Judgment Sheet
IN THE HIGH COURT OF SINDH, KARACHI

HCA NO. 262 Of 2017

PRESENT:
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Arshad Hussain Khan.

Gulshan Weaving Mills Limited
vs
Al Baraka Bank (Pakistan) Limited & 8 others

Appellant:	Through M/s. Shoaib Rashid & Shahid Iqbal Rana, Advocates.
Respondents No.3 & 8:	Through Mr. Arshad Tayyebaly Advocate along with M/s. Mikael Azmat Rahim & Muhammad Shahid, Advocates.
Respondent No.7:	Syed Nauman Zahid Ali, Advocate.
Respondent No.9:	Mr. Muhammad Jamshed Malik, Advocate.
Date of hearing& short order:	21.11.2017

JUDGMENT

Arshad Hussain Khan, J: The appellant through this High Court Appeal has challenged the Judgment dated 03.04.2017,passed by the Learned Single Judge in Judicial Company Miscellaneous No. 30 of 2016, to the extent of clarification that the Scheme of Arrangement duly approved will not bind the non-consenting creditors.

2. Brief facts leading to the filing of the instant appeal are that the appellant is a public listed company incorporated under the Companies Ordinance, 1984 ("Ordinance"). The appellant along with respondents No.1 to 8 filed a petition under Section 284 read with Sections 285 and 286 of the Ordinance before this Court bearing Judicial Company Miscellaneous (JCM) No.30 of 2016, whereby sanction of Scheme of Arrangement of the Creditors of the appellant dated 11.08.2016 in terms of Section 284 of the Ordinance was sought. The scheme was formulated, inter alia, with the objective of settlement and repayment of

all liabilities of secured creditors of the appellant through sale of all fixed assets of the appellant as per the terms mentioned in the scheme. Such sale was to be undertaken by Asset Sale Committee, comprising of creditor banks namely; (i) Faysal Bank limited, (ii) Habib Bank Limited, (iii) NIB Bank Limited and (iv) Al Baraka Bank (Pakistan) Limited. The settlement and repayment of liabilities was to be full and final settlement of all the liabilities owed by the appellant towards its secured creditors, resultantly, discharging the appellant of all its obligations towards its secured creditors. On 16.08.2016, learned Company Judge ordered that separate meetings of secured creditors as well as shareholders of the appellant were to be held in terms of Section 284 of the Ordinance. Such meetings of the creditors as well as the shareholders of the appellant were duly held on 04.10.2016.The meeting of the secured creditors of the appellant was attended by eleven (11) such creditors out of whom eight (8) creditors voted in favour of approval of the scheme whereas three (3) abstained from voting. In the said meeting, though respondent No.9 (the Bank of Punjab) participated, yet it abstained from voting and also did not raise any objection to the scheme during the said meeting. Thus, 100% of the secured creditors of the company, present and voting at the meeting dated 04.11.2016, duly approved and consented to the scheme. Furthermore, in Extra Ordinary General Meeting of the shareholders of the appellant, 100% shareholders, present and voting, voted in favour of the approval of the scheme. The decision of the meetings of the secured creditors as well as the shareholders of the appellant were placed before the learned Company Judge of this Court for passing formal orders of sanctioning the scheme. During the course of final hearing in the matter, respondent No.9 proceeded to file certain objections to the said scheme, which were entertained and heard by the learned Company Judge and vide its order dated 03.04.2017, sanctioned the Scheme of Arrangement with the clarification that it binds the consenting creditors only and allowed the petition with this clarification. Through the instant appeal, the appellant has impugned the Judgment dated 03.04.2017 to the extent of the clarification that the scheme duly approved will not bind the non-consenting creditors and reasons in support of the same being illegal, unlawful and contrary to the express provisions of the law.

3. Upon notice of the present appeal, respondents No.3, 4, 5, 6, 7,8 and 9 participated in the proceedings and their respective advocates filed vakalatnama. All the participated respondents, except respondent No.9, supported the present appeal, whereas respondent No.9 resisted the appeal and supported the judgment impugned in the appeal.

4. Learned counsel for the appellant during the course of arguments has contended that the impugned order, to the extent of holding that the scheme, despite having been approved by the requisite majority of the secured creditors, is not binding on the non-consenting creditors is contrary to the intent and scope of Section 284 of the Ordinance. Further contended that the Learned Company Judge while passing the impugned clarification failed to consider that purpose and scope of Section 284 of the Ordinance is that the decision of majority in a particular state of affairs and dealing with a particular purpose is to prevail above the wishes of a minority and by virtue of the statutory force of Section 284 of the Ordinance, any scheme approved/consented to by the majority is binding on all members of that particular class of the creditors. Further contended that the learned company judge while passing the impugned clarification has failed to consider the material fact that respondent No.9 duly participated in the meeting of the Secured Creditors held on 04.10.2016, however, no objection to the scheme was taken or raised during the said meeting and the said respondent abstained from voting on the scheme. On account of failure of respondent No.9 to raise any objection to the scheme during the meeting of the secured creditors of the appellant, the said respondent was estopped from raising and filing any objection to the Scheme of Arrangement duly approved by the requisite number of the Creditors, at a belated stage of final hearing before the learned Company Judge of this Court. It is also argued that the Learned Company Judge while passing the impugned clarification, has failed to appreciate the facts that the scheme was aimed at full and final settlement and repayment to entire liabilities of the appellant towards its secured creditors. Further argued that the learned Company Judge while passing the impugned order has failed to consider the fact that upon re-payment of the liabilities of the appellant through sale of its fixed assets as envisaged in the scheme, the same was to be construed as full and final settlement

of the liabilities towards its secured creditors. Such settlement, through a binding scheme in terms of Section 284 of the Ordinance, discharges the liabilities of a guarantor in terms of Section 133 of the Contract Act, 1872.It is also argued that Learned Company Judge while passing the impugned clarification has failed to appreciate the legal position that any scheme of arrangement approved by the requisite majority of the creditors or shareholders, as the case may be, and sanctioned by the Company Court have a statutory backing and force making the same binding on the entire class concerned. This aspect of the matter has neither been dealt with nor decided in the impugned order despite objection being taken during the course of hearing, hence the impugned order to that extent challenged in the instant appeal, is liable to be set aside. The learned counsel in support of his stance in the case has relied upon the following case law:

(i) 2014 CLD 26 FATIMA SUGAR MILLS LTD and others

(ii) 2013 CLD 7 COMPANIES ORDINANCE 1984 AND METRO CASH AND CARRY PAKISTAN (PRIVATE) LIMITED ETC.

(iii) PLD 2015 Lah. 632 FATIMA SUGAR MILLS LTD through Company Secretary and others

(iv) 2002 CLD 1392 Messrs. PAKLAND CEMENT LIMITED through Director Shamim Musheq Siddiqui

(v) Civil Appeal No. 2701/2006 Infrastructure Leasing & Financial Services Limited v. B.P.L Limited (a case of Indian Supreme Court)

(vi) 2004 CLD 1 INTERNATIONAL MULTI LEASING COMPANY v. CAPITAL ASSETS LEASING CORPORATION LIMITED and another.

(vii) CP WP No. 2713/2009 Shri kundanmal Dabirwala v. Haryana Financial Corporation and another

(viii) AIR (38) 1951 Madras 48 SUBRAMANIA v. NARAYANASWAMI

(ix) [2011] 167 Com Cases 1] (All) UNION BANK OF INDIA v. CHAIRPERSON, DEBTS RECOVERY APPELLATE TRIBUNAL AND OTHERS

(x) AIR 1926 Madras 184 VENKATASWAMI v. KOTILINGAM

(xi) 2017 SCMR 1218 Syed MUSHAHID SHAH and others v. FEDERAL INVESTMENT AGENCY and others

(xii) (1996) 5 Supreme Court Cases 591 CENTRAL BUREAU OF INVESTIGATION v. DUNCANS AGRO INDUSTRIES LTD.

(xiii) CHANCERY DIVISION In re ALABAMA, NEW ORLEANS AND PACIFIC JUNCTION RAILWAY COMPANY.

5. Learned counsel for respondents No. 3 to 6 and 8 in his arguments while supporting the stance and arguments of the appellant has relied upon the following the case law:-

(i) 2002 CLD 1392 *Messrs. PAKLAND CEMENT LIMITED through Director Shamim Musheq Siddiqui.*

(ii) 2004 *CLD 1 INTERNATIONAL MULTI LEASING COMPANY v. CAPITAL ASSETS LEASING CORPORATION.*

(iii) 1991 MLD 841 *Mian HAMIDUL HAQ and others v. TAJ COMPANY LTD.*

(iv) 2006 CLD 895*CARAVAN EAST FABRICS LIMITED v. ASKARI COMMERCIAL BANK LTD., ALBARAKA ISLAMIC BANK LTD.*

6. Learned Counsel for respondent No.9, while supporting the impugned judgment has contended that the order impugned in the present proceedings is well within the four corners of law and equity, hence, does not warrant any interference by this Court in the present appeal. He further argued that the purported scheme of arrangement and compromise is not binding upon the respondent/objector (Bank of Punjab), as the objector is a decree holder and not merely a creditor and therefore, purported scheme of arrangement and compromise amongst the other creditors cannot be forced upon the objector. Further contended that the objector has filed the execution application against the appellant/judgment debtor for the execution of the aforesaid decree before the Lahore High Court, which is still pending adjudication. It is also contended that the appellant secured its liabilities, inter alia, though pledge of stocks which were misappropriated by the appellant with collusion and connivance against which, the objector filed criminal complaint before the FIA, Lahore. Further contended that the provisions of the Companies Ordinance cannot override the provisions

of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Likewise, the benefits of the proceedings under Financial Institutions (Recovery of Finances) Ordinance, 2001 by way of a decree in favour of the objector and against the appellant cannot be overridden by any scheme of arrangement/compromise obtained, if at all permissible, under the provisions of the Companies Ordinance. As regards not raising objection at the time of meeting of secured creditors held on 04.10.2016, the learned counsel submitted that on the date of meeting of creditors, took place under the directions of Learned Company Judge of this Court, the representative of the objector was asked to put his signature on a piece of paper which had only the option to opt for/ agree to the scheme of arrangement, and there was no option to actually reject the same. Thus, it is wrong to say that the respondent/objector did not raise objection and or abstain from voting. He lastly argued that the appeal being frivolous is liable to be dismissed.

7. We have heard the learned counsel for the parties and with their assistance perused the material available on record and the case law cited at the Bar.

8. From the perusal of record, it appears that the appellant along with some of the secured creditors/banking companies, that had provided financial facilities, field Judicial Companies Miscellaneous Petition {JCM petition} bearing No.30 of 2016 before the Companies jurisdiction of this Court for sanctioning the Scheme of Arrangement, annexed with petition as Annexure 'F', with the following prayers:

> "It is respectfully prayed that this Hon'ble Court may be pleased to pass the following orders, if the required number of shareholders and creditors of the petitioner No.1 have approved the Scheme of Arrangement at the meetings called by the orders of this Hon'ble Court on the Petitioners application made under Rule 55 of the Companies Court Rules 1997:
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> (a) An order under Section 284 (2) of the Companies Ordinance, 1984 sanctioning the Scheme of Arrangement as set forth in Annexure 'F' hereto so as to make the Scheme of Arrangement binding on all persons with respect to the petitioner No.1 including but not limited to, the shareholders and creditors of the petitioner No.1;
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> (b) All necessary orders under Section 287 of the Companies Ordinance 1984 to give effect to the Scheme of Arrangement;
>
> (c) Make such further order(s) as this Hon'ble Court may deem fit."

And pursuant to order dated 16.08.2016 passed by the learned Company Judge of this Court, on 04.10.2016 separate meetings of secured creditors as well as shareholders of the Appellant were held. Thereafter, the chairman of the appellant's company submitted his report on 10.10.2016, from the perusal whereof, it appears that out of eleven (11) secured creditors, present in the meeting, eight (8) creditors voted in favour of the Scheme of Arrangement whereas three (3) secured creditors abstained themselves from voting. Conclusion of the said report for the sake of ready reference is reproduced as under:

> "5. **Conclusion:**
>
> It is respectfully submitted that one hundred percent (100%) of the value of creditors of the petitioner No.1, present and voting at the meeting of the creditors of Petitioner No.1, convened and conducted in accordance with the direction of this Hon'ble Court, have consented to and passed the resolution approving the Scheme of Arrangement.
>
> It is respectfully submitted that one (100%) of the shareholders/members of Petitioner No.1, present, either in person or by proxy, and voting at the extraordinary general meeting of the members of Petitioner No.1, convened and conducted in accordance with the direction of this Hon'ble Court, have consented to and passed the resolution approving the Scheme of Arrangement."

9. However, on 25.01.2017 when the matter came up for final hearing of main petition, the Bank of Punjab, the respondent /objector raised objection to the grant of Scheme of Arrangement. The relevant portions of the said objection for the sake ready reference are as under:

> "2. Appellant is a defaulter and "Judgment Debtor" of the objector for an amount of Rs.249,353,520/- together with the cost of funds, as its liabilities towards the objector, jointly and severally with the directors of petitioner No.1, has been established in Suit No.100 of 2013 vide decree dated 6.11.2015 of the Hon'ble Lahore High Court.
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> 3. That the objector has filed the execution application for the execution of the aforestated decree before the Hon'ble Lahore High court and the same is pending as of this date.
>
> 4. That the petitioner No.1 secured its liabilities inter alia though pledge of stocks which were misappropriated by inter alia the petitioner No.1 and the objector has put the law in motion by filing criminal complaint before the Federal Investigating Agency, Lahore.
>
> 5. That the above position is admitted by the petitioners as per inter alia annexure E of the main petition and is available at Page 151 of the Court file.

6. That the petition is not maintainable as the purported "Scheme of Arrangement" is merely to whitewash and imposes a "write off" of the decreed amounts/adjudicated finances borrowed by the petitioner No.1, from the objector and is not a compromise, arrangement or reconstruction of the capital of the petitioner No.1. The same is therefore beyond the scope of Section 284 of the Companies Ordinance, 1984.

7. That the petitioner Nos.2 to 9 instead of proceeding against the petitioner No.1 for creditors winding up under Section 305(e) of the Companies Ordinance have invoked, albeit wrongfully the provisions of Sections 284 to 288 of the Companies Ordinance. In case this Court accepts and enforces the purported scheme of arrangement/ compromise, the same would yield no additional benefit to these petitioner Nos.2 to 9 (creditors of petitioner No.1) then what they could achieve by invoking the provisions of Section 305(e) of the Companies Ordinance. Such a course will be a great detriment to the objector, as the liabilities of the petitioner No.1, and possibly of the other Judgment Debtors, would be wiped out. It is humbly and respectfully submitted that the petitioner No.1, as well as its directors, may not be allowed to wiggle out of their obligations inter alia under the Decree and otherwise the criminal acts committed by the same.

8. That the petition as well as the purported scheme of arrangement / compromise is not binding upon the objector, as the objector is a decree holder and not merely a creditor and therefore no so-called purported scheme of arrangement / compromise amongst the petitioners can be forced upon the objector.

9. That the provisions of the Companies Ordinance cannot override the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Likewise, the benefits of the proceedings under Financial Institutions (Recovery of Finances) Ordinance, 2001 by way of a decree in favour of the objector and against inter alia the petitioner No.1 cannot be overridden by any scheme of arrangement / compromise obtained, if at all permissible, under the provisions of the Companies Ordinance.

10. That on the date of the meeting of creditors, that took place under the directors of this Court, the representative of the objector was asked to put his signature on a piece of paper which had only the option to opt for / agree to the scheme of arrangement, and there was no option to actually reject the same. The table mentioned in the Chairman`s Report of the petitioner No.1, showing abstinence of the objector is, therefore, wrong statement of fact.

11. That the objector also relies on the comments submitted in this petition by the Securities and Exchange Commission of Pakistan, and for the sake of brevity, the same may be read as part hereof. However, it may be noted here that the registered charges of the objector has not been mentioned in the list of charges attached as Annexure A to the Comments of the Securities and Exchange Commission of Pakistan. It may also be relevant that the petitioner No.1 has not mentioned these charges in its balance sheet, which for this reason alone is also defective.

12. That it is prayed that this Court may be pleased to hold that the purported Scheme of Arrangement not to override civil liabilities, the Decree in favour of the objector and against inter alia including petitioner No.1 as well as the criminal liabilities of inter alia including petitioner No.1, pending before the Federal Investigating Agency."

10. Learned Company Judge of this Court after hearing counsel for the parties passed the Judgment on 03.04.2017 whereby the Scheme of Arrangement, though was approved but with clarification that it binds the consenting creditors and not otherwise. The appellant being aggrieved by the said judgment to the extent of clarification only preferred present appeal. For the sake of ready reference, relevant portions of the said judgment is reproduced are under:-

"21. This Scheme of Arrangement although is silent as to surety's liability but it was argued to propose and suggest in a manner which tend to take away the statutory rights of non-consenting creditors of the same class or of any other class of creditors. There are of course contractual rights and statutory rights which members of the same class of creditors may barter for any consideration but the consent of the majority of one class of creditors cannot sweep the statutory or legal rights available to them under the law unless the variance is established. The majority view could prevail over minority and releases the guarantors only in case of variance in terms of repayment and in its absence it does not interfere any other statutory rights. Such sanction could only be deemed to be to the exclusion of objectors or non-consenting creditors who merely seeks to enforce statutory rights available to them under the law. The principle of Section 133 of the Contract Act in its strict sense would not apply to a case of Scheme of Arrangement under the present circumstances of the case.

22. I am not interfering to challenge the wisdom of those creditors who opted for the approval of the Scheme but the decision should be limited to them only and it cannot trespass the rights and obligations arising out of the law. It is perhaps this common interest of consenting creditors which distinguishes the objector from rest of the secured creditors and since there is no commonality of interest between the objector and the consenting secured creditors the effect of this Scheme of Arrangement would not bind the objector.

23. Upshot of the above discussion is that this Scheme of Arrangement is approved with the clarification that it binds the consenting creditors and not otherwise and the petition is thus allowed to this extent and with the clarification mentioned hereinabove. The pending applications also stand disposed of."

[emphasis supplied]

11. Before going into any further discussion, it will be appropriate to discuss the nature and scope of Section 284, 285 and 286 of the Companies Ordinance 1984, which reads as under:-

"**284.** Power to compromise with creditors and members.---**(1)** Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case a company being wound up, of the liquidator order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called; and conducted in such manner as the Court directs.

(2) If a majority in number representing three fourth in value of the creditors or class of creditors, or members, as the case may be, present and voting either in person or, where proxies are allowed, by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court be binding on all the creditors or the class of creditors or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of 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 subsection (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company and the like.

(3) An order made under subsection (2) shall have no effect until a certified copy of the order has been filed with the Registrar within thirty days and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made and filed as aforesaid, or in the case of a company not having a memorandum to every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3), the company and every officer of the company who is knowingly and willfully in default shall be liable to a fine which may extend to five thousand rupees for each copy in respect of which default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceedings against the company on such terms as it thinks fit and proper until the application is finally disposed of.

(6) In this section the expression "Company" means any company liable to be wound up under this Ordinance and the expression "arrangement" includes a re-organization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods, and for the purposes of this section unsecured, creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

"**285.** Power of Court to enforce compromise and arrangements:---**(1)** Where the Court makes an order under section 284 sanctioning a compromise or an arrangement in respect of a company, it 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 is satisfied that a compromise or arrangement sanctioned under section 284 cannot be worked satisfactorily with or without modification, it, may, either of its own motion or on the application of the Registrar 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 section 305.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Ordinance sanctioning a compromise or an arrangement.

286. Information as to compromise or arrangements with creditors and members.---**(1)** Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 284--

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect; and in particular, stating any material interest of the Directors including the Chief Executive of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement if, and insofar as, it is different from the effect on the like interest of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Whether the compromise or arrangement, affects the rights of debenture-holders of the company, the said statement shall-give the like information and explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the Company's Directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the meeting every creditor or member so entitled shall, on making an application in the manner indicated by the notice, be furnished by the Company, free of charge, with a copy of the statement.

(4) Where default is made in complying with any of the requirements of this section, the company, and every officer of the company who knowingly and willfully is in default, shall be liable to fine which may extend to two thousand rupees; and for the purpose of this subsection any liquidator of the company shall be deemed to be an officer of the company:

> Provided that a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person, being a Director, including Chief Executive, or managing agent or trustee for debenture-holders, to supply the necessary particulars as to his material interests.
>
> **(5)** Every Director, including the Chief Executive or managing agent of the company and every trustees for debenture-holders of the company, shall give notice to the company of such matters relating to himself as may be necessary for the purpose of this section and on the request of the company shall provide such further information as may be necessary for the purposes of this section, and if he fails to do so within the time allowed by the company, he shall be liable to fine which may extend to one thousand rupees.

12. The aforesaid provisions of the Company Law provide that a compromise or an arrangement can be proposed between a company and its creditors or any class of them, or between a company and its members or any class of them. Such a compromise or arrangement would also take in its sweep any scheme of amalgamation/merger of one company with another. However, when such a scheme is put forward by a company for the sanction of the Court, in the first instance, the Court has to direct holding of meetings of creditors or class of creditors or members or class of members who are concerned with such a scheme and once, the majority in number representing three-fourth in value of creditors or class of creditors, or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting, accord their approval to any compromise or arrangement thus put to vote, and once such compromise is sanctioned by the Court, it would be binding to all creditors or class of creditors, or members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme would be equally binding. It may be observed that before sanctioning such a scheme, even though approved, by a majority of the concerned creditors or members, the Court has to be satisfied that the Company or any other person moving such an application for sanction under subsection (2) of section 284 has disclosed all the relevant matters mentioned in the proviso to subsection (2) of that section. So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by section 286(i)(a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the

concerned voters so that the parties concerned before whom the scheme is placed for voting can take a well-considered and objective decision to the effect as to whether to cast their vote for the proposed scheme or against it. On a conjoint reading of the relevant provisions of sections 284 and 286, it becomes clear that the learned Company Judge, who is called upon to sanction such a scheme is not merely required to go by the ipse dixit of the majority shareholders or creditors of their respective classes who might have voted in favour of the scheme by requisite majority, but the Court is also required to consider the pros and cons of the scheme with a view to find out as to whether, the scheme is fair, just and reasonable and is not contrary to any provisions of law, and it does not violate public policy. This is implicit in the very concept of compromise or arrangement, which is required to receive the imprimatur of a Court of law. No Court would ever countenance any scheme of compromise or arrangement arrived at between the parties, which might be even supported by the requisite majority, if the Court finds that it is an illegal scheme, or it is otherwise, unfair or unjust to the shareholders, or class of shareholders and the creditors for whom it is meant. However, once the scheme gets sanctioned by the Court, it would not only bind the consenting majority shareholders and creditors, but would also bind even the dissenting minority shareholders or creditors. Therefore, it is imperative that fairness of the scheme qua theme is to be kept in view by the Company Court while putting its seal of approval on the concerned scheme placed for its sanction. The question of viability of the scheme will have to be judged subject to the condition that a scheme sanctioned by majority will also remain binding to a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme, and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a scheme of Compromise and Arrangement put up for sanction before a Company Court, it will have to be seen whether the proposed scheme is lawful, just and fair to the whole class of creditors or members, including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote. It is also a settled law that Company Courts while dealing with issue of the nature certainly would not act as a Court of appeal and sit in judgment

over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court is not required to unnecessarily disapprove the considered opinion and the commercial wisdom of the majority shareholders or the creditors of the company unless it is in violation of law and public policy. The Company Court's jurisdiction in such matters is peripheral and supervisory' and not appellate. In this regard reliance can be placed in the case of *PFIZER LABORATORIES LTD. and another* **(2003 CLD 1209)**.

13. In view of the above, the function, power and discretion of the Court to sanction the scheme can be earmarked as under:-

(i) The sanctioning Court has to see to it that all the requisite statutory procedure for supporting the requisite meetings as contemplated by section 284(1) have been held.

(ii) That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by section 284(2).

(iii) 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.

(iv) That all necessary material indicated by section 286(1)(a) is placed before the voters at the concerned meetings as contemplated by proviso to section 284(1).

(v) That all requisite material contemplated by the proviso to subsection (2) of section 284 of the Ordinance is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

(vi) 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.

(vii) 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.

> (viii) That the Court has to examine the scheme on its merits and is not bound to treat the scheme as a fait accompli. In doing so the Court would not be substituting its own judgment for the commercial judgment.
>
> (ix) 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.

14. Reverting to the case in hand, from perusal of the record it appears that the main objection of the Respondent /objector Bank is that the subject scheme of arrangement / compromise is not binding upon the respondent /objector (Bank of Punjab), as the objector is a decree holder and not merely a creditor, hence, having separate class from the other secured creditors.

Term 'creditor' is of wide connotation whereas, its definition is inclusive in nature. In corporate parlance, creditor is a class of persons to whom company is indebted or owes a sum of money. Creditors may be preferential creditors, secured creditors and unsecured creditors. Reliance in this regard is placed on the case of *CARAVAN EAST FABRICS LIMITED v. ASKARI COMMERCIAL BANK LTD., ISLAMIC BANK LTD.* **(2006 CLD 895).**

The question regarding term ‘class’ came to be considered in the case of *SOVEREIGN LIFE ASSURANCE COMPANY v. DODD* (1892)2 QB 573 (CA). In the cited case, it was observed that the word ‘class’ is vague and to find out what is meant by it, one must look at the scope of the section which in the instant case, enables the Court to order a meeting of a Class of creditors to be called. One must interpret the term ‘class’ in such a manner that it may prevent injustice and disadvantage to all the shareholders or creditors, and it must be confined to those persons whose rights are not dissimilar so as to make it impossible for them to consult together with a view to their common interest. Similarly, in the case of *MANECKCHOWK AND AHMEDABAD MANUFACTURING CO. LTD.,* **(1970) 40 Company Cases 819**, it was observed as under:-

> "Broadly speaking a group of persons would constitute one class when it is shown that they have conveyed all interest and their

> claims are capable of being ascertained by any common system of valuation. The group styled as class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. "

Thus, it is the commonality of the interests held in the company which can be considered for treating the holders of such interest as one Class. The possession of common characteristics or agreement with the proposal for arrangement made will not render such persons making the proposal as a distinct class. If a set of persons making the proposal because of the commonality of the interest in the proposal of compromise or arrangement is to be treated as distinct class within the meaning of section 284 then there would not be any proposal which can be defeated by the majority as all such persons making the proposal will rank for treatment as a Class by themselves. Such interpretation would render subsection (2) of Section 284 of the Ordinance as redundant. The respondent/objector being secured creditor as such cannot be termed as a distinct /separate 'Class'. If the stance of the respondent/objector is accepted, then there would remain no need to hold the meeting for ascertainment of wishes of majority in number representing 3/4th in value of the creditors or class of creditors. In the circumstances, all the secured creditors who may have filed suits or obtained decrees are to be deemed to be of the same class as other secured creditors. Reliance in this regard can be placed upon the case of *Mian HAMIDUL HAQ and others v. TAJ COMPANY LTD.*(1991 MLD 841).

15. We may further observe that the objections to any compromise or arrangement, if any, based on classification, jurisdiction or otherwise, must be raised at the earliest opportunity. Objections raised immediately on receipt of notice of proposed scheme of compromise or settlement are usually given due consideration. In case objections are not raised at the first available opportunity, same may not be considered by the Court to thwart the legal course available under the law to the majority Shareholders, Members of the Company and its Creditors . Reliance in this regard can be placed on the cases of *CAPITAL ASSETS LEASING CORPORATION LTD.* (2003 CLD 1713), and *ALSTOM POWER BOILERS LTD. v. STATE BANK OF INDIA and another* (2002) 112 Comp. Cases 674). In the instant case,

it may be noted that the Objector Bank neither raised any objection upon receiving notice of the sanction of scheme nor at the time of meeting, called upon the directions of the learned Company Judge, hence, it estopped from raising objection of the nature at the time of final hearing of the sanction of scheme by the court.

16. The case law cited at the bar fully supports the stance of the appellant. Hence, in view of the above discussion, we are of the opinion that the impugned clarification is violative of the Scheme and scope of sub-section (2) of Section 284 of the Company Ordinance, 1984, and as such not sustainable in law, hence, the same is liable to be struck down.

Foregoing are the reasons for our short order dated 21.11.2017, whereby instant High Court Appeal was allowed.

JUDGE

JUDGE

Karachi
Dated: _____

jamil