

A ADMINISTRATOR OF THE SPECIFIED UNDERTAKING OF THE
UNIT TRUST OF INDIA

v.

GARWARE POLYSTER LTD.

MAY 9, 2005

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[B.P. SINGH AND S.B. SINHA, JJ.]

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Companies Act, 1956; Ss. 113, 391, 393/Companies (Issue of Share Certificate) Rules, 1960/Bombay Relief Undertakings (Special Provision) Act, 1958/Indian Contract Act, 1872; Section 28/Code of Civil Procedure, 1908; Order XXIII Rule 1:

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Company—Loss—Revival—Restructuring. package/Scheme—Common Subscription Agreement entered into between a Company and debenture holders—Creation of Debenture Trust Deed—Challenged by one of the debenture holders—appellant—Filing of a Petition by the Company seeking approval of the Scheme—Allowed by the Company Judge—Appeal dismissed by the Division Bench of the High Court—On appeal, Held: In terms of the Trust Deed, the rights, privileges and conditions attached to the debenture holders could be varied, modified or abrogated only in accordance with the provisions of law with the consent of debenture holders by way of a special resolution passed—But resolution shall not be operative against the company if its modifies or varies the terms and conditions governing the debentures—No provision as of Veto Power/unanimity provided for passing a resolution—Principle of Majority accepted by the authorities—Court could grant sanction to a scheme only when it is satisfied that the scheme is fair, just reasonable and does not contravene public policy or any statutory provision—The scheme applies equally to all the debenture holders and the appellant cannot be treated as a separate class—The purpose and object of advancing a huge investment by the appellant to the company is a matter of no concern to the company/other debenture holders—The Company prima facie showed that the

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scheme is fair and reasonable and having approval of the requisite majority of the debenture holders—Hence, the Company Judge rightly accepted the scheme—Sick Industrial Companies (Special Provisions) Act, 1985—The Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

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Commercial documents—Meaning of.

The respondent-Company is engaged in the manufacture of polyster film and also exporting its product. The company went for expansion and in connection thereto obtained finance by way of term loans and by issuance of debentures to financiers. However, the company suffered a huge loss and it approached the Industrial Development Bank of India for restructuring package to clear its liabilities. All the debenture holders except the appellat no.2 agreed to the proposed package/scheme. A common Subscription Agreement was entered into between the company and the debenture holders. Later, in terms of the agreement, a Debenture Trust Deed was created. The company filed a petition seeking grant of sanction to the Scheme before the High Court in terms of Section 391 of the Companies Act. The Company Judge allowed the application. Aggrieved, the appellat preferred an appeal which was dismissed by the Division Bench of the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. In terms of clause 10 of the Trust Deed, the rights, privileges and conditions attached to the debentures may be varied, modified or abrogated only in accordance with the Articles of Association of the Company and the Act and with the consent of the debenture holders by a special resolution passed at the meeting of the debenture holders but in terms of the proviso appended thereto nothing in such resolution shall be operative against the company where such resolution modifies or varies the terms and conditions governing the debentures, if the same are not acceptable to the company. The provisions of the Trust Deed and in particular clauses 22, 23, 24 and 25 thereof leave no manner of doubt that a resolution has to be passed in the manner laid down therein and/or in terms of the Companies Act. [202-D, E; 208-F]

1.2. The common subscription agreement is an investment agreement. The provisions contained therein are required to be read in their entirety and for the said purpose it is permissible to read the negative covenants with the positive covenants. It will, however, not be correct to say that the common subscription agreement has to be interpreted on its own without any reference to the trust deed. The provisions of the trust deed can be referred to for the purpose of giving a true meaning to the agreement, as there does not exist any conflict between the two. They are to be considered together for the purpose of finding out as to how the

A agreement can be worked out. [208-G-H; 209-A]

1.3. The underlying or basic thread of the agreement *vis-a-vis* the trust deed is that the majority principle was accepted by the authorities. They do not provide for an unanimity; or any veto power in favour of one debenture holder so as to scuttle the decision of the majority. [209-C]

B *Moti Ram and Ors. v. State of Madhya Pradesh*, AIR (1978) SC 1594, referred to.

Massachusetts B. & Insurance Co. v. U.S., (1956) 352 US 128 at 138, referred to.

C 2.1. It is true that a negative covenant by itself is not invalid in law. But it is also true that it requires a strict construction. The agreement is a commercial document. Commercial documents must be construed in a manner as are understood in commercial parlance. A commercial document must be read reasonably. It must be construed in such a manner so that it is made workable. [209-E]

D 2.2. The parties to the agreement are commercial concerns. Each party would indisputably try to protect its interest when advancing loans or making investment but it must also be conceded that they were aware of the risk factor involved therein. A scheme envisaged under Section 391 of the Companies Act, it is well-settled, is a commercial document. [209-F]

F 2.3. The Court would not grant sanction to such a scheme only because the same reflects the will of the majority of the creditors or a class of them but it must consider all aspects of the matter so as to arrive at a finding that the scheme is fair, just and reasonable and does not contravene public policy or any statutory provision. Such a care or caution is required to be exercised by all courts including the Civil Court in terms of Order XXIII, Rule 1 of the Code of Civil Procedure. [210-D, E]

G *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, [1997] 1 SCC 579 and *J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd. and Ors. etc.*, [1969] 2 SCR 866, referred to.

H 2.4. It is not the case of the Appellant/investor that the Company Judge has exceeded his jurisdiction and acted in violation of the guidelines. Once it is held that the normal rule, namely, the principle of majority in

corporate democracy or in other words, governance of the company by a majority, is accepted, the Appellants could not be heard to say that they had an absolute right to exercise veto power and thereby scuttle a *bona fide* attempt to revive a company. [211-D, E]

2.5. It cannot be said that clause 7.5 of the agreement puts a total embargo on the part of the company or other creditors to file a compromise under Section 391 of the Companies Act without obtaining the consent of all debenture holders. The said Clause neither can be read in such a manner nor should be read. Such a construction would be unwarranted having regard to the fact that two different expressions have been used in different clauses. Wherever a right has been conferred upon an individual debenture holder, the agreement used the expression 'any or all the debenture holders' as contrasted by all debenture holders. The debenture holders are required to exercise their right through the trustee save and except in the cases which confer specified power to them. The Appellant cannot claim any priority or preference in the matter of realization of their dues over the other debenture holders. Each debenture holders has a *pari passu* right with each other, as is evident from clause 2.2 of the agreement. [211-G, H; 212-A]

J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Ors. etc. [1969] 2 SCR 866 and *Andhra Bank v. Official Liquidator and Anr.*, [2005] 3 SCALE 178, referred to.

3.1. The Appellant having failed to establish that they could hold the entire scheme to ransom so as to stall the proceedings as a result whereof the majority of debenture holders would be deprived, the purpose or object motivating him to advance such a huge amount to the company against issue of debentures is a matter of little or of no concern to the company/ other debenture holders. A special or a new right cannot be found in favour of the Appellant in the agreement when it creates none. The scheme applies equally to all debenture holders and as such the Appellant cannot be treated as a separate class. Once the Respondent-Company prima facie showed that the scheme is fair and reasonable and also that the requisite majority of the debenture holders recorded their decision in its favour, the Court in absence of any unforeseen unjustness or unreasonableness therein ought not to reject the same. The Company Judge by reason of the impugned judgment while exercising supervisory jurisdiction only accepted the scheme. The High Court's decision is not being questioned

A as unfair. The company in view of the Scheme has no remedy other than approaching the High Court under Section 391 of the Companies Act.
[212-D, E, F, G]

Nanakram v. Kundalrai, [1986] 3 SCC 83 and *Nutan Kumar and Ors. v. 11nd Additional District Judge and Ors.*, [2002] 8 SCC 31, distinguished.

B *Smt. Rajbir Kaur and Anr. v. M/s. S. Chokesiri and Co.*, [1989] 1 SCC 19 and *Delta International Ltd. v. Shyam Sundar Ganeriwalla and Anr.*, [1999] 4 SCC 545, held inapplicable.

C *Sardar Amarjit Singh Kalra (Dead) by Lrs. and Ors. etc. v. Pramod Gupta (Smt.) (Dead) by Lrs. and Ors etc.*, [2003] 3 SCC 272, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3196 of 2005.

From the Judgment and Order dated 12.4.2004 of the Bombay High Court in A. No. 185/2004 in C.A. No. 269 of 2003.

D Dr. Rajeev Dhawan, Ms. Shubhr Kapur and Sanjay Kapur with him for the Appellants.

Soli J. Sorabjee, Bhargava V. Desai, Nimish Pandya, Ms. Kamala N. Pandya, Nikhil Sakhardande and Sanjeev Kr. Singh with him for the Respondent.

E The Judgment of the Court was delivered by

S.B. SINHA, J: Leave granted.

F The Respondent herein is a company registered under the Companies Act, 1956, and engaged in the manufacture of polyester film; 50% of which production used to be exported to United States of America, United Kingdom, Europe, Far East, Middle East, Japan, New Zealand etc. Having regard to the adoption of liberalization policy by the Government of India, the Company intended to become globally competitive and went for a massive expansion in the year 1996. The scheme of the said expansion was financed by obtaining term loans and issuance of debentures by various financial institutions including the Appellant No.2 herein. For various reasons, including imposition of European Union Levelled Anti Dumping Duties, the Respondent suffered a cumulative loss of Rs.228.58 crores by March 2001. In the said circumstance, the Respondent approached the Industrial Development Bank of India with a request for a restructuring package to clear its liabilities. A restructuring

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proposal was mooted; wherefor two meetings were held in March 2001 and October 2001 wherein the Unit Trust of India (UTI) participated. All the debenture holders upon due deliberations agreed to the said proposal of restructuring package except the Appellants herein. It is not in dispute that pursuant to or in furtherance of the said restructuring package, the Respondent herein paid a sum of Rs.64.44 crores to various financial institutions between the period 1.10.2001 and 15.1.2003 in the following terms: A

"Sr. No.	Institution	Principal in (Rs.Crores)	Deferred Interest	Total	
1.	IDBI 15.5% PPD	99.50	43.70	143.20	C
2.	IDBI 16% NCD	2.18	0.87	3.05	
3.	ICICI ZCD	6.00	1.95	7.95	
4.	UTI 16% NCD	9.80	3.92	13.72	
5.	UTI 18.5% PPS	4.00	1.85	5.85	D
6.	LIC 18.5% PPD	10.00	3.41	13.41	
7.	GIC 18.5% PPD	1.75	0.81	2.56	
8.	NEW INDIA 18.5% PPD	1.75	0.81	2.56	E
9.	NATIONAL 18.5% PPD	1.05	0.49	1.54	
10.	OIC 18.5% PPD	1.05	0.49	1.54	
11.	UTI 18.5% PPD	1.40	0.65	2.05	
			Total	197.43	F

81% of the principal outstanding carrying interest @ 12.5% need to be repaid in 28 quarterly installments commencing from 1.4.2003.

19% of the principal outstanding carrying nil rate of interest need to be repaid partly to the extent of 385 during 2003-2004 and the balance to be repaid with a premium of 85% in 24 quarterly installments commencing from 1.4.2006 G

Deferred interest being the interest outstanding carrying nil rate of interest need to be repaid in 24 quarterly installments commencing from 1.4.2006. H

A Penal interest and Liquidated damages outstanding as on 31.3.2001 to be waived.

In addition to the above, sacrifice being the amount representing the difference between the contracted rate of interest and the rate as per the restructuring package will be paid on net present value (NPV) basis in 12 quarterly installments commencing from 1.4.2002.”

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On or about 19.6.1997, a Common Subscription Agreement was entered into by and between the Respondent and the debenture holders; the relevant clauses whereof are as under :

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“1.1. Wherever used in this Agreement, unless the context otherwise requires the following terms shall have the following meanings :

(a) *** *** ***

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(b) *** *** ***

(c) “Debenture holders” means LIC, UTI, GIC, NIC, NIA, OIC and UTI or the holders of the Debentures for the time being deriving their title to the Debentures.

2. COMPANY'S REQUEST FOR FINANCIAL ASSISTANCE.

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The Company has approached the Debenture holders for financial assistance to the company for long term capital requirements and the Debenture holders have agreed to advance financial assistance in the form of subscription to 18.5%, 21,00,000 non-convertible. Privately placed debentures of Rs. 100 each to the extent mentioned below :

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Name of Debenture holders	Letter No. & Date	Amount in lacs
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UTI	DOI/2945/G-76/96-97 23.4.97	400
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LIC	INV:C:KAJ DT. 21.4.97	1000
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GIC	INV./97 DT.23.5.97	175
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NIC	INVT/UW/DEBS DT.30.5.97	105
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H NIA

NIA	INV/PM/BUD/72/96 DT. 10.6.97	175
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OIC	DEPTT	105.		A
	INVESTMENT DT			
	30.5.97			
UII	HQ:INV:262:97	DT.	140	
	30.5.97			
	Total		2100	B

2.2. *DEBENTURE SHALL RANK PARI PASSU :*

The Company shall ensure that the Debentures shall rank *pari passu inter se* to all intents and purposes without any preference or priority of one over the other.

3.3. *RIGHT TO REVIEW THE RATE OF INTEREST :*

The Company agrees and undertakes that the Debenture holder(s) shall have a right to review the rate of interest as mentioned herein. The Company shall pay interest on the Debentures at the rate that may be stipulated by the debenture holder(s) as a result of such review. The company also agrees and undertakes to obtain all necessary consents from the concerned authorities in accordance with the then prevailing rules and regulations and to sign all deeds and documents that may be required in this regard and to endorse the revised interest rates on the Debenture Certificates as and when communicated by the Debenture holder(s):

3.7 *REPAYMENT :*

The Company agrees and undertakes to redeem the debentures to all the debenture holders in three equal yearly installments from the end of 4th year from the date of allotment and ending in the 6th year from allotment.

Name of Debenture Holders	Rs. in lacs			G
	4th year from the	5th year date of	6th year allotment	
UTI	133.33	133.33	133.34	
LIC	333.33	333.33	333.34	
GIC	58.33	58.33	58.34	H

A	NIC	35.00	35.00	35.00
	NIA	58.33	58.33	58.34
	OIC	35.00	35.00	35.00
	UTI	46.66	46.67	46.67
	Total	699.98	699.99	700.03

B The debenture holders may at the request of the company in suitable circumstances and also in the absolute discretion of the Debenture holders, subject to the statutory guidelines as may be applicable for the purpose, revise/postpone the redemption of the debentures or any part thereof outstanding for the time being or any installment of redemption of the said debentures or any part thereof upon such terms and conditions as may be decided.

C If for any reason the amount of the Debentures finally subscribed for by the debenture holders is less than the amount of the debentures agreed to be subscribed the installment(s) of redemption will be reduced proportionately but will however be payable on the due date as specified.

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3.9. *DEBENTURE CERTIFICATE :*

E The Company shall issue debenture certificate/s to the debenture holder/s after making necessary compliance to the provisions of section 113(1) of the Companies Act, 1956 read with the Companies (Issues of share Certificate) Rules, 1960..

7.5. *NEGATIVE COVENANTS :*

F Unless the debenture holders/trustees shall otherwise agree, the Company shall not :

(a) *DIVIDEND*

G Declare and/or pay any dividend to any of its shareholders, whether equity or preference, during any financial year unless the company has paid to the debenture holders the installments of principal, if any interest commitment charges, costs charges and other moneys payable under this agreement upto and during that year or has made provisions satisfactory to the debenture holders for making such payment.

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(b) *CHARGES*

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Create or permit any charges or lien on any assets of the Company except as provided in Article-IV, hereof. For the purpose of this clause, the term 'Lien' shall include mortgages, pledges, shares, privileges and priorities of any kind and the term 'assets' shall include revenues and property of any kind.

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(c) *AMENDMENT OF MEMORANDUM AND ARTICLES OF ASSOCIATION*

Amend its Memorandum and Articles of Association or alter its capital structure except as specified herein.

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(d) *MERGER, CONSOLIDATION ETC.*

Undertake or permit any merger, consolidation, re-organization, scheme of arrangements or compromise with its creditors or share holders or effect any scheme of amalgamation or reconstruction,

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(e) *INVESTMENT BY THE COMPANY*

Make any investment by way of deposits, loans, share capital etc. in any manner.

(f) *REVALUATION OF ASSETS*

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Revalue its assets.

(g) *TRADING ACTIVITY*

Carry on any general trading activity other than the sale of its own product."

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In terms of the Common Subscription Agreement on or about 17.9.1997, a Debenture Trust Deed was created, the relevant clauses whereof are as under :

"45. *MODIFICATIONS TO THESE PRESENTS :*

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The Trustees shall concur with the Company in making any modifications in these presents which in the opinion of the Trustees shall be expedient to make. Provided that once a modification has been approved by consent in writing of the holder(s) of the Debentures representing not less than three fourths in value of the Debentures for

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A the time being outstanding or by a special resolution duly passed at a meeting of the Debenture holders convened in accordance with the provisions set out in Fifth Schedule hereunder written, the Trustees shall give effect to the same by executing necessary Deed(s) supplemental to these presents.

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“The Third Schedule above referred to Financial Covenants and Conditions

1. DEBENTURES TO RANK PARI PASSU

C The debentures shall rank *pari passu inter se* without any preference or priority of one over the other or others of them.

10. VARIATION OF DEBENTURE HOLDERS' RIGHTS

D The rights, privileges and conditions attached to the Debentures may be varied, modified or abrogated in accordance with the Articles of Association of the Company and the Act and with the consent of the holders of the debentures by a Special Resolution passed at the meeting of the Debenture holders, provided that nothing in such resolution shall be operative against the Company where such resolution modifies or varies the terms and conditions governing the Debenture if the same are not acceptable to the Company.”

E “The Fourth Schedule Above Referred to

Form of Debenture Certificate

F Xxx xxx xxx

The Fifth Schedule Above Referred to Provisions for the Meeting of the Debenture holders

G 22. A meeting of the Debenture holders shall, *inter alia*, have the following powers exercisable in the manner hereinafter specified in Clause 23 hereof :

xxx xxx xxx

H (ii) Power to sanction any compromise or arrangement proposed to be made between the Company and the Debenture holders.

(iv) Power to assent to any scheme for reconstruction or amalgamation of or by the Company whether by sale or transfer of assets under any power in the Company's Memorandum of Association or otherwise under the Act or provisions of any law.

23. The powers set out in Clause 22 hereof shall be exercisable by a Special Resolution passed at a meeting of the provisions herein contained and carried by a majority consisting of not less than three-fourths of the persons voting thereat upon a show of hands or if a poll is demanded by a majority representing not less than three-fourths in value of the votes cast on such poll. Such a Resolution is hereinafter called "Special Resolution".

24. A Resolution, passed at a general meeting of the Debenture holder duly convened and held in accordance with these presents shall, be binding upon all the Debenture holders whether present or not, at such meeting and each of the Debenture holders shall be bound to give effect thereto accordingly, and the passing of any such resolutions shall be conclusive evidence that the circumstances justify the passing thereof, the intentions being that it shall rest with the meeting to determine without appeal whether or not the circumstances justify the passing of such resolution.

25. Notwithstanding anything herein contained, it shall be competent for all the Debenture holders to exercise the rights, powers and authorities of the Debenture holders under the said Trust Deed by a letter or letters signed by or on behalf of the holder or holders of at least three-fourths in value of the Debentures outstanding without convening a meeting of the Debenture holders as if such letter or letters constituted a resolution or a special resolution, as the case may be passed at a meeting duly convened and held as aforesaid and shall have effect accordingly."

Encumbrances having admittedly been created in favour of the debenture holders including the Appellant No.2 herein, in respect of the properties of the Respondent herein situated at Chikalhana, Nasik and Waluj in the State of Maharashtra wherefor a legal mortgage by way of Debenture Trust Deed was created on the Debenture Certificate issued to the parties as contained in Annexure R-4 appended to the Counter Affidavit filed on behalf of the Respondent, the relevant provisions whereof read as under :

A “The Debenture Certificate is issued in terms of the Debenture
Trust Deed dated 17th day of September, 1997 (“the Trust Deed”)
entered into between the Company and the Industrial Credit and
B Investment Corporation of India Limited (“the Trustees”). The Trustees
will act as Trustees for the holders for the time being of the Debentures
C (“the Debentures holders”) in accordance with the provisions of the
Trust Deed. The Debenture holders are entitled to the benefit of and
are bound by and are deemed to have notice of all the provisions of
the Trust Deed. All rights and remedies of the Debenture holders
against the Company in respect of arising out of or incidental to the
Debenture shall be exercisable by the Debenture holders only though
the Trustees.

The Debentures are issued subject to and with the benefit of the
Financial Covenants and Conditions endorsed hereon which shall be
binding on the Company and the Debenture holders and all persons
claiming by, through or under any of them and shall enure for the
D benefit of the Trustees and all persons claiming by, through or under
them. The Company hereby agrees and undertakes to duly and
punctually pay, observe and perform the Financial Covenants and
Conditions endorsed hereon.”

E It is accepted that the total sums invested by the financial institutions
in the aforementioned debentures is to the tune of Rs.197.43 crores whereas
UTI invested a sum of Rs.19.57 crores i.e. only about 10% of the total
investment.

F The Respondent herein having regard to the aforementioned restructuring
scheme filed an application before the High Court of Judicature at Bombay
in terms of Section 391 of the Companies Act which was marked as Company
Petition No.269 of 2003. In the said proceedings except UTI, all other
debenture holders sanctioned the restructuring package.

G Before the learned Company Judge, the Appellants herein, *inter alia*,
contended : (1) having regard to clause 7.5 of the agreement, the Respondent
is totally precluded from filing the said application before the court without
its consent; (2) the Respondent had suppressed material facts in the sense that
disclosure to the effect that the Respondent-Company was granted relief
under the Bombay Relief Undertakings Act, 1958 had not been made to the
said court; (3) the proposed scheme of arrangement is unfair, unreasonable
H and unjust which no prudent businessman will accept; and (4) UTI being an

investment company forms a separate class by itself and, thus, cannot be compared with other financial institutions, as they are only lenders whereas UTI is an investing agency. A

The learned Company Judge rejected all the contentions raised on behalf of the Appellants herein in terms of its judgment and order dated 1.10.2003. Aggrieved by and dissatisfied therewith, an appeal was preferred by the Appellants herein, which was dismissed by a Division Bench of the said Court by reason of the impugned order dated 12.4.2004. B

Dr. Rajeev Dhawan, the learned Senior Counsel appearing on behalf of the Appellants, took us through various documents and principally raised the following two contentions in support of this appeal : (i) Clause 7.5 of the agreement having not been found unfair or unconscionable is not hit by Section 28 of the Indian Contract Act and (ii) The negative covenant as contained in clause 7.5 of the agreement in relation to the matters specified therein is imperative in nature. C

Dr. Dhawan would urge that clause 7.5 being a consent clause, the Respondent herein could not have taken any action in violation thereof as thereby the entire investment plan of the Appellants would be put to jeopardy. D

Our attention was drawn to the fact that the Respondent herein obtained moratorium in terms of the provisions of the Bombay Relief Undertakings (Special Provisions) Act, 1958 on 6.8.2001 whereupon a notification was issued declaring the Respondent Company as "Relief Undertaking" and thereby directing that any right, privilege, obligation or liability accrued before 6.8.2001 would be suspended and any remedy for enforcement thereof shall also be suspended and all proceedings relating thereto before any court, tribunal, officer or authority shall be stayed. Such moratorium was extended by notifications dated 6.2.2002, 5.2.2003; and February 2004 for a period of one year commencing from 6.2.2004 to 5.2.2005. E

Referring to Section 28 of the Indian Contract Act, Dr. Dhawan would submit that the said provisions must be read in the light of the definition of 'consideration' as contained in Section 2(d) thereof having regard to the fact that the negative covenants are included as a part of consideration therein and, thereby no absolute bar was created for enforcing the rights of the Respondent under or in respect of the agreement in any ordinary tribunal. The Respondent, Dr. Dhawan would argue, had no legal right to maintain an application under Section 391 of the Companies Act as it was not an ordinary H

- A Tribunal. A Company Judge, according to Dr. Dhawan, merely exercises a supervisory jurisdiction in terms of Section 391 of the Companies Act and keeping in view the fact that by reason of a negative covenant even a right can be extinguished or foreclosed, the High Court committed a serious error in holding that clause 7.5 would be hit by Section 28 of the Indian Contract Act. In support of the said contentions, strong reliance has been placed by
- B *Dr. Dhawan on M/s M.G. Brothers Lorry Service v. M/s Prasad Textiles*, [1983] 3 SCC 61; *A.B.C. Laminart Pvt. Ltd. and Anr. v. A.P. Agencies, Salem*, [1989] 2 SCC 163; *Food Corporation of India v. New India Assurance Co. Ltd. and Ors. etc.*, [1994] 3 SCC 324; *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co. and Anr.*, [1997] 4 SCC 366; *Nutan Kumar and*
- C *Ors. v. Ind Additional District Judge and Ors.*, [2002] 8 SCC 31; *Shri Lachoo Mal v. Shri Radhey Shyam*, [1971] 1 SCC 619; *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, [1997] 1 SCC 579; *Kempe and Anr. (joint liquidators of Mentor Insurance Ltd. v. Ambassador Insurance Co. (in liquidation)*, (1998) 1 BCLC 234 and *Re Hawk Insurance Co. Ltd.*, (2001) 2 BCLC 480.
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The learned counsel would contend that the Appellants herein stand absolutely on a different footing *vis-a-vis* the other creditors as they invest money on a long term basis whereas the Appellants make investment for the benefit of the members of the mutual fund.

- E Mr. Soli J. Sorabjee, the learned Senior Counsel appearing on behalf of the Respondent, on the other hand, would submit that the agreement dated 19.6.1997 must be read with the trust of deed dated 17.9.1997 and so read it would be seen that the Appellants herein did not have any power of veto so as to frustrate such a scheme which is beneficial to all the debenture holders. According to the learned counsel, clause 7.5 does not confer an
- F absolute or unbridled power upon all the debenture holders but the same having regard to the principle of corporate democracy would only mean that such a decision would be taken by the majority of debenture holders. As the Appellants herein, the learned counsel would argue, made contribution only to the extent of 10% of the total amount lent by the debenture holders and their right being *pari passu* with other debenture holders, they cannot claim a preferential right. If clause 7.5 of the agreement is read in the manner, as suggested by the Appellants herein, Mr. Sorabjee would urge that thereby words have to be added thereto which is impermissible in law as by reason thereof one debenture holder would be conferred a power of veto resulting
- G whereof not only in violation of the principle of corporate democracy would
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be violated, but a change in the integrity of the document would also be brought about. A

Section 28 of the Indian Contract Act was invoked by the Respondent before the High Court, it was contended, only because the Appellants herein raised a contention that by reason of clause 7.5 an absolute bar has been created in moving an application under Section 391 of the Companies Act. B

For the purpose of this case, we shall proceed on the premise that clause 7.5 of the agreement is valid and is not hit by Section 28 of the Indian Contract Act.

A Common Subscription Agreement was entered into by and between the Respondent herein and all the debenture holders. The debenture holders named therein are collectively referred to by that expression and the expression means the debenture holders specified therein deriving their title to the debenture. The said agreement was entered into having regard to the fact that the Respondent approached all the debenture holders for financial assistance for meeting their long term capital requirement in response whereunto which debenture holders agreed to advance various sums of monies, in the form of subscription to 18.5%, 21,00,000 non-convertible privately placed debentures of Rs. 100 each. Out of the total investment of Rs.21,00,00,000 made by the debenture holders, the contribution of the Appellant is only Rs. 4,00,00,000. The Respondent in terms of the said agreement had undertaken to redeem the debentures in three equal instalments from the end of fourth year of the date of allotment and ending in the sixth year. C
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E

In terms of clause 2.2 all debenture holders are entitled to be treated *pari passu inter se* wherefor no preference or priority of one over the other can be given. F

The Industrial Credit and Investment Corporation Limited became the trustee for the debenture holders. In the agreement wherever an individual right has been conferred upon the debenture holders, they have been described as debenture holder(s) or debenture-holder/s. Debenture certificates were issued to the debenture holders in terms of the Debentures Trust Deed pursuant whereunto they became entitled to the benefits specified therein but they were bound by and were deemed to have notice of all the provisions of the Trust Deed. The rights and remedies of the debenture holders against the company were to be exercised only through the trustee. G
H

A Clause 7.5 contains a negative covenant which enjoined the company not to undertake or affect any scheme of amalgamation or re-construction unless the debenture holders/trustees would otherwise agree.

B Does this mean that all the debenture holders/trustees singularly or collectively must agree thereto that the decision of the majority shall prevail, is the question involved in this appeal.

C We may at the outset notice that clause 7.8 of the said agreement uses the expression 'any or all of debenture holders'. The parties to the agreement, therefore, have used two different expressions in the said agreement, namely, (1) debenture-holders/trustees; and (2) any or all of debenture holders. We have noticed hereinbefore that the debenture holders have been referred to in the agreement in the said capacity collectively. The definition of debenture holders contains the expression 'means' which shows that it is not an expansive definition. The category of the debenture holders are confined to those who in terms of the agreement are holders of the debentures deriving their title thereto.

D In terms of clause 10 of the Trust Deed, the rights, privileges and conditions attached to the debentures may be varied, modified or abrogated only in accordance with the Articles of Association of the Company and the Act and with the consent of the debenture holders by a special resolution passed at the meeting of the debenture holders but in terms of the proviso appended thereto nothing in such resolution shall be operative against the company where such resolution modifies or varies the terms and conditions governing the debentures, if the same are not acceptable to the company. The Trust Deed speaks of such resolution also in terms of clauses 22 and 24 thereof. Clause 25 provides that such a resolution may be adopted by circulation of letter or letters. The provisions of the Trust Deed and in particular clauses 22, 23, 24 and 25 thereof leave no manner of doubt that a resolution has to be passed in the manner laid down therein and/or in terms of the Companies Act.

G The common subscription agreement is an investment/ loan agreement. The provisions contained therein are required to be read in their entirety and for the said purpose it is permissible to read the negative covenants with the positive covenants. It will, however, not be correct to say that the common subscription agreement has to be interpreted on its own without any reference to the trust deed. The provisions of the trust deed, in our opinion, can be referred to for the purpose of giving a true meaning to the agreement, as

there does not exist any conflict between the two. They are to be considered together for the purpose of finding out as to how the agreement can be worked out. A

This Court in this case is not called upon to interpret the nature of a document or the covenants entered into by and between the parties. The agreement specifies the rights and privileges of the parties thereto and in particular the rights and privileges of the debenture holder either collectively or individually. B

The underlying or basic thread of the agreement *vis-a-vis* the trust deed is that the majority principle was accepted by the authorities. They do not provide for an unanimity; or any veto power in favour of one debenture holder so as to scuttle the decision of the majority. C

In *Moti Ram and Ors. v. State of Madhya Pradesh*, AIR (1978) SC 1594, this Court noticed the observation of *Justice Frankfurter in Massachusetts B. & Insurance Co. v. U.S.*, (1956) 352 US 128 at 138 which is to the following effect : D

“there is no surer way to misread a document than to read it literally”

It is true that a negative covenant by itself is not invalid in law. But it is also true that it requires a strict construction. The agreement is a commercial document. Commercial documents must be construed in a manner as are understood in commercial parlance. A commercial document must be read reasonably. It must be construed in such a manner so that it is made workable. E

The parties to the agreement are commercial concerns. Each party would indisputably try to protect its interest when advancing loans or making investment but it must also be conceded that they were aware of the risk factor involved therein. The factors which are responsible for sufferance of loss by the Respondent herein to the extent of 228.58 crores was as a result of market situation then prevailing, i.e. steep devaluation of currencies of Korea and Indonesia who were the major suppliers of film in the international market as a result whereof they started dumping the materials at cheap prices in Europe, and the levy of anti-dumping/anti-subsidy duties by the European Union as a result whereof sales to European countries came down drastically. F G

The restructuring package was evolved at the instance of the Industrial Development Bank of India which was the largest lender and the trustee upon H

A obtaining a report in that behalf from KPMG, a reputed concern. A scheme envisaged under Section 391 of the Companies Act, it is well-settled, is a commercial document.

B Section 391 read with Section 393 of the Act postulate that where a compromise or arrangement is proposed between a company and its creditors or any class of them; or between a company and its members or any class of them, the court is required to direct holding of meetings of creditors or class of creditors or members or class of members who are concerned with such a scheme. In the event majority of the creditors 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 thereto thus put to vote, whereupon, the court may consider the question of grant of sanction thereto. Section 391(1)(a) enjoins that requisite information therefor should be placed for consideration before the voters, in terms whereof the creditors or class of creditors can take an informed decision in relation thereto. The court, however, would not grant sanction to such a scheme only because the same reflects the will of the majority of the creditors or a class of them but it must consider all aspects of the matter so as to arrive at a finding that the scheme is fair, just and reasonable and does not contravene public policy or any statutory provision. Such a care or caution is required to be exercised by all courts including the Civil Court in terms of Order XXIII, Rule 1 of the Code of Civil Procedure.

F The scope and jurisdiction of the Company Court has been examined at some length by a Division Bench of this Court in *Miheer H. Mafatlal* (supra) wherein the broad contours of such jurisdiction have been enumerated indicating :

G "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.

H 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.” A

In *J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd. and Ors. etc.*, [1969] 2 SCR 866, it was held :

“.....The principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties : it becomes binding on the company, the creditors and the shareholders and has statutory force, and, therefore the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of sec. 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dissented from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration” B C

It is not the case of the Appellants that the learned Company Judge has exceeded his jurisdiction and acted in violation of the said guidelines. Once it is held that the normal rule, namely, the principle of majority in corporate democracy or in other words, governance of the company by majority, is accepted, the Appellants could not be heard to say that they had an absolute right to exercise veto power and thereby scuttle a *bona fide* attempt to revive a company. Efforts to keep a company from becoming insolvent and even to revive an insolvent corporate have been receiving legislative and executive support, as would be evident from several Parliamentary Act, as for example the Sick Industrial Companies (Special Provisions) Act, 1985 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. D E

It is difficult for us to agree with the submission of Dr. Dhawan that clause 7.5 puts a total embargo on the part of the company or other creditors to file a compromise under Section 391 of the Companies Act without obtaining the consent of all debenture holders. Clause 7.5 neither can be read in such a manner nor should be read. Such a construction would be unwarranted having regard to the fact that two different expressions have been used in different clauses. Wherever a right has been conferred upon an individual debenture holder, the agreement used the expression ‘any or all the debenture holders’ as contrasted by all debenture holders. The debenture holders are required to exercise their right through the trustee save and except in the cases which confer specified power to them. The Appellants herein F G H

A cannot claim any priority or preference in the matter of realization of their dues over the other debenture holders. Each debenture holders has a *pari passu* right with each other, as is evident from clause 2.2.

In *J.K. (Bombay) (P) Ltd.*, (supra), it was held :

B “The Court could not have completed, as contended by the appellants, their rights which were still incomplete or order the company to execute a debenture trust deed or the second mortgage, and thus set up the appellants and the other Sch. ‘B’ creditors as secured creditors against the rest of the unsecured creditors. Such an order could not be passed as it would be contrary to and in breach of the right of distribution *pari passu* of the joint body of unsecured creditors.”

C [See also *Andhra Bank v. Official Liquidator and Anr.*, (2005) 3 SCALE 178]

D In view of the our findings aforementioned, we are of the opinion that the Appellants herein having failed to establish that they could hold the entire scheme to ransom so as to stall the proceedings as a result whereof the majority of debenture holders would be deprived, the purpose or object motivating the Appellants to advance such a huge amount to the Respondent against issue of debentures is a matter of little or of no concern to the Respondent - company or other debenture holders. A special or a new right cannot be found in favour of the Appellants in the agreement when it creates none. The scheme applies equally to all debenture holders and as such the Appellants cannot be treated as a separate class. Once the Respondent-Company prima facie showed that the scheme is fair and reasonable and also that the requisite majority of the debenture holders recorded their decision in its favour, the court in absence of any unforeseen unjustness or unreasonableness therein ought not to reject the same.

E The Company Judge by reason of the impugned judgment while exercising a supervisory jurisdiction only accepted the scheme. The High Court’s decision is not being questioned as unfair.

G The Respondent in view of the Scheme has no remedy other than approaching the High Court under Section 391 of the Companies Act.

H In *Sardar Amarjit Singh Kalra (Dead) by Lrs. and Ors. etc. v. Pramod Gupta (Smt.) (Dead) by Lrs. and Ors. etc.*, [2003] 3 SCC 272], this Court

stated :

“As far as possible, courts must always aim to preserve and protect the rights of the parties and extend help to enforce them rather than deny relief and thereby render the rights themselves otiose, “ubi jusibi remedium” (where there is a right, there is a remedy) being a basic principle of jurisprudence. Such a course would be more conducive and better conform to a fair, reasonable and proper administration of justice.”

We may at this stage refer to the decisions relied upon by Dr. Dhawan.

In the case of *Nanakram v. Kundalrai*, [1986] 3 SCC 83 as also *Nutan Kumar and Ors. v. IInd Additional District Judge and Ors.*, [2002] 8 SCC 31 the question which arose for consideration was as to whether a lease in violation of statutory provision was void. Such a question does not arise for consideration herein.

In *Delhi Development Authority v. Durga Chand Kaushish*, [1973] 2 SCC 825, the court was concerned with the interpretation of a deed of lease. It was noticed:

“19. Both sides have relied upon certain passages in Odgers’ *Construction of Deeds and Statutes* (5th Edn. 1967). There (at pp. 28-29), the First General Rule of Interpretation formulated is: “The meaning of the document or of a particular part of it is therefore to be sought for in the document itself”. That is, undoubtedly, the primary rule of construction to which Sections 90 to 94 of the Indian Evidence Act give statutory recognition and effect, with certain exceptions contained in Sections 95 to 98 of the Act. *Of course, “the document” means “the document” read as a whole and not piecemeal.*”

(Emphasis supplied)

There is no quarrel with the aforementioned position of law.

In *Smt. Rajbir Kaur and Anr. v. M/s. S. Chokesiri and Co.*, [1989] 1 SCC 19, the court was concerned with the interpretation as to whether a document in question was a lease or a licence. The said decision has been rendered on the fact of the said case and on the basis of the evidence brought on records as to whether the tailor and the ice-cream vendors had been put in exclusive possession in the tenanted premises. The said decision has no

A application to the fact of the present case.

Delta International Ltd. v. Shyam Sundar Ganeriwalla and Anr., [1999] 4 SCC 545 again dealt with a similar question. It was observed:

B “27. Lastly, it is to be noted that if the document is a camouflage as stated earlier, the mask or veil is required to be removed for determining the true intent and purpose of the document. In the present case, there is no pleading by the defendants that the document was a camouflage so as to defeat the rights of a tenant who had inducted the appellant or that of the owner of the premises. As stated earlier, C the document contemplates three types of agreements, one, that of a leave and licence; secondly, in case a consent is obtained from the tenant (sic landlord), for execution of a sub-lease which would create an interest in the property as a sub-tenant and thirdly, in case of a sub-lease, for purchase of equipment, fitting and fixtures at a price of Rs 2,50,000. The second and third parts of the agreement never came D into operation. Hence, for the reasons discussed above, we hold that the agreement dated 18-7-1970 is a deed of “leave and licence” and not a “lease”.”

The said decision also has no application in the instant case.

E In view of our findings aforementioned, it is not necessary for us to enter into the question as to whether clause 7.5 of the agreement is hit by Section 28 of the Indian Contract Act or not.

F We do not find any merit in this appeal which is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

S.K.S.

Appeal dismissed.