

In Re: Spectrum Power Generation Ltd.

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SooperKanoon Citation : sooperkanoon.com/445451

Court : Andhra Pradesh

Decided On : Oct-05-2007

Reported in : [2008]146CompCas266(AP)

Judge : S. Ananda Reddy, J.

Acts : [Companies Act, 1956](#) - Sections 169, 190, 217, 235 to 251, 391, 391(1), 391(2), 393, 393(1) and 394; Electricity Reforms Act, 1998; Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI); Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI); Indian Companies Act, 1913 - Sections 153, 153(1) and 153(2); Companies (Court) Rules, 1959 - Rule 79

Appeal No. : Company Petition No. 43 of 2007, Company Application No. 261 of 2007 and Company Application SR. Nos

Appellant : In Re: Spectrum Power Generation Ltd.

Advocate for Def. : S. Ravi, Adv. in C.A. Nos. 2310, 3349, 3351 and 4432 of 2007, ;M. Mohan Rao, Adv. for Respondent Nos. 1 and 2 in C.P. No. 43 of 2007, ;Vedula Srinivas, Adv. for Respondent No. 8 in C.P. No. 43 of 2007

Advocate for Pet/Ap. : S. Ravi, Adv. in C.P. No. 43 of 2007,; M. Mohan Rao, Adv. in C.A. No. 2310 of 2007,; Vedula Srinivas, Adv. in C.A. SR. Nos. 3349 and 3351 of 2007 and; D.V. Sitaram Murthy, Adv. in C.A. SR. No. 4432 of

Judgement :

S. Ananda Reddy, J.

1. By this company petition filed by the petitioner, viz., Spectrum Power Generation Ltd., under Section 391 of the [Companies Act, 1956](#) (for short 'the Act') read with Rule 79 of the Companies (Court) Rules, 1959, seeks approval of the scheme of arrangement between the petitioner-company and its secured creditors and members, under which, the debts as well as the capital was proposed to be restructured.

2. It is stated that the petitioner-company was incorporated under the provisions of the Companies Act, as per the Certificate of Incorporation granted by the Registrar of Companies dated October 26, 1992, with its registered office at Plot No. 231, 8-2-293/82/A/231, Road No. 36, Jubilee Hills, Hyderabad-500 033. The authorized share capital of the company, as on March 31, 2006, is Rs. 235,00,00,000 divided into 23,50,00,000 equity shares of Rs. 10 each. The issued, subscribed and paid up share capital of the company, as on March 31, 2006, is Rs. 176,47,68,900 divided into 17,64,76,890 equity shares of Rs. 10 each.

3 The main objects for which the petitioner-company was formed are:

(a) to generate, harness, develop, accumulate, distribute and supply electricity by setting up thermal power plants by use of liquid, gaseous or solid fuels for the purpose of light, heat, motive power and for all other purposes for which electrical energy can be employed. To carry on and generate power supply either by hydro, thermal gas, air, diesel oil, or through renewable energy sources such as solar, photovoltaic, windmill and/or other means. To transmit, distribute, supply and sell power either directly or through transmission lines and facilities of Central/State Governments or private companies or electricity boards to industries and to Central/State Governments, other consumers of electricity including for captive consumption for any industrial projects promoted by this company or promoter companies, generally to develop, generate, accumulate power at any other place or places and to transmit, distribute, sell and supply such power; (b) to construct, establish, operate, manage power stations, boiler houses, steam turbines, switch

yards, transformer yards, sub-stations, transmission lines, accumulators, workshops and all such works necessary for generating, accumulating, distributing and supply of electricity. The further details of the objects are enumerated in paragraph 5 of the petition.

4. The circumstances that necessitated for the proposed scheme of arrangement are set out as under:

It is stated that due to the shortage of electric power in the State of Andhra Pradesh, there was a proposal by the Government to set up a gas based power plant at Kakinada, East Godavari district, Andhra Pradesh. The permission for setting up the project was originally granted to the National Thermal Power Corporation (hereinafter referred to as 'NTPC') by the Central Government. But, since NTPC was already involved in various other projects in other parts of India, it was decided that the project should be allocated to private company. In the year 1990, the State Government of Andhra Pradesh had invited tenders for setting up the project. The original promoter of the petitioner-company has submitted its bid for the project, as a result of which, the same was awarded to the original promoters of the petitioner-company on June 19, 1992, thereafter, an agreement was entered into between the original promoters and NTPC. The petitioner-company had commenced its business on October 31, 1992, after obtaining commencing certificate. The petitioner had set up the project on a dual fuel basis, i.e., gas and naphtha, combined cycle power plant (hereinafter referred to as 'CCPP') with a rated capacity of 226 MW which was later downrated to 208 MW.

5. It is stated that the petitioner-company had achieved its combined cycle commercial operation on April 19, 1998, though the combined cycle commercial operation date (hereinafter referred to as 'CCCOD') was expected to be achieved in October, 1997 itself. The implementation of the project was delayed by six months due to cyclonic storm which damaged the infrastructure at the site of the project in November, 1996, and also a fire accident in April, 1997, affecting gas turbine-II in addition to the failure of the generator transformer supplied by BHEL and the delay in replacement of the same and the strike by transporters all over India in April, 1997.

6. It is stated that the Central Electricity Authority had approved the project with a capital cost of Rs. 748.43 crores on January 3, 1994. The petitioner-company had executed a long-term power purchase agreement (hereinafter referred to as 'PPA') with the erstwhile Andhra Pradesh State Electricity Board (hereinafter referred to as 'APSEB'). The obligations of the PPA, which were vested with APSEB, were transferred later on to the Transmission Corporation of Andhra Pradesh Ltd. (hereinafter referred to as 'APTRANSCO') as a result of the Electricity Reforms Act, 1998. However, after the enactment of the Electricity Act, 2003, the Government of Andhra Pradesh, in exercise of the powers conferred to it, had issued G.O. Ms. No. 58, dated June 7, 2005, ordering the transfer of the bulk supply of undertaking and power purchase agreements from APTRANSCO to the distribution companies, viz., (a) the Northern Power Distribution Company of Andhra Pradesh Ltd. (APNPDCL), (b) Southern Power Distribution Company of Andhra Pradesh Ltd. (APSPDCL), (c) Eastern Power Distribution Company of Andhra Pradesh Ltd. (APEPDCL), and (d) Central Power Distribution Company of Andhra Pradesh Ltd. (APCPDCL). In view of the above, the existing rights under the PPA were transferred from APTRANSCO to the distribution companies with effect from June 9, 2005. Since then, the Andhra Pradesh Co-ordination Committee (hereinafter referred to as 'APCC') has been constituted to represent the distribution companies and co-ordinate with the company in respect of the PPA.

7. It is further stated that the completed cost of the project stands at Rs. 972.60 crores. The reason for the cost overrun is primarily due to the exchange rate fluctuation, increase in customs duty, the resulting increase in interest during construction, and some other factors. The project cost of Rs. 972.60 crores has been funded through rupee equity of Rs. 32.69 crores, foreign equity of Rs. 85.24 crores, rupee loan of Rs. 306.20 crores, foreign currency of Rs. 286.62 crores and other short-term loans of Rs. 261.85 crores. The petitioner-company had submitted the completed cost details to APSEB/APTRANSCO for forwarding the same to the CEA for its final completed cost approval. APTRANSCO has not yet approved the revised capital cost which lead to reduced cash flow for the company.

8. The petitioner-company has been operating under severe financial constraints due to numerous factors as set out in the scheme, which has resulted in its net worth becoming negative. The petitioner-company has, therefore, failed to fulfil its financial commitments towards the repayment of loans/credit facilities due to various secured creditors. Therefore, the petitioner-company could service the principal amount due to the secured creditors for the financial year 2000-01. Similarly, the interest accrued thereon was serviced till the financial year 2000-01. Since then the petitioner-company has been in default and has not been able to make payment of both the principal and interest. The outstanding debt due from the petitioner-company as on the appointed date to the secured creditors has mounted to Rs. 1,23,506.41 lakhs which is unserviceable with the current cash flow of the petitioner-company.

9. It is further stated that the company has been incurring losses since the year 2003. The petitioner-company had accumulated losses to the extent of Rs. 14,03,08,843 as on March 31 2003, which had subsequently aggravated to Rs. 244,49,98,645 as on March 31, 2006. The earnings generated during the year 2006, even before the adjustment of depreciation, amortization/taxation, was not sufficient to service the interest and finance charges. Therefore, the petitioner-company is not in a position to service the principal and interest amount. It is pertinent to note that the secured loans taken by the petitioner-company have increased from Rs. 866,98,91,494 in the year 2003 to Rs. 1100,40,31,924 in addition to the losses that had increased by the year 2006.

10. As on march 31, 2006, the petitioner-company's reserves were negated by Rs. 244,49,98,645 and the operating surplus generated every year was not even sufficient to meet the interest obligation of the petitioner-company. Thus, based on the current financials, there was no prospect of the lenders being even able to recover any part of the principal dues, without enhancement of the petitioner-company's power generating capacity, restructuring of debt, infusion of equity and strengthening of the management.

11. The only source of income of the petitioner-company is the sales realization from the purchaser which at present, on an average, is to the tune of Rs. 22 crores

per month which is far lesser than the amount due to be paid to the secured creditors after providing for operating expenses. The sales realization will be further reduced in the coming years on account of various deductions by the purchaser under the PPA. In September, 2000, during a scheduled combustion inspection, damages were noticed on the GT-1 and was shutdown for a period of 25 days for the purpose of necessary repairs and was to bring back into service. With reference to the said damaged parts, an insurance claim was made for an amount of Rs. 8.85 crores and further amount on account of business interruption for Rs. 2.95 crores is pending. Further, even in November, 2002, during the routine inspection, the operator observed an abnormal increase in the thrust pad position which was found due to damages on the ST main rotor, as a result of which, the same was closed for a period of 403 days. With reference to the said damage also, claim was lodged together with loss on account of business interruption for an amount of Rs. 101.97 crores.

12. It is stated that CEA had approved the project cost of Rs. 748.43 crores to be funded in a debt equity ratio of 2.33:1. The equity and debt components were Rs. 523.90 crores and Rs. 224.53 crores respectively. The petitioner-company could not raise the envisaged equity capital. The paid up capital of the petitioner-company as on March 31, 2006, is Rs. 176,47,68,900. Although APTRANSCO has recognized the overdraft of Rs. 106.60 crores taken by the petitioner-company from the State Bank of India to bridge the gap in the funding of equity capital and paying 16 per cent, return on the same, it is not paying any incentives under the PPA on this amount. The delay in equity infusion is one of the reasons for the petitioner-company turning into a non-performing asset (hereinafter referred to as 'NPA').

13. For the abovesaid reasons, it had become imperative to rehabilitate the petitioner-company by restructuring its debt and capital structure in order to protect and safeguard the interests of the petitioner-company, its shareholders, creditors and other stakeholders and to secure cohesiveness within the management without which the petitioner-company stands the risk of going into liquidation.

14. The petitioner-company, while analysing the situation, had concluded that for securing repayment of the debt, revival of the petitioner-company, for maintaining the existing levels of operation and for the successful resolution of the involved issues, it would be imperative to streamline the management, infuse managerial and technical expertise of the highest level, restructure the petitioner-company's capital and execute expansion of generation capacity, etc. The options available in this regard were hampered by the limited flow out of the PPA entered into by the petitioner-company with the purchaser, the limited holding held by financial institutions in the petitioner-company, the compulsions of retaining assets within the same corporate entity and the necessity of ensuring implementation of the expansion project, etc. In the, said background, the Asset Reconstruction Company (India) Ltd. (hereinafter referred to as 'ARCIL') had issued an invitation for expression of interest inviting bids from prospective bidders for the realisation of the debt due from the petitioner-company. Pursuant to which, ARCIL had received various bids and Pinnacle Overseas Assets Limited (hereinafter referred to as 'POA') was the successful bidder.

15. Subsequently, a sanction letter came to be issued by ARCIL to POA incorporating all the terms necessary for the restructuring of the debt and capital of the petitioner-company. The board of directors of the petitioner-company had executed a definitive agreement with ARCIL and POA. Pursuant to the execution of the aforesaid definitive agreement, the scheme has been prepared by the petitioner-company as it is interested in the revival/rehabilitation of its business, which is not only in the interest of the petitioner-company, but also the creditors and shareholders.

16. In pursuance of the above decision, the board of directors of the petitioner-company, at its meeting held on January 27, 2007, approved the scheme of arrangement subject to the approval of the shareholders, secured creditors and the court. Accordingly, the petitioner-company has come up with an application C.A. No. 261 of 2007 to convene the meeting of the shareholders and the secured creditors of the petitioner-company, and this Court appointed the chairpersons for convening the meeting of the shareholders, fixing the date of meeting on March 23, 2007. Similarly, this Court also ordered convening of the meeting of the equity

shareholders on the same day, though separately. Pursuant to the said meetings convened, the chairpersons filed reports, stating that out of 16 secured creditors of the petitioner-company, all the secured creditors were present either through their representatives or the proxies. Of the 16 secured creditors, 15 secured creditors representing 98.49 per cent, of the total outstanding debt due to the secured creditors voted in favour of the resolution, while one secured creditor, viz., UTI Asset Management Company P. Ltd., holding 1.51 per cent, out of the total outstanding debt due, voted against the resolution. Similarly, with reference to the equity shareholders, the report shows that in pursuance of the notice and publication of the notice of the meeting, 69 shareholders were present either directly or through proxies. Of the 69 equity shareholders present, 65 shareholders representing 99.99 per cent, of the total value of shares held by the shareholders, voted in favour of the resolution, while four shareholders representing 0.01 per cent. of the total value of shares, voted against the resolution.

17. It is stated that as a result of the notices issued by the chairperson to the shareholders, convening the meeting of the shareholders, one of the shareholders, viz., R.R. Godavari Power Limited/Mauritius had sent a communication dated March 16, 2007, proposing certain modifications in the scheme of arrangement. The proposed alterations relate to the alternation in the capital clause. The alteration proposed is that the authorized share capital of the company shall be enhanced from Rs. 235,00,00,000 divided into 23,50,00,000 equity shares of Rs. 10 each to Rs. 700,00,00,000 divided into 50,00,00,000 equity shares of Rs. 10 each and 0.05 per cent, or 20,00,00,000 redeemable preference shares of Rs. 10 each. It further provides that upon coming into effect of the scheme, the existing equity share capital of the company shall be restructured by converting the entire existing equity share capital of the company into redeemable preference shares with a coupon rate of 0.05 per cent, payable at the end of 15 years. The amendment further proposes to add in Part II of the scheme as under:

As far as the secured creditors and secured debt in respect of the undeveloped deferred payment guarantees are concerned, the payments in accordance with restructure obligation under this Part II of the scheme shall be made to such secured creditors only up on respective devolvments. Till such time, such money

shall be retained by the company in a separate no lien interest bearing account. Obligations of such secured creditors in their capacity as surety under the Deferred Payment Guarantees (DPGs) to the person to whom the guarantee is given will continue to be in accordance with DPGs in full. However, payment obligations by the company to such 'sureties' after devolvment shall be in accordance with the scheme.

18. It is stated that at the time of putting the resolution before the equity shareholders, the chairperson, appointed by this Court, proposed the scheme with the above modifications, as was proposed by the secured creditors ARCIL, which was seconded by another secured creditor, representing the Life Insurance Corporation of India Ltd. Accordingly, the resolution originally proposed with the above proposed modifications was put and was accordingly approved.

19. A perusal of the scheme shows that as far as existing share capital is concerned, it would be converted into 0.05 per cent, redeemable preference shares, which would be redeemed at the end of 15 years. The scheme further refers to the payment of an amount of Rs. 50 crores out of the outstanding amount to ARCIL by POA the bidder which intends to step into the company, as a manager as well as investor and equity holder. The schedule provides that in addition to Rs. 50 crores already paid, the said third party would pay another amount of Rs. 100 crores by way of equity share capital. In addition, it is proposed that the secured creditors would be paid by the company an amount of Rs. 150 crores out of the outstanding amount in 60 monthly instalments, commencing from April 30, 2007, with interest at 10 per cent, per annum, payable quarterly, towards the outstanding balance commencing from April 1, 2007.

20. A further sum of Rs. 175 crores proposed to be paid as a bulletin payment on March 31, 2012, to the secured creditors (pro rata inter se). The said amount shall carry interest at 10 per cent, per annum, payable quarterly commencing from April 1, 2007. The first interest payment date being June 30, 2007.

21. A further sum of Rs. 325 crores out of the outstanding amount to be paid by issuance of compulsorily convertible debentures to the secured creditors, as specified in the appendix-A which will carry a coupon rate of 5 per cent, per annum

payable half yearly to be converted into equity of the company at such price, that would convert to 10 per cent, equity stake of the fully diluted equity share capital of the company post the equity infusion for the expansion project of up to 350 MW additional capacity. The said conversion shall happen at the time of achievement of financial closure in respect of the equity shares of the company.

22. It further provides that from the date of conversion of CCDs into equity as above till the date of the IPO, the company shall pay to the secured creditors pro rata inter se, an additional amount calculated at the rate of 5 per cent, per annum on the said amount of Rs. 325 crores. In case the IPO does not materialize within 5 years from December, 12, 2006, the secured creditors shall have the put option on the bidder for selling equity stake/CCDs of the secured creditors for a total value of Rs. 325 crores together with accrued interest at the abovementioned rate.

23. In addition to the above, a further amount of Rs. 8.5 crores to be paid to the secured creditors within 7 days of the sanction of the scheme by this Court in lieu of past interest over dues and other charges to that extent.

24. The scheme further provides the residual debt of all the secured creditors shall be written off, after sanction of the scheme by this Court, and after fulfilment of obligations of the company as mentioned in Clauses (a) to (c) and (e) and conversion of CCDs into equity shares in accordance with Clause (d).

25. All legal proceedings instituted by the secured creditors including the criminal proceedings pending before any court, tribunal and authority against the company, promoters, directors and the guarantors or any other person arising due to default and/or non-payment of dues by the company to the secured creditors shall, after the effective date, stand terminated and cease to continue and be withdrawn. Therefore, the petitioner-company seeks approval of the above scheme.

26. On behalf of ARCIL-Spectrum Power Generations Limited-I Trust, represented by its trustee M/s. Asset Reconstruction Company (India) Limited, represented by its chief manager filed C.A. No. 1199 of 2007 to get itself impleaded as party respondent to support the scheme of arrangement, as proposed by the petitioner-company and opposed the objections raised by the other parties.

27. Similarly, ARCIL-Spectrum Power Generations Limited-II Trust, represented by its trustee M/s. Asset Reconstruction Company (India) Limited, represented by its chief manager filed C.A. No. 1200 of 2007 to get itself impleaded as party respondent to support the scheme of arrangement, as proposed by the petitioner-company and opposed the objections raised by the other parties.

28. Similarly, ARCIL-Spectrum Power Generations Limited-III Trust, represented by its trustee M/s. Asset Reconstruction Company (India) Limited, represented by its chief manager filed C.A. No. 1202 of 2007 to get itself impleaded as party respondent to support the scheme of arrangement, as proposed by the petitioner-company and opposed the objections raised by the other parties.

29. Similarly, ARCIL-Spectrum Power Generations Limited-IV Trust, represented by its trustee M/s. Asset Reconstruction Company (India) Limited, represented by its chief manager filed C.A. No. 1201 of 2007 to get itself impleaded as party respondent to support the scheme of arrangement, as proposed by the petitioner-company and opposed the objections raised by the other parties.

30. Identical affidavits are filed by the same person in all four applications. In the affidavit, it is stated that the applicant trust along with other trusts have acquired more than 80 per cent, of the financial assets pertaining to the company in question, and the company is stated to have committed various defaults in payment of amounts to its lenders on account of fiscal mismanagement leading to the said accounts being classified as non-performance account. It is stated that in accordance with the provisions of SARFAESI Act, the financial assets of the company were acquired by the applicant and other trusts through its trustee, Asset Reconstruction Company (India) Limited (ARCIL) being a securitisation and an asset reconstruction company.

31. Pursuant to the said acquisition and in accordance with the provisions of the said Act, ARCIL has invited expressions of interest for realisation of the dues of the company. It was clearly specified that the expressor has to mention its proposed transaction structure along with the offer for evaluation by ARCIL of the feasibility of the structure, it was stipulated in the said invitation that such structure may include a scheme under Sections 391 and 394 of the [Companies Act, 1956](#).

In response to the said invitation, ARCIL received four offers and amongst the said four offers, ARCIL found the offers submitted by one Lehman Brothers Commercial Corporation (Asia) Ltd., on behalf of Pinnacle Overseas Assets Ltd., as being the most beneficial to the lenders.

32. It is stated that the lenders could exercise only such of the powers as are vested in it either under the various documents and/or in the provisions of the applicable laws. Therefore, the invitation for expression of interest had been issued purely in the contractual capacity and the contractual deliverables therein had been clearly specified to be in the nature of the quantum of the secured debt held by the ARCIL. Hence, it was stipulated that the expressors had to specify their respective contemplated structures for the transaction under their respective offers. It was also mentioned that in any possible structure, the deliverables of the applicant were limited, which deliverables are in the nature of exercise of contractual rights available under various loan and security documents.

33. It is further stated that the successful bidder has proposed : (a) to pay Rs. 50 crores within 15 days from December 12, 2006; (b) payment of Rs. 150 crores in 6 monthly instalments commencing from April 30, 2007, together with interest calculated at 10 per cent, per annum payable quarterly in arrears on the outstanding balance starting from April 1, 2007; (c) payment of Rs. 175 crores as bulletin payment on March 31, 2012. Interest shall be payable on the said payment at 10 per cent, per annum payable quarterly from April 1, 2007, first payment date being June 30, 2007; (d) issuance of compulsorily convertible debentures of Rs. 325 crores which shall carry a coupon rate of 5 per cent, per annum payable half yearly to be converted into equity of the company at such price, that would convert to 10 per cent, equity stake of the fully diluted equity share capital of the company within 5 years post the equity infusion for the expansion project of up to 350 MW additional capacity. Such conversion shall happen at the time of achievement of financial closure for the expansion project and before any initial public offer in respect of equity shares of the company; (e) the residual debt of all existing lenders shall be written off; and (f) the existing equity capital of the company shall be restructured through composite scheme by converting entire existing equity share capital of the company into redeemable preference shares with a coupon

rate of 0.05 per cent, payable at the end of 15 years from the composite scheme becoming effective and by issuance of fresh equity in favour of the bidder.

34. It is stated that ARCIL is satisfied with the said offer of the Pinnacle Overseas Assets Limited and accordingly, issued a letter accepting its offer. Pursuant to the said letter of acceptance, the bidder deposited Rs. 50 crores as stipulated. Further, the nominees of the said company were also co-opted on the board of directors of the company. Thereafter, the company has filed the present application under Section 391 of the [Companies Act, 1956](#), seeking sanction of the scheme of arrangement to reconstruct the debt and capital of the company. The said scheme as proposed is approved by majority of the creditors, as well as the shareholders. It is further stated that with reference to the pledged shares, the pledgee had exercised the option of voting at the meeting of the shareholders, as per the agreement between the pledgor and the pledgee. Therefore, ARCIL sought for approval of the scheme, as proposed by the company.

35. Similar impleaded applications are filed on behalf of some of the shareholders. C.A. No. 852 of 2007 is filed by Sri M. Kishan Rao individually, as well as on behalf of his HUF, representing the promoter shareholder of the company in question. Further, similar applications are also filed in C.A. Nos. 1071 of 2007 and 1240 of 2007 on behalf of two of his group companies, viz., M/s. Bambino Agro Industries Ltd., and Bambino Finance Private Ltd., which are stated to be the shareholders, to come on record as respondents, opposing the proposed scheme. Similarly, on behalf of 5 individual shareholders, C.A. No. 974 of 2007 is filed, to get themselves impleaded as party respondents, who sought to oppose the scheme.

36. It is stated in the affidavit filed by Sri M. Kishan Rao that he is a shareholder, holding 27,370 shares, while his HUF was holding 18,85,090 shares, apart from the shares held by the group companies. It is stated that though their names are being shown in the register of shareholders of the company, but, however, they were not allowed to participate in the meeting by the ARCIL which issued a letter dated March 20, 2007, informing the applicants that ARCIL has been exercising its right to vote, and therefore, the applicants were asked not to participate in the

meeting of the members of the company, which was convened as per the orders of this Court, appointing chairpersons, for putting the scheme for consideration of the members of the company. It is stated that in view of the fact that they were prevented from participating in the meeting of the shareholders, they could not raise any objections with regard to the scheme placed for consideration of the members, therefore, it is pleaded that they should be given an opportunity to raise their objections to the proposed scheme.

37. It is stated that apart from being shareholders of the petitioner-company, this applicants have substantial interest and stake in the company as the promoters and guarantors for the loans availed of by the company from the banks and financial institutions. It is stated that the said guarantees subsequent to the change in the management of the applicant-company in October, 2003, were never extended. The said guarantees also ceased to exist in the light of the recent developments wherein ARCIL took over the applicant-company under the Securitisation Act and through a sham and dubious bidding process allotted the same to a company, viz., Pinnacle Overseas Assets Ltd.

38. It is stated that the entire bidding process conducted by ARCIL was during the period when the board of the applicant company consisted of an illegally elected chairman and directors whose election through a never held extraordinary general meeting on March 10, 2006, was challenged by him through a suit being O.S. No. 329 of 2006 on the file of the Second Addl. Chief Judge, City Civil Court at Hyderabad. It is stated that an interlocutory application was also filed as I.A. No. 3023 of 2006, wherein an order was passed against the chairman and directors, preventing them from acting. But, however, the said order was modified in appeal by the High Court, confining the restriction from taking any major decision. When such is the case, it is surprising how the illegally elected chairman and directors could correspond with ARCIL and could do all in finalizing the bidding process in collusion with ARCIL.

39. It is stated that there are several discrepancies in the scheme being sought to be approved. The scheme as submitted to the court and also the facts and figures as detailed in various annexures filed along with the company petition are full of

distortions. The information provided is far away from truth and has been dented so as to suit the convenience of certain vested interests who are acting in the manner prejudicial to the interest of the applicant company. As an example, it is stated that the statutory auditors A.F. Ferguson and Co., chartered accountants, have submitted their limited review report. It is stated that the said auditors either turned blind eye to the reality or they were provided with insufficient information, which is clearly visible in the report, which is submitted by them. The scheme shows as if the guarantees provided by the applicants, continue even on this day. It is further stated that the said statement made in the scheme and sought to be approved is false and mala fide in nature. The same defies the logic and appears to be a product of mala fide intentions. Even in the profit and loss account for the period April 1, 2006, to December 12, 2006, there are too many discrepancies and mistake of facts and the same are intentionally made so as to cause wrongful loss to the original promoters and guarantors of the applicant-company.

40. It is stated that the scheme as it exists today is outside the scope of all parameters laid down by law, against principles of equity and probity. The scheme is not at all clear and smacks of a hidden agenda wherein things not mentioned in the scheme are sought to be pushed through in the garb of the scheme. The valuable assets of the applicant-company or a portion thereof are sought to be transferred to a third party and it is anybody's knowledge that the funds raised there from would be utilized for the purpose of funding the bid of Pinnacle Overseas Assets Ltd. The amounts shown as payables to the O & M Contractor are padded up with jacked up figures when compared with the payables shown during the last year. The company application is a bundle of distorted facts and is not in the best interests of the minority shareholders of the applicant-company. The scheme is devised with mala fide intentions of hijacking the applicant-company and its assets at a throw away price which by any stretch of imagination is grossly lower when compared to the real intrinsic value of the applicant-company. Therefore, sought for impleadment as respondents so as to bring on record all the facts so as to consider the scheme on its merits.

41. It is stated that the applicant along with his sons and group concerns together with National Thermal Power Corporation (hereinafter referred to as 'NTPC') and

Spectrum Technologies USA Inc. have started the company. The installed capacity of the company is 208 MW of power generation. The applicant and his associates have invested a sum of Rs. 26.50 crores in equity of the petitioner-company. Further, helped to raise loans to the tune of Rs. 5.44 crores from the banks and financial institutions, by giving personal guarantees as well as giving guarantees of assets of the applicant and his associates and family members.

42. It is stated that Dr. A.V. Mohan Rao joined the company as additional director in the year 1994 and ever since his induction, he turned hostile and created umpteen number of problems and filed numerous cases either by himself and his associates against this applicant and company and created obstacles in running the company smoothly though, at no point of time, he gave any sort of guarantee or pledged his properties as collateral securities in favour of the banks or financial institutions despite he was considered as a co-promoter in the limited sense. It is stated that the company was run by the applicant as a managing director till September 30, 2003, smoothly in spite of hurdles, but, however, after the applicant was eased out as managing director and the entire board was controlled by the nominees of the institutions, viz., IDBI, ICICI, SBI, IFCI, IRBI, LIC and various other banks and financial institutions till Dr. A.V. Mohan Rao forcibly took over the management on March 10, 2006. When the nominee directors of the financial institutions and banks were removed illegally from the board, the banks and financial institutions, including ARCIL did not initiate any action from their side.

43. It is stated that during the applicant's tenure as managing director, the company has repaid a sum of Rs. 871.01 crores to the banks and financial institutions as against Rs. 700 crores disbursed by them. But, it is so unfortunate that the banks and financial institutions have appropriated the amounts remitted by the company unilaterally against the interest and penal interests without absorbing even part of the amount towards the principal. It is further stated that under the applicant's management, the company earned a net profit of Rs. 49.81 crores for the financial year ended March 31, 2002 and the profit was earned after servicing the debts, meeting all the expenditure and writing off all pre-operative expenses and depreciation. However, during the year ending March 31, 2003, the company suffered a loss of Rs. 14.03 crores in which year the management was taken over

by the financial institutions with effect from October 1, 2003, and by the end of the said year, the loss had been increased, and finally the said loss mounted to about Rs. 245 crores by the end of March 31, 2006. At that stage, the erstwhile director Dr. A.V. Mohan Rao usurped the management of the company. The applicant complained of the said illegal act of usurpation of management by illegally removing the nominee directors of the institutions. The institution did not take any action against the said Dr. A.V. Mohan Rao, and finally the said Mohan Rao together with ARCIL have come up with the present illegal scheme.

44. It is stated that the applicant has made it clear to the banks and other financial institutions that the pledge of the shares holds no more good, as the pledge was not even registered, therefore, it was claimed by the applicant that he and his associates would continue to be shareholders of the company, despite which, the institutions and the company deprived the applicant and his associates from participating and exercising their rights at the shareholders meeting. It is stated that the ARCIL after taking over the secured assets and management of the company, invited bids for expression of interest without following any uniform rule, rhyme or terms and conditions and the same was done with an intention to favour the present bidder.

45. It is stated that the applicant understood that ARCIL has not entertained the better bids received from others and finalized the offer in favour of one Lehman Brothers Commercial Corporation Asia Limited, for the reasons best known to them. The scheme itself is silent as to how the affairs of the company were conducted and how the company was for a long time under the illegal management by Dr. A.V. Mohan Rao and how the bidding process was conducted. The whole bidding process conducted by ARCIL is far from law and suffers from lack of transparency and the whole process was planned clearly to help the bidder to take over the project, almost for a song. The scheme and arrangement are silent as to the mode adopted by ARCIL under Securitisation Act and there is absolutely no clarity as to whether the present scheme has anything to offer to other creditors or what would be the status of the company and other creditors under the scheme. ARCIL has not given wide publicity while inviting bids.

46. It is stated that the scheme as proposed shows that the assets would be transferred in favour of Pinnacle Overseas Assets Limited, a company stated to have been formed by Lehman Brothers Commercial Corporation Asia Limited, who was the original bidder, but has a minuscule minority holding in the above company along with others. Neither the shareholding pattern of the company in whose favour the assets have to be transferred, nor who is the original bidder nor the procedure adopted in approving the bids was placed in the petition with a clear intention to avoid scrutiny by this Court.

47. It is stated that no order sanctioning any arrangement shall be made unless the court is satisfied that the company or any other person by whom an application has been made has disclosed to the court by an affidavit or otherwise of all material and facts relating to the company, the latest financial position of the company and the latest auditors report, etc. It is further stated that the scheme in question is violative of the provisions of Section 391 of the Companies Act, in addition to violation of the applicant and his associates' rights as shareholders and creditors. It is stated that the scheme contains a hidden agenda to help the bidder to takeover the project of the company, implemented, executed and established by the applicant by sacrificing his monies, properties and time, just for a peanut. The scheme also suffers from legal infirmities. It is also stated that the losses which were minimal by the time the management of the company was taken over by the financial institutions, it was mounted to Rs. 245 crores within a short time of three years, for which the financial institutions owed obligation to explain the reasons and circumstances, under which the said losses have been mounted up, which the financial institutions have not explained.

48. It is stated that the balance-sheet for the year March 31, 2006, was approved by the board of directors on January 27, 2007. It is also stated that the board of directors have approved the scheme on January 27, 2007, if it is a fact, the same ought to have been find place in the annual report for the year ending March 31, 2006, which is conspicuously absent. It is stated that in terms of Section 217 of the Act, any material change that has taken place from the end of the financial year till the date of approval of the balance-sheet, the same should reflect and found as part of balance-sheet which was not shown, thereby violating the mandatory

provisions of Section 217, It is also stated that even though the pledge was not got registered with the company by the ARCIL for the purpose of exercising the rights of the shareholders, but improperly exercised which is contrary to the terms of the pledge, and therefore, the result of the meeting of the members of the company is vitiated by the illegal exercise of the rights by the ARCIL with reference to the pledged shares.

49. It is stated that the appointed date was fixed as December 13, 2006, mischievously so as to circumvent the provisions of BIFR, as the company became sick as on March 31, 2006, itself and the same was known as such to the Board on January 27, 2007, therefore, the appointed date was mischievously and calculatedly designed so as to circumvent the statutory provisions of SICA. The terms of the scheme, as proposed, cannot be considered as beneficial to the company and its shareholders and the creditors, apart from that the scheme does not refer to the other bids if any given with respect to the terms. It is contended that the bidder has been given number of benefits not only the written off the residual debt, but also offered long term of 60 months to pay Rs. 150 crores and again the bulletin amount also is to be paid only at the end of 5 years while the part of the amount was converted as convertible debentures. It is stated that though a new project and expansion was shown, but there are no details as to how the finances are going to be raised for the purpose of the new project for setting up of 350 MW additional capacity of power-plant. The applicant also referred to various items of expenditure, which were stated to have been incurred exorbitantly, which is stated to have been the result for the company to become sick.

50. On the same lines, objections are raised for approval of the scheme, on behalf of other two group companies, viz., M/s. Bambino Agro Industries Ltd. and Bambino Finance P. Ltd.

51. Similarly, in the other implead application who are 5 in number, stated that they were not served with notices of the convening of the meeting of the members of the company. It is stated that each of the member is holding 2,700 shares of Rs. 10 each. They were denied of the opportunity to participate in the meeting of the

shareholders, therefore, the scheme, as proposed, it approved, deprive these applicants from participating, and therefore, the same is in violation of the principles of natural justice. These applicants also raised an objection that though one of the members proposed an amendment to the scheme by issuing a notice in advance, the petitioner-company ought to have been incorporated as part of the notice of the scheme and ought to have given notice as is contemplated under the provisions of the Companies Act.

52. It is stated that under Section 190 of the Act, any resolution proposed, is to be communicated to all the members. As no such communication was given to the members, the convening as well as conducting the meetings itself is illegal and vitiated. It is stated that even the board's resolution does not reflect the approval of the scheme. It is stated that the interest of the directors was not disclosed as is contemplated under the provisions of the Act, and therefore, the scheme as proposed, seeking approval of the court, is liable to be rejected.

53. Counters are filed, opposing the implead applications filed by the objectors, opposing the sanction of the scheme, while at the same time, denying the allegations that are made therein. It was stated that the opposing shareholders have pledged their shares in favour of the financial institutions with a right to vote by participating in the shareholders meeting under the terms of the pledge. Exercising such right, the pledgee had participated in the shareholders meeting and voted in favour of the scheme. When once the rights in respect of the pledged shares have been exercised by the pledgee, viz., creditor financial institutions, the original holders of such shares cannot come on record to oppose the scheme as if they can again exercise their rights in respect of such shares. Even with reference to other allegations also, the stand of the company is that there are no merits in the said allegations and even the alleged expenses, which are stated to have been incurred by the company was only for the purpose of and in the course of its business and not otherwise. With reference to non-service of notice, it is stated that notices issued by the chairpersons were got issued under certificate of posting through Karvey Service. Apart from the individual notices, notice was published in the newspapers. Therefore, the service of notice is sufficient. Therefore, sought for dismissal of the applications filed by the applicants, opposing the scheme.

54. Learned Counsel for the petitioner relying upon the pleadings that are stated in the petition contended that the petitioner-company had obtained a licence for establishment of power generating unit by way of transfer, which was, in fact, originally granted in favour of NTPC. The petitioner-company proposed to set up a unit for production of 226 MW power, but later it was down rated to 208 MW. The competent authority approved the project with a capital cost of Rs. 748.43 crores on March 3, 1994. But, however, projected cost had over run to Rs. 972.60 crores mainly due to exchange rate fluctuation, increase in customs duty as well as the resulting increase in interest during the period of construction, and thus, the project was set up with a cost of Rs. 972.60 crores. The said cost of the project was funded both rupee equity as well as foreign currency equity and the loans obtained both in terms of rupees as well as foreign currency, including short term loans. It is stated that though the company was able to service the secured creditors up to 2001-02, but, however, subsequently it was not able to service the secured creditors and committed defaults and even the company also started suffering losses. For the year ending March, 2003 the company suffered a loss of about Rs. 14 crores which was subsequently increased to about Rs. 245 crores as on March 31, 2006. It is stated that due to non-service ability, the debts have mounted from about 866 crores in 2003 to 1,225 crores, in addition to the losses suffered by the petitioner-company. The petitioner-company's capital was only about 176 crores, though the APTRANSCO recognized the overdraft of Rs. 106.60 crores taken by the petitioner from the State Bank of India to bridge the gap of funding of equity capital by paying 16 per cent, return on the same, but no incentives under the PPA agreement were released. It is stated further that due to breakdown, the unit was closed for shorter periods, which had, aggravated the situation.

55. In the light of the above said circumstances, ARCIL which took over majority of the secured loans which are due to other financial institutions and banks, took over the management in 2003. Thereafter, in view of mounting losses by 2006, it felt that it would be imperative to streamline the management, infuse managerial and technical expertise of the highest level, restructure the petitioner-company's capital as well as to execute expansion of generation capacity. Since the options available for the ARCIL to initiate any steps towards the above are limited,

therefore, the ARCIL thought it fit to invite third parties having interest in the company for the purpose of securing additional capital as well as managerial and technical expertise, apart from expanding the generating capacity. In the process, ARCIL identified POA as the successful bidder. As a result of which, the board of directors of the petitioner-company had executed a definitive agreement with ARCIL and POA. Pursuant to which POA has even deposited an amount of Rs. 50 crores with ARCIL apart from getting its nominees into the board of directors. It is stated that as a result of the said agreement a scheme was formulated for the purpose of restructuring the capital as well as the debt. It is stated that in the process, it was proposed to convert the existing share capital into redeemable preference shares bearing a coupon rate at 0.05 per cent, redeemable at the end of 15 years, while at the same time POA would bring in 150 crores towards share capital and further agreed to pay a sum of Rs. 150 crores in 60 equal monthly instalments with interest at 10 per cent, with quarterly rests, in addition to the payment of Rs. 175 crores at the end of 5 years as a bulletin payment. In addition, the scheme also envisages the conversion of the debt to the extent of Rs. 325 crores into convertible cumulative debentures, which would be converted into equity shares at the option before the end of 5 years, and all the financial institutions have agreed to write off the balance amounts once the scheme is approved. In addition, the scheme also contemplates that the new management would take steps to set up another unit with a generating capacity of 350 MW power by mobilizing the required capital.

56. According to the petitioner, the said scheme, with the above terms, was approved by the board of directors and was also approved by the creditors as well as by the shareholders by the requisite majority. Therefore, the petitioner has come up with the present petition, seeking approval of the scheme. It is contended by learned Counsel that in view of the surmountable debt position, which mounted to about Rs. 1235 crores, there is no other option, except to go for this type of scheme and the ARCIL found that this is the best possible scheme that was offered, therefore, sought for approval. Learned Counsel also contended that there was only one secured creditor, viz., UTI Bank, which opposed the scheme, which was holding very minor share as a secured creditor.

57. Further, after the completion of the meeting of the secured creditors by the time of the present petition, even the said creditor is also agreeable to the proposed scheme. It is further stated that majority of the shareholders have approved the scheme except the dissent of four shareholders present at the meeting, representing 0.01 per cent. of the total value of the shares as is stated in the report of the chairperson. Therefore, learned Counsel sought for approval of the scheme.

58. It is stated that an affidavit was filed on behalf of the Regional Director of the Company Affairs by the Registrar of Companies. The only objection taken by the Registrar of Companies is that by conversion of the existing share capital into redeemable preference shares and bringing in fresh capital by the POA, there may be a gap, which would result in creation of vacuum in the equity capital, which could not be allowed. The Registrar of Companies also raised another objection with reference to the voting right of the shareholders, exercised by the ARCIL as a pledgee. It is stated that as per the letter of ARCIL addressed to the chairperson, ARCIL had stated to have been exercising voting power in respect of 2,64,89,700 equity shares which were pledged with them. But, however, the chairman's report shows that the value of the shares was only to the extent of Rs. 21,47,92,690 the balance shares were not considered and nothing was specifically mentioned in the report of the chairperson. Learned Counsel contended that the so called objections raised by the Registrar of Companies are only formal and they would not come in the way of approving the scheme as proposed. Therefore, ARCIL sought for approval of the scheme.

59. With reference to the objections that are being filed by one of the founder member of the company together with his associates, it is contended by learned Counsel that since all their shares were pledged with voting rights in favour of the secured creditors, they have no right to raise any objections as the creditors in whose favour the shares were pledged, have exercised their vote in favour of the scheme. Therefore, they have no right either to come on record as objectors or to raise any objections. Learned Counsel also contended that the objections raised by the objectors are motivated with an intention to see that the scheme would not go through. It is also contended that as on date, all the shareholders have lost

their share of capital as the net worth of the company is only negative, since the debts are many times more than the net worth of the company. In spite of it, under the scheme, the shareholders were promised to return their share capital after certain period, may be with a nominal interest. The said proposal is beneficial to all the shareholders, therefore, in fact, majority of the shareholders to the extent of 99 per cent, present and voted at the resolution, have voted in favour of the approval of the scheme. Therefore, there is no merit in the objections that are raised and the objections are only with an oblique motive.

60. On behalf of the ARCIL which filed applications, supporting the scheme, learned senior counsel, who appeared for ARCIL contended that while considering the scheme for approval, the scope and jurisdiction of the court is very limited, as was held by the apex court in *Miheer H. Mafatlal Industries Ltd. v. Mafatlal Industries Ltd.* : AIR 1997 SC506 . It is contended that the jurisdiction of the court is only supervisory and it is only the commercial wisdom of the shareholders and the creditors who are entitled to exercise their voting in their commercial wisdom, which could not be interfered by going into the merits examining those as an appellate authority. Learned Counsel contended that as was observed by the apex court, the jurisdiction of this Court is only peripheral and supervisory and not appellate, and 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. Therefore, learned Counsel sought approval of the scheme as the same is in accordance with the broad guidelines formulated by the apex court in *Miheer H. Mafatlal Industries Ltd. v. Mafatlal Industries Ltd.* : AIR 1997 SC506 . Learned senior counsel also relied upon the judgment of the apex court in *Hindustan Lever v. State of Maharashtra* [2003] 117 Comp Cas 758 where the principles formulated by the apex court in *Miheer H. Mafatlal Industries Ltd. v. Mafatlal Industries Ltd.* : AIR 1997 SC506 were reiterated while holding that the jurisdiction of the court is to see the compliance of the statutory requirements. Therefore, ARCIL sought for approval of the scheme. Learned Counsel for the petitioner also relied upon the following decisions in (1) *PMP Auto Industries Ltd., In re* [1994] 80 Comp Cas 289 (Bom), (2) *Spartek Ceramics India Ltd., In re* : 2006(1)ALT589 and (3) *Jaypee Cement Ltd., In re* , in support of his contentions.

61. Learned senior counsel, appearing for the objectors, who filed the applications to get themselves impleaded, contended that the applicant is the founder member, his family members and group companies are responsible for establishing the power generating plant of the company after entering into an agreement with NTPC and Spectrum Technologies USA Inc. The applicant and his associates invested a sum of Rs. 26.50 crores in the equity share capital of the petitioner-company, apart from raising loans to the tune of Rs. 544 crores from the banks and financial institutions, by giving personal guarantees as well as giving guarantees of assets of the applicant and his associates and family members. It is stated that the applicant was originally managing director of the company up to 2003 till he was eased out of the said post by the financial institutions.

62. It is stated that one Dr. A.V. Mohan Rao joined the company as additional director in the year 1994 and since then he was creating hurdles and problems to this applicant as well as to the company from smooth running of its activities. It is stated that in spite of the hurdles and troubles created by the said Mohan Rao the applicant was able to run the company smoothly as its managing director till September 30, 2003. During the year 2001-02 the company, in fact, made a net profit of Rs. 49.81 crores. The said profit was earned after servicing the debts as well as meeting all other expenditure. It is stated that during his tenure as managing director, the company has repaid an amount of Rs. 871.01 crores to the banks and financial institutions as against Rs. 700 crores disbursed by them by way of loan. But, unfortunately, the banks and financial institutions have appropriated the entire amount paid by the company unilaterally towards interest and penal interest without even adjusting a pie towards the principal amount.

63. However, the company during the year ending March 31, 2003, suffered a loss of Rs. 14.03 crores. During the same year, the financial institutions and banks, viz., IDBI, ICICI, SBI, IFCI, IRBI and LIC have assumed the management and possession of the assets are even taken over under Securitisation Act. The nominees of the above referred financial institutions and banks were in charge of the management as directors of the company till 2006, during which period, the loss of Rs. 14 crores in the year 2003 had gone up to Rs. 245 crores by the end of March 31, 2006. The said financial institutions nominees continued in the

management till they were illegally thrown out by Dr. Mohan Rao and his group without even getting themselves as elected as directors. It is stated that even though the applicant has complained of the said illegal act of Mr. Mohan Rao, the financial institutions, including ARCIL, did not take any action. Therefore, the applicant was constrained to file a civil suit to restrain Mr. Mohan Rao and his group from continuing in the management illegally. Though the trial court granted an injunction against them, but, however, the appellate court modified the order so as to carry out day to day work without taking any policy decision, pending disposal of the appeal.

64. It is stated that during the management of the said Mohan Rao, who had illegally usurped the office, the present scheme has been put forth with the assistance of ARCIL. It is contended by counsel for the applicant that there is a hidden agenda in the scheme, which is to benefit Mr. Mohan Rao and his group. It is stated that the scheme as proposed is not in any way beneficial either to the creditors or the shareholders. Under the scheme, the creditors have agreed to accept Rs. 150 crores in 60 instalments and Rs. 175 crores after 5 years as a lump sum amount and to convert an amount of Rs. 325 crores as convertible debentures, while waiving the balance residual debt. It is contended that from the above, it is clear that the proposed party who intends to take over the management of the company with its assets has to bring in a sum of Rs. 150 crores by way of equity capital and nothing more. It is stated that the company is getting gross income of Rs. 22 crores per month under PPA. Therefore, it is stated that even from out of the receipts by the company, the amount as proposed could be repaid without incurring or investing any amount by the proposed third party. In the process, it is stated that all the shares of the existing shareholders would be converted into redeemable preference share capital bearing coupon rate of 0.05 per cent, which could be treated as almost zero and would be redeemable at the end of 15 years.

65. It is stated that though the ARCIL has selected the proposed company -which is named as POA, but actually the participant was one Lehman Brothers Commercial Corporation Asia Limited, with reference to which, the shareholding was not disclosed. But even otherwise also the Lehman Brothers Commercial

Corporation Asia Limited, which is stated to be an expert in the field, holds only a minuscule share capital. The process of invitation by way of expression of interest and the selection of the bidder was not transparent as either details of the participants or the terms that are offered by different participants were not placed before this Court nor made any reference in the scheme. It is further stated that though the scheme refers that a new unit of the company would be set up with an additional 350 MW capacity, there are no details how the finances are going to be raised for the said purpose. Apart from all these, it is contended by learned Counsel that since the financial institutions including ARCIL were in-charge of the company from the year 2003 to 2006, during which period the losses of the company had mounted from 14.03 crores to about 245 crores, it is for them to explain as to how and why the losses had mounted up to such an extent, and there was absolutely no such explanation.

66. It is further stated that the scheme does not comply with the provisions of Section 391 since the scheme is not accompanied by all the particulars, including the latest financial position and the audited balance-sheet. In addition, it is stated that the applicant and his associates were prevented from participating in the meeting convened by the chairperson, as per the orders of this Court to consider the scheme for approval or otherwise. It is stated that though the shares were pledged to the original lenders, the said pledge gets lapsed or even otherwise also since ARCIL did not get itself registered with the company for the purpose of exercising the right of vote with reference to the pledged shares, it has no right to exercise such right of vote on behalf of the pledged shares, belongs to the applicant and his group. It is stated that the applicant and his associates have given guarantee for the repayment of the loans advanced to the company creating charge over their assets. Since the applicant was eased out as managing director as well as a director of the petitioner-company in the year 2003 and the guarantees have not been renewed thereafter, the guarantees would cease to be operative. But, however, without reference to the same, the scheme provides for continuing such guarantees in respect of the debts owed by the company. It is stated that the guarantees are executed by the applicant and his associates in favour of the financial institutions for advancing the loans to the company. Once the applicant and his associates were eased out, even as shareholders, the

guarantees which were given by them cannot be renewed or cannot be made as part of the scheme, without their specific consent for continuing such guarantees. Incorporation of such clause is illegal and against law.

67. It is also stated that the statements that are filed including the statements of limited review of the financial position contains full of distorted figures and the same does not co-relate with the figures that are given earlier, therefore, it has to be presumed that the scheme was presented without disclosing all the relevant material, with true and correct state of affairs. Therefore, ARCIL sought for rejection of the scheme. Learned senior counsel relied upon the following decisions in (1) J.S. Davar v. Dr. Shankar Vishnu Marathe : AIR1967 Bom456 ; (2) Balkrishan Gupta v. Swadeshi Polytex Ltd. : [1985]2SCR854 ; (3) Bharat Synthetics Ltd. v. Bank of India [1995] 82 Comp Cas 437; [2000] 1 Comp LJ 376 (Bom); (4) KEC International Ltd. v. Kamani Employees Union [2000] 1 Comp LJ 351 : [2002] 109 Comp Cas 659 (Bom); (5) Arjun Prasad v. Shantilal Shankarlal Shah [1962] 32 Comp Cas 149 (SC); AIR 1962 SC 1129; and (6) Exedy Ceekay Ltd. and Ceekay Daikin Ltd. In re [2000] 4 Comp LJ 142, in support of his contentions.

68. Sri V. Srinivas, learned Counsel, appearing for the other associate group companies, reiterated almost identical objections.

69. Sri V.S. Raju, learned Counsel, appearing for the four other shareholders, who filed the application, objecting the scheme contended that they were not served with notice of convening of the meeting of the shareholders, even though their names were shown as shareholders in the register of members. It is contended by learned Counsel that though an amendment has been proposed by one of the shareholders, much before the convening of the meeting of the shareholders, though the same was received by the company, it did not communicate or circulated to the other members of the company before the date of meeting, as is contemplated under Section 190 of the Act. In view of the non-communication of the amendment that was sought for, which was put for consideration in the meeting and in fact, approved, by incorporating the same as part of the scheme, the convening as well as conducting of meeting itself is illegal and vitiated. It is

further stated that though the board passed a resolution, the same does not reflect the approval of the scheme, as is evident from the annual report for the year ending March 31, 2006, as the alleged meeting of the board of directors had taken place on January 27, 2007, on which date even the financial results of the company were approved. The non-reference of the alleged resolution dated January 27, 2007, approving the scheme clearly shows that what was claimed on behalf of the company, is not true and correct, with reference to the proposed scheme, therefore, sought for rejection of the scheme. Learned Counsel relied upon the decision in *St. Mary's Finance Ltd. v. R.G. Jayaprakash*, in support of his contentions.

70. From the above the issues that arise for consideration are:

- (i) Whether the implead petitioners are to be allowed so as to consider their objections as to the sanction of the scheme
- (ii) Whether the scheme as proposed is in compliance with the provisions of the statute and can be approved ?

71. Issue No. 1: The company filed the petition, seeking approval of the ' scheme of arrangement with reference to the restructuring of the share capital as well as the debts. The company has come up before this Court with application, seeking to convene the meeting of the shareholders as well as the creditors by separate meetings under the chairpersons, appointed by this Court. Accordingly, the chairpersons convened the meeting where more than the statutory required percentage of the shareholders as well as creditors present and voted, approved the scheme as proposed, may be with some modifications, as are suggested by one of the shareholder, which was put for approval.

72. It is the case of the company as well as the creditor ARCIL that the contesting applicants, who filed applications to get themselves impleaded have pledged their shares in favour of the financial institutions while raising loans from them. As per the terms of the pledge, the pledgee was given the right even to exercise voting rights by participating in the shareholders meeting. It was the stand of the company as well as ARCIL, which also filed applications to get itself impleaded

that ARCIL had exercised the rights under the agreement of pledge, even for voting when the meeting of the shareholders was called for, for approval of the scheme. It is also stated that immediately after ARCIL came to know of the meeting of the shareholders convened, addressed a letter to the pledgers not to participate in the shareholders meeting, as a pledgee, it was exercising the right to participate in the voting. Therefore, it was stated that the objecting applicants did not even raise any objection at the meeting, and in fact, did not even participate in the shareholders meeting. Having not opposed the claim of the pledgee with reference to the shares pledged, the proposed applicants who pledged their shares have no right to object the proposed scheme, on their behalf, as the pledgee had exercised the right to vote, and in fact, voted in favour of the scheme, therefore, sought for rejection of their applications to get themselves impleaded as party respondents in the company petition to oppose the scheme of arrangement.

73. The contention of the opposing applicants is that even though their shares were pledged in favour of the financial institutions, which have transferred in favour of ARCIL, even assuming that ARCIL had exercised its right under the terms of pledge in favour of the scheme, still the petitioners have got a right in respect of their shares to oppose the proposed scheme. Since the rights of the opposing applicants have not been completely wiped off from their shares, they can come on record to oppose the scheme. Learned Counsel relied upon the decision of the apex court in *Balkrishan Gupta v. Swadeshi Polytex Ltd.* [1985] 58 Comp Cas 563, where the rights of the pledgee and the pledgor were considered. In the light of the said judgment, learned Counsel sought to allow their scheme.

74. In the present company petition, there are two sets of applicants; one set is by ARCIL representing four trusts. Applications have been filed on its behalf to get itself impleaded with an intention to support the scheme as proposed by the company. The company did not oppose the said applications as in fact, the said applicants are only in support of the scheme as proposed, therefore, the said applications filed by ARCIL are allowed.

75. Coming to the applications of the shareholders, who are one of the promoter and his associates and companies, which are holding shares in the company in

question, it is not in dispute that all the applicants in this group have pledged their shares in favour of the financial institutions at the time of raising loans for the purpose of setting up of the power generating plant. It is also not in dispute that the pledgee was given the right even to exercise the right of voting at the general body meeting or any other meetings of the shareholders. It is also not in dispute that ARCIL, as a pledgee had, in fact, exercised its right to vote in the shareholders meeting and voted in favour of the scheme.

76. It is stated that in order to prevent the applicants from participating in the shareholders meeting, ARCIL had addressed a letter to the applicants, conveying them its intention to exercise the right of voting by participating in the shareholders meeting, and further requested the applicants not to attend the shareholders meeting, which the applicants have complied by their non-appearance at the shareholders meeting. However, in the present petition, their stand is that still all the applicants have some right over the shares as the shares are still continuing in their names as far as the Register of Company is concerned, though they were pledged in favour of the financial institutions and the pledged assets were transferred to ARCIL.

77. In the case of *Balkrishan Gupta v. Swadeshi Polytex Ltd.* [1985] 58 Comp Cas 563, the apex court considered the consequences of the pledge and the rights of the parties with reference to the pledge. It would be appropriate to refer the same.

78. The apex court, after referring to some of the earlier judgments, observed that the two ingredients of a pawn are: (1) that it is essential to the contract of pawn that the property pledged should be actually or constructively delivered to the pawnee; and (2) a pawnee has only a special property in the pledge but the general property therein remains in the pawnor and wholly reverts to him on discharge of the debt. A pawn therefore is a security, where, by contract a deposit of goods is made as security for a debt. The right to property vests in the pledgee only so far as is necessary to secure the debt. The pawnor, however, has a right to redeem the property pledged until the sale.

79. The apex court, after referring to the decision in *Bank of Bihar v. State of Bihar* : AIR 1971 SC1210 , held that in the case of pledge, however, the legal title to the

goods pledged would not vest in the pawnee. The pawnor has only a special property. A pawnee has no right of foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law. In this sense a pledge differs from a mortgage. In view of the foregoing the pawnee in the instant case, i.e., the Government of Uttar Pradesh could not be treated as the holder of the shares pledged in its favour. The Cotton Mills Co., continued to be the member of the company in question in respect of the shares pledged and could exercise its rights under Section 169 of the Act.

80. A perusal of the above judgment of the apex court clearly shows that even after the pledge, the pledgor or original owner would not lose his interest in entirety. As is observed in the above judgment of the apex court, the pledgee would get a special right over the pledged assets to proceed against them for realization of the debt, in case the pledgor fails to repay the debt. In the light of the said judgment, it is clear that all this group of applicants, viz., Mr. Kishanrao, his HUF and other group companies who pledged their shares in favour of the financial institutions, which was transferred in favour of the ARCIL, still have a right in the shares, therefore, they are entitled to come on record to raise their objections. Under the above circumstances, all the applications filed for impleading them as party respondents are allowed.

81. Issue No. 2 : Coming to the merits of the scheme, it was claimed on behalf of the company that by the end of March 31, 2006, the company suffered huge accumulated losses and the company indebted to the extent of about Rs. 1,235 crores with the meagre revenue which it was realizing by way of sale of power under PPA, which was not sufficient to service the debt, leave apart the payment of principal debt. Therefore, it was thought fit by the financial institutions which took over assets of the company in the year 2003 itself, to restructure the capital and also to bring better management, as well as technology so as to improve the debt position of the company so as to service the debt. It was also felt that unless the generating capacity is increased so as to increase the revenues, it would not be possible to service the debt as well as to effect the repayment of the debt. Therefore, the ARCIL invited bids by way of expression of interest and in the process, selected the POA whose offer was found to be the best under the

circumstances, therefore, the company has even issued a letter of sanction so as to make the said POA to deposit the agreed amount of Rs. 50 crores with the ARCIL, which was complied with. It was also agreed between the parties that the proposed bidder has to come up with a scheme for restructuring the share capital, debts, bring in finance, better management and technology, and accordingly, the scheme has been formulated.

82. It is stated that as per the orders of this Court, separate meetings have been convened of the creditors as well as shareholders, where the scheme was approved by more than the statutory percentage of the creditors and the shareholders. Therefore, the present petition is filed seeking approval of the scheme. It is stated that the company had complied with all the statutory requirements. Further, the scheme as proposed was already approved by the board of directors at their meeting, subject to the approval of the shareholders, creditors and the court, and further, as the scheme was approved by the shareholders as well as creditors, therefore, there can be no further for approving the scheme as proposed. It was also contended by learned Counsel, appearing for the petitioner, as well as the ARCIL that in view of the settled proposition of law, as is laid down in *Miheer H. Mafatal v. Mafatlal Industries Ltd.* : AIR 1997 SC506 since this Court is not sitting as an appellate authority, the scheme as proposed is to be approved. It was also stated that though a formal objection has been raised by the Registrar of Companies on behalf of the Regional Director, the said objection has no merit, since the existing share capital is being converted into redeemable preference share capital, while at the same time, the new shareholder is bringing share capital of Rs. 150 crores of which Rs. 50 crores have already been paid with the ARCIL, therefore, there cannot be any gap between the conversion of the existing share capital and the contribution of fresh share capital by the incoming shareholder. Learned Counsel also contended that under the present circumstances, this is the best scheme, as proposed, since the new shareholder intends to set up a new generating plant with capacity of 350 MW in order to improve the financial position of the company by mobilizing the required finances, therefore, sought for approval.

83. From the material on record it is clear that the company has come up , with the present petition seeking approval of the scheme as proposed containing the terms, which are agreed to by the petitioner-company, the secured creditor ARCIL (holding more than 80 per cent.), and the bidder. Since the scheme was approved by the petitioner-company subject to the approval of the shareholders, its creditors and the court, the petitioner-company moved this Court by filing C. A. No. 261 of 2007 seeking appointment of a chairperson to convene the meeting of the shareholders and creditors separately and accordingly as per the orders of this Court meetings were held and the chairpersons appointed by this Court have filed their reports. As per the said reports, out of 16 creditors, 15 creditors, representing 93.75 per cent, of the total votes cast were in favour of the resolution, while one secured creditor holding 6.25 per cent, of the total votes cast, has voted against the resolution. Similarly, with reference to the shareholders, the report shows that out of 69 shareholders present and voted, 65 shareholders, representing 99.99 per cent, of the total value of the shares held by them have voted in favour of the resolution, while four shareholders, representing 0.01 per cent. of the total value of the shares held by them voted against the resolution. In view of the approval of the creditors as well as shareholders by majority, i.e., more than the statutory requirement sought for approval of the scheme. The scheme is intended to restructure the debt, infusion of additional equity and strengthening of the management, etc. Therefore, the scheme envisages the bidder, viz., POA to bring in Rs. 150 crores by way of equity share capital of which Rs. 50 crores have already been deposited with ARCIL while the existing subscribed share capital would be converted into 0.05 per cent, redeemable preferential shares to be redeemed at the end of 15 years. It was further provided for payment of Rs. 150 crores in 60 monthly instalments, which bears interest at the rate of 10 per cent, quarterly payable, apart from the bulletin payment of Rs. 175 crores at the end of five years, which shall also carry the interest at 10 per cent, per annum, quarterly payable. In addition to the above payments, a sum of Rs. 325 crores would be converted into convertible debentures to be issued in favour of the creditors of the company, which would be converted at the option of the creditors at the end of five years, before the petitioner-company goes to the initial public offer of equity. The same also shall carry interest at the rate of 5 per cent, per annum, payable half

yearly. The scheme also further provides that POA would mobilize the finances required to set up another power generating plant of the capacity of 350 MWs. The scheme also provides for payment of Rs. 8.50 crores to be paid to the secured creditors within seven days of the sanction of the scheme in lieu of past interest, over dues and other charges to that extent. According to the secured creditor ARCIL, this is the best offer received from the bidders that have been participated in the bid when it had invited expression of interest. Therefore, ARCIL sought for approval.

84. The contesting respondents, on the other hand, opposed the scheme on various grounds that are already set out in their applications, which are already referred to earlier. It was the stand of the respondents that there is a hidden agenda in the scheme in order to benefit some of the shareholders, the assets of the company are being handed over to a third party without bringing any substantial amounts to benefit the company.

85. The objectors raised various objections stating that the ARCIL did not specify the procedure that has been followed while inviting the bids and there was no transparency in the bidding process. Shareholding of POA is not specified even after raising objections. All the material facts are not disclosed including the interest of the directors as is contemplated under the provisions of the Act. At the time of bidding, the company was managed by the illegally elected chairman and directors. It was the contention of the objectors that the facts and figures furnished are of distorted one, including the one that are furnished in the profit and loss account. It is stated that though the scheme is intended for restructuring of the capital and the debt, no reference was made in respect of the creditors other than the secured creditors. The objectors also aggrieved by a clause containing in the scheme for continuing the guarantees which the objectors as original promoters of the company have given to the secured creditors while they were in the management of the company even though they ceased to be the managing director/directors, even after the approval of the scheme. It was their claim that they did not extend the guarantees after they were eased out of the management in the year 2003 when the company was taken over by the financial institutions, the creditors. When once the guarantees are not extended after the objectors were

eased out of the management, the guarantees cannot be continued by incorporating a clause in the scheme. Since the guarantee is a separate transaction entered into by the objectors with the financial institutions, while the scheme is an arrangement or agreement between the company and its creditors on one hand and its shareholders on the other, including a third party bidder, who intends to bring in additional capital. Therefore, the guarantees cannot be extended beyond the period for which they were executed. It is also stated that the amounts that were payable to O & M' Contractors have been jacked up. It is their further objection that even though the balance sheet for the year March 31, 2006, was approved on January 27, 2007, on which date the directors of the company also approved the scheme but no mention of it was made in their annual report. Therefore, sought for rejection of the scheme as proposed.

86. In reply the contention of the petitioner-company is that the bidding process conducted by the ARCIL is not part of the scheme. The scheme is confined only to the restructure of equity capital as well as strengthening of the management and the financial position of the company. With reference to the furnishing of the relevant material, all the material was made available, including the financial statement that was available as on the date of the filing of the company petition. Further, subsequent statements were filed at the time of hearing of the C. P. In fact it was contended that even the limited review of the balance-sheet prepared by the auditors up to December 2006 was also filed. In addition it is stated that in order to comply the objection of the objectors even an un-audited balance-sheet for the year ending March 31, 2007, is also filed which is available on record. With reference to the persons in the alleged illegal management at the time of bidding, it is stated that the petitioner-company was not part of the bidding process but after finalization of bidding process by ARCIL, the same was agreed as the company is not in a position to pay the debts. It is further stated that as soon as the bidding process was completed, the alleged illegally elected chairman and the directors have resigned and in their place the ARCIL had nominated the directors, who are the nominees of the proposed shareholder, viz., the bidder whose nomination has been effected in conformity with the definitive agreement that was entered into between the petitioner-company, the ARCIL and the bidder pursuant to which an amount of Rs. 50 crores has already been deposited by it. Therefore,

it was stated that the objections raised are devoid of merit. In fact, it is stated that even the firm which was set up by the objectors, viz., Ganta Infrastructures, has even participated as one of the bidder, which was not successful in the bidding process. Therefore, in order to scuttle the process of restructuring the company the objectors have come up with the present objections, even though they are not holding shares as on date, as all the shares were pledged in favour of the financial institutions, which exercised the right to vote representing their shares at the shareholders meeting.

87. Before proceeding further it would be proper to refer to the decisions that are relied upon by both sides.

88. In *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* : AIR 1997 SC506 , the apex court had considered the scope and jurisdiction of the company court, while considering an application for sanctioning of a scheme of amalgamation or arrangement, contemplated under Section 391 of the Act. In that case, the respondent-company was the transferee company and the transferor company was the Mafatlal Fine Spinning and . The respective board of directors have passed resolutions and even with reference to the transferor company, which was within the jurisdiction of the Bombay High Court, the scheme presented for approval, was sanctioned. One of the director of the transferor company was a party for the decision which had obtained even sanction from the jurisdictional High Court, raised an objection with reference to the transferee company, which was within the jurisdiction of the Gujarat High Court. The company judge of the Gujarat High Court, after considering the objections raised, by a detailed order, sanctioned the scheme, as proposed by the transferee company that was confirmed by the Division Bench in appeal. Hence, the matter came up before the apex court in further appeal.

89. The apex court while considering the scope and jurisdiction of the company court and the scheme that was presented for its approval, laid down broad guidelines. It would be appropriate to refer those guidelines here-under (pages 811 to 815 of 87 Comp Cas):

The aforesaid provisions of the Act show that a 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 on 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 concerned voters 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 concerned scheme 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 on 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 the 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.

90. However, further question remains whether the court has jurisdiction like an appellate authority to minutely scrutinize 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. 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 concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. 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 ... 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 are 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 scrutinizing 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 the green signal to such a compromise or arrangement.

91. The apex court finally on merits, confirmed the order of the court below.

92. In *Hindustan Lever v. State of Maharashtra* [2003] 117 Comp Cas 758, the apex court while considering the provisions of Section 391 read with Section 394 with reference to the amalgamation of the companies, considered the scope and jurisdiction of the company court. The apex court while reiterating the principles laid down in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* : AIR 1997 SC506

observed that two broad principles underlying a scheme of amalgamation which have been brought out in the said judgment, viz; (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.

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

94. In PMP Auto Industries Ltd., In re [1994] 80 Comp Cas 289 a learned single judge of the Bombay High Court while considering the scheme of amalgamation, after referring to the judgment of the Gujarat High Court in Maneckchowk and Ahmedabad . In re [1970] 40 Comp Cas 819, observed that thus the position of law appears to be clear, Section 391 invests the court with powers to approve or sanction a scheme of amalgamation/arrangement which is for the benefit of the company. In doing so, if there are any other things, which, for effectuation, require a special procedure to be followed-except reduction of capital-then the court has powers to sanction them while sanctioning the scheme itself. It would not be necessary for the company to resort to other provisions of the Companies Act or to follow other procedures prescribed for bringing about the changes requisite for effectively implementing the scheme, which is sanctioned by the court.

95. In Spartek Ceramics India Ltd. In re [2006] 1 ALT 589 : [2007] 75 SCL 548 a learned single judge of this Court while considering the issue whether the company can approach for sanctioning of a scheme even after implementation of the scheme, after referring to the relevant provisions of Section 391, concluded as

under (page 560 of 75 SCL):

A perusal of the said provision shows that what is sine qua non is in the first instance holding a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, and the majority in number representing three-fourths in value to the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxies at the meeting, agree to such compromise or arrangement. The court shall satisfy when approached for sanctioning of the compromise or arrangement that the petitioner-company disclosed the court 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 investigating proceedings in relation to the company under Sections 235 - 251 and the like. If the procedure of holding the meeting, of the creditors or members, as the case may be, is followed and a resolution is passed with the requisite majority as enjoined under Sub-section (2) of Section 391, the court has only to satisfy about the other requirements of the latest financial position, disclosure of material facts and pendency of any investigation or the like. Merely because the section reads that where a compromise or arrangement is proposed followed up by holding of the meeting passing of resolution and the satisfaction of the company court about the requirement contained in the provision to Sub-section (2) of Section 391, it does not mean that before sanctioning of the compromise or arrangement by the court the scheme shall not be given effect to. Furthermore, such an objection has not been taken by the respondent, inter alia, in the counter filed. In my considered view, giving effect to the scheme because of the fact that CDR evolved the restructure package and approved the same and because of the fact that the requisite majority of the secured creditors approved the scheme in the meeting held for the purpose in accordance with the provisions contained under Section 391 of the Companies Act, perhaps, the petitioner started giving effect to the scheme; that cannot be a bar for sanctioning the scheme if the conditions enjoined under Section 391 and the proviso incorporated thereunder are satisfied. The passing observations sought to be relied upon by learned Counsel from the judgment of the Punjab and Haryana High Court in Exedy Ceekay Ltd. and Ceekay Daikin Ltd., In re [2000] 4 Comp LJ 142, will not come in the way of the

petitioner-company as a legal bar. That apart, the compromise or arrangement takes effect from the date when it is arrived at subject to the sanction of the court. If the court refuses sanction, it becomes without effect. If the court grants sanction, it takes effect not from the date of the sanction, but from the date when it was arrived at, or the appointed date as envisaged in the scheme. Further more, the effect of the order of the court sanctioning the scheme is to make the scheme binding on all the creditors including the dissenting creditors. That being the scheme and object of the Act under Section 391 even if the arrangement has been given effect to before the necessary sanction is accorded by the court, in my considered view it is no infraction of any of the provisions of the Act or the Rules made thereunder. I, therefore, see no merit in the contention of learned Counsel.

96. In *Jaypee Cement Ltd. In re* [2004] 122 Comp Cas 854, a learned single judge of the Allahabad High Court, while considering the objections with reference to the non-filing of the latest financial statement, after referring to various judgments that are relied upon by the parties, observed that thus, it would appear that as the law stands today, when there is a long gap between the filing of the petition and its hearing, the concerned company should itself produce the latest financial position which may be available before the court. But, if the same has not been produced by the company, the court should call for it, and give an opportunity to the company to produce the relevant record and examine the same instead of dismissing the petition on this technical ground. It also appears that this requirement of furnishing the latest financial position is to be examined in the light of objections about any such drastic change in the financial position as would make sanction to proposed scheme undesirable.

97. In *J.S. Davar v. Dr. Shankar Vishnu Marathe* : AIR1967 Bom456 , the apex court while considering the provisions of Section 153(2) of the Companies Act, 1913, which corresponds to the present provision of Section 391, with reference to the scope and jurisdiction of the court while considering the scheme for sanction, observed that the first question which arises in this appeal is whether the court whose sanction is sought to a scheme of reconstruction is bound by the decision of the majority of the shareholders and the creditors of the company or whether it is open to the court to refuse to sanction a scheme despite the view of the

majority. The answer to this question can, in our opinion, be found in Section 153 of the Indian Companies Act, 1913, which governs the present proceedings. Section 153 provides by Sub-section (1) in so far as is material, that where a compromise or arrangement is proposed between a company and its creditors or its members, the court may order that a meeting be held of the creditors or the members of the company. After referring to Sub-section (2) of Section 153, it was held that it is clear from the language of Sub-section (2) that the court is not bound to accept the view of the majority. Sub-section (2) says that if a certain majority agrees to the compromise or arrangement, the same shall bind the creditors, members, liquidators and contributories, 'if sanctioned by the court'. Sub-section (2), advisedly, does not say that if a certain proportion of the creditors or members agrees to a compromise arrangement, the court shall sanction the same and thereupon the compromise or arrangement shall bind all concerned. Therefore, though the opinion of the creditors or members of the company must be given due weight, such an opinion does not conclude the question whether the scheme must be accepted. The opinion of the majority is only one of the elements in the case, to be considered by the court, which is called upon to sanction the scheme.

98. In *Bharat Synthetics Ltd. v. Bank of India* [1995] 82 Comp Cas 437 : [2000] 1 Comp LJ 376, a learned single judge of the Bombay High Court, while considering the mandatory requirements for sanctioning a scheme, observed that the next glaring aspect of the matter, heavily weighing and militating against the grant of sanction is non-compliance with the proviso to Sub-section (2) of Section 391 of the said Act. The petitioners have not placed before the court, its authenticated latest financial position, from the year 1991 onwards. In the affidavits dated August 18, 1993, filed on behalf of the company petitioner, the information provided is vague showing unaudited (provisional) financial results. To say the least, it is not in compliance with the above referred provision of the statute. Therefore, the court rejected the petition filed, seeking sanction of the scheme.

99. In *KEC International Ltd. v. Kamani Employees Union* [2000] 1 Comp LJ 351 : [2002] 109 Comp Cas 659, a learned single judge of the Bombay High Court, while considering the scheme of amalgamation for sanction, reiterated the legal position with reference to the compliance of proviso of Section 391 of the Act, and

observed that the next issue is with regard to non-disclosure of latest financial position. The proviso to Section 391(2) makes it abundantly clear that no order of sanctioning any compromise or arrangement shall be made by the court unless the court is satisfied with regard to the latest financial position. Admittedly, in this case, the petitioner has filed an audited financial report, as on March 31, 1997, and not subsequent thereto. Learned Counsel sought to argue that what is contemplated as latest financial position is as at the time of the meeting and also at the time of filing of the present petition. It would be rather strange in the sense that if the petition were to be heard almost after two years and in that event, to say that the petitioner need not disclose the latest financial report- would render the whole objective absurd. If one were to look at the provisions regarding amalgamation scheme, the time appears to be the essence in approval of such schemes. In fact, within the time prescribed, the meeting has to be held, and within 15 days, the chairman has to file his report in this Court and within a week thereof, the petition has to be presented in the court so as to enable the court to consider the amalgamation scheme at the earliest. In a given case the petition may come up for hearing after three or four years and to say that the petitioner need not disclose the latest financial position of the company would render the entire objective meaningless. It is pertinent to note that the words used 'court must be satisfied with regard to the latest financial position of the company'. The learned judge also referred to the decision of the Delhi High Court in Bhagwan Singh and Sons v. Smt. Kalawati [1983] 3 Comp LJ 397 where similar issue was considered holding, the meaning of words 'latest financial position' has categorically been held as the financial position should be when the matter is due for sanction. Obviously, it means, at the time of final hearing of the petition and this requirement is statutory since the Supreme Court in Miheer H. Mafatlal v. Mafatlal Industries Ltd. [1996] 87 Comp Cas 792 : [1997] 1 SCC 579, has categorically held that all the statutory requirements have to be strictly complied with before sanctioning amalgamation scheme. Therefore, what is required is the latest financial position at the time of final hearing of the application, i.e., at the time of sanctioning. The court also referred to the earlier judgment of the same court in Bharat Synthetics Ltd. v. Bank of India [1995] 82 Comp Cas 437 : [2000] 1 Comp LJ 376 and finally the application filed for sanctioning of a scheme was dismissed.

100. In *Arjun Prasad v. Shantilal Shankarlal Shah* [1962] 32 Comp Cas 149, the apex court while considering the objections as to the proposed scheme for sanction observed that the next contention that the objection cannot be entertained for the first time at the final hearing of the application appears to us to be equally unsound. It is undoubtedly true that the opposing creditor were guilty of negligence in not drawing the attention of the chairman to what they considered to be a defect in voting on behalf of the two creditor companies, viz., Bhandani Brothers and the Hindustan Coal Co., and no less negligent in not bringing this to the court's notice at the earliest opportunity. Laches on the part of some creditors cannot however justify the chairman or the court in disobeying the requirements of the Act. If in law the two votes cast by Arjun Prasad for these two creditor companies were not validly cast the three-fourths majority requisite under Section 153(2) would not be there and so no further action under Section 153 could be taken by the court in the matter. How can the court turn a blind eye to the fact, if proved, that on the basis of valid votes at the meeting the requisite majority was not obtained, merely because the chairman's attention was not drawn to the defect or it was not brought to the court's notice earlier. In our opinion, the learned judges who heard the appeal were right in thinking that however deplorable the delay by opposing creditors in raising the objection might be, that would not be a sufficient reason for refusing to entertain the objection.

101. In *Exedy Ceekay Ltd. and Ceekay Daikin Ltd. In re* [2000] 4 Comp LJ 142, a learned single judge of the Punjab and Haryana High Court while considering an application for sanctioning of a scheme of amalgamation, especially with reference to the scope and jurisdiction of the court under Sections 391 and 394 of the Companies Act, observed that it is obvious from the aforesaid that the consistent view is that the court is basically having supervisory jurisdiction, but it is not a rubber stamp. The claim has to be seen as a whole. If it is found that it is not fair or what is being projected is not true, the court can well refuse the claim. Basically, it is the creditors' as well as the shareholders 'and others' wishes which matter, but totality of the facts and the circumstances have to be kept in mind before giving approval to such a scheme. The court having found that there are certain of the conditions under the scheme, which were found unfair, therefore, the court declined to grant sanction to a scheme.

102. In *St. Mary's Finance Ltd. v. R.G. Jayaprakash* [2000] 99 Comp Cas 359, a learned single judge of the Kerala High Court while considering a scheme for approval, held when a scheme of compromise is presented, and notice of meeting for consideration of such scheme is sent to the creditors of the company, there must be full and fair disclosure of the interest of the directors as members of the company. This is a pre-requisite and a statutory essentiality in terms of Section 393 of the [Companies Act, 1956](#). On the facts, that the interest of one of the directors of the petitioner-company and another director in SMP Ltd. which is the largest debtor of the company had not been disclosed. Because of the compromise, the real beneficiary was SMP Ltd., to whom the company had heavily advanced monies. The company not only withheld that valid information from the creditors, but also from the chairman as well. So whatever be the majority in support of the scheme the company managed to obtain through completed proxies, the meeting had no validity in the eyes of law. On that sole reason itself, the compromise now suggested or as modified could not be accepted.

103. From the above case law relied upon by the parties, it is clear that while considering the scheme for approval under Section 391 of the Act, the same shall be based on the terms arrived at between the parties, and the jurisdiction of the court while considering such scheme for approval is only supervisory to see that the statutory formalities required, are to be complied with, and the scheme shall not violate any provisions of law or contrary to public policy. It should not be unconscionable and the scheme should be beneficial to the company. Though the scheme is approved, by the statutorily required majority, the same shall not conclude and bind the court and it is only one of the elements for consideration. It is obligatory on the part of the company seeking approval of the scheme to disclose all the relevant material including the latest financial position before the court, i.e., showing the financial position of the company up to the date of hearing of the petition for approval. The scheme can also be approved even after the same is implemented, since it takes effect from the date of the stipulation in the scheme and not from the date of the order approving the scheme. Finally, the company court is not a rubber stamp to approve the scheme, merely it was approved by the majority of the members and the creditors of the company.

104. Therefore, the facts of the present case are to be examined in the light of the above principles of law deduced from the above judgments referred to above.

105. In the present case, the scheme as proposed by the petitioner-company was approved not only by the company at its director's meeting, but, as is evident from the chairpersons' reports, it was also approved by more than the statutory required majority, viz., more than 99 per cent, of the shareholders present and voted for 93 per cent, of the creditors. With reference to the objection as to placing relevant material before the court, it is stated that the company filed the annual report for the year ending March 31, 2006, and also limited review report of the auditors up to December, 2006 which are available as on the date of filing of the company petition. But, an objection was raised that the financial position for the subsequent period was not placed since the matter came up for consideration before the court only in July 2007. In view of the said objection, the petitioner-company filed un-audited financial statements for the year ending March 31, 2007, also. Therefore, the objection is complied with. The another objection was that the financial statements contain distorted figures. According to them, the amount payable to O & M Contractors was inflated, for which, there was no explanation. The explanation of the petitioner-company is that there was a settlement with O & M Contractors, under which the company was given all the spares worth more than Rs. 25 crores and therefore the difference in the figures is the additional cost of spares and settlement of the claims, etc., but not by way of payment of share capital to any shareholder as alleged. Therefore, there is no merit in the said objection. Similarly, with reference to certain expenditure incurred by the company, objection was raised. But from the explanation offered in the counter, it is clear that the same was spent to acquire vehicles to the company, to improve the corporate office, etc. In the light of the said explanation, having regard to the scope of this enquiry, it would be difficult for this Court to accept the same as a tenable objection to reject the scheme.

106. Learned Counsel for the objectors also contended that though the annual accounts of the company for the year ending March 31, 2006, was approved on January 27, 2006 and if the scheme was also approved at that meeting, the same would have found place in the annual report for the year ending March 31, 2006.

Since there is no reference to the scheme in the annual report, it should be inferred that the same would not have been approved on January 27, 2006. But the stand of the petitioner-company is that it is not material relevant since the decision of the board does not lead to anywhere unless approved by the shareholders, creditors and the court. Therefore, the same was not mentioned in the annual report.

107. Coming to the other objection that there is no transparency in the bidding process conducted by the ARCIL, there was no proper publicity while inviting expression of interest and further the scheme was approved by illegally elected chairman and directors, the answer of the company is that the bidding process is not the subject matter of the scheme. Further, the expression of interests was invited by ARCIL, which is the leading secured creditor which took over the assets of the company, having lost the hope of recovery of loan amount, which was mounted to the tune of Rs. 1,235 crores. Therefore, thought it fit to invite bidders who can invest capital and bring in technical and managerial expertise to strengthen the company. In the process, ARCIL felt that the offer given by POA was the best one. In fact, the objectors also participated through their company M/s. Ganta Infrastructures which was unsuccessful. Though the objectors are opposing the scheme, it is not their case that they gave any better offer than what was accepted. It is also not their case that even now there are any parties who are prepared to give any better offer to the company. In the absence of any of the above, it is difficult for this Court to accept the contentions of the objectors that the offer is not just and proper to accept. Apart from this, the bidding process is not part of the scheme. The successful bidder was obligated to come up with the scheme for reconstitution of the capital, debt and management. The chairman and directors' of the company are not parties to the bidding process and in fact, as soon as bidding process was over, they have resigned and the nominees of the bidder were inducted into the company since the bidder has paid or deposited Rs. 50 crores as per the agreed terms with the ARCIL. Therefore, there is no merit in this connection also. The objectors also claimed that while placing the scheme for approval, the interest of the directors was not disclosed as is required under Section 393 of the Act. Therefore, there is a failure to disclose the material facts and hence, the scheme is liable to be rejected. But the contention of the petitioner-

company is that the scheme as proposed clearly shows the fact that they are nominees of the bidder and except as nominees, there is no other interest in the company. Since this is a known fact that the scheme envisages the change of management by inducting bidder into the management and as per the scheme even part of the amount towards share capital was paid. Therefore, there is no merit in the said contention.

108. Apart from the above, the petitioner-company's net worth as on the date of the scheme is negative since it is indebted to Rs. 1,235 crores and in addition to the same, it is suffering from a loss of Rs. 245 crores for the year ending March 31, 2006, as against meagre revenue of Rs. 22 crores per month which may be even reduced in the months to come as per the terms of PPA.

109. In spite of such bad financial position, according to the company and ARCIL, POA has come forward to bring in Rs. 150 crores of share capital; agreed to pay Rs. 150 crores with interest at the rate of 10 per cent, per annum quarterly payable in 60 instalments; Rs. 175 crores as bulletin figure at the end of five years with interest at the rate of 10 per cent, per annum quarterly payable and further agreed to convert Rs. 325 crores into cumulative convertible debentures which carry 5 per cent, interest payable half-yearly, which would be converted into equity capital at the end of five years and further agreed to convert the existing share capital into redeemable preference shares carrying a coupon rate of 0.05 per cent, interest, redeemable at the end of 15 years. No other bidder has come up with any better offer than the one that was offered by POA through its representatives, Layman Brothers Commercial Corporation (Asia) which has set up POA as a special purpose vehicle. Therefore, it was decided that it is the best offer in the facts and circumstances of the case. Therefore, the objections raised are devoid of merit.

110. The objectors claim that they ceased to be directors of the company after 2003 and thereafter, they did not renew the pledge of the shares. Therefore, the pledge ceases to be in operation. Similarly, the guarantees given to the borrowers were also not renewed. But, under the scheme, it is provided to continue the guarantees without the consent of the objectors, who gave the guarantees on behalf of the company. The pledge of shares and the guarantees given to the

lenders would continue as per the terms of the pledge and guarantee and does not depend upon the persons in the management. It is not their case that the pledge require to be renewed every year or periodically. The existence of such clause was not brought to the notice of this Court. In the absence of any such clause, the pledge continues till it is terminated as per the terms of the pledge. Similarly, the guarantees given to the secured creditors would continue till the discharge of the debts or the guarantees are relieved in any of the mode provided under the terms of the guarantee or the law. It is not the case of the objectors that the pledge or the guarantees are relieved or discharged under any of the modes. In the absence of any such material, the claim is devoid of merit.

111. Similarly, an objection was raised by five shareholders by filing a separate application that they were not served with notices of the meeting of the shareholders preventing them from participating in the meeting. But the petitioner-company has stated that it has availed of services of M/s. Karvey Computer Share P. Ltd., for effecting services of notices which served notices on all the shareholders. Further notice was also issued by paper publication in Eenadu and The Deccan Chronicle. Therefore, the objection is not tenable. Even otherwise, their voting would not alter the situation since these objectors are holding only small fraction of shares. The other objection raised by them is that non-disclosure of interest of the directors as members of the company. The objectors were not able to show the interest, if any, they had as members of the company, except they are the nominee directors of the POA, the successful bidder to become investor and manager of. the petitioner-company. Yet another objection was that the amendment proposed by one of the shareholders to the scheme was not circulated as is required under Section 190 of the Act. The explanation of the petitioner-company is that since the amendment was proposed with reference to the resolution proposed by the company, the provisions of Section 190 of the Act has no application and further the proposed amendment was placed before the members at the time of consideration of the scheme by way of resolution and the amended resolution as proposed was approved by all the members as well as creditors by the majority specified earlier. Therefore, there is no merit in the said contention.

112. Since the scheme as proposed was approved by the shareholders as well' as creditors by more than the required statutory majority and as the objections raised by the Regional Director of Companies were found to be unsustainable and even the objections raised by the objectors are held to be devoid of merit, the scheme as proposed is approved without any modification. A copy of the order approving the scheme is directed to be served on the Registrar of Companies as is required under the Rules within 30 days from the date of receipt of a copy of this order.

113. The company petition is accordingly ordered. The implead petitions, -viz., Company Applications Nos. 852, 974, 1071, 1240 and 1199, 1200, 1201, 1202 of 2007 are ordered and the applications opposing the scheme, viz., C. A. SR. Nos. 2310, 3349, 4432 of 2007 and the C.A. SR. No. 3351 of 2007 for imposing sanctions on the expenditure are dismissed.

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