

(1993) 05 DEL CK 0071

In the Delhi High Court

Case No : Civil Petition No. 131 of 1988 and Civil Appeal No's. 26, 130 and 414 of 1985, 94 of 1987, 2083 of 1988, 7626 and 13375 of 1989 and 328 of 1990

Wearwell Cycle Co. (I) Ltd. (In Liquidation)

APPELLANT

Vs

A.K. Misra and Brahm Arenja

RESPONDENT

Date of Decision : 28-05-1993

Acts Referred:

Citation : (1994) ILR Delhi 109

Hon'ble Judges : J.K. Mehra, J

Bench : Single Bench

Advocate : G.S. Vohra, M.L. Lonial, Jagdeep Kishore, J.C. Seth and H.L. Seth, for the Appellant;

Judgement

J.K. Mehra, J.

(1) By this order I propose to dispose of C.P. 131188. CAs, 2083188, 7626189, 13375189 and 130190 in Ca 2626/85 and 328/90 in Cp 131/88 and Ca 414/85 and C.A. 94/87.

(2) Before I proceed any further it will be helpful to notice some of the salient facts.

(3) Wearwell Cycle Co. (India) Limited (in liquidation) (hereinafter referred to as "the Company") was incorporated in the year 1951 which Was wound up on 9th March 1978 on the petition filed by one of the creditors, namely Lalit Trading Co., which had been filed on 24-5-1977, (CP. 54/77), inter alia, for the failure of the company to pay the dues of the said M/s> Lalit Trading Company despite statutory notice, that the company had not been carrying on any business for want of funds and loss of creditability ,the failure of the company to comply with the provisions of the Companies Act and mismanagement of the company by the Directors etc.. The company did not file any reply to the main winding up petition. On the contrary the company conceded its inability to pay and in fact

supported the said creditor's petition. It was also alleged in the said petition that the company had transferred its valuable rights in its Connaught Place Office, to a third party for huge underhand payment to the Directors with a view to defraud the company's creditors. The company is also stated to have suffered loss of Rs. 2,38,400.53 in the year 1973-74 and in that year the accumulated losses had risen up to Rs. 27,86,687.91 as against the paid-up capital of Rs. 18,62,970. It was mentioned that the Directors and their friends and relatives had also given a loan of Rs. 3.75 lacs to the company which they were unable to get back and further that the bankers had declined to grant a further loan to the company. The factory of the company suffered disconnection of electric supply on account of non-payment of electricity bills. In addition, there were certain statutory liabilities which were yet to be satisfied. The company's efforts in approaching the Government for a takeover of the company had also not met with any success. The company had also failed to pay the remuneration to the Directors for the last over 16 years from the date preceding the filing of the winding up petition. Of the three directors one died in December 1977 and another resigned leaving the company only with one Director. On 31-12-1977 the Punjab National Bank, had also instituted a suit against the company being Suit No. 109/78 for recovery of Rs. 24,87,547.95 P. in that suit the Bank had impleaded M/s. H. L. Seth and P. N. Seth as defendants 2 and 3 out of the 9 defendants in the suit in their capacity as guarantors who had mortgaged their respective personal houses as collateral security. During the pendency of the suit, thus there was an imminent danger to the personal properties of Mr. H. L. Seth and Mr. P. N. Seth, Mr. H.L. Seth filed on 14-9-83 a petition being Ca 527 of 1983 for revival of the company u/s 391 of the Companies Act. However, when that petition was taken up on 15-3-1984 the propounders were still found by the court to be unclear about the viability of the Scheme. The said Scheme was adversely commented upon by the Official Liquidator and Central Government. The Scheme was found to be vague and did not bring out the detailed particulars. Accordingly the court directed the propounders to come out with clear figures of liabilities as also particulars of financial participation. Faced with the aforesaid situation Mr. H. L. Seth entered into an agreement with M/s. A. K. Misra and Brahm Arenja whereby Mr. Seth agreed to sell shares owned by his group to the said M/s. Mishra and Arenja and also transfer the credits of the creditors who were so declared in Annexure "D" to the said agreement dated 28-11-1984. The said M/s. Mishra and Arenja had agreed to take over the project and the scheme for revival of the company subject to the approval of this They also agreed to and purchased the credits of fee creditors of the company which were disposed at that time by Mr H.T L Seth Rs. 4,88,966.24 on a amount in full and final settlement of the dues of the said creditors .The said amounts were paid and thereafter the said M/s. Misra and Arenja stepped into the shoes of the said creditors listed in Annexure "D" to the said agreement. M/s. Misra and Arenja also agreed to purchase the credit of and settle the claim of the Bank. The said Misra and Arenja pending the approval of the Scheme also provided the company through official liquidator after obtaining orders dated 3-12-1984 from the Company Judge on their

application being C.A, 666/84, assistance to contest Lpa No. 109174 filed by Government against the single Judge's order issuing the mandamus to the Government to sell the property viz. factory land and sheds to the company. Under the said agreement they also agreed that Mr. Seth shall have nothing to do with the result of the said L.P.A. and that cost of the litigation from the date of the agreement would be borne by said M/s. Misra and Arenja.

(4) Following the said agreement Mr. Seth filed a new Scheme being C.A. 26/85 for the revival of the company mentioning the said M/s. Misra and Arenja as financial associates and providing for transfer of 15000 shares to the said M/s. Misra and Arenja and their nominees as provided in the Scheme for approved by the Company Court. On 15-1-1985 the earlier Scheme mentioned in Ca 527/83 including the said petition were dismissed as infructuous. On the same date Lpa 109/74 which had been filed by the Government against the Single Judge's order in respect of the factory land was dismissed. The company became entitled to purchase the factory land and building. The Government demanded over Rs. 30 lakhs but on Misra and Arenja challenging the Government demand as being excessive direction was given by the company court to seek clarification of the order of D.B. which was sought vide C.M. 721 j85 filed in the said Lpa and the necessary clarification was granted by the court whereby an amount of a little over Rs. 16 lacs was found payable. The amount of Rs. 12 lacs and Rs. 4,36,707.78 was accordingly deposited by M/s. Misra and Arenja. They also deposited with Official Liquidator another sum of Rs. 68,365 as noticed in the order dated 20-5-1987 by D- P. Wadhwa, J. M's. Misra and Arenja filed an application being Ca 963/85 seeking directions to Mr. H.L. Seth to hand over the shares in terms of the agreement entered into between the parties which was disposed of by the said order dated 1 20-5-1987. In April 1985 Kelvinator of India Limited also filed Ca 414/85 propounding a Scheme for revival of the company. M/s. Kelvinator who came into this fray had not been able to show any financial involvement in the revival of the company. In the course of arguments it was pointed out that existing factory of Kelvinator is on the plot adjoining the company's properties at Faridabad. On 10th April, 1986 Justice B. N. Kirpal had ordered the meetings of shareholders and creditors to be held and further ordered that both H. L. Seth as well as Misra and Arenja should be entitled to vote Paralley Such direction was given pending the decision on the validity of the transfer of the said shares by Seth group. in favor of M/s. Misra and Arenja group under the said agreement. On 31st October 1986 the suit of "the Punjab National Bank was also settled by paying a sum of Rs. 19.81 lakhs to the. Bank. It was stated at the bar that this amount of Rs. 19.81 lakhs was also provided by M/s. Misra and Arenja to Mr. H. L. Seth to conclude the suit so that apart from. the claim of the bank being settled Mr. H. L. Seth and P. L. Seth could have their personal properties released. It has been held by D. P. Wadhwa, J. in his order of 20-5-1987, that this settlement was the result of a tripartite agreement and that after settling with the Bank M/s. Arenja and Misra stepped into the shoes of the Bank. This and other relevant extracts of the said order are as under:

"UNDER this agreement and pending approval of the Scheme in Ca No. 26/85 Misra and Arenja claimed to have paid a sum of Rs. 39,87,570.90, and this has not been disputed. This amount is stated to have been paid as under:

(1)Rs. 51,000 paid to Seth on 28-11-1984 on the execution of the agreement on account of purchase of shares.

(2)RS.2,69,000 paid to Seth on 11-2-1985 being the balance amount payable under the aforesaid agreement for the purchase of 13000 equity shares and 2000 preference shares.

(3)Rs. 2,44,498.12 again paid to Seth on 11-2-1985 on account of assignment of credits /deposits as mentioned in the agreement.

(4)R.s. 19,18.000 paid to Punjab National Rank in the sums of Rs. 14,00,000 on 1-8-1985 and Rs. 1,09,000 on 10-8-1985 and Rs. 4,18,000 on , 8 .5-11)86.

(5)Rs. 16,36,707.78 deposited with the Registry of the High Court being price for transfer of land and building to the company through the official liquidator by the Central Government as per judgment of the High Court dated 15-1-1985 in Lpa No. 109/74. This amount was deposited in the sums of Rs. 12,00,000 on 24-5-1985 and Rs. 4,36.707.78 on 30-9-1985.

(6)Rs. 68,365 paid to the official liquidator on 20-2-1987 for purchase of non-judicial stamp papers for execution of sale deed by the Central Government in favor of the company."

"THERE could be thus no challenge to the agreement between Seth, Misra and Arenja regarding transfer of shares and assignment of credits. On second thought I think whole of the discussion on this point was unnecessary as Seth did not challenge the agreement at all as various orders in the proceedings as reproduced above would go to show. Seth took full benefits under the agreement and on payment made by Misra and Arenja to the Punjab National Bank even got his immovable properties released which were mortgaged with the bank by way of security. In fact I should not have permitted Mr. Khanna to address arguments on the question of validity of the agreement. Certainly. agreement was entered into before Lpa 109/74 was decided, but even thereafter the parties acted on the agreement. If the agreement is looked into it was with reference to scheme proposed in Ca 527183 which was, as noted above, withdrawn as new scheme was filed with Ca 26/85. So much so that earlier under the agreement the Punjab National Bank was to be paid Rs. 14 lacs in settlement of its dues from the company but ultimately Misra and Arenja had to pay Rs. 19.18 lacs to settle the suit of the bank against the company and others which was,, for recovery of Rs. 24,87,547.95. Seth had been the direct beneficiary of this settlement with the bank. On receipt of this amount the suit of the bank was satisfied and the guarantors including Seth were released from their liability and their documents of title returned to them. it was contended by Seth that he would stand subrogated in place of bank in respect of the property of the company for which

the bank was mortgagee, This contention is quite meaningless. No, particulars of the mortgage property were given. If reference is made to the bank suit it will be seen that only some items of the machinery of the company had been mortgaged to the bank. Moreover, it is quite clear that the credits held by the bank were to be assigned to Misra and Arenja. There was in fact a tri-partite agreement between, the bank. Seth, Misra and Arenja under which Misra and Arenja became creditors of the company in respect of the amounts due to the bank. It appears to me that the agreement was entered into bona fide and in the interest of the company."

"IT is not disputed that statement of affairs as required under Sub-s. (1) of S. 454 of the Act- was filed giving the details of the debts and liabilities of the company, I am of the view that the creditors named in the statement of affairs be taken to be the creditors for the purpose of the meetings in question except where the credits have been lawfully transferred. In the present case there is no dispute that the credits amounting to Rs. 4 88,996.24 as mentioned in Annexure "D to the agreement dated 28-11-1984 were rightly transferred to Misra and Arenja. This has been admitted in the replies filed by Seth in Case 949/85 and 963/85. Misra and Arenja will have to be treated as creditors in place of the persons whose names are mentioned in Annexure "D" to the agreement with the amounts shown against their names."

In the said order, Wadhwa, J. had proceeded to give following directions :

"(1)The O.L. to substitute the names of M/s. A. K. Misra and Brahm Arenja and their nominees as per the transfer deeds in place of the members as per Annexures A and B to the agreement dated 28-11-1984 in the Register of members of the company subject, however, that Misra will produce requisite permission from the Reserve Bank of India for his being brought on record as a member of the company.

(2)Misra and Arneja will be treated as the creditors of the company in place of those mentioned in Annexure "D" to the aforesaid agreement as well as in place of Punjab National Bank: in respect of the debts as appearing in the statement of affairs filed u/s 454 of the Act.

(3)The Members appearing in the list of members of the company and the creditors as given in the statement of affairs and as amended as per (1) and (2) above will be the members and creditors entitled to vote. These lists of members and creditors shall be submitted by the official liquidator to the Chairman.

(4)Meetings of the members and shareholders of the company for considering the scheme proposed by Seth will be held on 10-7-1987 and in respect of the scheme proposed by Kelvinator of India Ltd., these meetings will be held on 11-7-1987.

(5)Notices of the meetings to be sent to the shareholders and creditors of the Company shall be settled by the Chairman/alternate chairman with the Registry.

(6) Subject to above directions, other directions as given in the orders dated 10-4-1986 in Ca No. 26/85 and dated 15-4-1986 in Ca No. 414/85 as modified by order dated 5-5-1986 shall remain the same.

(7) The Chairman and the -alternate chairman shall respectively be paid a further sum of Rs. 1,000 and Rs. 500 in respect of each of the four meetings for the work done by them earlier for taking steps in settling the lists of shareholders and creditors as per interim report dated 12-7-1986 of the Chairman.

(8) A copy of these directions shall be forwarded to the chairman/alternate chairman by the Registry."

(5) The meetings which were originally directed to be held on 16th and 17th October 1987 could not be so held on account of certain clarifications which were required by the Chairman regarding the list of the creditors and shareholders.

(6) It appears that having got his property released and persuading Misra and Arenja in sinking considerable funds towards the achievement of the revival of the company Mr. Seth was no longer interested in going along with the said financiers or concurring his commitments under the said agreement and started looking for excuses to frustrate the revival of the company with the help of the financiers viz. Misra and Arenja despite having committed to the contrary under the aforesaid agreement.

(7) Mr. Seth also instituted a suit being Suit No. 2621/87 along with 1.A. 9438/87 praying for interim injunction/cancellation of the holding of the meetings of the creditors and the shareholders. Interim orders were passed and injunction was granted with regard to the convening of the meetings of the transfer of the share:-The court in the said suit also passed an order of injunction in respect of the meetings to consider the Scheme of Kelvinator, The said I.As. were finally dismissed on May 11, 1988.

(8) The court finally passed an order directing the convening of the meetings of both the Schemes one propounded by La 26/85 and the other propounded in Ca 414/85 giving liberty to anyone attending the meetings of the shareholders and creditors of the company to move for modification/amendment of the Scheme or any of the terms of"-the said Scheme of arrangement which is proposed and the scheme might be passed with or without any modification. Kelvinator not being a member itself was unable to propound a scheme without any member or the company. As such it got hold of one HIR. Khera who appears to have lent. his name as the propounder. Mr. Khera was one of the shareholders of the company.

(9) The aforesaid order dated 20-5-1987 passed by D.P. Wadhwa, J. was appealed against on 4-8-87 vide Company Appeal Nos. 16 and 17 of 1987.

(10) On 4-8-87 the D.B. passed an order in Company Appeals No. 16 and 17 of 1987 directing that the Chairman will hold the meeting of the creditors and shareholders and further taking note that the list of creditors has already been prepared by the learned Company Judge vide order dated 20-5-87. The Division

Bench also directed parallel voting pending the decision of appeals.

(11) I was informed that the order passed by Db in Co. Appeals was challenged by Seth before the Supreme Court by filing SLP. The Hon"ble Supreme Court did not interfere with that order and dismissed the SLP. The Supreme Court ordered as under : "Heard learned counsel for the parties. We do not propose to interfere in the matter except to indicate that as had been directed earlier by the learned Company Judge in his Order dated April 10, 1986, votes casted in the meeting of the Shareholders in regard to the transferee shareholders shall be separately recorded. The Division Bench of the High Court will do well to hear the appeal expeditiously. SLP i? disposed of accordingly."

(12) The Division Bench finally dismissed all the for appeals being Company Appeals No, 16 &"17 of 1987. 9 of 1988 and 27 of 1990 vide order dated 13-1-"1992 upholding the transfer of shares. Some of the important observations in the said judgment of the Division Bench are as under :

"So, we hold that the court has the jurisdiction u/s 536(2) to validate the transfer of shares which had taken place in the present ca.sc after the winding up order as the winding-up process is still continuing and the company has not yet been dissolved."

"IT may be that if the transaction of transfer of shares is not complete the Company Judge may in ifs discretion refuse to entertain any claim for transfer of shares. But in the present case the parties had completed the transaction of transfer of shares when the share certificates and the transfer forms were duly handed over to- the respondent by the appellant and his associates and full consideration which was agreed upon had. been obtained by the transferors from the transferees. So, (he transaction of transfer of shares was complete in the present case."

"IF the court in its wisdom comes to the conclusion that transfer of shares has been made between the parties validly and the said transfer of shares is not going to adversely affect the public interest or the interest of the Company, there is no earthly reason why the Company Court should not declare such a transaction as valid and direct the registration of shares in the names of the transferees or their nominees in the register of the company."

"IT has been then argued that the transaction in question was unconscionable inasmuch as the appellant was in dire circumstances and had to agree to the transfer of shares in order to come out of the economic hardship which he was facing. The transaction, of shares between the parties is purely a commercial transaction. The transaction has been entered into by the appellant and his associates willingly and voluntarily and thus, it does not like in his mouth to urge that the transaction is unconscionable. Mere fact that the Company had become solvent with the acquisition of the precious land by the Company would not render the transaction earlier made between the parties as void or voidable. The agreed full consideration of transfer of shares and the credits has been obtained

by the appellant and his associates. The appellant is, thus, now estopped from urging that the appellant and his associates ought to have been paid better price of their shares and credits as the Company had become solvent. The appellant in his claim for revival of the Company had intended to pay same type of consideration to the share-holders and the creditors as has been obtained by the appellant and his associates from the respondents. The mere fact that now the propounders of the schemes pending before the Company Judge had proposed to pay full value, of the shares and. also the credits to other members of the Company and the creditors would not mean that the transaction which has been completed earlier between the parties stands vitiated.

THE Company Judge in our view could, invoking the jurisdiction u/s 536(2), Section, 155 and Section 446 of the Companies Act, come to the conclusion: that the transaction was valid, genuine arid. bona fide and could direct the Official Liquidate" to make necessary amendments in the registers. It is true that under Rule 154 and Form 35(1) of the Company Court Rules, 1959, the status of creditor is to be recognised as it existed on the date of winding .up order but by substituting one creditor with the other creditor does not mean change in the status of the creditors as it existed on the date of winding-up order.

THERE is no provision in the Companies Act by virtue of which the transfer of credits is declared as void. So, the transaction of transfer of credits entered into between the parties is not hit by any provisions of law and could be duly given effect to by the Company Judge. The interim orders earlier made in the case by which the respondent was not to have any voting rights in the meetings of the creditors and the appellant and the respondent have later been asked to exercise parallel voting rights in the meetings of the members were obviously subject to the final disposal of the present petition. It was so made clear even in the order of B. N. Kirpal, J. dated April, 1986."

" HENCE, we find no merit in these appeals. We make it clear that the Company Judge would consider the schemes pending before him keeping in: view the public interest of reviving the Company so that job opportunities become available. The Company Judge may also keep in view as to which propounder is having sufficient finances to revive the Company and put it on sound footing, without selling or encumbering the precious land owned by the Company. There" are various considerations which have to be considered by the Company Judge in deciding as to whether he should accept any of the schemes already propounded before him which we need not elaborate further. These two appeals are dismissed. The parties are left to bear their own costs."

(13) This order of the Division Bench was also challenged before the Hon"ble Supreme Court and only on 12th May, 1993 it came to light that even that challenge had failed and the SLP of Mr. H.L. Seth had since been dismissed.

(14) Thus the order passed by D.P. Wadhwa, J. on 20-5-1987 became final.

(15) In view of .the fact of transfer of shares having been upheld by the Division:

Bench and the challenge thereto in. Supreme Court having also failed the Direction with regard to the parallel voting given before the decision of the validity of transfer of shares, had lost its significance inasmuch as 13,000 equity shares and 2000 Preference Share stood validly transferred to M/s. Misra and Arenja on of a total of 14,802 equity shares and 3527 Preference Shares.

(16) Ultimately the meetings of the shareholders and creditors were held on 16-7-1988 when the Scheme in Ca 26/85 was considered. The .meetings scheduled for 17th July. 1988 to consider the Scheme propounded by Kelvinator did not take place as the requisite steps had not been taken by the Kelvinator for convening the meetings on the said date. Their Scheme was ultimately voted upon on February 4, 1989.

(17) Now, . I come to the schemes referred to in Ca 26/85, Ca 414/85 and Cp 131188. It is settled law that before Court accords its sanction to any Scheme, it will need to satisfy itself on the following 3 points : ii) Whether the statutory requirements have been complied with : (ii) Whether the class, classes effected by Scheme have been fairly represented and : (iii) Whether the arrangement is such as a man of business would reasonably approve.

(18) In order to assess this factor, it will be necessary to consider some of the facts relating- to the capital structure and the dues of the creditors of the Company. I find that the company had an authorised share capital of Rs. 50 lakhs divided into 40.000 equity shares of Rs. 100 each and 10.000, 10% cumulative Preference shares of Rs. 100- each. it has a paid up capital of Rs, 18,32.900.00 composing of 3527 Preference shares of Rs. 100.00 each and 14,802 expiry shares of Rs. 100.00 each. The call money in arrears is Rs. 2575..00. As per the Statement of Affairs ,the position of the company with regard to its assets and liabilities was as follows:--- 1. Gross Assets Rs. 3,19,082.26 2. Secured Loan Rs. 24.57.547.95 (Punjab National Bank) 3. Unsecured Loan Rs. 5.93.2101.19 4. Preferential creditors Rs. 2,32,745.58 5. Trade & other bills Rs. 2,68.489.76

THE official Liquidator also claims to have incurred expenses after the Company went into the liquidation and submitted that an share of about Rs.2 Lakhs is due to him on this account. M/s.Misra and Arneja have already invested among other thing a sum of Rs. 16,36,707.78 as price of factory land and sheds apart from incurring expenses on stamp duty of Rs. 68,3651- for the execution of the sale deed plus certain other expenses in this connection. It is also not disputed that M/ s. Misra & Arenja after securing settlement with the Punjab National Bank had stepped into the shoes of the Bank. The said Bank was due a sum of Rs. 24,87,537.00 as detailed in Annexure "H" to the petition. At the time of hearing, Mr. Lonial pointed out that certain other sums are due to all the remaining creditors of the company and he had offered to pay that in. the Court immediately. As regards shares M/s. Misra and Arenja and their Associates and"/ or nominees have already purchased a total "of 15,000 shares i.e. 13,000 equity and 2000 Preference Shares from Seth Group. They also claimed to have

purchased another 958 equity shares from other shareholders of the company.

(19) By an Order dated May 29, 1987, the Court had referred the Scheme in Ca 26185 & 414185 propounded by Sri H.L. Seth & M/s. Kelvinator, respectively, to the meeting of the creditors and shareholders of the Company. The Scheme covered by Cp 131/88 is the same as propounded in Ca 26/85 with some modifications as set out in the Resolution No. 1 at the meetings of the shareholders and creditors. This Court had ordered that at the meeting it would be open to anyone who is entitled to be present there to move an amendment of any of the terms of the arrangement which is proposed and the Scheme might be passed with or without modifications. It appears that the Scheme propounded by Mr. H. R. Khera vide Ca 414/85 was not supported by the Kelvinator at the time of the meeting and they came up with another Scheme which is contained in Ca 94/87. Mr. Lonial, counsel for Misra and Arenja contends that Mr. H. R. Khera has nothing to do with the Scheme contained in Ca 94/87. He has further pointed out that there is no affidavit of Mr. H. R. Khera in support of the Scheme of Kelvinator contained in Ca 94/87. Mr. Lonial also referred to some letters, alleged to have been addressed by the Kelvinator to the creditors and shareholders proposing to pay more than 100% to them for the value of their I credits and of the shares respectively but I have not come across any such letter on record. I, however, need not go into this question because I find that no such modification was moved at the time of the meeting. At the time of hearing, I found that Mr. Seth objected to the Scheme propounded by Kelvinator. Counsel for Kelvinator conceded that he was hoping for the support from Seth Group for his Scheme and in the absence thereof, there is no possibility of the Scheme going through. I also found that the said Scheme was not passed in any of the meetings. Apart from that Kelvinator is neither a contributory nor a creditor and the Central Government in response to a notice u/s 394(a) of the Companies Act has also raised certain objections including the one that Kelvinator Co. is neither a creditor nor a shareholder of the Company in liquidation and is not competent to make application u/s 391 of the Act. Central Government has further alleged that the Scheme appears to have been devised, for expansion of Kelvinator's own activities of manufacture of refrigerators and mopeds parts. The said Scheme has also been objected to by the Official Liquidator. The Official Liquidator when called upon to file comments on the report of the Chairman has stated that Kelvinator could not muster the majority of the creditors as required under the law. This Scheme could not be passed even at the time of the meeting of the shareholders. For these reasons, the Schemes covered by C.A. 414/85 & 94187 cannot be accepted and are hereby rejected. Kelvinator had also filed an application being Ca 133/85 under Rule 79 of Companies Court Rules, which also stands dismissed in the light of the above.

(20) Coming to the Scheme propounded by Mr. H. L. Seth which is contained in Ca 26/85. I find that at the meetings two resolutions were moved proposing modifications to the Scheme, one by Mr. Vipin Galokh of Matchless Industries of India being Resolution No. 2 and the other by M/s. Misra and Arenja being

Resolution No. 1. The resolution No. 2 was adopted by Mr. H. L. Seth. It is the admitted case of the parties that this resolution No. 2 was not approved by the creditors and shareholders of the Company and apparently for that reason no application was made u/s 391(2) of the Act by Mr. Seth who had in fact moved C.A. No. 1082189 alleging that none of the Scheme could be approved at the said meetings.

(21) Resolution No- 1 moved by M/s. Misra & Arenja which is Annexure "J" to Cp 131188, was by way of a modification of the Scheme originally propounded by Mr. H. L. Seth and contained in Ca 26185. It will have to be seen whether the said Scheme was passed by the majority of the shareholders and creditors and whether they represented the 3 [4th majority in value of the shares and value of the credits respectively.

(22) Mr. Seth opposed the said Scheme also on various grounds which are as follows :

(I)The scheme has not been passed at the meeting of the creditors and shareholders with the requisite majority as envisaged u/s 391(2) of the Companies Act.

(II)Whether the Chairman of the meeting was duly authorised in accordance with law and whether he considered the evidence produced before him by the creditors for purpose of voting and could be allow any statutory creditor to vote at a meeting for a higher value of credit then the amounts mentioned in the lists of creditors which was sent to him by O.L. under directions or order of Wadhwa, J. dated 20th May, 1987 which was taken on. record by the Order dated 9th November, 1987.

(III)Whether the petitioners did not disclose the latest financial position in the latest auditors report in accordance with proviso to Section" 391(2) of the Act.

(IV)Whether M/s. Misra and Arenja could not substitute themselves as propounders of the Scheme in place of Mr. H. L. Seth and could not have removed him from the position of the Chairman of the. Management Committee by the said Resolution No. 1 in the meeting of the creditors and shareholders of the Company held on July 16, 1988.

(V)Whether Misra and Arenja can be members without their names being brought on Register of Members in view of statutory provisions of the Act.

(VI)Whether M/s. R.ajdhani Firms Pvt. Ltd. and Arenja Enterprises Pvt. Ltd. are not the creditors of the Company and as such their words could net be taken into consideration.

(VII)The Scheme is not viable and is not in public interest.

(VIII)Mr. Misra and Mr. Arenja could not join as propounders without forming a registered" partnership or a Company and what would be the effect if one of the two is a non-residents Indian.

(23) Certain other objections were also raised relating to the Chairman's Report being not enclosed and the Scheme being not supported by "the project Report.

(24) Before dealing with the above let me notice a few submissions made at the bar on behalf of M/s. Misra & Arenja. It was submitted that under the Scheme all government dues in respect of liabilities to various authorities such as sales tax, income tax and local authorities which may be found to be finally due and payable by the company would be paid in full; and

(25) The remaining shareholders of the company holding the balance 2371 shares would be free to retain their shares and incase they wish to sell. Mis. Misra & Arenja will buy the same at. par.

(26) Mr. Lonial has also sought directions from this Court to the Commissioner, Sales Tax to suo motu set aside the exparte assessment for the year 1973-74 to 1977-78 and remand the cases for fresh assessment on merits. It is submitted that all these exparte assessment are highly exaggerated and have resulted from inaction of the Official Liquidator- It was vehemently argued that in case Mr. Seth had cooperated with the official Liquidator, the amount would have come to much smaller figure. It is not disputed before me that with Mr. Seth's help the figure of the Sales Tax dues could come down drastically. In support of his argument relating to exercise of suo-motu powers of the Commissioner of Sales Tax, Mr. Lonial has relied upon the case of Hathi Singh Manufacturing Co. Ltd. (Guj.) reported as 1967 (46) Comp Cas 59 .(1) He has further disputed the quantum of Sales tax dues and slated that until final assessment order is passed, after giving an opportunity to the Company to be represented, no one can be certain of the exact amount of Sales Tax due and payable. He has relied upon In Re: Bihar Bolts and Rivets and Engineering Works (in liquidation), in. support of this argument. He has also drawn my attention to the fact the affidavit of Excise & Taxation Officer is false inasmuch as appeals had already been filed for years i.e. 1968-69 to 1972-73 and were pending at the time of voting. It is, however, not disputed that on the date of winding up the dues of Sales Tax Department stood at Rs. 1221- only as given in the Statement of Affairs. It has been further pointed out that Mjs. Misra and Arenja are men of sufficient means and financial resources and would be in a position to provide all necessary funds for the implementation of the Scheme. For implementation of the Scheme. Mr. Lonial has agreed that a Management Committee under the supervision of the Court could be appointed consisting of 5 persons under the Chairmanship of either Mr. Misra or Mr. arenja Along with one or two of their associates and a creditor to be nominated by the Court or the official liquidator, for the duration it is considered necessary by the Court. He has further stated "that on the sanction of the Scheme the Company will start manufacturing bicycles besides taking up some other business within the ambit of its object clause, as set out in its Memorandum of Association, particularly, in the field of manufacturing of motor cycles, mopeds etc. or spare parts for cars, scooters etc. and other ancillary unit for transport industry. Under the Scheme the Management Committee is to

prepare or get prepared a project report for the above-mentioned objects, including diversification and modernisation of Plant and machinery respectively.

(27) The Central Government filed their report and has recommended an earlier sanction of the Scheme covered by Resolution No. 1. Official Liquidator has also recommended sanction of the Scheme as modified by Resolution No. 1, Mr. H. L. Seth Subhash Chander, K. K. Mehendiratta and S. L. Gupta (Excise and Taxation Officer on behalf of Sales Tax Department) and Kelvinator have filed their respective objections against the sanction of the Scheme. As already observed Mr. H. L. Seth had earlier also propounded a Scheme which was covered by C.A. 527183. Earlier the Court did not feel satisfied about viability of the said Scheme as it did not show as to how the resources are to be mobilised. I find the same problem arising in the modification of the Scheme covered by resolution No. 2. In the statement of affairs Mr. H.L. Seth had shown only Rs. 122.00 as the dues of Sales Tax authorities. The amounts due to the creditors in my opinion could not be changed from what had already in terms been approved under the order dated 20th May, 1987 passed by Wadhwa, J. which order has been upheld in appeal and has since become final. Although the order dated 9th November, 1987 passed by Mahinder Narain, J. pointed out that those creditors whose complete addresses were not available and who had not been served with notices and appear in response to public notice only would be permitted to vote at the meeting on establishing prima-facie proof of the credits before the Chairman. That direction could not and did not apply to those creditors whose names with complete addresses were already available and who had been served with notices of the meetings. The amount of and whose credits shown in statement of affairs would still be governed by orders dated 20-5-87. I am also not in a position to appreciate the obstructive attitude adopted by Mr. H. 1.- Seth who was the person responsible for the affairs of the company and in that capacity he failed to get the assessment completed or get. the accounts audited. He seems to have changed his stand after having taken full benefit from M/s. Misra and Arenja under his agreement with them and the proposed Scheme and after having made them to put in huge amounts in reducing Company's liabilities and redeeming Mr. H. L. Seth's and his brothers properties from the charge in favor of the Bank. The objections being raised by Mr. Seth in the light of the facts which have come to light in the course of hearing cannot be accepted as bonafide. I, however, felt that cooperation of Mr. Seth would be in the interest of the Company and Mr. Seth should make his service available to the Company to enable it to finalise the tax assessments. With that object, I had called upon the parties to explore the possibility of a settlement between Mr. Seth and "his supporters on one hand and M/s. Misra and Arneja, initially in the month of May 1992. Mr. Seth indicated his agreement to cooperate provided he was suitably compensated for such cooperation and indicated that he should be paid substantial amount in lump sum for past services and is paid suitable remuneration for the future to enable him .to devote his time to this work. Mr. Seth further pointed out that majority of the creditors who had opted against the

resolution No. I would accept whatever Mr. Seth suggests to them. Somehow all these negotiations, to settle a. pending suit and other matters could not bear fruit and finally at the hearing on 21st September, 1992 the parties indicated break-down in the negotiations for an amicable solution. I was further informed by Mr. Seth that he had filed a petition in the Supreme Court of India. I wanted to be informed about the outcome of the said petition neither party informed me about what had happened to the said petition in the Supreme Court or whether "that petition was at all taken up for hearing by the Hon"ble Supreme Court. I was only on 12th May 1993 from C.A. 669193 that I came to know of the dismissal of the said SLP by the Hon"ble Supreme Court. Mr. J.C. Seth points out that he has filed another SLP which is still pending. He however conceded that no stay of present proceedings was granted in that Special Leave Petition. In the circumstances, I do not think it appropriate to wait any longer for the outcome of the said petition filed in the Supreme Court.

(28) Coming to the modification by Resolution No. 1 the main and most vehement opposition to the sanction of Scheme came from Mr. H. L. Seth, represented by Mr. J. C. Seth, Advocate who is incidentally Mr. H. L. Seth's brother.

(29) I will now deal with the above objections in the order in which they appear.

(30) I feel that whenever a choice is available to court between the revival of the company and its winding up, the Court must as far as possible lean in favor the revival of the company for that will have the prospectus of generating jobs and putting the assets of the company to productive use as against auction of assets and distribution of the proceedings by the official liquidator to various parties.

(31) I will deal with Objections Nos. (i) and (ii) together. The main objection which was most vehemently canvassed before me by Mr. J C. Seth, counsel for Mr. H. L. Seth related to the Scheme having not been approved by the requisite majority in terms of Section 391(2) of the Act and that the Court should: not exercise its discretion in favor of the Scheme. Another application being Ca 328190 was filed by one Mr. Subhas Chander raising substantially similar objections to the sanction of Scheme contained in Ca 26185 as modified by Resolution No. 1 in the meeting of the creditors and shareholders of the Company. His objection was mainly based on the plea that notwithstanding the 314th majority of number of shares represented by the persons present and voting under proper proxy and number of votes representing the Scheme should not be sanctioned as there is no majority of the number of persons who were present and who voted at the meeting either in person or by proxy notwithstanding also the fact of poll having been demanded, granted and taken place. Similar is the submission regarding creditors. Mr. Seth has cited a number of authorities on this point including Palmer's Company Law 24th Ed. para. 79-16 reading as under :

"THE court must be satisfied that those who attended the meeting are fairly

representative of the class and that the statutory majority did not coerce the minority in order to promote interests adverse to those of the class whom they purport to represent.

THIS requirement is, in part, an offshoot of the first. As regards the majority, there are two requirements: the majority who vote in favor of the scheme must be first a majority in number of those members of the class (whether of creditors or shareholders) who are present and voting; and, secondly, it must be three fourths in value of the holding of such person.

Thus, there are 100 members voting of whom (to take an extreme example) one member holds 901 shares and the remainder hold one each, the 99 shareholders holding one share each cannot force a scheme against the vote of the holder of the 901 shares, because they do not muster three-fourths in value. Conversely, that "shareholder and 49 of the others could not force a scheme against the votes of the remaining 50 because there would not be a majority in number. The same principle applies to creditors.

IT will be seen that the majorities are of those who vote, not of those entitled to vote nor of those who are present. Thus, shareholders who are not present in person or by proxy, or who, although present, do not vote, may be ignored."

(32) It may further be noticed that the above illustration is not based on any judgment of any Court or any authentic judicial pronouncement in interpreting this expression.

(33) In this case, it may be pointed out that the author has relied Upon (1973) 1 All. F. R." 134 (Ch.) (139), where it has been observed as under :

"THE purpose is to prevent a numerical majority with a small stake Outvoting a minority with a large stake, e.g. to prevent 51 members with one share each outvoting 49 members with ten shares each."

(34) Mr. Lonial argued that counting of heads of the persons present. and voting is certainly the right method so long as a poll is not demanded. But when a poll is demanded the value of proxies cannot be ignored. However, it would be noticed from the facts appearing hereafter that even the numbers and value both criteria have been fulfilled in this case. I think I need not go into this question as from the facts regarding meeting of shareholders. There is no doubt that both the requirements of the majority to number of shareholders who voted for the Resolution No.1 as also the value of their shares representing 3/4th of the value of shareholders present and voting has been satisfied and this position has not been seriously challenged by Mr. Seth also after order of Wadhwa, J. had become final. It would appear that 27 shareholders holding) 15,689 shares of the value of Rs. 15,68,9001- voted in favor of the Scheme and 14 shareholders holding 700 shares of the value of Rs. 70,0001- voted against the Scheme. Thus it would appear that so far as meeting of the shareholders is concerned, the Scheme was approved and with the requisite majority in number representing more than

3 /4th shares in value of the total shares represented at the meeting. In fact; the Scheme was approved by over 95% of the total shares represented at the meeting. The contention of Mr. Seth that there were 48 shareholders voted against the Scheme cannot be accepted after the dismissal of the aforesaid Company Appeals which has made the parallel voting infructuous and the effective strength of the shareholders opposing the Scheme stands reduced on 14 shareholders. It has not been disputed before me that both the meetings i.e. of the shareholders as well as of creditors, a poll was demanded. Coming to the case of creditors. I feel the correct method would be that when a person acquires or buys the credits of a number of creditors, he merely steps into their shoes and would consequently represent the number of creditors in whose shoes he has stepped into. Once a poll is demanded in the case of shareholders, the value should be determined as provided in Section 87 while in the case of creditors the number be determined by the number of creditors represented by the persons voting including the number of creditors in whose shoes he has stepped into.

(35) I have already observed above that M/s. Misra and Arenja had under the Agreement dated 28th November, 1984 paid off the 24 creditors mentioned in Annexure "D" thereto. A perusal of Annexure "D" shows that there were 24 creditors who were satisfied which among others included M/s. H. L. Seth, P. N. Seth and J. C. Seth. Mr. J. C. Seth in this case is now appearing as counsel for Mr. H. L. Seth. In addition to these 24, M/s. Misra & Arenja had also stepped into the shoes of the Punjab National Bank who was a secured creditor as has been held by D. P. Wadhwa, J. Thus they had stepped into the shoes of in all 25 creditors. Subsequent to the meeting of course Sales Tax authorities on remand had reassessed the sales tax dues which came to substantially reduced amount, M/s. Misra and Arenja have also offered to pay the said reduced claim of Sales Tax Department as mentioned above.

(36) Coming to the creditors meeting I find that with regard to the statutory creditors claim as well as the claims of M/s. Misra and Arenja who had placed substantial amount at the disposal of the Official Liquidator were not ordered to be included in the list of creditors even though such payments are matters of court record. The said order of Wadhwa, J. has since been upheld by the Division Bench in appeal and a challenge to the Division Bench order has also failed in the Supreme Court and as such the said order has become final. It is for this reason that I am of the view that only those creditors could be included in the list of creditors and creditors for the purpose of the meetings, who had been named in the Statement of affairs except where credits have been lawfully transferred. Mr. Lonial has relied on Smt. Gian Devi and another vs. Bachan Motor Financiers (Pvt) Ltd. reported as 1988(64) Comp Cas 766 where it has been held that the List of Creditors cannot be added to and/or varied except under an order of the Court. The Counsel had placed reliance on Rule 168 of the Companies Court Rules.

(37) According to the record of the company, the claim of Excise & Taxation

Department, Faridabad amounted to Rs 122.30. The Chairman should not have travelled beyond what was ordered by court in this connection. Normally, one would have expected the Revenue authorities to back a scheme which provides for full payment of the dues of Revenue. But, in the present case such a possibility has not found favor with the Excise & Taxation Officer. It appears that the department in connivance with Mr. H. L. Seth had kept the assessment pending for the years 1968-69 onwards. No reason is forthcoming for such long pendency. I have already observed above that the O.L. had also been not very vigilant in dealing with assessments in respect of 1973-74 onwards up to the year 1977- 78. Had the O.L. taken appropriate steps the ex parte hasty assessments could have been avoided. According to O.L. Mr. Seth did not cooperate and explain the accounts to the assessing authority and that in spite of repeated requests Mr. Seth did not respond. However from the affidavit filed by the Taxation Officer, it appeared that the Revenue authorities were interested in Realizing their dues only. Furthermore, if the company is not revived and remains under liquidation the taxation officer shall be required prove his claim u/s 528.

(38) In the course of arguments as also in the Scheme modified by the resolution moved by M/s. Misra and Arenja 100 per cent payment in respect of tax liability of the company is provided for, once the dues are finally determined and crystalised. Mr. Lonial has drawn my attention to the case of Hathisingh Mrg. Co. Ltd. (Guj) reported as .1976 (46) Comp Cas 59. Mr. Lonial has contended, that in case the order dated 9th November 1987 passed by Mahinder Narain, J. vested authority in the Chairman to determine the correct value of the higher credits other than the amounts in the list settled by the court, then the Chairman could not have rejected the claims of Misra and Arenja presented before him and rejected by him. I think this submission is not without merit. As already observed above, I consider that what was intended by the order dated 9-11-87 was that in case any creditor who has not been served with. personal notice comes before the Chairman and presents his claim to substantiate that he is one of the creditors in the records of the company on the date of winding up, then he could be permitted to vote subject of course, to the amounts tallying with the records of the company and the Statement of affairs. No such exercise was carried out by the Chairman, Mr. Lonial has referred to a letter dated 11-11-85 addressed to the assessing authority which has been issued by Mr. Seth wherein Mr. Seth has written "I can only help to a limited extent and I am sure that once the records are organized and explained by the competent person who knows the accounts thoroughly there should be no liability of sales tax on the company." Having taken up such a stand, it is surprising that Mr. Seth is not supporting the inflated claim of the Sales Tax authorities which arose after the winding up without even referring to the effect of appeals filed.

(39) Prior to the winding up it was certainly the duty of the Directors of the Company, in this case Mr. Seth to ensure proper assessment and even after the winding up Mr. Seth was duty bound to assist the official liquidator for the proper conduct of the assessment proceedings. " I find that the ex-parte assessments

where no appeal was filed .i.e. years 1973-74 to 1977-78 resulted in the demand of Rs. 13,31,542 only while for other years either the appeals were pending or the cases had been remanded back.

(40) On the voting pattern of creditors, I find that M/s. Misra and Arenja had purchased the credits of 24 creditors mentioned in Annexure ""D" to the agreement dated 28-11-84, and had stepped I into their shoes. Similarly after settling the suit with Punjab National Bank, they also stepped into the shoes of the Punjab National Bank as has been held by Wadhwa, J. in his order dated 20-5-87. There was no restriction on Misra and Arenja assigning these debts in favor of anyone else and it is on record that they assigned those credits to M/s. Rajdhani Films Pvt. Ltd. and M/s. Arenja Enterprises Pvt. Ltd. Thus, in fact the said two parties M/s. Rajdhani Films Pvt. Ltd. and Arenja Enterprises Pvt. Ltd. had Punjab National Bank totalling RJ. 29:76.533.24. Apart from this "D" to agreement date 28-11-84 who had assigned their debts and cast vote for 25 creditors i.e. 24 creditors as mentioned in Annexure there were six other creditors, named herein below, who had cast their votes in favor of this resolution :

- 1.M/s. Garg Publishing Co. for value of Rs. 234.06
- 2.M/s. Marshal Cycles for value of Rs. 54.40
- 3.M/s. Diwan Chand & Sons for value of Rs. 574.64
- 4.M/s. Lalit Trading Co. for value of Rs. 5151.92
- 5.M/s. Maharaja Exports (P) Ltd. for value of Rs. 105847
- 6.M/s. Indra Paints, for value of Rs. 1140.10

which makes the total of 31 cast in favor of Resolution No. 1 as against 30 votes against it. Mr. Lonial has contended" that even out of these 30 votes the Chairman could not have considered two votes, those of M/s. T.I&M. Sales Ltd. and M[s. Ralson India Ltd. because no proper authorisation as required u/s 187 of the Companies Act was lodged by these companies in favor of their representatives. As such votes of these two creditors represented by person not duly authorised could not have been considered. I find that the votes of the creditors represented and the voting against the resolution were less than those who were represented and voted in favor thereof.

(41) Coming to the value of the votes, I find that while the value of the debts represented by the votes cast in favor of Resolution No.1 of M/s. Misra & Arenja came to Rs. 30,80,535.36 without taking into accounts which M/s. Misra & Arenja had paid to company to enable it to acquire valuable property and the value of the votes cast against it was only Rs. 1,99/132 which figure also includes the value of the votes of T.I.&M. Sales Ltd", and Ralson India Ltd. which were cast by persons who had not been duly authorised in terms of the provisions of Section 187 of the Companies Act. The value of the credit of T.I.&M.

Sales is Rs. 8293.92 while that of Ralson India Limited is Rs. 4500. I hold the votes by these two parties cannot be taken into account. Votes cast on behalf of the Regional Provident Fund Commissioner and Esic also could not have been taken into consideration for lack of Authority in favor of person voting. Assuming that they were duly authorised, even then in the absence of affidavits supporting the claim it is not clear now they could claim to vote for any credit in excess of what is shown in the statement of affairs, even in the case of Sales Tax dues even if the Chairman wanted to allow for the demands raised subsequent to winding up he could do only for Rs. 13,31,542.00 only, but in that event he could not shut out M/s. Misra & Arenja for their claim for money contributed by them and noticed by Wadhwa, J. i.e. Rs. 17,05,072.78. This would also result in more than 3/4th value of credits voting for the Resolution No. 1.

(42) Both parties have relied on various rulings in support of their respective contentions with regard to the fact as to whether it is the majority of the voting or the majority of the number of persons who are represented or in whose shoes the voter had stepped into which is to be taken note of. Counsel for M/s. Misra & Arenja, Mr. Lonial has placed reliance on Mahalaxami Cotton Mills reported as 19-50(54) Calcutta Weekly Notes 80 at pages 82(5) where the court observed that :--

"I have very little doubt that the proper method of ascertaining the wishes of creditors is to take into account the value of each creditors debt. I have no doubt that that was the intention of the parties to the scheme of composition when it was passed. Indeed it is difficult to appreciate why the company should insist on giving equal voting strength to each creditors irrespective of the value of the debt due to him."

(43) In this case 275 creditors of the value of over Rs. 14 lacs were placed against 400 petty creditors having a total claim of about Rs. 1 lac only. Even in the case of Maneckchowk and Ahmedabad Mfg. Co. Ltd. reported as 1970(40) Comp Cas 819, the Court observed as under : "It would immediately appear that the valid votes cast in favor of the scheme were majority in number representing 3/4th in value of the total shares represented at the meeting by the members attending the meeting by person or proxy."

(44) Therefore, it would be clear that even when a person attends by proxy or if one person is attending on behalf of more than one it is the number of person represented by him who will be treated as numbers present and voting. In this fashion the members present and voting in favor of the Resolution No.1 did exceed the number who voted against the resolution. Another case which is opposite to illustrate the point would be the case of Bhavnagar Vegetable Products Ltd. reported as 1984(55) Comp Cas 107 . In that case as regards the preference shareholders out of 12492 fully subscribed shares, Lic alone held shares of the value of Rs. 10 lacs and at the Nddb meeting four shareholders holding 10017 shares voted in favor of Nddb as against eight shareholders holding only 158 shares who opposed, which shows that Nddb is acceptable to

the former who hold the majority of shares The Court had upheld the scheme which was voted by four preference shareholders present and voting as against 8 other shareholders which means that if it was only a matter of head count the scheme could not have been accepted or sanctioned. On the contrary, the discussion and the conclusion in the judgment shows that Nddb was acceptable to the Lic who hold the majority of the shares. Similar was the case of Navjivan Mills Co. Ltd., Kalol reported as 1972 (42) Comp Cas 265.

(45) I am of the considered view that mere head count cannot be the final deciding factor if that were so then the service of notice on certain creditors below a certain value which is being done by courts within their powers could not be justified and that every creditor howsoever small would be entitled to a notice. No challenge to exercise of such powers is made. A number of authorities on either side have been cited on this question of majority alone. In the light of my views expressed above, it is not necessary to discuss all those authorities cited before me and repeating the same question.

(46) I think, it will be more appropriate and fair to consider the term "Number" to mean /convey number of shares; creditors represented by each person present and voting.

(47) The affidavit filed by the Excise & Taxation Officer where In para 19 he has stated :

Moreover exercise my vote for Sh. H. L. Seth, who in his statement u/s 393 had offered to pay all the creditors....."

(48) The above statement already shows that the real intention of the Department was to recover its dues. This was offered during the hearing by M/s. Misra & Arenja when Mr. Lonial pointed out "that his clients would pay the Sales tax dues as finally determined. The financial capacity of M/s. Misra and Arenja has not been disputed by any party before me. Further more in sub para 36 of Cp 131j86 they had undertaken to provide the company with all the necessary funds as and when required and to place a sum of Rs. 10 lakhs atleast at its disposal immediately on sanction of the Scheme. Another factor which cannot be lost sight of is that this Group Misra & Arenja have already contributed approximately Rs. 40 lakhs in this venture and substantial part of such contribution has been mainly responsible for saving the company's properties as well as Seth's and personal properties of his family members from being sold. It is further claimed by Mis. Misra & Arenja "that they are in a position to attract even Nri investment and can raise additional capital. My attention has also been drawn to para 8 of Mr. Seth's affidavit filed in C.A. 26/85 wherein Mr. Seth has testified to the resource and credit worthiness of M/s. Misra and Arenja.

(49) As already observed, that the revival of a company or a sick industrial unit is in public interest. Industry, and trade as it will generate employment avenues for a number of persons and also help the growth of commerce which in turn will result in payment of taxes to the State.

(50) In the light of above discussion, I hold that the objections(i) and (ii) have no merit and are rejected (iii) Mr. Seth next contended very vehemently that the full disclosure of facts has not been made about the affairs of the company to the shareholders and the creditors at the time of the meeting. Mr. Seth did not give any detail of the material facts which were not disclosed and which would be necessary to enable the court in coming to the conclusion whether the scheme has been approved by the statutory majority or not. The notices were in fact prepared by the O.L. in terms of the order of the court. Notices were also duly sent to all the shareholders and creditors. In case the present objection is based on non-availability of audited balance sheet or the non-audit of the company's accounts then I think Mr. Seth himself is responsible for the state of affairs prior to the winding up, as he was the person in charge of the affairs of the company. Mr. Seth contended that in the course of proceedings " he assets of the company have increased by over 7 crores offer the scheme was propounded by Mr. Seth which is given in Ca 26185 and that the court cannot appreciate essence of the Scheme to protect the interest of the members and creditors of the company. I am unable to agree with Mr. Seth. Firstly, for the reason that the petition u/s 391(1) of the Act was made by Mr. Seth himself and he had the responsibility to disclose such facts which he did not do. Secondly, it would not make much difference because the question of acquisition of land and building of the company had been duly disclosed by M/s. Misra & Arenja in their petition. Thirdly, even the rulings cited by Mr. Seth of Maneckchowk and Ahmedabad Manufacturing Co. Ltd. (Supra) does not help Mr. Seth in that ruling at page 841 it has been held that : There may be some difference here or "heir and there is no material because the court is not examining the accounts of the company or any allegation of embezzlement or defalcation.

(51) The Court at this stage is concerned with the financial position of the company in its broad outlines. In fact the Court would primarily be concerned with the assets and liabilities of the company and few minor details would not be of any consequence while considering the scheme of compromise or arrangement. Mr. Seth in para 13 of his affidavit has himself stated that there are no proceedings pending in respect of the company u/s 235 to 252 of the Act. It is also not the case of any party including Mr. Seth that there is any case of embezzlement or defalcation or the Scheme has been propounded to cover up the affairs or misdeeds . of the delinquent directors and workers of the company. I think the court has to look at the purpose for which provision is made, its nature and the intention of the legislature in making the provision to determine whether a provision is mandatory or directory in nature. A reference may be made in this behalf to the observations of the Hon"ble Supreme Court in the case of Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, . In the present case the statement of affairs has been filed by Mr. Seth, who was at the material time at the helm of the affairs of the company- The scheme covered by Ca 26/85 was also propounded by Mr. Seth. That very scheme was adopted by M/s. Misra and Arenja which is pending consideration before this court. For the above reasons, I

do not find any merit in this objection of Mr. Seth and reject the same".

(IV) Mr. Seth next contended that Mr. H. L. Seth could not have been substituted by M/s. Misra and Arenja as the propounder of the Scheme and he would not have been removed from the position of Chairman of the Management Committee by moving resolution in the meetings of the creditors and shareholders held on July 16 1988. Mr. Lonial in reply has submitted that in its order dated 10-4-1986, the court had specifically made it clear that at the meeting the Scheme may be passed with or without modifications. It was also clarified that it would be open to anyone who would be entitled to move for amendment of any of the terms of arrangement. In this connection my attention was drawn by Mr. Lonial to the fact that Mr. Seth had moved for modification seeking total ouster of M/s. Misra and Arenja from the Scheme ; selling 2500 sq. yards of the land of the company and giving up rights of the company to appeal in respect of Sales Tax Assessment cases. The said modifications were defeated by a big majority of votes

(52) Mr. Lonial has placed reliance on the case of R. K. Gupta reported 1979 (49) Comp Cas 342 wherein the Hon'ble Supreme Court had laid down :

"THAT the omission of the original sponsored or substituting another one in his place would not change the basic fabric of the Scheme."

(53) Looking to the facts of the present case it is clear that Mr. Seth has already sold practically all his shareholding of the Seth Group as well as their credits in favor of Misra and Arenja and their associates and now Mr. Seth is not left with any interest in the future of the company and the intention of the present opposition to the scheme appears to be to pressurise M/s. Misra and Arenja to give him more money., It is very unfortunate that although Mr. Seth who is in the know of all the affairs of the company and is in a position to help the company in its revival .by; assisting the company in getting the sales tax assessment reopened and re-assessed, has not been rendering requisite assistance to the liquidator. However, it is pertinent to note that if the course of hearing on various dates of hearing Mr. Seth had shown his willingness to render such assistance in sorting out the problems of the sales tax for which he wanted to be adequately compensated. He indicated that apart from some substantial payment initially he should be suitably remunerated also. That would be so only if this court decides in favor of the Scheme being accepted as modified by resolution No. 1 moved by Misra and Arenja. Mr- J. C. Seth, Advocate appearing on behalf of Mr. H. L. Seth did get support from Mr. Ved Vyas appearing for Mr. Subhash Chander and from Mr. R. S. Chaudhary, Advocate who was appearing for Mr. K. K. Mehendiratta. In the course of hearing, it was revealed that Mr. Subhash Chander is one of the nephews of Mr. H. L. Seth. He is the son of Mr. Kishan Lal Seth who had moved the modification of Scheme at the meeting seeking total ouster of Misra and Arenja from the Scheme. This resolution was supported by Mr. H. L. Seth at the meeting of the shareholders but could not be passed at the meetings. It was also revealed in the course of the hearing that Mr. K. K. Mehendiratta is a member of

Mr. Seth Group who had admittedly sold his shares in favor of Misra & Arenja Group. As such as of date he is no more a member of the company and is not left with any locus standi in this matter.

(54) In the light of the above discussion. I hold that there is no substance in this objection of Mr. Seth and it is also rejected.

(V) The fifth objection raised by Mr. Seth was that the names of Misra and Arenja had not been mentioned in the register of members to the Company and accordingly votes cast by them for the purpose of ascertaining the number and value thereof cannot be taken into account. Regarding Member Register my attention was drawn to the order dated November 11, 1987 wherein Mahinder Narain, J. had made specific inquiry from Mr. Seth regarding any evidence of delivery of Members Register of the company, but Mr. Seth failed to produce any such document. The liquidator has contended that Member Register was never handed over to him by Mr. Seth. However, in his report on the Scheme and comments on the report of the Chairman, the Official Liquidator has stated that he recorded the transfer of shares in the Share Register of the company and thereafter only the list of shareholders was prepared and filed in the court on November 11, 1987. It appears that the liquidator had reconstructed the records with the help of Mr. Seth or others and might have recorded the transfers in such record 13 the liquidator according to his record has mentioned in his comments as M/s. A. K. Misra and Braham Arenja and their nominees as the contributories (shareholders) of the company in liquidation in respect of the said 15000 shares purchased by them from Seth Group. Furthermore, in the light of the several orders already passed by this court holding the transfer of shares as valid, I do not accept this contention of Mr. Seth having no merit is rejected.

(VI) The next ground of attack of Mr. Seth is that Rajdhani Films Pvt. Ltd. and Arenja Enterprises Pvt. Ltd., are not the creditors of the company. Accordingly the votes cast by the companies should not be taken into account for the purposes of the Scheme. Mr. Seth has further argued that as per the orders dated 20-5-1987, the credits of Punjab National Bank and Seth Group were ordered to be transferred in the name of Seth Group only and has further stated that of has wrongly and without authorisation shown the above two companies as creditors of the company in the list of creditors filed by him and taken on record on 20-11-1987. Mr. Lonial has argued that of has not done anything wrong, in fact. credits to the said two companies have been transferred by him at the behest of Misra and Arenja. Mr. Lonial has challenged Mr. Seth's locus standi to raise objections to transfer of the said credits. He has relied upon Section 130 of the Transfer of Properties Act and has contended that no particular words are needed to constitute the assumption of credits. In this behalf, he has cited the case reported as 76(2) Guj 405. He has contended that Section 130 of the Transfer of Property Act does not require the transfer to be in particular form or to be couched in a technical language provided the words used are sufficient to indicate the transferor's intention to transfer a claim due to him to the

transferee. The Division Bench while deciding the Company Appeals No. 16 and 17 of 1987 has also held that there is no provision in the Companies Act by virtue whereof the transfer of credits is declared void. It is not disputed that the of has given the credit to the said two companies at the written request of M/s. Misra and Arenja. It is Therefore not possible for me to accept the contention of Mr. Seth. Accordingly I reject the said objection also.

(VII)The next ground of attack by Mr. .T. C. Seth was that the Scheme is not commercially viable and is also not in public interest. While raising this argument Mr. J. C. Seth primarily stressed that the Scheme is in fact unfair and discriminatory towards his client. Apart from this allegation Mr. Seth was unable to point out any other argument or bring to my notice any fact wherefrom such contention of Mr. Seth received any support. All these arguments have already been dealt with in the earlier decisions and I need not go over the same again and I find no merit in contentions of Mr. Seth. In fact, I find this argument rather surprising because the Scheme was originally propounded by Mr. Seth himself vide Ca 26/85 and in that, it has been categorically stated that the Scheme is commercially viable fair and reasonable and now Mr. Seth himself turns around and states to the contrary. The opposition by M/s. H. L. Seth and Subhash Chander is based on factors irrelevant to the merits of the Scheme. I consider that the Scheme which was propounded by Mr. H. L. Seth following the agreement between H. L. Seth and Misra & Arenja on 28-11-1984 has already been acted upon by the parties concerned and M/s. Misra & Arenja has changed their position by making the huge investment in it. While examining the Scheme the Court cannot ignore the interest of other small creditors and shareholders who had not participated in the meetings or in the proceedings before the Court. In the course of the hearing, Mr. Lonial had on behalf of his client offered to pay of all the principal amount due to such class of creditors forthwith. Even the Central Government u/s 394A of the Act has also stated that the Scheme is in the interest of the company, its creditors as well as shareholders. The Central Government has further stated that the Scheme is in public interest and may be sanctioned subject to appointment of Management Committee. In these circumstances, even this contention of Mr. Seth is rejected.

(VIII)Yet another contention of Mr. Seth is that M/s. Misra and Arenja could not join as propounder of the Scheme without forming a registered partnership firm. Mr. Seth has not cited any authority in this connection and I find it difficult to accept this contention. I have also not come across any "ruling laying down such a proposition. This contention is also rejected as being without merit.

(55) The last ground raised by Mr. Seth is that the Chairman's report has not been enclosed with the present petition and Therefore the present petition has not been tiled as per the requirement of Rule 40 of the Company Court Rules and for that reason, the scheme should not be sanctioned. Mr. Lonial has countered this argument on the ground that the report of Chairman is already on record in Ca 26185 and in fact the said report was sent directly to the court by the

Chairman on 14th August 1986. As such there is no merit in this contention.

(56) Mr. Seth also contended that the Scheme under consideration is not supported by a Project Report. Mr. J. C. Seth further states that Misra and Arenja had no intention to revive the company and that the Scheme has been propounded with a view to sell the valuable lands, factory building of the company for their personal benefits. Mr. Lonial while opposing this argument has argued that there is absolutely no merit in the said contention and it has been raised with ulterior motive and the sole object is to pressurise his client in an effort to extort further payments. In fact, Mr. Seth through his own people had proposed the other resolution modifying his scheme which had the intention of selling the company's assets to raise working capital. He strongly defended the Scheme and submitting that the same had been propounded with the principal object of reviving the sick industrial unit. In the course of arguments, he went to the extent to suggest that M/s. Misra and Arenja had also offered not to charge interest on a large part of their credits and investments and to reduce the burden of repayment of their credits and investments, they would convert a part thereof into fully paid capital of the company. He repeated his assertion that the Scheme was originally propounded by Mr. H. L. Seth himself. Even at the time of propounding the Scheme by Mr. Seth there was no electric power connection available which had been disconnected for non-payment of the bills. He pointed out that the scheme had provided that the Managing Committee to be appointed by the Court at the time of the sanction of the Scheme shall prepare the necessary project report immediately after the power and electricity connections are restored upon payment of the outstanding bills. "The scheme had provided that with minor alterations, repairs and replacements plant and machinery of the company could be put in running condition to enable the company to take up the business of manufacturing of bicycles or any other object within the scope of the Object Clause. I think, the Project Report can be prepared by the Managing Committee once the electricity and power connections are restored and the plant and machinery is put on trial run after carrying out the necessary services, repairs and replacements. Even if the Scheme is sanctioned the court will have ample power and jurisdiction u/s 392 of the Act to ensure proper implementation of the Scheme. non-submission of project report with the Scheme cannot be fatal to the Scheme.

(57) The contention of Mr. Seth receives support from the counsel appearing for Kelvinator of India Ltd. Mr. Subhash Chander and Mr. K. K. Mehendiratta also. Mr. Chaudhary appearing for Mr. K. K. Mehendiratta raised only one plea before me that no notice of the meeting which was held on July 16, 1988 was served upon his client as a consequence whereof Mr. Mehendiratta could not attend the meeting of the shareholders and cast vote at that meeting. I am unable to accept this contention because I have come across on the record of this case, as pointed out by Mr. Lonial, that a notice was, dispatched at the address available, on the record of the company with the of under Certificate of Posting and should be presumed to have been served and in case his address had changed it was his

duty to inform the company or the old which he never did. Further that Mr. Mehandiratta belonged to H. L. Seth's group and had admittedly sold all his 7 equity shares to Misra and Arenja and their nominees which transfer of shares had been upheld by the Division Bench vide its judgment dated 13-1-92. This had put an end to his voting right. It has also been pointed out that the court vide orders dated 14th July 1988 had directed Mr. Seth to notify persons of his group to attend the meeting to be held on 16th July 1988. Besides this, notices of the meetings were published as per the orders of the court in Times of India and Nav Bharat Times. This objection is also without any merit.

(58) In the light of the above discussions. I would accord sanction to the Scheme contained in C.A. No. 26 of 1985 as modified by Resolution No. 1 and approved in the meetings of the creditors and shareholders subject to further directions contained hereunder. The Scheme as modified by the resolution No. 1 and by the directions contained hereunder shall form part of this judgment and will be binding on all the creditors and members of the Company :---

1.M/s- Misra. & Arenja shall deposit Rs. 1.83,654.50 with the Official Liquidator within 15 days from the date hereof to liquidate the liability of the company towards the remaining creditors other than revenue authorities, of the company. The Official Liquidator is directed to pay the said creditors after verifying the debts due to them.

2.The amount of Rs. 91.259]- paid by M/s. Misra & Arenja to Official Liquidator Which is already laying with the Official Liquidator shall be paid by him to the Sales Tax authorities towards the payment of sales tax dues for the year 1968-69 immediately. A further sum of Rs. 50,520.00 be also placed with the Official Liquidator within fifteen days from today for onward payment of the Sales Tax dues determined on reassessment for the year 1969-70.

3.Commissioner, Sales Tax, Haryana, is directed to exercise suo motu exercise revisional jurisdiction and set aside the ex-parte assessment orders pertaining to the year 1973-74 to 1977-78 and remand the proceedings to Excise & Taxation Officer authority concerned at Faridabad to be decided along with the proceedings for the assessment for the periods earlier remanded and pending before the said authority with the direction to carry out fresh assessments. The amount of the tax finally found due and payable be paid within two months of the date of such final assessment order. The Management Committee however will be free, if aggrieved by the assessment order, to prefer appeals and may obtain therein such reliefs including interim relief as may be advised" under the law.

4.The Official Liquidator should prepare an up to date account in respect of the expenses incurred by him for and on behalf of the company during the period of his appointment. He should furnish the said account to M/s. Misra and Arenja and who are directed to pay to the of the said amount within 15 days from the date of receipts of the said account.

5.M/s. Misra & Arenja will not be entitled to charge any interest on their credits investments in the company or any part thereof. They may, however, convert the amount of such credits investments into equity share capital of the company in their or in the name's of their associates nominees.

6.The affairs of the company will be initially looked after by a Management Committee consisting of following members : -

(I)Mr. A. K.. Misra will be the Chairman of the Management Committee.

(II)Mr. Braham Arenja will be the Alternate Chairman and will the chat the meetings in the absence of the Chairman.

(III)Authorised representatives of M/s. Rajdham Films Pvt. Limited.

(IV)Mr. R. C. Nangia. a Joint Registrar of this Court, shall be a Member of the Management Committee as Court Nominee and he shall be paid a remuneration of Rs. 2000- per month.

6(a) The above Management Committee would be responsible for the implementation of the Scheme and would file progress report after every three months. The Management Committee will pay the electricity dues and get restoration of the electric connections and take immediate steps for the preparation of the Project Report. All efforts should be made to get the project report prepared within three months from the date hereof. Once the electricity is restored and Project report obtained" and submitted steps be initiated to reconstitute the Board of Directors of the Company after calling an extra-ordinary Annual General Meeting of the members of the Company. The said Board will also continue to be responsible to ensure the progress made in the implementation of the Scheme.

6(B)Mr. H. L- Seth shall be associated with it by the Management Committee Board of Directors. His services should be availed of in getting the Sales tax assessment re- assessment carried out. Mr. Seth shall be paid a monthly remuneration of Rs. 19,0001- per month plus expenses incurred by him in discharging his duty initially for a period of one year commencing after 60 days from today. Thereafter the Board of Directors; Management Committee may consider the need for his services to be continued or not. I am providing for this association of Mr. H. L. Seth because in my opinion he would be the best man to assist the Management Committee in getting the assessments I reassessments of Sales Tax by the Revenue authorities completed expeditiously. Mr. H. L. Seth will also be paid a sum of Rs. I lakhs within 30 days from today to enable him to take initial steps for the aforesaid purpose. I further direct that Mr. H. L. Seth shall be bound to give effective assistance to the company in all pending assessment cases.

7.ONCEthe Board of Directors of the company is constituted) reconstituted, the Management Committee should handover the control and management to the Directors of the Company and thereafter the Management Committee shall stand

dispensed with and the control and all powers shall thereafter vest in the Board of Directors of the Company subject however to such further directions of this Court as may be deemed proper necessary and desirable.

8.NOW when the Scheme has been sanctioned I direct that the order dated 9th March, 1978 in C.P. 54 of 1977 for winding up of this company be and is hereby recalled and cancelled subject to the aforesaid directions and the respondent is directed to hand over possession of assets and relevant records and papers which he has in his custody to the Management Committee through its Chairman or Alternate (chairman against a proper receipt).

(59) The result of the above discussion is that C.P. 131 of 1988 is allowed in terms of the above order, and C.A. 1082 of 1987 is partly allowed as mentioned above, while the other C.As. 2083188, 7626 of 1989, 13375 of 1989, 130 of 1990 and 328 of 1990, and C.As. 414i85 and C.A. 94187 are dismissed. There will be no order as to costs.