1982 (1) GLR 395 : 1982 GLH(NOC) 23

GUJARAT HIGH COURT

Hon'ble Judges:M.P.Thakkar and R.C.Mankad JJ.

Tungabhadra Industries Limited Versus National Dairy Development Board, Anand

CIVIL APPEAL No. 6 of 1981 ; *J.Date :- AUGUST 19, 1981

- COMPANIES ACT, 1956 Section - 391 , 392

COMPANIES ACT, 1956 - S. 391, 392 - power and discretion of court to sanction scheme of compromise or arrangement - entitlement to substitute sponsor of scheme - permissibility to exercise power of modification to substitute - interpretation of provisions - death of productive unit - exercise of power under S. 392 - original sponsor TIL had offered 10 paise per share to equity shareholders - NDDB offered Rs. 15/- per share - shareholders were willing to accept 10 paise per share - consideration as to basic feature of Scheme - held, power of modification by substituting one sponsor by another can be exercised by court at point of time when question of sanctioning scheme arises - if productive unit dies, it results into incurable harm to society - law has to be evolved continuously in dynamic manner with forward looking approach - powers conferred by S. 392 may be exercised 'at time of making such order or at any time thereafter' - while making order under S. 391 sanctioning scheme of compromise or arrangement court has undoubted authority to modify compromise or arrangement by substituting one sponsor to another.

What was essence of matter was price to be paid to them and not identity of party from whose pocket price was to come - there is no question of shareholders being obliged to sell their shares - court can substitute sponsor - appeal dismissed.

Cases Referred To :

1. In The Matter Of Bhavnagar Vegetable Products Ltd., 1982 1 GLR 361 : 1981 GLHEL_HC 205043
2. S.K. Gupta And Anr. V/s. K.P.Jain, 49 CC 342

Equivalent Citation(s):

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JUDGMENT :-
M.P.THAKKAR, J.

1 At times an illustration can simplify a complicated question and can have a more telling effect than any other mode of communication. The present is an occasion to do so in order to bring into focus the real issue and in order to clearly hear the heart throbs of the real problem.

Shri K. S. Nanavati
Sr. Advocate

2 Visualize a patient on his death bed. A Doctor (Dr. NDDB) has a medicine which will cure him is prepared to administer it to the patient and to save his life. Another Doctor (Dr. TIL) who was consulted earlier is not in a position to offer any effective medicine or save the life of the patient and confesses that such is the case. A learned Judge permits Doctor-NDDB to go ahead and save the life of the dying man whose life is precious to his family as also to the society. The Doctor who admittedly is neither willing to save the life nor has the capacity to do so DR. TIL objects to the order of the learned Judge and prefers an appeal on the ground that the patient had consulted him earlier and had agreed to be treated by him (Dr. TIL) before Dr. NDDB was brought in Such is the true scope of this appeal preferred by a Company- Tungabhadra Industries Ltd. (hereinafter referred to as the TIL) which itself is not prepared to offer terms as good as the terms offered by its rival-National Dairy Development Board (hereinafter referred to as the NDDB) by way of a Scheme to resurrect an economically ruined oil & vegetable Products manufacturing unit. The appellant Company TIL in terms admits that it is not in a position to implement even its own less attractive scheme (offering something less to creditors as also to share-holders) as the secured creditors and nationalized banks do not support it. Not prepared to offer the terms offered by its rival not prepared to implement its own scheme which is much inferior and is admittedly unworkable what locus standi has the appellant to challenge by way of this appeal an order sanctioning a scheme by the learned Company Judge ? What is the motivation ? Dog in the manger philosophy ? We are not told what interest the appellant has in challenging the impugned order. All that we are told is that on a microscopic examination of the relevant provisions (sections 391 and 392 of the Indian Companies Act) in the light of the interpretation canvassed by the appellant the learned Company Judge had no jurisdiction to order substitution of its rival in the place of the appellant (notwithstanding the law laid down by the Supreme Court in S. K. Guptas case: 49 Company Cases 342) as sponsor of the Scheme to resurrect the Company whereby life is being infused in a dead industrial unit and hundreds of workers will get employment consumers will get more consumer goods and the State will get more revenue. We are not prepared to do it but our rivals cannot be allowed to do it in view of the hair splitting technical pleas we have at our command-say the appellants. That is the crux of the question. So far as the legal contentions are concerned we see no substance in the same for reasons we shall presently indicate. The Backdrop:

3 A company known as Bhavnagar Vegetable Products Limited. having a total paid up capital of approximately Rs. 30 lacs incurred huge losses in the year ending on 31/12/1975 The profits and loss account of the company for the period ending 31/12/1975 reveals a loss of Rs. 201.71 lacs. And the total liabilities as and by way of secured and unsecured loans including current liabilities were around 315.75 lacs. Thus the entire capital of the Company its reserves and surpluses were washed away and its secured debts and other liabilities were so huge that neither the share- holders nor the creditors were likely to get any money. One of the creditors instituted a petition on 2/02/1976 under sec. 433 read with sec. 439 of the Indian Companies Act, 1956 (hereinafter referred to as the Act) for winding up the said company. The petition was admitted on 16/02/1976 In the course of the proceedings an attempt was made to evolve a Scheme in order to prevent the Company from being wound up and in order that the shareholders creditors and workers could retrieve a portion of what was due to them. A scheme was proposed by appellant TIL the details of which are set out in paragraph 11 of the judgement of the learned Company Judge which has given rise to the present appeal. Before the Scheme could be sanctioned under sec. 391 of the Act respondent No. 1-the NDDB proposed a Scheme of its own the details of which have been set out in paragraph 17 of the judgement of the learned Company Judge. Thus there were in the field two competitive Schemes. It so transpired that before NDDB presented its scheme the TIL scheme came up

for consideration before all classes of creditors shareholders and workers. The meetings envisaged by the relevant provisions of the Act were called and the requisite majority voted in favour of the acceptance of the TIL scheme. On 4/10/1976 the Chairman appointed by the Court to preside over this meeting submitted his Report On 21/10/1976 the appellant (TIL) instituted a petition for sanctioning the scheme. Before final orders could be passed by the Court NDDB proposed its own scheme. Thus the scheme proposed by the appellant-TIL which was sanctioned by the requisite majority remained unsanctioned. The learned Company Judge who was seized of the matter at the relevant time issued appropriate directions in Company petition No. 9 of 1978 filed by NDDB for calling the meetings of the shareholders creditors and workers in order to consider the scheme sponsored by the NDDB. Strangely enough the equity shareholders who were prepared to accept 10 paise per share under the TIL scheme and had accepted the offer for payment at that rate in the course of the meetings called to consider the TIL scheme in 1976 refused to vote for the NDDB Scheme whereby they were offered Rs. 10.00 per share in place of 10 paise per share. In other words though they were offered a price which was 100 times the price offered by TIL they did not accept the offer. The NDDB revised its offer upwards by offering Rs. 15.00 per share in place of Rs. 10.00 per share. The equity shareholders who were prepared to accept 10 paise per share from TIL in 1976 were not prepared to accept Rs. 15.00 per share from NDDB. Thus the scheme as sponsored by NDDB did not secure necessary majority as required by sec. 391(2) of the Act. The resultant position was that the TIL Scheme which offered 10 paise per share to the equity shareholders secured the requisites majority and could have been sanctioned whereas the scheme sponsored by NDDB whereby 100 times the price offered by TIL. (which was subsequently raised to 150 times) could not secure the requisite majority from the equity shareholders. It appears that meanwhile TIL also increased its offer from 10 paise per share to Rs. 10.00 per share as against Rs. 15.00 per share offered by NDDB. Thus the appellant-TIL who had obtained consent of the equity shareholders and secured the requisite majority in respect of a scheme offering 10 paise per share was itself prepared to offer Rs. 10.00 per share when the NDDB scheme entered the field of competition. The appellant however did not agree to step up the price upto Rs. 15.00 per share. Meanwhile one more development took place. The Banks to whom the Company owed a very large sum by way of secured loans of the order of Rs. 80 lakhs which had initially lent support to TILs Scheme withdrew their support. In the course of hearing of a Summons taken out by NDDB learned Counsel for M/s. Velji Shamji & Co. the sponsor of TIL Scheme-made a statement before the Court that in view of withdrawal of the support by the Banks the scheme as put forward by TIL was not practicable. Under the circumstances the Court placed on record that TIL on whose behalf no body appeared before the Court on that day was out of the picture as a party sponsoring the scheme before the Court. The order passed by the learned Company Judge is in the following terms:

> " Mr. B. J. Shelat. for Messrs Velji Shamji & Co. the petitioners states that in view of the withdrawal of support by the Bank of TIL the scheme as put forward by his client is not practicable. In view of this it is recorded that TIL on whose behalf no body has appeared today is out of the picture as a party sponsoring the scheme before this Court".

Yet another development took place later on. On 29/03/1979 the appellant TIL took out a Summons which was registered as Company Application No. 279 of 1979 praying for the refund of earnest money deposit of Rs. 75 0 on the premise that it was out of picture. This application was supported by an Affidavit sworn by one Dalal a constituted attorney of TIL. Thus there was no question of granting approval to the Scheme as proposed by TIL.

Meanwhile on 15/02/1980 learned Counsel for-M/s. Velji Shamji & Co. which had sponsored the TIL Scheme informed the Court that his client no longer supported the scheme proposed by TIL and went to the length of stating that his client supported the NDDB scheme. On that very day the NDDB took out a Judges Summons for substitution of its name in place of Messrs Velji Shamji & Company-the sponsor of the TIL Scheme and for modification of the said Scheme to bring it in line with the NDDB Scheme. So also Messrs Velji Shamji & Company - original sponsor of TIL Scheme took out a Judges Summons on 13/03/1980 which was registered as Company Application No. 144 of 1980 making a similar request for the substitution of NDDB for TIL in the scheme sponsored by it subject to it being modified in conformity with the NDDB Scheme. The prayers made in these two Company Applications one by original sponsor of TIL Scheme and another by NDDB were opposed by (1) equity shareholders (2) a section of the workers and (3) appellant TIL. It may be placed on record that appellant-TIL itself had not made any application for sanctioning of any schemes the sponsor of the application petitioning creditor Velji Shamji & Company who had originally prayed for the sanction of the TIL Scheme now withdrew its support from TIL and prayed for the substitution of NDDB for TIL subject to modification of the original TIL Scheme by upgrading it to bring it in conformity with the NDDB Scheme which offered better terms to all concerned. A comparative study of the two schemes has been made by the learned Company Judge. We can do no better than quote the passage:

> " A comparative study of the two Schemes reveals that the Scheme proposed by NDDB was far more beneficial to practically all interests than the TIL Scheme as originally proposed. Under the TIL Scheme depositors claiming at principal amount of Rs. 7,500.00 and below were to receive 30 per cent and the rest 20 per cent of the principal amount without interest whereas under the NDDB Scheme the whole of the principal amount was offered within one month from the effective date without interest. It was only at the meeting that TIL agreed to pay 50 per cent of the principal amount with 12 per cent interest to all the depositors. This offer was further enhanced after the introduction of the NDDB scheme to payment of the whole of the principal amount in four equal installments with interest after the first instalment at 14 per cent per annum. So far as other unsecured creditors are concerned TIL offered 20 per cent of the principal amount without interest in five yearly installments as against the NDDB offer of payment of principal amount in full within one month from the effective date. TIL has not upgraded its offer so far as the other unsecured creditors are concerned. The employees were to be treated as paid off from 1/11/1975 and were to be paid 50 per cent of the compensation upto 31/12/1975 under the TIL Scheme whereas under the NDDB Scheme all permanent employees were to be paid full salary from 1/11/1975 to 31/12/1978 and others were to receive gratuity. The offer underwent an upward revision only after the workers there attended to vote against the Scheme at the TIL Meeting. NDDB also revised their Scheme to bring it in line with the TIL scheme. So far as the preference shareholders are concerned TIL agreed to pay them Rs. 10 per share whereas NDDB offered Rs. 25 per share straightway. Even the subsequently unguarded offer made by TIL does not offer the preference shareholders more than Rs. 20 per share. Thus even at present NDDB offers Rs. 5 per share extra as compared to TIL. Equity shareholders were to receive a paltry Rs. 0.10 ps. per equity share under that TIL Scheme but NDDB offered Rs. 10 per equity share and hence TIL was compelled to raise its offer to Rs. 10 per share to which NDDB reacted by raising it to Rs. 15 per share. It will thus appear from the above that the Scheme initially proposed by TIL was far from fair and equitable. It was only after

NDDB entered the field that TIL was compelled to revise its Scheme upward. Even so it does not match the NDDB Scheme in all respects... "

The learned Company Judge by his closely reasoned judgement and order dated 20/01/1991 (which is presently under challenge) granted the prayer for substitution of NDDB as a party in place of appellant TIL subject to upgrading of original TIL Scheme to bring it in conformity with the NDDB Scheme. It is this order which has given rise to the present appeal by the appellant-TIL. Thus the appellant-TIL who had made a statement to the effect that it was no longer interested in the Scheme presented by it during the course of the hearing and who had applied for the refund of Rs. 75,000.00 deposited be it at the time of the presentation of the Scheme in pursuance to the provision contained in the Scheme is now objecting to the order passed by the Court sanctioning the request of the original sponsor of TIL Scheme for substituting NDDB as a party in place of TIL. Even now be it noted TIL is not prepared to offer the same scheme as is being offered by NDDB under which scheme the shareholders creditors and workers and every one stands to benefit. TIL is not prepared to offer similar terms in its scheme. TIL is not able to secure support of secured creditors and Banks to whom the company is indebted to the tune of Rs. 80 lacs. Appellant TIL itself does not want to go ahead with the scheme or compromise. Yet TIL has preferred the present appeal in order to challenge the legality of the order passed by the learned Company Judge sanctioning the prayer for substitution and the consequent sanction accorded to the Scheme in favour of the NDDB. It may be stated that during the course of hearing before this Court learned Counsel for a section of the workers who had originally opposed the prayer for substitution has made a statement to the effect that the workers do not any more oppose the substitution of NDDB in the original Scheme subject to upward modification in the Scheme. Thus there is no objection on the part of the workers or the secured creditors or other creditors all of whom stand to benefit by the order passed by the learned Company Judge. The only opposition to the order passed by the learned Company Judge now comes from two quarters namely (1) TIL-who does not want to go ahead with the scheme and (2) from a section of Equity Shareholders-who were prepared to accept 10 paise per share from TIL but are not prepared to accept Rs. 15.00per share from NDDB. The equity shareholders who have their own reasons for adopting this seemingly suicidal stance which is inconsistent with their self-interest have preferred a separate appeal which we shall deal with in due course. So far as the present appeal is concerned it is preferred by TIL who does not want to go ahead with the Scheme and thus has no understandable reason to challenge the order which is not prejudicial to it. Since TIL does not want to go ahead with the Scheme whatever order has been passed by the learned Company Judge cannot in any way cause any prejudice to TIL. Yet TIL has challenged the legality of the said order on grounds to which we will advert to in due course. The first question however arises as to whether TIL can be said to be an aggrieved party who has a right to challenge the order passed by the learned Company Judge granting the prayer for substitution of NDDB in place of TIL in the original Scheme sponsored by Messrs Velji Shamji & Company which has been upgraded to bring it in conformity with the NDDB Scheme as it has finally emerged. We on our part are unable to see what interest TIL can have in questioning or challenging the legality of the order passed by the learned Company Judge whereby a company is being resurrected and as a result of which an industrial unit which has ceased production will be able to start production provide employment to hundreds of workers and benefit shareholders workers secured creditors and unsecured creditors i.e. all concerned. In fact as pointed out earlier at the earlier stage the sponsor of the TIL Scheme had placed on record that TIL was out of picture. TIL itself had prayed for the withdrawal of Rs. 75,000.00 deposited in pursuance to the TIL Scheme. TIL scheme even after the modification it was prepared to make during the course of the hearing is less advantageous to

all concerned than NDDB Scheme. The TIL Scheme is not workable as submitted by TIL itself inasmuch as NDDB Scheme visualises payment of Rs. 80 lacs to the nationalised banks with interest at 15% after one year on the outstanding amount and visualises a deposit of Rs. 1 crore to be paid immediately and even payment of all costs and expenses upto Rs. 3 lacs to the Nationalised Banks. TIL scheme does not envisage deposit of Rs. 1 crore in connection with the dues of the nationalised Banks. The nationalised Banks do not support the TIL Scheme and it is conceded that TIL will not be able to work without co-operation of these Banks. What is more important is the fact that the Court cannot sanction a scheme which is less favourable to all concerned and prejudicial to all concerned when a more beneficial and more advantageous scheme has been offered by the NDDB. In any view of the matter therefore the scheme which has been proposed by TIL cannot be sanctioned by the Company Court. Nor has TIL any legal right to insist that its scheme should be sanctioned notwithstanding the fact that it is not as good as the scheme offered by NDDB and in fact is much inferior to the scheme offered by NDDB and which is not acceptable to any one except equity shareholders in respect of whose share of the face value of Rs. 100 offered 10 paise per share which the equity shareholders were prepared to accept (the same shareholders are not ready to accept Rs. 15 share under the scheme pursuant to substitution). All the workers are now unanimously with the NDDR Scheme and TIL scheme is not acceptable to them. Thus it is abundantly clear that the Court cannot sanction the TIL Scheme as it is not acceptable to any one but the equity shareholders. So far as workers are concerned all of them are now unanimously supporting the scheme sanctioned by the learned Company Judge by substitution of NDDB in place of TIL. None of the creditors has preferred an appeal. Thus all the creditors have accepted the order of substitution. At the cost of repetitions it may be stated that admittedly TIL Scheme is not workable. TIL is not prepared to deposit Rs. 1 crore which the NDDB is prepared to do and the Banks having withdrawn their support TIL Scheme is not workable. Under the circumstances it is difficult to comprehend how TIL can feel aggrieved by the order passed by the learned Company Judge. It would appear to us that TIL is not even an aggrieved party. Nor has TIL anything to gain by preferring this appeal in the sense that even assuming that the order passed by the learned Company Judge is set aside TIL does not stand to benefit for its original scheme which is much inferior does not get automatically sanctioned and the Court can never accord sanction to it when NDDB has offered a much superior scheme which is beneficial to all concerned including equity shareholders who are for some ulterior reason opposing the prayer for substitution. All the same since the appeal has been admitted and legal submissions have been urged by TIL to the effect that the order passed by the learned Company Judge is one which cannot be lawfully passed we will proceed to deal with the submissions urged by learned Counsel for the appellant TIL not with standing the fact that even if TIL succeeds it gets no benefit except and save the satisfaction that the NDDB scheme is frustrated and injury is caused to secured creditors unsecured creditors and workers all of whom stand to lose and an industrial unit which had started functioning will have to be closed down. All that we wish to say is that it is difficult to comprehend how the appellant TIL can feel aggrieved by the order passed by the learned Company Judge which does not in any way cause prejudice to it while it benefits all concerned. Still we will deal with the legal submissions urged by learned Counsel for the Appellant TIL. Is substitution of NDDB as sponsor in place of TIL illegal notwithstanding the law laid down by the Supreme Court in S. K. Guptas case ? 4 The first submission urged on behalf of the appellant is that the order for submission of the sponsor in the original scheme as modified subsequently is contrary to law. It may be mentioned that the question whether substitution of one party for another in a Scheme is competent or not is no more a question which is res integra. It is concluded by a decision of Supreme Court in S. K. Gupta and Anr. V/s. K. P. Jain and sec. 49 Company Cases 342. The Supreme Court has taken the

view to that on a true interpretation of sec. 392 of the Act the Court has power to modify the compromise or an arrangement proposed between a Company and its creditors or class of creditors or between its members or class of members and that in pursuance of the said power of modification the Court has power to deal with the Scheme of compromise or arrangement for the purpose of making it workable and it has power to substitute by way of modification one sponsor for another. In other words the Supreme Court has taken the view that in exercise of powers sec. 391 read with sec. 392 of the Act it is competent to the Court to substitute one party as sponsor instead of some other party as sponsor. The proposition which emerges from S. K. Guptas case (supra) cannot and has not been questioned. The Supreme Court has also observed in the course of its judgement in S. K. Guptas case that strictly speaking omission of the original sponsor of a scheme of compromise or arrangement and substituting another one in his place should not change the basic fabric of the scheme. This is also a proposition which cannot therefore be questioned before us. Even so Counsel for the appellant- TIL has contended that the order passed by the learned Company Judge substituting the name of NDDB as sponsor in place of TIL is contrary to law.

4 For proper appreciation of the submission urged in this context it is desirable to reproduce sections 391 and 392 of the Act which are part of Chapter V which deals with arbitration compromises arrangements and reconstructions in so far as they are material: 391 (1) Where a compromise or arrangement is proposed- (a) between a company and its creditors or any class of them; or (b) between a company and its members or any class of them; Court may on the application of the company or of any creditor or member of the company or in the case of a company which is being wound up of the liquidator order a meeting of the creditors of class of creditors or of the members or class of members as the case may be to be called held and conducted in such manner as the Court directs. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members as the case may be present and voting either in person or where proxies are allowed (under the rules made under sec. 643) by proxy at the meeting agree to any compromise or arrangement shall if sanctioned by the Court be binding on all the creditors all the creditors of the class all the members or all the members of the class as the case may be and also on the company or in the case of a company which is being wound up on the liquidator and contributories of the company; Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the Company or any other person by whom an application has been made under sub-sec. (1) has disclosed to the Court by affidavit or otherwise all material facts relating to the company such as the latest financial position of the company the latest auditors report on the accounts of the company the pendency of any investigation proceedings in relation to the company under sec. 235 to 251 and the like. (3). ... ... (7). ... ... 392 Where the High Court makes an order under sec. 391 sanctioning a compromise or an arrangement in respect of a company it (a) shall have power to supervise the carrying out of the compromise or arrangement; and (b) may at the time of making such order or at any time thereafter give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. (2). If the Court aforesaid is satisfied that a compromise or arrangement sanctioned under sec. 391 cannot be worked satisfactorily with or without modifications it may either on its own motion or on the application of any person interested in the affairs of the Company make an order winding up the company and such an order shall be deemed to be an order made under sec. 433 of this Act. (3). ... ... What is the true ratio of S. K. Guptas case ? Doses the power to substitute depend on whether it is exercised before or after the Scheme is sanctioned ? 6 It is contended that sec. 391 read with sec. 392 in the context of the law laid down by the Supreme Court in S. K. Guptas case

empowers the High Court to make an appropriate order or to give appropriate directions or make such modifications compromises or arrangements only after such compromise or arrangement has been sanctioned. In other words the arrangement or compromise must be sanctioned under sec. 391 of the Act before any question of modification of the compromise or arrangement can be tackled by the Court under sec. 392 of the Act. Counsel submits that Court cannot modify the compromise or arrangement by first substituting one sponsor for another sponsor and sanction the scheme thereafter. The Court can only sanction the scheme without modification. And if such a scheme is sanctioned then only the sanctioned scheme can be modified in exercise of the powers under sec. 392 of the Act as interpreted by the Supreme Court in S. K Guptas case. Now it is no doubt true that the question of substitution arose in S. K. Guptus case after the scheme was sanctioned under sec. 391 of the Act. While that position is as a matter of fact true the ratio of decision in S. K. Guptas case does not turn on the question whether or not the substitution of sponsor and modification in this behalf was sought before or after the according of sanction under sec. 391 of the Act. The question before the Supreme Court was not whether one sponsor can be substituted for another provided and only provided the scheme proposed by the original sponsor has been already sanctioned under sec. 391 of the Act and a modification by way of substitution of original sponsor by another sponsor arose subsequent to the sanction in point of time. No such question had arisen for the very good reason that the question of substitution arose officer sanctioning of the Scheme. There is however nothing in S. K. Guptas case which would go to suggest that sanctioning the scheme of the original sponsor is a condition precedent for exercising the power of substitution under sec. 392 of the Act and that such substitution can only follow on the heels of sanction accorded to the Scheme proposed by the original sponsor in which the original sponsor figures as a party to the compromise. Such a proposition does not emerge from S.K.Guptas case. In our opinion on a true interpretation of sec. 391 read with sec. 392 of the Act in light of the law laid down by the Supreme Court in S. K. Guptas case the power of modification by substituting one sponsor by another can be exercised by the Court at the point of time when the question of sanctioning the Scheme arises. There is no warrant for reading the aforesaid two pro- visions in an extremely restricted fashion as is suggested by learned Counsel for the appellant (TIL). By doing so the Court would be denying itself the power to resurrect or breathe new life in a company facing extinction. And would be denying to itself the power to relieve the distress of the workers creditors and shareholders (and at the same time augment the supply of consumer goods and enrich the public exchequer) without harming the cause of any one else. The Court would be denying to it self the power to do good to all concerned without any detriment to may individual or collective interest. Chapter V of the Companies Act deals with arbitration compromises arrangements and reconstructions. The very birth of secs. 391 and 392 has a purpose. These provisions have been designed with a view that a productive unit is saved from economic disaster and is brought back to life. The anxiety underlying this objective is understandable. If a productive unit dies it results into incalculable harm to the society to the economy to the workers to the shareholders to the creditors and the banking institutions which serve the public by extending credit to the industrial units. If the industry thrives the consumers would get more supplies the workers would get employment the State may get more revenue and the augmented public funds could be employed for a nation building purpose. The large investments made by the Banking institutions would be lost if a 2 company is allowed to die. On the other hand if a rescue operation is carried out under the powers conferred by secs. 391 and 392 of the Act by infusing new blood and new life all concerned stand to benefit. And there will be one more industrial unit producing more goods for the consumers. Availability of more goods would mean availability of goods at a more reasonable price. It will mean more employment in an age when unemployment on a large scale is the bane of the society. It

will bring in more revenue by way of sales tax income tax and other taxes. How then shall we construe secs. 391 and 352 ? Shall we construe them in a manner so that the Industrial unit can be resurrected ? Or shall we interpret them in a fault finding manner with a hair-splitting attitude in order to hold that no such power exists in the Court ? Shall we interpret it in such a manner that the relevant provisions take place of life saving drugs or shall we interpret the provisions in such a manner that they take place of a placebo with no curative power and with no potency ? No doubt if the provisions are not capable of a construction other than the one that no such power exists Court may raise its hands in helplessness. But if the provisions are capable of such an interpretation as to make them meaningful and purposeful there is no compulsion to adopt an approach which would render the provisions practically worthless in a situation like the present one. The law has to be evolved continuously in a dynamic manner with a forward looking approach. This does not mean that if the provisions are not susceptible to such interpretation even on making an approach informed with the desire to make them purposeful rather than purpose- less an impossible construction should be placed on the provisions. In our opinion however the provisions are capable of being interpreted in the manner in which the learned Company Judge has interpreted the same. There is nothing in these provisions which countermands such a construction. In fact clause (b) of sub-sec. (1) of sec. 392 makes it abundantly clear that the powers conferred by sec. 392 may be exercised at the time of making such order or at any time thereafter. The provisions there- fore envisage exercise of power at the very point of time of making the order meaning thereby before the order is passed. The expression which follows namely at any time thereafter lends further support to this construction namely that before the order is signed the power can be exercised under the earlier part of the provision and after the order is signed the power can be exercised under the second part of the provision. The expression or at any time thereafter leaves on room for doubting the score that the preceding part contemplates exercise of power at a point of time prior to the making of the order. It is therefore abundantly clear that while making the order under sec. 391 of the Act sanctioning the Scheme of compromise or arrangement the Court has undoubted authority to modify the compromise or arrangement by substituting one sponsor for another. Than the power of modification includes power of substituting the original sponsor by a new sponsor is a proposition which is not capable of being disputed in view of the law laid down by the Supreme Court in S. K. Guptas case (supra). We therefore do not see any substance in the first submission urged by learned Counsel for the appellant-TIL in this behalf. Is the order vulnerable on the ground that it seeks to do something indirectly which it could not have done directly ?

5 The submission which is urged is that the learned Company Judge should not have authorised a scheme indirectly which was rejected by the shareholders and the creditors. The argument is that one cannot be permitted indirectly to do what cannot be done directly. It is contended that since the Scheme sponsored by the NDDB had been rejected at the meeting of the shareholders and the creditors NDDB cannot be substituted in place of original sponsor by the order of the Court such is the submission amounting to giving a back door entry to NDDB. Now as discussed earlier the Scheme which has been sanctioned by the Court by substituting NDDB in place of TIL is admittedly vastly beneficial to the shareholders as also to the creditors and the workers. In fact barring the equity shareholders no one has taken exception to the sanctioning of the Scheme. So far as the shareholders are concerned one wonders how any one can object to being paid compensation at Rs. 15.00 per share instead of compensation at the rate of 10.00 paise per share. Equity share- holders were prepared to accept 10 paise per share from TIL and even now are prepared to accept Rs. 10.00 per share from TIL. They are how- ever not prepared to accept Rs. 15.00 per share from NDDB. Do Rs. 15.00 per share coming into the pocket of the shareholders have less value than 10 paise

per share merely because Rs. 15.00 come from NDDB while 10 paise come from TIL ? The learned Company Judge was perfectly justified under the circumstances in suspecting that there was some under- hand dealing involved in it. No person would ever object to payment of Rs. 15.00 per share if he is willing to accept 10 paise per share. And no shareholder is concerned with the question as to from whose pocket the value of the share comes from. For a shareholder what is material is the money that be gets and not from whose pocket the money comes. Therefore it is obvious that the objection of the shareholders is one which cannot be countenanced by the Court. It is too late in the day for the Courts to countenance such a submission. It would not have found favour in the times of Shylock the Jew. It is inconceivable that any Court would countenance it even for a moment today. It is thus clear that the objection of the equity shareholders (with which we are concerned in the allied appeal which is being disposed of along with this appeal) is rooted in some evil design and is not bona fide. The Court would therefore refuse to entertain a protest from the quarters of the shareholders. The Court may well tell the shareholders that not- withstanding your desire to be content with 10 paise per share the Court will sanction a scheme whereby you will get 150 times the amount you were prepared to accept and that your intrigues cannot prevent the Court from infusing life in a dying industrial unit for the Court cannot be unaware of this dimension of the matter. While the Court would be anxious to protect the interest of the shareholders the Court would not create a situation where the shareholders inflict harm on themselves and also harm on all concerned. The existence of an industrial unit today is not a matter concerning the rights of the shareholders only. It is a matter in which the entire society the consumers the workers the revenue and the welfare state have a stake. The objection raised on the part of the shareholders must therefore be repelled unhesitatingly. But it must be realised that the present appellant is not the guardian-ad item of the shareholders. The present appellate-TIL is a limited company which has proposed the scheme which admittedly cannot work and which is admittedly less attractive than the scheme proposed by NDDB. One can best describe the attitude of as the dog in the manger attitude for the appellant TIL can have no grievance if a dying company is reconstructed and if the shareholders creditors workers and the National economy benefits whilst it loses nothing. Is it mere jealousy which makes it persist in opposing the scheme by preferring this appeal? We do not know. But one thing is clear viz. that TIL does not want to offer the same terms as NDDB offers. TIL is not prepared to offer a scheme which will go through. TIL is not in a position to offer a scheme which will go through. What interest then has TIL in challenging the order passed by the learned Company Judge sanctioning the scheme which it does not want to push through itself and is not in a position to push through? We are unable to comprehend how TIL can contend that by substitution of NDDB in place of TIL as sponsor amounts to giving basis door entry to NDDB. The argument completely overlooks the basic aspect of the real problem. What was accepted by the shareholders and the creditors was a scheme offering them certain terms. They were not concerned with the question through when they were going to be paid under the Scheme. The identity of the sponsor would not be a basic element of the Scheme. It has been observed in S. K. Guptas case (supra) that identity of the sponsor is not something basic in the structure of the scheme. Whether or not it is essence of the scheme or a basic element in the scheme is a question of fact depending on the circumstances of every case. Even if one were to proceed on the assumption that in certain cases it may be a basic element in the scheme whether or not it is a basic element is 8 question which can be examined by the Court. In the present case it is an undisputed position that NDDB is financially far more sound and has greater financial backing than TIL. It is not con- tended that TIL is financially preferable to NDDB from the standpoint of the persons who are going to get their dues under the scheme. It is not even contended by TIL that NDDB is not in a position to fulfil the obligations undertaken by it under the Scheme. Neither the creditors nor the workers nor the

Banks nor the secured creditors have objected to the scheme on this count before us. Even TIL has not contended to this effect. Apart from the fact that TIL is neither representative nor guardian ad litem of the interest of the shareholders or creditors or workers where is the question of identity of the sponsor being a basic element in the schemes ? What was agreed to at the meeting of the shareholders and creditors was an arrangement under which they were going to get compensation in respect of their rights. The essence of the matter was the monetary compensation which they were going to get. It was not the essence of the agreement or compromise as to from whose pocket the compensation was going to come. In a given case if the sponsor sought to be substituted does not have the financial capacity to meet with the obligations undertaken by it it may stand on a different footing. With such a hypothetical case we are not concerned in the present matter. So far as the present appellant is concerned it is an admitted position that the financial viability of NDDB and its position to meet with its obligations under the Scheme is not questioned by any one. Not even by the shareholders. Under the circumstances how can TIL who offered a much less attractive Scheme which the Court was not prepared to accept because it was against the interest of the shareholders creditors and workers and which TIL itself in any case was not prepared to upgrade in order to bring it in conformity with the more beneficial Scheme offered by the NDDB challenge the order passed by the learned Company Judge on this score ? There is no question of granting sanction to a scheme rejected by the shareholders and the creditors. In fact sanction is being accorded to a scheme. which was accepted by the shareholders and creditors with an upward modification of monetary benefits in favour of all concerned parties namely share-holders creditors and workers. The only modification which in had is the in place of TIL (which is not prepared to go ahead with the Shareholders which admits that it is not in a position to implement the scheme because the secured creditors and banks have withdrawn their support) NDDB (which is in a position to implement the scheme) is being substituted. It is thus evident that the submission urged on behalf of the appellant (TIL) is altogether lacking in merits. Does it amount to compelling the Shareholders to sell their shares and is It invalid on that account 7 Is the impugned order illegal on that account?

6 It was lastly contended that unless the sponsor agreed the scheme should not have been sanctioned because it amounts to compelling share- holders to sell their shares to NDDB against their choice. Pray who is TIL to raise an objection on this score ? The shareholders are not minors and TIL is neither their natural guardian nor guardian appointed by the Court. This argument is wholly misconceived. No one is compelling the shareholders to sell their shares to NDDB. The shareholders have at a duly convened meeting agreed to sell their shares at 10 paise per share. All that the Court is sanctioning is a sale of share at the rate of Rs. 15 per share instead of at 10 paise per share. Is it compulsion or is it something done in order to confer a windfall benefit on the shareholders ? We have discussed at length the ramification of the matter pertaining to the identity of the purchaser of the shares from the standpoint of share-holders who had agreed to sell their shares at 10 paise per share. What was the essence of the matter was the price to be paid to them and not the identity of the party from whose pocket the price was to come. 10 paise per share from TIL could not be of greater value to the shareholders than Rs. 15.00 per share from NDDB. There is therefore no question of shareholders being obliged to sell their shares. The Court has sanctioned a scheme under which they had agreed to sell their shares at 10 paise per share by directing that instead of 10 paise they should be paid at Rs. 15.00 per share. Incidentally the modification effected by the Court is to the effect that the value of the shares should be paid by NDDB and not by TIL-who is not prepared to pay this value for the shares. Under the circumstances we cannot accede to this argument which is altogether devoid of any substance. These were the

only submissions urged on behalf of the appellant. We see no substance in any one of them. The appeal therefore fails and is dismissed.

7 We may state that we have passed an order dismissing the appeal and refusing certificate of fitness to appeal to the Supreme Court of India on 8/07/1981 on which date we passed the order in the following terms: (I) 10 Appeal is dismissed for reasons which will follow hereafter. (II) Appellant will pay the costs of the respondents as also the workers. (III) Counsel for appellant orally applies for certificate of fitness to appeal to the Supreme Court of India. Certificate is refused as the matter does not involve any substantial question of law of general importance which in the opinion of this High Court needs to be decided by the Supreme Court. (IV) Counsel for the appellant applies for stay of the operation of the order dismissing the appeal in order to enable the appellant to appeal to the Supreme Court after obtaining special leave. We refuse the prayer for stay in view of the fact that Mr. K. S. Nanavati for respondent no. I makes a statement in the same terms as he made on 6-4-1981 in C.A. No. 21 of 1981 in O. J. Appeal No. 6/81 when the appeal was admitted and interim relief was refused which will hold good till expiry of fifteen days from the date of signing of judgment.

Shri K. S. Nanavati
Sr. Advocate