite majority in respect of a scheme offering 10 paise per share, was itself prepared to offer Rs. 10/- per share when the NDDDB scheme entered the field of competition. The appellant however, did not agree to step up the price upto Rs. 15/- per share. Meanwhile, one more development took place. The Banks, to whom the Company owed a very large sum by way of secured loans of the order of Rs. 80 lakhs, which had initially lent support to TIL'S Scheme, withdrew their support. In the course of hearing of a Summons taken out by NDDDB, learned Counsel for M/s. Velji Shamji & Co. the sponsor of TIL Scheme-made a statement before the Court that in view of withdrawal of the support by the Banks, the scheme as put forward by TIL was not practicable. Under the circumstances, the Court placed on record that TIL on whose behalf no body appeared before the Court on that day, was out of the picture as a party sponsoring the scheme before the Court. The order passed by the learned Company Judge is in the following terms:

Mr. B.J. Shelat, for Messrs Velji Shamji & Co., the petitioners, states that in view of the withdrawal of support by the Bank of TIL, the scheme as put forward by

his client is not practicable. In view of this, it is recorded that TIL on whose behalf no body has appeared today is out of the picture as a party sponsoring the scheme before this Court.

Yet another development took place later on. On March 29, 1979 the appellant, TIL, took out a Summons which was registered as Company Application No. 279 of 1979 praying for the refund of earnest money deposit of Rs. 75,000/- on the premise that it was out of picture. This application was supported by an Affidavit sworn by one Dalai, a constituted attorney of TIL. Thus, there was no question of granting approval to the Scheme as proposed by TIL. Meanwhile, on February 15, 1980 learned Counsel for M/s. Veiji Shamji & Co. Which had sponsored the TIL Scheme, informed the Court that his client no longer supported the scheme proposed by TIL and went to the length of slating that his client supported the NDDDB scheme. On that very day, the NDDDB took out a Judge's Summons for substitution of its name in place of Messrs Velji Shamji & Company-the sponsor of the TIL Scheme and for modification of the said Scheme to bring it in line with the NDDDB Scheme. So also Messrs Veiji Shamji & Company - original sponsor of TIL Scheme took out a Judge's Summons on March 13, 1980, which was registered as Company Application No. 144 of 1980 making a similar request for the substitution of NDDDB for TIL in the scheme sponsored by it subject to it being modified in conformity with the NDDDB Scheme. The prayers made in these two Company Applications, one by original sponsor of TIL Scheme, and another by NDDDB, were opposed by (1) equity shareholders, (2) a Section of the workers and (3) appellant TIL. It may be placed on record that appellant-TIL itself had not made any application for sanctioning of any scheme. The sponsor of the application, petitioning creditor Veiji Shamji & Company, who had originally prayed for the sanction of the TIL Scheme, now withdrew its support from TIL and prayed for the substitution of NDDDB for TIL subject to modification of the original TIL Scheme by upgrading it to bring it in conformity with the NDDDB Scheme, which offered better terms to all concerned. A comparative study of the two schemes has been made by the learned Company Judge. We can do no better than quote the passage:

A comparative study of the two Schemes reveals that the Scheme proposed by NDDDB was far more beneficial to practically all interests than the TIL Scheme as originally proposed. Under the TIL Scheme depositors claiming at principal amount of Rs. 7,500/- and below were to receive 30 per cent and the rest 20 per cent of the principal amount, without interest, whereas under the NDDDB Scheme the whole of the principal amount was offered within one month from the effective date, without interest. It was only at the meeting that TIL agreed to pay 50 per cent of the principal amount with 12 per cent interest to all the depositors. This offer was further enhanced after the introduction of the NDDDB scheme to payment of the whole of the principal amount in four equal installment, with interest after the first installment at 14 per cent per annum. So far as other unsecured creditors are concerned TIL offered 20 per cent of the principal amount without interest in five yearly installment as against the NDDDB

offer of payment of principal amount in full within one month from the effective date. TIL has not upgraded its offer so far as the other unsecured creditors are concerned. The employees were to be treated as paid off from 1st November 1975 and were to be paid 50 per cent of the compensation upto 31st December 1975 under the TIL Scheme whereas under the NDDDB Scheme all permanent employees were to be paid full salary from 1st November 1975 to 31st December 1978 and others were to receive gratuity. The offer underwent an upward revision only after the workers there attended to vote against the Scheme at the TIL Meeting. NDDDB also revised their Scheme to bring it in line with the TIL scheme. So far as the preference shareholders are concerned TIL agreed to pay them Rs. 10 per share whereas NDDDB offered Rs. 25 per share straightway. Even the subsequently ungraded offer made by TIL does not offer the preference shareholders more than Rs. 20 per share. Thus, even at the NDDDB offers Rs. 5 per share extra as compared to TIL. Equity shareholders were to receive a paltry Rs. 0.10 ps. per equity share under that TIL Scheme but NDDDB offered Rs. 10 per equity share and hence TIL was compelled to raise its offer to Rs. 10 per share to which NDDDB reacted by raising it to Rs. 15 per share. It will thus appear from the above that the Scheme initially proposed by TIL was far from fair and equitable. It was only after NDDDB entered the field that TIL was compelled to revise its Scheme upward. Even so it does not match the NDDDB Scheme in all respects....

The learned Company Judge by his closely reasoned judgment and order dated January 20, 1981 (which is presently under challenge) granted the prayer for substitution of NDDDB as a party in place of appellant TIL subject to upgrading of original TIL Scheme, to bring it in conformity with the NDDDB Scheme. It is this order which has given rise to the present appeal by the appellant-TIL. Thus, the appellant-TIL who had made a statement to the effect that it was no longer interested in the Scheme presented by it during the course of the hearing and who had applied for the refund of Rs. 75,000/-deposited by it at the time of the presentation of the Scheme in pursuance to the provision contained in the Scheme, is now objecting to the order passed by the Court sanctioning the request of the original sponsor of TIL Scheme, for substituting NDDDB as a party in place of TIL. Even now, be it noted, TIL is not prepared to offer the same scheme as is being offered by NDDDB under which scheme the shareholders, creditors and workers and every one stands to benefit. TIL is not prepared to offer similar terms in its scheme. TIL is not able to secure support of secured creditors and Banks to whom the company is indebted to the tune of Rs. 80 lacs. Appellant TIL itself does not want to go ahead with the schema or compromise. Yet TIL has preferred the present appeal in order to challenge the legality of the order passed by the learned Company Judge sanctioning the prayer for substitution and the consequent sanction accorded to the Scheme in favour of the NDDDB. It may be stated that during the course of hearing before this Court, learned Counsel for a Section of the workers who had originally opposed the prayer for substitution, has made a statement to the effect that the workers do

not any more oppose the substitution of NDDDB in the original Scheme subject to upward modification in the Scheme. Thus, there is no objection on the part of the workers or the secured creditors or other creditors, all of whom stand to benefit by the order passed by the learned Company Judge. The only opposition to the order passed by the learned Company Judge now comes from two quarters, namely, (1) TIL-who does not want to go ahead with the scheme and (2) from a Section of Equity Shareholders-who were prepared to accept 10 paise per share from TIL but are not prepared to accept Rs. 15/-per share from NDDDB. The equity shareholders, who have their own reasons for adopting this seemingly suicidal stance which is inconsistent with their self-interest, have preferred a separate appeal which we shall deal with in due course. So far as the present appeal is concerned, it is preferred by TIL, who does not want to go ahead with the Scheme and thus has no under-standable reason to challenge the order, which is not prejudicial to it. Since TIL does not want to go ahead with the Scheme, whatever order has been passed by the learned Company Judge cannot in any way cause any prejudice to TIL. Yet TIL has challenged the legality of the said order on grounds to which we will advert to in due course. The first question, however, arises as to whether TIL can be said to be an aggrieved party who has a right to challenge the order passed by the learned Company Judge granting the prayer for substitution of NDDDB in place of TIL in the original Scheme sponsored by Messrs Veiji Shamji & Company, which has been upgraded to bring it in conformity with the NDDDB Scheme as it has finally emerged. We, on our part, are unable to see what interest TIL can have in questioning or challenging the legality of the order passed by the learned Company Judge, whereby a company is being resurrected and as a result of which an industrial unit which has ceased production will be able to start production, provide employment to hundreds of workers, and benefit shareholders, workers, secured creditors and unsecured creditors i.e. all concerned. In fact, as pointed out earlier, at the earlier stage the sponsor of the TIL Scheme had placed on record that TIL was out of picture. TIL itself had prayed for the withdrawal of Rs. 75000/- deposited in pursuance to the TIL Scheme. TIL scheme, even after the modification it was prepared to make during the course of the hearing, is less advantageous to all concerned than NDDDB Scheme. The TIL Scheme is not workable as submitted by TIL itself inasmuch as NDDDB Scheme visualises payment of Rs. 80 lacs to the nationalised banks with interest at 15 % after one year on the outstanding amount and visualises a deposit of Rs. 1 crore to be paid immediately and even payment of all costs and expenses upto Rs. 3 lacs to the Nationalised Banks. TIL scheme does not envisage deposit of Rs. 1 crore in connection with the dues of the nationalised Banks. The nationalised Banks do not support the TIL Scheme and it is conceded that TIL will not be able to work without co-operation of these Banks. What is more important is the fact that the Court cannot sanction a scheme which is less favourable to all concerned and prejudicial to all concerned when a more beneficial and more advantageous scheme has been offered by the NDDDB. In any view of the matter, therefore, the scheme which has been proposed by TIL cannot be sanctioned by the Company

Court. Nor has TIL any legal right to insist that its scheme should be sanctioned notwithstanding the fact that it is not as good as the scheme offered by NDDDB and in fact is much inferior to the scheme, offered by NDDDB and which is not acceptable to any one except equity shareholders in respect of whose share of the face value of Rs. 100/- it offered 10 paise per share, which the equity shareholders were prepared to accept (the same shareholders are not ready to accept Rs. 15/-per share under the scheme pursuant to substitution). All the workers are now unanimously with the NDDDB Scheme and TIL scheme is not acceptable to them. Thus, it is abundantly clear that the Court cannot sanction the TIL Scheme as it is not acceptable to any one but the equity shareholders. So far as workers are concerned, all of them are now unanimously supporting the scheme sanctioned by the learned Company Judge by substitution of NDDDB in place of TIL. None of the creditors has preferred an appeal. Thus, all the creditors have accepted the order of substitution. At the cost of repetition, it may be stated that admittedly, TIL Scheme is not workable. TIL is not prepared to deposit Rs. 1 crore which the NDDDB is prepared to do and the Banks having withdrawn their support TIL Scheme is not workable. Under the circumstances it is difficult to comprehend how TIL can feel aggrieved by the order passed by the learned Company Judge. It would appear to us that TIL is not even an aggrieved party. Nor has TIL anything to gain by preferring this appeal in the sense that even assuming that the order passed by the learned Company Judge is set aside TIL does not stand to benefit, for, its original scheme, which is much inferior, does not get automatically sanctioned and the Court can never accord sanction to it when NDDDB has offered a much superior scheme which is beneficial to all concerned including equity shareholders who are, for some ulterior reason, opposing the prayer for substitution. All the same, since the appeal has been admitted and legal submissions have been urged by TIL to the effect that the order passed by the learned Company Judge is one which cannot be lawfully passed, we will proceed to deal with the submissions urged by learned Counsel for the appellant TIL notwithstanding the fact that even if TIL succeeds it gets no benefit except and save the satisfaction that the NDDDB scheme is frustrated and injury is caused to secured creditors, unsecured creditors, and workers, all of whom stand to lose and an industrial unit which had started functioning will have to be closed down. All that we wish to say is that it is difficult to comprehend how the appellant TIL, can feel aggrieved by the order passed by the learned Company Judge which does not in any way cause prejudice to it while it benefits all concerned. Still we will deal with the legal submissions urged by learned Counsel for the Appellant TIL.

Is substitution of NDDDB as sponsor in place of TIL illegal notwithstanding the law laid down by the Supreme Court in S.K. Gupta's case?

4. The first submission urged on behalf of the appellant is that the order for submission of the sponsor in the original scheme, as modified subsequently, is contrary to law. It may be mentioned that the question whether substitution of one party for another in a Scheme is competent or not, is no more a question

which is *res integra*. It is concluded by a decision of Supreme Court in *S.K. Gupta and Anr. v. K.P. Jain and Anr.* 49 Company Cases 342. The Supreme Court has taken the view that on a true interpretation of Section 392 of the Act the Court has power to modify the compromise or an arrangement proposed between a Company and its creditors or class of creditors or between its members or class of members and that in pursuance of the said power of modification, the Court has power to deal with the Scheme of compromise or arrangement for the purpose of making it workable and it has power to substitute, by way of modification, one sponsor, for another. In other words, the Supreme Court has taken the view that in exercise of powers u/s 391 read with Section 392 of the Act, it is competent to the Court to substitute one party as sponsor instead of some other party as sponsor. The proposition which emerges from *S.K. Gupta's* case (*supra*) cannot and has not been questioned. The Supreme Court has also observed in the course of its judgment in *S.K. Gupta's* case that strictly speaking, omission of the original sponsor of a scheme of compromise or arrangement and substituting another one in his place would not change the basic fabric of the scheme. This is also a proposition which cannot, therefore, be questioned before us. Even so. Counsel for the appellant-TIL has contended that the order passed by the learned Company Judge substituting the name of NDDB as sponsor in place of TIL is contrary to law.

5. For proper appreciation of the submission urged in this context, it is desirable to reproduce Sections 391 and 392 of the Act which are part of Chapter V which deals with arbitration, compromises, arrangements and reconstructions, in so far as they are material:

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

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

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

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed (under the rules made u/s 643). by proxy, at the meeting, agree to any compromise or arrangement shall, if sanctioned by the Court be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be. and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company; Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the Company or any other person by

whom an application has been made under Sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company u/s 5 to 251, and the like. (3). (7).

392(1). Where the High Court makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it-

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

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

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

(3)

What is the true ratio of S.K. Gupta's case? Does the power to substitute depend on whether it is exercised "before" or "after" the Scheme is sanctioned?

6. It is contended that Section 391 read with Section 392 in the context of the law laid down by the Supreme Court in S.K. Gupta's case empowers the High Court to make an appropriate order or to give appropriate directions or make such modifications, compromises or arrangements only "after" such compromise or arrangement has been sanctioned. In other words, the arrangement or compromise must be sanctioned u/s 391 of the Act "before" any question of modification of the compromise or arrangement can be tackled by the Court under Section 392 of the Act. Counsel submits that Court cannot modify the compromise or arrangement by first substituting one sponsor for another sponsor and sanction the scheme thereafter. The Court can only sanction the scheme without modification. And if such a scheme is sanctioned then only the sanctioned scheme can be modified in exercise of the powers u/s 392 of the Act as interpreted by the Supreme Court in S.K. Gupta's case. Now, it is no doubt true that the question of substitution arose in S.K. Gupta's case "after" the scheme was sanctioned u/s 391 of the Act. While that position is, as a matter of fact, true, the ratio of decision in S.K. Gupta's case does not turn on the question whether or not the substitution of sponsor and modification in this behalf was sought "before" or "after" the sanctioning u/s 391 of the Act. The question before the Supreme Court was not whether one sponsor can be substituted for another provided and only provided the scheme proposed by the

original sponsor has been already sanctioned u/s 391 of the Act and a modification, by way of substitution of original sponsor by another sponsor arose subsequent to the sanction in point of time. No such question had arisen for the very good reason that the question of substitution arose "after" sanctioning of the Scheme. There is, however, nothing in S.K. Gupta's case which would go to suggest that sanctioning the scheme of the original sponsor is a condition precedent for exercising the power of substitution u/s 392 of the Act and that such substitution can only follow on the heels of sanction accorded to the Scheme proposed by the original sponsor in which the original sponsor figures as a party to the compromise. Such a proposition does not emerge from S.K. Gupta's case. In our opinion, on a true interpretation of Section 391 read with Section 392 of the Act in light of the law laid down by the Supreme Court in S.K. Gupta's case the power of modification by substituting one sponsor by another, can be exercised by the Court at the point of time when the question of sanctioning the Scheme arises. There is no warrant for reading the aforesaid two provisions in an extremely restricted fashion as is suggested by learned Counsel for the appellant (TIL). By doing so the Court would be denying itself the power to resurrect or breathe new life in a company facing extinction. And would be denying to itself the power to relieve the distress of the workers, creditors and shareholders, (and at the same time augment the supply of consumer goods and enrich the public exchequer) without harming the cause of any one else. The Court would be denying to it-self the power to do good to all concerned without any detriment to any individual or collective interest. Chapter V of the Companies Act deals with arbitration, compromises, arrangements and reconstructions. The very birth of Sections 391 and 392 has a purpose. These provisions have been designed with a view that a productive unit is saved from economic disaster and is brought back to life. The anxiety underlying this objective is understandable. If a productive unit dies, it results into incalculable harm to the society, to the economy, to the workers, to the shareholders, to the creditors, and the banking institutions which serve the public by extending credit to the industrial units. If the industry thrives the consumers would get more supplies, the workers would get employment, the State may get more revenue and the augmented public funds could be employed for a nation building purpose. The large investments made by the Banking institutions would be lost if a sinking company is allowed to die. On the other hand, if a rescue operation is carried out under the powers conferred by Sections 391 and 392 of the Act by infusing new blood and new life, all concerned stand to benefit. And there will be one more industrial unit producing more goods for the consumers. Availability of more goods would mean availability of goods at a more reasonable price. It will mean more employment in an age when unemployment on a large scale is the bane of the society. It will bring in more revenue by way of sales tax, income tax and other taxes. How then shall we construe Sections 391 and 392? Shall we construe them in a manner so that the Industrial unit can be resurrected? Or shall we interpret them in a fault finding manner with a hair-splitting attitude in order to hold that no such power exists in the Court? Shall we interpret it in such a manner that the

relevant provisions take place of life saving drugs or shall we interpret the provisions in such a manner that they take place of a placebo with no curative power and with no potency? No doubt, if the provisions are not capable of a construction other than the one that no such power exists, the Court may raise its hands in helplessness. But, if the provisions are capable of such an interpretation as to make them meaningful and purposeful, there is no compulsion to adopt an approach which would render the provisions practically worthless in a situation like the present one. The law has to be evolved continuously in a dynamic manner with a forward looking approach. This does not mean that if the provisions are not susceptible to such interpretation even on making an approach informed with the desire to make them purposeful, rather than purpose-less, an impossible construction, should be placed on the provisions. In our opinion, however, the provisions are capable of being interpreted in the manner in which the learned Company Judge has interpreted the same. There is nothing in these provisions which countermands such a construction. In fact, Clause (b) of Sub-section (1) of Section 392 makes it abundantly clear that the powers conferred by Section 392 may be exercised "at the time of making such order or at any time thereafter". The provisions therefore, envisage exercise of power at the very point of time of making the order meaning thereby, "before" the order is passed. The expression which follows, namely, "at any time thereafter" lends further support to this construction, namely, that before the order is signed the power can be exercised under the earlier part of the provision and after the order is signed, the power can be exercised under the second part of the provision. The expression "or at any time thereafter" leaves no room for doubting the score that the preceding part contemplates exercise of power at a point of time prior to the making of the order. It is, therefore, abundantly clear that while making the order u/s 391 of the Act sanctioning the Scheme of compromise or arrangement the Court has undoubted authority to modify the compromise or arrangement by substituting one sponsor for another. That the power of modification includes power of substituting the original sponsor by a new sponsor is a proposition which is not capable of being disputed in view of the law laid down by the Supreme Court in 5. K. Gupta's case (supra). We, therefore, do not see any substance in the first submission urged by learned Counsel for the appellant-TIL in this behalf.

Is the order vulnerable on the ground that it seeks to do something indirectly which it could not have done directly?

7. The submission which is urged is that the learned Company Judge should not have authorised a scheme indirectly which was rejected by the shareholder and the creditors. The argument is that one cannot be permitted indirectly to do what cannot be done directly. It is contended that since the Scheme sponsored by the NDDB had been rejected at the meeting of the shareholders and the creditors, NDDB cannot be substituted in place of original sponsor by the order of the Court, such is the submission, amounting to giving a back door entry to NDDB. Now, as discussed earlier, the Scheme which has been sanctioned by the Court

by substituting NDDDB in place of TIL is admittedly vastly beneficial to the shareholders as also to the creditors and the workers. In fact, barring the equity shareholders, no one has taken exception to the sanctioning of the Scheme. So far as the shareholders are concerned, one wonders how any one can object to being paid compensation at Rs. 15/-per share instead of compensation at the rate of 10/-paise per share. Equity share holders were prepared to accept 10 paise per share from TIL and even now are prepared to accept Rs. 10/- per share from TIL. They are, however, not prepared to accept Rs. 15/- per share from NDDDB. Do Rs. 15/-per share coming into the pocket of the shareholders have less value than 10 paise per share merely because Rs. 15/- come from NDDDB, while 10 paise come from TIL? The learned Company Judge was perfectly justified under the circumstances in suspecting that there was some underhand dealing involved in it. No person would ever object to payment of Rs. 15/- per share if he is willing to accept 10 paise per share. And no shareholder is concerned with the question as to from whose pocket the value of the share comes from. For a shareholder what is material is the money that he gets and not from whose pocket the money comes. Therefore, it is obvious that the objection of the shareholders, is one which cannot be countenanced by the Court. It is too late in the day for the Courts to countenance such a submission. It would not have found favour in the times of Shylock the Jew. It is inconceivable that any Court would countenance it even for a moment today. It is the clear that the objection of the equity shareholders (with which we are concerned in the allied appeal which is being disposed of along with this appeal) is rooted in some evil design and is not bona fide. The Court would, therefore, refuse to entertain a protest from the quarters of the shareholders. The Court may well tell the shareholders that notwithstanding your desire to be content with 10 paise per share, the Court will sanction a scheme whereby you will get 150 times the amount you were prepared to accept and that your intrigues cannot prevent the Court from infusing life in a dying industrial unit, for, the Court cannot be unaware of this dimension of the matter. While the Court would be anxious to protect the interest of the shareholders, the Court would not create a situation where the shareholders inflict harm on themselves and also harm on all concerned. The existence of an industrial unit today is not a matter concerning the rights of the shareholders only. It is a matter in which the entire society, the consumers, the workers, the revenue and the welfare state, have a stake. The objection raised on the part of the shareholders must, therefore, be repelled unhesitatingly. But it must be realised that the present appellant is not the guardian-ad-litem of the shareholders. The present appellant-TIL is a limited company which has proposed the scheme which admittedly cannot work and which is admittedly less attractive than the scheme proposed by NDDDB. One can best describe the attitude of TIL as the dog in the manger attitude, for, the appellant TIL can have no grievance if a dying company is reconstructed and if the shareholders creditors, workers, and the National economy benefits, whilst it loses nothing. Is it mere jealousy which makes it persist in opposing the scheme by preferring this appeal? We do not know. But one thing is clear viz. that TIL

does not want to offer the same terms as NDDDB offers. TIL is not prepared to offer a scheme which will go through. TIL is not in a position to offer a scheme which will go through. What interest then has TIL in challenging the order passed by the learned Company Judge sanctioning the scheme which it does not want to push through itself and is not in a position to push through? We are unable to comprehend how TIL can contend that by substitution of NDDDB in place of TIL as sponsor amounts to giving back door entry to NDDDB. The argument completely overlooks the basic aspect of the real problem. What was accepted by the shareholders and the creditors was a scheme offering them certain terms. They were not concerned with the question through whom they were going to be paid under the Scheme. The identity of the sponsor would not be a basic element of the Scheme. It has been observed in S.K. Gupta's case (supra) that identity of the sponsor is not something basic in the structure of the scheme. Whether or not it is essence of the scheme or a basic element in the scheme, is a question of fact depending on the circumstances of every case. Even if one were to proceed on the assumption that in certain cases it may be a basic element in the scheme, whether or not it is a basic element is a question which can be examined by the Court. In the present case, it is an undisputed position that NDDDB is financially far more sound and has greater financial backing than TIL. It is not contended that TIL is financially preferable to NDDDB from the standpoint of the persons who are going to get their dues under the scheme. It is not even contended by TIL that NDDDB is not in a position to fulfil the obligations undertaken by it under the Scheme. Neither the creditors, nor the workers nor the Banks nor the secured creditors have objected to the scheme on this count, before us. Even TIL has not contended to this effect. Apart from the fact that TIL is neither representative nor guardian ad litem of the interest of the shareholders or creditors or workers, where is the question of identity of the sponsor being a basic element in the scheme? What was agreed to at the meeting of the shareholders and creditors was an arrangement under which they were going to get compensation in respect of their rights. The essence of the matter was the monetary compensation which they were going to get. It was not the essence of the agreement or compromise as to from whose pocket the compensation was going to come. In a given case if the sponsor sought to be substituted does not have the financial capacity to meet with the obligations undertaken by it, it may stand on a different footing. With such a hypothetical case we are not concerned in the present matter. So far as the present appellant is concerned, it is an admitted position that the financial viability of NDDDB and its position to meet with its obligations under the Scheme is not questioned by any one. Not even by the shareholders. Under the circumstances, how can TIL, who offered a much less attractive Scheme which the Court was not prepared to accept because it was against the interest of the shareholders, creditors and workers and which TIL itself, in any case, was not prepared to upgrade in order to bring it in conformity with the more beneficial Scheme offered by the NDDDB, challenge the order passed by the learned Company Judge on this score? There is no question of granting sanction to a scheme rejected by the shareholders and the creditors. In

fact, sanction is being accorded to a scheme which was accepted by the shareholders and creditors with an upward modification of monetary benefits in favour of all concerned parties, namely, share holders, creditors and workers. The only modification which is made is that in place of TIL (which is not prepared to go ahead with the Scheme and which admits that it is not in a position to implement the scheme because the secured creditors and banks have withdrawn their support) NDDDB (which is in a position to implement the scheme) is being substituted. It is thus evident that the submission urged on behalf of the appellant (TIL) is altogether lacking in merits.

Does it amount to compelling the Shareholders to sell their shares and is it invalid on that account? Is the impugned order illegal on that account?

8. It was lastly contended that unless the sponsor agreed, the scheme should not have been sanctioned because it amounts to compelling share holders to sell their shares to NDDDB against their choice. Pray, who is TIL to raise an objection on this score? The shareholders are not minors and TIL is neither their natural guardian nor guardian appointed by the Court. This argument is wholly misconceived. No one is compelling the shareholders to sell their shares to NDDDB. The shareholders have, at a duly convened meeting agreed to sell their shares at 10 paise per share. All that the Court is sanctioning is a sale of share at the rate of Rs. 15/- per share instead of at 10 paise per share. Is it compulsion or is it something done in order to confer a windfall benefit on the shareholders? We have discussed at length the ramification of the matter pertaining to the identity of the purchaser of the shares, from the standpoint of share holders, who had agreed to sell their shares at 10 paise per share. What was the essence of the matter was the price to be paid to them and not the identity of the party from whose pocket the price was to come. 10 paise per share from TIL could not be of greater value to the shareholders than Rs. 15/- per share from NDDDB. There is therefore no question of shareholders being obliged to sell their shares. The Court has sanctioned a scheme under which they had agreed to sell their shares at 10 paise per share by directing that instead of 10 paise they should be paid at Rs 15/- per share. Incidentally, the modification effected by the Court is to the effect that the value of the shares should be paid by NDDDB and not by TIL- who is not prepared to pay this value for the shares. Under the circumstances, we cannot accede to this argument which is altogether devoid of any substance. These were the only submissions urged on behalf of the appellant. We see no substance in any one of them. The appeal therefore fails and is dismissed.

9. We may state that we have passed an order dismissing the appeal and refusing certificate of fitness to appeal to the Supreme Court of India, on July 8, 1981 on which date we passed the order in the following terms:

I

Appeal is dismissed for reasons which will follow hereafter.

II

Appellant will pay the costs of the respondents as also the workers.

III

Counsel for appellant orally applies for certificate of fitness to appeal to the Supreme Court of India. Certificate is refused as the matter does not involve any substantial question of law of general importance which in the opinion of this High Court needs to be decided by the Supreme Court.

IV

Counsel for the appellant applies for stay of the operation of the order dismissing the appeal in order to enable the appellant to appeal to the Supreme Court after obtaining special leave. We refuse the prayer for stay in view of the fact that Mr. K.S. Nanavati for respondent no. I makes a statement in the same terms as he made on 6-4-1981 in C.A. No. 21 of 1981 in O.J. Appeal No. 6/81 when the appeal was admitted and interim relief was refused which will hold good till expiry of fifteen days from the date of signing of judgment.