IN THE HIGH COURT OF SINDH AT KARACHI

JCM No. 05 of 2019

Petitioner No.1:	**Paramount Spinning Mills Limited Through M/s. Muhammad Shoaib Rashid, Muhammad Hamza Khokhar and Shahid Iqbal Rana, Advocates.**
Petitioner No.2 to 14:	**Faysal Bank Limited & others Through Mr. Arshad Tayabaly, Mr. Mikael Azmat Rahim, Ms. Heer Memon, & Ms. Sehar Rana, Advocates.**
Bank of Punjab:	**Through Mr. Mehmood Ali & Mr. Abid Naseem, Advocates.**
SECP:	**Through Mr. Saad Abbasi, Advocate**

1. **For hearing of CMA No. 56/2019.**
2. **For hearing of Main Petition.**

Dates of hearing:	**06.09.2019, 17.09.2019 & 01.10.2019.**
Date of Order:	**25.10.2019**

O R D E R

Muhammad Junaid Ghaffar J. This is a Petition under Section 279 to 283 and 285(8) of the Companies Act, 2017, seeking approval of an arrangement / compromise entered into between Petitioner No.1 and Petitioners No.2 to 14. The Petitioner No.1 is a Public Company authorized to carry on business mainly of textiles and its authorized share capital is Rs.250,000,000/- divided into 25,000,000 ordinary shares of Rs.10/- each, whereas, paid-up share capital of this Petitioner is currently Rs.173,523,290/-. The Petitioner Nos.2 to 14 are all Banking Companies, as defined in the Banking Companies Ordinance 1962 or non-banking finance companies, as defined in Part-VIIIA of the Companies Ordinance, 1984 and from time to time, have provided finance as defined in the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**FIO**") to the Petitioner No.1. It is

a matter of an admitted position that Petitioner No.1 has defaulted in honoring the repayments to its lenders, and now these secured creditors along with the Borrower Company / Petitioner No.1 have entered into an arrangement/compromise for the purposes of paying the existing liabilities of the secured creditors, in the manner so specified in the said arrangement / scheme.

2. Learned Counsel for Petitioner No.1 has contended that Petitioner Nos.2 to 14 (in respect of the finance facilities availed by Petitioner No.1) constitute approximately 70.13% of the existing liabilities to the extent of principal amount as on 31.12.2018. Per learned Counsel for various reasons, the Petitioner No.1 has faced significant difficulties in meeting its financial obligations towards its creditors, whereas, the Creditors have already filed various proceedings including Suits for recovery of finances, and at the same the Petitioner No.1 has also filed various proceedings against its certain secured creditors, which are also pending. He has further contended that as a consequence of discussion with its secured creditors, terms for the purposes of settlement and compromise have been prepared and through the Scheme of Arrangement now before the Court, the Petitioners seek approval of the same in terms of the provisions of the Companies Act, 2017. According to him the Scheme of Arrangement, attached as Annexure **"B"** hereto, gives full particulars of the proposed compromise / arrangement including, but not limited to, the background leading up to the same, the objective of the arrangement, details of the existing liabilities, the manner in which the Petitioner No.1 shall repay the existing liabilities of its secured creditors, the mechanics / procedure of such repayment, the obligations of the Petitioner No.1, the principal sponsor of the Petitioner No.1 and the secured creditors of the Petitioner No.1, and the consequences of a default by the Petitioner No.1, along with all related and ancillary matters. Per learned Counsel the Scheme of Arrangement be treated as part and parcel of the petition. According to him all consenting creditors have

appointed United Bank Limited as the lead creditor, who will manage this scheme of compromise and all other Petitioners have consented to such an agreement. He further submits that after filing of this petition, on an application in terms of Rule 55 of the Companies (Court Rules) 1997, on 20.05.2019, permission was granted to conduct a meeting of the petitioners as well as the creditors to consider and approve the scheme, including objections, if any, and the meeting has been conducted in compliance of the orders of this Court and the Chairman has filed his report on 08.07.2019. According to him, as reflected from the report, out of the two non-consenting creditors, one remained absent, and the other opposed the scheme. Whereas, 75.34% in value of the outstanding principal amount of the secured creditors were present and voted by giving consent to such arrangement. As to the objections raised on behalf of one of the secured creditors (Bank of Punjab), learned Counsel has relied upon the judgment reported as ***Gulshan Weaving Mills Limited v. Al Baraka Bank (Pakistan) Limited and 8 others*** **(2018 CLD 737)** and has contended that a learned Division Bench of this Court has been pleased to overrule similar / identical objections, and therefore, the Scheme be allowed and approved for further proceedings.

3. Insofar as, the Petitioner Nos.2 to 14 are concerned, Mr. Mikael Azmat Rahim, appearing on their behalf has adopted the arguments of the Petitioner No.1's Counsel and has prayed for allowing this Petition.

4. Learned Counsel appearing on behalf of Objector / Bank of Punjab has contended that the Scheme, as presented on behalf of the petitioners does not fall within the contemplation of Section 279 of the Act and he has read out Subsection (6) thereof in support of his contention. According to him, this is not a Scheme of reorganization; hence cannot be granted. Per learned Counsel in the Scheme the total liability has been shown as Rs.3.37 billion, whereas, the net value of the assets of Petitioner No.1 is Rs.1.837 billion, with a forced sale value of only Rs.1.474

billion; and therefore, this Scheme cannot be approved as it will not cater for the entire set of creditors. He has further argued that it is the case of Bank of Punjab that an amount of Rs.836.00 million is outstanding against the Petitioner No.1, whereas, various Courts have already passed decrees in its favour, and if the Scheme is granted as prayed, then it will seriously prejudice the interest of Bank of Punjab and would also amount to losing public money. According to him, the Court must consider the Scheme as a whole and when it is against the interest of public and intends to defeat the law itself, then such a Scheme must not be granted by the Court. Per learned Counsel in the meeting of creditors, they have raised various objections, which were not properly considered, therefore, the meeting so conducted, is not in accordance with the rules as well as the law. He has also referred to the provisions of FIO and has contended that this being a special law, must override any other provisions of Companies Act and in terms of the FIO, no such Scheme can be approved, whereas, it is only the Banking Court(s) having jurisdiction, who can decide the cases in accordance with FIO. Insofar as the judgment of the learned Division Bench in the case of ***Gulshan Weaving Mills Limited*** (Supra) as relied upon by the learned Counsel for the Petitioner No.1 is concerned, he has argued that on facts the same is not squarely applicable, whereas, even the said judgment supports the case of the objectors. He has prayed for dismissal of the Petition.

5. Learned Counsel appearing on behalf of SECP has argued that since the Banks are involved, therefore, the Petitioners be directed to obtain NOC from State Bank of Pakistan. He has also contended that the value of the assets in question is less than the outstanding liability and there is difference in the loan amount as mentioned in the Scheme and the accounts of Petitioner No.1.

6. I have heard all the learned Counsel and perused the record. The facts have been briefly discussed hereinabove and as reflected from the record, presently, the Petitioners

seek approval of the Scheme in question, whereby, the Petitioner Nos.2 to 14 have entered into a compromise with Petitioner No.1 for settlement of their liabilities in the manner so stated in the Scheme. The object of this Petition is to, inter alia, obtain sanction of this Court to the Scheme of Arrangement for compromise and arrangement as envisaged between Petitioner No.1 and its secured creditors (including Petitioner No.2 to 14), involving all existing liabilities of Petitioner No.1 towards it secured creditors. The Petitioner No.1, along with the Petitioner Nos.2 to 14 have approved the Scheme of Arrangement as according to them the same constitutes a viable solution for the secured creditors of Petitioner No.1 and it is their case that it is in the interest of all the parties. According to them, the same would, *inter alia,* allow the secured creditors to recover the outstanding amounts payable to them from Petitioner No.1, or a portion thereof, in the manner prescribed under the Scheme of Arrangement, as full and final settlement for all the outstanding amounts payable by the Petitioner No.1 to its secured creditors. Though the Scheme as whole is a complete document; however, it mainly encompasses the mode and manner in which it is to proceed further and reference in this regard may be made to Article-3; which relates to the object of the Scheme, Article 6 which is in respect of the sale of the assets and repayment of the existing liabilities whereas, in Schedule "C", the details of the existing liabilities of the secured creditors have been mentioned and according to it the secured creditors are owed Rs.2701.702 Million as the principal amount and Rs.671.296 Million as markup; making it a total of Rs.3372.998 Million, whereas, out of these outstanding liabilities, the two secured creditors, who have not consented to this Scheme, in total are owed, an amount of Rs.807.00 Million in principal and Rs.67.436 Million as markup and a total of Rs.874.436 Million, which is equal to 29.87% of the total outstanding liabilities, whereas, in percentage terms, Petitioner No.2 to 14 are owed 70.13% of the total principal liability. It is further provided that the secured creditors i.e.

Petitioner No.2 to 14, out of which some of whom have a first charge on the mortgaged properties, have foregone their claims to that extent, and have agreed to the scheme of compromise, through which, a mechanism has been devised to settle the liabilities of the creditors.

7. This present petition has been filed under Section 279 of the Companies Act, 2017, which reads as under:-

> "**279. 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 Commission may, on the application of the company or of any creditor or member of the company or, in the case of 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, held and conducted in such manner as the Commission directs.
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> (2) If a majority in number representing three-fourths 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 Commission be binding on the company, all its creditors, all the members, the liquidators and the contributories of the company, as the case may be:
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> Provided that no order sanctioning any compromise or arrangement shall be made by the Commission unless the Commission is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Commission, by affidavit or otherwise, all material facts relating to the company, such as the financial position of the company, the auditor's report on the latest accounts of the company, the pendency of any investigation proceedings in relation to the company and the like.
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> (3) A copy of the order under sub-section (2) sanctioning the compromise or arrangement duly certified by an authorized officer of the Commission shall be forwarded to the registrar within seven days from the date of the order.
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> (4) A copy of the order under sub-section (2) shall be annexed to every copy of the memorandum of the company issued after the order has been made 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.
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> (5) The Court may, at any time after an application has been made to the Commission under this section, stay the commencement or continuation of any suit or proceeding until final disposal of the application.
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> (6) In this section the expression "company" means any company liable to be wound up under this Act 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.

> (7) Any contravention or default in complying with requirements of sub-section (4) shall be an offence liable to a penalty of level 1 on the standard scale

8. Perusal of the above provision reflects that in Sub-section (1), it has been provided that 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 Commission may, (here, the power of the Commission has been entrusted and assigned to the respective Company Benches of the High Court's Court vide SRO 840(I)/2017 dated 17.8.2017 issued in terms of s.285(8) of the Companies Act 2017) on the application of the company or of any creditor or member of the company or, in the case of 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, held and conducted in such manner as the Commission [Court] directs. Subsection (2) provides that if a majority in number representing three-fourths 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 Commission be binding on the company, *all its creditors*, all the members, the liquidators and the contributories of the company, as the case may be. On 18.03.2019, when this petition was presented before this Court, and an order was sought for convening the meeting of the Petitioners and the creditors, this Court before granting such permission, issued directions for issuance of notice to the non-consenting creditors, i.e. National Bank of Pakistan and Bank of Punjab, and thereafter the Counsel has affected appearance on behalf of Bank of Punjab. Insofar as National Bank of Pakistan is concerned, their Litigation Manager Azmat Zuberi appeared before the Court on 15.04.2019 and sought time to engage a Counsel. Again on 06.05.2019, he was in attendance and sought further time. Subsequently,

permission was granted to convene the meeting of the Petitioners and secured creditors, as the non-consenting creditors were already on notice and had all available means to attend the meeting and oppose, if so desired. Record reflects that when the meeting was convened on 01.07.2019, Bank of Punjab participated, whereas, National Bank of Pakistan remained absent and they have also failed to affect appearance before the Court and to assist in respect of the Scheme in question despite being properly served. It is not in dispute that when the meeting was convened, 75.34% of the creditors in value were present and voted in favor of the scheme and it is only Bank of Punjab, who opposed the scheme. Insofar as the objections raised on behalf of Bank of Punjab are concerned, it appears that earlier in an almost identical case, a Company had filed JCM No.30/2016, seeking approval of a compromise scheme in similar terms and in that case also one of the secured creditors had opposed the scheme. In fact it was the same secured creditor i.e. Bank of Punjab. Their precise argument before the Company Judge was to the same effect, as contended in this matter. The learned Company Judge of this Court vide Order dated 03.04.2017, though approved the scheme of arrangement, but was pleased to hold that the Court is not required to challenge the wisdom of the creditors, who have opted for the approval of the Scheme, but according to the learned Judge, the decision was limited to them only and the Scheme was approved with a clarification that it only binds the consented creditors and not otherwise. The relevant finding of the learned Company Judge in the concluding paragraph reads as under:-

> "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 obligation arising out of the law**. It is perhaps this common interest of consenting creditors which distinguishes the objection from rest of the secured creditors and since there is no commonality of interest between the objector and the consenting creditors the effect of this Scheme of Arrangement would not bind the objection.

> 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."

9. Such order of approval of the Scheme with the above modification and condition was impugned in HCA No. 262/2017, by the Company and a learned Division Bench of this Court in the case of ***Gulshan Weaving Mills*** (Supra) has been pleased to allow the appeal and has set aside the observations of the learned Company Judge, whereby, the Scheme was approved only to the extent of consenting creditors and not otherwise. The relevant findings of the learned Division Bench are as under:-

> "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:-
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> > "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).
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> 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.
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> 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 subsection (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."

10. From perusal of the above judgment of the learned Division Bench it clearly reflects that insofar as the objections now being raised by Bank of Punjab are concerned, they already stand decided against them. It is a

matter of record and as confirmed by their Counsel, the said judgment has not been challenged any further before the Hon'ble Supreme Court. Therefore, it is binding on this Bench and cannot be deviated from in identical facts, notwithstanding the weightage and attraction in the arguments so raised by the learned Counsel for Bank of Punjab. I may observe that this sounds attractive and so also somewhat emotional, but Courts are not required to decide cases on the basis of emotions. The decisions are to be given on the basis of mandate of law. The Court is duty bound to apply the law, come what may, as sometimes the law may not permit something which ought to have been, but there is very little the Court can do about it, for it is and should be, emphatically the duty of the Court to apply it, but not rewrite what has been enacted by the law makers / competent authority. The Court must not reach a decision which it likes, but must try to reach a decision which law compels. And this is the way a Court (like this Court) must work as no doubt the Court might reach to a decision it dislikes, but believes that the law demands it. This is the only way the Court can only be admired. It is not for the Court to legislate, but for the legislature to do so. The decision makers are required to adopt law as it is, but not as they wish to be.

11. In my view the objection of Bank of Punjab has been taken care of in an elucidative manner by the learned Division Bench in the case above, and this Bench cannot take any alternate or contrary view as the said precedent is a binding precedent. Nothing has been argued so as to even remotely suggest that the judgment of the learned Division Bench in the case of ***Gulshan Weaving Mills (Supra)*** is bad in law or is either *per-incuriam*. The only ground which has been urged is to the effect that since the objector has not consented to the Scheme in question and has in possession certain decrees of the Banking Court; hence, it will not be binding on the objector. However, this objection has already been repelled by the learned Division Bench as above and

this Court cannot draw an exception to it. Moreover, learned Counsel was also confronted as to whether the objectors have impugned the said judgment of the learned Division Bench any further, to which his answer was in the negative. Therefore, in the circumstances as above, it does not lie with the objector to reiterate the same objections once again before a Single Bench of this Court, when it has already been decided by a learned Division Bench against it.

12. In somewhat similar facts a learned Company Judge of this Court in the case reported as ***In Re: Messrs Pakland Cement Limited*** **(2002 CLD 1392)** had the occasion to deal with objections of similar nature to the effect that the borrower has defaulted and the Banking Court has passed a decree against which an appeal has also been dismissed; that in terms of FIO it is only the Banking Court which can take care of such issues and the orders of the Banking Court cannot be reviewed under the Company jurisdiction; that the Banking Law will override the Company Law; that the secured creditors having a decree are of a different class and cannot be clubbed with any other class of creditors; that the Scheme if granted would prejudice the interest of the objector and will dilute their securities held on behalf of the Company; that the objectors will be entitled to lesser amount of money as against the decrees held by them; however, all these objections were rejected and repelled by the learned Judge and the Scheme was allowed.

13. The analogous provision of Section 279 of the Act is contained in Section 391 of the Companies Act, 1956 in India and a learned Single Judge of the Karnataka High Court in the case reported as ***In Re: Kirloskar Electric Co. Ltd*** **[2003] 116 Comp Case 413 (Kar)** had the occasion to dilate upon the said provision and so also to the fact that whether in such a situation the Scheme of arrangement and compromise entered into by the consenting secured creditors would also be binding on the objecting secured creditor(s) or not. It was held by the Court that firstly the Company Court does not have unlimited powers like a Court of plenary

jurisdiction to examine the Scheme as the jurisdiction is limited in scope. Secondly, once such a compromise is sanctioned by the Court, it would be binding on all the creditors or class of creditors, as the case may be, which means that even upon dissenting creditors, such scheme would remain binding. The relevant findings of the learned Judge are as follows;

> 35. Before I deal with the aforesaid points for determination, it is necessary to keep in view the limited scope of the jurisdiction of the Company Court which is called upon to sanction the scheme of amalgamation as per the provisions of Section 391 read with Section 393 of the Act. The aforesaid provisions of the Act provides that compromise or 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. When 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. Once the majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting accord their approval to any compromise or arrangement the Court gets jurisdiction to sanction the scheme. Once such a compromise is sanctioned by the Court, it would be binding on all the creditors or class of creditors, or members or class of 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 remain binding.
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> 36. 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 Sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to Subsection (2) of the section. So far as the meetings of the creditors or members, or their respective class for whom the scheme is proposed are concerned, it is enjoined by Section 391(1)(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 an informed and objective decision whether to vote for the scheme or against it.
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> 37. The Company Court, which is called upon to sanction such a scheme is not merely to go by the Ipse Dixit of the majority of the shareholders or creditors or the respective classes who might have voted in favour of the scheme with the requisite majority but the Court has to consider the pros and cons of the scheme with a view to find out whether the scheme is fair, just and reasonable and is not contrary to any provision of law and it does not violate any public policy. No Court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if

> the Court finds that it is a unconscionable or an illegal scheme or is otherwise unfair and unjust to the class of shareholders or creditors for whom it is meant. The Court is not to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme being approved by the majority.
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> 38. However, the question remains whether the Court has jurisdiction like an Appellate Authority to minutely scrutinize the scheme and arrive at an independent conclusion whether the scheme should be sanctioned or not when the creditors and members have approved the scheme as required by Section 391(2). The Court has to keep in view the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority. The Court certainly would not act as a Court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the Company who have ratified the scheme by the requisite majority. To that extent the jurisdiction of the Company Court is peripheral and supervisory and not appellate. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act. The propriety and the merits of the compromise and arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasonable judgment and agree to be bound by such a compromise or arrangement.

14. The Indian Supreme Court in the case reported as ***Miheer H Mafatlal v Mafatlal Industries Ltd***., **(AIR 1997 SC 506)** has laid down the following broad contours defining the jurisdiction of the Company Judge in such matters and reads as under;

> "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.
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> 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).
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> 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, Subsection (1).

5. That all the requisite material contemplated by the proviso to 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 no 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 requirement 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.

15. "In exercising its power of sanction the Court will see, first that the provisions of the statute have been complied with, secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of this interest, might reasonably approve. The Court does not sit merely to see that the majority are acting bond fide and thereupon to register the decision of the meeting, but at the same time,

the Court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considering the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the Scheme."[1]

16. Besides the above settled proposition there is one more aspect of the case which has not been touched upon by any of the learned Counsel for the parties. It is not in dispute that presently the petitioner Nos.2 to 14 (consenting creditors) holds 70.13% of the total owed liabilities as reflected from Schedule "C" to the Scheme, whereas, the two non-consenting creditors hold a total of 29.87% thereof, with Bank of Punjab the objector before the Court holding 22.95% and National Bank of Pakistan 6.92% thereof. Now the issue would have been very easy for the Court to decide if the 2nd non-consenting creditor would have also come before the Court as an objector and then perhaps the position of the petitioners would have been difficult so as to meet the criterion of 3/4th majority of the consenting creditors to the Scheme. In fact it would have been difficult for them even if National Bank had participated in the meeting called pursuant to directions of this Court and had opposed the same. However, surprisingly, they have not appeared before the Court despite being served and tendering an assurance to do so; nor they have participated in the meeting of the secured creditors either to oppose it or to ratify it. Therefore, what would be the position as to the consent of 3/4th majority as required to be present and voting in respect of the Scheme in the meeting called pursuant to notice and directions of this Court. The law requires that if a majority in number representing three-fourths in value of the creditors or class of creditors, ***present and voting*** either in person or, where proxies are allowed, by proxy at the meeting agree to any compromise or arrangement, the same shall, if sanctioned by Court, shall be binding on the Company, all its creditors etc. Now in this matter, NBP has chosen to

[1] Buckley on the Companies Act, 2006 (UK) 14th Edition.

remain absent in the meeting and as a consequence has not voted at all; either in favor or against. In fact even if someone is present in the meeting and abstains from voting; it is of no relevance, as it is no voting at all. Therefore, in construing whether a resolution is passed by "three-fourths" majority or not, it is the number of secured creditors present in meeting and participating in voting in favor or against which is relevant and on the basis of which the Scheme is supposed to be approved or not by way of a resolution. When this analogy is applied on the facts of this case it reflects that creditors to the extent of Rs.2514.70 Billion were present in the meeting as per report of the Chairman, out of which the consenting creditor's amount is Rs.1894.70 equivalent to 75.34%, whereas, the only objector who voted against passing of any resolution is owed Rs.620.00 Million which is equivalent to 24.65% of the creditors present in the meeting; hence, the statutory threshold of 3/4th majority is fulfilled.

17. The Indian Supreme Court in the case reported as ***Hindustan Lever and another v State of Maharashtra and another*** **(2004) 9 Supreme Court Cases 438** had the occasion to examine the question that whether an approval of a compromise or a scheme as envisaged under s.391 of the Companies Act, 1956 (analogous to our s.279 of the Companies Act, 2017), has a binding effect on the persons or creditors who had in fact opposed the same and the Supreme Court of India has held that it is binding on all including the Company itself. The relevant findings are contained in Para 10 and 18 of the judgment and read as under.

> 10. **By virtue of provisions of section 391 of the Companies Act a scheme sanctioned by the Court is statutorily binding on all its shareholders and creditors including those who dissented from or were opposed to the scheme being sanctioned**. Since by law a procedure has been prescribed by which every shareholder and creditor in the absence of individual agreement, gets bound by the scheme, which would otherwise be necessary to give its validity, the two provisos have been introduced casting a duty on the Court to satisfy itself that the affairs of the company were/are not being conducted in a manner prejudicial to the interest of its members or to the public interest. The basic principle underlying these provisos is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to the

public policy, unconscionable or against the law. There is no adjudication as such. Any modification proposed by the Court in the scheme is also subject to its being accepted by the transferor and the transferee company. If any one of them objects to the modifications suggested by the Court then the scheme would not be sanctioned. The scheme would be sanctioned only if there is an acceptance to the modification proposed by the Court to the scheme by the transferor as well as transferee company. On acceptance of the same it gets incorporated in the compromise or arrangement arrived at between the two companies. Modification in the scheme becomes a part of the compromise or arrangement arrived at between the parties.

18. It is difficult to subscribe the view propounded by the learned counsels for the appellants. As stated earlier, the order of amalgamation is based on a compromise or an arrangement arrived at between the two companies. No individual living being owns the company. Each shareholder is the owner of the company to the extent of his shareholding. By enacting Sections 391 to 394 a method has been devised to give effect to the will of the prescribed majority of shareholders/ creditors. Even in the absence of individual agreement by all the shareholders and creditors the decision of the majority prescribed in Section 391(2) binds all the creditors and the shareholders. **The Scheme after being sanctioned by the Court binds all its creditors, members and shareholders including even those who were opposed to the scheme being sanctioned. It binds the company as well. While exercising its power in sanctioning the scheme of amalgamation, the Court is to satisfy itself that the provisions of statute have been complied with. That the class was fairly represented by those who attended the meeting and that the statutory majority was acting bona-fide and not in an oppressive manner. That the arrangement is such as which a prudent, intelligent or honest man or a member of class concerned and acting in respect of the interest might reasonably would take. While examining as to whether the majority was acting bona-fide the Court would satisfy itself to the effect that the affairs of the company were not being conducted in the manner prejudicial to the interest of its members or to public interest. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties the same being that it should not be unfair, contrary to public policy and unconscionable or against the law.**

18. The learned Counsel for the objector also made a submission that since the objector has already got a decree against petitioner No.1 from a Banking Court; hence, the objector is not of the same category of creditors as petitioner Nos.2 to 14 are; however, this contention is apparently misconceived and an answer to this is given in sub-section (6) of s.279 ibid, which provides that "*...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". I do not see as to why a separate treatment could be meted out to secured creditors as this provision would squarely be applicable to the objectors / secured creditors.

19. In the case reported as ***Haricharan Karanjai v Ulipur Bank Ltd.,*** **(AIR 1942 Calcutta 442)**, a learned Division Bench of that Court in an appeal had the occasion to deal with a case of a depositor having a decree against it in respect of his deposit with the Bank, which had embarked upon a scheme of arrangement and compromise with its creditors under the erstwhile Section 153, of Companies Act 1913, and the scheme was settled and it was finally sanctioned which provided inter alia that *"the creditors of the Bank shall not be entitled to demand payment of their dues at once except in terms of the scheme which shall remain in force for a period of ten years."* The appellant sought execution of the decree and Bank objected that under the scheme decree-holder could claim payment only in accordance with the, provisions of the scheme and not otherwise, and the application for execution was consequently not maintainable, which found favour with both the Courts below, whereas, the appellant's case in substance was that he was not a depositor at the time when the scheme was put forward or sanctioned by the Court but had already become a decree-holder, and as there was no arrangement with the class of creditors to which he belonged, he was not bound by the scheme. His case was that he was a creditor of a different class. The learned Division Bench was not impressed by such argument and decided that;

> Pg:443 The whole question therefore is whether the depositors who obtained decrees against the company formed a separate class of creditors from the others who had not obtained decrees, and it was necessary to convene a meeting of the decree-holder creditors before the scheme could be made binding on them. This question was raised in quite a large number of cases in recent years, and there is apparently a diversity of judicial opinion regarding it, In Barisal Loan Office Ltd. V. Shasthi Charan Bhattacharya ('35) 39 C.W.N. 1198, it was held by Guha and Lodge JJ, that the scheme of composition was applicable to all creditor a, including those who had already obtained decrees, and it was not necessary that

> there should be a separate meeting of the decree-holder creditors. This decision was affirmed by Mitter J. in Serajganj Loan Office v. Nilkantha Lahiri A.I.R. 1935 WB. 777. On the other hand, there are a number of cases where a different view has been taken and it has been held that depositors who obtained decrees against a banking company before any scheme was embarked upon by the latter, ceased to be depositors and became decree-holders. They would constitute a separate class from ordinary depositors and it was necessary that there should be a separate meeting of such creditors before the scheme could be sanctioned by the Court: vide Manikganj Trading and Banking Co. Ltd. V. Madhabendra Kumar Shaha MANU/WB/0124/1936: AIR1936Cal162, Rajshahi Banking Corporation v. Sura Bala Debi MANU/WB/0397/1936: 40 C.W.N. 1104and Rajshahi Banking Corporation and Trading Corporation Ltd. V. Pulin Behari Mukherjee 42 C.W.N. 610. The Companies, Act was amended by Act 22 of 1936, and Sub-section (6) of Section 153 of the new Act, now expressly lays down that "for 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." The Legislature, therefore, has distinctly approved of the first set of judicial decisions referred to above and disapproved of the other group.

20. In view of hereinabove facts and circumstances of this case I am of the view that the objections of Bank of Punjab cannot be sustained as the law is already settled in our jurisdiction through the case of ***Gulshan Weaving Mills Limited (Supra)***, which is a Division Bench judgment of this very Court, whereas, even in the English and Indian Jurisdiction the same principle applies that if once a Scheme of arrangement or a compromise is agreed upon by a class of creditors and a resolution to that effect is passed by them, then the said Scheme is binding on all including the non-consenting creditors. Since all requisite formalities as prescribed in law have been completed and complied with by the petitioners in accordance with the Companies Act, 2017 read with the Companies (Court) Rules, 1997, and I am satisfied that the petitioners have made out a case, therefore, the petition is allowed as prayed. The Petitioners to act further pursuant to the grant of this petition in accordance with the approved Scheme in question.

Dated 25.10.2019

J U D G E