M/S Meghal Homes Pvt. Ltd vs Shree Niwas Girni K.K.Samiti & Ors on 24 August, 2007

Equivalent citations: AIR 2007 SUPREME COURT 3079, 2007 AIR SCW 5558, 2007 (6) AIR BOM R 56, 2007 CLC 1359, (2007) 80 CORLA 304, (2007) 4 BANKCAS 491, (2007) 6 SUPREME 387, (2007) 4 CURCC 65, (2008) 1 PUN LR 408, (2007) 10 SCALE 298, 2007 (7) SCC 753, (2007) 139 COMCAS 418, (2008) 2 BOM CR 344

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Bench: G.P. Mathur, P.K. Balasubramanyan

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           CASE NO.:
Appeal (civil)  3179-3181 of 2005

PETITIONER:
M/S MEGHAL HOMES PVT. LTD

RESPONDENT:
SHREE NIWAS GIRNI K.K.SAMITI & ORS

DATE OF JUDGMENT: 24/08/2007

BENCH:
G.P. MATHUR & P.K. BALASUBRAMANYAN

JUDGMENT:
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J U D G M E N T CIVIL APPEAL NOS. 3179-3181 OF 2005 WITH [C.A. Nos. 3182-3184/2005, C.A. Nos. 3569-3571/2005, C.A. No. 4377/2006] P.K. BALASUBRAMANYAN, J.

1. These appeals arise out of proceedings in the Company Court in the matter of M/s Shreeniwas Cotton Mills Limited (SCML). The Company was incorporated on 5.2.1935. It established and ran a textile mill in a land measuring 70,490 square meters in Lower Parel in the then City of Bombay.

2. Just like various other textile mills located in that city, SCML also ran into difficulties. A creditor of the Company made an application C.P. No. 642 of 1983 under Section 433 of the Companies Act, for the winding up of the Company. By order dated 25.7.1984, SCML was ordered to be wound up by the Company Court. The Official Liquidator took charge of the affairs of the Company.

3. Nothing significant seems to have happened for a decade. Then, on a report of the Official Liquidator, the Company Court passed an order dated 1.9.1994 directing the Official Liquidator to issue a public notice inviting offers for the revival of the textile mills and absorption of the workmen

and to purchase the assets of the Company. At that stage, Rangnath Somani, a contributory, filed Company Application No. 339 of 1994 seeking directions of the Company Court for holding a meeting of the creditors, contributories and other interested persons to consider a scheme proposed allegedly for the revival of the Company. The application was opposed. The Company Court directed the convening of the requisite meeting to consider the proposed scheme. Pending consideration thereof, the Company Court also withheld the proceedings pursuant to the public notice inviting offers. The order of the Company Court directing the convening of a meeting for the purpose of considering the scheme propounded was challenged in appeal by the workers' union and three of the parties who had submitted their offers in response to the advertisement issued by the Official Liquidator pursuant to the direction of the Company Court dated 1.9.1994. Notwithstanding the pendency of the appeals, a meeting as directed by the Company Court was held and a scheme was approved by the creditors, contributories and workers. An application for sanctioning the scheme was also filed. But, meanwhile, on 4.4.1995, the Division Bench of the High Court allowed the appeal against the order dated 1.9.1994 and set aside the direction for convening a meeting to consider the scheme proposed. The Company Application filed in that behalf was thus dismissed. In the view of the Division Bench, the scheme proposed was not a bona fide one since it was not on the basis of any viability report regarding the revival of the company and there was a failure to disclose the latest financial position of the Company. The court also found that even on the showing of Rangnath Somani, the value of the land belonging to SCML would be approximately Rs. 200 crores if unencumbered and that itself was a very conservative valuation. The court was of the view that the intention behind presentation of the Scheme appeared to be to acquire the huge lands and other real estate belonging to SCML at a throw away price ostensibly in the guise of reviving the mills but with no real intention of reviving it. After the obtaining of a viability report, the Division Bench wanted the Company Judge to consider certain suggestions. They were:

> "(1) Whether it is possible and viable to reopen the mills and/or any portion of it and run it profitably and without disposing of immovable assets of the Company;
>
> (2) In case the mills cannot be re-started then whether any department or process of the mills could be started as viable;
>
> (3) In case any party who comes forward with an offer to pay off all the creditors, take the company out of winding up and revive and restart the mills happens to be a shareholder of the Company, such party should surrender the shareholding in the capital of the Company at the value to be determinied by the Court;
>
> (4) In case above courses are not workable then whether the mills can be restarted by disposing of part of its assets to generate finance after payment to all the creditors;
>
> (5) In case even the course under clause (4) above is not possible, then the Official Liquidator may sell the assets by public auction in which even the shareholders of the Company will be at liberty to bid."

4. Thereafter, the Division Bench emphasized what was the main object to be kept in mind by the Company Court. In that behalf, it was stated:

> "It is open for the learned Company Judge to give any other suitable directions in the matter keeping in mind that the whole anxiety is to revive the Company and to restart the mills which is in the interest not only of the workers and creditors of the Company but also in the general interest of public. Needless to say that the revival of the Company and restarting of the mills will generate more employment and will be for healthy economy of the country."

(emphasis supplied)

5. A Petition for Special Leave to Appeal filed in this Court challenging the decision of the Division Bench as Special Leave Petition (Civil) No. 13305 of 1995 was dismissed on 10.7.1995.

6. The State Bank of India Capital Markets Limited was assigned the task of preparing a viability report. That Body made its recommendations after a due study of the situation. On the first aspect posed by the Division Bench, it answered:

> "It is not possible to reopen the mills or any portion of it without disposing of the immovable assets of the Company. In our opinion, it would be unviable to revive the weaving and the processing sections of the above mill on account of the reasons summarized below."

For the moment, we are not concerned with those reasons and therefore we are not adverting to them at this stage. In answer to the second query posed, the answer was:

> "It is not possible to restart the entire mill. Only a section of the spinning division with 21420 spindles can be restarted and operated as viable, details of which are given below."

The details are not relevant for the moment. In answer to the third query regarding the surrender of shareholding if the offer comes from a shareholder, the report stated that the said matter rested with the court and its discretion. Regarding query No. 4, it was reported that since revival plan envisaged the functioning of the spinning section alone, the machinery in the weaving and processing sections and part of the machinery in the spinning section had to be sold or scrapped. A sale of such machinery was estimated to fetch a price of approximately Rs.550.99 lakhs. It was further reported that saleable extent of 44593 square meters of mill land, being a part of the total holding, if sold may fetch the required sum to settle all the past liabilities of the Company. But, it was suggested that it may be appropriate if the interested party brought in Rs.12367.41 lakhs in the form of loans initially and once the weaving and processing machinery and non-viable spinning machinery are sold, then, the question of sale of part of the land could be taken up. In answer to the fifth query, it was reported that since a partial revival of the mills was possible, sale by the Official Liquidator of the assets by public auction may not arise. It was also suggested that delay in implementing the revival

package will escalate the liability and would lead to further deterioration in the condition of the spindleage proposed to be revived.

7. On 7.11.1998, a new Industrial Location Policy of the Government of Maharashtra became operative. That applied to all industries in the Mumbai Metropolitan Region excluding the cotton textile industries. Since cotton textile industry was excluded from its purview, it appears that there was no restriction on restarting of the manufacturing activities of SCML.

8. We may notice at this stage that the main shareholders of SCML were Bangurs, Somanis, and the Life Insurance Corporation of India and the sundry shareholders held about 20% of the shares. Two of the secured creditors were the State Bank of India and the Punjab and Sind Bank.

9. The matters lingered on. On 29.6.2003, it is seen that a Memorandum of Understanding was executed between the shareholders, the Somani Group, who meanwhile had acquired the shares of the Bangur Group (there is controversy whether the acquisition was by Rangnath Somani in his own right or it was an acquisition by the Somanis Group, a controversy that we are not called upon to decide here) and Lodha Builders Private Limited (LBPL). Under that Memorandum, LBPL agreed in consideration of getting the right to develop the properties of SCML, to pay a sum of Rs. 78 crores to SCML and 70,000 square feet of built up area or 19.50 crores in the alternative at the option of SCML. In other words, LBPL was to pay Rs. 97.50 crores to SCML or Rs. 78 crores and 70000 square ft. of built up area. It was also provided that if any additional funds were required for settling the affairs of the Company, the additional funds would have to be brought in by SCML. In other words, on payment of Rs. 78 crores and handing over a built up area of 70000 square feet or on paying Rs. 97.50 crores in all, LBPL was to get the right to develop and deal with the lands of SCML. Based on this Memorandum of Understanding, the three Somani cousins filed Company Application No. 4 of 2004 propounding a scheme and seeking directions from the Company Court for convening a meeting to consider the amended scheme. The amendment to the earlier scheme presented, included the replacement of paragraph 1.5 of the original scheme which had indicated that sale of the assets or properties of SCML was not envisaged and the scheme was for revival of the textile mill unit of SCML by a provision that the scheme envisaged development and transfer of SCML's propertiesd by LBPL for revival of SCML. Another amendment was to clause 5.1. This was by deleting the salient features for scheme for revival of the mills and providing in its place that the aim was that after discharging the liabilities of all creditors as per the scheme, if extra funds are available with SCML, then SCML will start a viable industry in any part of Maharashtra and employment would be generated. It was further stated in the proposed amendment that LBPL was to bring in funds of Rs. 78 crores for the payment of liabilities of SCML. In the event of any further finance being required than the amount agreed to be brought in by LBPL, the Company Applicants, the Somani cousins, would be permitted to dispose of a part of the assets of SCML and the proceeds of the sale will be utilized to pay off the workers and the creditors if required.

10. On 12.12.2003, the Company Court directed the meeting to be convened to consider the amended scheme. On 21.2.2004, the amended scheme was approved at the meeting. Company Petition No. 315 of 2004 was filed on 7.4.2004 seeking sanction of the amended scheme. The Regional Director on behalf of the Central Government pointed out that the propounders of the

scheme were required to file an affidavit regarding the latest financial position of the Company but that they had not filed such an affidavit. On 23.7.2004, the Company Court rejected the amended scheme and dismissed the Company Petition No. 315 of 2004. The court held that the scheme presented was not a scheme for revival but it was in substance a disposal of the Company's assets which then vested in the Official Liquidator. The court found that it was only a mode of disposal of the Company's assets and hence it would be proper for the Company Court holding the assets to dispose of the assets after inviting offers. That would fetch a better price and such a course would be in the interest of the Company's minority shareholders, workmen and secured and unsecured creditors. The court was also of the view that the amount of Rs. 97.50 crores offered by LBPL was considerably less than the amount of Rs. 200 crores, which the Division Bench had noticed about ten years back, would be the minimum price that could be fetched if the properties were to be auctioned. The Company Court directed the issue of advertisements inviting offers for the assets of SCML showing a reserve price of Rs. 150 crores. The Official Liquidator issued advertisements inviting offers.

11. The order of the Company Court dated 23.7.2004 was challenged in appeal by LBPL, by the Somanis and by the workers' union. Though various offers had been received pursuant to the advertisement issued at the direction of the Company Court, they were not considered since in appeal, the auction process was stayed. The Division Bench, on 15.12.2004, passed an order directing the Somanis, LBPL and the various interveners who had made offers, to place their proposals for rehabilitation on record. It was also directed that those interested in purchase of the property should file affidavits placing on record whether they were prepared to make a down payment of a specified sum for release to the workers. The court also directed the Somanis holding the major shares (again we are not concered with their inter se dispute here) to state whether they would be willing to accept any such better scheme. Some affidavits were filed and in its affidavit, LBPL stated that in addition to the payment of Rs. 45 crores to the workers, LBPL would set up a spinning unit and a garment unit at the cost of Rs. 40 crores on the 7,50,000 square feet coming to them under the Scheme, and would construct and transfer to a Workers Trust a 30,000 square feet unit, housing a school and other accommodation at a cost of Rs. 15-20 crores. Rangnath Somani, the eldest of the cousins filed an affidavit showing that the Somanis would be willing to consider and evaluate any better scheme in the interests of SCML. But, on the same day, Ramesh Somani, who was one of the co-propounders of the scheme, filed an affidavit stating that he fully supported the scheme of LBPL and did not want any change in the sponsors. He also filed another affidavit stating that the propounders of the scheme would set up a textile unit for rehabilitation of the workers of SCML at Sholapur at a cost of Rs. 35.02 crores. It is said on behalf of the appellants, that at the last moment just before the delivery of the judgment began, affidavits filed on behalf of the LBPL were received by the court, even while refusing to receive two affidavits, Rangnath Somani wanted to file. The Division Bench allowed the appeals, set aside the judgment of the Company Court and sanctioned the scheme as modified and as further modified by two affidavits of the Directors of LBPL, by its judgment dated 21.3.2005. It is this decision of the Division Bench that is in challenge before us in these appeals. Three of the appeals are by persons, who had made offers pursuant to the direction of the court and have been described for convenience, as the interveners and one of them by Rangnath Somani. Even at this stage, we may mention that Civil Appeal Nos. 3569-3571 of 2005 filed by one of the interveners is sought to be withdrawn. We see no reason why the prayer for

withdrawal of those appeals shall not be granted. So, Civil Appeal Nos. 3569-3571 of 2005 would stand dismissed as withdrawn. We are only considering the other appeals on merits.

12. Before we proceed to consider the merits of the appeals, an objection taken to the maintainability of the appeals requires to be considered. According to the respondents, the appellants in Civil Appeal Nos. 3179- 3181 of 2005 and Civil Appeal Nos. 3182-3184 of 2005 have no locus standi either to object in the Company Court or to challenge the decision of the Division Bench of the High Court in appeal before this Court. It is submitted that neither of those appellants are creditors, contributories or debenture holders and are total strangers to SCML and they have nothing to do with the proposal and acceptance of the Scheme under Section 391 of the Companies Act read with Sections 392 and 393 of that Act. This contention is sought to be met by the appellants in these appeals by pointing out that the appellant in Civil Appeal Nos. 3171-3181 was associated with the original Scheme for which approval was sought from the Company Court and that the appellant therein had in fact deposited a sum of Rs. 18 crores as per the direction of the court and had also furnished a bank guarantee for Rs.10 crores and had allegedly discharged certain creditors of the Company and what was sought in the present case was a modification of the earlier Scheme in which the appellant was involved and in this situation the locus standi of the appellant could not be denied. It was also pointed out that there was a specific direction by the Division Bench to the appellant and others to present their Schemes/Proposals before the court and they had filed affidavits in that behalf. The Company Court was bound to consider their proposals in the light of the directions of the Division Bench. The Division Bench in the present round also could not go back on what had been ordered by earlier Division Bench. This gave the appellants sufficient locus standi. The appellants in both these sets of appeals had also submitted proposals pursuant to the directions of the court and had also responded to the tenders issued as per the directions of the Company Court. If the proceedings had continued in the Company Court, one of those persons could have benefited. The benefit that was thus to accrue to one of the interveners was deprived of by the Division Bench by its present order and in that situation, the appellants are persons who are aggrieved by the decision of the Division Bench and entitled to challenge the said decision in this Court. It is also submitted that the framing of a Scheme for revival of a Company under liquidation had overtones of public interest and commercial morality and in the context of what had transpired in this case and the involvement of the interveners at every stage, it was not open to the respondent now to raise a contention that the appellants have no locus standi. In fact, the Division Bench of the High Court was totally in error in excluding their objections on the ground that they had no locus standi and as persons aggrieved by that finding, it is open to them to file these appeals. It is also submitted that LBPL was also in the same boat as the appellant in Civil Appeal Nos. 3179- 3181 of 2005 and if it had locus standi to appeal to the Division Bench of the High Court against the order of the Company Court, the appellant has the locus standi to appeal to this Court.

13. In the light of what had transpired in this case and the orders of the Division Bench dated 4.4.1995 and 15.12.2004, it is not possible to accept the argument on behalf of the respondents that the appellants in the two sets of appeals have no locus standi to maintain their appeals in this Court. They have been allowed to intervene by the Division Bench of the High Court on earlier occasions and it is too late in the day now to raise a contention that they have no role to play in the approval of a Scheme under Section 391 of the Act and their appeals should be rejected on that ground. The case

of the appellant in Civil Appeal Nos. 3171-3181 of 2005 involves a further fact that it was sought to be involved in the Scheme originally presented by the Somanis which ultimately was rejected by the court, but during the course of the proceedings the appellant therein was directed to deposit certain amounts and furnish security for certain other amounts and this could only be on the basis that as a participant in the original Scheme proposed, the appellant had some locus standi. In a sense, LBPL, which is now sought to be associated in the modified Scheme also stands on the same footing as the appellant in Civil Appeal Nos. 3179-3181 of 2005 and we are not invited to hold that LBPL has no locus standi in this proceeding as no such argument was raised before us. Considering the aspects involved, in the context of the order for liquidation of the company and the attempt to sponsor a scheme for acceptance by the Company Court, we are of the view that the two sets of appeals could not be dismissed as appeals by persons who have no locus standi to maintaini them. Surely, to the extent the Division Bench has held that their objections are irrelevant, they can certainly appeal to this Court in an attempt to show that their objections are indeed relevant. Whether their claim is meritorious, is another matter.

14. The right of Rangnath Somani to maintain his appeal being Civil Appeal No. 4377 of 2006, is challenged on the ground that he was a co-sponsor of the Scheme which has been accepted and approved by the Division Bench and therefore he cannot claim to be a person aggrieved by the decision of the Division Bench entitled to challenge the decision of the Division Bench. The argument on behalf of Rangnath Somani is that the Scheme as approved by the general meeting of the concerned, has not been accepted by the Division Bench and certain modifications were brought in on the basis of affidavits filed on behalf of LBPL and he has always a right to object to such modifications or to contend that such modifications must go back to the general meeting for consideration and approval. On this part of the objection, we find substance in the stand adopted on behalf of Rangnath Somani and on that basis we cannot say that he is not entitled to file an appeal against the decision of the Division Bench.

15. But more seriously it is contended that Rangnath Somani had accepted the decision of the Division Bench of the High Court and had even received possession of the assets of SCML from the Official Liquidator pursuant to his discharge on the basis of the decision of the Division Bench and having done so, he is estopped from questioning the order of the Division Bench in an appeal which he has filed subsequently. This argument is sought to be met on behalf of Rangnath Somani by pointing out that the receiving of possession pursuant to the order of the Division Bench from the Official Liquidator cannot estop him from filing an appeal before this Court and from pointing out that the decision suffers from a vital defect of being one in excess of the authority of the Division Bench of the High Court and not in consonance with the terms of the Companies Act. It is seen that some objection was sought to be raised by Rangnath Somani regarding the proposals contained in the affidavits filed on behalf of LBPL, which proposals were accepted and made part of the Scheme of the Division Bench and the objection of Rangnath Somani was not dealt with as such. Moreover, from the fact that, subsequent to the decision of the Division Bench, Rangnath Somani received possession of the assets of SCML along with his cousins, the other two Somanis, it cannot be said that thereby he has lost his right to appeal to this Court questioning the modifications in the Scheme sought to be propounded by him and approved at the General Meeting. We are not inclined to go into the charges and counter charges as to which of the Somanis has been got at and by whom, since

we consider those allegations to be irrelevant for our purpose. Suffice it to say that, we are not inclined to accept the argument on behalf of the respondents that Rangnath Somani is estopped from filing an appeal against the decision of the Division Bench. Anyway, since we have held that the appeals by the other two appellants are maintainable, the question that arises will have to be examined by this Court and in that context, we find it not proper to turn away Rangnath Somani from the portals of this Court on the ground of estoppel. Thus, we overrule the objections to the maintainability of these appeals.

16. Now to recapitulate, the Company was ordered to be wound up on 25.7.1984 and the Official Liquidator was directed to take possession of the assets of the Company. Once an order of liquidation had been passed on an application under Section 433 of the Companies Act, the winding up has to be either stayed altogether or for a limited time, on such terms and conditions as the court thinks fit in terms of Section 466 of the Act. If no such stay is granted, the proceedings have to go on and the court has to finally pass an order under Section 481 of the Act dissolving the Company. In other words, when the affairs of the Company had been completely wound up or the court finds that the Official Liquidator cannot proceed with the winding up of the Company for want of funds or for any other reason, the court can make an order dissolving the Company from the date of that order. This puts an end to the winding up process. Winding up is dealt with in Part VII of the Companies Act and Sections 433 to 483 occur in Chapter II of that Part. Part VI deals with management and administration of a Company and Chapter V thereof deals with Arbitrations, Compromises, Arrangements and Reconstructions. In that Chapter occurs Sections 390 to 396A of the Act with which we are concerned. While defining a Company for the purpose of Sections 391 and 393, Section 390 clarifies that Company means any Company liable to be wound up under the Companies Act. SCML was a company that was ordered to be wound up on 25.7.1984. Therefore, when the Scheme was originally presented on 3.10.1994, it was at a time when the winding up order was already in existence. The argument that Section 391 would not apply to a Company, which has already been ordered to be wound up cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a Company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a Company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a Company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application. By and large, the High Courts are seen to have taken the view that the right of the Official Liquidator to make an application under Section 391 of the Act was in addition to the right inhering in the creditors, the contributories or members and the power need not be restricted to a motion only by the liquidator. For the purpose of this case, we do not think that it is necessary to examine this question also in depth. We are inclined to

proceed on the basis that the Somanis, as contributories or the members of the Company, are entitled to make an application to the Company Court in terms of Section 391 of the Act for the purpose of acceptance of a compromise or arrangement with the creditors and members.

17. The question in this case really is whether the compromise put forward under Section 391 of the Companies Act could be accepted by the court without reference to the fact that it is a company in liquidation and without considering whether the compromise proposed as intending to take the company out of liquidation, contemplates the revival of the company and whether it puts forward a proposal for revival and whether such a proposal also satisfies the element of public interest and commercial morality, the elements required to be satisfied for the court to stop the winding up proceeding in terms of Section 466 of the Act. In the present case, the Company Court was of the view that the compromise or arrangement that is put forward by the Somanis in conjunction with LBPL was not a scheme or proposal for revival of the company or the Mills, but it is one for disposal of the assets of the company and in that situation, it would be proper that the assets are disposed of by the Official Liquidator by inviting offers from the public in that behalf and maintaining transparency. But, the Division Bench accepted the contention that it was not mandatory in law that a compromise or arrangement has to be for revival of the very activity in which the company was engaged in at the time of winding up and the anxiety of the court while sanctioning the scheme which is approved by all classes should be to see that the company is permitted to continue its corporate existence. The Division Bench also took the view that the judgment of the earlier Division Bench dated 4.4.1995 did not stand in the way of accepting the present scheme, and that since the Company Court had no jurisdiction to sit in appeal over the decision of the creditors, members and contributories of the company, the proposal put forward was liable to be accepted especially in the context of its finding that the interveners have no locus standi to oppose the proceedings.

18. Learned counsel argued before us whether in the case of a company which had been ordered to be wound up, a compromise or arrangement made under Section 391 of the Act could be accepted on the basis that the said arrangement has been approved by the relevant meeting of the creditors, members and so on and whether the court was concerned with anything more than such a decision taken by the concerned members and creditors of the company. In the case of a company ordered to be wound up, a compromise or arrangement that could normally be accepted by the Company Court could be either paying off all dues by liquidation of assets or an arrangement for revival of the company and its business. That is the rationale of the order dated 4.4.1995 by which the Division Bench directed consideration of the various aspects pointed out therein. The Division Bench had emphasized that what the court was concerned with while sanctioning a Scheme under Section 391 of the Act in the case of a company that is ordered to be wound up, is the revival of the company. Strictly speaking, in the light of that order of a Division Bench, which was binding on the subsequent Division Bench, no question arises in this case especially when we notice that the decision of the earlier Division Bench dated 4.4.1995 was sought to be challenged in this Court by way of a Petition for Special Leave to Appeal and that challenge was repulsed and the Petition was dismissed. Therefore, as far as this case is concerned, the contours of the enquiry to be made by the Company Court was drawn by the decision of the Division Bench dated 4.4.1995. Hence, what is relevant for the court to consider was whether the proposal or the modified compromise or arrangement put forward was for revival of the company.

19. In that context, it is clear that the State Bank of India Capital Markets Limited had pointed out that it was not possible to revive the entire business of the SCML and that a part of the spinning industry could be retained and revived by disposing of the machinery related to the other activities carried on by SCML and by sale of a portion of the immovable property of the company. Therefore, the main aim of any scheme or modified compromise or arrangement in terms of Section 391 of the Act, would be a revival only of the spinning section of the company at the premises of the Mill and the facilitating of that revival by the sale of parts of the assets of the company. The Scheme as it was, originally proposed, contained the following clause in the preamble:

> "1.5. The Scheme does not envisage sale of any of the assets or properties of Shreeniwas Cotton Mills Limited (now in liquidation) and is for the revival of the textile Mill unit of Sree Niwas Cotton Mills Ltd. (now in liquidation)"

It provided for payment and discharge of liabilities and it contained what were described as salient features of the Scheme for revival of the Mills. The amendments proposed to that Scheme by the Somanis were the deletion of paragraph 1.5. quoted above and replacement of it with the following:

> "The Scheme envisages development and transfer of SCML's said property by LBPL for revival of SCML (now in liquidation)."

After dealing with the modified proposal for settlement of liabilities to creditors and others, it was provided in clause 5 that on the sanctioning of the Scheme, a development agreement will be entered into between SCML and LBPL for developing SCML's property, liquidity will be generated and all creditors paid off and the company will come out of liquidation. Then it was stated:

> "Secondly, after discharging all creditors as per the scheme, if extra funds are available with SNCML, then SNCML will start a viable industry in any part of Maharashtra and employment will be generated."

It also explained that the entire dues of the workers will be paid and all the creditors will be satisfied. The following clause was also to be inserted:

> "If the Scheme is allowed, SCML will enter into an agreement with the LBPL for development and transfer of SCML's said property. LBPL shall bring in and provide for funds to discharge the creditors of SCML. LBPL will bring in funds of Rs. 78.00 crores for payment of liabilities of SCML. Finance for the purpose of the Scheme is being provided by LBPL and all the creditors and workers will be paid. In the event, if any further finance is required than the amount agreed to be brought in by LBPL, the Applicants be permitted to dispose off the part of the assets of SNCML and proceeds from the sale will be utilized to pay off the workers and the creditors if required."

It was stated that:

"In the event, if after paying all creditors of SNCML funds are available with SNCML, then SNCML will start such viable industry in any part of Maharashtra."

According to the contesting respondents, the Scheme as sought to be modified is a Scheme that takes care of all the liabilities of SCML and also contemplates the setting up of some viable industry in any part of Maharashtra by the company. This was enough to recognize a scheme under Section 391 of the Companies Act. It was not feasible to revive the mills as a whole as was clear from the materials and in that context what was possible was to save the godown and the office building of SCML, discharge all liabilities and if any excess fund is left, to start an industry in any part of Maharashtra and there was nothing wrong with the acceptance of such a scheme. It was during the course of the hearing before the Division Bench that two alternatives were proposed in an affidavit filed on behalf of the LBPL, not a member or creditor of the Company, but which was associated with the proposal put forward by way of a compromise or arrangement, that LBPL will, in addition to the liability of Rs. 97.50 crores undertaken, would put up a school / industrial unit of 30000 square feet for the benefit of the workers or pay a sum of Rs. 15 lakhs in lieu thereof to the workers; that LBPL will set up a spinning/garment unit in an area of 1,00,000 square feet in the Mill premises at a cost of Rs. 40 crores and SCML would set up a unit in rural Maharashtra at a total outlay of Rs. 20 crores. Yet another affidavit was filed on behalf of LBPL in which willingness was expressed by it to pay the higher amounts claimed by the two secured creditors, the State Bank of India and the Punjab and Sind Bank subject to LBPL being entitled to create a charge on the mill property even before discharging the liability to the two banks and on condition of delivery of the original documents relating to SCML to LBPL and not to SCML, on full payment of the amounts agreed to be paid to the two creditor banks. It was to these modifications proposed by a non member of the company, but which was associated with the working of the compromise or arrangement, that Rangnath Somani tried to raise some objections one of which was that SCML was not agreeable to set up an industrial unit anywhere in Maharashtra at a cost of Rs. 20 crores. Ramesh Somani supported LBPL. The Division Bench of the High Court accepted the affidavits filed on behalf of LBPL and sanctioned the scheme as amended and as further modified by the two affidavits of Abhishek Lodha, Director of the Company dated 21.3.2005. Obviously, the Division Bench must have been conscious that Abhishek Lodha was only a Director of LBPL and that he was not a Director of the Company in liquidation, though there is some ambiguity in the concerned sentence in the judgment. He was also not a propounder of the Scheme, but he was only a participant in the proposed arrangement come to between the company and its creditors, shareholders, debenture holders, workers, etc.

20. How far the scheme could be modified on the suggestion of LBPL which is not one of the entities contemplated by Section 391 of the Act, is a moot question. Even otherwise, the deletion of clause 1.5 indicated in the original proposal and the replaced clause 1.5 in the modified scheme, indicated that the object was not the revival of SCML. The vague stipulation that SCML would put up some viable industry in some part of the State of Maharashtra, if funds are available, was sought to be replaced by a commitment to start an industry in rural Maharashtra that also at the cost of Rs. 20 crores. Though, one of the Somani cousins agreed to these proposals, another cousin attempted to object to that proposal and is objecting to it before us. Similarly, the amendment by way of an affidavit on behalf of the LBPL contemplated the starting of an industry in the Mill land by LBPL

and not by the company in liquidation. Thus, the company in liquidation, did not intend taking up any revival activity in the properties belonging to SCML other than retaining the office building it had and the godown it had away from the mill lands. It is difficult to conceive of this as a revival of SCML, a company in liquidation. This is more in the realm of disposal of the assets of the company in liquidation, no doubt, with a view to pay off all the creditors, debenture holders and workers from the funds generated out of the sale of the lands in favour of LBPL. Going by the test laid down by the Division Bench in its order dated 4.4.1995, which has become final inter parties and the object of Section 391 of the Act, it is difficult to say that it is a scheme for revival of the company, the clear statutory intention behind entertaining a proposal under Section 391 of the Act.

21. Considerable arguments were raised on the role of the Court when a Scheme under Section 391 of the Act was propounded for its consideration. The decision in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. [(1997) 1 S.C.C. 579] was relied on. That was a case of merger or amalgamation of two companies. Neither of the companies was in liquidation. This Court held that compromise or arrangement included amalgamation of one company with another. This Court also defined the broad contours of the jurisdiction of the Company Court in granting sanction to a scheme in terms of Section 391 and Section 393 of the Act. This Court laid down the following parameters:

> "1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
>
> 2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 Sub-Section (2).
>
> 3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
>
> 4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391 Sub-section (1).
>
> 5. That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.
>
> 6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

> 7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.
>
> 8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.
>
> 9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

We may straightaway notice that this Court did not have occasion to consider whether any additional tests have to be satisfied when the Company concerned is in liquidation and a compromise or arrangement in respect of it is proposed. Therefore, it cannot be said that this would be the final word on any Scheme put forward under Section 391 of the Act, whatever be the position of the concerned company. Even then, this decision lays down the need to conform to the statutory formalities, the power of the Court to ascertain the real purpose underlying the Scheme, the bona fides of the Scheme, the good faith in propounding it and that as a whole, it is just, fair and reasonable, at the same time emphasizing that it is not for the Court to examine the Scheme as if it were an appellate authority over the commercial wisdom of the majority.

22. When a Company is ordered to be wound up, the assets of it, are put in possession of the Official Liquidator. The assets become custodia legis. The follow up, in the absence of a revival of the Company, is the realization of the assets of the company by the Official Liquidator and distribution of the proceeds to the creditors, workers, and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the ultimate step is taken or before the assets are disposed of, to accept a scheme or proposal for revival of the Company. In that context, the Court has necessarily to see whether the Scheme contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529A of the Act. Of course, the Court has to see to the bona fides of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the Company in liquidation.

23. In fact, it was on this basis that the Division Bench of the High Court proceeded when it passed the order dated 4.4.1995. Apart from the fact that the correct principle was adopted, the directions therein are binding on the Company Court and the Division Bench of the High Court of coequal jurisdiction when the proposal for amendment of the earlier scheme came up. It has to be noted that it was not a fresh scheme that was being mooted, but it was a proposal for an amendment of the scheme already considered by the Division Bench when it passed the order dated 4.4.1995. It was the plain duty of the Division Bench on the latter occasion to keep in focus the suggestions earlier made.

24. It was argued before us on behalf of the appellant that Sections 391 to 394A were procedural provisions and when once a company was under

> liquidation, the Chapter dealing with winding up applied and the only provision or substantive provision conferring power of stopping the winding up was conferred on the court by Section 466 of the Act, and unless the court is satisfied that the Company is being taken out of liquidation by way of revival and that it will sub-serve public interest and will conform to commercial morality, the court cannot accept a scheme proposed under Section 391 of the Act. The argument on the side of the respondents is that Section 391 is a self-contained code and read with Section 392 of the Act, which was peculiar to our Act, it was clear that a Company Court could approve, independently of Section 466 of the Act, a scheme and could take the company out of liquidation and even pass an order of stay in terms of Section 391 read with Section 392 of the Act. Section 466 of the Act was not attracted when a scheme approved by the shareholders, creditors, members of the Company and so on was put forward before the Company Court.

25. It is a well settled rule of interpretation that provisions in an enactment must be read as a whole before ascertaining the scope of any particular provision. This Court has held that it is a rule now firmly established that the intention of the legislature must be found by reading the statute as a whole. In Principles of Statutory Interpretation by Justice G.P. Singh, it is stated:

> "The rule is referred to as an "elementary rule"

by VISCOUNT SIMONDS; a "compelling rule"

> by LORD SOMERVELL OF HARROW; and a "settled rule" by B.K. MUKHERJEE, J."

(See pages 31 and 32 of the Tenth Edition) When we accept this principle, what we have to do is to read Sections 391 to 394A not in isolation as canvassed for by learned counsel for the respondents, but with reference to the other relevant provisions of the Act. We see no difficulty in reconciling the need to satisfy the requirements of both Sections 391 to 394A and Section 466 of the Companies Act while dealing with a Company which has been ordered to be wound up. In other words, we find no incongruity in looking into aspects of public interest, commercial morality and the bona fide intention to revive a company while considering whether a compromise or arrangement put forward

in terms of Section 391 of the Companies Act should be accepted or not. We see no conflict in applying both the provisions and in harmoniously construing them and in finding that while the court will not sit in appeal over the commercial wisdom of the shareholders of a company, it will certainly consider whether there is a genuine attempt to revive the company that has gone into liquidation and whether such revival is in public interest and conforms to commercial morality. We cannot understand the decision in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. (supra) as standing in the way of understanding the scope of the provisions of the Act in the above manner. We are therefore satisfied that the Company Court was bound to consider whether the liquidation was liable to be stayed for a period or permanently while adverting to the question whether the scheme is one for revival of the company or that part of the business of the company which it is permissible to revive under the relevant laws or whether it is a ruse to dispose of the assets of the company by a private arrangement. If it comes to the latter conclusion, then it is the duty of the court in which the properties are vested on liquidation, to dispose of the properties, realize the assets and distribute the same in accordance with law.

26. But before that, we think that another step has to be taken in this case. What has now been accepted by the Division Bench, is not the scheme as modified by the general meeting as contemplated by Section 391 of the Act. At least two of the modifications having ramifications are based on undertakings or statements made on behalf of LBPL and there appears to be difference of opinion on that modification even among the Somanis. There is also the question whether the proposals of a person who is not one of those recognized by Section 391 of the Act, could be accepted by the Company Court while approving a scheme. We are of the view that the scheme with the modifications as now proposed or accepted, has to go back to the General Meeting of the members of the Company, called in accordance with Section 391 of the Act and the requisite majority obtained.

27. It was argued on behalf of the respondents that under Section 392 of the Act, the Court has the power to make modifications in the compromise or arrangement as it may consider necessary and this power would include the power to approve what has been put forward by LBPL who has come forward to discharge the liabilities of the Company on the rights in the properties of the Company other than in the office building and in the godown, being given to it for development and sale. As we read Section 392 of the Act, it only gives power to the Court to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. This is only a power that enables the court to provide for proper working of compromise or arrangement, it cannot be understood as a power to make substantial modifications in the scheme approved by the members in a meeting called in terms of Section 391 of the Act. A modification in the arrangement that may be considered necessary for the proper working of the compromise or arrangement cannot be taken as the same as a modification in the compromise or arrangement itself and any such modification in the scheme or arrangement or an essential term thereof must go back to the general meeting in terms of Section 391 of the Act and a fresh approval obtained therefor. The fact that no member or creditor opposed it in court cannot be considered as a substitute for following the requirements of Section 391 of the Companies Act for approval of the compromise or arrangement as now modified or proposed to be modified. In Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. (supra), this Court had insisted that the procedural requirements of Section

391 must be satisfied before the court can consider the acceptability of a scheme even in respect of a Company not in liquidation. Therefore, we are not in a position to accept the argument on behalf of the respondents that the scheme now as modified by the decision of the Division Bench need not go back to the general meeting of the members in terms of Section 391 of the Act. We must also remember that at least before us there is serious objection to the modifications by one of the Somanis who are the promoters of the Company in liquidation and the sponsors of the arrangement and that objection cannot be brushed aside.

28. We find that the modifications proposed alters the position of the shareholders vis-`-vis the Company. Instead of the company reviving the spinning unit as recommended by the State Bank of India Capital Markets Limited, as adopted in the General Meeting, now the Company will have nothing to do with the mill lands and the whole of the mill lands will pass on to LBPL on LBPL paying a value of Rs. 97.50 crores to SCML and LBPL will start an industry of its own in that property. This cannot be considered to be a modification in the scheme necessary for the proper working of the compromise or arrangement. This is a modification of the scheme itself. Same is the position regarding the provision of replacing the resolution passed that if any surplus amounts are available, SCML would start a viable industry in any part of the State of Maharashtra, by a commitment that SCML would establish an industry in any part of the State of Maharashtra on an investment of Rs. 20 crores. This again is an obligation cast on the members of SCML and we are of the view that this cannot also be taken to be a modification which the Court can bring about on its own under Section 392 of the Act on the pretext that it is a modification necessary for the proper working of the compromise or arrangement. We have no hesitation in holding that in any event, the Division Bench of the High Court ought to have directed a reconvening of the meeting of the members of the Company in terms of Section 391 of the Act to consider the modifications and ensured that the approval thereof by the requisite majority existed.

29. In the view we have thus taken, we are satisfied that it is a fit case where we should set aside the decision of the Division Bench as also of the Company Court and remand the proceedings to the Company Court. The Company Court first will direct the sponsors of the scheme to call a meeting of the concerned in terms of Section 391 of the Act and seek an approval for the modifications now suggested by the Division Bench or that may be put forward at the meeting. If the requisite majority approves the modifications and the matter comes back to the Company Court, the Company Court will consider whether the compromise or arrangement put forward is one that deserves to be accepted in respect of a company which has been ordered to be wound up in the light of what we have indicated above and what the Division Bench had earlier indicated in its order dated 4.4.1995.

30. In addition to expanding and supporting the submission that in terms of Sections 391 to 393 of the Act, the court had the power to accept the compromise or arrangement even in respect of a company ordered to be wound up, independent of Section 466 of the Act and in that process the power to stay a winding up, learned Senior Counsel appearing for the Workers' Union argued on behalf of the workmen that interference by this Court would further delay the benefits that would accrue to the workers under the arrangement now approved by the Division Bench and considering the long lapse of time, that would be unjust. Learned counsel highlighted the additional benefits that would accrue to the workers under the present scheme. Though, we do appreciate this aspect of the

matter, having taken the view that the arrangement has to go back to the meeting of members, creditors, etc. of the company in terms of Section 391 of the Act and once it is adopted or adopted with modifications with the requisite majority at the meeting, the arrangement would require a fresh scrutiny by the Company Court thereafter, we cannot avoid interfering with the decision of the Division Bench on the ground put forward by learned Senior Counsel of benefit to the workers.

31. We thus allow Civil Appeal Nos. 3179-3181 of 2005, Civil Appeal Nos. 3182-3184 of 2005 and Civil Appeal No. 4377 of 2006, set aside the judgment of the Division Bench and that of the Company Court, and remit the matter to the Company Court for a fresh consideration in accordance with law and in the light of the directions contained in the judgment. Civil Appeal Nos. 3569-3571 of 2005 is dismissed as withdrawn. The parties are directed to suffer their respective costs. The parties will appear before the Company Court for further directions on 12.11.2007.