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Veljee Shamjee, Vs. Veljee Shamjee

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Court : Gujarat

Decided On : Aug-18-1981

Reported in : [1984]55CompCas107(Guj)

Judge : A.M. Ahmadi,; M.P. Thakkar and; R.C. Mankad, JJ.

Acts : Companies Act, 1956 - Sections 15A, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 391, 391(1), 391(2), 391(3), 392, 392(1), 433, 439, 536, 536(2) and 643; Industries (Development And Regulation) Act, 1951 - Sections 15A

Appeal No. : Appeal No. 6 of 1981 in Company Petition No. 57 of 1976 with Company Applications Nos. 279 of 1979,

Appellant : Veljee Shamjee,;girish Manilal Jhala And;national Dairy Development Board;veljee Shamjee;tungabhadra

Respondent : Veljee Shamjee;national Dairy Development Board;national Dairy Development Board and ors.

Judgement :

Ahmadi, J.

1. Messrs. Veljee Shamji & Co., a registered partnership firm, filed Company Petition No. 5 of 1976, under s. 433 read with s. 439 of the Companies Act, 1956

(for short 'the Act') for winding up the Bhavnagar Vegetable Products Ltd. (for short 'the company'). The said company was incorporated in 24th November, 1945, under the Indian Companies Act, 1913, as applicable to the then State of Bhavnagar. The nominal capital of the company is Rs. 50 lakhs divided into 25,000 equity shares of Rs. 100 each and 25,000 ten per cent. cumulative redeemable preference shares of even value. The paid up capital of the company is Rs. 29,98,600 consisting of 17,492 equity shares of the value of Rs. 100 each and 12,494 cumulative redeemable preference shares of Rs. 100 each, full paid up. The redeemable preference shares were redeemable on par on 31st October, 1976, under the special resolution dated 24th June, 1967. There is also a sum of Rs. 575 received on forfeited shares.

2. The company was incorporated to manufacture, extract, refine, prepare for the market, stores, sell, purchase, transport, export, import and generally deal in all kinds of oils and oil products; to carry on all the mechanical and chemical process for extraction of oil from oil-seeds and for refining and dehydrogenating the same; and for the manufacture of vanaspati or vanaspati ghee. Immediately after its incorporation it set up a plant at Bhavnagar and had a promising start. Initially the company flourished and made substantial profits but by about the end of 1974 and the beginning of 1975, it encountered rough weather and was soon on the rocks having been compelled to close its manufacturing activity by about November, 1975. While the going was good, the company built up a high reputation so far as its financial stability and economic viability is concerned and, consequently, attracted large deposits, largely from middle class depositors. Unfortunately, by about the end of 1974, the company faced financial difficulties and lost its reputation in the market. The audited accounts of the company up to the end of October, 1974, reveal liabilities to the tune of Rs. 87,46,095 to sundry creditors. Besides, the company was indebted in the sum of Rs. 58,00,000 (approximately) to Messrs J. H. Rayner and Co., Ltd. The company had obtained loans from banks which were to the tune of Rs. 3,16,00,000. The profit and loss account of the company for the period ending on 31st December, 1975, revealed a loss of Rs. 201.71 lakhs and the total liabilities as and by way of secured and unsecured loans including current liabilities were around Rs. 315.75 lakhs. The result was that the entire capital of the company, its reserves and surpluses were swept

away. The inevitable result was cessation of business and manufacturing activity by about the beginning of November, 1974.

3. The petitioner, M/s. Veljee Shamji & Co., was working as commission agent-cum-broker for the company and was entitled to receive commission aggregating Rs. 33,826.89 as per the bills submitted from time to time to the company. The details of the brokerage dues have been set out in the statutory notice served on the company dated 1st September, 1975. The petitioning creditors were also working as agents for Messrs J. H. Rayner & Co. Ltd., of Rayner House, 39, Hutton, Garden, London, ECIN 8BX, U.K. The partners of the petitioning creditors had a power-of-attorney from their principals, M/s. J. H. Rayner Co. Ltd. The said principals had entered into two contracts with the company dated 4th November, 1973, and 23rd November, 1973, whereby the company undertook to supply 1,000 metric tonnes of groundnut-hand-picked kernels (Bombay type) by March/April, 1974, at the price mentioned in the contracts. The U. K. Company paid a sum of Rs. 59,91,938 as pre-shipment advance to the company under the aforesaid two contracts. The allegation is that the company failed to ship the goods as per the contracts and also failed to refund the pre-shipment advance and thus failed to honour its contractual as well as financial obligations. The petitioning creditors not having been paid their commission of Rs. 33,826.89, which was indisputably due to them, served the company with a statutory notice demanding their dues on 1st September, 1975 (exhibit 'B'). The company admittedly received this notice but failed to meet the demand therein by either paying or tendering the amount or compounding the same to the satisfaction of the petitioning creditors. The petitioning creditors, therefore, filed the aforesaid petition praying that the company which was in insolvent circumstances and unable to meet its financial obligations be wound up.

4. The said petition came up for admission on 4th February, 1976, when the court directed notice pending admission to issue on the company calling upon it to show cause why the petition should not be admitted. This notice was served on the company on or about 7th February, 1976, but no appearance was entered on behalf of the company till 16th February, 1976, on which date the notice was made returnable. Thereupon, the petition was admitted on 16th February, 1976, and

usual advertisements were directed to be published in the Government Gazette and local dailies. The date of hearing was fixed on 29th March, 1976, but before that date, on 8th March, 1976, the official liquidator was appointed provisional liquidator, who immediately took charge of the assets of the company. Shortly thereafter on 20th March, 1976, the court gave directions to invite offers for running the plant during the pendency of the petition. Although the company did not enter an appearance by 29th March, 1976, as the advertisement in the Gujarat Government Gazette was not published in time due to some confusion, advertisement was directed to be issued afresh and the date of hearing was fixed on 13th September, 1976.

5. In between, in response to the directions given on 20th March, 1976, the petitioning creditors filed Company Application No. 74 of 1976, on 12th July, 1976, under s. 391(1) of the Act, sponsoring a scheme on behalf of M/s. Tungabhadra industries Ltd. (for short 'TIL'). The usual directions were given on 16th July, 1976, for convening separate meetings of the shareholders, the secured and unsecured creditors, etc., of the company. Before the chairman of the meetings submitted his report on 4th October, 1976, the company was ordered to be wound up by an order dated 15th September, 1976. On receipt of the report from the chairman of the meetings the petitioning creditors filed a substantive petition under section 391(2) on 21st October, 1976, which was heard from time to time and, lastly, on 1st July, 1977. On that date two other parties, Shri Balvantrai Oil Processing Co-operative Society Ltd. and Shri Jashbhai Nagjibhai Patel requested the court to postpone then hearing to enable them to put forward their own schemes offering better terms than the scheme sponsored on behalf of TIL. The court acceded to this request whereupon two petitions were filed under s. 391(1) of the Act on 21st July, 1977, being Company Applications Nos. 75 and 76 of 1977. Once again the usual directions were given in the said two applications for convening meetings of different interests to consider the scheme propounded by the said two parties. However, before the meetings could be held in pursuance of the directions given in the aforesaid two applications, the National Dairy Development Board (for short 'NDDB') entered the field by filling Company Application No. 110 of 1977 on 26th August, 1977, under s. 391(1) of the Act, proposing its own scheme. Suitable directions were given in that application on 29th August, 1977, for convening

meetings, etc. Pursuant to the directions of the court, meeting of creditors, etc., were held between 8th October, 1977, and 15th October, 1977, to consider the schemes propounded by three different parties under the aforesaid three separate applications. Ultimately, on 1st November, 1977, the chairman of the meetings presented his report to the court but no substantive petition was filed under s. 391(2) of the Act within the prescribed time by the first two applicants; only NDDB presented a substantive petition under s. 391(2) of the Act on 9th December, 1977. As that petition was filed beyond the statutory period, by Company Application No. 168 of 1977 condonation of delay was sought which was granted on 16th December, 1977. The above facts disclose that there are two competing schemes in the field, one of TIL and the other of NDDB.

6. The official liquidator appointed to work as the provisional liquidator of the company moved Company Application No. 151 of 1977, for inviting proposals from interested parties for running the plant of the company during the interim period till the final disposal of the winding-up petition and/or sanction of the schemes of compromise and arrangement proposed by different parties. That application was granted by the court by its order dated 19th December, 1977, and the official liquidator was directed to hand over the plant of the company to NDDB on the terms and conditions set out in the order whereunder NDDB was permitted to run the plant till 30th June, 1978, with option to renew the lease for a further period or periods and on such terms and conditions as the court thought fit to impose. The NDDB has been running the plant in pursuance of the said arrangement since then, and has paid the company over ninety lakhs by way of lease money. In running the plant on lease, NDDB has incurred substantial losses of over Rs. 80 lakhs.

7. The two company applications preferred under section 391(2) of the Act, one sponsoring the scheme of TIL and the other of NDDB could not be heard for one reason or the other. In the meantime under the aforesaid arrangement NDDB was running the plant of the company on lease. Before this interim arrangement was made in pursuance of the court's order of 19th December, 1977, the Union of India had on 14th November, 1977, filed Company Application No. 155 of 1977, for permission under s. 15A of the Industries (Development and Regulation) Act,

1951, to make, or cause to be made, an investigation into the possibility of running or restarting the industrial undertakings of the company by such person or body or persons as the Government of India may appoint for that purpose and further praying that till the report under the said provisions is received, and decision taken thereon by the Central Govt. the industrial undertaking or its management should not be transferred or handed over to any party or person whether in the winding-up proceedings or otherwise. Several affidavits were filed opposing the said Company Application including those by TIL, the United Commercial Bank. The State Bank of Saurashtra and the workmen of the company. The State Govt. supported the plea of the Central Govt. The official liquidator did not commit himself but merely pointed out existing circumstances to show that the intervention of the Central Govt. at that stage was not desirable. Before the court decided upon the interim arrangement to permit NDDB to run the plant on hire basis, the application of the Central Govt. was heard. The learned Additional Standing Counsel for the Central Govt. after some discussion in court made a statement that in view of the contemplated interim arrangement, the Central Govt. was not inclined to press for immediate permission but would revive the application at a later stage. The court, while according sanction to NDDB to run the plant on lease, kept the application of the Central Govt. pending. Thereafter, when the substantive petitions under s. 391(2) of the Act were set down for hearing, the learned Additional Standing Counsel for the Central Govt. was called upon to clarify whether the Central Govt. desired that orders should be passed on its application. The learned Additional Standing Counsel for the Central Govt. stated at the bar that he was instructed by Shri I. A. Siddiqi, Director (Vanaspati) in the Ministry of Civil Supplies and Co-operation, Government of India, to inform the court that 'the Government of India does not press the summons at this stage and that if necessary it will take out a fresh summons in the light of the orders this court may make so far as the two competing schemes are concerned'. On this statement, the said summons was disposed of.

8. One further development which took place in the course of the hearing of Company Petition No. 9 of 1978, filed by NDDB, may be taken note of at this stage as it has some relevance on the question whether the scheme sponsored on behalf of TIL survives for consideration by this court. In the course of the hearing it

was alternatively suggested that if the court finds any legal flaw in sanctioning the NDDB scheme, the court may examine the possibility of selling the assets of the company to NDDB. The court felt that before any direction could be given to the official liquidator to take out a judge's summons for the above purpose, the court should have the valuation of all the assets of the company made by expert valuers. The official liquidator was, therefore, directed to get two valuers jointly, one to be suggested by the body of secured creditors and the other by NDDB. In pursuance of this order the valuation of the assets of the company was undertaken and the report is on the record of the case. At that time the following statement came to be made on behalf of the petitioning creditor who had sponsored the scheme of TIL :

'Mr. B. J. Shelat for M/s. Velji Shamji & Co., the petitioners, states that in view of the withdrawal of support by the bank to TIL, the scheme as put forward by his client is not practicable. In view of this, it is recorded that TIL on whose behalf nobody has appeared today is out of the picture as a party sponsoring the scheme before this court.'

It may here be mentioned that during the pendency of the applications sponsoring the competing schemes an order was made on 1st November, 1977, in Company Application No. 131 of 1977, preferred by its workmen, that both TIL and NDDB should deposit a sum of Rs. 75,000 each with the official liquidator to meet with the demand of the workmen. It was understood that each party sponsoring the scheme, which deposits the amount as directed by the court for payment to workmen, would be reimbursed fully in case the scheme sponsored by such party is not approved by the court. In pursuance of this direction and having regard to the statement made by Shri B. J. Shelat on behalf of the party sponsoring the scheme of TIL on 22nd December, 1978, TIL took out a Company Application No. 279 of 1979, on 29th December, 1979, for the refund of Rs. 75,000 on the premises that it was out of the picture. This company application was supported by affidavit filed by Mr. Dalal, the constituted attorney of TIL. In view of this development which took place during the pendency of the two competing schemes, it was strongly argued on behalf of NDDB that TIL was no more in the picture and hence there was no question of granting approval to the scheme

propounded on behalf of TIL.

9. Further developments which took place on different dates thereafter may now be briefly recapitulated. On 15th February, 1980, the representatives of the various creditor banks as well as Gujarat State Finance Corporation (GSFC) informed the court in no uncertain terms that they supported the NDDB scheme. They also pointed out that is view of the developments set out in the preceding paragraph, the TIL scheme was no more in the picture. The learned counsel for TIL asked for time to clarify its position. On the two subsequent dates fixed for hearing, no one appeared on behalf of TIL. On 29th February, 1980, the learned counsel for M/s. Velji Shamji & Co., the sponsor of the TIL scheme, caused a flutter when he informed the court that his client no longer supported the TIL scheme but on the contrary supported the NDDB scheme. However, on 4th March, 1980, TIL clarified that if continued to be interested in the scheme sponsored on its behalf and would press for its acceptance. On the very same day by Company Application No. 106 of 1980, a Judges summons was taken out by NDDB for (a) substitution of its name in place of M/s. Velji Shamji & Co., the sponsor of the TIL scheme; and (b) for modification of the said scheme to bring it in line with the NDDB scheme. Hot on the heels of this judge's summons, that is, on 13th March 1980, M/s. Velji Shamji and Co. filed Company Application No. 114 of 1980, praying for the substitution of NDDB for TIL in the scheme sponsored by it and for the modification of the TIL scheme to bring it in conformity with the NDDB scheme. The reason for this sudden shift in its attitude is ascribed to (a) the refusal on the part of the nationalised banks, the statutory creditors and GSFC to support the TIL scheme; (b) the huge investment already made by NDDB for running the plant during the interregnum, and (c) public interest demanded that the NDDB scheme should not be rejected on technical grounds as such rejection would prove detrimental to the interests of all concerned. Thus, while considering the question of according approval to either of the two competing schemes, this court is also called upon to decide if, in the facts and circumstances of the case and having regard to the interests of all concerned including the labour, it would permit substitution as prayed for in the aforesaid two company applications, should it, for technical reasons, find itself unable to approve the NDDB scheme.

10. During the course of the hearing it was rightly pointed out by Mr. Cooper, the learned counsel for TIL, that the two petitions for sanction of the schemes were advertised under r. 80 of the Rules way back in November, 1976, and December, 1978, but the hearing could not be completed on those dates or immediately thereafter for one reason or the other and as considerable time had since elapsed it would be proper to give intimation of the hearing of the said two petitions and the judge's summons for substitution by fresh advertisement. Accordingly, fresh advertisements were directed to be inserted in the very same newspapers intimating all concerned to attend court to state their points of view in the changed circumstances. Pursuant to this order passed by me on 14th March, 1980, the necessary advertisements appeared in the newspapers and in response there to representatives of various interests made their submissions before me on the merits and demerits of two competing schemes.

* * * *

A comparative study

48. A comparative study of the two schemes reveals that the scheme proposed by NDDB was far more beneficial to practically all interests than the TIL scheme as originally proposed. Under the TIL scheme depositors claiming the principal amount of Rs. 7,500 and below were to receive 30 per cent. and the rest 20 per cent. of the principal amount, without interest, whereas under the NDDB schemes the whole of the principal amount was offered within one month from the effective date, without interest. It was only at the meeting that TIL agreed to pay 50 per cent. of the principal amount with 12 per cent. interest to all the depositors. This offer was further enhanced after the introduction of the NDDB scheme to payment of the whole of the principal amount is four equal instalments with interest after the first instalments at 14 per cent. per annum. So far as other unsecured creditors are concerned TIL offered 20 per cent. of the principal amount without interest in five equal yearly instalments as against the NDDB offer of payment of principal amount in full within one month from the effective date. TIL has not upgraded its offer so far as the other unsecured creditors are concerned. The employees were to be treated as laid off from 1st November, 1975, and were to be paid 50 per cent. of

the lay off compensation up to 31st December, 1975, under the TIL scheme whereas under the NDDB scheme all permanent employees were to be paid full salary from 1st November, 1975, to 31st December, 1975, and others were to receive gratuity. The offer underwent an upward revision only after the workers threatened to vote against the scheme at the TIL meeting. NDDB also revised their scheme to bring it in line with the TIL scheme. So far as the preference shareholders are concerned TIL agreed to pay them Rs. 10 per share whereas NDDB offered Rs. 25 per share straightway. Even the subsequently upgraded offer made by TIL does not offer the preference shareholders more than Rs. 20 per share. Thus, even at present NDDB offers Rs. 5 per share extra as compared to TIL. Equity shareholders were to receive a paltry Rs. 0.10 per equity share under the TIL scheme but NDDB offered Rs. 10 per share to which NDDB reacted by raising it to Rs. 15 per share. It will thus appear from the above that the scheme initially proposed by TIL was far from fair and equitable. It was only after NDDB entered the field that TIL was compelled to revise its scheme upwards. Even so it does not match the NDDB scheme in all respects. Therefore, it is intriguing that all the aforesaid interest voted for the TIL scheme. Similarly M/s. Rayner & Co. Ltd. which accepted the TIL scheme voted against the NDDB scheme offering the same terms. Speaking broadly, it seems to me that this was largely due to proxy votes and behind the curtain manoeuvres.

Know thy sponsors

49. TIL is a public limited company belonging to the Birla group which is engaged in the business of manufacture, sale and export of vegetable oils, oil cakes, hydrogenated vegetable oils, i.e., vanaspati, washing soap and other by-products made from oil. It supplies technical know-how relating to the said business to foreign concerns and is extending its activity to Philippines involving a project cost of rupees six crores. Financially it is a sound concern; its assets far exceed its liabilities and its sales turnover at the end of September 30, 1975, was to the tune of Rs. 28,99,21,627.

50. NDDB on the other hand has been set up by the Ministry of Agriculture and is registered under the Societies Registration Act. It is carrying on multifarious

activities all over the country mainly in the field of development of dairy industry. According to NDDB the Government of India is seriously considering a proposal to evolve a national policy on edible oils. It is proposed to obtain 2,50,000 tonnes of vegetable oil as gift from co-operatives in the USA and to utilise the sale proceeds therefrom for stimulating production of oil seeds and oil within the country and to build up an efficient system of procurement, processing and marketing of oil in the State of Gujarat. Depending upon the final outcome of the policy decision to be taken by the Government of India as to the instrumentality through which the long-term national policy on edible oil should be implemented, the proposed scheme would be implemented by the specific agency if so set up or alternatively by NDDB or its nominee. Financially it too is sound.

The fiscal indiscipline

51. The company was incorporated in 1945 under the 1913 Act. It set up a plant in Bhavnagar and had a promising start. In the years that followed it flourished and made huge profits and earned a good reputation for financial stability in the market. But alas, by the end of 1974 and the beginning of 1975, because of the misdeeds of those in management, the edifice built over the last three decades began to fall apart and there was a total cessation of business by November, 1975. The audited accounts of the company at the end of October, 1974, showed that the company was indebted to the banks in the sum of Rs. 3,16,00,000, to M/s. J. H. Rayner & Co. Ltd. in the sum of Rs. 58,00,000 and to sundry creditors in the sum of Rs. 87,46,095. The profit and loss account of the company for the period ending 31st December, 1975, shows that the company had incurred heavy losses to the tune of Rs. 201.71 lakhs and the total liabilities were in the vicinity of Rs. 315.75 lakhs. The liabilities have by the passage of time multipied, notwithstanding the receipt of compensation from NDDB, which must be in the vicinity of over Rs. 90 lakhs by now, which amount is subject to income-tax liabilities. The valuation report submitted by M/s. Dixit and Bhate of CHEMCON in July, 1979, shows that the total assets are worth Rs. 68,51,979 only. It becomes immediately clear from the above figures that as liabilities were far in excess of the assets the value of the equity share of the company stood reduced to zero on the date of the institution of the petition. It may at this stage be pointed our that it is generally believed that this

tragedy befell the company mainly due to misdeeds of then directors of the company who, it is alleged, siphoned out the company's money for their personal gains and thereby denuded the company of the vital financial support needed to run the plant; but as this is a matter under investigation by the CBI which has filed charge-sheets in a few cases, I do not think it proper to dilate on the subject. Suffice it to say that by the end of December, 1975, the company was financially wrecked.

Submissions at the bar

52. We have had fairly comprehensive picture of the two competing schemes. I will now indicate in brief the view points of the different interests, including the sponsors of the two schemes, as projected in the submissions of their learned counsel. The submissions of Mr. K. S. Nanavati, the learned counsel for NDDB, run thus : NDDB is a non-profit-making institution aimed at advancing the cause of research in different fields and in making available consumer goods at competitive prices. Its object is to benefit both the producer and the consumer by eliminating the middlemen who takes away a big slice and thereby spirals the prices of various commodities. TIL on the other hand is floated with the object of profit-making and it cannot have the interest of consumers or producers at heart but would on the contrary try to exploit them with a view to boosting up its profit-margin. Under the TIL scheme the total offer is to the tune of Rs. 1,19,94,000 while under the NDDB scheme the offer is to the tune of Rs. 2,86,51,000, that is, Rs. 96,00,000 more than what is offered by TIL. If NDDB enters the edible oil market on no-profit-no-loss basis, both the groundnut growers and consumers will benefit by the elimination of the middleman whose removal from the scene will help stabilise the prices at a reasonable level.

That is why the nationalised banks, including the Dena Bank with whom over 75 per cent. of the equity shares are pledged, the secured creditor, GSFC, the preference-shareholders in value though not in number, the principal unsecured creditor, M/s. Rayner & Co., some of the depositors and even M/s. Sidhrani and Musa Adam of Rashtriya Mazdoor Sangh, have desired NDDB to be in the management saddle. Mr. J. I. Mehta, the learned counsel who spoke on behalf of

all the nationalised banks, made it absolutely plain that the nationalised banks would not support TIL in management and that they would lend their wholehearted and unreserved support to NDDB to run the plant of the company. Lastly, counsel pointed out that earlier TIL had declared that it was out of the picture when it realised that the nationalised banks had withdrawn support and that is why after the order of 22nd December, 1978 TIL too out a company Application No. 279 of 1979, dated 29th December, 1979, for withdrawal of the deposit money. The situation has since worsened as TIL's sponsor, M/s. Veljee Shamji and Co. (the petitioning creditor), has withdrawn support and has thrown its lot with NDDB. In these circumstances, Mr. Nanavati contends that NDDB should be substituted in place of TIL.

53. Mr. B. R. Shah, the learned advocate for the liquidator, argued that if the nationalised banks, GSFC, the statutory creditors and the principal creditor, M/s. Rayner & Co., do not support the TIL scheme and decided to take their remedy outside the liquidation proceedings, it would be practically impossible for the liquidator to liquidate the assets and in any case having regard to the fiscal condition of the company, no other creditor or member of the company except the secured creditor would receive anything towards their dues. He also emphasised that the original sponsor of TIL had lost confidence in the capacity of TIL to operate the scheme without the support of the secured creditors and this fact should weigh with the court in deciding whether or not to permit substitution as prayed by NDDB.

54. Mr. Cooper, the learned counsel for TIL, countered the submissions made by Mr. Nanavati and Mr. Shah by pointing out that the NDDB scheme was a dead scheme as it did not receive statutory recognition and could not be approved under s. 391 of the Act. The effort at substitution is nothing short of seeking back-door entry. Since NDDB had failed to sell its scheme at the meetings of the different interests held for according approval thereto, the subsequent success in winning over a few creditors and M/s. Sidhrani and Musa Adam, the office bearers of the Rashtriya Mazdoor Sangh, cannot infuse life into a dead scheme. In the circumstances, it would be a fraud on the statute if the TIL scheme is by passed by allowing substitution as prayed for in the summons taken out by NDDB and Velji

Shamji and Co., because the court would be doing indirectly that which the statute does not directly permit. Again, if till is capable of working the scheme, there is no reason why it should be refused the opportunity to do so particularly when its scheme has been approved by the creditors/members as well as worker/employees of the company at the meetings held for that creditors having regard to their furniture trade prospects depending on who will be in the management of the company. The equity shareholders had refused to sell their shares to NDDB and they cannot be compelled to do so and the mere fact that approximately 75 per cent. of the shares are pledged with Dena Bank is not a valid consideration for the simple reason that it would be open to Dena Bank to exercise its rights as a pledge. If the nationalised banks and the secured creditors do not support the TIL scheme, they can remain outside the scheme. There can be no question of exercise of power under s. 392(1)(b) of the Act as it contemplates an existing scheme which has received sanction and which in the opinion of the court requires modification. He, therefore, submitted that unless the court gives sanction to the TIL scheme which has received statutory recognition, there can be no question of invoking s. 392(1)(b) because under that provision there can be modification of an existing scheme. Under the circumstances, counsel submitted, no valid reason exists for substituting NDDB as the sponsor of the TIL scheme which has received statutory recognition.

55. Mr. Vakharia who represents Mr. Subodh Mehta, President of the Bhavnagar Kamdar Sangh, claims that the majority of the workers employees have joined the said union and they do not approve of NDDB as the sponsor of the scheme. According to him, the approach of the officials of NDDB towards the workers is rude, insulting and inhuman and hence the workers are disinclined to work under such highbrow bosses. During the short period that NDDB has been in management of the plant and machinery of the company under the interim arrangement approved by the court, it has suffered substantial losses because of the mismanagement on the part of those incharge of the plant and yet the management has throughout tried to throw the blame on the workers/employees of the company by propagating that the workers/employees refused to co-operate with the management. The management has by a series of acts of omission and commission alienated the workers who have lost confidence in NDDB to smoothly

run the plant and machinery of the company under the scheme proposed by it. Mr. Vakharia, therefore, made it clear that the workers/employees of the company who were the members of the Bhavnagar Kamdar Sangh are totally opposed to NDDB being in the management saddle.

56. Mr. J. C. Bhatt, who appeared for NDDB at a later stage, pointed out in his reply that the agreement which TIL had reached with 91 per cent. of the equity shareholder is of no relevance as the shareholders have no interest whatsoever and their whishes need not even be ascertained because if the company is wound up, they are certain to bet nothing, as the value of the company's total assets is far less that the claim of the secured creditors. In the circumstances, what is offered to the equity shareholders under the scheme is more or less by way of a gift. The equity shareholders cannot transfer their shares without the court's sanction in view of s. 536(2) of the Act. Mr. Bhatt pointed out that Mr. Navlakha, an employee of the Birlas, had gone round and collected proxies with the help whereof TIL was successful in defeating the NDDB scheme at the meeting of the equity shareholders. While assuming the court that the grievance of the workmen would be examined and redressed, Mr. Bhatt submitted that NDDB was prepared to pay the workmen in full outside the scheme. In brief, his submission was that the objections against the plea for substitution are not well-founded and the court should disregard them.

Statutory requirements :

57. Chapter V of the Act deals with compromises, arrangements and reconstructions of companies which are liable to be wound up under the Act. Section 391 of the Act 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 the members or class of members, as the case may be, to be called, held and conducted in such manner as the court directs. Sub-s. (2) of s. 391 next provides that 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, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company. This sub-section has two-fold significance, namely, (i) that the compromise or arrangement must be approved by the requisite majority present and voting at the meeting; and (ii) it must be sanctioned by the court.

58. A scheme of compromise or arrangement can be proposed on the summons taken our either by a creditor or a member of the company or by the liquidator if the company is being wound up. On receipt of such a summons the court has to give directions for convening meetings of the members, or class of members, or creditors, or different classes of creditors, under the chairmanship of a person appointed by the court. Once this direction for convening meetings is given, the function of the court under s. 391(1) of the Act ends. Thereafter, on receipt of the report of the chairman as to the outcome of the meetings, if the scheme has received statutory recognition, i.e., has been approved by the requisite majority, an application under s.391(2) of the Act for sanctioning the scheme will have to be moved. At that stage the court would address itself on three points, namely : (i) whether the statutory provisions have been complied with; (ii) whether the class or classes affected by the scheme were fairly and properly represented at the meetings; and (iii) whether the arrangement is such as a man of business would reasonably approve, that is, whether the scheme is fair and reasonable and does not hurt any class or classes of persons affected thereby. While considering the scheme, in addition to the above, the court will also examine its effect on the workers/employees of the company with a view to safeguarding their interests. The section confers a wide discretion on the court in the matter of the according its sanction to the compromise or arrangement between the company and its creditors/members. The court is not bound to superadd its seal to the scheme or arrangement merely because it has received approval of the requisite majority at the meetings held for that purpose. The use of the expression 'if sanctioned by the

court' in s. 391(2) clearly suggests that the discretion conferred on the court is of the widest amplitude and regardless of the fact that the scheme has been approved by the requisite majority, the court will refuse to put its seal thereto if its purpose is not bona fide but merely to shield the misdeeds of the ex-directors or if it oppresses the minority or is otherwise inequitable. Only a scheme which is fair and reasonable and propounded in good faith will receive the court's approval provided the abovementioned three conditions are satisfied. Once the court sanctions the scheme it acquires statutory force and becomes binding on all the members, creditors and contributories including the liquidator, their dissent at the meetings notwithstanding.

59. In re Sidhpur Mills Co. Ltd. AIR 1962 Guj 305, Miabhoy J. succinctly explained the function of the court while exercising power under s. 391(2) of the Act. He observed (headnote) :

'The function of the court is two-fold. The first function is to determine whether the statutory requirements as laid down in section 391 of the Companies Act have been complied with. The requirements which have been laid down in section 391 are the sine qua non for sanctioning the scheme. However, even if the statutory requirements have been complied with, that does not mean that the court must sanction the scheme as a matter of course. The Legislature has purposely left the discretion with the court in this respect. The court should apply its judicial mind to the scheme and reach a conclusion of its own. It must consider whether it is in the interest of the company as a whole and of the class of persons for whom the majority acts and whether the scheme is such that it must be pushed through. Therefore, the correct approach to a case is to bear in mind that the court is neither called upon merely to register a decision of the majority, nor is it called upon to act in such a manner that the minority will create a stalemate and thereby retard the progress which the majority has legitimately and reasonably a right to except and make. The court must test the scheme not from the point of view of a lawyer or an accountant or an expert, but it must look at it from the point of view of a reasonable and a fair minded person. When dealing with a company which is dealing in commerce or industry or with similar activities, the scheme has got necessarily to be looked at from the point of view of a prudent commercial man.'

These oft-quoted observations clearly lay down that the scheme must be scrutinised by the court from the point of view of a prudent commercial man and not an expert. The attitude of the court must not be of a sceptic who is our to find faults but of a reasonable and prudent businessman whose insistence is not for an ideal scheme but a workable scheme which would help revive the sick unit. Every circumstance which a reasonable and prudent businessman is expected to bear in mind while approving the scheme must be taken into consideration by the court and thereafter if the court finds that the majority has acted fairly and honestly and has not oppressed the minority in any manner whatsoever, it will proceed to accord sanction to the scheme.

60. In re Maneckchowk & Ahmedabad Mfg. Co. Ltd. [1970] 40 Comp Cas 819 (Guj), the court reiterated that in exercising its discretion in sanctioning a scheme of compromise with members and creditors under s. 391(2) of the Act, it must treat it as cardinal that its function does not extend to usurping the view of the members or creditors. It must look at the scheme and determine that it is a reasonable and while doing so, it will certainly weigh the wishes of the majority vote and the reasons which actuated the contesting creditors in opposing the scheme. None the less it is essential that the scheme must be a fair and equitable one and the court must be satisfied that the majority was acting in a bona fide and honest manner and in the interest of the class that it represented at the meeting. If the scheme is such as a fair-minded person, reasonably acquainted with the facts of the case as prevailing at the time when the scheme was sponsored and approved, can regard it as beneficial for those whom the majority seeks to represent, then unless there are some strong and cogent grounds to show that the scheme was conceived, designed or calculated to cause injury to others, the court will ordinarily sanction it, rather than reject it.

61. In Bank of Baroda Ltd. v. Mahindra Ugine Steel Co. Ltd. [1976] 46 Comp Cas 227 (Guj), the court, while dealing with the question of according sanction to a scheme under s. 391(2) of the Act, observed that in exercising its discretion in according sanction, the court will consider, firstly, whether the statutory provisions have been complied with; secondly, whether the classes were fairly represented by those who attended the meeting and whether the majority were acting bona

fide; and, thirdly, whether the scheme is such as a man of business would reasonably approve. It was pointed out that the court must be carefully however, to see that the principles laid down are never so narrowly interpreted as to reduce it to a mere registering agency and preventing it from seeing whether there is such an objection to it that any reasonable man might say that he could not approve it. While examining the scheme the court must bear in mind the interest of that small class of shareholders and dissident members, who, for obvious reason, cannot and do not participate in the meetings or in the proceedings before the court and who took upon the court to protect their interests even if they are not before it. The court pointed out that it is a hard reality that the leadership of a company is sometimes vested in the hands of the few businessman occupying strategic positions of great power and such businessman often promote schemes which may appear at first sight to be prudent and beneficial to the shareholders but which may in fact conceal the clever design to promote their personal interests at the cost of innocent investors. Since these business magnates usually hold controlling interest in the equity capital of the company or can procure proxies in diverse ways and since the few shareholders who personally attend the meeting do not necessarily represent the well informed opinion, such schemes are often pushed through even with more than the statutory majority. The well informed class of shareholders, such as, financial institutions, statutory corporations, etc., scrutinise the scheme with an expert's eye and it is presumed to act bona fide and for the benefit of the company as a whole. It must, therefore, be realised that before the court sanctions a scheme, it must not only be satisfied that the statutory provisions have been complied with but must also be satisfied that the minority is not unduly oppressed and that those who are promoting the scheme are not doing so merely to advance their personal interests at the cost of innocent investors.

62. Having clearly understood the width and amplitude of the court's power under s. 391 of the Act, we may now go to the next important provisions, namely, s. 392, the relevant part whereof reads as under :

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

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

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

The rest of the sub-sections are not material for our purpose.

63. Under s. 392(1)(b) of the Act, the court has power, at the time of making an order sanctioning the scheme, to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the scheme. The court can exercise this power and modify the scheme of compromise or arrangement with a view to making it effective and workable. A power of the widest amplitude is conferred on the court by this provision to make such modification in the scheme as it might consider necessary, either at the time of sanctioning the scheme or at any time thereafter, with a view to making the working of the scheme efficient and smooth. As pointed out in the case of Bank of Baroda Ltd. [1976] 46 Comp Cas 227 (Guj), the role which the courts have to play in this country is more vital and potent; it is not only an inquisitorial and supervisory role but also a pragmatic role which requires the forming of an independent and informed judgment as regards the feasibility or proper working of the scheme. The submission of Mr. Cooper, that the plea for the exercise of power under s. 392(1)(b) of the Act cannot be entertained in the absence of a sanctioned scheme, runs counter to the plain language of s. 392(1)(b) of the Act which in terms states that the court may at the time of making the order sanctioning a compromise or arrangement under s. 391 or at any time thereafter give directions in regard to any matter or make such modifications in the scheme as it may consider necessary for the proper working thereof. It is, therefore, abundantly clear that the power can be exercised by the court at the time of sanctioning of the scheme or thereafter. If, in the facts and circumstances of a given case, the court is satisfied, while sanctioning the scheme under s. 391(2) of the Act, that for the proper working of the scheme certain modifications are necessary, it may simultaneously modify the

scheme in exercise of the powers conferred upon it by aforesaid sub-section. In exercising power under s. 392(1)(b) of the Act, the court must be governed by the paramount consideration that the modification is necessary for the proper working of the scheme.

64. The next question to be considered is whether the court can in exercise of power conferred upon it by s. 392(1)(b) of the Act substitute one sponsor for another while sanctioning the scheme under s. 391(2) of the Act. A scheme under s. 391 is a compromise or arrangement between a company and its creditors or between a company and its members. The question then is, if the scheme is between a company, which is a juristic personality, and its members and creditors, can it be said that the personality of the sponsor is of secondary importance and the court can while exercising power under s. 392(1)(b) of the Act substitute one sponsor for another even though the scheme proposed by the sponsor sought to be substituted did not receive approval at the meetings of the diverse interests called for considering the scheme Even though a company is undoubtedly a juristic personality, it is well known that the whole show is monitored by the human machinery which is the decision-making body so far as the day to day management is concerned. The observations of Viscount Haldane L.C. in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] AC 705 (HL), may be recalled with advantage (at p. 713) :

'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'

These observations were quoted with approval in Mansukhlal v. M. V. Shah, Official, Liquidator, Liquidator of Hathising Mfg. Co. Ltd. (In Liquidation) [1976] 46 Comp Cas 279 (Guj). The learned judge, after reproducing the aforesaid observations, proceeded to observe that the human machinery is the alter ego but because of the fiction of law the company is independent of the persons constituting it. But, when a situation arises where the court is called upon to decide

who is running the show, who is responsible for certain acts and omissions of the company, who is the very ego and centre of the company, the veil of corporate personality has to be lifted to find out the person. Mr. Cooper placed emphasis on the following observations made by the learned judge (at p. 289-290) :

'Viewed from this angle, the position of a sponsor of the scheme of compromise and arrangement is of such a vital nature that if there is a complete substitution of the sponsor, the modification sought for substitution is of a basic nature and before sanctioning such a modification, the matter will have to be examined with care and attention.'

and submitted that the substitution of NDDB for TIL would be a modification of a basic nature which the court will not allow unless there are compelling reasons to do so, particularly in a case of the present type where the scheme proposed by NDDB has been thrown out at the meetings convened for approving the scheme. In making this submission Mr. Cooper overlooks the observations of the Supreme Court S. K. Gupta v. K. P. Jain [1979] 49 Comp Cas 342, on this important aspect which may be reproduced at this stage (at p. 359) :

'Strictly speaking, omission of the original sponsor (of a scheme of compromise or arrangement) and substituting another one would not change the 'basic fabric' of the scheme. The scheme in this case is one by which a compromise is offered to the unsecured creditors of the company and whoever comes in as sponsor would be bound by it. Undoubtedly, a sponsor of the scheme enjoys an important place in the scheme of compromise and/or arrangement but basically the scheme is between the company and its creditors or any class of them, or the company and its members or any class of them, and not between the sponsor of the scheme and the creditor or member. The scheme represents a contract sanctified by court's approval between the company and the creditors and/or members of the company. The company may as well be in charge of directors and the implementation of the scheme may come through the agency of the directors but that would not lead to the conclusion that during the working of the scheme the directors cannot be changed. If the scheme has to be ultimately implemented by the company as part of its contract and yet its directors can be changed according

to its articles of association, we see no difference in the situation where a sponsor is required to be changed in the facts and circumstances of a case. Therefore, it is not possible to accept the submission that as and by way of modification one sponsor of a scheme cannot be substituted for another sponsor.'

These observations of the Supreme Court leave no doubt that substitution of the original of a scheme by another one is not a change of such basic character as would affect the very fabric of the scheme. Dealing with the observations in Mansukhlal's case [1976] 46 Comp Cas 279, which at first blush give the impression that the substitution of one sponsor by another is a change of a basic character, the Supreme Court explained (at p. 360 of 49 Comp Cas) :

'This procedure was also followed by the Gujarat High Court in Mansukhlal's case [1976] 46 Comp Cas 279 and by referring to that part of the judgment, the High Court held that that judgment itself is an authority for the proposition that substitution of the sponsor is a vital change of a basic nature and cannot be ordered by the court acting under section 392 and must be referred to a meeting of the creditors or members. With respect, this is not fair reading of the judgment. At pages 290-291, the scope and ambit of the power of the court under s. 392 has been precisely set out and it is concluded that the power to modify would comprehend the power to substitute one sponsor for the other if he is found otherwise fit and competent.'

It is thus clear that the observations in Mansukhlal's case [1976] 46 Comp Cas 279 on which considerable reliance was placed by Mr. Cooper in support of his argument, that a substitution of one sponsor by another affected the basic character of the scheme and cannot be allowed in exercise of the power conferred by s. 392(1)(b) of the Act, as it is not a modification, in the strict sense of the term, necessary for the efficient and smooth working of the scheme, is not a fair reading of the judgment as explained by the Supreme Court in the above-quoted paragraph. It is made amply clear by the Supreme Court that the substitution of a sponsor does not affect the basic fabric of the scheme and it would be open to the court to permit such substitution under s. 392(1)(b) of the Act if the circumstances of the case so demand. The result of the above discussion is that Parliament has

in its wisdom armed the court with powers of the widest amplitude and if, on the facts and in the circumstances of the case, it appears to the court that its refusal to substitute the sponsor would ultimately truncate the scheme or adversely affect its working, there is nothing in the Act or in decided cases to fetter the court's power to modify the scheme to achieve the paramount objective of reviving the sick unit in a manner conducive to the interest of all concerned.

65. Mr. Cooper next argued that the court must decide the question of according sanction to the scheme on the basis of the circumstances prevailing at the time when the meeting was called for the purpose of considering the scheme and it would not be open to it to take subsequent developments into consideration. In support of this submission he strongly relied on the following passage from the judgment of Miabhoy J., in Sidhpur Mills Co. Ltd., In re, AIR 1962 Guj 305, 311 :

'It (the scheme) must be tested from the point of view of an ordinary reasonable shareholder, acting in a business like manner, taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question. I am emphasizing the last point because an argument was made by Mr. Amin that certain circumstances or events which took place after the scheme had been considered should be taken into account. I do not wish to be understood to say that, in no case post facto circumstances or events cannot be taken into account, but, on the whole. I have come to the conclusion that, whilst, in some rare and exceptional cases, the court may take into consideration subsequent events to protect the interests of the company or the shareholders, as a general rule, the court should consider the resolution on the footing of the circumstances which were in existence at the time when the scheme was formulated, deliberated upon the approved.'

The meetings of the members and creditors of the company were held in September, 1976, to consider the TIL scheme. At that time there was no other scheme in the picture. The NDDB scheme was presented to the court subsequently and the meetings were called to consider the said scheme in October, 1977, at which a representative of TIL was allowed to remain present and participate in the discussions. Certainly, Mr. Cooper cannot expect this court to

ignore the subsequent development and sanction the scheme on the basis of circumstances prevailing in September, 1976. The upgrading of the two schemes which tool place at the NDDB meetings also cannot be ignored. If Mr. Cooper reads the observations of Miabhoy J. to mean that the subsequent events which took place at the NDDB meetings also cannot be considered, I am afraid he is placing too narrow a construction on the passage relied upon. Even from the above quoted passage it becomes clear that the learned judge was aware that no hard and fast rule could be laid down in this behalf and that in some rare and exceptional cases a departure from the general rule may be permissible in the interest of the company or its shareholders. If it is the submission of Mr. Cooper that the circumstances prevailing in September, 1976, when the TIL scheme was debated alone should be considered and the subsequent events that took place at the meetings held in October, 1977, to consider the NDDB scheme should be ignored, I reject the same out of hand. I am not prepared to give such a narrow meaning to the observations of Miabhoy J. reproduced earlier.

66. Mr. Cooper, however, emphasised that the court will not impose its decision on a vast majority of the members who rejected the NDDB scheme while exercising its discretion under s. 391(2) of the Act. Referring to the observations In re Manekchowk & Ahmedabad Mfg. Co. Ltd. [1970] 40 Comp Cas 819 (Guj), he submitted that the court must treat it as cardinal that its function does not extend to usurping the view of the members and if the scheme is otherwise fair and reasonable it must respect the majority vote cast at the meeting. This board general principle of law is indisputable but its application must necessarily depend on the facts of each case. In the first place, the scheme is between the company and its members. We have already seen that even though the sponsor of the scheme plays an important role, his substitution would not effect the basic fabric of the scheme. In fact, in the instant case, it is difficult to understand how the scheme, in so far as it concerns the members, will be affected if TIL is substituted by NDDB. By the substitution of NDDB the rights of the members will not be adversely in any manner; on the contrary, the NDDB offer is better. It is, therefore, clear that by substitution of the sponsor the provision of the scheme concerning the members is not sought to be altered to their detriment. If at all, it will stand improved.

67. Now, out of 17,492 equity shares, 2,593 shares are held by Ratilal Gandhi and his group; 1,666 shares are held by Javerbhai Jamnadas Thakkar and his group; and 11,679, share are held by Mohmadhusein M. Merchant and his group and only 1,553 shares are held by sundry shareholders. While considering the two competing schemes I have pointed out that notwithstanding the fact that NDDB offered to pay at the rate of Rs. 15 per equity share as against TIL's offer of Rs. 10 per equity share, the equity shareholders, for some inexplicable reason, spurned the NDDB offer. This was sought to be explained by Mr. Cooper by projecting the personality of the promoter of the TIL scheme as a far more astute businessman. This explanation is far from convincing. As pointed out earlier, under the TIL scheme the shares have to be transferred to TIL on payment of the price offered by TIL. Similar is the provision in the NDDB scheme. In fact, NDDB has offered a better price. Besides, the financial capacity to pay the price is not doubted. Ordinarily, therefore, the equity shareholders would opt for the NDDB scheme whereunder they would receive Rs. 15 per share as against Rs. 10 offered by TIL. It cannot be forgotten that before NDDB entered the field, TIL had offered a paltry 10 paise per share to the equity shareholders and even this flea-bite payment was approved at the meeting held to consider the TIL scheme. The shares are tightly held by three groups and the voting pattern shows that the NDDB scheme was rejected by proxy votes. There are serious charges of misconduct and misfeasance against the ex-directors of the company who own the bulk of the equity shares. A CBI enquiry is pending against them, Mr. Nanavati, therefore, charged that here was a secret deal between the Birlas and the ex-directors of the company whereunder the Birlas have agreed to shield the ex-directors for their misdeeds once their scheme goes through. Be that as it may, it is crystal clear that there is more than meets the eye in the equity shareholders rejecting the better offer made by NDDB. The subtle intrigues the precede the meetings are difficult to know as they are carried out on the sly but the rejection of an obviously beneficial offer is bound to raise eyebrows. But under the scheme the equity shareholders do not have any lasting interest. They are to be paid off and it should be of little concern to them who buys them. In the earlier part of this judgment it has been clearly brought out that the company was financially broke and was unable to pay its debts. The value of the company's assets was clearly insufficient to pay off

even the secured creditor. Therefore, if the assets of the company were liquidated the ordinary shareholders could not except to receive anything for their shares. The offer to pay them a certain price per share is, therefore, clearly gratuitous or in the nature of a gift. In Re : Broomsfield Guild Pottery Society [1898] WN 80, it was said that if the company is insolvent and the scheme provides for the transfer of its business to another company, it is not necessary for the scheme to be approved by a meeting of ordinary shareholders, because they would receive nothing if the company were wound up and so they have no rights which are affected by the scheme. This principle was reiterated In re Tea Corporation Ltd., Sorsbie v. Same Co. [1904] 1 Ch D 12. In that case it was found as a fact that the value of the company's assets was such as to negative the notion that the ordinary shareholders had any financial interest in them. The ordinary shareholders did not vote in favour of the scheme at the meeting. The ordinary shareholders did not vote in favour of the scheme at the meeting. It was held that their dissent from the scheme was immaterial as they had no interest in the assets of the company and whatever was offered to them under the scheme was clearly in the nature of a gift. No decision disapproving this view is shown to me. So it matters little who pays the gift-money - TIL or NDDB.

68. It was, however, contended by Mr. Cooper that 91 per cent. of the equity shareholders had agreed to sell their shares to TIL outside s. 391 of the Act. He, therefore, argued that there was no scope for substituting NDDB for TIL since the equity shareholders had refused to sell their shares to NDDB. In the first place this arguments overlooks the provision in sub-s. (2) of s. 536 of the Act which, inter alia, provides that in the case of a winding up by or subject to the supervision of the court, any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void. Therefore, even if TIL has secured such an agreement from 91 per cent. of the shareholders (presumably the three groups holding the bulk of the equity holding) such an agreement would be void unless the court otherwise orders. In fact, such an agreement betrays the intrigues on the part of TIL to corner the shares and lends credence to the allegation of a secret deal between the ex-directors and TIL. Secondly, once a scheme is approved by the court, it receives statutory recognition and such an agreement executed in

favour of TIL would not stand in the way of its implementation.

69. Mr. Vakharia vehemently argued that the wishes of the workers/employees must be respected and the fact that the workers had disapproved the NDDB Scheme cannot be ignored. He complained that the highhanded, rude and insulting behaviour of the officials of NDDB who are presently manning the unit had totally alienated the workers and if NDDB remains in the management saddle there will not be any industrial peace and that will jeopardise the smooth working of the unit under the scheme. Now, under the TIL scheme as originally proposed all the workers/employees were to be treated as laid off from 1st November 1975, and they were to be paid only 50 per cent. of their respective salaries/wages up to 31st December, 1975, in full and final settlement of all their claims in two equal instalments. Subsequently at the meeting TIL upgraded the offer by agreeing to pay up to 9th March, 1976, instead of 31st December, 1975. As against this NDDB offered to pay full salary/wages to all workers/employees from 1st November, 1975, to 8th March, 1976, within three months form the effective date. It agreed to pay gratuity to those workers whose services were terminated prior to the closure. At the NDDB meeting TIL once again upgraded the offer and NDDB also matched its offer accordingly. It will be seen from the above that but for the appearance of NDDB on the scene the workers would have received a raw deal. TIL was to exploit them and they would not have got a better deal but for the emergence of NDDB. At the hearing of this matter Mr. Nanavati went so far as to say that NDDB would pay the workers/employees outside the scheme fully, if they so desire. At the time when the meetings were called to consider the schemes offered to them, the workers/employees were represented by the office bearers of the Rashtriya Mazdoor Sangh and they voted for the TIL scheme even though the NDDB scheme had initially offered a better deal. Subsequently the workers/employees were divided into two groups on the Bhavnagar Kamdar headed by Mr. Subodh Mehta making its appearance. The said Sangh has entered an appearance through Mr. Vakharia and its President, Mr. Subodh Mehta, has filed a detailed affidavit pointing out the manner in which NDDB has dealt with the employees/workers. The office bearers of the Rashtriya Mazdoor Sangh have sine changed their approach towards NDDB on realising their mistake. At the hearing of this petition they appeared and stated that they have no objection if NDDB is

substituted for TIL, in fact, they favoured the substitution; It clearly emerges from the above that there are two rival unions in the field one favouring TIL and the other favouring NDDB in management. Thus, the workers are divided on the question as to who should be in the ultimate management of the unit.

70. It will appear from the above discussion that the main objection of the Bhavnagar Kamdar Sangh is that the behaviour of the officers of NDDB who were in charge of the management was rude and unbecoming towards the workmen employed in the unit. While appreciating the grievance of the workmen, after the petitions was heard, the officers who were in the management have been replaced by others. I delayed the disposal of the summons to make sure if even after this change the grievance persists. Since then the working is smooth and there are no serious complaints. It must be realised that the burden of the song in the affidavit of Mr. Subodh Mehta is that the officials of NDDB who were in management behaved in a rude and insulting manner with the workmen and hence the workmen did not want NDDB in management. This objection can be and has been overcome by replacing the officers manning the key and sensitive posts in the unit. Therefore, this does not appear to be a strong ground for rejecting the substitution summons.

71. The other raised in the affidavit of Mr. Subodh Mehta is that during the interim period NDDB had suffered substantial losses because of mismanagement and want of experience in this line. The fact that it has suffered losses cannot be disputed. Mr. Vakharia, therefore, submitted that the workers/employees can never opt in favour of an inefficient management and would be justified in opting for stability to avoid recurrence of a similar situation within a short period. According to him the workers were inclined to opt for TIL not because there was any secret understanding with that concern but because they were satisfied that TIL would provide stable and efficient management having regard to its past experience in this field. It was, therefore, urged with considerable vehemence by Mr. Vakharia that the court should not foist on the workers an inefficient management which can promise nothing but a recurrence of the present situation within a few years and thereby worsen the plight of the workers. It must immediately be conceded that the welfare of the workmen under a particular

scheme or management is a relevant consideration, more particularly when the court is deciding the question of substitution, and if the court is satisfied that a particular management will not be able to deliver the goods and the scheme will soon be on the rocks it will refuse to stake the future of the company and its workmen by opting in its favour. What we have then to see is whether there is justification in the apprehension expressed by Mr. Vakharia on behalf of one of the trade unions.

72. Let us first focus our attention to the affidavit of Mr. Subodh Mehta dated 14th March, 1980. By that affidavit Mr. Mehta has tried to question the NDDB claim made in the affidavit of Mr. Rangwala by relying on certain articles appearing in magazines and journals criticising the project popularly known as 'operation flood' undertaken by NDDB based on the import of milk products. Without the necessary factual basis or foundation it would not be permissible for a court of law to act on certain articles projecting the view points of a few. A court of law acts on facts duly proved and not on individual opinions based on unauthenticated information.

73. After the fresh notice of hearing was issued Mr. Mehta filed another detailed affidavit dated 31st March, 1980, inter alia, contending that (i) NDDB had incurred substantial financial losses during the interim working of the unit; (i) there had been gross mismanagement in purchasing of groundnuts, cotton seeds, oil cakes, etc., and in the disposal of waste products because of want of expertise in this field; and (iii) the approach of the officers of NDDB manning the unit was rude, insulting and unbecoming towards the workers. I have already dealt with the last ground earlier and need not dwell on it any more. The first two points are interconnected and may be dealt with together. Now it is an admitted fact that NDDB has incurred losses during the working of the unit as and by way of an interim arrangement but at the same time it must be remembered that it has paid almost a crore of rupees by way of compensation. Its capacity to withstand the losses and at the same time pay a substantial amount by way of compensation speaks of its financial soundness. In the affidavit in rejoinder the purchasing policy of NDDB has been explained by its treasurer, Mr. Rangwala. The main reason for the heavy losses incurred by NDDB, in the opinion of Mr. Mehta, is its defective purchasing policy. According to Mehta, NDDB paid a price higher than the market

price in purchasing groundnuts through Balwantrai Mehta Oil Processing Co-operative Society Limited in 1978. He points out that Mr. H. Gohil of the Gujarat Co-operative Marketing Federation had also questioned the action of NDDB purchasing groundnuts through the aforesaid society which was out to exploit the growers. Mr. Rangwala in his rejoinder points our that in 1978 NDDB purchased 18,000 tonnes of groundnuts and out of its total purchases only 400/500 tonnes were purchased through the said society while most of the remaining stock was purchased through the Gujarat Oil Growers Co-operative Federation with a view to eliminating the middlemen. Similarly, the purchases of cotton seeds were made through the said Federation. It would appear from the above that the allegation that the bulk of the purchases were made through the Balwantrai Mehta Oil Processing Co-operative Society is not well founded. There is no basis for the allegation that the groundnut purchase were sub-standard. It must also be remembered that NDDB is not in a position of introduce long-term changes and instal new machinery for the simple reason that it has been permitted to work the unit as a stop-gap measure till the scheme to a snap strike notwithstanding the assurance given to court, which hampered production programme of NDDB. In the circumstances, it cannot be said that NDDB incurred losses because of lack of expertise in the field and defective purchasing policy. To my mind, the allegation of mismanagement has been made on hearsay and is without foundation.

CONCLUSION

74. With the factual panorama clear and the statutory perspective explained, we come face to face with the core question whether or not, in the said facts and circumstances, substitution of NDDB in place of TIL is warranted. The scrutiny of the salient features of the TIL scheme, as originally presented to this court, has clearly shown that TIL was out to exploit practically all the interests, including the workmen, and the offer made by it under the said scheme could hardly be said to be fair and equitable. But for the introduction of the NDDB scheme, I daresay, TIL would not have upgraded its scheme. The NDDB scheme, though beneficial, was rejected by the use of proxy power. Now, as observed earlier, a scheme under s. 391 of the Act is essentially between the diverse interests on the one hand and the company on the other and the personality of the sponsor, though important, is not

woven into the basic fabric of the scheme and it is always open to court to substitute one sponsor by another, if the facts and circumstances of the case so warrant. But, it must be realised that it is the TIL scheme which has received statutory clearance and not the NDDB scheme. There is, therefore, no question of according sanction to the NDDB scheme, the fact that it offers a better deal notwithstanding.

75. However, it cannot be overlooked that the financial institutions, viz., the nationalised banks and GSFC, have in no uncertain terms refused to support TIL though they initially voted in its favour before NDDB made its appearance. Technically, the TIL scheme stands duly approved even by these institutions but the court can ill-afford to ignore the subsequent developments. After the financial institutions voted in favour of the TIL scheme, NDDB entered the arena and the financial institutions voted in favour of its modified scheme. NDDB has since offered to deposit a sum of rupees one crore with the nationalised banks. TIL has expressed its inability to match this revised NDDB offer. So the financial institutions, particularly the nationalised banks, are disinclined to trade with TIL. Besides, they had not voted in favour of the TIL scheme in the absence of a better alternative. Can TIL effectively and smoothly implemented its scheme, if approved, without the co-operation of the financial institutions, particularly the nationalised bank The answer is not far to seek. The TIL scheme was originally sponsored by the petitioning creditor, M/s. Shamji Velji & Co. On an earlier occasion, when the banks withdrew support to the TIL scheme. Mr. B. J. Shelat, the learned counsel for the petitioning creditor, has informed the court that 'in view of the withdrawal of the support by the bank to TIL, the scheme as out forward by his client was not practicable'. The subsequent conduct of TIL in applying for the withdrawal of the deposit money of Rs. 75,000 from court betrays want of confidence on its part to run the unit under the said scheme without the support of the banks. If this was the situation in December, 1979, how does one account for TIL's revived interest in its scheme To my mind, it is because of the huge amount of accumulated compensation money, now in the hands of the official liquidator received from NDDB under the interim arrangement. If the TIL scheme is from NDDB under the interim arrangement. If the TIL scheme is approved and the winding-up order is revoked, TIL hopes to lay its hands on this huge amount of nearly a crore of

rupees. But as things presently stand, the nationalised banks are not willing to co-operate with TIL. If at one stage TIL felt that it cannot run the unit under its scheme without the support of the banks and decided to withdraw, it is difficult to understand how it can hope to implement the scheme now.

76. It must be borne in mind that in response to the advertisement issued by the official liquidator some time in November, 1977, NDDB alone showed interest in running the plant on an interim basis. It is because of the interest shown by NDDB that the employees/workers of the company were re-employed and were able to earn their living. Otherwise their plight would have been ruesome. It is under this interim arrangement that NDDB paid compensation to the official liquidator at the rate of Rs. 3 lakhs per month. Even after the expiry of the duration of the interim arrangement and notwithstanding the loss, NDDB continued to provide employment to the workers by running the unit up to date. Thinking retrospect, the office-bearers of the Rashtriya Mazdoor Sangh realised their mistake in opposing NDDB and that is why at the hearing they supported the prayer for substitution. In the meantime, another trade union headed by Mr. Subodh Mehta entered the field and it is opposed to NDDB being the management saddle. I have dealt with this inter-union rivalry in the earlier part of this judgment and do not think it necessary to restate the facts. Suffice it to say that on the question of substitution the workers are divided. None the less it cannot be forgotten than since the last about three years it is NDDB which has provided bread to the hungry workmen of the unit.

77. The statutory creditors, such as the taxation Departments, municipality, electricity board, etc., who are outside the scheme, have also favoured NDDB. The nationalised banks and GSFC have made it clear that they favour the substitution of NDDB for TIL. LIC, which holds a sizable number of preference shares, also prefers NDDB. Thus, the well-informed class which, it must be presumed, must have carefully considered the question of substitution having regard to its interest and the long-term interest of the company, has favoured NDDB. If all these creditors do not support TIL it is naive to think that TIL would have a smoothsailing. If as a result of considerable effort put in by all concerned, a fair, reasonable and workable scheme emerges, as in the present case, every endeavour must be made by the court to revive the sick unit by according approval

to the scheme. But if it is realised that a workable scheme is likely to be truncated because the financial institutions and the statutory creditors are opposed to a particular sponsor and are unwilling to do business with him, should not the court substitute the sponsor to salvage the scheme in larger public interest rather than allow it to wither away In such a situation if the court refuses to adopt a pragmatic approach and insists on the same sponsor implementing the scheme on the erroneous belief that he forms part of the basic structure of the scheme, the scheme is bound to face rough weather and if it capsizes (a risk not worth taking) it will prove disastrous to all interests, particularly the labour, for we will be back to square one.

78. On the one hand NDDB is a non-profit making body operating in the co-operative field while on the other hand TIL has profit-making as its objective. The NDDB objective is to benefit the producers as well as consumers by eliminating the middleman who is generally responsible for hiking up the prices of consumer goods and thereby offer the same at competitive rates. As its objective is not profit-making it can certainly offer its products at a price which is lower than that of a private enterpreneur such as TIL, and at the same time indirectly curb the monopolistic tendencies. Besides, it has the backing of the nationalised banks, GSFC, LIC and the statutory creditors. From the very outset it put up a fair and a reasonable scheme evincing no desire to exploit any interest. TIL, on the contrary, initially put up an unreasonable, unfair and inequitable scheme with a view to exploiting every interest. A comparative study of the two schemes as initially proposed, undertaken in the earlier part of this judgment, highlights this difference. TIL did not hesitate to employ unfair and dubious methods, such as, exhorting the equity shareholders to refuse to sell their shares to NDDB under the scheme, entering into agreements outside the court to purchase the shares, purchasing proxies and using proxy-power to defeat the more beneficial NDDB scheme. That seems to be the reason why the well-informed class of creditors is not favourably inclined towards TIL. If, having regard to this background, the nationalised banks, GSFC, LIC and the statutory creditors have lost confidence in the capacity of TIL to run the plant under the scheme, they cannot be blamed. Even the petitioning creditor who sponsored the TIL scheme expressed want of confidence in TIL and not only withdrew but moved a separate summons to substitute NDDB for TIL.

79. The principles which should guide a court in a situation like the present one may now be outlined. Once a fair, reasonable and bona fide scheme emerges, it should be the endeavour of the court to push it through. If there are obstacles which threaten the smooth working of the scheme, the court should try to remove them. A scheme under the Act is essentially between the members/creditors on the one hand and the company on the other and is not in the nature of a tripartite agreement between the members/creditors, the company and the sponsor of the scheme. Therefore, even though the sponsor enjoys a position of importance in any scheme of compromise or arrangement under the Act, his position is not so sacrosanct that the court cannot substitute him by another in exercise of the power under s. 392(1)(b) of the Act. Of course, the court will not lightly substitute the sponsor of the scheme unless it is satisfied that refusal to exercise the discretionary power will result in the otherwise workable scheme being defeated. If the court is on the horns of a dilemma, whether to substitute the sponsor or run the risk of throttling the successful implementation of the scheme, the court will certainly prefer the former course. Speaking generally, the purpose of presenting a scheme is not only to benefit the members/creditors of the company but also to subserve public interest and if this objective cannot be satisfied without substituting the sponsor, the sponsor must yield. Therefore, in cases where the court is satisfied that the scheme cannot be successfully implemented without substituting or changing the sponsor, the court will, without doubt, lean in favour of substitution for the obvious reason that it is preferable to implement the scheme under another sponsor (management) rather than allow it to be defeated altogether. It is the scheme which is of paramount importance and not the sponsor who promotes it. If the situation in a given case demands that the sponsor must be substituted to save the scheme, the court should not hesitate to do so and the sponsor who is replaced should not grudge it because the endeavour of all, including the court, should be to achieve the main objective, namely, to revive the sick unit in public interest. If this approach of the court is correct its effort should be to salvage the scheme and to save it from sinking by substituting the sponsor (TIL) whose stewardship is not acceptable to the nationalised banks, GSFC, LIC and the statutory creditors as well as the petitioning creditor who originally sponsored the TIL scheme. All these well-informed class of creditors have refused to co-

operate with TIL but have extended their whole-hearted co-operation to NDDB. So far as the equity shareholders are concerned, as pointed out earlier, they do not have any lasting interest in the future of the company as they are to be paid off under both the scheme and it matters little who buys them. Besides, having regard to the company's insolvent circumstances the equity shareholders have no subsisting financial interest in the company and hence what they are to receive under the scheme is clearly in the nature of a gift. So far as the preference shareholders are concerned, out of 12,492 fully subscribed shares, LIC alone holds shares of the value of Rs. 10 lakhs. Besides, at the NDDB metting four shareholders holding 10,017 shares voted in favour of NDDB as against eight shareholders holding only 158 shares who opposed, which shows that NDDB is acceptable to the former who hold the majority of shares. So far as the unsecured creditors/depositors are concerned, their interest is not likely to be jeopardise if substitution is allowed. So far as the workers/employees are concerned, as pointed out earlier, they are divided because of interunion rivalry. NDDB is, therefore, prepared to treat them outside the scheme. It must also be remembered that when the question of running the unit on interim basis was under consideration, NDDB was the only part which came forward to serve public interest, namely, to revive the unit, go into production and offer employment to the workers who were rendered jobless on the closure of the unit. Since then it has invested a substantial amount in reviving the unit and has paid a huge amount by way of compensation also. Undaunted by the loss suffered by it during the interim period, it did not leave the workers in the lurch by withdrawing after the expiry of the lease period but exhibited optimism and confidence by continuing to run the unit even thereafter. It was heartening to learn from Mr. Nanavati that NDDB has almost reached the break-even point. It is true that for sometime the workers had certain misgivings and they had resorted to a snap strike but, as stated earlier, their grievance was against the personnel manning the unit. The top brass in the management of the unit underwent a change to redress their grievance and in order to watch their performance I allowed some time to pass. The unit has since been working smoothly without any serious labour problem. In fact, NDDB has increased the percentage of D.A. payable to the workers on the summons moved by the Rashtriya Mazdoor Sangh which shows that the labour-management

relations are fast improving. It will appear from the above that by and large NDDB is acceptable to all concerned and since it is assured co-operation from the financial institutions, there is do difficulty in substituting it as the sponsor of the scheme which has received statutory approval.

Final order

80. The upgraded TIL scheme which has been approved by the statutory majority is sanctioned on the following terms and conditions :

(a) NDDB will stand substituting for TIL and the two judge's summons taken out for that purpose, namely, Company Application No. 106 of 1980 and Company Application No. 114 of 1980, are accordingly made absolute;

(b) in respect of each and every interest, the offer made by the finally upgraded TIL scheme will stand further upgraded according to the offer made under the upgraded NDDB scheme, to the extent the latter is beneficial to the concerned interest;

(c) so far the workers/employees are concerned, they will be paid on the basis that they are outside the scheme but in no case will the payment be less than what they would have received under clause (b) above;

(d) if any workman has not been employed as per the condition imposed by the interim arrangement dated 19th December, 1977, or has been unjustly removed thereafter, liberty to such workman to apply within two months from today;

(e) the amount of Rs. 75,000 deposited by TIL pursuant to the court's order in Company Application No. 131 of 1977 shall be refunded to it by the official liquidator as prayed for by Company Application will stand disposed of accordingly;

(f) the official liquidator shall retain the accumulated compensation money till further orders. If any amount due from NDDB by way of compensation, the same should also be paid to the official liquidator at an early date;

(g) within a fortnight from today NDDB will file an undertaking in court that it will sue and/or prosecute the ex-directors of the company for misappropriation, misfeasance, etc., if there is prima facie evidence against them or if this court so directs;

(h) this court reserves unto itself the right to direct institution of civil proceedings against and/or prosecution of the ex-directors of the company for criminal acts allegedly committed by all or any of them in connection with the affairs of the company, independently of clause (g) above;

(i) all the expenses incurred by the official liquidator for and on behalf of the company shall be borne by the company after this order becomes effective;

(j) subject to the aforesaid terms and conditions, the winding-up order passed by this court on 15th September, 1976, and the interim arrangement for the running of the unit made by its order dated 19th December, 1977, shall stand revoked and terminated from the date of filing of the undertaking under clause (g) above or at the end of 31st January, 1981, whichever is later;

(k) on the revocation of the winding up order, the official liquidator will, subject to the terms and conditions of this order, give possession of the company to NDDB along with the relevant records;

(l) the scheme will be implemented and carried out under this court's supervision and subject to the directions that this court may give from time to time for the better and efficient execution of the scheme;

(m) if any difficulty is experienced in the execution or implementation of the scheme hereby approved and modified or any doubt arises as regards the true meaning and scope of any of the terms imposed by this order, parties will be at liberty to apply for further directions;

(n) a copy of the finally approved scheme together with the modifications accepted by this order will be separately filed; and

(o) a certified copy of this order will be filed with the Registrar of Companies as required by sub-s. (3) of s. 391 of the Act.

81. In the result, therefore, Company Petition No. 57 of 1976, preferred under s. 391(2) of Act, for according sanction to the TIL scheme is allowed subject to the modifications made from time to time as also the modifications sought and granted by the two judges summons, viz., Company Applications Nos. 106 and 114 of 1980, vide cls. (a) and (b) hereinabove. So far as Company Petition No. 9 of 1978 is concerned, alternative prayers can survive. If I had not been inclined to substitute NDDB for TIL I would have certainly given serious thought to the second alternative regarding sale of the unit. Thereafter, Company Petition No. 9 of 1978 does not survive and stands disposed of accordingly; in so far as Company Application No. 279 of 1979, is concerned, as observed earlier, it is disposed of as per clause (e) above.

82. There shall be no order as to costs so far as the parties who appeared at the hearing are concerned save and except the official liquidator who will receive costs from the company quantified at Rs. 2,000. Liberty to Central Government to take out a separate summons for quantification of its costs.

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