SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

In Re: Siel Limited;

In Re: Siel Limited;

SooperKanoon Citation : sooperkanoon.com/698010

Court : Delhi

Decided On : Aug-26-2003

Reported in : [2004]122CompCas536(Delhi); 2004(72)DRJ329; [2003]47SCL631(Delhi)

Judge : Mukundakam Sharma, J.

Acts : Companies Act, 1956 - Sections 2(12), 2(45AA), 274(1), 391, 391(1), 391(2), 393 and 394; Securities (Contract Regulation) Act - Sections 28; Transfer of Properties Act - Sections 6

Appeal No. : C.P. Nos. 107, 108, 109 and 110/2003

Appellant : In Re: Siel Limited;;In Re: Siel Sugar Limited;;In Re: Siel Holdings Limited; in Re: Shivajimarg Pro

Advocate for Pet/Ap. : R.K. Anand, Sr. Adv. and; Praveen Mehdiratta, Adv. for; Obj

Judgement :

Mukundakam Sharma, J.

1. These petitions are filed under sections 391(2) and 394 of the Companies Act, 1956 praying for sanction of the scheme of arrangement between Siel Limited, Siel Sugar Limited, Siel Holdings Limited and Shivajimarg Properties Limited.

Company Petition o. 107 of 2003 is filed by Siel Limited, whereas Company Petition Nos. 108/2003, 109/2003, 110/2003 are filed by Siel Sugar Limited, Siel Holdings Limited and Shivajimarg Properties Limited, respectively. The registered office of the companies are located within the territorial jurisdiction of this Court and, thereforee, this Court has jurisdiction to decide the present petitions. As the facts pertaining to all the petitions are same and the issues raised are also similar, I propose to dispose of ll these petitions by this common judgment and order.

2. The Boards of Directors of all the companies prepared a scheme of arrangement consisting of debt restructuring as well as business restructuring and the said Boards of Directors have passed resolutions approving the said scheme of arrangement. Petitions were filed in this Court under section 391(1) of the Companies Act and this Court by order dated February 11, 2003 was pleased to direct the companies to convene separate meetings of its equity shareholders, preference shareholders, secured creditors and unsecured creditors for the purpose of considering and, if thought fit, approving the said scheme of arrangement with or without modification. Meetings of the equity shareholders, preference shareholders, secured and unsecured creditors were held in terms of the orders of this Court. After the aforesaid meetings were held the Chairperson has submitted his report which is placed on record. It is reported that in compliance with the provisions of section 391 of the Companies Act the scheme of arrangement has been approved in those meetings. Thereafter, the companies have filed the present petitions for sanction of the scheme under section 391(2) read with section 394 of the Companies Act. Notice of these petitions were duly served on the Regional Director, Department of Company Affairs, Kanpur. Notice was also advertised in the newspapers in compliance with the court's order dated March 20, 2003. When the matter was listed on the date fixed, i.e., on April 10, 2003, a copy of the citation so published was filed in this Court. The Central Government submitted its report through the Regional Director. However, an objection was filed by Mr. R.K. Gupta, who appeared in person. On the subsequent date, i.e., on May 23, 2003, Mr. R.K. Gupta decided to withdraw the objection filed by him upon which the said objection was ordered to be closed. In the report submitted by the Regional Director, Department of Company Affairs, Kanpur, it is stated that the Unit Trust of India, who are not only shareholders but

also debenture holders, has objection to the grant of scheme. Even after publication of the citation, the Unit Trust of India did not file any objection initially. But in view of the fact that it had raised its objections in the meetings and also because it is a financial institution this Court deemed it fit and appropriate to issue a notice to the Unit Trust of India informing it about the filing of the present petitions in this Court. On service of the said notice, the Unit Trust of India entered appearance and filed its objections. Another objection was filed by Rashtrawadi Janhit Sabha. The other objection was filed by Shri Nahar Singh who holds two shares in Siel Limited. Since the aforesaid objections were filed, pleadings in respect of the said objections were allowed to be completed. The matter was thereafter placed for hearing including hearing of the objections filed by the objectors. The learned counsel for the parties have painstakingly taken me through the various documents filed in the case and also various decisions which are cited at the bar, and on a close perusal of the same I propose to dispose of all these petitions by giving reasons for my decision.

3. One of the petitioners in the present company petitions is Siel Limited which carries on diverse business including Chemicals, vegetable oils and sugar. It is stated in the petitions filed that pursuant to an order of the Supreme Court passed in November 1996 in the matter of M.C. Mehta v. Union of India and others, Siel Limited had to close its manufacturing units located in Delhi. Due to the said reasons and for various other reasons the company also faced financial problems. The Chemical plant o the company was relocated at Rajpura, Punjab, which commenced its commercial production from the month of February 1999. During the aforesaid period from 1996 to 1999, the company incurred heavy losses resulting in a large debt burden consequent to which in October 1999 the company and the financial institutions agreed for restructuring of the debt without the intervention of the Court. However, despite the aforesaid restructuring the company continued to face financial problems.

4. It is the further case of the petitioners that as on September 30, 2002, the principal amount of long term debt due to financial institutions/banks are Rs.211.03 crores which remained at the same level as on December 31, 2002. Besides the working capital lenders had also advanced Rs.98.13 crores which,

however, due to some repayment came down to Rs.45.75 crores by December 31, 2002. As the Reserve Bank of India issued guidelines for corporate debt restructuring, the Siel Limited decided to propose t at its corporate debt should be restructured and accordingly the aforesaid scheme of arrangement was propounded. In the said scheme it was proposed that Siel Limited would be demerged/hived off into four units, namely, Shivajimarg Properties Limited, Siel Sugar Limited, Siel Holdings Limited and the petitioner-Siel Limited would continue to operate the residual business, namely, Chemicals and vegetable oils. There are certain salient features of the aforesaid scheme which are highlighted by the petitioner as follows:- (a) The cut off and effective date for the scheme is September 30, 2002. (b) The sustainable level of debt has been determined by the financial institutions/banks at Rs.211.03 crores (which is the principal amount). (c) For repayment of such debt by the lenders three options have been provided as options A, B and C which are set out in the scheme at length. (d)It is also pointed out that there is a degree of sacrifice to be made by the lenders for their accommodation against each of the options. A lender who wishes to be repaid quickly would avail of option A whereunder he would be paid 80% of the principal amount without interest within 24 months. Option B means settlement of outstanding loans on the terms that settlement amount shall be 100% of the principal amount of the loan outstanding but without interest as on the cut off date, i.e., September 3 , 2002, 45% of which shall be paid from the proceeds realised within 24 months of the cut off date and the balance 55% of the settled amount shall be allocated to Siel Sugar Ltd. at zero coupon debentures repayable in four years from the cut off date in terms of the percentage as shown in the scheme and that all of the compound interest and liquidated damages due and outstanding on the cut off date would be waived. On the other hand, a lender who would stay with the company for a longer period would avail of option C whereunder he would be paid 100% of the principal amount together with interest on 88% of the principal amount within a period of seven years from the cut off date. (e)The non-performing assets of the company would be de-linked and sequestered. The real estate comprising of 24.88 acres comprising 32% of the original holding comprising 79.41 acres would be assigned to Shivajimarg Properties Ltd. which would be a se lf liquidating company. The real estate has been valued at Rs.65 crores and an

equivalent amount of debt, i.e., Rs.65 crores has been allocated to the aforesaid Shivajimarg Properties Ltd. and upon sale of the aforesaid real estate, the said company would get liquidated. (f)The other assets of the company, namely, investment in shares which is also held to be non-performing assets, have been assigned to Siel Holdings Ltd. which is also made to be a self liquidating company. The said shares have been valued at Rs.35 crores and an equivalent amount of debt, i.e., Rs. 35 crores have been assigned to Siel Holdings Ltd. (g) The sugar business would be spun off and vested in Siel Sugar Limited. The shareholders of Siel Ltd. shall be allocated shares in the Siel Sugar Limited in proportion of three shares in the new company for every four shares held in Siel Ltd., and (h) The petitioner company, i.e., Siel Ltd., would continue to operate with the residual business, i.e., Chemicals and vegetable oil.

5. According to the petitioners, by the aforesaid restructuring the non-performing assets of an estimated value of Rs.100 crores would be liquidated and an equivalent amount of debt would be discharged, and from the operations of Siel Ltd. and Siel Sugar Limited, the remainder of debt would be discharged over a period of seven years. It is contended on behalf of the petitioners that delinking and sequestering non-performing assets, vesting them in self liquidating companies, selling the assets and discharging an equivalent debt is a tried and tested method followed by banks and financial institutions and, thereforee, the aforesaid scheme which includes such delinking and sequestering non-performing assets could be sanctioned by this Court. It is also submitted that the scheme propounded satisfies all the requirements as prescribed under the Companies Act including the provisions of section 391 and, thereforee, there is no impediment in granting sanction to the aforesaid scheme.

6. On the basis of the applications filed by the petitioners under section 391(1) of the Companies Act this Court permitted the companies to hold the meetings of the equity shareholders, preference shareholders and secured and unsecured creditors of the companies. The aforesaid four meetings were held on March 15, 2003 under the Chairmanship of Mr. Justice H.C. Goel, a retired Judge of this Court. After the meetings, the Chairperson submitted his reports dated March 16, 2003. The reports are placed on record along with relevant documents. The

Chairperson in his reports has stated that the compromise or arrangement embodied in the scheme of arrangement between between Siel Limited, Siel Sugar Limited, Shivajimarg Properties Ltd. and Siel Holdings Limited and the respective shareholders and creditors was read out and explained by the Chairperson in the meetings. The question which was submitted to the said meetings was whether the equity shareholders, preference shareholders, secured creditors and unsecured creditors present at the said meetings approved the scheme of arrangement submitted to the meetings and agreed thereto. It is also stated in the said reports that the meetings of the shareholders and creditors were of the opinion that the terms or arrangement embodied in the said scheme of arrangement be approved. He has given the details of the pattern of voting on the said scheme in each of the meetings in his reports. The reports filed by him indicate that in the meeting of the secured creditors held, the Unit Trust of India participated. To the ballot paper given to the Unit Trust of India for casting its vote a sheet was found attached raising the following objections:- "1. There is no parity among lenders. In case of other institutions, their principal as well as funded interest is part of principal outstanding, whereas in case of UTI only principal is shown which is also less. 2. We as NCD holders are at least more than 64% of total NCD of the company. Hence, we should be treated as separate class of creditors. We form majority of NCDs and we do not agree to this scheme of arrangement. 3. That SOA is not acceptable to us as all the three packages involve considerable sacrifices, which do not suit our business and regulatory environment. We would like our dues to be settled through a OTS which should not be linked to sale of assets. " The said ballot paper, however, clearly indicates that the U.T.I. had voted against the resolution. In the ballot paper given to the State Bank of India it was found by the Chairperson that the State Bank of India had voted for the resolution but a letter dated March 13, 2003 addressed to the Chairperson was found attached along with the ballot paper. However, the minutes of the meeting record that at the meeting no mention of the said letter was made by the State Bank of India nor any issue was raised and, thereforee, as the State Bank of India had ex facie voted for the resolution the aforesaid vote was counted as a valid vote and in favor of the resolution. The State Bank of Hyderabad did not exercise its option and, thereforee, the same was take as an invalid vote. The

reports of the Chairperson in respect of the four meetings state that majority in number representing 3/4th in value of the creditors, or class of creditors, or members, or class of members present and voting agreed to the aforesaid scheme of arrangement.

7. However, objections have been taken by the Unit Trust of India herein challenging the aforesaid satisfaction of the Chairperson that a majority in number representing 3/4th in value of the creditors, or class of creditors, or members, or class of members present and voting agreed to the aforesaid scheme of arrangement. Initially when objection was raised by the UTI, it was purely and substantially based on aforesaid three grounds. However, when the objection was filed by the UTI upon notice being issued by this Court, several other objections came to be raised. During the course of arguments the UTI has filed an additional objection wherein it took up many more objections. All the aforesaid objections are, thereforee, required to be taken up and considered by me.

8. In the present case the companies initially filed petitions under Section 391(1) praying for convening of the meetings of the equity shareholders, preferential shareholders, creditors, namely, secured creditors and unsecured creditors. The objections n the present case have been filed by the Unit Trust of India, who is a debenture holder and also holds 4% of the shares and thereforee, is a member being a shareholder apart from being a debenture holder and, thereforee, a secured creditor. Objection is also filed by one Shri Nahar Singh Verma, who holds two shares. There is another objection which is filed by Rashtrawadi Janhit Sabha as a measure of public interest. It, however, does not fall under any of the aforesaid categories and it does not have the power and jurisdiction to file any objection as against the scheme. The said objection, thereforee, stands rejected at the very threshold. The objections filed by the UTI as also by Shri Nahar Singh have been taken notice of.

9. On the basis of the pleadings, namely, the objections and the replies filed thereto and the submissions made by the counsel appearing for the parties, several issues like the following arise for consideration:-

1. Whether the debenture holders like Unit Trust of India, which is a financial institution, constitute a separate and distinct class? Whether there is no uniformity or similarity of interest between them and the other secured creditors as their rights a e distinct as envisaged in the Trust Deed?

2.Whether the objector UTI having held 64% of the total non-convertible debentures, a separate meeting for the UTI was to be held as it constitutes a separate and distinct class from other debenture holders as interest in their case was not funded and as UTI had sought for one time settlement? .

3.Whether 3/4th of the value of the creditors and members had not voted in favor of the scheme and, if so, its effect?

4.Whether holding of meeting and including working capital providers in the said meeting held for the secured creditors, is illegal?

5.Whether the share exchange ratio propounded by the company under the scheme is unjust and improper?

6.Whether the latest balance sheet and latest financial position was not disclosed by the company?

7.Whether all relevant materials were not disclosed by the company along with the notice sent to the members and the creditors?

8.Whether the company could appoint those directors under the scheme who had already incurred disability under the provisions of Section 274(1)(g)(B) as the company failed to redeem the debentures within one year?

9.Whether the provisions in the scheme for transfer of the assets particularly the land is illegal as the same is sought to be transferred in violation of the orders of the Supreme Court that also on hypothetical price, which is not based on expert opinion?

10. The aforesaid issues raised before me are being discussed and dealt with making reference to the relevant decisions to which reference was made at the bar.

11. The first two issues which are formulated herein above are inter related and inter connected and, thereforee, I propose to discuss the said issues together.

Issues No. 1 and 2:

12. Section 391 deals with the power to compromise or make arrangements with creditors and members. It provides that where a compromise or arrangement is proposed between a company and its creditors or any class of them; or between a company and its members or any class of them, the Court may, on the application of the company or of any creditor or member of the company or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of t e members or class of members, as the case may be to be called, held and conducted in such manner as the Court directs.

13. One of the principal objections which is raised by the UTI is that no distinction was maintained by the petitioners between the secured creditors and the debenture holders like the UTI who should have been treated as a distinct group or class separate from the other secured creditors in view the unique and distinct position enjoyed by the debenture holder under the trust deed. It was also submitted that there is a conflict of interest between the debenture holders and the secured creditors and that t ere is not only absence of commonality of interest but also a conflict of interest between the objector and the other secured creditors and that there could not have been any effective consultation in the meeting of the secured creditors as the UTI who in view of the provisions made in the trust deed could not have been equated with that of the other secured creditors. In support of the aforesaid contention, the counsel appearing for the objector relied upon the ratio of the decision in Miheer H. Mafatlal v. Mafatlal Industries Ltd, (1996) 87 Comp Cas 792, and also on the decision in Re Hawk Insurance Co. Ltd, (2001) 2 B C L C 480. Mr. Chidambaram and Mr. Chandhiok appearing for the company also relied upon the same decisions while refuting the submissions made by the counsel appearing for the objector on the aforesaid score. In addition, counsel for the petitioner also relied upon the decision of the Bombay High Court in Wipro Finance Ltd. v. Suman Motels Ltd, (2002) 10 Comp 549, and the decision of the Gujarat High Court in Arvind Mills Limited, (2002) 4 Comp L J 273. With the

aforesaid issue which is raised, another issue which is closely connected is the submission of the objector UTI contending inter alias that a non-convertible debenture holder is distinct from other debenture holders and, thereforee, a separate treatment was to be given to the UTI making them separate from other debenture holders particularly when in the present case interest in the case of UTI was not funded and as the UTI had sought for one time settlement in view of which the UTI stood as a distinct and separate class from other debenture holders and there is no commonality of interest rather a conflict of interest of the UTI with that of the other debenture holders. Section 391 to which reference is already made provides for compromise or arrangement which could be of two types as referred to under section 391(1). One type of such arrangement or compromise could be made y and between the company and its creditors as a whole or between its members as well. The other type of compromise or arrangement which is envisaged under section 391(1) is the one between the company and its creditors and members as well, but it could be between the company and class of creditors or between the company and class of members. The same sub-section (1) of section 391 also provides that an application is to be made by the company for the issue of a direction for meetings of creditors or class of members or class of creditors, as the case may be. Such application also could be made in the case of a company in liquidation by any creditor or member of the company or also by the liquidator. The provision is very specific and rules out the possibility of any other person than those specified under the sub-section to move the Court. Sub-section (2) lays down the procedure as to how and when a resolution is deemed to be passed in such a meeting by providing as follows:-

"S. 391. Power to compromise or make arrangements with creditors and members -

(1) ....

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 643, by proxy, at the meeting, agree to any compromise or

arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class as the case may be, and also on the company, or, in the case of a company which is being would up, on the liquidator and contributories of the company. . Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under section 235 to 251, and the like.

(3) ...."

14. A reading of the aforesaid provision would make it amply clear that that where different terms are offered to different class of creditors under the proposed compromise or arrangement, then in that event a separate class could be said to be constitute in respect of each class of creditors or shareholders and in that event separate meetings are to be held for such different class of creditors. If the creditors do not have a commonality of interest and if their rights and interest under a compromise could have different effect, they are to be separately treated and cannot be included into one class. Those who are offered substantially different compromise have to be treated separately and differently. Even if there are different groups within a class, and their interests are different from the rest of the class, they are to be treated differently as forming a separate class. A group of persons would constitute one class when it is shown that all of them have a common interest and they are not adversely situated. This test provides the criteria for formation of a class or a group. In the present case, meetings of different classes of members, namely, equity shareholders and preference shareholders have been held and no objection is raised as against the aforesaid holding of the meetings of the equity shareholders and preference shareholders and, thereforee, I am not called upon to examine the aforesaid aspect regarding holding of separate meetings of the equity shareholders and preference shareholders. The

only dispute that is raised pertains to holding of the meeting of all the secured creditors together without making provision for holding separate meeting for debenture holders and that also for the non-convertible debenture holders like the U I which forms one distinct and separate class. The entire object of the submission of the counsel appearing for the objector was to show and establish that the UTI, which is a financial institution, stands on a different and distinct class and it cannot be included either within the ambit of the secured creditors nor within the ambit of debenture holders in the light of the facts of the present case. It is, however, necessary to mention that by order passed on the petitions filed by the petitioners under section 391(1) of the Companies Act meetings were ordered to be held of the equity shareholders and the preference shareholders separately. This Court also ordered for holding of separate meetings of the secured creditors and unsecured creditors. In accordance with the aforesaid directions meetings were accordingly held for the secured creditors and unsecured creditors separately. In those meetings held separately for share holders and creditors the UTI participated without raising any object on at that stage seeking for holding a separate meeting only for UTI as it constitutes a separate and distinct class. However, in the meeting held for the secured creditors, it raised the aforesaid three objections, reference to which is already made therein before. One of such objections, of course, relates to the UTI to be given and treated as a separate class of creditor as it holds more than 64% of the total Non-Convertible Debentures of the company. It, however, did not come up with an application before this Court initially contending inter alias that it could not have been included within the ambit of the class of the secured creditors as it constituted a distinct and separate class. The classification of members or creditors can be founded on he basis of difference in the terms offered under the scheme. The difference in terms of the scheme can only be the criterion for identifying class for the purpose of convening a separate meeting of such class. In this connection, a reference may be m de to the decision of the Supreme Court in Miheer H. Mafatlal (supra) where the Supreme Court has said as follows:-

" In view of the aforesaid settled legal position, thereforee, the scope and ambit of the jurisdiction of the company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:- .

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

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

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

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

(5) That all the requisite material contemplated by the proviso to sub-section

(2) of section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same. .

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

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

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

(9) Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class f persons who with their open eyes have given their approval to the scheme even if in the view of the court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. . The aforesaid parameters of the scope and ambit of the jurisdiction of the company court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the court's jurisdiction. . . In the said decision the Supreme Court proceeded to hold as follows:- . "......... On the express language of section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly pre-supposes that if the scheme of arrangement or compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive. Even otherwise, it becomes obvious that as minority shareholder if the appellant had to dissent from the scheme his dissent representing 5% equity shareholding would have been visible both in a separate meeting, if any, of his sub-class or in the composite meeting where also his 5% dissent would get registered by the appellant either remaining present in person or through proxy. Consequently, when one and the same scheme is offered to the entire c ass of equity shareholders for their consideration and when the commercial interest of the appellant so far as the scheme is concerned is in common with other equity shareholders he would have a common cause with them either to accept or to reject the scheme from commercial point of view. Consequently, there was no occasion for convening a separate class meeting of the minority equity shareholders represented by the appellant and his ground as tried to be suggested. It is also to be kept in view that it is not the case of the appellant that any different terms of compromise were offered to persons holding

equity shares who were covered by the family arrangement of 1979 or otherwise. In fact the entire proposal of the scheme of arrangement was one affecting equally and in the like manner all the existing equity shareholders of the respondent-company. In this connection, it is profitable to refer to what the learned author Palmer in his treatise Company Law, 24th edition, has to say: . ''What constitutes a class: . The court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the company to decide, in accordance with the scheme purports to achieve. The application for an order for meeting s is a preliminary step, the appellant taking the risk that the classes which are fixed by the judge, unusually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, and we emphasise the words 'in the result, they reveal inadequacies, the scheme will not be approved'. If, e.g., rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be treated differently under the scheme, such groups must be treated as separate class for the purpose of the scheme. Moreover, when the company has decided what classes are necessary parties to the scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the scheme. In that case it is not the practice to hold a meeting of that class, but to make the class a party to the scheme and to obtain the consent of all its members to be bound. It is, however, necessary for at least one class meeting to be held in order to give the court jurisdiction under the section.'' . It is, thereforee, obvious that unless a separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main c lass of members or creditors is required to be convened. On the facts of the present case the appellant has not been able to make out a case for holding a separate meeting of the dissenting minority equity shareholders represented by him.......''

15. In Re. Hawk Insurance Co. Ltd (supra) it was held as follows:- .

"[12] It can be seen that each of those stages serves a distinct purpose. At the first stage the court directs how the meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon. The second stage ensures that the proposals are acceptable to at least a majority in number, representing three-fourths in value, of those who take the opportunity of being present (in person or by proxy) at the meeting or meetings. At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favor of the proposals) receive impartial consideration. As it was put in the BTR case ([2001] 1 BCLC 740:

. '.....the court is not bound by the decision of the meeting. A favorable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the Court is satisfied that the meeting is unrepresentative, or that those voting at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favor of the decision is not to be given effect by the sanction of the Court.' xx xx xx

"......The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such meaning to the terms "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a vi w to their common interest....."

xx xx xx

''..... The scheme proposed may be regarded as a single arrangement with those creditors whom it is intended to bind, if only if, the rights of those creditors are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. It the rights of those creditors whom the scheme is intended to bind are such as to make it impossible for them to consult together with a view to their common interest, then the scheme must be regarded as a number of linked arrangement . In the latter case it will be necessary to have a separate meeting of each class of creditors; a class being identified by the test that the rights of those creditors within it are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'' .

16. The facts of the present case indicate that all secured creditors including the UTI have been treated alike and in the scheme no separate provision is made for any of the secured creditors, and no distinction at all is made amongst the secured creditors. Almost similar terms of arrangement have been made and offered to all the secured creditors. No preferential treatment is given to any of the secured creditors and they were treated alike for all purposes under the scheme making similar provision o arrangement for all of them. The scheme does not provide for any special treatment to any of the secured creditors. When an offer was made to the UTI by the company for funding of the interest, the same was rejected by the UTI and it stuck to the terms of one time settlement which was proposed by it. In that view of the matter and particularly in view of refusal of the UTI to accept the proposal for funding of the interest, no such provision is made for funding of interest in the case of the UTI in the scheme. However, the aforesaid situation was the own making of the UTI for which it now cannot claim to be treated separately. Besides, as a debenture holder, the UTI does not enjoy any distinct and different position than the other secured creditors. All the secured creditors including the debenture holders enjoy the same status and rights and that there is no conflict of interest at all amongst them. They constitute one class as was held in the decision of the Supreme Court in National Rayon Corporation Limited v Commissioner of Income Tax, : [1997]227ITR764(SC) . In the said decision, the Supreme Court had occasion to deal with a plea of debenture redemption reserve comprising an amount less than the amount of debentures floated by the assessed- company and were redeemable not in the relevant current year but in the distant future. The

Court held the same to be a provision and not a reserve. While coming to the aforesaid conclusion the Supreme Court considered the distinction of 'provision' and 'reserve' in Part III, Schedule VI of the Companies Act and thereafter analysed the said distinction for coming to the conclusion that if an amount is retained by way of providing for any known liability that amount shall not be treated as reserve but the same would be treated as provision. The Supreme Court also referred to the decision of Vazir Sultan Tobacco Co. Ltd v. CIT, : [1981]132ITR559(SC) , wherein also it was held that even if a sum of money which had been set apart for a certain purpose was held not to be a 'provision'', it did not automatically follow that it would be a reserve. In the decision in National Rayon Corporation Ltd (supra) the Supreme Court held that by issuing the debentures the company had taken a loan against the security of i s assets and that although the said loan may not be repayable in the year of account but the obligation to pay the loan is a present obligation and, thereforee, any money set apart in the accounts of the company to redeem the debentures must be treated as moneys set apart to meet a known liability. It was, thereforee, held that debentures have to be shown in the company's balance sheet of the year as a ''liability'. In paragraph 12, the Supreme Court held that the debentures were nothing but secured loans and merely because the debentures were not redeemable during the accounting period, the liability to redeem the debentures did not cease to exist, and that the same was a known liability. The aforesaid conclusion was arrived at also in view of the fact that in the form of balance sheet prescribed by the Act in Schedule VI, the secured loans have to be shown under the heading ''liabilities'' which also included debentures amongst others such as loan and advances, loans and advances from banks, loans and advances from subsidiaries and other kind of loans and advances. thereforee, the aforesaid decision conclusively holds that debenture is only a security like any other security. A very extensive argument was made by the counsel for the UTI to prove and establish that the Debenture Holder forms a separate class distinct from other secured creditors. In support of such contention reference was made extensively to the trust deed executed in favor of the Debenture Holder wherein it is provided that for a y compromise or arrangement in respect of debentures, meetings are to be held. The aforesaid submission is found to be without any credence in view of the ratio of the aforesaid decision of the

Supreme Court. A reading of the provision of section 2(12) along with section 2(45AA) of the Companies Act along with section 28 of the Securities (Contract Regulation) Act would also corroborate the aforesaid position. In that view of the matter, it is held that the debenture holders are only secured creditor . In the light of the decision of the Supreme Court in National Rayon Corporation Ltd (supra) and particularly in view of the position that debentures are also classified under the heading ''secured loans'' in the balance sheet as per Schedule VI to the Companies Act, the debenture holders would have a pari pasu charge on the fixed assets of the company along with that of the term lenders and, thereforee, the debenture holders would also come within the ambit of the expression ''lenders''. Consequently, there was no necessity of having a separate meeting so far the UTI is concerned as the UTI was also a secured lender like all other secured creditors and it did not constitute a separate class. In Arvind Mills Limited (supra) the Gujarat High Court has held that there cannot be a class within the class and the class has to be one type of creditors, namely, secured creditors, unsecured creditors and working capital lenders as all the secured creditors have similar rights in the company.

17. It was also suggested that the debentures are easily tradable securities but the term loans are not tradable and, thereforee, non-convertible debenture holder is a separate class. The aforesaid submission also cannot be accepted in the light of the facts of the present case. Even term loans are tradable because term loan agreements specifically give to the lenders the right to assign their term loans. Besides, under the general law a debt is a chosen action and assignable under section 6 of the Transfer of Properties Act. It was also suggested that the petitioner company has created debenture redemption reserve as per SEBI guidelines. However, the aforesaid reserve is only a provision for known liability represented by corresponding assets o the balance sheet and, thereforee, it cannot be said to be a reserve as there is no physical money available in a separate account for redemption of debentures as has been clearly pointed out by the Supreme Court in paragraphs 3 and 4 in National Rayon Corporation Ltd (supra).

18. In the present case also the UTI has a commonality of interest of securing their dues and, thereforee, their rights are not dissimilar to the rights of other secured creditors. There was commonality of interest and no conflict of interest amongst all the aforesaid secured creditors including the objector and, thereforee, the aforesaid submission of the objector is without any merit.

Issue No.3: 3/4th of the value of the creditors.:

19. Next major thrust was made and substantial argument was advanced by the objector UTI to the effect that 3/4th of value of the creditors did not vote in favor of the scheme and, thereforee, requirement of sub-section (2) of section 391 was not complied with and could not be satisfied and, thereforee, the scheme should be deemed to have been rejected in terms of the provisions of sub-section (2) of section 391. In support of the aforesaid submission the counsel appearing for the UTI submitted by referring to paragraph 2 of its objection that the objector is a secured creditor of the petitioner company, namely, Siel Limited, to the tune of Rs.4623 lakhs and not Rs.3971 lakhs and that the said amount was given to the petitioner company in the year 1994 a d that the outstanding amount as on September 30, 2002 is Rs.79,91,43,740/- and as on May 30, 2003 it is Rs.89,07,28,324/-. It was submitted that while making payment of Rs.632 lakhs the petitioner company requested the objector to adjust the same again t the outstanding principal amount which was rejected by the objector because the same was against the accounting policy as any amount received was first adjusted against the interest and thereafter against principal. The aforesaid issue was amplified y the objector in their additional objection filed contending inter alias that the petitioner company in order to secure 3/4th majority has given the debt as amounting to Rs.211.03 crores as on September 30, 2002, the cut off date, whereas voting right ha been given to other secured creditors for Rs.256.79 crores as on November 31, 2002 to gain the absolute majority. It was further submitted that in order to reduce the voting right of the objector, the petitioner company has taken only the principal mount of Rs.3971 lakhs though the same is also disputed as the same is Rs.4623 lakhs and thereforee Rs.3971 lakhs was not the outstanding amount due as on September 30, 2002. In support of the aforesaid contention, the objector also referred to the Valuation Advisory Report submitted

by M/s. S.S. Kothari and Co. on January 31, 2003 wherein it was mentioned that the total debt of all the secured creditors of the petitioner company is Rs.371.15 crores.

20. I have considered the aforesaid contentions raised on behalf of the UTI and have perused the relevant documents pertaining to the aforesaid objection. The objector has an interest of about 4% in the equity of the petitioner company. While refuting the aforesaid submission, the company strongly relied upon the letter of the UTI dated September 11, 2001. In paragraph 'C ' under the heading ''mode of payment'' it was stated that the amount of Rs.1074.40 lakhs already paid by the company would be adjusted against the original principal amount of Rs.4603.01 lakhs. Placing reliance on the said contents it was submitted by Mr. Chidambram that as the objector has confirmed receipt of a sum of Rs.1074 lakhs from the petitioner and the said amount was adjusted towards the principal amount of Rs.4603.01 lakhs, thereforee, the remaining principal amount would be Rs.3529 lakhs. I have perused the contents of the aforesaid letter dated September 11, 2001. The said letter relates to one time settlement whereby the UTI has intimated its decision stating that it has examined company's request and the Trust is agreeable for one time settlement of Rs.5260.74 lakhs on the basis as mentioned therein. There are several conditions attached to the aforesaid letter . Subsequently, however, the said proposal was cancelled by the Trust in terms of its subsequent letter. thereforee, the aforesaid proposal has fallen through and the said amount of Rs.1074.40 lakhs which was paid by the company and proposed to be adjusted against the original principal amount of Rs.4603.01 lakhs could not have been so adjusted. In that view of the matter, the position would be that the principal amount which was due and payable to the UTI was Rs.4623 lakhs towards principal and interest payment was Rs.3368 lakhs and, thereforee, the total amount outstanding including interest would be Rs.7991 lakhs as on September 30, 2002. The same is also an admitted position also on behalf of the UTI as stated in paragraph 2 of the objection. A debt profile has been submitted on behalf of the company as also on behalf of the UTI. The debt profile filed by the UTI shows the percentage of the value held by UTI. In my considered opinion the debt profile of the creditors and working capital provider as shown by the UTI and filed during the course of hearing is speculative and is not based on the records.

The effective date was September 30, 2002 and, thereforee, total principal amount due and payable to the said creditors was Rs.21755 lakhs to which interest due and payable was Rs.5812 lakhs, total being Rs.27567 lakhs, of which dues of the UTI were Rs.7991 lakhs, and the aforesaid principal dues of R .21755 lakhs together with debts provided by the working capital provider comes to Rs.26271 lakhs as principal amount and to Rs.32083 lakhs as total amount including interest, and out of the aforesaid 100%, UTI's value of share was 24.91%. It was only he UTI who had opposed the scheme and voted against the scheme in the meeting held for the secured creditors. Counsel appearing for the objector UTI tried to rely upon the stand of the State Bank of India also contending that the State Bank of India had also voted against the scheme. I have seen the ballot paper of the State Bank of India. The said ballot paper categorically indicates that the vote was given by the SBI in favor of the scheme when it had ticked in the box 'Yes', thereby categorically asserting that it had cast its vote in favor of the scheme. Besides, in the letter attached, it was also categorically stated that the Bank has given approval to the scheme. It is true that the SBI has raised certain queries and also put certain conditions in the letter attached to the ballot paper dated March 13, 2003, but the same cannot in any manner be interpreted as a vote against the scheme. thereforee, in the facts and circumstances of the present case it is held that only 24.91% votes were ca t against the scheme. thereforee, majority in number representing 3/4th of the value of creditors had agreed to the arrangement propounded by the petitioner company and, thereforee, there was compliance of the provisions of section 391(2) of the Companies Act in the present case. The aforesaid objection raised by the objector is also found to be without merit for the aforesaid reasons. Issue No.4: Joint meeting of secured creditors and working capital providers.

21. The next contention was that holding of the meeting of the creditors and the working capital providers together was also illegal. It was also submitted that the working capital providers could not have been included in the list of secured creditors a no sacrifice is made by the aforesaid working capital providers. The aforesaid contention appears to be unacceptable in view of the fact that under the Scheme working capital providers have also to make sacrifices in the following manner:-

(a) Interest rate, so far working capital providers are concerned, would stand reduced from existing agreed rate to 12% per annum.

(b) Interest of working capital providers from January 1, 2003 to December 31, 2003 would be converted into funded interest term loan on which no interest would be paid till the date of payment which would be in the year 2008-2009 and 2009-2010.

(c) The security of working capital providers would get diluted on relinquishment of charge on certain properties which shall be vested with other companies and shall be restricted to those companies to which they provide working capital.

22. The working capital providers are also secured creditors enjoying the common security over the assets of the company. Working capital facility or limit is a cash credit facility where a maximum cash is fixed by the lender. The amount drawn (at any time) must be within the limit. Interest on the amount drawn will be debited monthly/quarterly against the cash credit facility. There is no such thing as principal and interest in the case of working capital lenders and factually, it is one sum outstanding on the given date but within the given limit of cash credit facility.

23. It was also one of the contentions of the objector that although the restructuring is only for an amount of Rs.211 crores, the meeting of the creditors was held for Rs.256 crores whereas the Kothari report states that it is for Rs.371 crores. It was also submitted that although the effective and cut off date as given in the scheme is September 30, 2002, voting right has been given as on December 1, 2002. The aforesaid contention on the face of it is untenable as Rs.256.79 crores which is mentioned n the scheme include all the secured creditors of the company including term loan lenders and working capital providers. The principal amount of term lenders according to the debt profile of petitioners is Rs.211.03 crores and that of the working capital providers is Rs.45.76 crores, whereas going by the profile of the UTI, the principal is Rs.217.55 crores and that of working capital provider it is Rs.45.16 crores. So far M/s. S.S. Kothari report is concerned, it shows the total amount due to the secured creditors inclusive of principal amount of term lenders, working capital providers and overdue interest. In that view of the matter, the aforesaid riddle of figures sought to

be created by the UTI has no basis at all and the same is found to be without any merit. Issue No.5: Share Exchange Ratio.

24. Another serious objection was raised by the objector in respect of the share exchange ratio as provided for in the scheme on the ground that the aforesaid ratio is unjust and improper. It was submitted by the counsel appearing for the objector that he aforesaid exchange ratio is based on the unedited report as on March 31, 2003 as provided by the petitioner on record and no independent investigation/enquiry was made regarding such valuation by the said Chartered Accountant which is established fro the said valuation report. It was also submitted that the valuation report as submitted by M/s. S.S. Kothari is based on capital asset pricing model approach. Counsel for the objector submitted that there is hazard involved in practical application o the CAPM approach in a country like India. In support of the said contention a reference was made to the book written by M.Y. Khan and P.K. Jain on `Financial Management', Text and Problems (Second Edition). Particular reference was made to pages 33 and 337 of the said book. However, when the report of the Chartered Accountant, M/s. S.S. Kothari is scrutinised it would be apparent there from that the said report took notice of several factors and various methods and thereafter it proposed an exchange ratio taking a summary of the various methods. A close reading of the valuation advisory report submitted by M/s S.S. Kothari and Co. would indicate that while suggesting the share exchange ratio, it took notice of the several commonly used methodologies like the (a) Asset value, (b) Profit earning capacity value and (c) Discounting cash flow. These methods are commonly used for determining the fair value of the business. After discussing the said methodologies along with the discounting factor it was opined that the equity capital structure of a company in the case of a demerger should be governed not by the Net worth or debts but by the equity capital servicing capability of the company. Having considered all the aspects it had recommended that on the basis of the maintainable free cash flows of the two companies, 3 shares in Siel Sugar Ltd and 1 share in residuary Siel for every 4 shares held in existing Siel Limited. The expert on the subject has taken into consideration maintainable profits and free cash flows, as the benchmark as because the dividends to the shareholders has to flow from the aforesaid two factors. M/s. S.S. Kothari is stated to be a reputed firm of Chartered Accountants

with expert professional knowledge in preparing the valuation report. The exchange ratio which is proposed by the valuer is based on different method other than Discounting Factor Method involving Beta application. The aforesaid share exchange ratio is also approved in accordance with Section 391 of the Companies Act by the shareholders and all the creditors. The valuation report including the disclaimer clause of S.S. Kothari was kept for inspection of all concerned before the meeting including the meetings of the shareholders and creditors. In the decision of Miheer H. Mafatlal (supra) it was held by the Supreme Court that valuation of shares is a technical and complex problem which should be appropriately left to the consideration of experts in the field of accountancy. In paragraph 40, the Supreme Court has held as follows:- . "40. It was submitted that the exchange ratio of equity shareholders so far as the transferee-company is concerned works very unfairly and unreasonably to them. As per the proposed scheme five equity shares of the transferor-company are to be exchange for two equity shares of the transferee-company. So far as this contention is concerned it has to be kept in view that before formulating the proposed scheme of compromise and amalgamation an expert opinion was obtained by the respondent-company as w ll as the transferor-company, namely, MFL on whose board of directors, the appellant himself was a member. C.C. Chokshi and Co., a reputed firm of chartered accountants, having considered all the relevant aspects suggested the aforesaid exchange ratio keeping in view the valuation of shares of respective companies. It must at once be stated that valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy......" .

25. In this connection, reference may also be made to the decision of the Supreme Court in Balco Employees Union (Regd) v. Union of India and others, : (2002)ILLJ550SC , wherein the Supreme Court in paragraph 94 has held as follows:-

"94. The offer of the highest bidder has been accepted. This was more than the reserve price which was arrived at by a method which is well recognised and, thereforee, we have not examined the details in the matter of arriving at the valuation figure. Moreover, valuation is a question of act and the Court will not

interfere in matters of valuation unless the methodology adopted is arbitrary [see Duncans Industries Ltd. v. State of U.P. and others, : 2000ECR19(SC)]''

26. In Chaturanan Industries Ltd. v. Sulabh Leafin (P) Ltd. and others, (1998) 5 Comp.L.J. 444, this Court referred to the aforesaid decision of the Supreme Court in Miheer H. Mafatlal (supra) and in paragraph 15 the Supreme Court held as follows:-

'' 15. It is admitted in the present case that the valuation of the shares in the present case was done by a recognised firm of chartered accountants of repute. It is also reported by the chartered accountants that while determining the exchange ratio in the present case, he has followed not only the book value method but also profitability and earning per share. The aforementioned method of valuation of shares is recognised as a proper mode of valuation. ...., it is not for the court either to substitute the exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies, or to say that the shareholders in their collective wisdom could not have accepted the s id exchange ratio on the ground that it would be detrimental to their interest.''

27. In Hindustan Lever Employees Union v. Hindustan Lever Ltd, (1995) 83 Comp. Cas 30, the Supreme Court observed thus:-

''The valuation of shares is a technical matter, it requires considerable skill and experience. There are bound to be differences of opinion among accountants as to what is tile correct value of the shares of a company, it was emphasized that more than 99% of the shareholders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder....., who may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the shareholders have approved of the valuation. The Court should not interfere with such valuation. . xx xx xx . In the absence of it being shown to be vitiated by fraud and malafide, the mere fact that the determination done by slightly different method might have resulted in different conclusion would not justify interference of Court. '' .

28. It is also settled position of law that once the exchange ratio of the shares of the transferee company to be allotted to the shareholders of the transferor company has been worked out by a recognised firm of chartered accountants who are experts in t e field of valuation and if no mistake can be pointed out in the said valuation, it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies. The aforesaid ratio was also accepted by this Court in Jindal (India) Ltd. v. Cold Rollings India Pvt. Ltd, (1998) 1 Comp. L.J. 36.

29. In Hindustan Lever Employees' Union's case (supra), it was again held by the Supreme Court that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain mathematical accuracy, if the determination satisfied the arithmetical est. It was further held that a Company Court does not exercise an appellate jurisdiction. In the said decision it was held as follows:-

. ''..... The Court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body. The High Court appears to be correct in its approach that this test was satisfied even though the chartered accountant who performed this function was a director of TOMCO, but he did so as a member of renowned firm of chartered accountants. His determination was further got checked and approved by two other independent bodies at the instance of shareholders of TOMC by the High Court and it has been found that he determination did not suffer from any infirmity. The Company Court, thereforee, did not commit any error in refusing to interfere with it. May be as argued by the learned counsel for the petitioner that i some other method would have been adopted, probably the determination of valuation could have been a bit more in favor of the shareholders. But since admittedly more than 95% of the shareholders who are the best judge of their interest and are better conversant with market trend agreed to the valuation determined, it could not be interfered by Courts as, 'certainly' it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws.'' .

30. In view of the aforesaid legal position settled by the various High Courts including this Court as also the Supreme Court, I find no justification to hold that

the share exchange ratio as propounded and as approved by the Boards of Directors and the meetings of the members and the creditors, both secured and unsecured, is in any manner unjust and improper. Issue No.6: Latest Balance Sheet.

31. It was also submitted that the company did not submit the latest balance sheet and latest financial position which according to the objector should have been disclosed by the company. In support of the said contention, reliance was placed by the counsel for the objector on the decision of this Court in Bhagwan Singh and sons v. Kalawati and Others, (1986) 60 Comp Cas 94. It was held in the said decision that while sanctioning a compromise or arrangement the Court must be satisfied that the company has disclosed to the Court all material facts relating to the company such as the latest financial position of the company and the latest auditors report on the accounts of the company. In my considered opinion, there is no infraction of the aforesaid (sic)roposition laid down by this Court in the facts of the present case. When the facts of the present case are examined it is disclosed that audited balance sheet of the company is available for the period as on September 30, 2001. The next balance sheet f the company should have been prepared for the period as on September 30, 2002. However, the company made a representation before the Competent Authority, namely, the Registrar of Companies for extension of time. The aforesaid request of the company or extension of time has been granted and the same stood extended by letter dated 29.10.2002 for holding the Annual General Meeting of the company up to 29.9.2003. thereforee, in view of the aforesaid extension granted, the accounts for the current year a extended have to be finally audited and placed before the Annual General Meeting to be held on or before September 29, 2003. The company has filed the latest available audited accounts up to September 30, 2001. unedited balance sheet, however, for the period up to September 30, 2002 was prepared and circulated and, thereforee, it must be held that the latest balance sheet and the latest financial position was available on record and that there is no default of the petitioners on that score also. Issue No.7: All relevant materials were not disclosed.

32. It was next submitted that the company has failed to disclose all material interests as is required to be done under the provisions of section 393 of the Companies Act. It was submitted that the shareholding of only director has been given and not of the group companies. It was also submitted that notice issued gives an impression that Mr. Siddharth Shriram's interest is only up to 129393 shares. It was also submitted that the company has failed to disclose in the scheme about the surrender of 68% and to the D.D.A. which land the company cannot sell in view of the orders of the Supreme Court. Further submission was that there was no mention of any non-disclosure of amount of sacrifice to be made by each of the secured creditors. I now propose t discuss all the aforesaid objections one by one.

33. So far the disclosure of material interest of the directors is concerned, section 393 of the Companies Act lays down the requirement of disclosure of all material interest of directors, managing director or manager of the company. The informations which were circulated to all the members and the creditors have been placed on record along with the petitions. They give the details of all the directors and the aforesaid informations provided make a full disclosure about the said directors and their relatives in all the three companies. Pages 611 and 612 of the paper book clearly prove and establish the aforesaid position. Mr. Siddharth Shriram is not a director in the Siel Limited and his interest in other companies is correctly disclosed. The scheme proposed makes a provision for 32% of the land and, thereforee, information with regard to the said land was furnished. That also provides the information in respect of the balance 68% of land which is being surrendered to the D.D.A. It was also submitted that annexures to the scheme of arrangement, namely, Annexures I, II and III, although referred to in the page of the information which was circulated, were not circulated along with the informations circulated. As a matter of fact there was no complaint from any of the secured creditors including the UTI or any shareholder about non-receipt of the annexures along with the informations furnished by the company during the time when the aforesaid meetings were held. The UTI has raised such an objection for the first time during the course of arguments. Except for the UTI, no other creditor or member has even subsequently made such a complaint about the non-receipt of the annexures. The aforesaid position cannot be accepted as the document at

pages 603 and 604 clearly indicate that the aforesaid annexures to the scheme of arrangement were circulated to the members and the creditors and, thereforee, the said contention also cannot be accepted. The scheme proposed, which is part of the record, when read with the allocation of the debt of the lenders, would depend upon the option exercised by each one of them, i.e., from Options A, B and C.

34. The amount of sacrifice that is to be made under the scheme by each of the lenders would depend upon the option exercised by such lender. Even the UTI was aware of the aforesaid position and also of the sacrifice to be made as each option clearly s ells out the degree of sacrifice to be made by each of the lenders including the working capital providers. It is also understood that the sacrifice to be made by each of the lenders cannot be the same as it was open for each of the lenders to select i s own option and as the sacrifice to be made by a lender opting for one option would always be different from the sacrifice to be made by a lender opting for the second category of options. However, it is also established from the scheme that within ach of the options the degree of sacrifice is the same.

35. Besides, notice issued to each of the members and the creditors in respect of the meetings to be held was settled by the Registrar under the relevant company rules. No grievance is made that the said notice is not in compliance with the provisions f the Act. None of the shareholders, nor any of the creditors including the UTI raised any objection in the meetings stating that any one of them has been misled, nor any objection was raised with regard to the notice. In Tata Oil Mills Company Ltd, r : (1994) 3 Comp. Cas 46, the Bombay High Court has held that section 393(1)(a) does not require disclosure of all the material facts and that it only requires an Explanationn of the material interests involved. It was also held that difference in phraseology shows that the legislature intended to make a difference between the statement to be annexed to a special resolution and the statement for the purposes of section 393(1)(a). The Supreme Court also in the decision in Hindustan Lever Employees' Un on (supra) held thus: ''where considering the overwhelming manner in which the shareholders, the creditors, the debenture holders, the financial institutions, had supported the scheme and had not complained about any lack of notice or lack of understanding of what the

scheme w s about, it would not be right to hold that the explanatory statement was not proper or was lacking in material particulars''. .

36. In the light of the aforesaid discussions and the ratio of the decisions of the Supreme Court, I find no merit in the aforesaid submission of the counsel appearing for the Objector. thereforee, the said objection also stands rejected. . Issue No.8: Disability under the provisions of section 274(1)(g):

37. In order to appreciate the contention raised giving rise to the aforesaid issue it would be necessary to extract the relevant provisions:

''274. Disqualification of directors. - (1) A person shall not be capable of being appointed director of a company, if- . xx xx xx . (g) such person is already a director of a public company which, - . (A) has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after the first day of April, 1999; or . (B) has failed to repay its deposit or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more; . Provided that such person shall not be eligible to be appointed as a director of any other public company for a period of five years from the date on which such public company, in which he is a director, failed to file annual accounts and annual returns under sub-clause (A) or has failed to repay its deposit or interest or redeem its debentures on due date or pay dividend referred to in clause (B). . xx xx xx'' . .

38. It was submitted that the petitioner company-Siel Ltd. was in default since 1998 as the company failed to redeem the debentures of the objector and, thereforee, the directors of the petitioner company as on the effective date of the scheme are disqualified to become the directors of any public company for five years. It was also submitted that as t26petitioner company failed to redeem the debentures on the due date, the directors of the petitioner company have to resign as per provisions of law, and n order to circumvent the same the present scheme has been so framed in a manner that the directors who had resigned could protect themselves from earning the disqualification under section 274(1)(g) of the Companies Act and could again become directors f the company. The aforesaid submission was made relying on the provisions of section 274(1)(g). It is, however,

brought out by the petitioner company during the course of its arguments that amongst the directors who had resigned, only Shri Siddhart Sriram is being appointed as a director in the three new companies. So far he is concerned, it was also stated that he had resigned on December 12, 2001 and, thereforee, he could not have earned any disqualification under section 274(1)(g) of the Companies Act. No other director except Shri Siddharth Sriram is being appointed as a director in the three new companies. The reason for appointment of Shri Siddharth Sriram as a director has also been given by the petitioner companies. It is stated that Shri Siddharth Sriram is required to be appointed as director of the three new companies as the secured creditors made it obligatory for him to give personal guarantee for securing the loans of the secured creditors. In view of the aforesaid condition but in by the secured creditors for giving personal guarantee by the promoter for securing the loans of the secured creditors, Shri Siddharth Sriram has to be appointed as a director in the new companies and he is so appointed. The aforesaid reason which is given for appointing Shri Siddharth Sriram as the director of the three new companies is just and appropriate and found to be reasonable, and, thereforee, I hold that Shri Siddharth Sriram had earned no disqualification and also that no illegality or irregularity was committed by the companies in appointing Shri Siddharth Sriram as a director of the three new companies. The scheme is in the public interest as it is in the interest of the creditors, the workers, farmers who grow sugarcanes, and the shareholders. The aforesaid objection also is found to be without merit and is accordingly rejected. Issue No.9 : Sale of land by the companies:

39. It was contended on behalf of the objectors that the proposed scheme of arrangement envisages transfer of land by the applicant company. It was submitted that the applicant company cannot transfer any land without first removing the financial encumbrances that is attached to the entire land. Besides, the execution application filed is pending before the District Judge, and thereforee, no such transfer of land as envisaged in the scheme could be made without obtaining permission from the District Jud e. The aforesaid contention on behalf of the objector was refuted by the counsel appearing for the petitioner company. It was shown that the petitioner company pursuant to the orders of the Supreme Court in M.C. Mehta's case (supra) has surrendered 68 of the land and has also

made provision only to retain 32% of the land for its own utilisation. What is proposed under the . scheme is transfer of the aforesaid portion of 32% of the land which the company is entitled to retain and utilise. In this connection reference may be made to the letter of the petitioner to the Delhi Development Authority dated April 14, 2003 wherein t was specifically mentioned by the company that all encumbrance on the 68% of the land has been removed by the company and it is in position to hand over possession of the land to be surrendered pursuant to the orders of the Supreme Court. The Delhi Development Authority was requested to withdraw the execution application pending before the District Judge whereupon the company undertook to hand over the possession of the land required to be surrendered pursuant to the Supreme Court order. In view of t e aforesaid request and in view of the fact that the land which is surrendered is also demarcated, a drawing of which is placed on record indicating that the surrendered land has also proper and sufficient approach from the main road, the aforesaid objection that the surrendered land is not properly approachable and is encumbered ex facie is found to be untenable. What is sought to be transferred is the land which is legally vested on the petitioner. It is also indicated from the records that for sale of the aforesaid land, the price of which is hypothetically earmarked at Rs.65 crores, an asset committee is constituted wherein secured creditors including the UTI is also a member. In case a higher valuer than what is hypothetically fixed is received, the said excess amount shall be utilised/appropriated in the manner as provided for in the scheme. It is provided in paragraph 9 of the scheme at page 421 that any surplus realised on sale of those assets would be utilised for further reducing t e debts of the lenders. It is also established from the scheme that in case a lower price is received than what is hypothetically fixed at Rs.65 crores, the said shortfall shall be made good by the director, namely, Shri Siddharth Sriram, who has given personal guarantee for making good such shortfall. thereforee, even if there be any shortfall, the same is protected. In this connection reference may be made to clauses 8 and 9 of the scheme at page 421 of the paper book, as also to clauses 8 and at page 423. The personal guarantee which is provided is also referred to in the scheme as clause (e) of the Terms of Settlement in Part III at page 414 of the paper book. Reference can also be made to the letter dated March 5, 2003 written by the Corporate/Restructuring Cell to the Nodal Officer, ICICI Bank Ltd. on the

subject of the petitioner company and its restructuring. The same is a proposal approved under the scheme and it also referred to one of the conditions which is agreed to that the personal guarantee of promoter director furnished to the term lenders would continue in the restructuring package on the existing terms, and additionally the promoter director shall furnish personal guarantee to the working capital providers on similar basis. The aforesaid condition having been laid down and agreed upon, such personal guarantee was given by the promoter director, namely Shri Siddharth Sriram, to the term lenders, and thereforee, the contention that the value of the land was fixed arbitrarily has no relevance and has to be rejected.

40. Under these circumstances and in the light of the aforesaid discussion, it is held that the aforesaid objection also has no basis.

41. In terms of the aforesaid discussion, the various issues which have emerged during the course of arguments stand crystalised, discussed and decided. The objections raised by the two objectors are, thereforee, found to be without any merit and the same are dismissed. Having held thus, I find no impediment in granting sanction to the proposed scheme of arrangement.

42. However, the aforesaid sanction to the scheme, in my considered opinion, is to be granted only on fulfillment of one condition. It was found by me during the course of my discussion, as stated hereinbefore, that the UTI had demanded parity with all other lenders on funding of interest. It is true that the UTI failed to accept the option when it was given to the UTI at the time of earlier debt restructuring package of the company in the year 1999. However, on the facts and circumstances of the present case I am fully satisfied that although at that stage the UTI rejected the aforesaid proposal on funding of interest, since the UTI had demanded a parity with all other lenders on funding of interest by raising such an issue in the meetings of the creditors held for approving the scheme, it would be necessary that parity shall be maintained by the company to the UTI on funding of interest as was done in the case of other lenders. The facts of the case disclose that on such parity the additional amount of principal payable to the UTI would have been higher by Rs.11.73 crores (after a sum of Rs.10.74 crores is adjusted

which is already paid by the company against principal).

43. Accordingly, sanction under sections 391(2) and 394 of the Companies Act is granted to the aforesaid scheme subject to the modification that the Unit Trust of India shall be paid an additional amount of Rs.3 crores in view of the aforesaid facts as stated in the preceding paragraph and as proposed and agreed to by the counsel for the petitioner company during the course of arguments. The amount shall be paid at any time according to the convenience of the petitioner but during the currency of the period of the scheme.

44. With the aforesaid modification, the scheme is sanctioned. The petitions stand disposed of.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com