In Re: Arvind Mills Ltd.

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SooperKanoon Citation : sooperkanoon.com/737525

Court : Gujarat

Decided On : Apr-08-2002

Reported in : [2002]111CompCas118(Guj)

Judge : N.G. Nandi, J.

Acts : Companies Act, 1956 - Sections 177, 391, 391(1), 391(2), 391(6) and 394; Bombay Relief Undertaking (Special Provisions) Act, 1948 - Sections 3, 4 and 4(1)

Appeal No. : Company Petition No. 140 of 2001 and Company Application No. 230 of 2001

Appellant : In Re: Arvind Mills Ltd.

Advocate for Pet/Ap. : S.N. Soparkar,; Swati Soparkar,; S.B. Vakil,;

Judgement :

N.G. Nandi, J.

1. This petition under Section 391(1) of the Companies Act, 1956 ('the Act') has been filed by Arvind Mills Ltd. ('the company'), seeking sanction to the scheme of restructuring of its debts, floated by the creditors.

The company was incorporated on 1-6-1931 as a Public Limited Company to carry on business of spinning, weaving, manufacturing, dealing in cotton or other fabrics, substances and the preparation, dyeing or colouring of any of the said

substances and the sale of yarn cloth or other manufactured fabrics and products and to carry on the business namely cotton spinners etc.; that the company had the authorised issued and subscribed share capital running into crores of rupees and issued equity shares of Rs. 1,00,54,99,450 with redeemable cumulative and non-convertible preference shares etc.; that the company and its associated textile companies employed over 10,000 persons in and around the city of Ahmedabad making them a largest private sector employer in the State of Gujarat; that the petitioner company earned profit for pretty long time; that the company obtained borrowings/credits from various Banks and financial institutions to finance its business needs and as on 31-3-2000 the total debt of the company mounted to approximately $ 593 million or Rs. 2,700 crores; that 64 per cent of that is from on-shore lenders and balance from off-shore lenders. That during the period between years 1997-2000 the company started making loss and was confronted with falling denim price and increase in manufacturing cost. The changed supply and demand structure in the industry, world-wide intensified price competition and as a result there was steep fall in the company's sales realisation. That, on account of sharp increase in full expenses, significant cost and time overrun in certain projects, pre-operative expenses due to longer period of trial production and translation loss on dollar debt due to the depreciation of Indian rupees, the company did not generate adequate operational cash to service its debt during the financial year 2000. That the petitioner company felt the need for rescheduling and restructuring of its debts. That the company pro-actively sought a debt restructuring in a comprehensive manner that could prevent it from seeking repeated roll-overs from several lenders at differing terms. That the company held meetings with its lenders to formulate its debt restructuring and lenders elected representatives to form a Steering Committee in order to implement the restructuring process in an efficient manner. On 14-11-2000 the Steering Committee approved the restructuring plan for launch to all lenders. That the detailed terms of the restructuring were incorporated in term sheet which was despatched to all lenders on 25-1-2001 for their approval. A large majority of the existing lenders have approved the 'Term Sheet' incorporating the detailed terms of the restructuring.

2. The company filed Company Application No. 160 of 2001 for requisite directions for convening meeting of the various classes of creditors of the company. Vide

order dated 13-6-2001 the Court directed the company to convene meeting of its various classes of creditors for the purpose of considering and if thought fit approve with or without modifications, the arrangement embodied in the Scheme of Arrangement. The order further directed Mr. A.L. Shah, Advocate and failing him Mr. A.C. Gandhi, Advocate to act as Chairman of the meeting of the classes of creditors of the Company, i.e. unsecured creditors, working capital lenders and secured creditors of the company and to report the result thereof to this Court. Necessary notices of the meeting together with copy of the scheme, explanatory statement and form of proxy were individually sent to each of the creditors of the company; that on 13-7-2001 meeting of each of the class of creditors of the company was held at the registered office of the company in accordance with the order dated 13-6-2001; that the meeting of the unsecured creditors of the company was attended by 21 unsecured creditors. That the scheme duly amended was placed for consideration of the meeting, after inviting debate thereon and the question submitted to the meeting of secured creditors, unsecured creditors and working capital lenders was, whether unsecured/secured/working capital creditors of the company approved the Scheme of Arrangement submitted at the meeting in the form of resolution. That, thereupon the aforesaid resolution on the proposed Scheme of Arrangement was put to vote by poll. That twenty (20) unsecured creditors holding Rs. 8,914.94 million of the outstanding unsecured debt of the company as on 31-3-2000 voted in favour of the said Scheme of Arrangement, representing 95.24 per cent in the number of unsecured creditors and 98.95 per cent in value of the total outstanding unsecured debt of the company as on 31-3-2000, present and voting, excluding invalid ballot papers. One unsecured creditor voted against the Scheme of Arrangement representing 4.76 per cent in the number of unsecured creditors and 1.05 per cent in value of the total outstanding unsecured debt of the company as of 31-3-2000 present and voting. Thus the scheme was approved and resolution was passed with the requisite majority. That the meeting of the working capital lenders of the company was attended by 12 working capital lenders. That the resolution on the proposed Scheme of Arrangement was put to vote by poll. Ten working capital lenders holding Rs. 4,432.32 million of the outstanding working capital debt of the company as of 31-3-2000 voted in favour of the said Scheme of Arrangement

representing 90.91 per cent in number of the working capital lenders and 96.2 per cent in value of the total outstanding working capital debt of the company as of 31-3-2000, present and voting, excluding invalid ballot papers. One working capital lender holding Rs. 175 million of the outstanding unsecured debt of the company as of 31-3-2000 voted against the said Scheme of Arrangement representing 9.09 per cent in number of working capital lenders and 3.80 per cent in value of the total outstanding working capital debt of the company as of 31-3-2000, present and voting. One vote was found to be invalid. The scheme was approved and resolution was passed by the working capital lenders with the requisite majority. That the meeting of the secured creditors of the company was attended by forty six (46) secured creditors. Forty (40) secured creditors holding Rs. 10,735-30 million of the outstanding secured debt of the company as of 31-3-2000 voted in favour of the amendment representing 90.09 per cent in the number of secured creditors and 89.90 per cent in value of the total outstanding secured debt of the company as of 31-3-2000, present and voting, excluding invalid ballot paper. Four (4) secured creditors holding Rs. 1205.16 million of the outstanding secured debt of the company as of 31-3-2000 voted against the said Scheme of Arrangement representing 9.09 per cent in the number of secured creditors and 10.09 per cent in value of the total outstanding secured debt of the company as of 31-3-2000, present and voting. Two (2) votes were found to be invalid. The amendment was approved and the resolution was passed with the requisite majority. Thereafter the scheme duly amended was placed for consideration of the meeting. The meeting passed requisite resolution and approved the scheme. Thereupon, resolution on the proposed Scheme of Arrangement was put to vote by poll. Thirty five (35) secured creditors holding Rs. 9,565.03 million of the outstanding secured debt of the company as of 31-3-2000 voted in favour of the said Scheme of Arrangement representing 85.36 per cent in the number of secured creditors and 88.56 per cent in value of the total outstanding secured debt of the company as of 31-3-2000, present and voting, excluding invalid ballot papers. Six (6) secured creditors holding Rs. 1,235.16 million of the outstanding secured debt of the company as of 31-3-2000 voted against the said Scheme of Arrangement representing 14.63 per cent in the number of secured creditors and 11.43 per cent in value of the total outstanding secured debt of the company as of 31-3-2000 present and voting. Five

(5) votes were found to be invalid. That the scheme approved and resolution was passed with the requisite majority.

3. The company along with the petition under Section 391(1) presented the scheme 'Exhibit D' floated by the body of creditors for approval and prayed for the reliefs stated in para-24 of the petition.

The petition was admitted on 25-7-2001. This Court directed the petition to be advertised in Times of India (Ahmedabad edition), Gujarat Samachar (Ahmedabad edition) and Sandesh (Ahmedabad edition). Notice in Official Gazette was dispensed with. The notice to the Central Government was directed to be served through Regional Director, Department of Company Affairs, Bombay. Mr. S.B. Vakil, the learned senior counsel with Mr. A.S. Vakil for respondent United Bank of Switzerland, Mr. P.C. Kavina, the learned counsel with Mr. A.S. Diwan and Mr. N.C. Thakkar for respondent Commerzebank AG, Mr. P.P. Banaji, the learned counsel for respondent Fuji Bank, Ms. Rajni Iyer, the learned counsel with Mr. Jal Soli Unwala for respondent Bank of Nova Scotia Asia Ltd. Mr. S.N. Shelat, the learned senior counsel with Mr. N.V. Anjaria for respondent Deutsche Bank, Mr. K.S. Nanavati, the learned senior counsel with Ms. Megha Jani for respondent UCO Bank, Ms. P.J. Davawala, the learned counsel for UOI, Deptt. of Company Affairs, Mr. Mihir Joshi, the learned counsel for respondent State Bank of Saurasthra, Mr. Sandip Singhi, the learned counsel for respondent Exim Bank and Mr. D.S. Vasawada, the learned counsel for Textile Labour Association appeared on advance copy being supplied to them. The petition was published in the newspapers referred to above as directed by this Court.

4. Secured Creditors, namely Commerzebank AG, and The Bank of Nova-Scotia Asia Ltd., Singapore Branch filed collective objections to the Scheme of Arrangement in response to the public notice of the company's advocate published in the issue dated 27-7-2001 of Times of India (Ahmedabad edition). The objectors in their affidavit of objections raised following disputes, namely (1) that the company cannot invoke jurisdiction of this Court under Section 391 as the company is a 'Relief Undertaking' under the provisions of Bombay Relief Undertaking Act, (2) Jurisdiction to entertainment this petition, (3) there is no

genuine compromise or arrangement, (4) the scheme operates unfairly, while favouring some creditors, the scheme seeks to confiscate the legitimate rights and securities of the objectors and members of its class, (5) sanction of the scheme, if accorded by this Court would operate as a cloak to cover up the legitimize fraud perpetrated by the company in collusion with one of its lenders, ICICI Limited (ICICI) and also would legitimize criminal acts and breach of trust as also legitimize gross acts of misfeasance and malfeasance by the company and ICICI, (6) that the relief sought are beyond the scope of the powers of this Court under Section 391 and (7) the scheme of offends public and commercial morality, and that the scheme does not have the approval by requisite majority, that the foreign currency lenders (off-shore lenders) have not been constituted as a separate class.

5. On 1-2-2002 Ms. P.J. Davawala, the learned additional standing counsel for the Central Government stated that the Government of India has no objection to the sanctioning of the scheme or restructuring and produced letter dated 13-9-2001 by Registrar of Companies, Gujarat, to the said effect.

6. I have heard Mr. S.N. Soparkar, the learned senior counsel with Mrs. Swati Soparkar for the petitioner company, Mr. S.B. Vakil, learned senior counsel with Mr. A.S. Vakil for United Bank of Switzerland, Mr. P.C. Kavina, the learned counsel with Mr. A.S. Diwan & Mr. N.C. Thakkar for Commerzebank AG, Mr. P.P. Banaji, the learned counsel for Fuji Bank, Ms. Rajni Iyer, the learned counsel with Mr. Jal Soli Unwala for Bank of Nova Scotia Asia Ltd., Mr. S.N. Shelat, the learned senior counsel with Mr. N.V. Anjaria for Deutsche Bank, Mr. K.S. Nanavati, the learned senior counsel with Ms. Megha Jani for UCO Bank, Ms. P.J. Davawala, the learned counsel for Union of India, Department of Company Affairs, Mr. Mihir Joshi, the learned counsel for State Bank of Saurasthra, Singhi & Co. for Exim Bank and Mr. D.S. Vasawada the learned counsel for Textile Labour Association.

7. It is not much in dispute that the company at one point of lime a leading textile company in the country fell into rough weather in the latter half of 1990's and incurred losses and confronted with financial crunch. As seen above its debts on 31-3-2000 mounted to approximately $ 593 million/ Rs. 2,700 Crores and 64 per

cent of the aforesaid debt was from the onshore (Indian Currency) lenders and balance from off-shore (foreign currency) lenders - the present objectors are the off-shore lenders who have lent money to the company in foreign currency, namely American dollars and the repayment thereof also agreed to be in the foreign currency. The company filed company application being Company Application No. 160 of 2001 for directions for convening meeting of the various classes of creditors of the company. Vide order dated 13-6-2001 this Court directed the company to convene meeting of various classes of creditors of the company for the purpose of considering and if thought fit approving with or without modification the arrangement embodied in the Scheme of Arrangement. After service of notice individually sent to the creditors as well as the publication of the notice in the local daily newspapers as directed in the said order, the meetings of the different classes of creditors i.e. unsecured creditors, working capital lenders and secured creditors of the company were convened on 13-7-2001. The said meeting of the unsecured creditors was attended by 21 unsecured creditors. The meeting of the working capital lenders was attended by 12 working capital lenders. The meeting of the secured creditors was attended by 46 secured creditors. All the classes of creditors approved the scheme with requisite majority. Finally, amended scheme of Compromise or Arrangement (Annexure-D) was put to vote by poll. 35 secured creditors, i.e. 88.56 percent in value of the total outstanding secured debt of the company as of 31-3-2000, present and voting, excluding invalid ballot papers. Six secured creditors representing 14.63 per cent in number of sercured cretitors and 11.43 per cent in value of the total outstanding secured debt of the company as of 31-3-2000, present and voting, with 5 votes found to be invalid, approved the Scheme of Arrangement and the Chairman reported the result of all the three meetings to this Court vide report dated 20-7-2001. It is not in dispute that, out of total number of secured creditors the present objectors four (4) in number have chosen to object to the scheme being sanctioned by this Court under Section 391.

8. The salient features of the scheme reproduced in para-14 of the petition read :--

(a) The Scheme of Arrangement ('the Scheme') with the creditors has the effect of restructuring of the debt of the company owed to the existing lenders (as defined

in Section 1 of the Schedule) pursuant to Section 391 and other relevant provisions of the Act.

(b) In the scheme, unless repugnant to the meaning or context thereof, the following expressions shall have the following meanings :

I. 'Act' means the Companies Act or any statutory modification or re-enactment thereof;

II. 'Commencement Date' or 'Appointed Date' shall mean 1-4-2000, being the date as of which (or by reference to which) relevant existing credits will be restructured on the basis that relevant calculations of and relating to, existing creditors are made as of 31-3-2000;

III. 'effective date' shall mean the date, which is the later of;

(i) the date on which the certified copy of the order of the High Court of Gujarat sanctioning the scheme is filed with the Registrar of Companies, Gujarat, and;

(ii) the date on which all the conditions precedent sent forth in Section 3(A) and Section 3(B) of the Schedule are, unless waived as per Clause 19 of the scheme, satisfied;

IV. 'Existing Credit' shall mean the credit facilities as specified in Appendix 1 and Appendix 2 of the Schedule; and

V. 'Schedule' means the schedule annexed to the scheme being the Term Sheet' in relation to the restructuring.

(c) The term sheet annexed as the Schedule to the scheme shall be, unless the scheme provides otherwise, deemed to be incorporated by referenec herein, and all capitalised terms in the scheme which are not otherwise defined shall have the meaning given to them in the Schedule. The Schedule forms an integral part of the scheme and all actions that are contemplated to be done or done under or in pursuance of the term sheet shall be deemed to have been done in pursuance of the scheme. Upon the coming into effect of the scheme, the provisions of set forth in the term sheet shall become binding in terms of the provisions of the scheme

and shall operate notwithstanding anything to the contrary contained in any deed, instrument or writing, provided that all references to signing of restructuring documents to implement the restructuring would be construed as referring to the implementation of the restructuring through the Scheme of Arrangement and 'Closing Date' as defined in Section 1 of the Schedule would be construed as referring to the effect date and no effect would be given to the date mentioned therein. It is, however, clarified that in the event of any conflict between the scheme and the term sheet, the former shall prevail over the latter.

(d) From the effective date and with effect from the commencement date and subject to the provisions of the scheme including in relation to the execution of any documentation to give formal effect thereto, the existing credits of the company shall be restructured on the terms and conditions and in the manner provided for in the Schedule.

(e) The restructuring of the preference shares may be effected, if need be, by a separate proceedings in accordance with the terms and conditions mentioned in Section 2(D) of the Schedule.

(f) Pursuant to Section 1 [under Clause (c) of the heading 'Credits to be Restructured'] of the Schedule, the non-retail public debenture holders shall be restructured under the scheme in the same manner as the restructured lenders and would accordingly elect or be deemed have elected to participate in either the Buyback Schemes or the Restructuring Scheme on the same terms and conditions as the restructured lenders.

(g) Excluded Debt - The excluded debt shall remain unaffected by the restructuring contemplated under the scheme and the company shall continue to make the payments due in relation to them as and when they become due and payable. Provided however, that any consequential changes to their terms in relation to the restructuring of the security or otherwise to give effect to the restructuring of the debt under the scheme, shall be carried out by the company.

(h) Modification of Security- From the effective date and subject to the provisions of the scheme including in relation to the execution of any documentation to give

formal effect thereto, the approvals from any party which is not a holder of the existing credits and the time frame therefore, the following security shall be deemed to be created and/ or modified in the manner provided for in Section 4 of the Schedule :

(i) security held by the existing lenders (first charge and second charge);

(ii) security held by the working capital lenders; and

(iii) security to be created in favour of the lenders providing the new debt and/or participating in Debt Buyback Scheme C.

(i) Documentation - The existing credits of the company have been restructured under the scheme and all rights and liabilities relating to the restructured debt are created under the scheme. In addition, the company and the restructured lenders shall enter into any documentation that may be required, only to give formal effect to the restructuring and for the creation of the security contemplated by the scheme, and to govern the prospective/ongoing relationship between the company and its existing lenders (including covenants of the company, supervision of the management of the company, events of default etc.) Section 11(c) of the Schedule and the references in the Schedule to restructuring documents would be construed accordingly. Provided however that on and from the effective dale, in the absence of the formal documentation referred to above, the rights, obligations and privileges of the company and the existing lenders shall continue to be governed by the documents in relation to the existing credits in so far as the same are not inconsistent with the provisions of the scheme, and to the extent of any inconsistency between the scheme and the said documents the scheme shall prevail.

(j) Election to the Restructuring and Buyback Schemes - As indicated in Section 2(A) of the Schedule (under the heading 'Election Process') the restructured lenders are to make elections to the Debt Buyback Schemes and/or the Restructuring Schemes. Such election shall be made within seven days from the date of conclusion of the meeting of the classes of the existing lenders. As this election has already been made by most of the existing lenders consenting to the

term sheet pursuant to a circular sent by the company, such existing lenders would not be required to send fresh letters of election and in the absence of such fresh letters of election their existing elections shall be deemed to be the elections for the purposes of the scheme. The existing lenders not consenting to the scheme at the meeting of the classes of the creditors would be dealt with in accordance with Section 11(B) of the Scheme.

(k) Regulatory Approvals for Payments-The company shall make all the payments contemplated under the Debt Buyback Schemes, subject to all necessary regulatory approvals. The company shall make all necessary applications (and shall do all follow up actions that may be required) to the relevant regulatory authorities for effecting such payments. In the event that any payments that are required to be made by the company cannot be made immediately due to regulatory reasons, the company shall open a separate no lien account with a third party agent acceptable to the existing lenders whose payments cannot be made and such account would be charged to the security agent or any other agent chosen by such existing lenders for the benefit of the existing lenders and the company would make all necessary applications for the creation of such charge.

(l) References to 75 per cent consent of Lenders - Except in relation to consent/actions to be taken after the effective date from the post restructuring lenders all references in the schedule to 75 per cent consent of the lenders shall be deemed to have been satisfied upon the sanction of the scheme by the requisite majority of each class of existing lenders and references to the consent of 100 per cent of existing lenders shall be deemed to have been satisfied upon the sanction of the scheme by the Hon'ble High Court of Gujarat at Ahmedabad.

(m) Borrowing Restrictions and Disposal Restrictions- The scheme shall be deemed to restrict the company's ability to borrow further monies and upon the company's ability to sell, transfer or lease any of the fixed assets of the company, except in the circumstances provided for in Section 8(B) and 8(C) respectively of the Schedule.

(n) Issue of Warrants - The company shall issue warrants as provided for in the Schedule.

(o) Contractual Arrangements prior to coming into effect of the Scheme - During the pendency of the scheme before the High Court of Gujarat at Ahmedabad, nothing contained in the scheme shall restrict any of the parties hereto from entering into any definitive documentation or receiving any payments pursuant to their elections made under the circular sent to existing lenders consenting to the term sheet by the company [as described under Clause (j) above] from the company, provided that no such arrangement would be inconsistent with the object or provisions of the scheme.

(p) Pending Legal Proceedings - Any proceedings pending against the company, in India or abroad, relating to any of the existing credits shall, on the effectiveness of the scheme, be terminated and the rights, obligations and liabilities of the parties shall be governed by the terms of the scheme.

(q) The company shall with all reasonable despatch, make applications/ petitions under Section 391 and other applicable provisions of the Act to the High Court of Judicature of Gujarat for sanctioning the scheme and obtain all approvals as may be required under law.

(r) In the event of the scheme failing to take effect by 31-12-2001 or such later date as may be agreed by the company and the working group, the scheme shall become null and void and in that event no rights or liabilities whatsoever shall accrue or be incurred inter se by the parties. Provided that the company may, with the approval of the working group, at anytime withdraw the scheme so as to implement the restructuring in any other manner if that is found to be feasible.

(s) All costs, charges and expenses, including any taxes and duties in connection with the scheme and incidental to the completion of the restructuring of the debt of the company in pursuance of the scheme shall be borne and paid by the company.

(t) The working group shall take all decisions required to be made by it under the scheme, including in relation to waiver of any of the conditions precedent set out in Sections 3(A) and 3(B) of the Schedule, with the consent of at least three of its members.

(u) The board of directors of the company, with the consent of the working group may assent from time to time on behalf of all persons concerned to any modifications or amendments or additions to the scheme, or which the High Court of Gujarat at Ahmedabad and/or any other authorities under law may deem fit to approve or impose and to resolve all doubts or difficulties that may arise for carrying out the scheme and to do and execute all acts, deeds, matters and things necessary for bringing scheme into effect.

9. The benefits of the Scheme of Arrangement reproduced in Para-15 of the petition read thus :--

(a) This scheme would help in the revival and continued existence of the petitioner company, which as a group employs over 10,000 employees at various locations. It is apprehended that if a scheme of revival/ rehabilitation is not sanctioned, the petitioner company may have to be wound up resulting into tremendous unemployment. Further the chances of the creditors receiving any money in such a situation are always bleak. Incidentally it may be stated that one winding up petition is already pending against the petitioner company before this Hon'ble Court.

(b) This scheme would help in the revival and continued existence of the petitioner company, which has contributed heavily to the exchequer by way of sales-tax and excise duty. It is also one of India's largest exporters in the textile industry. Over the years it has played a major role in the economic development of the State of Gujarat.

(c) The scheme presents the comprehensive solution for the entire debt problem of the petitioner company. Once the scheme is implemented, the financial health of the petitioner company will be restored as the scheme is aiming at infusion of fresh equity, reduction of substantial portion of debt and rescheduling of balance debt so as to align with the expected generation of cash in future. The scheme is acceptable to large majority of the creditors and has been worked out after protracted negotiation with the creditors.

(d) The scheme contains the best possible solution under the present circumstances for all the stakeholders of the petitioner company, i.e. the shareholders, the management, the workers and the creditors and involves substantial sacrifice and commitment to contributions from the management, the promoters and the creditors.

(i) The shareholders are infusing additional capital of Rs. 75 crores by way of a rights issue even though there would be severe restrictions on the declaration of dividend on equity capital.

(ii) The promoters will make additional investment in the equity capital of the petitioner company by subscribing to their portion of the rights issue and may also arrange for shortfall, if any, in the subscription to the rights issue. The promoters have also agreed not to dispose of the existing share held by them in the petitioner company until all the post restructuring debt is fully paid. If any dividend were paid on existing equity, the promoters would reinvest the dividend in the petitioner company in the form of interest-free and subordinated loans.

(iii) The lenders who are opting for buyback of their debt are sacrificing 52 per cent--55 per cent of principal outstanding and waiving the entire unpaid interest in consideration of their immediate exit from the petitioner company lenders who are not opting for buyback are accepting longer (5 to 10 years) tenure for repayment and reduced rates of interest.

(iv) The management of the petitioner company is accepting well defined control and monitoring by the lenders over the management of the petitioner company. The board of the petitioner company is to be reconstituted with lenders appointing four nominee directors and influencing the appointment of another four directors. The Chairman of the board of directors and director (Finance) will be independent persons not connected with the promoters of the company. There will be a Supervisory Board consisting of Chairman, Managing Director, Director (Finance), one nominee director and one independent director. The management is also accepting the appointment of an independent auditor for assisting lenders in reviewing and monitoring the cash flow and performance of the petitioner company in a specified manner. The management of the petitioner company has also given

rights to the creditors to appoint independent engineer to oversee the technical performance of the manufacturing facilities of the company. Further, lenders are being given the power to change the management upon the occurrence of certain events of default.

(e) The scheme would maintain the petitioner company as a 'going concern'. Since the petitioner company is unable to generate cash sufficient to meet its contract debt service obligations, the only alternative would be to liquidate the petitioner company which would not benefit the creditors as their recovery would be substantially lower in the case of liquidation than what is possible from the operation of the petitioner company. The continued operation of the petitioner company would ensure that the assets of the petitioner company remain productive, the petitioner company will continue to earn foreign exchange and contribute to the exchequer in the form of taxes and the employment of over 10,000 employees would also be protected.

(f) The scheme does not involve any sacrifice from retail fixed deposit/ debenture holders or the workers of the company as their dues are sought to be repaid in full and therefore the small investor or workers would not suffer due to this restructuring of the petitioner company.

10. It is not disputed that the scheme has been floated and supported by the majority of the creditors. The objectors do not have majority even in the $ 75 million syndicate, i.e. off-shore lenders. Fuji Bank who had earlier supported the scheme later on, on account of the change of the management, the new management Deutsche Bank AG Singapore has objected to the scheme but majority of the $ 75 million Syndicate off-shore lenders who are tenders in foreign currency have supported the scheme at the time of meeting of the secured creditors. It is not disputed that the objectors as the foreign currency lenders insisted for the better terms than the terms offered by the scheme to the other secured creditors including off-shore lenders, and the terms offered under the scheme to the secured creditors were not palatable to the present objectors and that is why the objections to the scheme. It is also not disputed that the objectors attended the meeting of secured creditors but have declined to be the members of

the Steering Committee or a Sub-Committee which was constituted by the Steering Committee to scrutinize the transactions of the company for the purpose of the scheme of compromise, but attended the meeting as the observers had participated in the meeting.

It is also admitted that in December 1999 a Technical Expert KSA Technopak was appointed as consultant to carry out techno-economic viability study of the company at the instance of some of the lenders, including the objectors. Thereafter, in January 2000 the Company appointed Jardine Fleming (P.) Ltd. a firm of financial consultants to devise the package for revival of the company. After receipt of the report of the said consultants in March 2000, two meetings of the lenders of the company were held and a Core Group of the major lenders by the name 'Steering Committee' ('SC') was formed to examine reports of the experts of majority lenders, including the objectors. The SC which met five times all the representatives of the objectors attended these meetings but refused to be the part of the SC as members thereof. Request of the objectors for better terms as it is revealed from Pages 00005, 6 and 49 of Document File, Part-I was refused by the SC. The objectors raised allegation of illegality of sale and lease back transaction, spin-off garment division and diversion of funds. The objections raised by the objectors did not find favour with the SC which consisted of foreign currency lenders also, and the SC approved terms of restructuring.

11. One of the arguments advanced by the learned counsel for the objectors is that, this Court has no jurisdiction under Section 391(1), in as much as the foreign currency secured lenders (i.e. the objectors) have not been constituted as a separate class as the consent of each class of creditors should be available with the Court before sanctioning the scheme and the objectors have not consented or agreed to the Scheme of Arrangement Exhibit-D.

It is not in dispute that all secured creditors i.e. lenders in foreign currency and lenders in Indian rupees and who are to be repaid in foreign currency and Indian currency respectively have been constituted as one single class of creditors for the purpose of meeting convened on 13-7-2001. Thus, there is no distinction kept between secured creditors lending either in foreign currency or Indian currency. In

other words the foreign currency lenders were not treated as a distinct group/class. It is also the say of objector No. 1 in particular that as against other secured creditor, namely ICICI, the objectors have a conflicting interest as a civil suit and criminal complaint have been filed and pending against ICICI. Thus, in the say of the objectors, there is not only absence of commonality of interest but also a conflict of interest between objectors and other secured creditor viz. ICICI; that, there could not have been and in fact there is no effective consultation in the meeting of the secured creditors on 13-7-2001. That, the group or class of secured creditors as constituted by the company are heterogeneous group having nothing in common and that the objectors cannot be identified with lenders in domestic currency.

12. In order to appreciate what is meant by class of members/creditors and what is the nature of interest which is required for a separate classification of members, and also in what set of circumstances separate classes of creditors would be required to be constituted under Section 391, it would be necessary as to what Section 391 provides:-

'391. Power to compromise or make arrangements with creditors and members - (1) Where a compromise or arrangement is proposed -

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

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

The aforesaid provisions provide for two types of arrangement or compromise. One type of arrangement made by and between the company and its creditors as a whole or between its members as a whole, and the other type of compromise or arrangement is such which is between the company and its creditors and members as a whole, but it may be between the company and class of creditors or between the company and class of members. Sub-section (4) of Section 391 provides for an application being made for the issue of direction for meeting of the creditors or class of members or the members of class of creditors as the case may be. Sub-section (2) deals with when majority in number in value of creditors or class of creditors agree to any arrangement or compromise, if sanctioned by the

Court, be binding on all the creditors. It is suggested from the provisions contained in Section 391 that, it is only where different terms are offered to different class of creditors under the proposed compromise or arrangement, separate class' would-be required to be constituted in respect of each class of creditors or shareholders for whom either compromise or arrangement has been offered. The use of the phrase 'as the case may be' in Sub-section (1) for the purpose of holding separate meeting and Sub-section (2) for the purpose of agreeing with the proposed scheme by requisite majority and its binding effect of being sanctioned by the Court, would be superfluous. In any given case, whether the compromise or arrangement has been proposed between the company and the creditors as a whole without spelling out different terms for different classes of creditors or between the company and its members as a whole without giving any separate package for different class of members, separate meetings of different classes of members are required to be held. The phrase 'as the case may be' for the purpose of holding of meeting of creditors or class of creditors or of the members or class of members or the requirement of majority representing the requisite value of creditors or class of creditors or members or class of members as the case may be would carry no meaning. Thus it is to be seen whether any different terms have been offered to different classes of creditors or members and whether any classification of members is required to be made in accordance with the distinctions in terms of arrangement offered to the creditors and whether any such separate meeting was required to be called. The classification of members or creditors can be founded on the basis of difference in the terms offered under the scheme. The difference in terms of the scheme can be the only criterion for identifying separate class for the purpose of convening a separate meeting for such class.

13. The learned counsel for the objectors in this regard referred to the decision in the case of Indequip Ltd. v. Maneckchowk & Ahmedabad Mfg. Co. Ltd. [1970] 2 CLJ, 300. At page 339 it is observed:-

'... Speaking very generally, in order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest. If people with heterogeneous interests are combined in a class, naturally the majority having

common interest may ride rough shod over the minority representing a distinct interest. One test that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or classes. The company will ordinarily be expected to offer an identical compromise to persons belonging to one class, otherwise it may be discriminatory. At any rate, those who are offered substantially different compromises each will form a different class. Even if there are different groups within a class the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. Broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. This will provide rational indicia for determining the peripheral boundaries of classification. The test as stated earlier would be that a class must be confined to those persons whose rights are so similar as to make it possible for them to consult together with a view to their common interest.'

In the case of Mafatlal Industries Ltd., In re [1996] 87 Comp. Cas. 705, the Division Bench of this Court observed that, 'what is of the primary importance for the purpose of constituting a class requiring a separate meeting thereof is, a different treatment given to a group under the proposed scheme and no separate classification is required until a group is treated differently under the scheme. The term 'any interest treated differently under the scheme' is important. The fact that the shareholders/members of the same class offered the same terms under the scheme perceive their interest differently and or considered that their interest may be affected differently from others because of their inter-relationship or the interests other than as shareholder simpliciter, cannot sustain their claim to constitute a class distinct from others. Such interest is to be taken care of by expressing their views during the course of the meeting. If that were not so, all interests would be identical and if anybody has any interest apart from being treated differently under the scheme, likely to be affected in different manner because of the personal circumstance of the holder of shares or creditor, as the case may be, on account of consequences of the scheme but not on account of

the terms of treatment under the scheme, would lead to the whole provisions being unworkable in as much as every person claiming his interest to be adversely affected by the proposed scheme on that account will have to be treated differently resulting in classification of groups having identical interest and identical response to the scheme.

14. The contention of the objectors is that their interest is not similar to that of other secured creditors, particularly ICICI, and on that basis the objectors contended that the foreign currency lenders constitute a separate class of secured creditors. It may be appreciated that, it is not because of the different treatment/treatment given to the objectors that they constitute a separate class of secured creditors, and it is not the say of the objectors that the terms offered to them under the scheme are different. There is no dissimilarity of interest vis-a-vis the scheme. As far as objectors are concerned all the secured creditors under the scheme are offered the same terms but the objectors being foreign currency lenders perceive their interest differently or consider that their interest may be affected differently from other secured creditors because of their interrelationship particularly ICICI or their interest other than as secured creditors simplicitor but the same cannot entitle the objectors to sustain their claim of separate class distinct from other secured creditors. The inter se differences/disputes amongst some secured creditors cannot be the criterion for constituting separate class of secured creditors in foreign currency. Personal conflict of interest of the objectors with ICICI would be totally foreign to the scope of class meeting convened by the company to consider the scheme.

In case of Miheer H. Mafatlal v. Mafatlal Industries Ltd AIR 1997 SC 506; at para-38 the Supreme Court considered provisions contained in Section 391(1) and observed thus :

'... So far as the Articles of Association of respondent-company are concerned they also contemplate two classes of shareholders. No separate class of equity shareholders is contemplated either by the Act or by the Articles of Association of the respondent-company. Appellant is admittedly an equity shareholder.'

Therefore, he would fall within the same class of equity shareholders whose meeting was convened by the orders of the Company Court..... Even though the Companies Act or the Articles of Association do not provide for such a class within the class of equity shareholders, in a given contingency it may be contended by a group of shareholders that because of their separate and conflicting interests vis-a-vis other equity shareholders with whom they formed a wider class, a separate meeting of such separately interested shareholders should have been convened. But such is not the case of the appellant. It is not his case that his interest as an equity shareholder in respondent-company is in any way conflicting with the general interest of the equity shareholders as a class. Consequently it could not be urged by him with any emphasis that the General Body of equity shareholders acting as a class while considering the question of approval of the Scheme was likely to take a decision which would adversely affect the commercial interest of the appellant as an equity shareholder. His personal conflict of interest with the director was totally foreign to the scope of class meeting which was convened to consider the Scheme in question as we have seen earlier while considering earlier points for determination. It is also to be kept in view that the appellant would have urged with some justification his contention for convening a separate meeting representing for him and his group of dissenting equity shareholders if it was his case that the Scheme of Compromise and Arrangement as offered to him and his group was in any way different from the Scheme of Compromise and Arrangement offered to other equity shareholders who also belonged to the same class in the wider sense of the term. On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any sub-class of members which has a separate interest and a separate Scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive.... Consequently when one and the same Scheme is offered to the entire class of equity shareholders for their consideration and when commercial interest of the appellant so far as the Scheme is concerned is in common with other equity shareholders he would have a common cause with

them either to accept or to reject the Scheme from commercial point of view. Consequently there was no occasion for convening a separate class meeting of the minority equity shareholders represented by the appellant and his group as tried to be suggested.'

In this connection the Supreme Court referred to what the learned author Palmer in his Treatise Company Law 24th Edition, has to say on 'What Constitutes a class':

'The Court docs not itself consider at this point what classes of creditors or members should be made parties to the Scheme'.

The Supreme court then proceeds to observe :--

'... It is, therefore, obvious that unless a separate and different type of Scheme of Compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened.'

In case of D.A. Swamy v. India Meters Ltd. [1994] 79 Comp. Cas., 27, the Division Bench of the Madras High Court observed, 'broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should, ordinarily, be homogeneous and must have commonality of interest and the compromise offered to them must be identical.'

In the above case before the Madras High Court, at the meeting of the unsecured creditors of the company to consider a proposed scheme for revival of the company, certain motions for amendments sought to the scheme were not carried for want of majority and the scheme was approved as proposed. The learned single Judge accorded sanction to the scheme in the interest of the employees, rejecting the objections of certain unsecured creditors, inter alia, that the scheme proposed differential treatment to fixed depositors and other unsecured creditors such as loan and hundi and suppliers, and that proxies obtained by those

attending the meeting had been misused (including by the Chairman, a director of the company) to defeat the motion for amendments. As far as the principle enunciated is concerned, there cannot be any disagreement with the same.

In case of Re Osiris Insurance Ltd. Chancery Division (Companies Court), [1999] 1 BCLC pg. 182, at page 188, case of Sovereign Life Assurance Co. v. Dodd [1892] 2 QB 573 has been referred, reproducing the following observations from page-583 thereof :

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

15. As far as the company is concerned all secured creditors, off-shore lenders as well as on-shore lenders have been treated alike and no distinction is kept by the company within/amongst the secured creditors. It is not the say of the objectors that this group of secured creditors have been treated differently from other secured creditors by the company. The grievance is otherwise. Identical/same terms of compromise have been offered to all the secured creditors. There cannot be any preferential treatment to some secured creditors and the scheme cannot give any special treatment to some creditors. Simply because some of the secured creditors, have some dispute between them or have been fighting litigation inter se can be no ground for treating litigating secured creditors differently from the body of secured creditors. There cannot be a class within the class and the class has to be of one type of creditors, namely secured creditors unsecured creditors and working capital lenders as all the secured creditors have similar rights in the company. As far as commonality or conflict of interest is concerned all the secured creditors have a common interest of securing their dues in proportion to the amount lend and the terms or conditions thereof. It is not the say of the objectors that their rights are dissimilar to the rights of supporting secured creditors. As far

as the body of secured creditors is concerned, there can be an effective consultation as far as their dues/interest/rights against the company under the scheme are concerned. It is not the say of the objectors that in the meeting of 13-7-2001 they were not allowed to participate in the proceedings of the meeting nor any secured creditor including the on-shore lenders prevented them to have their say in the meeting. The class of creditors constituted, namely secured creditors cannot be regarded as a heterogeneous group having nothing in common or want of the commonality of interest or the objectors have conflict of interest vis-a-vis the scheme with other secured creditors or that the class was formed to ensure that the rights and interest of some of the secured creditors (objectors) are confiscated.

It will be seen from the above discussion that all the secured creditors, including foreign currency lenders who were constituted as one class and called at the meeting had the commonality of interest and their rights are not so dissimilar as to make it impossible for them to consult together with a view to have their common interest. The nature of the proposals embodied in the scheme apply equally to all the secured creditors, domestic currency lenders as well as foreign currency lenders and same terms were offered to the entire body of secured creditors under the scheme. It is not suggested from the scheme offered that the interest of the secured creditors is in any manner conflicting or there is no commonality of interest vis-a-vis the company and the objectors form a homogeneous group along with other secured creditors and the class of secured creditors constituted cannot be regarded as heterogeneous.

In my opinion, the objectors would not be entitled to be treated as a different class of secured creditors, a class within the class, as there is no conflict of commercial interest between objectors and other secured creditors, especially when the same scheme with same terms has been offered to all the secured creditors and there is no distinction made in the scheme between the objectors and other secured creditors.

16. The second objection on the score of jurisdiction of this Court under Section 391(1) is that the company is declared as a relief undertaking and during the period the notifications under Section 3(1) of Bombay Relief Undertaking (Special

Provisions) Act, 1948 ('BRU Act') is in force, Section 391(1) cannot be invoked.

It is the say of the objectors that in view of Section 4(1)(a)(iv) which enacts a complete suspension of all rights and obligations of the company, the right to invoke the jurisdiction of this Court under Section 391(1) are also suspended, consequently this Court does not have jurisdiction to sanction the Scheme; that the provisions of the BRU Act and the provisions of Section 391 operate in the same field viz., an undertaking requiring rehabilitation and protection against distraint from execution and sale of its assets may move either under the BRU Act or under provisions of Section 391. While rehabilitation and protection extended by the BRU Act is under the aegis of the State Government, the rehabilitation and protection extended by Section 391 is under the aegis of Company Court and as the company enjoys protection of the State Government under the BRU Act it cannot seek Company Court's protection.

It is submitted for the company that, the issue as regards jurisdiction is closed/concluded in view of the order dated 9-7-1991 passed in Company Application No. 160 of 2001 by this Court when the meeting was permitted to be convened by this Court. In the alternative it is submitted that, even if the question as regards jurisdiction in the context of Section 4(1)(a)(iv) of BRU Act is not concluded, then also, the company, having been declared as relief undertaking under Section 3 of the BRU Act, cannot be precluded because of Section 4(1)(iv) of BRU Act, from approaching Company Court under Section 391 for sanction of the scheme floated and supported by the creditors.

17. The relevant provisions of Section 4(1) of the said Act read as follows:--

'4(1). Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, standing order or other provisions whatsoever the State Government may, by notification in the Official Gazette, direct that--

(a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under Sub-section (2) of Section 3--

* * *

(iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking any remedy for the enforcement thereof shall be suspended and all proceedings relative thereto pending before any court, tribunal, officer or authority shall be stayed;'

Confining to the jurisdiction of this Court to entertain this petition and considering the scheme of restructuring of the debts of the company under Section 391 in the context of Section 4(1)(iv) of the BRU Act reproduced above, the Division Bench of this Court in case of D.S. Patel & Co. v. Gujarat State Textile Corporation Ltd. 41 Comp. Cas. (sic) 1908, had the occasion to consider Sections 3 and 4 of the BRU Act. The Division Bench while considering reasonableness of the restrictions contemplated under Section 4 of the BRU Act, in light of the restrictions being in public interest, observed that; 'The Bombay Relief Undertakings (Special Provisions) Act was enacted for three main purposes, namely; (1) to make temporary provisions for industrial relations; (2) to enable the State Government provide loan, grant or financial assistance for the industrial undertaking in question and (3) to do the above as a measure of preventing unemployment or of unemployment relief. It is undoubtedly true that Sub-clause (iv) is so worded that on a plain reading it gives an impression that what is suspended is not only the remedy for the enforcement of the right to hold but also the right itself. But we find that on a true construction of this sub-clause the right itself is not suspended but only the remedy for the enforcement of the right is suspended. In our opinion, this appears to be the true construction of Sub-clause (iv) because, if this sub-clause is interpreted as suspending the very existence of the rights covered by the notification issued under Section 4, the very object of the statute would be frustrated. This will be evident from the discussion which follows:--

'It is evident from the wording of this sub-clause that it contemplates the suspension of 'any' right, privilege, obligation or liability accrued or incurred in the past. The sub-clause, therefore, covers within its vide compass even the rights accrued in favour of the relief undertaking itself.

Now, if this sub-clause is construed as putting a temporary halt to the very existence of the rights covered by the notification issued under Section 4, the

result would be that even the rights of the undertaking accrued in the past would have no existence for the temporary period in question. If this happens, it would be totally impossible for the undertaking to function at all because it cannot use its machinery or premises for running its industry. This would obviously destroy the very object for achieving the statute as enacted.... The rights, remedies and proceedings with regard to obligations are suspended under Section 4. Suspension does not mean to destruction of the rights.'

In case of Inderjit C. Parekh v. V.K. Bhatt 15 Guj. LR 574, it has been observed by the Supreme Court that the object of Section 4(1)(a)(iv) of the BRU Act is to declare a moratorium on actions against the undertaking during the currency of the notification declaring it to be a relief undertaking. By such Clause (iv), any remedy for the enforcement of an obligation or any liability against the relief undertaking is suspended and proceedings which are already commenced are to be stayed during the operation of the notification. On the notification ceasing to have force, such obligations and liabilities revive and become enforceable and the proceedings which are stayed can be continued. These provisions are aimed at resurrecting and rehabilitating industrial undertakings brought by inefficiency or mismanagement to the brink of dissolution, posing thereby the grave threat of unemployment of industrial workers. 'Relief Undertaking' means under Section 2(2) an industrial undertaking in respect of which a declaration under Section 3 is in force. By Section 3, power is conferred on the state Government to declare an industrial undertaking as a relief undertaking, 'as a measure of preventing unemployment or of unemployment relief. Relief undertakings, so long as they continue as such, are given immunity from legal actions so as to render their working smooth and effective. Such undertaking can be run more effectively as a measure of unemployment relief, if the conduct of their affairs is unhampered by legal proceeding or the threat of such proceedings. That is the genesis and justification of Section 4(1)(a)(iv) of the Act.

18. If the provisions of Section 391(1) and 391(6) of the Act are read together the protection is the resultant effect of the entire scheme of the Act. As far as the scheme brought before the Court under Section 391(1) is concerned, there is no question of granting any relief or remedy to the company. The Court under Section

391(1) examines the scheme irrespective of the objection if any, to the scheme from any corner and when the Court is examining the scheme for the purpose of deciding whether the same should be sanctioned with or without modification or not, then the protection under Section 391(6) would follow. As far as the power to consider or examine the scheme under Section 391 is concerned the power has to be either express or implied. As far as provisions under the BRU Act are concerned there is no implied or express bar to any petition for the sanction of the scheme and in absence of any express or implied bar to the petition under Section 391, merely because the company is declared a relief undertaking under Section 3 of the BRU Act, I do not see any substance in the contentions raised on behalf of the objectors on the score of want of jurisdiction of this Court to consider the scheme under Section 391(1), 7(2), and the company can pursue the proceedings under Section 391, even during subsistence of the notification under Section 3 of the BRU Act. Reading Sections 3 and 4 together the privilege or insulation offered to the undertaking is because of the subjective satisfaction of the State Government that the particular undertaking needs some help or protection. It be hardly said that the notification under Section 4 is not issued pursuant to any prayer by the company and, therefore, there is no question of double insulation to the company under Section 4(1)(a)(iv) and Section 391(6). For these reasons I am unable to accept the submission advanced on behalf of the objectors as regards want of jurisdiction under Section 391(1).

19. One of the arguments advanced by the learned counsel for the objectors is that the Scheme of compromise has not been supported/ approved by the requisite majority of the secured creditors as envisaged by Sub-section (2) of Section 391, and, therefore the scheme cannot be sanctioned.

The relevant provision of Sub-section (2) of Section 391 provides as under;--

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

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

arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class as the case may be, and also on the company, or in the case of a company which is being wound up the liquidator and contributories of the company.'

It will be seen from the above reproduced Sub-section (2) that the scheme of compromise or arrangement with creditors and members must have the support from majority in number three-fourth in value of the creditors or class of creditors or members or class of members present and voting either in person or where proxies are allowed, by proxy, at the meeting, agreeing to any compromise or arrangement.

According to the petitioner on 13-7-2001, pursuant to the order dated 13-6-2001 passed in Company Application No. 160 of 2001 the meeting of each of the classes of creditors of the company was convened and held at the registered office of the company, under the Chairmanship of Mr. A.L. Shah, Advocate, appointed by this Court. That the meeting of the secured creditors of the company was attended by 46 (forty-six) secured creditors and that the scheme of arrangement was taken as read with the permission of the members of the meeting. Thereafter the proposed Scheme of arrangement was put to vote by poll. 35 (thirty-five) secured creditors holding 9,565.03 millions of the outstanding secured debt of the company as of 31-3-2000 voted in favour of the said scheme for arrangement representing 85.36 per cent in the number of secured creditors and 88.68 per cent of the value of the total outstanding secured debt of the petitioner company as of 31-3-2000 present and voting. 6(six) secured creditors holding Rs. 1,235.16 million of the outstanding secured creditors of the petitioner company as of 31-3-2000 voted against said scheme of arrangement representing 40.63 per cent in the number of secured creditors and 11.43 per cent in value of the total outstanding secured debt of the company as of 31-3-2000 present and voting. 5(five) votes were found to be invalid and, thus, the scheme was approved and resolution was passed with the requisite majority.

20. Sub-section (2) of Section 391 requires that the scheme of compromise or arrangement must be approved by majority of creditors/members representing 3/4 in value of the creditors or class of creditors/or members or class of members.

It is contended that, if the objectors were treated as a separate class then the voting pattern would have been changed and there would not be requisite majority supporting the scheme; that the votes cast by State Bank of India could not have been treated as invalid and the same could have been considered as votes against the scheme; that three fourth of the majority supporting the scheme must agree to the scheme as per the statutory requirement.

In this regard reliance has been placed on behalf of the objectors on the decision in the case of Hindustan General Electric Corporation Ltd. In re AIR 1959 Cal. 679. It has been observed that 'the function and duties of the court in the matter of sanctioning of schemes are well known. Any scheme which is fair and reasonable and made in good faith will be sanctioned if it could reasonably be supposed by sensible people to be for the benefit of each class of the members or creditors concerned. It is also the duty of the court to see that the resolutions were passed by the statutory majority. The majority of the three fourth value must be of persons who were present and who took part in the voting. Mere presence would not be enough.

It may be noted that, in the instant case State Bank of India supported the scheme on condition, so it was not an unconditional or blanket support/ or agreement with the scheme.

21. In the case of Ms. Lily Thomas Advocate v. Speaker, Lok Sabha [1993] 4 SCC Cases, Pg. 234, it is observed :

'... Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question.'

In Black's Law Dictionary 'Voting' is explained as 'the expression of one's will, preference, or choice, formally manifested by a member of a legislative or deliberative body, or of a constituency or a body of qualified electors, in regard to

the decision to be made by the body as a whole upon any proposed measure or proceeding or in passing laws, rules, regulations, or the selection of an officer or representative. ...' 'Right to vote means right to exercise the right in favour of or against the motion or resolution. Such right implies right to remain neutral as well...'

It is also observed not less than two-thirds of the members present and voting implies that the motion shall be carried only if the requisite numbers expressed their opinion by casting vote in support of the Motion. One may be present and yet not voting. A reading of paragraph 1163 of Vol. 34 of Halsbury's Laws of England indicates that when division becomes necessary then the Speaker directs, those in support to go in the right lobby and those who oppose in left lobby. And, 'the members who take part in it pass through one or other of lobbies, give their names to the clerks, who sit at desks, and are counted by the tellers as they leave the respective lobbies...'

In practice and procedure of the Parliament by M.N. Kaul and S.L. Shakdher, the procedure of voting in Lok Sabha is described thus :

'Under the automatic vote recorder system, each member casts his vote from the seat allotted to him by pressing the requisite button provided for the purpose. A push button set containing a pilot light and three push buttons - a green button for 'Yes', a red button for 'No' and a black button for 'Abstain' - together with a push switch suspended by a wire, is provided at the seal of each member.'

Thus, it will be seen from the above that a member present and voting may remain neutral, indifferent, unbiased, impartial, not engaged on either side. Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question has to be either in the affirmative or negative, that is yes or no. On the ballot paper or voting paper one is not supposed to write anything, except putting a 'X' 'v' either in favour of the proposition or against the proposition and any writing suggesting condition or reservation cannot be said to be an expression of will or opinion either for or against the proposition and those votes have to be necessarily treated as invalid or void as such votes are no voles leading either way.

22. It need hardly be said that the votes cast on the proposition and voting thereof are to be construed in the ordinary and usual sense and that mean 'expressing the will, mind or preference; casting or giving a vote'. They do not include the votes or ballots, that do not cast a vote on the proposition legally or void votes may no be counted either for or against the proposition submitted even though they may have been even received, placed in the ballot box and constitute sum of the total number of ballots. A bare attempt to vote by depositing blank ballot containing any writing is not effective and cannot be included in the total count upon the 3/4th majority is to be estimated. Only those ballots that express voters points with such clearing that the ballot can be counted for or against can be counted in total. The requirement contemplates two ballots only, one affirmative and the other negative. To adopt any other rule would be to say that three ballots were contemplated one affirmative, one negative and the other neither affirmative or negative but forming a new class into which all ballots for any reason void must go. In the instant case to accept the submission of the objectors to consider the ballots by the State Bank of India suggesting condition would tantamount to creating a third class of ballots which cannot be regarded as legal and such class of ballots putting condition for acceptance or on agreement to the scheme cannot be treated but as void and illegal and such ballots have to be treated as rejected ballots which could not be counted in determining whether or not to submit proposition it received the necessary three-fourth affirmative votes. All such votes have to be treated as no votes. In other words it is nullity and void and a void vote is of no more effect than no vote. It is only those ballots entitled to be counted for or against the proposition in determining the required majority.

23. Mr. A.L. Shah, Chairman appointed by this Court in Company Application No. 160 of 2001 in the matter of Scheme of Arrangement of Arvind Mills Limited with its creditors, filed his report, copy whereof is at pages 237 to 272 of the document file Part-Ill. Page-252, Clause (C) whereof refers to the Meeting of Secured Creditors, suggesting that 46 secured creditors. 18 attended through proxy and 28 through representatives. That the total amount due as on 31-3-2000 to the said total 46 creditors who attended the meeting is Rs. 11,970.77 millions. That, at page 257 it is observed that Shri. A. Sekar, proxy holder of the Commerzebank AG and of three other Secured Creditors, with the permission of the Chairman of

the meeting raised 4 objections to the approval of the Scheme of Restructuring :

1. The garment business as also brands of the company have been illegally sold away at a price of about Rs. 361 crore.

2. Various amounts have been transferred to subsidiaries and as a result about Rs. 395 crores of the Company has been siphoned.

3. The company had entered into between September 1998 and March 1999, transaction of sale and leaseback with ICICI Ltd., whereby the assets which were hypothecated and mortgaged to the Syndicate were sold away.

4. That, ICICI, one of the secured creditors has been given better treatment by prepaying amount due to ICICI and that, all information were not given in the information/memorandum circulated by the Company.

Objections raised were discussed in the meeting. It is observed at page-262 that, after full and complete discussion voting by poll was called for. The question submitted to the said meeting was whether the Secured Creditors of the said company approved of the Compromise and/or Arrangement (as arranged). The representative of State Bank of India inquired whether any vote for the Scheme subject to certain condition would be valid or not and it was explained by the Chairman to the meeting that the members had to vote either 'For' or 'Against' the proposed motion, That, there cannot be any conditional vote. If a vote is conditional it would be treated as a invalid since in a meeting convened for considering a Scheme of Compromise or arrangement one has to either vote 'For' or 'Against' the resolution. Giving a conditional vote might make the vote invalid and might be considered as no voting at all. It is observed at page-263 that the Chairman informed the meeting that anyone voting for or against the Scheme subject to certain conditions would be treated as invalid and a note to that effect would be included in the report to the Court. At page-264 it is observed that the meeting was of the opinion that the compromise or arrangement (as modified by the amendment) should be approved or agreed to. All the forty-six (46) secured creditors attending either by proxy or representative of total of thirty-five (35) Secured Creditors (86.36 per cent) in number of those attending and casting valid

votes) having a total voting value of Rs. 9,565.03 million (88.56 per cent in value of those attending and casting valid votes) voted 'For' the scheme and approved the same, while six (6) Secured Creditors (14.63 percent in number of those attending and casting valid votes) having voting value of Rs. 1,235.16 million (11.43 per cent in value of those attending and casting valid vote) voted 'Against' the motion. Five votes cast by State Bank of India, London, State Bank of India, and Indian Bank, were considered invalid since though Secured Creditors viz. State Bank of India (four votes) and Indian Bank (one vote) had the ballot papers voted 'For' the Scheme they attached with the ballot papers their letter dated 12-7-2001 (in case of State Bank of India) and in case of Indian Bank writing on the ballot paper itself stating that they were approving the Scheme subject to condition mentioned in their letters/comments on the ballot papers. Thus, these five votes, four of State Bank of India and one of Indian Bank were treated invalid.

24. The above observations would reveal that the votes cast by State Bank of India and Indian Bank are conditionally agreeing with the Scheme. Conditional approval to the Scheme cannot be regarded as votes in favour of the proposition nor at the same time these votes can be regarded as against the proposition because it is conditional expression of opinion by the State Bank of India and Indian Bank and the votes of State Bank of India and Indian Bank have been rightly excluded from consideration by the Chairman at the meeting treating these votes to be nullity/void and void votes are of no more effect than no votes and the votes by State Bank of India being unintelligible ballot being ineffective cannot be included in the total count done which the required majority of a 3/4th is to be estimated. There is no question of considering that votes of the foreign currency lenders which are negative treating the foreign currency lenders as a separate class since the objectors as foreign currency lenders are not entitled to be treated as a separate class as observed earlier and therefore their votes would be counted along with other secured creditors for the purpose of determining the 3/4th majority to the proposition as required under Section 391 and the proposition is rightly said to have been supported by requisite majority of 3/4th secured creditors as stated by the Chairman in his report as pointed out, above and I do not find any flaw in this regard.

25. One of the objections raised by the objectors is that the proposed scheme of restructuring should not be accorded sanction as the scheme would operate as a cloak to cover up/legitimize the fraud perpetrated by the company in collusion with one of its lenders, ICICI Ltd. (ICICI) and would also legitimize ICICI's criminal acts and also legitimize gross acts of misfeasance and malfeasance by the company and ICICI.

In this regard it has been submitted by the learned counsel for the objectors that the scheme seeks to regularise petitioner's unauthorised transactions with ICICI. There is sale and lease back transaction and the spin-off of the Garment division and the scheme makes no provision for recovery of large scale diversion to the extent of Rs. 362 crores for the period 1998-99 and 1999-2000 to subsidiaries and family controlled companies and the intention of the scheme is to legitimize these transactions and that the scheme is a cloak to cover the misdeeds of the company and/or to shield the directors against any investigation into their management and that the scheme will have the shield on the pending proceedings, namely the suit filed in the English Court by one of the objectors.

It is submitted on behalf of the company that the scheme does not operate as a cloak to cover up/legitimize so called fraud with the syndicate consisting of 14 members. The objectors are only 4 and no other members of the Syndicate has objected to the scheme of compromise. That these four objectors do not have even majority amongst the Syndicate. That the Scheme has been floated, and supported/approved by various creditors themselves. That the company does not stand to lose anything in these transactions and nothing has gone out of the company and that there has been no transfer of fund to any of the subsidiary companies and as such there is no diversion of funds. That no objection has been raised even by the statutory auditor against any of the above transactions.

The petitioner in rejoinder has denied all these allegations and stated that the criminal proceedings are pending before the Court of the learned magistrate; that under the scheme it is proposed that all the existing securities offered to the secured creditors would undergo a change and only fresh documentation would be necessary for that purpose. Leasehold assets are not owned by the petitioner

company, the same would not, therefore, be part of security available to the lenders; that even independent of the scheme it is always open to the company to enter into compromise with any of its lenders and the scheme recognises the right which even otherwise is available to the company; that the proceedings pending in the English Court are beyond jurisdiction of this Court and the said issue is irrelevant in view of the fact that the objectors having seen futility of continuing the litigation, pending the scheme of proceedings have agreed to keep such proceedings in abeyance; that the transactions relating and sale and leaseback are not under the scheme and no unfair advantage has been offered to ICICI by the company.

It is suggested that the Government of Gujarat issued a Notification under Section 3. The petitioner then filed Special Civil Application No. 9188 of 2000 before this High Court challenging the Notification under Sections 3 and 4. The High Court issued directions vide its order dated 22-2-2001 requiring the petitioner company to propose a rehabilitation scheme which was to be examined by GBIFR guided by the consideration, namely putting the company on a sound footing. Pursuant to the directions issued by the High Court, GBIFR held a meeting wherein all the lenders, including the objectors were heard. The objectors filed same objections to the scheme as suggested from pages 339-345 of Document File Part-I, before the GBIFR. It is also suggested that even before GBIFR majority of the lenders supported the scheme floated by creditors of the company and the GBIFR found the restructuring proposal to be the best possible solution observing that 'the rehabilitation package proposed by the company is fair in the circumstances that are prevailing'. That the scheme is 'in the best interest of all concerned'. Thus, the GBIFR recommended to the State Government that the BRU Notification should be extended by one more year, with the result the Notification under Section 3(1) issued by GBIFR is extended up to 21-6-2002.

GBIFR is an independent technical expert Government agency. It is not in dispute that the same scheme floated and supported by the creditors was placed before GBIFR. All the aspects of the Scheme were examined by GBIFR, guided by supreme consideration of putting the company on sound financial footing. The GBIFR gave its report which is to be found at page 746 of File Part-I.

26. It is not disputed that the company sold movable machineries at market price. It is also suggested that the petitioner company had undergone expansion project worth Rs. 1,500 crores and it had spent about Rs. 1,100 crores and there was cost and time overrun to the tune of Rs. 400 crores. At this juncture company experienced financial difficulties for want of sufficient resources to complete the project and it became necessary for the company to raise funds as the capital invested by that time would become a dead investment as the project would have remained incomplete. The incomplete project with investment of Rs. 1,100 crores would have led to financial catastrophe. At this point of time the sale and lease back transaction came to be entered into between the company and ICICI. Under the said transaction ICICI gave Rs. 150.00 crores more which have been adjusted against the dues of the ICICI and the same assets sold to the ICICI have been taken on lease by the company which has raised the assets coverage to Rs. 290 crores between 1996-1999. Under the agreement with the Syndicate undisputedly the company was required to provide asset coverage of Rs. 133 crores against the loan of Rs. 100 crores. It is not the say of the objectors that the project was not in incomplete state and needed no further funds, has not been completed by the company after the sale and lease back transactions with ICICI. It may be appreciated that, as far as foreign currency lenders are concerned they only had floating charge on movable items and all that the company was required to do was to maintain the asset coverage under the agreement. The sale of assets by way of sale and lease back transaction by the company to ICICI, so long as the assets coverage docs not fall below the minimum required under the agreement and also such transactions not covered under the scheme, cannot come in the way of scheme of restructuring the debts of the company.

27. As far as the diversion of funds to subsidiary companies are concerned, the investment of the company in the subsidiary companies were made quite some lime back and only the nature of investment is charged. It is not in dispute that not a farthing has gone out of the company. All the information was supplied by the company to all the creditors in February 2000 and the same was available with the objectors also since February 2000. The negotiations for the Scheme lasted from February 2000 to July 2001, i.e., for 16 months, yet no secured creditor has objected on this point, except the objectors. It may also be seen that the

information supplied in Document File Part-III has not been questioned as incorrect by the objectors at any point of time.

It is admitted that to examine the accounts of the company and to verify the allegations as regards diversion of funds steering committee appointed by the secured creditors appointed a Sub Committee. The objectors did not object to the constitution of the said Sub Committee. It is suggested from the record that the said Sub Committee held its meeting in the month of August 2000 which lasted for two days. Before the Sub Committee the accounts and all the disputed transactions including the financial projections made in the Scheme were scrutinised by members of the Sub Committee and nothing objectional was found on examination of the accounts as far as the allegations on the question of diversion of funds are concerned, The Sub Committee on the contrary approved the financial projections. It is highly unbelievable that the other secured creditors who have larger stake would not notice anything objectionable if the accounts so revealed in the meeting before the Sub Committee. If there was anything wrong on the score of diversion of funds, at least some one from the other secured creditors who have larger stake than the objectors would have in all probability taken some action against the company. It may be appreciated that if anything objectionable was noticed by the Sub Committee, then the Steering Committee which consist of major secured creditors, including members of the Syndicate, after scrutiny of the accounts would not have supported the Scheme of compromise. It may be appreciated that on the information supplied to all the creditors the discussions amongst secured creditors lasted for sixteen months and the total period taken for the proposed scheme of reconstruction is twenty-one months. It may also be noted that the four objectors are not the only foreign currency lenders, but there are other foreign currency lenders, ten in number, who have supported the scheme along with other secured creditors in domestic currency. Since it is not suggested from the record that a single rupee was given by the company to any of its subsidiary company and the original investments have been made quite some time back, and that, only the nature of investment has changed, I do not find any force in the objection on this score.

28. One more objection under the head of Cloak to cover up and legitimize fraud is the spin off of the Garment Division by the company. It is submitted on behalf of the objectors that between the years 1997-98, 1998-99 and 1999-2000 the company diverted up to Rs. 395 crores to its subsidiaries as loans and investments which in fact amounts to spinning off of the cash available with the company. The garment business spin-off is reflected from para-1 of Exhibit 'C-I' which is at page-327. Perusal of the same suggests the details of sale of Garment Division by the company for Rs. 361 crores to Arvind Brands Ltd. (ABL). It further suggests that the company owns the brands New port. Flying Machine, Ruggers, Excalibur and Ruf-N-Tuf; that the company under the loan agreement was prohibited, without prior written consent of the agent (Objector No. 2) acting on instructions of the majority of Syndicate other than in the ordinary course of business and for full market consideration, from selling, transferring, lending, surrendering or otherwise disposing of its material undertakings or any of its material assets and despite being such prohibition the petitioner sold the Garment Division to ABL. Exhibit 'C-2' at page-332 is in respect of Information Memorandum for Creditors by Jardine Fleming relating to garment business spin-off. It is suggested therefrom that the garment business spin-off involved three entities, AML's garment division, Arvind Clothing Ltd. (ACL) and Arvind Fashions Ltd. (AFL). The performance of the AML garment division, ACL and AFL have been detailed on pages 333 to 335. It is suggested from the transaction details that the existing shell company Evergreen Growfine (P.) Ltd. was renamed as Arvind Brand Ltd. (ABL), which has been taken over by the garment division of AML and held 100 per cent stake each in ACL and AFL and the AML engaged the services of Arthur Andersen to assist it in valuation, identifying investors and negotiating the transaction. The transaction structure involving both selling AML's garment business to ABL and selling ABL's 40 per cent equity to the potential investors. The AML had two offers, one from an international private equity fund and the other from ICICI. ICICI's valuation and terms were superior to the former and the AML decided to favour the ICICI.

It has been stated at pagc-338 which deals with 'cash flows from spin-off that due preference has been shown to ICICI in as much as the ICICI's debt of Rs. 519 million has been paid off from extra valuation available from ICICI's offer and the

additional benefit to the Company is reduction in debt and consequent interest burden thereon. That during year 1998-99 and 1999-2000 sale and leaseback of fixed assets was done with ICICI for Rs. 491 million of book value of the assets and the purpose could be to pay for project cost. In December 1998, AML sold 35 per cent of two of its branded garments unlisted subsidiaries, namely Arvind Clothing Ltd. (Arrow brand of apparels) and Arvind Fashions Ltd. (LEE brand of apparels) to ICICI at an aggregate consideration of Rs. 410 million. That, AML had a buy back obligation for these shares at an interest-driven price. That the proceeds helped the Company to beef up its liquidity position to keep servicing debt obligations and continue operations. That remaining 65 per cent holding in each of the subsidiaries to Asman Investments Ltd. (AIL), a wholly owned subsidiary, as part of consolidating all investments in one balance sheet and the AIL pledged 65 per cent holding to ICICI as security for AML's buy back obligation.

That, the company sold some fixed assets in March 1999 to ICICI Group at the book value of Rs. 2,545 million and leased those assets back. Some of the debt instalments of ICICI maturing in financial year ended in 3/ 1999 and 3/2000 were pre-paid from the proceeds of 7 to 10 years lease transactions and these transactions helped the company repay some of the debts and also helped boost up working capital. Out of sale and leaseback proceeds Rs. 1,910 million was utilised to pay certain debts and the balance of Rs. 635 million was used in the operation. Page-340 contains Table 6.1 suggesting detailed debt repayment from sale and leaseback transactions. It is further suggested that in December 1999 AML sold some of the fixed assets which was taken on lease with which rental payable over a period of 9 years in Santej plant and raised net proceeds of Rs. 583 million. That the attempt of the AML management in the early stages of the financial crisis seems firstly to complete the project, secondly to repay the debt obligations as per original schedule and lastly to keep the operations going on at normal level and the transactions described above appear to have been carried out to achieve these objectives. It may be noted that transfer to ICICI would always be subject to the charge in favour of the objectors/secured creditors.

29. As revealed from the record the Company transferred its garment division as well as its investments in ACL and AFL to a new company called ABL and invited

the participation of a financial investor (ICICI) in the new company. Out of the proceeds the company repaid Rs. 515 million of loans to ICICI relating to the loan payments due in financial year 2000-2001, as a result of the above two transactions there are no outstanding loan repayments to ICICI during financial years 1999-2000 and 2000-2001. In Table 6.2 cash flow from spin-off garment business indicate gross consideration on account of sale of garments division to be Rs. 3,610 million and sale of assets, sale and leaseback to be Rs. 583 million. It is suggested from the said table that the net cash receivable is Rs. 2,343 million. It also indicates repurchase of 35 per cent holding of ACL and AFL and repayment of ICICI debts of Rs. 519 million, reduction in consortium working capital limit (garment division) Rs. 175 million and payment of consortium working capital interest December 1999 quarter Rs. 135 million, overdue interest and lease rentals Rs. 511 millions. Utilized/to be utilized in operations Rs. 433 millions.

30. Exhibit-'D' at page 343 is the letter dated 10-3-2000 of the petitioner Company to The Bank of Nova Scotia Asia Ltd., Singapore and to Deutsche Bank AG, Hong Kong (both the objectors). It is suggested therefrom that the meeting of the off-shore lenders was convened on 3-3-2000 and some of the lenders present requested for information on certain matter and the information provided related to assets cover ratio. The position of asset cover ratio as on 31-3-1998, 31-3-1999 and 31-12-1999 was attached with the said letter. That the information was also supplied of directors' resolutions on sale and leaseback thereof. The information provided contain relating to sale of fixed assets and leaseback related to period 24-9-1998 for the first sale and lease back of September 1998, 16-3-1999 and 25-3-1999 and both the above transactions were noted by the Board of Directors on 29-5-1999 and 14-9-1999. That the information was also supplied as regards assets sale and leaseback with the list of plant and machineries in respect of which sale and leaseback transactions were executed with ICICI group also attached with the said letter. The information was also supplied as regards Regulatory Returns on end-use which include details of returns filed with Reserve Bank of India in form ECB 2, including inter alia the end use of the USD 75 million syndicated loan also attached, further slating that the end use amount stated in the returns filed with RBI have been audited by the statutory auditor of the company. That the details were also furnished as regards two offers of garment spin-off,

further stating that the comparative salient features of the two alternative garment spin-off transactions are provided in Annexure-D and the terms offered by ICICI Ltd. were superior in terms of valuation, milder covenants and trunkey financing package. The details were also furnished as regards Security provided on lease transactions with ICICI group. Said letter also states that no security was provided for lease transaction in September 1998. The transaction of March 1999 and December 1999 were secured by (1) the company and its subsidiaries were to pledge certain equity shares they held in erstwhile Arvind Polycot, Arvind Intex and Arvind Cotspin. These companies have now been merged into Arvind Products. Post merger the holding is 70 per cent of which 54 per cent has been pledged; (2) the promoters of Arvind Mills were to pledge 5 per cent of their equity holding in Arvind Mills immediately and other 10 per cent as and when released from their current encumbrances and the mill company was to create charge on certain unencumbered commercial real estate and movable assets of the value of approx. Rs. 376 million,

31. It is not in dispute that Jardine Fleming were appointed as advisor who prepared restructuring package of the company and a meeting was convened on 3-3-2000 of off-shore lenders followed by another meeting dated 4-3-2000 of on-shore lenders. It is pertinent to note that, it is not even the say of the objectors that the garment business transferred by the company to its wholly owned subsidiary namely ABL was in any manner mortgaged, hypothecated or charged to any of the objectors. In that case, it would be open to the company to deal with the Garment Business in any manner it liked. The Scheme, therefore, is not affected by the transfer of Garment Business. Why transfer of Garment Business and at what price are commercial issues and cannot be the subject matter in this petition. As far as the sale of Garment Business is concerned the same is irrelevant for deciding the sanction if any, of the scheme.

As observed earlier, a Sub Committee has scrutinised the books of account of the company and transactions were checked and nothing was found objectionable in any of the transactions entered into by the company and the Sub Committee approved the Financial Projections. It is pertinent to note that the objectors though requested to join the Sub Committee to scrutinise the books of account of the

Company, have declined to join the Sub Committee. Document File Part-II (page-271) Appendix II and information Memorandum of Document File Part-III (page-875) suggests the inventory, advances, other loans and advances current assets, investments by each of the Company, investment in bonds and investment in other equity shares etc. Perusal of the same suggest that there is no transfer of funds/assets to AIL, and that, the company transferred amount of its investments in AIL for a total consideration of Rs. 1,752.3 million in the financial year 1998-99. Most of the investments were in AIL. While total exposure of the company to AIL was Rs. 2,506 million at the end of December, 1999. It is suggested from sub para 4.2 that major investments transferred included Arvind Products Ltd., Arvind Clothing Ltd., Arvind Fashions Ltd., Arvind Intex Ltd., Arvind Polycot Ltd. and Arvind Cotspin Ltd. Convertible debentures, loans and receivables, all from Company paying for acquisition. That, Arvind Intex, Arvind Polycot and Arvind Cotspin were subsequently merged into Arvind Products Ltd., as pointed out above. That, neither the merger nor sale of investments had any positive or negative impact on the company, and after above merger Arvind Products Ltd. will become 70 per cent owned by the company through AIL. All these information relating to all the transactions was available with the members attending the meeting, since information memorandum was circulated to all the members which also included information relating to Spin-off of garment business as pointed out above. The record does not suggests any details have been asked by any of the secured creditors or for that matter unsecured creditor or working capital lenders relating to the diversion of funds namely Spin-off garment business. It is also suggested that there was discussion in August, 1999 with the Syndicate about transaction entered into by the petitioner company. The Document File Part-II (page-00449) para-43 suggests that there was sufficient knowledge by correspondence to the Syndicate about the transactions relating to sale/the garments spin-off transactions. It is also suggested that there was extensive correspondence relating to the proposed Spin-off of Garment division which would bestow knowledge on the Syndicate about the sale of garment business.

There is no question of legitimizing or cover up the fraud of ICICI or misfeasance or malfeasance, since no criminal act would be covered up or legitimized by sanction of the Scheme, and the same can be subject to/ without affecting the

criminal acts, if any.

32. The other objection to the Scheme by the objectors is that the Scheme offends public and commercial morality. It is submitted on behalf of the objectors that the Scheme is against the public policy, discriminatory and unconscionable and there is no sufficient provision for payment of State Government's dues; that under the Scheme the debt due to the State Government features in the category of excluded debt, i.e., outside the purview of rehabilitation scheme and the Scheme does not set out sources of funds for payment of State Government's dues; that, it would have been quite appropriate, especially when the Company is paying sum of Rs. 550 crores to its creditors, to have paid dues of the State Government first. More so when the State Government is battling for funds in the aftermath of the earthquake in Gujarat. As against this, the say of the Company is that the scheme seeks to cover only certain debts of the Company and so far as other creditors are concerned no Scheme of Compromise is proposed. That the State Government dues are not covered under the Scheme because they are to be paid on due dates.

It may be appreciated that, the State Government's dues have been excluded from the scheme, may be for the reason that the same would amount to sacrifice by the State Government also like other creditors. It may be realised that the Scheme has been floated and supported by the creditors, namely working capital creditors, unsecured creditors, secured creditors and all the creditors have sacrificing to certain extent floated and supported the Scheme considering the public interest and the commercial morality. The State Government has rightly not been included in the Scheme so as not to insist upon the sacrifice from the State Government. Perusal of the Scheme does not refer to sources of funds from which the payment of debt is to be made under the Scheme to the creditors. It may be appreciated that the petitioner company is protected by the notification under Sections 3 and 4. It is irrelevant whether the Government is battling for the funds in the aftermath of the earthquake in Gujarat as stated in the affidavit in reply. As far as the Government dues are concerned, same have to be paid as and when it becomes payable. Since the Government dues are excluded from the Scheme there is no question whether any source for payment of Government debt is provided or not.

All that can be said is that there are Government dues payable by the company and that is why the notification under Section 3 protecting the company came to be issued. There is absolutely nothing to suggest as to how the Scheme is against the public and commercial morality. The Scheme is acceptable to large majority of the creditors and the objectors are less than 3.5 per cent of the total debts. The total debt is Rs. 2,700 crores. Secured creditors Rs. 698 crores, out of which debt due to objectors is Rs. 136 crores. It may be appreciated that there are more than 10,000 workers directly employed by the company. If the size of a family is taken to be of 4 persons then 40,000 persons are directly dependent on the employment with the company and there would be large number of other persons indirectly connected with the company. Thus, there are large number of persons directly and indirectly employed/dependent who would be indirectly benefited by the Scheme, and if the Scheme seeks to serve the interest of large number of persons directly/indirectly, how the Scheme can be said to be against public morality/interest.

33. One of the arguments advanced on behalf of the objectors is that the past conduct/transactions of the company would disentitle approval of the Scheme. As far as provisions contained in Section 391 and Section 394 are concerned the past conduct would be hardly relevant for the purpose of the approval of the arrangement. In case of the Scheme of Restricting the Company concerned would very much remain as legal entity and would continue to function. Past transactions would be relevant or required to be seen in cases of amalgamation of the Company where the transferor company merges into the transferee company. Section 391 does not contemplate or require that the past events be reflected in the scheme document. The past events cannot be a disqualification as far as approval of the scheme of restructuring is concerned. It is only because the financial difficulties experienced/undergone by the company and the debt mounting over the company the scheme of restructuring is necessitated, so that the company can survive and the creditors may also get their dues with some sacrifice on their part depending upon the resources available to the Company and the object behind the exercise of restructuring is that the employees of the Company may not starve and putting the company on a sound financial footing to serve interest of all concerned under the circumstances. It may also be seen that

what is sought to be approved/sanctioned is the Scheme of Restructuring of debt and not the past conduct. Suffice it to say that the past conduct is not relevant for consideration of the Scheme of Restructuring of the debt.

34. File Part-I, Page 0001 Annexure-A suggests holding of meeting of the off-shore lenders on 3-3-2000. Page-00003 is the Synopsis of the meeting of the on-shore lenders held on 29-3-2000. It is suggested therefrom that US $ 75 million syndicate demanded payment upto March 2000 and that the SC declined that said payment for the reason of inability from cashflow perspective for the company to accede. It is also suggested that two syndicates would not be offered a deal better than what would be agreed with the lenders being represented by the SC. Page-00039 is the letter dated 19-2-2000 by the Company to the Bank of Nova Scotia Asia Ltd., Singapore. Page-00040 is the letter dated 15-3-2000 by the company to Bank of Nova Scotia Asia Ltd. and Deutsche Bank AG, formerly Fuji Bank, which suggest that meetings of the off-shore lenders of US $ 75 million syndicate were convened but these two syndicates did not indicate their representatives and these two syndicates were requested to indicate one name of their representative. It is also suggested from page-00050 to page-00060 that the SC considered and discussed every objections raised in the meeting. It is also suggested from page-00011 to 00013 that the second meeting of the SC was held on 11-7-2000, third meeting was held on 16-8-2000, fourth meeting was held on 20-9-2000 and the last meeting was held on 14-11-2000; that, in all five meetings of the SC were held to discuss the Scheme. It is the Scheme of the creditors who have floated and supported the Scheme and Company has agreed to the said Scheme and brought to this Court for sanction. Commercial viability of the Scheme has been considered by the body of creditors who have been dealing in lending of money at national as well as international level and they are the persons with commercial wisdom. They have examined viability of the Scheme from all commercial angles and found the Scheme to be commercially viable best under the circumstances and then the Scheme has received the support of the requisite statutory majority of the creditors. Thus the Scheme is a conscious Scheme by the creditors. As observed in the case of Miheer Mafatlal (supra) this Court cannot exercise jurisdiction like an appellate Court to minutely scrutinize the Scheme or to arrive at any independent conclusion, whether the Scheme should be permitted to go through or not when

the majority of the creditors or members or their respective classes have approved the Scheme as required under Section 391(2). This Court has also not to see the commercial viability of the Scheme. This Court is to consider as to whether the Scheme is unconscionable or illegal or otherwise unfair and unjust to the classes of creditors for whom the Scheme is meant. Propriety, merits of the compromise or arrangement have to be judged by the parties to the Scheme, who with their open eyes and full information about the pros and cons of the Scheme arrive at their own reasoned judgment and agreed to join such compromise or arrangement. It is also not within the realm of the Court to find out whether a better Scheme could have been adopted by the parties or not. The Scheme has been favoured by the requisite statutory majority of the creditors who as the experts into the commercial wisdom and have exercised their commercial wisdom by supporting the scheme. In the instant case, the Scheme supported by the majority of the creditors does not appear to be unconscionable or illegal in any manner or that the same is otherwise unfair or unjust to the classes of creditors for whom the Scheme is meant. It may be appreciated that it is not the say of the objectors that they are not offered equal terms under the Scheme like other secured creditors. To be precise, off-shore lenders - foreign currency lenders, nor the objectors in principle opposed to the Scheme, Simply because the terms demanded by the objectors did not find favour with the SC that would not make the Scheme unfair, dishonest, unconscionable or illegal. It may be noted that this is the Scheme by the creditors so there is no question of the Scheme being unfair, dishonest or unconscionable qua body of creditors. Discussion on this is nothing but academic.

35. One of the arguments advanced on behalf of the objectors is that, if the Scheme is sanctioned then the suit filed by the objectors Commerzebank AG and Bank of Nova Scotia Asia Ltd., in the English Court would be set at naught and the rights of these objectors cannot be prejudicially affected as the Scheme will have the effect of negating the remedy available to these objectors,

It is no denying the fact that if the Scheme is approved the objectors would not be able to get a money decree against the company. At the same time the objectors would get their dues as per the terms of the Scheme as offered to other secured creditors, but because the objectors have filed suit in English Court, that cannot

deprive the other secured creditors of the benefits under the Scheme when they have floated and supported the Scheme. Pages 392 to 403 of File-I is the copy of the plaint filed in English Court. As far as the reliefs claimed in the suit pending before the Court in England against ICICI and the company are concerned, consideration of the Scheme cannot come in the way of grant of relief of declaration prayed in Para-30(a) and (b) thereof if the English Court is inclined to grant the same against the company. The relief of declaration sought against the company in the suit before the English Court will remain irrespective of the Sanctioning, if any, of the Scheme, as the Scheme is to be considered under the provisions of Sub-sections (1) and (2) of Section 391. In my opinion, filing of the aforesaid suit by some of the objectors and pendency of the same before the Court in England cannot come in the way of considering the Scheme by this Court as it is the body of the creditors which has floated and supported the scheme with a view to protect it's own interest coupled with the intention that the company be put on sound financial footing, so that all creditors can have their dues, though with some sacrifice on their part keeping in view the long term benefits accepting the Scheme to be commercially viable, exercising their commercial wisdom.

36. It is submitted by the learned advocate on for the textile labour association that the Scheme be sanctioned otherwise the petitioner company may be wound-up and as result where of 12,000 workers, i.e., 48,000 persons would be directly affected these days of global recession; that the workers and their families have a right to livelihood.

In this regard reliance has been placed on the decision in case of Textile Labour Association v. State of Gujarat 1995 (1) Guj, Pg. 12 (D.B.). In para-22 it has been observed that 'The constitutional law and fundamental rights are part of the law and even within the Constitution, the fundamental rights have special importance and within the fundamental rights, right to life and liberty is the most fundamental of such rights. If for enforcement of such rights which is the fundamental law of the land anything comes in conflict thereof, it has to give way to see that the fundamental rights guaranteed by the Constitution are not violated.'

Reliance is also placed on the decision in case of Tata Iron & Steel Co. Ltd. v. Micro Forge (India) Ltd., 41 (2) G.L.R. pg. 1594 (D.B.). While dealing with the case under Section 433 of the Act the Division Bench in para-17 observed that, certain important chronicles and contours to be kept in the mental radar, before reaching to the conclusion in a windingup petition, One of such chronicles articulated at Sr. No. 5 reads as follows:--

'(5) If the Company is an ongoing concern having regular business and employment of employees, the Court cannot remain oblivious to the aspect. The effect of winding-up would be of putting an end of the business or an industry or an entrepreneurship, and in turn, resulting into loss of employment to the several employees and loss of production and effect on the larger interest of the society.'

37. The petitioner company as well as the objectors have placed reliance on the decision in case of Miheer H. Mafatlal (supra). The Supreme Court was dealing with the question of amalgamation of the Companies wherein arose the question of exchange of shares which was fixed by the experts in the field of valuation of share and the majority of the shareholders of both the Companies had accepted the said ratio. In para-28 it has been observed that:

'...the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a Court of law. No Court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members of any

class of them for whom the scheme is mooted by the concerned company has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting majority shareholders or creditors...'

In para 28A, it is observed that:--

'However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 Sub-section (2).... The Court certainly would not act as a Court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.... The propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bounded by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties.'

In para-34 it has been observed that, 'while considering the question of bona fides of the majority voters and whether they were unfair to the appellant it has to be kept in view that bona fides of the majority acting as a group has to be examined vis-a-vis the Scheme in question and not the bona fides of the person whose

personal interest might be different from the interests of the voters as a class.'

38. Sidhpur Mills Co. Ltd. In re AIR 1962 Guj. 305, Miabhoy J, succinctly explained the function of the court while exercising power under Section 391(2) as under:

'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 expect 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.'

The 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 out 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.

39. At page 593 in the Pennington's Company Law, Fifth Edition, under the heading 'Protection of Dissenters' it is observed that:

'In describing the function of the court when asked to sanction the scheme under the predecessor of the Companies Act, 1985, Section 425, Lindley LJ said :

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

The court therefore protects dissenters who have voted against the scheme or have not voted for it, by refusing to make it binding on them (a) if it is unreasonable; or (b) if the majority who voted for the scheme did not vote to promote the interests of their own class, but to foster some extraneous interest; or (c) if the scheme is unfair on the face of it.'

40. The approach of the company court has always been to revive/put the Company on sound financial footing and to see that the Company continues as an ongoing concern and the employees are not driven to economic death, particularly in the days of recession. It is a settled principle of law that larger good shall prevail over the smaller good and smaller good shall pave way to larger good. In the instant case, as suggested from the record, different classes of creditors have been offered different packages by the company and all the creditors have sacrificed to some extent. Refusal to sanction the Scheme would create further economic problems not only to the company but will have effect on the persons directly and indirectly dependent on/connected with the company, including the workers. Apart from the company and the creditors who have floated and supported the Scheme, the approval to the Scheme is necessary in the larger

social interest. It may be realised that when majority of the secured creditors have supported the Scheme sacrificing to certain extent, it would be unfair to refuse approval to the Scheme when it is generally fair to all classes of creditors and it stands to serve the interest of the workers also, so that with the help of the Scheme the Company can tie over the financial crisis and can regain the sound financial footing. As compared to the percentage of creditors who have supported the Scheme and the benefit of the Scheme would indirectly extend to the other classes of persons including the employees, the objections by only four (4) foreign currency lenders who are in microscopic minority, for the larger good when it does not appear that the Scheme is dishonest, unfair to any class of creditors nor illegal or opposed to public policy or unconscionable, must be allowed to go it's way.

The prospect of putting the company on sound financial footing cannot be totally disregarded. More over the Court also cannot be oblivious to the fact that the industry generating employment to about 10,000 persons directly and about 1,00,000 indirectly dependent on it, does not require to be obliterated if it can be resuscitated with the assistant/help of it's creditors.

It may also be seen that the Scheme was scrutinised by the Steering Committee comprising of Syndicate and domestic lenders and also by GBIFR in light of the objections raised by the objectors and came to the conclusion that the only way to salvage under the circumstances is to restructure the debts of the Company. The approach of the court, so far as it is practical, it has to be to revive the company.

41. The above discussions would reveal that the Scheme for reconstruction of the debt of the company floated by all the classes of creditors is supported by the statutory majority as required under Section 391(2). The company has only placed the Scheme, floated and supported by statutory majority of the creditors, before this Court for approval/ sanction of the same under Section 391(1). Since the Scheme is of the creditors of the company there is no question of the same being dishonest/unfair to or against the interest of the body of the creditors nor it is suggested that the Scheme is otherwise illegal or unconscionable. The inter se disputes between some of the secured creditors can hardly be a ground for refusing approval of the Scheme. Even the objectors do not in principle oppose the

Scheme saying that no Scheme for restructuring the debt of the Company is required. On the contrary the need for the Scheme for restructuring the debt of the Company is accepted. As observed earlier the objectors demanded better terms/preferential treatment being foreign currency lenders. The learned counsel for the objectors have never denied that the objectors did not demand better terms or preferential treatment before the SC in the matter of repayment of their dues. As the same did not find favour with the SC the objections saw the light of the day. This would go to show that as far as the objections to the Scheme are concerned, the same cannot be regarded as bona fide besides the Scheme tends to serve the interest of all the classes of creditors over and above 10,000 workers and their family members who are dependent on the company for their livelihood and as stated above there are about one lac persons indirectly connected/dependent on the company for their subsistence and the Scheme being for social good as pointed out earlier, the objectors cannot throttle the Scheme when the Scheme is otherwise just, fair and equitable to all covered under the Scheme. However, it is wished to be clear that the sanction of the Scheme is subject to the criminal prosecution for the alleged Acts of misfeasance and/or malfeasance (past transactions) for which criminal complaint has been pending before the Criminal Court, and the issue of past transaction is kept open to be adjudicated in appropriate proceedings, civil as well as criminal, by the appropriate Court. (Ratmani Engg. Ltd. In re[1999] (33) CLA 358 Guj.) and the Scheme deserves to be sanctioned subject to and without prejudice to the liability if any, in the civil and criminal proceedings in respect of the past transactions.

42. The sanction is hereby accordingly accorded to the Scheme of compromise and arrangement and restructuring of the debt of the petitioner company, copy whereof is Annexure-D to the petition. This Court hereby accord sanction to Restructuring of the debt of the petitioner company as envisaged in the Scheme Annexure-D, subject to and without prejudice to the liability if any, in the civil and criminal proceedings in respect of the past transactions.

43. All the parties who appeared at the hearing should bear their respective costs. Petition disposed of accordingly.

In Company Application No. 230 of 2001:

No order is necessitated in this Company Application, in view of the disposal of main Company Petition No. 140 of 2001. Company Application No. 230 of 2001 stands disposed of as not surviving.

Other order dated 8-4-2002.

After the pronouncement of the judgment, it is submitted by Mr. P.C. Kavina, learned counsel for the objectors that, the operation of the statement dated 17-8-2001 made by Mr. S.N. Soparkar, learned Senior counsel for the Company in Company Application No. 230 of 2001 in Company Petition No. 140 of 2001, be extended for a suitable period, so as to enable the objectors to move the appellate Court.

Mr. Soparkar, learned senior counsel has stated that, he is not willing to continue the statement made by him on 17-8-2001, as the supporting creditors are pressing hard for payment. Mr. S.B. Vakil, learned senior counsel, Mr. S.N. Shelat, learned senior counsel and Mr. M.J. Thakore, learned senior counsel appearing for supporting creditors respectively objects to the deferment of the payment.

Having regard to the facts and circumstances and the provisions contained in Sub-section (3) of Section 391 of the Companies Act, the request made by Mr. Kavina for the objectors does not deserve to be accepted, and the same is accordingly rejected.