
(1979) 07 BOM CK 0036

In the Bombay High Court

Case No : Company Petition No. 113 of 1979 connected with Application No. 178 of 1978 in I.C. No. 221 of 1958

Vasant Investment Corporation Ltd.

APPELLANT

Vs

Official Liquidator, Colaba Land and Mill Co. Ltd.

RESPONDENT

Date of Decision : 06-07-1979

Acts Referred:

Companies Act, 1956 — Section 100, 101, 102, 103, 104

Citation : (1981) 51 CompCas 20

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : J.B. Chinai, for the Regional Director, Company Law Board, Bombay and L.M. Chagla, for Ruby Trading Co. Pvt. Ltd., Bharat Estates Pvt. Ltd. and M.M. Patel, S.D. Parekh, for the Appellant; A.B. Divan, for the Respondent

Judgement

Sujata V. Manohar, J.—The litigation pertaining to the Colaba Land and Mill Co. Ltd. has a stormy history spanning two decades. This, perhaps the last, round of litigation is in respect of a scheme propounded by the petitioners under s. 391 of the Companies Act to bring the company out of winding up.

2. The petitioners are some of the shareholders of the Colaba Land and Mill Co. Ltd., holding in all 15,214 equity share of Rs. 100 each out of a total issued and paid up capital of 49,000 shares of Rs. 100 each. The company was incorporated as public limited company as far back as 1st July, 1880. The authorised capital of the company was Rs. 1 crore divided into 1 lakh equity shares of Rs. 100 each. The paid up capital of the company of Rs. 49,00,000 divided into 49,000 equity shares of Rs. 100 each, fully paid up. The principal commercial activity of the company consisted of dealings in a large number of immovable properties belonging to the company. Originally, the company also had a textile mill which was sold some time before the commencement of the winding-up proceedings against the company. By an order made by this court on 7th October, 1969, the company was ordered to be wound up under the provisions of the Companies

Act, 1956, and the official liquidator was appointed the liquidator of the company. In the course of winding up, the official liquidator has disposed of several immovable properties belonging to the company and has realised large amounts. Out of the amounts so realised, all the creditors of the company have been paid in full. All the shareholders of the company have also received full repayment of their share capital of Rs. 100 per share in respect of the share held by them in the company. They have, in addition, received a sum of Rs. 40 per share as a dividend out of the surplus lying in the hands of the official liquidator. There are about 17 other immovable properties belonging to the company which are yet to be sold. These properties have been given by the company on lease, and the company realise an annual income of about Rs. 1,29,000 as and by way of rent from these properties. According to the petitioners, the estimated value of the immovable properties in the hands of the official liquidator today is about Rs. 15,00,000. There does not appear to be much controversy about this valuation. In addition, the official liquidator has in his hands about Rs. 14,00,000 in cash which he have invested in fixed deposits. The company, therefor, has today assets worth about Rs. 29,00,000, with no liabilities whatsoever. At the time when the petition was filed, there was a disputed contingent claim of the I.T. department for an approximate of Rs. 5,00,000 against the company. Mr. Parekh who appears for the petitioner states that no such claim is pending today. The official liquidator had taken out misfeasance proceedings against the directors of the company, but the misfeasance proceedings have come to an end some time in April, 1978. The official liquidator has thus failed in his attempt to pin a charge of delinquency on the ex-directors of the company. Today, there are no pending misfeasance proceedings against any of the directors of the company. Under these circumstances, the petitioner and other shareholders of the company now wish to revive the company.

3. The petitioners, therefore, took out a judge's summons being Company Application No. 178 of 1978, proposing, for the consideration of the shareholders of the company, an arrangement, a copy of which was annexed top their application. Under the scheme, which has now come up for sanction, the company is to be restarted with the help of the available surplus assets. The issued, subscribed and paid up capital of the company will be Rs. 4,90,000 divided into 49,000 fully paid up equity shares of the face value of Rs. 10 each. The balance of the assets of the company, after capitalisation of the sum of Rs. 4,90,000 as aforesaid, will be held by the company as its assets. The members of the company and the shares respectively held by them shall be as appearing in the list of contributories, immediately prior to the making of the order. Each new share of Rs. 10 shall be deemed to have issued and allotted to each of the members of the company in proportion to the number of old shares held by each of them. Various other provisions of the original scheme are as set out in the application. When the application for placing the scheme for the consideration of the shareholders came up for hearing, it was opposed by the official liquidator. Ultimately, by an order dated 16th October, 1971, directions were given for

convening a meeting of the shareholders of the company for considering, with or without modification, the proposed scheme or arrangement. An appeal from this order was filed by the official liquidator. However, subsequently, it was withdrawn by him. In pursuance of the order, a meeting of the shareholders of the company was duly convened on 20th January, 1979, after notice to the shareholders. As the petitioners were proposing certain amendments to the scheme for the consideration of the shareholders, the petitioners had given a notice under certificate of posting to every individual shareholders of the proposed amendments prior to the convening of the meetings of the shareholders. At the meetings, 95 shareholders holding a total number of 30,675 shares out of a total of 49,000 shares were present; that is to say, shareholders holding approximately 62 % of the shares of the company were present at the meetings. The scheme was put before the meetings along with the amendment. The scheme and the amendments were put to vote separately. 93 shareholders holding 30,131 shares voted in favour of the amendments and 2 shareholders holding 544 shares voted against the amendments. Some votes were declared invalid. When the scheme was put to the vote, all the 95 shareholders unanimously voted in support of the scheme, Here again, on account of technical defects, a few votes were declared invalid. The petitioners have, therefore, filed the present petition for obtaining sanction of the court to the scheme or arrangements for the reconstruction of the company in accordance with the amendment scheme, Ex. I, to the petition, and for other appropriate orders and directions in that connection.

4. Mr. A. B. Divan, who appears for the official liquidator, has neither opposed not supported the scheme. But he has drawn my attention to certain aspects of the scheme. In the first place, he points out that the scheme may be construed as involving a reduction of the share capital of company. If the scheme involves a reduction of the share capital, then under r. 85 of the Companies (Court) Rules, the procedure required under the Act for the reduction of the share capital must be followed before the scheme can be sanctioned. Rule 85 runs as follows :

"85. Compromise or arrangement involving reduction of capital. - Where a proposed compromise or arrangement involves a reduction of capital of the company, the procedure prescribed by the Act and these rules relating to the reduction of capital, and the requirements of the Act and these rules in relation thereto, shall be complied with, before the compromise or arrangements so far as it relates to reduction of capital, is sanctioned."

5. Under the rule, therefore, the requirements regarding the reduction of share capital prescribed under the Act must be complied with the before the scheme can be sanctioned. He also drawn my attention to a passage in Halsbury's Laws of England, 4th Edn., Vol. 7, para 178. It says :

"178. Reduction when company is winding-up. - The power of a limited company to reduce continues even after it has gone into liquidation. If the reduction is part of a scheme of arrangement, the requirements of the Companies Act, 1948, as

regards reduction in other cases must be complied with."

6. In the present case, Mr. Divan argues, as procedure required for a reduction of share capital is not followed by the company, the scheme cannot be sanctioned. Before this aspect can be examined, it is necessary to consider, in the first place, whether the scheme involves any reduction of share capital. Under the existing memorandum and articles of association of the company, the authorised capital is rupees one crore divided into one lakh share of Rs. 100 each, out of which 49,000 shares of Rs. 100 each are issued, subscribed and fully paid-up. Under the scheme, the issued and subscribed capital of the company is Rs. 4,90,000 divided into 49,000 equity shares of the face value of Rs. 10 each. Hence, *prima facie*, it does appear that the scheme results in a reduction of the share capital. However, in the present case, in the course of winding-up, the official liquidator has repaid to each of the shareholders the full face value of his shares. In addition, he has paid Rs. 40 per share as a dividend. He has also discharged all the liabilities of the company. What remains in his hand as today is surplus assets. Out of this surplus fund, a certain portion is being utilised under the scheme for the creation of the share capital of the reconstituted company. In such a scheme, therefore, where the share capital is being created out of the existing surplus funds of the company, there can be no question of a reduction of share capital. In this connection, Mr. S. D. Parekh who appears for the petitioners, has drawn my attention to a decision in *McLeod & Co. v. S. K. Ganguly* reported in [1975] 45 Com Cas 563. The Calcutta High Court in this case also was dealing with a company which, under a proposed scheme of reconstruction, utilised its surplus funds for creating the necessary share capital. The court observed (p. 571) :

"Under the scheme the company does not propose to carry on its business with the share capital subscribed by the shareholder but with the surplus now in the hand of liquidators after repayment of the capital invested by the shareholders. In our view, therefore, it is not a case of reduction of the share capital as contemplated by ss. 100, 101 and 102 of the Act."

7. In the present case also, the company proposes to carry on its business with help of the surplus funds available. The company has already repaid in full to all the shareholders the capital invested by them in the company. There is, therefore, no question of any reduction on the share capital of the company.

8. Even assuming that the scheme involves a reduction of the share capital of the company, it is possible to say, on the facts of the present case, that the procedure prescribed under ss. 100 to 102 of the Companies Act for the reduction of share capital has been substantially complied with the company before the filing of this petition (by the petition). In this connections, the petitioners have relied upon a decision of the Gujarat High Court in *Maneckchowk and Ahmedabad Manufacturing Co. Ltd.*, In re reported in [1970] 40 Com Cas 819. In the course of his judgment in the above case, D. A. Desai J. (as he then was) has held that s. 391 of the Companies Act is a complete code. However, in

view of r. 85 of the Companies (Court) Rules, whenever a scheme of arrangements proposed under s. 391 involves reduction of share capital, the procedure prescribed under ss. 100 to 102 of the Companies Act must be complied with. He went on to hold that in a case where the rights of the creditors were not affected, where 21 days' notice had been given of the proposed to the members of the company and where the scheme was approved at a meeting held for the purpose by more than three-fourths of the members present and voting, the provisions of the Companies Act pertaining to reduction of share capital were subsequently complied with. In respect of s. 100 which requires a special resolution to be passed for the reduction of share capital, he further held that the notice calling the general meetings need not specify the resolution as a special resolution. He held that the provisions under the Companies Act for such notice is merely a directory provisions and not a mandatory provision. The court should, therefore, ascertain in such cases whether ss. 100 to 102 of the Companies Act are substantially complied with. In the above case, the rights of the creditors were not affected by the scheme. Hence, the provisions laid down in ss. 100 to 102 for the protection of the creditors did not require any consideration. In the present cases also, there are no creditors of the company. The procedure under the Companies Act pertaining to reduction of share capital has been substantially complied with, inasmuch as 21 days' notice has been given to the shareholders for convening a meeting for the purposes of passing the scheme; at the meeting which was held, more than three-fourths of the shareholders present had voted in favour of the scheme. Hence, even assuming that the scheme involves a reduction of share capital, the provisions relating to it have been substantially complied with.

9. It has next been pointed out by the official liquidator that the shareholders who were present at the meetings convened for considering the scheme constituted only 62% of the shareholders of the company. The rest of the shareholders did not remain present; their views about the scheme are not known. It is, therefore, necessary in the interest of justice that they should be protected while considering the scheme. That is to say, before the surplus of the company is handed over to the reconstituted company, a provision should be made for those shareholders who may not want to become shareholders in the new company and may want the company to be completely wound up under the directions of the official liquidator. The official liquidator also felt that express consent of all the shareholders is required before they can be bound by the scheme. In this connection, my attention was drawn to a decision in *In re Calgary and Edmonton Land Co. Ltd.*, reported in [1975] 1 All ER 1046; [1975] 1 WLR 355 . That was an application for a stay of the winding-up under s. 206 of the English Companies Act, 1948, which is in para materia with s. 466 of our Companies Act. While considering the application, Justice Megarry stated at p. 1051 as follows (p. 360 of WLR) :

"That brings me to the third point, that of the person whose interests have to be considered on an application for a stay. These must, of course, depend on the

circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all the creditor and expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three categories to consider. First, there are the creditors. Their rights are finite, in that they cannot claim more than 100p. in the pound. I cannot see that in normal circumstances any objection to a stay could be made on behalf of the creditors if for each of them it is established either that he has been paid in full, or that satisfactory provision for him to be paid in full has been or will be made, or else that he consents to the stay or is otherwise bound not to object to it Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for, unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets, and each should be protected against the destruction of that right without good cause."

10. The official liquidator strongly relies on these observations which lay down that no stay of winding up should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding up proceeded to its conclusion. He points out that, in the first place, all the members have not consented to the scheme. Next, he points out that the amended cls. 3A to 3C of the scheme which provide for the rights of the dissident shareholders are wholly inadequate to safeguard their interests, and on this ground also the scheme should not be sanctioned. The petitioners have taken strong exception to this argument. It is true that under s. 466 of the Companies Act, which is equivalent to s. 206 of the English Companies Act, where a winding up of the company is sought to be stayed simpliciter, consent of all the members of the company is required; but in a case where a scheme is presented under s. 391 of the Companies Act, pursuant to which winding-up proceedings are required to be either stayed or cancelled, members can take advantage of the provisions of s. 391. Under s. 391 of the Companies Act, it is provided by sub-s. (2) :

"(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 under s. 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or,

in the case of a company which is being wound up, on the liquidator and contributories of the company :

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

11. Hence, if at a meeting called to consider a scheme under s. 391, the scheme is passed by the requisite majority, then it becomes binding on all the members of the company, irrespective of the question whether they have expressly consented to it or not. Hence, under s. 391 of the Companies Act, it is not necessary for the court to ascertain whether all the members of a company have expressly consented to the scheme. Under the section, once the scheme is passed by the requisite majority, all the members become bound by it. In this connection, a reference may be made to *In re Trix Ltd.* reported in [1970] 3 All ER 397 , which makes a clear distinction between a stay of winding up under s. 245 of the English Companies Act (equivalent to s. 466 of the Companies Act, 1956) and a stay under a scheme of arrangement framed under s. 206 of the English Act (equivalent to s. 391 of the Indian Act). While the former requires express consent of all shareholders, the latter provides for a meeting of the shareholders and creditors which is required to approve of the scheme by a prescribed majority. On such approval the scheme becomes binding on all the shareholders or creditors, as the case may be. In the case of *S. K. Gupta v. K. P. Jain* reported in [1979] 49 Com Cas 342, the Supreme Court has observed as follows :

"Section 391 envisages a compromise or arrangement being proposed for consideration by members and/or creditors of a company liable to be wound up under the Companies Act, 1956. Compromise or arrangement has to be between creditors and/or members of the company and the company, as the case may be. It was always open to the company to offer a compromise to any of the creditors or enter into arrangement with each of the members. The scheme in this case is essentially a compromise between the company and its unsecured creditors. The scheme when sanctioned does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is "to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity" [see *J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others*,

12. Even in the case *Calgary and Edmonton Land Co. Ltd.*, In re reported in [1975] 1 All ER 1046, the observations of Megarry J., in terms refer to three factors which must be taken into account by the court, viz., (1) there should be consent of each member, or (2) it should be ascertained that the members are otherwise bound not to object to the scheme, or (3) there is secured to the members the right to receive all that they would have received had the winding up proceeded to its conclusion. As the scheme or arrangement is proposed under s. 391, the case will fall under the second category contemplated in the above case where the members become bound by the scheme. Hence, it is not necessary to obtain from each member of the company his express consent to the scheme of reconstruction.

13. It has next been pointed out by the official liquidator that, under the scheme, the company proposes to carry on business which is not contemplated under the existing objects clause of the memorandum of association of the company. He has also drawn my attention to the explanatory statement of which was made under s. 393 of the Companies Act prior to the convening of the meeting of the shareholders. In clause 12 of the explanatory statement, the petitioners have stated that they have already obtained a project profile for the manufacture of sodium dichromate and basic chrome sulphate. They have gone on to mention that in carrying out the above project or any other business, the company will be embarking upon a profitable venture and if the members approve of the proposed business, the necessary amendments of the objects clause in the memorandum of association will have to be obtained. Under the existing memorandum of association, the company does not have any power to carry on business of manufacturing chemicals. The official liquidator has, therefore, pointed out that the scheme is based on the company embarking upon business which is ultra vires the memorandum and articles of association of the company, and hence also the scheme should not be sanctioned. By sanctioning such a scheme, he has pointed out, the court will give its sanction to the court will give its sanction to the company doing something which is ultra vires. Now, broadly speaking, it would be correct to say that a scheme which propounds doing something which is ultra vires the powers of the company cannot be sanctioned. Thus, in the case of *Oceanic Steam Navigation Co.*, In re reported in [1939] 1 Ch 41; 9 Com Cas 229 (Ch D) it was held that a company has no power to enter into, nor can the court sanction, any arrangement or compromise which necessarily involves the doing of any act which is ultra vires the company, being in excess of its corporate powers as defined in its memorandum of association. But every alteration of the memorandum of association required under a scheme of compromise or arrangement cannot be looked upon as an ultra vires act. In the first place, under s. 391, the court has very wide power of reconstituting company. When, for example, a scheme is proposed which involves a restructuring of the capital of the company - as in a case where the rights of the various shareholders are sought to be altered - it can also be said that under the existing memorandum and articles of association of the company, the rights of

the shareholders are fixed in a certain way and to change them would involve sanctioning an act which is ultra vires the memorandum and articles of association. Strictly speaking, such an act may be considered as ultra vires. But, in fact, the very purpose of a scheme of reconstruction is to make suitable alterations in the structure of the company to enable it to function. A scheme, therefore, which contains such "ultra vires" provisions can be - and is, in fact - sanctioned in a number of cases. It is in connection with such a reorganisation that Justice Rangnekar has observed in *Katni Cement and Industries Co. Ltd., In re* [1937] 7 Comp Cas 348; 39 BomLR 675 that under s. 153 of the Indian Companies Act, 1913, the court can sanction a scheme or arrangement even though it involves acts which, apart from its provisions, would be ultra vires the company. However, in the above case, the question of changing the business of the company under a scheme of reconstruction was not before the courts. These observations, therefore, cannot, be themselves, help the petitioners if, under their scheme, the court is required to sanction a change in the nature of the business carried on by the company, which change is not warranted under the objects clause of the memorandum of association of the company. An examination of the scheme, however, makes it clear that it does not require the court to sanction such a change. Under the amended clause 7A of the scheme of compromise, it is provided as follows :

"7A. The company will carry on the business of dealing in immovable properties in accordance with the objects set out in the memorandum of association. Before carrying out any other nature of business (whether indicated in the explanatory statement or otherwise) the company will act in accordance with the provisions of the Companies Act and if necessary will take steps for amendment of memorandum of association of the company in accordance with law."

14. The clause, therefore, contemplates that the company will continue to carry on the business which it was doing prior to the winding up, namely, dealing in immovable properties, and that, in the event of the company desiring to carry on any other business, it would act in accordance with the provisions of the Companies Act and, if necessary, would take steps to amend the memorandum of association in accordance with law. This clause, therefore, cannot be said to contemplate something which is ultra vires either the memorandum of association of the company or the provisions of the Companies Act. Once the company is reconstituted, it will be open to the company to carry on such business as its memorandum of association warrants; and it would be open to the company - as it is open to any other company - to get its memorandum of association altered in accordance with the provisions of law. The scheme, therefore, does not require sanctioning any ultra vires act on the part of the company.

15. In considering a scheme under s. 391 of the Companies Act, the court must attach importance to the wishes of the members. In addition, it should be satisfied, (i) that the statutory provisions are complied with; (ii) that case

affected by the scheme has properly represented; and (iii) that the arrangement is such that a man of business would reasonably approve [1976] 46 Com Cas 59 (Guj) In re Hathising Mfg. Co. Ltd.). An examination of the scheme proposed in the present case reveals provisions which are somewhat unsatisfactory from the point of view of those shareholders who may not be anxious to retain their membership of the reconstituted company.

16. Under the amended cls. 3A to 3C of the scheme, it is proposed that any shareholder of the company, who does not wish to continue to be a shareholder of the reconstituted company, will be entitled to give notice to one M. M. Patel, whereupon M. M. Patel shall be entitled to the shares of such a shareholder and he shall pay to such a shareholder a sum equal to Rs. 40 per share by installments which are laid down in that clause. The last installment is to be paid to the shareholder on or before January 1, 1982. The payment of these installments by M. M. Patel is guaranteed by the company. There is a counter-guarantee of M. M. Patel in favour of the company in respect of these installments. The official liquidator has pointed out that a shareholder should not be required to depend upon an unknown individual for the purpose of recovery of the value of his shares. Instead of putting a shareholder in the hands of such an individual who may or may not pay him the requisite amount, it would be far more desirable to allow the official liquidator or any other independent person to retain sufficient funds with him to enable him to make the payment to such dissident shareholders. He also pointed out that the value of Rs. 40 per share appears to be low. There is considerable force in this contention. The assets in the hands of the official liquidator today are admittedly to the tune of at least Rs. 29 lakhs. As against this, there are 49,000 issued shares of the company. Hence, the value per share would come to about Rs. 58. Even after deducting the expenses of realisation, taxes, etc., the value of share would come to substantially more than Rs. 40. Mr. Parekh, who appears for the petitioners, has fairly conceded this point and has agreed to the alteration of cls. 3A to 3C of the scheme as per the draft handed in by him, under which shares of the dissident shareholders are to be purchased by Mr. Sudarshan Loyalka, who is a director of the Vasant Investment Corporation, the petitioners herein, holding a substantial number of shares in the company. Under the altered clause the price to be paid to the shareholder is raised to Rs. 50 per share, and there is also a guarantee given by the petitioners herein, viz., Vasant Investment Corporation, for payment of the purchase price by Mr. Sudarshan Loyalka. In addition, a sum of Rs. 1 lakhs is being deposited by Vasant Investment Corporation as security for the performance of its obligations under the clauses. The amount will also be paid to the shareholder forthwith. In my view, this would provide adequate protection to any dissident shareholder and would also enable him to realise an adequate price for his shares within a reasonable time. It should also be noted that, in fact, to-day there is nothing on record to show that a substantial body of shareholders, whether present at the meeting or otherwise, object to the scheme. Only two shareholders holding 554 shares objected to the amendments which included cls.

3A to 3C. It does not seem that a large number of shareholders are likely to avail themselves of the provisions of these clauses. In my view, therefore, the security of Rs. 1 lakh which is provided for the benefits of dissident shareholders is adequate.

17. In the petition, the petitioners have asked for an order rescinding the order of winding up. Normally, the proper order to be made in such a case under the scheme of the Companies Act would be, not an order rescinding the winding up but an order staying the winding up. In this connection, a reference may be made to Form 666 in Palmer's Company Precedents, 17th Edn, at p. 620. It states as follows :

"The court has jurisdiction under ss. 256 and 307 to stay the winding up and thus allow the company to resume business, and many orders have been made accordingly. As to the principles on which the court exercises its jurisdiction to stay, see *Re Telescriptor Syndicate* [1903] 2 Ch 174. For an order to stay, see Form 667, *infra*."

18. Form 667 provides for an order to stay voluntary winding up in consequence of a scheme of arrangement. Form 668 provides for an order to stay pursuant to a scheme of arrangement under s. 206 of the English Act. In [1898] Weekly Notes, at p. 60, Note 3 is to the following effect :

"3. Company - Winding-up - staying proceedings - Companies Act, 1862 (25 & 26 Vict. c. 89), s. 80. - After a winding-up order had been made against a company on a creditor's petition, practically all the creditors were paid off or settled with, and the company moved for an order rescinding the winding up order :-

Held, that the proper order to be made was to stay all proceedings in the winding up, and that order would only be made on the notice of Motion being amended so as to ask for a stay of proceedings, and by the joinder of a creditors or contributory as applicant, and on the terms of liberty being given for any dissentient creditor or the official receiver to apply within three months to remove the stay. In *re Baxters Ltd.*, [1898] W.N. 60 June 17. Wright J."

19. Mr. Parekh appearing on behalf of the petitioners has, however, drawn my attention to the order passed in *Hathising Manufacturing Co. Ltd.*, In re, reported in [1976] 46 Comp Cas 59 at p. 86 (Guj), in which D. A. Desai J. (as he then was) of the Gujarat High Court has held that in a case where under a scheme of arrangement a company is reconstituted, an order can be passed cancelling the winding up from the date of the order sanctioning the scheme. In the present case, the company was originally wound up on the ground that it was just and equitable that it should be wound up. The persons who were in charge of the management of the company at that time were also under a cloud, though misfeasance proceedings taken against them have not been successful. The company to day is being handed over to the original shareholders of the company, as it must be. In such a case, it would be preferable to stay the

winding up proceedings permanently instead of cancelling the order of winding up. This appears to be a well-established practice. In substance, there does not appear to be much difference between the consequences of the passing of an order of stay of winding up and the passing of an order cancelling the winding up. In the former case, perhaps, it may be possible for a shareholder who may be aggrieved by the acts of the reconstituted company or its directors to move the court more easily for vacating an order of stay. In the present case at least, it appears preferable to pass an order of stay instead of an order of cancellation of winding up.

20. Mr. Parekh has also applied for a slight alteration in clause 2, whereby it should be provided that the memorandum and articles of association of the company should stand amended under the scheme itself to reflect correctly the provisions regarding the share capital of the reconstituted company. Basically, the court is given wide powers under s. 391 of the Companies Act to frame a scheme for the revival of the company. Section 391 of the Companies Act is a complete code under which the court can sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out the scheme, except reduction of share capital which required a special procedure to be followed by virtue of r. 95 of the Companies (Court) Rules. In the absence of r. 85, procedure for alteration in the memorandum and articles of association of a company prescribed under other provisions of the Companies Act is not required to be followed before sanctioning a scheme involving such alterations. The whole purpose of s. 391 is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as reconstituted company under the scheme (vide *Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re* [1970] 40 Com Cas 819 (Guj)). The company is, therefore, not required to make a separate application under the Companies Act for alteration of its memorandum of association to show the new share capital. Such an alteration can be sanctioned under the scheme itself. It is true that in *Calcutta case, McLeod & Co. v. S. K. Ganguly*, reported in [1975] 45 Com Cas 563, the final order of the court stated that the memorandum and articles of association should be altered and amended in accordance with the provisions of the Companies Act, 1956, so as to correctly reflect the capital structure of the company. But there is no discussion on this aspect of the matter in the above case. In my view, it is open to the court while sanctioning the scheme under s. 391, to make an order whereby the memorandum and articles of association of the company stand amended to reflect the new capital structure of the company, provided no reduction of share capital is involved. The petitioners wish to make certain other minor alterations in the scheme as per the draft handed in. They do not affect the substance of the scheme in any way. It should also be noted that the company has no creditors, and hence the question of taking their interest into account in sanctioning the scheme does not arise.

21. Accordingly, the scheme at Ex. I, as altered by the draft modifications, is sanctioned, save and except that, under clause 6, the order of winding up is not rescind but all further proceedings in winding up are permanently stayed and the company is taken out of liquidation. The scheme should be annexed to this judgment. The official liquidator to file with the Registrar of Companies a certified copy of this order within 30 days from the date of sealing of the order.

22. The petitioners to pay the Regional Director of Company Law Board his costs fixed at Rs. 300. The petitioners to pay to the official liquidator his costs of the petition fixed at Rs. 300. The petitioners also to pay to the chairman of the meeting his fees quantified at Rs. 3,000. This fee has been fixed bearing in mind the considerable work that the chairman was required to undertake in the present case.

ANNEXURE

SCHEME OF COMPROMISE AND ARRANGEMENT FOR RECONSTRUCTION OF THE COLABA LAND AND MILL COMPANY LIMITED (IN LIQUIDATION) AS BETWEEN THE COMPANY AND THE MEMBERS AS SANCTIONED BY THE COURT BY ORDER DATED JULY 6, 1979.

1. There is at present no creditor of the Colaba Land and Mill Co. Limited (In Liquidation), hereinafter called "the company".

2. Immediately prior to the making of the winding-up order against the company dated October 7, 1959, the authorised capital of the company was Rs. 1,00,00,000 and divided into 1,00,000 equity shares of the face value of Rs. 100 each and the subscribed and paid up capital of the company was Rs. 49,00,000 divided into 49,000 equity shares of the face value of Rs. 100 each. Thereafter, by various orders made by the High Court at Bombay in the course of the winding up of the said company, the official liquidator returned in aggregate a sum of Rs. 100 per share to the respective shareholders of such shares and thus the entire paid up share capital of the company is returned to the shareholders and the official liquidator has paid an additional sum of Rs. 40 per share as dividend to the respective shareholders. Thus, the previous paid up share capital of Rs. 49,00,000 of the company consisting of 49,000 shares is fully repaid by return of the amount under the above mentioned orders. The authorised capital of the company shall be Rs. 1,00,00,000 divided into 10,00,000 shares of the face value of Rs. 10 each. The issued, subscribed and paid up capital of the company shall be Rs. 4,90,000 divided into 49,000 fully paid up shares of the face value of Rs. 10 each. The memorandum and articles of association of the company is amended to carry out the aforesaid provisions.

3. Out of the assets which are and will be available to the company on the effective date : (i) Rs. 4,90,000 shall be treated as the issued, subscribed and paid up capital of the company; (ii) each such new share of Rs. 10 each shall be deemed to have been issued and allotted to each of the members of the company in the proportion of the number of old shares held by each of such

members; and (iii) the balance of the assets of the company after capitalisation of the sum of Rs. 4,90,000 as aforesaid will be held by the company as its assets subject to the provisions contained in para. 3A.

3A. (a) In the event of any shareholder of the company giving a notice within the time mentioned hereinafter that such shareholder does not want to retain the shares of the company under paragraph 3 above, in that event such shareholder shall be entitled to sell to Sudarshan Loyalka and Sudarshan Loyalka shall be bound to buy from such shareholder the shares of such shareholder at or for the price of Rs. 50 per share payable against delivery by the shareholder giving notice of the share certificate or the letter of authority together with the transfer forms duly signed by the transferor. Vasant Investment Corporation Ltd. guarantees payment of the purchase price by the said Sudarshan Loyalka to the shareholders giving notice for sale of their shares. In the event of the transfer not having received the share certificate from the company then the transferor will be give to Sudarshan Loyalka a letter of authority to receive the share certificate from the company.

(b) Vasant Investment Corporation Ltd. within one week from the effective date deposit a sum of Rs. 1,00,000 in the joint names of itself and Mr. Rusi Sethna and the same may be invested in a fixed deposit receipt with a schedule bank. The said deposit of Rs. 1,00,000 shall be security for the due performance of the obligations of Vasant Investment Corporation Ltd. as the guarantor.

(c) Within one month from the effective date the persons mentioned a paragraphs and will give individual notice to all shareholders of the company giving them intimation of the availability of the option under this paragraphs and will also insert a public advertisement intimating the availability of the option under this paragraph.

4. The members of the company and the shares respective held by them shall be as appearing in the list of contributories immediately prior to the making of the order on the application for mentioning this scheme.

5. Immediately upon the certified copy of the order sanctioning the scheme being file with the Registrar of Companies, Maharashtra, Bombay, the scheme is sanctioned shall come into force and become operative (hereinafter called "the effective date").

6. All further proceedings for winding up be altogether and permanently stayed and the company be taken out of liquidation.

7. The memorandum and articles of association of the company as existing immediately before the making of the said order for winding up the company, as amended in paragraph 2 above, shall be memorandum and articles of association of the company. However, the company shall be at liberty to amend its existing memorandum and articles of association in accordance with law.

7A. The company will carry on the business of dealing in immovable properties in

accordance with the objects set out in the memorandum of association. Before carrying out any other nature of business (whether indicated in the explanatory statement or otherwise) the company will act in accordance with the provisions of the Companies Act and if necessary will take steps for amendment of the memorandum of association of the company in accordance with law.

8. On and from the effective date of the company shall be entitled to all its properties and the claims as existing on that date and shall also be liable for all its obligations and liabilities as existing on that date.

9. The official liquidator shall, after deducting his costs, charges and expenses, hand over to :-

(i) Mr. Rusi Sethna (Solicitor)

and

(ii) Mr. Sunderlal Saraf (chartered accountant) for and on behalf of the company (and/or its new management) the entire undertaking of the company including all its properties, immovable, movable and cash and all books of account, documents, papers and vouchers. Upon the official liquidator doing so he shall stand discharged as liquidator of the company.

10. Within a period of 3 months from the date the said Shri Rusi Sethna and Sunderlal Saraf receive the charge of the property and records of the company from the official liquidator, the company will issue a notice convening an extraordinary general meeting of the shareholders of the company for the purpose of electing the directors of the company and containing such other business as the said Rusi Sethna and Sunderlal Saraf may deem proper. Thereafter the said Rusi Sethna and the said Sunderlal Saraf will hand over the charge of the property and the records and the undertaking of the company to the board of directors of the company.