IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF DECEMBER, 2025

PRESENT

THE HON'BLE MR. JUSTICE D K SINGH

AND

THE HON'BLE MR. JUSTICE VENKATESH NAIK T

ORIGINAL SIDE APPEAL NO. 22 OF 2009

C/W

ORIGINAL SIDE APPEAL NO. 23 OF 2009

IN OSA No. 22/2009:

BETWEEN:

1. SRI M.G.DATTATHREYA
   AGED ABOUT 49 YEARS,
   S/O LATE SRI M.L GOPALA SHETTY
   R/AT NO.146, 5TH CROSS
   2ND BLOCK, JAYANAGAR
   BANGALORE 11.

2. SRI M.G. CHANDRAMOHAN
   AGED ABOUT 62 YEARS
   S/O M L GOPALA SHETTY
   R/AT NO.444, MANONIDHI,
   9TH CROSS, 1ST BLOCK,
   JAYANAGAR BANGALORE 11.

...APPELLANTS

(BY SRI. R.V.S.NAIK, SENIOR COUNSEL FOR
SRI. NITIN PRASAD, ADVOCATE FOR A1 & A2)

AND:

1. M MANOJ KUMAR
   S/O LATE S K MARIYAPPA

AGED ABOUT 27 YEARS,
NO.10, "DWARAKA NIALYA",
KALYAN HOUSING SOCIETY,
RPC LAYOUT, VIJAYANAGAR
BANGALORE 40

2. DR RAMAKANTH K DESHPANDE
S/O SHRI KRISHNAJI
AGED ABOUT 49 YEARS,
NO.801, RAHEJA EMPRESS
392, VEER SAVARKAR ROAD,
PRABHA DEVI, MUMBAI
OUT OF STATE

3. MR M P PRABHU
S/O LATE DR .R.PRABHU
SINCE DECEASED
REP.BY HIS LRS.

3(a) SMT SHASHIKALA PRABHU
W/O LATE M.P.PRABHU
SINCE DECEASED
REP. BY HER LRS 3(B)

3(b) SRI NARENDRA PRABHU
S/O LATE M P PRABHU
AGED 41 YEARS,
R/AT NO.405, SASHIPRABHA,
20TH MAIN ROAD, I BLOCK,
RAJAJINAGAR, BANGALORE-560010.

4. MR M VINODA RAO
S/O LATE SHRE B MADAVA SHENOY
AGED ABOUT 63 YEARS,
"MADHAVA KRUPA",NO.883/1, VANI VILAS ROAD,
MYSORE 570 004, MYSORE.

5. M/S KARNATAKA LEASING AND
COMMERCIAL CORPORATION LTD., (IN LIQDN.)
REP.BY OFFICIAL LIQUIDATOR, 4TH FLOOR
D & F WING, KENDRIYA SADAN
KORAMANGALA, BANGALORE 34
PRESENTLY AT NO.26, 12TH FLOOR RAHEJA
BUILDING, M.G.ROAD, BANGALORE 1

6. SRI M R JAYASHANKAR
AGED ABOUT 52 YEARS,
S/O R RAMACHANDRA SHETTY
R/AT SHANTINIKETAN NO.15/3-1, PALACE ROAD,
BANGALORE 52.

…RESPONDENTS

(BY SRI. G.KRISHNAMURTHY, SENIOR COUNSEL ASSISTED BY SRI.K.M.SAI APABHARANA, KOUSHIK, S.KAREGOUDAR FOR SMT.G.K.BHAVANA R-1, R-2, 3(b), 4;
SRI. K.S.MAHADEVAN, ADVOCATE FOR OL/R-5; INDUS LAW FOR R-6)

THIS O.S.A IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT, 1961 READ WITH SECTION 391(7) OF THE COMPANIES ACT, AGAINST THE ORDER DATED 19.06.2009 PASSED IN COMPANY PETITION NO.102 OF 2006.

IN OSA NO. 23/2009:

BETWEEN:

1. SRI M.G.DATTATHREYA
AGED ABOUT 49 YEARS,
S/O LATE SRI M.L GOPALA SHETTY
R/AT NO.146, 5TH CROSS 2ND BLOCK,
JAYANAGAR BANGALORE 11.

2. SRI M.G. CHANDRAMOHAN
AGED ABOUT 62 YEARS,
S/O M L GOPALA SHETTY
R/AT NO.444, MANONIDHI, 9TH CROSS,
1ST BLOCK, JAYANAGAR BANGALORE 11.

...APPELLANTS

(BY SRI. R.V.S.NAIK, SENIOR COUNSEL FOR
SRI. NITIN PRASAD, ADVOCATE)

AND:

1. M MANOJ KUMAR
S/O LATE S K MARIYAPPA
AGED ABOUT 27 YEARS,
NO.10, "DWARAKA NIALYA",
KALYAN HOUSING SOCIETY,
RPC LAYOUT, VIJAYANAGAR
BANGALORE 560040

2. DR RAMAKANTH K DESHPANDE
S/O SHRI KRISHNAJI
AGED ABOUT 49 YEARS,
NO.801, RAHEJA EMPRESS
392, VEER SAVARKAR ROAD,
PRABHA DEVI, MUMBAI
OUT OF STATE

3. MR M P PRABHU
S/O LATE DR .R.PRABHU
SINCE DECEASED
REP.BY HIS LRS.

3(a) SMT SHASHIKALA PRABHU
W/O LATE M.P.PRABHU
SINCE DECEASED
REP. BY HER LRS 3(B)

3(b) SRI NARENDRA PRABHU
S/O LATE M P PRABHU
AGED 41 YEARS,
R/AT NO.405, SASHIPRABHA,
20TH MAIN ROAD, I BLOCK,
RAJAJINAGAR, BANGALORE-560010.

4. MR M VINODA RAO
S/O LATE SHRE B MADAVA SHENOY
AGED ABOUT 63 YEARS,
"MADHAVA KRUPA",NO.883/1, VANI VILAS ROAD,
MYSORE 570 004, MYSORE.

5. M/S KARNATAKA LEASING AND
COMMERCIAL CORPORATION LTD., (IN LIQDN.)
REP.BY OFFICIAL LIQUIDATOR, 4TH FLOOR
D & F WING, KENDRIYA SADAN
KORAMANGALA, BANGALORE 34
PRESENTLY AT NO.26, 12TH FLOOR RAHEJA
BUILDING, M.G.ROAD, BANGALORE 1

6. SRI M R JAYASHANKAR
AGED ABOUT 52 YEARS,
S/O R RAMACHANDRA SHETTY
R/AT SHANTINIKETAN NO.15/3-1, PALACE ROAD,
BANGALORE 52.

...RESPONDENTS

(BY SRI. SRI.G.KRISHNAMURTHY, SENIOR COUNSEL
ASSISTED BY SRI K.M.SAI APABHARANA,
SRI KOUSHIK, SRI S.KAREGOUDAR FOR
SMT.G.K.BHAVANA R-1 TO R-4;
SRI.K.S.MAHADEVAN, ADVOCATE FOR OL/R-5;
INDUS LAW FOR R-6)

THIS O.S.A IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT, 1961 AGAINST THE ORDER DATED 19.6.2009 PASSED IN COMPANY APPLICATION NO.1183 OF 2008.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 16.09.2025, COMING ON FOR PRONOUNCEMENT THIS DAY, ***HON'BLE MR. JUSTICE D K SINGH*** PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE D K SINGH
and
HON'BLE MR. JUSTICE VENKATESH NAIK T

CAV JUDGMENT

(PER: HON'BLE MR. JUSTICE D K SINGH)

The present Original Side Appeal Nos.22 and 23/2009 are filed impugning the judgment and order dated 19.06.2009 passed by the learned Single Judge in Company Petition No.102/2006 connected with Company Application Nos.640/2001, 899/2008, 900/2008, 864/2008, 1069/2008, 31/2009, 1372/2006, 265/2007, 1183/2008, 777/2006 and 925/2006, filed by different parties.

2. By the impugned judgment and order, the learned Single Judge sanctioned the scheme for revival of the Karnataka Leasing and Commercial Corporation Ltd., (for brevity referred as ***'the KLCCL'***). The KLCCL was incorporated under the Companies Act, 1956 (for brevity referred as ***'the Act'***). The Company had paid up share capital of Rs.51.49 lakhs divided into 5,14,900 equity shares of Rs.10/- each. The Company was incorporated to carry

on the business of Non-Banking Financial Company viz., leasing, sub-leasing, hire purchase, trading and other allied activities.

3. Respondent No.3 held 1,36,800 equity shares and respondent No. 4 held 1,12,500 equity shares, in 5th respondent Company i.e., KLCCL. Altogether 2,49,300 equity shares were held by respondent Nos. 3 and 4.

4. The appellants are the members of the Company. The 1st appellant holds 7500 shares and the 2nd appellant holds 50 shares and claims that they had acquired 2000 shares by succession from their father. Their total share holding is 1.47%. The Company Petition No.43/1992 was filed under Section 433(e) of the Companies Act by a few unsecured creditors/depositors of the Company for winding-up of the said Company. Company Court vide order dated 29.10.1996 ordered for winding up of the Company. OSA No.35/1996 was preferred against the said order

of winding-up of the Company by the Chairman and Managing Director of the Company. In the said appeal, a scheme for revival of the Company was proposed. Learned Division Bench of this Court directed the Managing Director of the Company, Sri S.K. Mariyappa, the father of the 1st respondent to deposit a sum of Rs.50.00 Lakhs, and the said amount was deposited. The learned Division Bench had further directed to deposit a sum of Rs.1.00 Crore on or before 31.08.1998 and Rs.3.00 Crores on or before 31.10.1998, further sum of Rs.2.00 Crores on or before 31.12.1998. Since, the said amounts as directed by the learned Division Bench were not deposited, the interim order granted earlier came to be vacated vide order dated 30.11.1998.

5. Further direction was given to proceed for the liquidation proceedings. Finally, the OSA No.35/1996 came to be rejected by the Division Bench vide, order dated 13.04.2005. However, the Division Bench while rejecting the OSA No.35/1996 reserved liberty

to the legal representatives of late S.K. Mariyappa, the then Chairman and Managing Director of the Company, to file an appropriate application for orders before the learned Single Judge.

6. Respondent Nos.1 to 4 - Sri M. Manoj Kumar, S/o.S.K. Mariyappa, Dr. Ramakanth K. Deshpande, M.P. Prabhu and Sri.M. Vinoda Rao respectively filed Application No.93/2006 in Company Petition No.43/1992 under Section 391 of the Act before the learned Company Court to convene a meeting of the members, and creditors to consider a scheme of arrangement between the members, creditors and respondent Company. The application came to be allowed on 21.06.2006 directing that the meeting be held on 07.08.2006. In compliance of the said order dated 21.06.2006 passed in Company Application No.93/2006, a meeting of the Members of the Company and creditors was held.

7. The appellants herein attended the meeting of the members and voted against the scheme. Respondent Nos.3 and 4 and other members of the Company voted in favour of the scheme. The Chairman of the Meeting submitted his report dated 19.08.2006 stating that 15 shareholders holding 2,52,000 shares i.e., 91.27% in value, voted in favour of the scheme and 6 shareholders holding 24,100 shares voted against the scheme.

8. Pursuant to this, Company Petition No.102/2006 was filed under Section 391(2) and 392 and 394 of the Companies Act, by respondent Nos.1 to 4, praying for sanction of the scheme of arrangement as approved by the majority shareholders. A number of objections were filed by different parties, including the appellants. The appellants filed Company Application No.1183/2008 under Rule 9 of the Companies (Court) Rules 1959 seeking a direction to the Official Liquidator to exercise his powers under Section 457(1)(c) of the Act, to sell all assets of the

Company by public auction and distribute the dividends after selling the Company's properties.

9. The appellants herein filed objections before the learned Company Judge against the scheme stating that respondent Nos.1 and 2 are the real Propounders of the scheme and they are neither members nor creditors of the Company and therefore, they had no locus under Section 391 of the Act.

10. Learned Company Court had allowed the Company Petition No.102/2006 vide judgment and order dated 19.06.2009 for revival of the Company and sanctioned the scheme with certain conditions, which read as under :-

> *"(1) Till the implementation of the scheme to its last detail, the petitioners and the company shall not alienate the assets of the company.*
>
> *(2) The Secured Creditor, Corporation Bank, shall appropriate the amount of Rs.8.65 Crore from the date of this order and the petitioners shall pay interest on the same at 9% per annum*

from 15.12.2007 till the date of payment, within 15 days from to-day.

(3) (a) The petitioners shall pay interest to the Depositors at the rate of 14% on the amount of Rs.6,85,82,203/- from 1.7.1991 to 29.10.1996.

(b) At the rate of 9% per annum on Rs.6,85,82,203/-from 29.10.1996 to 21.6.2001.

(c) At the rate of 9% per annum on Rs.3,65,19,884/-(Rs.6,85,82,203-Rs.3,20,62,319) from 22.6.2001 to 21.6.2001

(d) At the rate of 9% per annum on Rs.3,65,19,884/- from 5.9.2006 till date of payment.

The amounts due and payable in terms of (a) and (b) above shall be paid within 30 days from the date of this order. And the amounts due in terms of (c) and (d) along with the principal amount within 60 days from the date of this order. Any disputed amounts to be deposited with this Court.

(4) The employees' dues in a sum of Rs.39,88,404.87 shall be paid with interest.

(a) from 29.10.1996 to 21.6.2001 @ 9% per annum on Rs. 56,97,720/-.

(b) And from 22.6.2001 till date of payment on Rs.39,88,404.87 @ 9% per annum.

The above dues along with interest shall be paid within 30 days from this order.

The petitioners shall re-employ any of the erstwhile employees who had continued in employment as on the date of order of winding-up and who are eligible for such employment.

(5) The petitioners shall settle all property taxes and other statutory claims such as Provident Fund within 90 days from the date of this order.

(6) The share holders dues @ Rs.30/- per share shall be paid or deposited within 90 days from the date of this order.

(7) The petitioners as well as the company shall file a report of the working of the company and the implementation of the scheme every quarter, till the Scheme is fully implemented.

(8) The order of winding-up passed by this Court is hereby re-called.

(9) The Official Liquidator is directed to hand over all the assets of the company to the petitioner."

11. The learned Senior Counsel on behalf of the appellants submitted that Chapter V of the Act deals with Arbitration, Compromises, Arrangements and

Reconstructions. A reading of provisions of Section 391(1) of the Act, makes it evidently clear that the proposed compromise/arrangement should be between the Company and its creditors or any class of them or between the Company and its Members or any class of them. The Propounders of the scheme of compromise/arrangement should only be the creditors or any class of the creditors or members or any class of them. In addition, it is also provided that in the case of a Company which is being wound up, the liquidator may also propound a scheme of compromise arrangement.

12. In the present case, the Liquidator has not propounded any scheme. The propounders of the scheme are respondent No.1 M. Manoj Kumar and respondent No.2 Dr. Ramakanth K Deshpande. Respondent No.3 and respondent No.4 viz., M.P. Prabhu and M. Vinoda Rao were only the facilitators. The scheme contemplates respondent Nos.1 and 2 or their nominees taking over the entire

shareholding of the Company including the shareholding of Respondent Nos.3 and 4, at an agreed price of Rs.30/- per share.

13. The submission is that the petitioners in the Company Petition No.102/2006 had no locus standi to maintain the petition.

14. In support of their submissions, learned counsel for the appellants has placed reliance on the judgment in ***S. K. GUPTA AND ANOTHER VS. K. P. JAIN AND ANOTHER*** (***1979) 3 SCC 54***.

15. The learned Senior Counsel for the Appellants has also placed reliance on the judgment in the case of ***KASHINATH DIKSHIT AND ANOTHER VS. SURGICALS AND PHARMACEUTICALS COMPANY (MYSORE) LTD., (ILR 2002 KAR 5191)***. The submission is that the real Propounders of the scheme were neither the members of the Company nor the creditors and they were ranked as outsiders.

16. The Official Liquidator attached to the High Court filed objection opposing the scheme of the arrangement on the ground that though petitioner No.1 was the Member of the Company in liquidation, but was not Propounder of the scheme, petitioner No.2 who was the propounder of the scheme was neither a shareholder nor creditor of the Company in liquidation. Therefore, neither a member nor a creditor of the Company could maintain the petition filed under Section 391 of the Companies Act.

17. The learned counsel for the appellants further submits that the question of locus standi of the petitioners in the Company Petition No.102/2006 was raised before the Company Court by and on behalf of the objectors. The learned Company Judge, though heard the submissions of the learned counsel for the objectors has failed to record any findings on this issue.

18. It is further submitted that the material facts as contemplated in the proviso to Section 391(2) of the Act, were not placed either in the meeting or before the Court. Therefore, sanction to the proposed scheme ought not to have been granted. It is further submitted that the learned Company Judge has failed to consider the continuation of the winding-up proceedings and sale of Company's Assets would have been more advantageous to the shareholders. Petitioners in the Company Petition had admitted in their affidavit dated 12.01.2009 that the liabilities of the Company was around Rs.26.50 Crores. However, the value of the Company's asset being Bangalore property and Mysore property was valued at Rs.29,82,80,000/- i.e., in excess of the liabilities.

19. The learned counsel for the appellants submit that the Company Judge has failed to consider that the real purpose of the scheme was to dispose of the assets of the Company in favour of the respondents. The scheme was a ruse to dispose of the assets of the

Company in liquidation. The Court should have satisfied itself with the scheme, and the element of public interest and the commercial morality, as sanctioning the scheme would result in stopping or recalling of the winding up order.

20. In support of the said submission, the learned Senior Counsel for the appellants has placed reliance on the judgment in the case of ***MEGHAL HOMES (P) LTD. VS. SHREE NIWAS GIRNI K. K. SAMITI AND OTHERS, [(2007) 7 SCC 753]***. The learned Senior Counsel has submitted that the scheme propounded was not one for revival of the Company, but it was only a takeover of the shares of the Company at a price of Rs.30/- as agreed by the respondents *inter se* without any basis whatsoever.

21. Company Application No.640/2001 was filed by the Official Liquidator against respondent Nos.1 and 2 and other Directors. The Official Liquidator had made a series of allegations of misfeasance against

respondent Nos.3 and 4 including the allegations that:

I. The Ex-Directors of the Company are solely responsible for not recovering the amount of Rs.7,27,79,086/- given as loan and advances to various Companies and individuals,

II. Advancing an amount of Rs.3,17,09,840.91 to various group concerns in which either respondent No.3 or respondent No. 4 or both had substantial interest.

III. Company Application in great details narrates this misfeasance against the Directors including respondent Nos.3 and 4 based on various materials.

IV. Learned Company Judge ought to have rejected the Petition on the sole ground that if the scheme is sanctioned, it amounts to terminating the pending misfeasance proceedings against the Propounders/ Directors by reports to promoting the scheme and therefore, such scheme ought not to be sanctioned.

V. Reliance is placed on the judgment in *APURVA J. PRAKASH JAI PRAKASH VS. ESCHEN COMPUTER* reported in *COMPANY CASES 121 (GUJARAT).*

VI. The Company Judge has failed to notice that the respondent Nos.1 and 2 on the one hand and the respondent Nos.3 and 4 on the other hand, had technical understanding and respondent No.3 and respondent No.4 were to be benefited in some manner or the other outside the scheme.

22. Learned counsel for the appellants has further submitted that the Company Court failed to appreciate that there were criminal proceedings pending against respondent Nos.3 and 4 in Criminal Case No.90/1997 and as such the scheme ought not to have been sanctioned.

23. It is further submitted that the Company was in liquidation and was represented by the Official Liquidator. The learned Company Judge has noted at page No.31 of the impugned judgment that the

Official Liquidator was significantly absent at the meeting of the shareholders held on 07.08.2006. Thus, there was no representation of the Company in liquidation and the Members present had disadvantage as to the current affairs of the Company in liquidation, which was wholly within the knowledge of the Official Liquidator. The learned Company Judge has also taken note of the fact that the Official Liquidator filed OLR No.783/2006 in Company Petition No.102/2006, but had remained absent and not raised any objections to the scheme.

24. Learned Senior Counsel therefore, submitted that respondents/petitioners being outsiders had no locus standi to maintain the petition and the Official Liquidator was silent with regard to the petitioners' locus standi. It is further submitted that the valuation of shares at the rate of Rs.30/- per share was meagre. In fact the appellants had submitted an application under Order XL1 Rule 27 of the CPC, placing on record valuation report prepared by

M/s.Colliers India Private Limited, Bangalore. The said valuer had placed valuation report of Rs.113,10,00,000/- for the Bangalore property as on 29.06.2022 and at Rs.58.05 crores in the year 2009.

25. On the other hand, Sri G. Krishna Murthy learned Senior Advocate appearing for the respondents has submitted that the Division Bench, while rejecting the OSA No.35/1996 vide judgment and order dated 13.04.2005 had granted liberty to respondent No.1, the alleged outsider to file appropriate application before the Company Court. The judgment and order dated 13.04.2005 passed in OSA No.35/1996 remained unchallenged and attained finality.

26. In pursuance to the liberty granted by the Division Bench, Company Application No.93/2006 was filed under Section 391 of the Act, seeking permission to convene a meeting of the shareholders of the Company to propose the scheme. Vide order dated

21.06.2006, the Company Court permitted respondent Nos.1 to 4 to convene a meeting of the shareholders, secured and unsecured creditors. The said order was also never challenged by the appellants. In fact, they had participated in the meeting on 07.08.2006 and voted against the scheme.

27. The Chairman report, disclosing approval of the scheme by overwhelming majority of the shareholders and secured and unsecured creditors had been accepted by the learned Company Judge vide order dated 19.08.2006 in Company Application No.93/2006. The said order accepting the report of the Chairman has never been challenged.

28. The learned Senior Counsel appearing for the respondents has submitted that there is no merit in the submission and that the scheme of revival is a scheme to transfer valuable assets of the Company including the immovable properties at Church Street,

Bangalore and two properties at Mysore for a pittance to respondent Nos.1 and 2. It is submitted that two valuers were appointed by the learned Company Judge vide order dated 19.01.2009. The Bangalore property was valued at Rs.24,52,80,000/- and the two properties at Mysore were valued at Rs.2,70,00,000/- and Rs.2,60,00,000/- respectively. The scheme had been approved relying upon the valuation arrived at, by the said valuers.

29. It is further submitted that no valuation report, valuing the property to the contrary was ever produced by the appellants. The scheme had already been approved by the shareholders, creditors and the employees using their commercial wisdom and no proof disclosing undervaluation was produced by the appellants before the Company Court. Therefore, the appellants who are holding insignificant number of shares cannot question the valuation at this stage, wherein the scheme has been fully complied with.

30. It is further submitted that in the cases of ***MIHEER H. MAFATLAL VS. MAFATLAL INDUSTRIES LTD., [(1997) 1 SCC 579]*** and ***IN HINDUSTAN LEVER AND ANOTHER VS. STATE OF MAHARASHTRA AND ANOTHER [(2004) 9 SCC 438],*** it has been held that the Court would not act as a Court of appeal and sit in judgment over the informed decision of the parties in a scheme of compromise and the commercial wisdom of these parties. Similar view has been taken by a Division Bench of the Bombay High Court in ***LARSEN AND TOUBRO LIMITED, IN RE [2004 SCC ONLINE BOM 1082]***.

31. It is well settled law that the scheme is required to be sanctioned if the Court arrives at a finding that the scheme is fair, just and reasonable and the scheme is approved by the requisite majority. The following judgments have been relied in support of the aforesaid submission:-

a.***UNIT TRUST OF INDIA AND ANOTHER VS. GARWARE POLYESTER LIMITED [(2005) 10 SCC 682].***

b. ***IN RE: HINDUSTAN GENERAL ELECTRIC CORPORATION LTD., [1958 SCC Online Cal 201].***

32. The Court is required to see before sanctioning of the scheme that whether the scheme contemplates the revival of business of the Company, makes provision for paying off creditors, satisfying their claims as agreed by them and for meeting the liabilities of the workers. All these criteria have been considered by the learned Single Judge in the impugned judgment and order before sanctioning the scheme that the scheme is fair, just, reasonable, bona fide and the reasons mentioned in the scheme. In support of the aforesaid submission, the learned counsel has placed reliance on the judgment in ***MEGHAL HOMES (P) LTD. VS. SHREE NIWAS GIRNI K. K. SAMITI AND OTHERS [(2007) 7 SCC 753].*** The

scheme cannot be scrutinized in a manner of a carping cryptic, a hair splitting expert, a meticulous accountant or a fastidious counsel. The effort is not to emphasise loopholes, technical mistakes, and the accounting errors. So the perspective has to be that of the ordinary shareholder exercising discretion in a reasonable and business like manner. ***ALSTOM POWER BOILERS LTD. VS. STATE BANK OF INDIA AND ORS. [MANU/MH/0493/2002].*** It is also submitted that Section 391 of the Act is a complete code and it is intended to be in the nature of a single window clearance system to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the Court for various other alteration and changes, which may not be needed to effectively implement the sanction scheme, whose overall fairness and feasibility has been judged by the Court under Section 394 of the Act. Considering the fact that the scheme has been approved by the majority

of the members, depositors and creditors in accordance with the various provisions under the Act, after taking into consideration all objections raised by the objectors including the appellants, questioning the sanctioned scheme before this Court is to be rejected. It is further submitted that the properties of the Companies are valued by an independent Court Appointed Valuer. Therefore, the commercial wisdom of the shareholders, depositors and creditors cannot be interfered with. It is further submitted the allegation that the scheme is a ruse to absolve respondent Nos.3 and 4 of their liabilities in respect of the misfeasance proceedings in Company Application No.640/2001 under Section 543(1) of the Companies Act, has no merit.

33. It is submitted that the scheme itself makes no reference to the misfeasance proceedings as initiated in Company Application No.640/2001 as the said proceedings were dismissed on the ground that the proceedings were still in the stage of notice being

served on the respondents, despite completing 9 years since filing of the petition and one of the Directors/respondent in the said proceedings had died during such time. The Official Liquidator had not raised any objection to the scheme or petition citing Company Application No.640/2001 filed by him. The irregularities discovered in the audit, basis of the Company Application No.640/2001 were only of *prime facie* in nature. There had been no independent application of mind by the Official Liquidator.

34. In view of the aforesaid, and having regard to the final order passed in the Company Petition No.102/2006, the Company Application No.640/2001 came to be dismissed.

35. One of the Directors against whom Company Application No.640/2001 for misfeasance was initiated was Sri. Gopala Shetty, the father of the appellants. The 2nd appellant had filed the above petition claiming that he held 50 shares in the

Company, in addition to 2000 shares to which he had succeeded under the Will of his late father Sri Gopala Shetty, which are yet to be transferred to him. The learned counsel for the respondents has submitted that Sri Gopala Shetty had purchased the said shares of the Company through funds of the Company. The very basis of the appellants approaching this Court by preferring an appeal is that they had inherited shares from their father against whom also the misfeasance proceedings were initiated. When the misfeasance proceedings do not come in the way of them filing the appeal, it would also not come in the way of the scheme being approved.

36. The respondent Nos.3 and 4 are not alive as of today. The scheme had already been complied with and therefore, it is submitted that the appeals are liable to be dismissed.

37. The learned Senior Counsel for the respondents has further submitted that the allegation that respondents had not disclosed about filing of the

Company Application No.640/2001 and not filed the latest financial position before the Court and therefore, had violated proviso to Section 393(1)(a) and 391(2) of the Act, does not merit consideration inasmuch as Section 393 of the Act requires notice to be sent to the members or creditors calling for a meeting, along with statement explaining material interests of a Director.

38. Company Application No.640/2001 would not qualify as a 'material interest under Section 393 of the Companies Act'. Once the scheme has been approved it does not make reference to Company Application No.640/2001. The approval of the scheme had resulted in dismissal of Company Application No.640/2001.

39. It is further submitted that the Company has been carrying on its activities post its revival and the judgment and order dated 19.06.2009 passed by the learned Single Judge impugned in this appeal has not

been stayed and therefore, re-visiting the scheme, which has worked out for last 15 years or more, would prejudice the rights and interests of the respondents, creditors, unsecured creditors, and shareholders.

40. It is further submitted that paid up share capital of the Company then was Rs.51,49,000/- of 5,14,900 shares of Rs.10/- each. The share holding of the appellant No.1 is 7500 shares and the share holding of appellant No.2 was 50 shares. The face value of the combined share holding would come to Rs.75,500/-. The scheme had provided Rs.30/- per share and therefore, the total entitlement of the appellants would be Rs.2,26,500/- and the said amount had already been deposited in the Court on 16.09.2009. Their share holding is 1.47%, hence such a minuscule shareholders should not be allowed to stall the activities of the Company. Details of payment made by the Company is as follows:-

"I. DETAILS OF PAYMENTS MADE BY RESPONDENT:

Sl. No.	**PARTICULARS**	**AMOUNT(Rs.)**
1	CORPORATION BANK (Secured Creditor)- Claim is Rs.**16,59,90,483** as on 06.08.2006 along with 21.25% PA compounded quarterly. However, they have agreed for the reduced amount in view of the efforts of the Respondent at settlement.	**9,53,01,226**
2	EMPLOYEES CLAIM along with Provident Fund	**32,90,283**
3	PROPERTY TAX Details: a. On account subject to assessment: **40,00,000/-** b. On account: **25,00,000/-** c. As per the Direction of the High Court: **1,50,00,000** d. As per the Order of the Civil Court in MA No. 01/2013 dated 29.07.2013: **2,76,82,452** e. Up to date tax : **2,01,71,140.** f. BBMP Demand on measurement is Rs. **1,88,13,522.** g. As per the compromise (OTS) Rs.**1,46,86,252** in MA No. 01/2013 as against the demanded amount of	**10,71,70,002**

	Rs. **6,90,21,114** + equal amount of penalty h. Mysore Property Tax: **43,16,636**	
4	DEPOSITORS CLAIMS	10,23,68,161
5	SHAREHOLDERS PAYMENT for 5,14,900 shares of RS. 10/- each i.e., Rs. 51,49,000/-. As per scheme paid: Rs. 86,31,500/- Deposited as per the Order of the Court including that of the Appellants: Rs. 68,15,500/-	**1,54,47,000**
	TOTAL	**32,35,76,672**
6	AMOUNT SPENT FOR RENOVATION, UPGRADATION OF THE PROPERTIES & AMOUNT INVESTED FOR INFRASTRUCTURE AND ASSET PROCUREMENT FOR THE COMPANY	**11,18,31,683**

II. IF THE COMPANY WAS WOUND UP ON 19.06.2009, THE FOLLOWING WOULD BE THE CONSEQUENCES:

Sl. No.	**PARTICULARS**	**AMOUNT(Rs.)**
1	Valuation of the Assets of the Company as per Valuation Report vide Order dated 19.01.2009.	**29,82,80,000**
2	**Less**: Corporation Bank(Secured Creditor Claim) 16,59,90,483 x 21.25% PA (compounded quarterly)	**28,83,16,189**
3	**Less**: Employees Claim along with Provident Fund.	**32,90,283**
4	**Less**: Property Tax	**6,94,65,422**

5	**Less**: Depositors' Claim (as per scheme). If interest is applied as per agreement, it will be much more.	**10,23,68,151**
	TOTAL DEDUCTION	**46,34,40,055**
	TOTAL	**- (16,51,60,055)**

NOTE:

1. Once company is wound up the amount realised on selling the properties has to be distributed in accordance with Section 529, 529A and 530 of the Companies Act, 1956.

a. Preference as per Section 529A:

i. Workmen's dues & Secured Creditor's Debt

ii. All Revenues & Taxes

iii. Employees Provident Funds and due payable to employees.

iv. If anything left out after discharging all the debt, the balance will be divided by the Paid-up share capital and such amount will be payable to the respective shareholders.

In the instant case, preferences are:

Sl. No.	**PARTICULARS**	**AMOUNT(Rs.)**	**AMOUNT**
1	Value of the assets		**29,82,80,000**
2	**Less:** Secured creditor (Corporation Bank) due	28,83,16,189	
3	**Less**: Employees Dues	32,90,283	
		29,16,06,472	
	AMOUNT AVAILABLE FOR PAYMENT		**66,73,528**

4	**Less:** Property Tax up to 19.06.2009 NO AMOUNT IS AVAILABLE TO PAY EVEN THE TAX DUES.	6,94,65,422	
5	DEPOSITORS DUES	10,23,68,168	

Amount will not be available even to pay the property tax and principal amount of the depositors. Hence, shareholders would not receive any amount.

III. IF THE COMPANY IS ORDERED TO BE WOUND UP IN THIS APPEAL, THE FOLLOWING WOULD BE THE CONSEQUENCES:

Sl. No.	PARTICULARS	AMOUNT(Rs.)
1	CORPORATION BANK (Secured Creditor Claim) 16,59,90,483 x 21.25% PA (compounded quarterly) as per Recovery Certificate	**7,26,30,24,930**
2	PROPERTY TAX, even as on 19.06.2009	**6,94,65,422**
3	EMPLOYEES DUES, even as on 19.06.2009	**32,90,283**
4	DEPOSITOR CLAIMS due as per the scheme. (If the contract rate of interest is charged, it will be more than 20,00,00,000/-)	**10,23,68,161**
5	AMOUNT SPENT FOR RENOVATION, UPGRADATION OF THE PROPERTIES & AMOUNT INVESTED FOR INFRASTRUCTURE AND ASSET PROCUREMENT FOR THE COMPANY	**11,18,31,683**

41. If the Company is wound-up, there would be huge deficit and propounders' investment also have to be refunded. Therefore, interfering with the scheme as approved by the learned Single Judge

would have disastrous consequences and therefore, it is prayed that the appeals be dismissed.

42. We have considered the submissions advanced on behalf of learned counsels for both the parties and perused the record.

43. It would be relevant to take note of the important facts as stated above in brief, before culling out the issues involved in the present appeal for answering, by this Court. The respondent No.1, an alleged outsider, in association with other respondents and also with the support of shareholders i.e., respondent Nos.3 and 4 had filed Company Application No.109/1998 in Company Petition No.43/1992 seeking leave of the Court to convene the meeting. The same was allowed by the learned Company Court on 21.06.2006, permitting to convene the meeting on 07.08.2006. As per the direction of the Court, propounders of the scheme had deposited Rs.6.00 Crores to show their bona fide on 12.07.2006. The appellants never challenged the

order dated 21.06.2006 and in fact they participated in the meeting of the Company held on 06.08.2006, for approval of the scheme of arrangements for revival of the Company. As stated above 91.27% shareholders voted in favour of the scheme and only 8.73% against the scheme. The Company Petition No.102/2006 was filed by respondent Nos.1 to 4 under Sections 391(2), 392 and 394 of the Companies Act along with the amended scheme. In response to the advertisement issued under the order of the Court, several Company Applications came to be filed including the objections filed by the appellants. Besides filing the objections, they also filed Application No.1183/2008 under Rule 9 of the Companies (Court), Rules 1959, seeking a direction to the Official Liquidator to exercise his powers under Section 457(1)(c) of the Companies Act to sell all the assets of the Company by public auction.

44. The issues which arises for consideration before this Court in these appeals are:

a. Whether respondents Nos. 1 and 2, who are alleged outsiders, fall outside the scope of Section 391 of the Companies Act and they could not have propounded the scheme along with respondent Nos.3 and 4 (shareholders)?

b. Whether the scheme of revival is a scheme to transfer valuable assets of the Company including the immovable properties at Church Street, Bangalore and two properties at Mysore for a pittance to respondent Nos.1 and 2?

c. Whether the scheme is a ruse to absolve respondent Nos.3 and 4 of their liabilities in respect of the misfeasance proceedings in Company Application No.640/2001 filed under Section 543 of the Act, initiated by the Official Liquidator?

45. **RE: ISSUE No.1:**

(a) Section 391 of the Companies Act, 1956 reads as under :-

> **"Sec 391 - Power to compromise or make arrangements with creditors and members.**
>
> (1) Where a compromise or arrangement is proposed
>
> (a) between a company and its creditors or any class of them ; or
>
> (b) between a company and its members or any class of them ;
>
> the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.
>
> (2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 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-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

(3) An order made by the Court under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for each copy in respect of which default is made.

(6) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of."

(b) The learned Senior Counsel for the appellants has submitted that in view of the language employed

in Section 391 of the Act, the compromise arrangement has to be between the Company and its creditors or any class of them or between a Company and its members or any class of them.

(c) A person, who is not the creditor or member (shareholder) cannot propound a scheme of compromise or arrangement. It may be taken note that in OSA No.35/1996 filed against the order dated 29.10.1996 passed in Company Petition No.43/1992 under Section 433(e)(f) of the Act, while dismissing the said appeal by the Division Bench, liberty was granted to respondent No.1 to file an appropriate application before the Company Court. The said order had remained unchallenged, and it had attained finality. It may also be noted that Company Application No.93/2006 was filed under Section 391 of the Act, seeking permission to convene a meeting to propose the scheme and the learned Company Court allowed the said application vide order dated 21.06.2006, permitting the respondent Nos.1 to 4 to

convene the meeting of shareholders, secured and unsecured creditors. The said order also remained unchallenged and in fact the appellants had participated in the meeting.

(d) In ***S. K. GUPTA AND ANOTHER*** (supra), it has been held that an application proposing compromise or arrangement cannot be moved by anyone other than those specified in Section 391(1) of the Act.

(e) The Supreme Court in the said judgment has also held that Section 392(1) of the Act confers power of widest amplitude on the High Court (Tribunal) as the case may be, to give directions and if necessary, to modify the scheme. The only limitation is that such directions or modifications must be for the proper working of the compromise/arrangement. Sub section (2) of Section 392 provides the legislative exposition as to who can move the Court for taking action under Section 392 of the Companies Act. The High Court can act suo motu as contemplated by Section 392(1) or it may act on an application of 'any person

interested in the affairs of the Company.' this would include persons mentioned in Section 391 and would also include even a non-member or a non-creditor. Paragraphs 12, 14 to 16 are extracted hereunder :-

> *"12. 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) Pvt. Ltd. v. New Kaiser-i-Hind Spg. & Wvg. Co. Ltd.. Further Section 391(1) itself, by a specific and positive provision, prescribes who can move an application under it. Only the creditor or member of that company or a liquidator in the case of a company being wound up is entitled to move an application proposing a compromise or arrangement. By necessary implication any one other than those specified in the section would not be entitled to move such an application.

13……..xxxxxxxxxx…….xxxxxx….

14. Sub-section (2) provides the legislative exposition as to who can move the Court for taking action under Section 392. Reference to Section 391 in sub-section (2) of Section 392 merely indicates which compromise or arrangement can be brought before the Court for taking action under Section 392. The reference to Section 391 does not mean that all the limitations or restrictions on the right of an individual to move the Court while proposing a scheme of compromise or arrangement have to be read in sub-section (2) merely because Section 391 is referred to therein. Unlike Section 391, Section 392 does not specify that a member or creditor or in the

case of a company being wound up, its liquidator, can move the Court under Section 392. On the other hand, the legislature uses the expression "any person interested in the affairs of the company" which has wider denotation than a member or creditor or liquidator of a company. In fact, the ambit of the power to act under Section 392(2) can be gauged from the fact that the Court can suo motu act to take action as contemplated by Section 392(1) or it may act on an application of any person interested in the affairs of the company.

15. In this context the observations of the Gujarat High Court, extracted hereunder, in Mansukhlal v. M.V. Shah can be referred to with advantage as it precisely lays bare the ambit and width of Court's power under Section 392:

"The framers of the company law in India have conferred statutory powers on the High Court to make such modifications in the compromise or arrangement as the Court may consider necessary for the proper working of the compromise and arrangement. The power of the widest amplitude has been conferred on the Court under Section 392(1)(b) and the width and the magnitude of the power can be gauged from the language employed in

Section 392(1)(a) which confers a sort of a supervisory role on the Court during the period the scheme of compromise or arrangement is being implemented. Reading clauses (a) and (b) of sub-section (1) of Section 392, it appears that Parliament did not want the Court to be functus officio as soon as the scheme of compromise and arrangement is sanctioned by it. The Court has a continuing supervision over the implementation of compromise and arrangement. Unenvisaged, unanticipated, unforeseen or even unimaginable hitches, obstruction and impediments may arise in the course of implementation of a scheme of compromise and arrangement and if on every such occasion, sponsors have to go back to the parties concerned for seeking their approval for a modification and then seek the approval of the Court, it would be a long-drawn out, protracted, time-consuming process with no guarantee of result and the whole scheme of compromise and arrangement may be mutilated in the process. Parliament has, therefore, thought it fit to trust the wisdom of the Court rather than go back to the interested parties. If the parties have several times to decide the modification with the democratic process, the good part of an

election machinery apart, the dirt may step in, the conflicting interests may be bought and sold, and, in the process, the whole scheme of compromise and arrangement may be jettisoned. In order, therefore, to guard against this eventuality and situation, which is clearly envisageable, Parliament has conferred power on the Court, not only to make modifications even at the time of sanctioning the scheme, but at any time thereafter during the period the scheme is being implemented. Conceding that, before the Court sanctions the scheme, it partakes the character of an emerging contract between the company and the creditors and members; once the Court approves it, it becomes a statutorily enforceable contract even on dissidents, with power in the Court to modify, amend or correct or revise the contract the outer periphery or the limit on the power being that, after testing it on the anvil of probabilities, surrounding circumstances and the prevalent state of affairs, it can be done for the proper working of the compromise and arrangement, and subject to this limit on the Court's power, the power seems to be absolute and of the widest amplitude and it would be unwise to curtail it by process of interpretation."

16. If the Court can suo motu act, it is immaterial as to who drew the attention of the Court to a situation which necessitated Court's intervention. Where the power is conferred on the Court to take action on its own motion the information emanating from whatever source which calls for Court's attention can as well be obtained from any person without questioning his credentials, moving an application drawing attention of the Court to a situation where it must act. Undoubtedly, the Court may decline to act at the instance of a busy body but if the action proposed to be taken is justified, valid, legal or called for, the capacity or credentials of the person who brought the situation calling for Court's intervention is hardly relevant nor would it invalidate the resultant action only on that ground. Therefore, when sub-section (2) confers power on the Court to act on its own motion, the question of locus standi hardly arises. The High Court while examining the question of locus standi, after combing the provision contained in sub-section (2), wholly overlooked the important provision therein contained that the High Court can act on its own motion. It was, however, said in passing that sub-section (2) enables the Court to wind up the company and, therefore, the Court may act on its own motion or on the application of

any person interested in the affairs of the company not for modifying the scheme or for any directions but for winding-up the company. But when the Court is required to act under Section 392(1), the limitations and restrictions imposed upon the Court under Section 391(1) must be read in Section 392(1) because the sections are complementary to each other. This submission overlooks the two different stages at which Sections 391 and 392 operate though they may be complementary to each other. Two sub-sections of Section 392 have to be harmoniously read and sub-section (2) clearly indicates the power of Court to take action suo motu while taking action under sub-section (1). Again this approach is inconsistent with the language employed in Section 392(2) in that the Court can wind up the company under Section 392(2) if and only if it is satisfied that the compromise and/or arrangement sanctioned by it cannot be satisfactorily worked with or without modifications. The Court has to reach an affirmative conclusion before acting under Section 392(2) that the compromise and/or arrangement cannot be worked satisfactorily with or without modification [see J.K. (Bombay) P. Ltd.]. It follows as a corrolary that if the compromise or arrangement can be

worked as it is or by making modifications, the Court will have no power to wind up the company under Section 392(2). Now, if the arrangement or compromise can be worked with or without modification, the Court must undertake the exercise to find out what modifications are necessary to make the compromise or arrangement workable and that it can do so on its own motion or on the application of any person interested in the affairs of the company. If such be the power conferred on the Court, it is difficult to entertain the submission that an application for directions or modification cannot be entertained except when made by a member or creditor. It would whittle down the power of the Court in that it cannot do so on its own motion."

(f) Thus, a scheme when sanctioned it would not operate as an agreement between the parties, but has statutory force. It would be binding not only on the Company but even the dissenting creditors or members, as the case may be. When a scheme is considered by the Court under Section 392 of the Act, it gives power to the High Court/Tribunal, providing

for effective working of the compromise/ arrangements once sanctioned, for which the Court is required to exercise continuous supervision, and for modification of the scheme, for its effective working. The Court may exercise its *suo motu* power or any person interested in the affairs of the Company other than those mentioned in Section 391 of the Act is also empowered to move the High Court/Tribunal for necessary directions/ modification.

(g) In ***KASHINATH DIKSHIT*** (supra) the learned Single Judge of this Court has rejected the scheme propounded at the instance of a person, who was neither a shareholder nor a creditor or a member of the Company in liquidation and therefore, he would not have any interest in the affairs of the Company. Paragraphs 14, 15, 16, 18 and 20 of the said judgment are extracted hereunder :-

> *14. A plain reading of the Section clearly indicates that the legislature intended that if any compromise or arrangement is proposed, the company, or any creditor or any member of*

the company will be entitled to make the necessary application/petition and in case where the company is being wound up, as the Board of Directors has ceased to function and the company is represented by the liquidator, the liquidator wilt also be entitled to make the necessary application/petition. The right, which is conferred on the contributories or the creditors. Is not intended to be taken away when the company has gone into liquidation and in such a case, an additional right is also conferred on the liquidator.

15. The provisions contained in the Companies (court) Rules, 1959, in Rules 67 and 68, the forms prescribed under the said rules also clearly go to indicate that even in the case of company in liquidation, the contributories and the creditors of the company are entitled to make an application under Section 391 of the Act.

16. The Section is intended to confer rights both on the company and on the creditors and the members of the company when it is a going concern. The object is to avoid the winding up of the company and even after a winding up order is made, an application/Petition can be filed to recall the winding up order and to sanction the scheme of arrangement and allow the company to resume its normal business,

since it is the creditors and members of the company, who are interested in the life of the company and they are the best judges of their interest. Therefore, to maintain an application/petition under Section 391 read with Section 395 of the Act, the petition must be by a company or by any creditor or a member of the company and where the company is in liquidation, apart from the above person, the liquidator is an additional person to whom the right to frame such a scheme and move the Court for sanction under Section 391 of the Act is provided.

17…….xxxxxxxxxxx……xxxxxxxxxxxx…..

18. One of the shareholders of the company in liquidation is the first petitioner in this company petition. He has identified the second petitioner to revive the company in liquidation. This clearly shows that he is not the propounder of the scheme of arrangement for revival of the company. The second petitioner is neither a member nor a creditor of the company. He is willing to settle the claims of the creditors of the company with a view to revive the company in liquidation, provided the entire share capital of the company is transferred in his favour and his nominees. In order to attract Section 391 of the Act, it is necessary that a compromise or arrangement between a

company and its creditors or any class of them, or between the company or its members or class of them should propose a compromise or arrangement. When such a scheme is proposed, and the sanction is requested, the court will have to be satisfied as to the prima facie, that the scheme of arrangement is genuine, bonafide and would be in the interest of the company and its creditors and the application is filed by a person, who is authorised under the provisions of Section 391 of the Act. The Apex Court in the case of S.K Gupta v. K.P Jain . 1979 49 Company Cases 342, while considering the scope of Section 391(1) of the Act and who can move the application under that Section was pleased to observe:

"Section 391 enables a member or a creditor of the company or a company which is being wound up, its liquidator, to make an application to the Court proposing a compromise or arrangement between the company and its creditors or any class of them or between the company and its members of any class of them and seeking directors of the Court to convene a meeting of each class of creditors and/or each class of members to whom the compromise or arrangement is offered. On the Courts giving the directions, the meeting would be convened

in which the proposed scheme of compromise and/or arrangement would be submitted for consideration and each class will have to vote upon it and if the scheme is accepted by a majority in number representing three-fourths in value of the creditors or members or class of members, as the case may be, present and voting either in person or where proxy is allowed by proxy, such approved scheme has to be placed before the Court for sanction of the Court as envisaged in Section 391(2).”

19. ……..xxxxxxxxxx……..xxxxxxxxx……

20. The second petitioner, who is the propounder for the sanction of scheme of arrangement is neither a member nor a creditor of the company. He has no interest in the affairs of the company. He has only come forward to purchase the assets and liabilities of the company in liquidation by filing an application styled one under Section 391 of the Act. The first petitioner though a member of the company in liquidation, is not the propounder under the scheme. He is only an intermediary in assisting the second petitioner to purchase the assets of the company in liquidation. Therefore, in my opinion, the petition filed for sanction of scheme of arrangement is not maintainable under Section 391 of the Act."

(h) We note that the said judgment of the learned Single Judge was affirmed by the Division Bench vide judgment dated **11.06.2003 passed in OSA No.110/2002.**

(i) The facts in the present case are different to that of in ***S.K.GUPTA*** and ***KASHINATH DIKSHIT*** *(s*upra). In the present case, the Division Bench had granted liberty to respondent No.1 to file an appropriate application before the Company Court. The order dated 21.06.2006 passed by the learned Company Judge in Company Application No.93/2006 filed under Section 391 of the Act seeking permission to convene the meeting for considering the proposed scheme was never challenged. The Chairman in his report disclosed the approval of the scheme by overwhelming majority of the shareholders, secured and unsecured creditors and that they had accepted the scheme, which is evident from the order dated 19.08.2006 passed by the learned Company Judge in Company Application No.93/2006. The said order also

remained unchallenged. Therefore, it is too late in the day to challenge the scheme approved overwhelmingly by majority shareholders on the ground that the scheme was propounded by respondent Nos.1 and 2 (outsiders). The respondent Nos.1 and 2 along with respondent Nos.3 and 4 propounded the scheme in view of the liberty granted by the Division Bench to file an appropriate application before the Company Court. Therefore, we are of the view, that the said objection at this stage, does not merit consideration.

46. **RE: ISSUE NO.2:**

(a) The learned Senior Counsel for the appellants has submitted that no material facts as contemplated in proviso to Section 391(2) were placed either in the meeting of the Company or before the Court. While considering the scheme in respect of a Company in liquidation, the Court should consider whether the scheme is genuinely for revival of whole or part of the

business or is a ruse to dispose of the assets of the Company in liquidation.

(b) The learned Senior Counsel further submitted the Court must satisfy that the meeting of the creditors was duly held and the creditors or members were provided with relevant material to enable them to take an informed decision as to whether the scheme is just and fair. The Court must also conclude that the proposed scheme of compromise/ arrangement is not violative of any provisions of law and not contrary to the public policy. It is further submitted that before sanctioning the scheme, the Court must consider whether the scheme is genuinely for revival of the whole or part of the business of the Company, makes provision for paying off creditors or for satisfying their claims as agreed to them and for meeting liability of workers under Sections 529 and 529A of the Act. The Court is required to see the bona fide of the scheme and to ensure that the scheme put forward is not a ruse to dispose off the

assets of the Company in liquidation, and whether such a proposal satisfies the elements of public interest and commercial morality.

(c) Learned counsel for the appellants has placed reliance on ***INTEGRATED FINANCE CO. LTD. VS. RBI ETC., ETC.*** [***(2015) 13 SCC 772.*** Paragraphs 44 and 45 read as under:-

> *"44. In view of the aforesaid, it needs to be considered as to whether a scheme which does not comply with the provisions of Section 45-QA of the RBI Act can be sanctioned. The High Court on a careful consideration of the entire matter has concluded that the Scheme must fail as it does not comply with the provisions contained in Section 45-QA(1) of the RBI Act. To get over this difficulty, the learned counsel for the appellant has submitted that Chapter III-B of the RBI Act is not a complete code. This apart, the RBI Act and the Companies Act must be read in their own sphere since both operate in different fields, altogether. We are unable to agree with the aforesaid submission of the learned Senior Counsel for the parties.*
>
> *45. Chapter III-B of the RBI Act was incorporated through the RBI (Amendment)*

Ordinance, 1997, subsequently replaced by the RBI (Amendment) Act, 1997. The Statement of Objects and Reasons make it abundantly clear that before the amendment, the unincorporated bodies circumvented the statutory restrictions by floating different partnership firms as and when a firm reached the level of 250 depositors. It was also reiterated that several unincorporated bodies were advertising aggressively through various media, soliciting deposits from public by offering high rates of interest and other incentives. The Amendment Act provides several safeguards for NBFCs so as to ensure their viability. This includes compulsory registration of NBFCs with RBI, stipulation of minimum need in the funds requirements, creation of reserved funds and transfer of certain percentage of profits every year to the fund; and prescription of liquidity requirements. The RBI has also been vested with powers to issue guidelines intended to ensure sound and healthy operations and the quality of assets of these companies. The RBI was also empowered to issue directions to Auditors of NBFCs to order special audits in NBFCs, prohibited acceptance of deposits by NBFCs and make applications for winding up of NBFCs. It is specifically noticed that earlier the

only recourse available to the depositors was to approach the court of law for redressal of grievances. However by the amendment, powers have been vested with the Company Law Board for directing the defaulter NBFCs to make repayment for the deposit interest with a view to protect the interest of the depositors. The NBFCs have been totally prohibited from accepting deposits for the purpose other than for personal use, if unincorporated. They have been permitted to continue to take deposit after incorporating themselves within the regulatory framework. The unincorporated bodies have also been specifically prohibited for issuing any advertisements in any form. The real intent is set out in Para 6, which is as under:

"6. There are reports of several finance companies and unincorporated bodies having failed to repay the deposits collected from unsuspecting depositors who have been tempted by the attractive returns and incentives offered. Concern has been expressed in several quarters on the need to take urgent steps to regulate the activities of such companies and unincorporated bodies."

(d) Regarding the factors to be considered by the Company Court, while sanctioning the scheme

including the commercial morality and bona fide of the scheme, it is not a ruse for disposing off the assets of the Company and whether the proposal of revival of the Company satisfies the element of public interest and commercial morality, the learned Senior Counsel has placed reliance on judgment in ***MEGHAL HOMES*** (supra) paragraphs 30 to 37, 47, and 50 to 52, which would read as under :-

> *"30. We are not inclined to go into the charges and counter-charges as to which of the Somanis has been got at and by whom, since we consider those allegations to be irrelevant for our purpose. Suffice it to say that, we are not inclined to accept the argument on behalf of the respondents that Rangnath Somani is estopped from filing an appeal against the decision of the Division Bench. Anyway, since we have held that the appeals by the other two appellants are maintainable, the question that arises will have to be examined by this Court and in that context, we find it not proper to turn away Rangnath Somani from the portals of this Court on the ground of estoppel. Thus, we overrule the objections to the maintainability of these appeals.*

31. Now to recapitulate, the Company was ordered to be wound up on 25-7-1984 and the Official Liquidator was directed to take possession of the assets of the Company. Once an order of liquidation had been passed on an application under Section 433 of the Companies Act, the winding up has to be either stayed altogether or for a limited time, on such terms and conditions as the court thinks fit in terms of Section 466 of the Act. If no such stay is granted, the proceedings have to go on and the court has to finally pass an order under Section 481 of the Act dissolving the Company. In other words, when the affairs of the Company had been completely wound up or the court finds that the Official Liquidator cannot proceed with the winding up of the Company for want of funds or for any other reason, the court can make an order dissolving the Company from the date of that order. This puts an end to the winding-up process.

32. Winding up is dealt with in Part VII of the Companies Act and Sections 433 to 483 occur in Chapter II of that Part. Part VI deals with management and administration of a company and Chapter V thereof deals with arbitrations, compromises, arrangements and reconstructions. In that Chapter occur Sections

390 to 396-A of the Act with which we are concerned. While defining a company for the purpose of Sections 391 and 393, Section 390 clarifies that company means any company liable to be wound up under the Companies Act. SCML was a company that was ordered to be wound up on 25-7-1984. Therefore, when the scheme was originally presented on 3-10-1994, it was at a time when the winding-up order was already in existence.

33. The argument that Section 391 would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound

up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application.

34. By and large, the High Courts are seen to have taken the view that the right of the Official Liquidator to make an application under Section 391 of the Act was in addition to the right inhering in the creditors, the contributories or members and the power need not be restricted to a motion only by the liquidator. For the purpose of this case, we do not think that it is necessary to examine this question also in depth. We are inclined to proceed on the basis that the Somanis, as contributories or the members of the Company, are entitled to make an application to the Company Court in terms of Section 391 of the Act for the purpose of acceptance of a

compromise or arrangement with the creditors and members.

35. The question in this case really is whether the compromise put forward under Section 391 of the Companies Act could be accepted by the court without reference to the fact that it is a company in liquidation and without considering whether the compromise proposed as intending to take the company out of liquidation, contemplates the revival of the company and whether it puts forward a proposal for revival and whether such a proposal also satisfies the elements of public interest and commercial morality, the elements required to be satisfied for the court to stop the winding-up proceeding in terms of Section 466 of the Act.

36. In the present case, the Company Court was of the view that the compromise or arrangement that is put forward by the Somanis in conjunction with LBPL was not a scheme or proposal for revival of the company or the mills, but it is one for disposal of the assets of the company and in that situation, it would be proper that the assets are disposed of by the Official Liquidator by inviting offers from the public in that behalf and maintaining

transparency. But, the Division Bench accepted the contention that it was not mandatory in law that a compromise or arrangement has to be for revival of the very activity in which the company was engaged in at the time of winding up and the anxiety of the court while sanctioning the scheme which is approved by all classes should be to see that the company is permitted to continue its corporate existence. The Division Bench also took the view that the judgment of the earlier Division Bench dated 4-4-1995 did not stand in the way of accepting the present scheme, and that since the Company Court had no jurisdiction to sit in appeal over the decision of the creditors, members and contributories of the company, the proposal put forward was liable to be accepted especially in the context of its finding that the interveners have no locus standi to oppose the proceedings.

37. Learned counsel argued before us whether in the case of a company which had been ordered to be wound up, a compromise or arrangement made under Section 391 of the Act could be accepted on the basis that the said arrangement has been approved by the relevant meeting of the creditors, members and so on and whether the court was concerned with anything more than such a

decision taken by the members and creditors of the company concerned. In the case of a company ordered to be wound up, a compromise or arrangement that could normally be accepted by the Company Court could be either paying off all dues by liquidation of assets or an arrangement for revival of the company and its business. That is the rationale of the order dated 4-4-1995 by which the Division Bench directed consideration of the various aspects pointed out therein.

38 TO 46.....XXXXXXXXXX.....

47. When a company is ordered to be wound up, the assets of it are put in possession of the Official Liquidator. The assets become custodia legis. The follow-up, in the absence of a revival of the company, is the realisation of the assets of the company by the Official Liquidator and distribution of the proceeds to the creditors, workers and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the ultimate step is taken or before the assets are disposed of, to accept a scheme or proposal for revival of the Company. In that context, the court has necessarily to see whether the scheme

contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529-A of the Act. Of course, the court has to see to the bona fides of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the company in liquidation.

48.....XXXXXXXXXX.....

49.....XXXXXXXXX.....

50. It is a well-settled rule of interpretation that provisions in an enactment must be read as a whole before ascertaining the scope of any particular provision. This Court has held that it is a rule now firmly established that the intention of the legislature must be found by reading the statute as a whole. In Principles of Statutory Interpretation by Justice G.P. Singh, it is stated:

"The rule is referred to as an 'elementary rule' by Viscount Simonds; a 'compelling rule' by Lord Somervell of Harrow; and a 'settled rule' by B.K. Mukherjee, J."

(See pp. 31 and 32 of the Tenth Edn.)

When we accept this principle, what we have to do is to read Sections 391 to 394-A not in

isolation as canvassed for by learned counsel for the respondents, but with reference to the other relevant provisions of the Act.

51. We see no difficulty in reconciling the need to satisfy the requirements of both Sections 391 to 394-A and Section 466 of the Companies Act while dealing with a company which has been ordered to be wound up. In other words, we find no incongruity in looking into aspects of public interest, commercial morality and the bona fide intention to revive a company while considering whether a compromise or arrangement put forward in terms of Section 391 of the Companies Act should be accepted or not. We see no conflict in applying both the provisions and in harmoniously construing them and in finding that while the court will not sit in appeal over the commercial wisdom of the shareholders of a company, it will certainly consider whether there is a genuine attempt to revive the company that has gone into liquidation and whether such revival is in public interest and conforms to commercial morality.

52. We cannot understand the decision in Miheer H. Mafatlal v. Mafatlal Industries Ltd. as standing in the way of understanding the scope of the provisions of the Act in the above

manner. We are therefore satisfied that the Company Court was bound to consider whether the liquidation was liable to be stayed for a period or permanently while adverting to the question whether the scheme is one for revival of the company or that part of the business of the company which it is permissible to revive under the relevant laws or whether it is a ruse to dispose of the assets of the company by a private arrangement. If it comes to the latter conclusion, then it is the duty of the court in which the properties are vested on liquidation, to dispose of the properties, realise the assets and distribute the same in accordance with law."

(e) As stated above, two valuers were appointed by the learned Company Judge vide order dated 19.01.2009 wherein the Bangalore property was valued at Rs.24,52,80,000/- and two properties at Mysore were valued at Rs.2,70,00,000/- and Rs.2,60,00,000/- respectively. No valuation report valuing the property to the contrary was produced by any of the objectors including the appellants. The said scheme had already been accepted by overwhelming

majority of the shareholders, creditors and employees using their commercial wisdom and no proof disclosing undervaluation was produced by the appellants. At this stage, questioning the valuation by the appellants who have miniscule share holdings cannot be considered, particularly, when the scheme has been fully complied with and worked out. The Supreme Court in the case of ***MIHEER H MAFATLAL*** *(*supra) held that the Company Court is not required to act as a Court of appeal and sit in judgment over the informed decision taken by the shareholders, members and creditors of the Company and the commercial wisdom exercised by the parties. Paragraphs 28 to 30 of the said judgment, which are relevant are extracted hereunder:

> *"Scope of interference by the Company Court in sanction proceedings*
>
> *28. The relevant provisions of the Companies Act, 1956 are found in Chapter V of Part VI dealing with "Arbitration, Compromises, Arrangements and Reconstructions". In the present proceedings we will be concerned with*

Sections 391 and 393 of the Act. The relevant provisions thereof read as under:

"391. (1) Where a compromise or arrangement is proposed—

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

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

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

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under Section 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-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251, and the like.

393. (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under Section 391,—

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular, stating any material interests of the directors, managing directors, managing agents, secretaries and treasurers or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or

arrangement, if, and insofar as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid."

The aforesaid provisions of the Act show that compromise or arrangement can be proposed between a company and its creditors or any class of them or between a company and its members or any class of them. Such a compromise would also take in its sweep any scheme of amalgamation/merger of one company with another. When such a scheme is put forward by a company for the sanction of the Court in the first instance the Court has to direct holding of meetings of creditors or class of creditors or members or class of members who are concerned with such a scheme and once the majority in number representing three-fourths in value of creditors or class of creditors or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting accord their approval to any compromise or

arrangement thus put to vote, and once such compromise is sanctioned by the Court, it would be binding to all creditors or class of creditors or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme would remain binding. Before sanctioning such a scheme even though approved by a majority of the concerned creditors or members the Court has to be satisfied that the company or any other person moving such an application for sanction under sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to sub-section (2) of that section. So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391(1)(a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the voters concerned so that the parties concerned before whom the scheme is placed for voting can take an informed and objective decision whether to vote for the scheme or against it. On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to

sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets

sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the scheme concerned placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a scheme of compromise and arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote.

29. However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and

to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the

limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act which reads as under:

"392. (1) Where a High Court makes an order under Section 391 sanctioning a compromise or an arrangement in respect of a company, it—

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

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

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

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of

which an order has been made before the commencement of this Act under Section 153 of the Indian Companies Act, 1913 (7 of 1913), sanctioning a compromise or an arrangement."

Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement. The aforesaid statutory scheme which is clearly discernible from the relevant

provisions of the Act, as seen above, has been subjected to a series of decisions of different High Courts and this Court as well as by the courts in England which had also occasion to consider schemes under pari materia English Company Law. We will briefly refer to the relevant decisions on the point. But before we do so we may also usefully refer to the observations found in the oft-quoted passage in Buckley on the Companies Act, 14th Edn. They are as under:

"In exercising its power of sanction the court will see, first that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not

been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme."

In the case of Alabama, New Orleans, Texas and Pacific Junction Rly. Co., Re the relevant observations regarding the power and jurisdiction of the Company Court which is called upon to sanction a scheme of arrangement or compromise between the company and its creditors or shareholders were made by Lindley, L.J. as under:

"What the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the minority has been acting bona fide. The court also has to see that the minority is not being overriden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can reasonably be taken by businessmen. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order

to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve it."

To a similar effect were the observations of Fry, L.J., which read as under:

"The next enquiry is: Under what circumstances is the court to sanction a resolution which has been passed approving of a compromise or arrangement? I shall not attempt to define what elements may enter into the consideration of the court beyond this, that I do not doubt for a moment that the court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the court may take into consideration I will not attempt to forecast."

In Anglo-Continental Supply Co. Ltd., Re Ashtury, J., a century later reiterated the very same propositions as under:

"Before giving its sanction to a scheme of arrangement the court will see firstly that the provisions of the statute have been complied with; secondly that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and, thirdly, that the arrangement is such as a man of business would reasonably approve."

The learned Single Judge of the Calcutta High Court in the case of Mankam Investments Ltd., Re relying on a catena of decisions of the English courts and Indian High Courts observed as under on the power and jurisdiction of the Company Court which is called upon to sanction a scheme of merger and amalgamation of companies:

"It is a matter for the shareholders to consider commercially whether amalgamation or merger is beneficial or not. The court is really not concerned with the commercial decision of the shareholders until and unless the court feels that the proposed merger is manifestly unfair or is being proposed unfairly and/or to defraud the

other shareholders. Whether the merged companies will be ultimately benefited or will be able to economise in the matter of expenses is a matter for the shareholders to consider. If three companies are amalgamated, certainly, there will be some economies in the matter of maintaining accounts, filing of returns and various other matters. However, the court is really not concerned with the exact details of the matter and if the shareholders approved the scheme by the requisite majority, then the court only looks into the scheme as to find out that it is not manifestly unfair and/or is not intended to defraud or do injustice to the other shareholders."

We may also in this connection profitably refer to the judgment of this Court in the case of Employees' Union v. Hindustan Lever Ltd. wherein a Bench of three learned Judges speaking through Sen, J. on behalf of himself and Venkatachaliah, C.J., and with which decision Sahai, J., concurred, Sahai, J., in his concurring judgment in the aforesaid case has made the following pertinent observations in this connection in the Report: (SCC pp. 506-08, paras 3-6)

"But what was lost sight of was that the jurisdiction of the court in sanctioning a claim of merger is not to ascertain with mathematical

accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction.

***

Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle of 'prudent business management test' or that the scheme should not be a device to evade law. But when the court is concerned with a scheme of merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximising profits of the shareholders or whether the interest of employees was protected but it has to ensure that merger shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on English decisions Hoare & Co. Ltd., Re and Bugle Press Ltd., Re that the

power of the court is to be satisfied only whether the provisions of the Act have been complied with or that the class or classes were fully represented and the arrangement was such as a man of business would reasonably approve between two private companies may be correct and may normally be adhered to but when the merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The jurisdiction of the court in this regard is comprehensive."

Sen, J., speaking for himself and Venkatachaliah, C.J., also towed the line indicated by Sahai, J., about the jurisdiction of the Company Court while sanctioning the scheme and made the following pertinent observations: (SCC p. 528, para 84)

"An argument was also made that as a result of the amalgamation, a large share of the market will be captured by HLL. But there is nothing unlawful or illegal about this. The Court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved. But that is not the case here. A company may, on its own, grow up to capture a large share of the market. But unless it is shown that there is some illegality or fraud involved in the scheme, the Court cannot decline to sanction a scheme

of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO. Dr Dhavan has argued that TOMCO is not yet a sick company. That may be right, but TOMCO at this rate will become a sick Company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The shareholders, the employees, the creditors will all suffer. The argument that the Company has large assets is really meaningless. Very many cotton mills and jute mills in India have become sick and are on the verge of liquidation, even though they have large assets. The Scheme has been sanctioned almost unanimously by the shareholders, debenture-holders, secured creditors, unsecured creditors and preference shareholders of both the Companies. There must exist very strong reasons for withholding sanction to such a scheme. Withholding of sanction may turn out to be disastrous for 60,000 shareholders of TOMCO and also a large number of its employees."

In view of the aforesaid settled legal position, therefore, the scope and ambit of the

jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a

scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction

to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction.

30. In the light of the aforesaid settled legal position we will now proceed to deal with the main points for determination indicated hereinabove."

(f) Similar view has been taken in ***HINDUSTAN LEVER***. (supra) in paragraphs 11 and 12, which are extracted hereunder:

"11. While exercising its power in sanctioning a scheme of agreement, the court has to

examine as to whether the provisions of the statute have been complied with. Once the court finds that the parameters set out in Section 394 of the Companies Act have been met then the court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the court a better scheme could have been framed. This aspect was examined in detail by this Court in Miheer H. Mafatlal v. Mafatlal Industries Ltd. [(1997) 1 SCC 579] The Court laid down the following broad contours of the jurisdiction of the Company Court in granting sanction to the scheme as follows: (SCC pp. 597-98 & 601-02, para 29)

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the meetings concerned of the creditors or members or any class of them

had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the class of voters concerned is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. *That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).*
5. *That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.*
6. *That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not unconscionable, nor contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.*
7. *That the Company Court has also to satisfy itself that members or class of members or*

creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. It is the commercial wisdom of the parties to the scheme who have taken an

informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392. Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. The supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their

own reasoned judgment and agree to be bound by such compromise or arrangement.

12. Two broad principles underlying a scheme of amalgamation which have been brought out in this judgment are:

1. that the order passed by the court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and

2. that the jurisdiction of the Company Court while sanctioning the scheme is supervisory only i.e. to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. The role of the court is that of an umpire in a game, to see that the teams play their role as per rules and do not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire.

Both these principles indicate that there is no adjudication by the court on the merits as such."

(g) The Bombay High Court in ***LARSEN AND TOUBRO LTD***., (supra) at paragraphs 62 and 63 has held that once the majority of the members and creditors have accepted the scheme, their commercial wisdom cannot be questioned by individual shareholders. Paragraphs 62 and 63 of the said judgment are extracted hereunder:

"62. In this case also, objections as raised cannot be considered in view of the above dear observations in this court.

63. A shareholder, in such circumstances, cannot or should not extend his rights which are available under the Companies Act, to oppose such scheme of arrangement to obstruct the whole object and purpose of such scheme. The parties or shareholders attended the meeting and suggested modifications and once their modifications or suggestions were rejected by majority, there is no reason further to reconsider the same view or modification suggested by such objectors espedally by the court and to reverse the decision which has

been taken by the majority in their respective meetings. Individual shareholders, in no way, can raise any objection on behalf of the creditors or unsecured creditors when admittedly in this case, they have sanctioned and approved the arrangement by unanimous decision in their respective meetings. The objections raised by the objectors in the present case are, therefore, not bona fide and not in the interest of the company at all. The commercial wisdom of the shareholders to approve such scheme in majority has to be respected. Mere bald allegations that scheme is not in the public interest, without material or justification for the said allegation, cannot be accepted. The majority shareholders have taken into consideration the total scheme of arrangement in question. The share exchange ratio which has been fixed after the valuation report of professional and expert auditors, the effect of shares of Narmada Cement Company Ltd. or transfer of cement division or the alleged monopoly or concentration needs to be rejected and for that reason, such scheme of arrangement cannot be interfered with. It is necessary to consider that objectors like Mr. V. Ranganathan and Mr. R. Shekar, who have admittedly not attended the meeting and have not participated in any proceedings, now,

cannot be allowed to raise any objection in such a cryptic manner. As per the practice and procedure of the company rules, Mr. V. Ranganathan and Mr. R. Shekhar have not even filed affidavit or application in the prescribed form and no leave of any kind was obtained from the court. The allegations made in their so-called objections are vague, bald and without any supporting material and the same cannot be considered and definitely cannot be a reason to discard the present scheme of arrangement. The apex court in Miheer H. Mafatlal's case, particularised cases like the objectors in question and their objections which are as follows (page 828): "So far as the transferee company is concerned though the appellant was not a director he was a 5 per cent, shareholder who did not think it fit to personally remain present at the time of voting and simply relied upon the proxy. If he was feeling that the scheme was unfair to him or was not going to protect his interest as shareholder in the respondent-company nothing prevented him from remaining present and voicing his grievance before the general body of the equity shareholders and to apprise them of the alleged pernicious effect of die scheme. It is, therefore, too late in the day for him to

contend that the scheme was unfair to him and that the family of Arvind Mafatlal had tried to dominate and engineer any adverse pattern of voting at the meeting of the equity shareholders."

(g) If the Court finds that the scheme is just, fair and reasonable and approved by the requisite majority, the scheme has to be approved as held in ***ADMINISTRATOR OF THE SPECIFIED UNDERTAKING OF UNIT TRUST AND ANOTHER*** (supra) and ***CALCUTTA HIGH COURT IN RE-HINDUSTAN GENERAL ELECTRIC CORPORATION*** (supra)***.*** Even in ***MEGHAL HOMES*** (supra) as cited by the learned counsel for the appellants, it has been held that before sanctioning the scheme the Court has to see whether the scheme contemplates the revival of business of the Company or makes provision for paying off creditors or satisfying their claims as agreed by them and for meeting the liability of the workers, the scheme has to be approved. The learned

Single Judge has considered all these aspects before sanctioning the scheme.

(h) The Bombay High Court in ***ALSTOM POWER BOILERS LTD.,***(supra) in paragraph 19 has held as under:

> *19. My learned Brother Dr. Chandrachud J. in the case of ION Exchange (India) Ltd., In re MANU/MH/0330/2001 : [2001] 105 Comp Cas 115 (Bom) has very rightly cited the observations of the learned single judge of the Gujarat High Court in Sidhpur Mills Co. Ltd., The learned judge indeed has ven succinctly described the jurisdiction of the company court as under (page 126) :*
>
> *".....it is not for the court to scrutinise the scheme in the manner of 'a carping critic, a hair-splitting expert, a meticulous accountant or a fastidious counsel' for the effort is not to emphasise the loopholes, technical mistakes and the accounting errors. The perspective has to be that of the ordinary shareholder exercising his discretion in a reasonable and businesslike manner.*
>
> *Fundamentally, the point to be emphasised is that the discretion as to whether to sanction the scheme for amalgamation is one which the court has the jurisdiction to exercise. This cannot be concluded on the supposed consideration that the scheme has the support of a large majority of shareholders. Majorities are not necessarily comprised individuals*

each of whom critiques the provision of the scheme with a measure of expertise. Lethargy is not unknown to collective bodies of shareholders and creditors. In these circumstances, the court has to be alive to the duty which Sections 391, 392 and 394 cast upon it, before, the court grants the seal of its approval upon the proposed amalgamation." (emphasis is given by me)"

47. **RE: ISSUE No.3:**

(a) It may be noted that the learned Company Judge has rejected the Company Application No.640/2001 on the ground that the proceedings were at the stage of notice and notice had been served on the respondents, despite completion of 9 years since filing of the petition and one of the Directors/respondents in the said proceedings had also died during such time. The Official Liquidator never raised an objection to the scheme citing pending Company Application No.640/2001 for misfeasance. It may also be noted that father of the appellants, late Gopala Shetty was one of the Directors, against whom the misfeasance proceedings were initiated in Company No.640/2001 and 2nd

appellant who held only 50 shares claims additional 2000 shares under the Will of his father, which were allegedly purchased by the father of the appellants from out of the funds of the Company. The respondent Nos.3 and 4 are also not alive as of today. It may also be noted that two independent valuers have valued the properties and there is not a case that the properties were undervalued. No objection was filed by the appellants to the valuation report. The Company meeting took place as per the provisions of the Act. Notice under Section 393 of the Act was issued and report of the Chairman discloses that the scheme was approved by the members and creditors overwhelmingly. In addition, the Company has made payment of huge amounts as mentioned above.

48. We therefore, do not find that the impugned order dated 19.06.2009 passed by the learned Company Court suffers from any illegality, which requires an interference by this Court. Thus we

dismiss the appeal and affirm the order passed by the learned Single Judge.

49. In view of dismissal of both the appeals, the interim applications, if any, stand rejected.

Sd/-
(D K SINGH)
JUDGE

Sd/-
(VENKATESH NAIK T)
JUDGE

NG