

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**COMPANY APPLICATION No. 217 of 2005
WITH
COMPANY APPLICATION No. 224 of 2005**

For Approval and Signature:

THE HON'BLE MR.JUSTICE K.A.PUJ

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- 1 Whether Reporters of Local Papers may
be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the
fair copy of the judgment ?
 - Whether this case involves a
substantial question of law as to the
 - 4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?
 - 5 Whether it is to be circulated to the
civil judge ?

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**ESSAR OIL LIMITED - Petitioner(s)
Versus
.. - Respondent(s)**

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Appearance :

MR M.J. THAKORE AND MR S.N. SOPARKAR, SENIOR ADVOCATES
WITH MR SUNIT S SHAH for Applicant Company.
MR N K PAHWA for Objector – Peerless.

MRS K.K. RAVAL WITH MS DHARMISHTHA N RAVAL for Objector
- UTI.

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CORAM :THE HON'BLE MR.JUSTICE K.A.PUJ

Date : 30/06/2005

COMMON ORAL JUDGMENT

1. Company Application No. 217 of 2005 is filed by Essar Oil Limited seeking direction of this Court for convening of the meeting of the Scheme Lenders of the applicant Company for the purpose of considering and if thought fit, approving with or without modification, the arrangement embodied in the Scheme of Compromise and arrangement between the applicant Company and its Scheme Lenders. The applicant has also prayed for the method of convening, holding and conducting the said meetings and as to the notice and advertisement be issued in this behalf. Lastly, the applicant has prayed for the appointment of the Chairman of the meeting.
2. Company Application No. 224 of 2005 is filed by Peerless General Finance and Investment Company

Limited seeking declaration from this Court to declare the Scheme of Arrangement and Compromise (Annexure 'II') submitted by the Company is null and void. Alternatively, the direction was sought for by the applicant to direct the Company to convene separate meeting of the Debenture holders holding more than 2000 debentures in the interest of justice.

3. Company Application No. 217 of 2005 was filed on 23.06.2005 and it was placed for hearing on 24.06.2005. However, a request was made on behalf of the applicant in Company Application No. 224 of 2005 to adjourn the said matter. Accordingly, it was adjourned to 27.06.2005. On that day, Peerless General Finance and Investment Company Limited has moved Company Application No. 224 of 2005 and has sought the permission of this Court to circulate the said matter and hear the same along with Company Application No. 217 of 2005. Accordingly, both these applications are heard

together with the consent of the parties and on mutual understanding between the parties, the hearing of both these applications is treated as the final hearing of the applications.

4. As far as Company Application No. 217 of 2005 is concerned, an affidavit in support of the Judge's Summons is filed by Shri Sheikh S. Shaffi, Senior Vice President and Company Secretary of the applicant Company. Mr. Mihir Thakore and Mr. S.N. Soparkar, learned senior counsels along with Mr. Sunit S. Shah, learned advocate appeared on behalf of the applicant Company. It is submitted that before filing the present application, the Company has initially filed four separate company applications being Company Application Nos. 164, 166, 167 & 168 of 2003. It is further stated that the Scheme proposed by the applicant Company were in line with the proposed terms of CDR package under discussion at that time and based on discussions with the principal lenders. This

Court has accorded its sanction to three out of four Schemes vide its judgment and orders dated 07.10.2004. In respect of the 4th Scheme of the Debenture holders holding more than 2000 debentures mainly comprising of Financial Institutions, Banks and Mutual Funds, the meetings were held and adjourned from time to time in view of the ongoing deliberations and discussions with the CDR Cell on the proposal of restructuring package for overall dues of Lenders including dues pertaining to the debenture holders. The CDR Cell vide their letter dated 17.11.2004, conveyed their final approval to restructuring package. Some of the debenture holders were not in agreement with the Scheme proposed by the applicant Company by way of Company Application No. 166 of 2003. One of the debenture holders, namely, Peerless General Finance and Investment Company Limited has approached this Court by way of Company Application No. 405 of 2004 inter alia on the ground that more than 1/4th of the debenture

holders are not agreeable to the Scheme proposed by the applicant Company and, therefore, the said Scheme proposed for debenture holders holding more than 2000 debentures have failed. This Court vide its order dated 21.02.2005 disposed of Company Application No. 405 of 2004 inter alia directing the Chairman of the meeting to hold the meeting on 23.02.2005 or any other adjourned meeting thereafter but not later than 30.06.2005.

5. It is further stated that in the meantime, some of the debenture holders had given their proposal in respect of the settlement of their debts. The applicant Company under the terms of the CDR sanction was obliged to refer the matter to Lender Monitoring Committee for its decision and approval. Subsequent to the order passed by this Court in Company Application No. 405 of 2004, several meetings were held by the Company with the Lender Monitoring Committee in respect of the proposal put forward by certain debenture holders.

The Company had also held meetings with the said debenture holders from time to time in respect of the proposals submitted by them. The Lender Monitoring Committee after evaluation of the proposals placed by the said Debenture holders with the sustainability of the Company's cashflows, sustainability of Company's debt and post-settlement and impact on project completion with the envisaged time and cost suggested for the repayment of the dues as on maturity date of all the debenture holders with 5% each down payment immediately and thereafter another 5% at the end of 12 months from the down payment date and the balance within a period of 6 years from the down payment date. The said proposal suggested by the Lender Monitoring Committee did not lend support of the said debenture holders inspite of efforts made by the Company based on the guidelines provided by the Lender Monitoring Committee. The meeting of the debenture holders was thereafter adjourned to 25.06.2005. However, the lenders

informed the Company to restructure all the debts in line with CDR sanction and hence, the Company has moved the present Scheme and sought the direction of this Court.

6. It is further stated that the Scheme now framed by the Company is on the line of the restructuring package sanctioned by CDR Cell and it contemplates waiver of default interest and charges, reduction in rate of interest, deferment of repayment of borrowings and further financing for restarting the project, varying the terms and conditions of various borrowings coupled with injection of fresh funds from Promoters and Lenders for the purpose of restart and completion of the Refinery. The Refinery is expected to be commissioned within 18 to 24 months after restart of the Project Implementation activities.

7. Mr. M.J. Thakore has submitted that for the purpose of seeking direction for convening the

meeting under Section 391 (1), no other party is required to be heard. In this connection, he has drawn the attention of the Court to the provisions of Rule 67, 68 & 71 of the Company (Court) Rules, 1959. Rule 67 deals with Summons for directions to convene a meeting. It reads as under :-

67. Summons for directions to convene a meeting :-

An application under Section 391 (1) for an order convening a meeting of Creditors and/or members or any class of them shall be by a Judge's Summons supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed to the affidavit as an exhibit thereto. Save as provided in Rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form No. 33 and the affidavit in support thereof in Form No. 34.

Rule 68 carves out an exception. It deals with Service on Company. It reads as under :-

68. Service on Company :-

Where the Company is not the applicant, a copy of the summons and of the affidavit shall be served on the Company, or, where the company is being wound up on its liquidator, not less than 14 days before the date is fixed for the hearing of the summons.

8. Mr. Thakore has further submitted that combined reading of Rule 67 & 68 makes it clear that an application under Section 391 (1) for an order convening the meeting of Creditors or members shall be moved ex parte except where the Company is not the applicant or the Company is being wound up. In this context, he has invited the attention of the Court to Rule 71. It deals with application for stay. It reads as under :-

71. Application for Stay :-

An application under sub-section (6) of Section

391 for stay of the commencement or continuation of any suit or proceeding against the Company may be moved by a Judge's Summons ex parte, provided that where a petition for winding up of the Company or a petition under Section 397 or 398 is pending, notice of the application shall be given to the petitioner in such petition.

9. He has further submitted that in the present case, the applicant has simply moved an application under Section 391 (1) seeking direction for convening the meeting of the Scheme Lenders. No application under Section 391 (6) for stay has been moved by the Company. The objectors have no right to have any audience while deciding the application by the Court seeking direction to convening the meeting under Section 391 (1) of the Act. He has further submitted that the provisions contained in Rule 69 deals with directions at hearing of Summons and it starts with "*Upon the hearing of the summons or any adjourned hearing*

thereof, the Court can give such directions as it may think necessary in respect of the matters enumerated therein." The word "hearing" contemplates that the hearing of all the parties interested in the proceedings. This issue arose before the Allahabad High Court in the case of **HIND AUTO INDUSTRIES LIMITED V/S. PREMIER MOTORS (P.) LTD. AND OTHERS, (1969) 39 COMPANY CASES 137 (ALL.)**. The Court takes the view that hearing as contemplated by Rule 69 obviously implies hearing of all sides which are to be heard and each of the questions, in Rule 69 involves the interest or at any rate the convenience of persons whose meetings are to be held. The shareholders are necessary parties before a decision can be taken on the matters specified in Rule 69 and are entitled to be heard at this stage. The Court further takes the view that even if the rule does not specifically provide for such notice to them, Rule 9 of Rules enables the Company Court in the exercise of its inherent powers to issue

directions for service of notice upon the persons concerned or interested. The Court, therefore, held that the nature of function exercised in the matter before the Court under Section 391 (1) is undoubtedly a judicial function and both the Central Government and the shareholders are entitled to notice.

10. Mr. Thakore has also referred to the decision of the Bombay High Court in the case of VASANT INVESTMENT CORPN. LTD. V/S. COLABA LAND AND MILLS CO. LTD. (1977) 47 COMPANY CASES 662 (BOM.)

wherein it is held that merely because a rule makes the provision for ex parte application, it cannot debar the party interested in the action from placing its view point that the proposed order should or should not be made. The interest of justice require that if a party desires to make any submission, even at the ex parte stage, the Court should hear him. Precisely for this reason and keeping these judicial pronouncements in mind,

the Court has orally directed the applicant to supply a copy of the application to the learned counsel appearing for Peerless General Finance and Investment Company Limited. The Court is, therefore, of the view that though the proceedings as referred to in Rule 67 are ex parte proceedings, the Court while exercising its inherent powers permits the interested parties to make their submissions before the Court in respect of the directions which are sought from the Court. The Court has, accordingly, heard Mr. N.K. Pahwa, learned advocate appearing for Peerless General Finance and Investment Company Limited and Ms. Dharmishtha N. Raval, learned advocate appearing for UTI.

11. Mr. Thakore has addressed the Court on the other issue as to whether the Court can examine the Scheme at the stage of seeking direction for convening the meeting or whether the Court can straightway reject the Scheme without issuing

direction to convene the meeting. In this connection, he relied on the decision of **GUJARATI KAMDAR SAHAKARI MANDAL AND OTHERS V/S. RAMKRISHNA MILLS LIMITED (1998) 92 COMPANY CASES 692 (GUJ.)** wherein this Court has observed that when in cases where at the threshold serious objections are raised by class of Creditors, the Court may issue directions to convene the meetings of shareholders and Creditors because the discussion and exchange of views, with or without modification may ultimately result in the evolving of some such scheme which may become acceptable to a class of persons who opposed the scheme initially. The Court has further observed that the very purpose of this consultation would be frustrated if the Sponsor of the Scheme is denied opportunity of consulting the affected interests by convening the meeting. The Court has, therefore, taken the view that the application cannot be rejected by the Court at the very threshold.

12. Mr. Thakore further relied on the decision of the Hon'ble Supreme Court in the case of **RAINBOW DENIM LIMITED V/S. RAMA PETROCHEMICALS LIMITED (2003) 116 COMPANY CASES 641 (S.C.)** wherein the Hon'ble Supreme Court has observed that the appropriate time for the Company Judge to consider the scheme was subsequent to approval thereof by the shareholders and creditors of the appellant Company. Therefore, the orders of the Company Judge and the Division Bench were to be set aside and liberty given to the appellant Company to move the High Court for calling meetings of its shareholders and creditors for the purpose of considering and approving the Scheme. Once that was done a further application had to be made to the Company Judge and that would be the time for him to consider the Scheme. Though in no uncertain terms, the Hon'ble Supreme Court has observed that it is not time for the Company Judge to consider at the stage of issuance of direction to convene the meeting, whether the said

observations are confining to the facts of that case only or it lays down any precedent.

13. In this connection, Mr. Thakore has invited the Court's attention to the decision of this Court dated 24.02.2005 in **Company Application No. 01 of 2005 in the case of SHREE RAMA MULTITECH LTD.**

Wherein this Court has taken the view that the plain reading of Rule 69 itself makes it clear that the powers are conferred on the Company Judge even to dismiss the Summons at the stage of hearing of Summons. The Court has further taken the view that the observation made by the Hon'ble Supreme Court does not lay down any precedent and the said observations are confining to the facts of the said case. The Court has ample power within the meaning of Rule 69 to dismiss the Summons at the initial stage if prima facie it appears to the Court that the application is not sustainable or is palpably in contravention of the provisions of the Act. In such case, the Court

does not show any indulgence for issuance of directions to convene the meeting. Mr. Thakore has, therefore, submitted that the exceptions carved out by this Court in this decision are not applicable to the facts of the present case as it cannot be said that the present application is not sustainable or that it is palpably in contravention of the provisions of the Act. He has, therefore, submitted that the prayers made in the present application by the Company and the directions sought for therein should be granted by this Court.

14. Mr. N.K. Pahwa, learned advocate appearing for Peerless General Finance and Investment Company Limited, the applicant in Company Application No. 224 of 2005 has submitted that the Company from its very inception had classified its liabilities in two parts, one pertaining to the dues of the Banks and Financial Institutions and the other pertaining to the dues of Debenture holders.

Whereas in so far as the dues of Banks and Financial Institutions are concerned, the Company has already reached to an agreement of compromise with them which is binding on the parties under a Restructuring package finally sanctioned by CDR Cell. The Company has thereafter proposed the Scheme under Section 391 of the Act for the Debenture holders. As far as the present Scheme is concerned, the Company has put both the Banks and Financial Institutions as well as the Debenture holders holding more than 2000 debentures under one Class. This is being done despite the fact that so far as Banks and Financial Institutions are concerned, there is no question of any Scheme for compromise as the respondent Company has already reached to a compromise with them under a Restructuring package approved by CDR Cell. As per CDR system, the Restructuring Package approved by CDR Cell is binding on the parties. Pursuant to the approval granted by CDR Cell, formal contracts in the

direction of implementation of the Restructuring Package were also executed. There is, therefore, no reason to include the Banks and Financial Institutions in the present Scheme for the debts which are already restructured. The Banks and Financial Institutions, even otherwise, constitute a separate and distinct Class as compared to the Debenture holders and it is not open for the Company to club these two Classes into one.

15. Mr. Pahwa has further submitted that the present Scheme is proposed by the Company only with a view to see that the debenture holders who are opposed to the Scheme as proposed earlier by the Company and who had about 33% stake are brought down below the statutory margin of majority required under Section 391 of the Act. The Company is not entitled to any orders from this Court on the application submitted by the Company. The Company once having failed in procuring their requisite majority for the purpose of approval of the Scheme

has presented the present Scheme with completely malafide intentions and with ulterior motives. The Company is seeking to enforce its own terms upon the Debenture holders. The present Scheme is completely a replica of the CDR package which is approved by the Banks and Financial Institutions for themselves and by presenting such Scheme, the Company is seeking to impose the CDR package upon the Debenture holders by adopting this illegal method. Mr. Pahwa has, therefore, submitted that the present Scheme is nothing but a gross case of fraud which is sought to be committed upon the Debenture holders.

16. Mr. Pahwa has further submitted that a comparison of the earlier Scheme which is already rejected and the present Scheme will disclose that the present Scheme is much more worse in its offer for compromise with the Debenture holders. As per the earlier Scheme, the Company proposed moratorium period for payment of the principal amount upto

20.04.2009 and to be paid in 8 Annual installments from 20.04.2009 to 20.04.2017 whereas under the present Scheme, the Company is proposing moratorium period of the principal amount upto 25.10.2014 and repayment upto 25.07.2018 (assuming Project re-start date of 25.01.2005 and completion date of 25.04.2007). With respect to payment of interest for the period from 01.10.1998 to 29.12.2003, in the earlier Scheme, the Company proposed to pay the interest as a Bullet repayment on 20.04.2025, whereas in the present Scheme, it is proposed for a Bullet repayment by 31.03.2026. He has further invited the Court's attention to the distinguishing features between the Term Lenders and Working Capital Lenders on the one side and Debenture Holders on the other side. In this connection, he has submitted that as far as Term Lenders are concerned, the year of investment / finance is 1996 and there are distinguishing features with regard to governing document, rate of interest, repayment, security, listing and the

nature of finance / investment for investor. So far as Debenture Holders are concerned, the same were issued pursuant to the public issue prospectus. The rate of interest was 14%. It was to be repaid by April, 2003 and the Debenture Holders are having second charge over assets of the Company and there was no personal guarantee of promoters. Moreover, security in trust managed by a debenture trustee and the Security is common for all debenture holders on a particular debenture issue. He has, therefore, submitted that both these Classes are different and they can never be put in the same class.

17. Mr. Pahwa has further submitted that the Company itself has firstly proposed the Scheme for the Debenture holders holding more than 2000 debentures by treating them as a separate Class. However, having realised that this Scheme is not being accepted, the Company kept on adjourning the meetings on its own without any approval of this

Court for almost two years. Ultimately, this Court has directed the Company to conclude the meeting latest by 30.06.2005. Faced with no other legal way, the Company has presented the Scheme which, on the face of it, suffers from the vice of malafides. He has, therefore, submitted that the Scheme should be declared as null and void at the very outset.

18. Mr. Pahwa has further submitted that though the Company's counsel has relied on the decision of this Court as well as the decision of the Hon'ble Supreme Court, the present case clearly falls within the ambit of the exceptions carved out by this Court in the order dated 24.02.2005 in Company Application No. 01 of 2005 in the case of Rama Multitech as the present application on the face of it is not maintainable and even otherwise, not sustainable and it is palpably in contravention of the provisions of the Act. He has, therefore, submitted that the directions

sought for in the present application should not be granted by this Court.

19. Alternatively, Mr. Pahwa has submitted that if this Court is not inclined to declare the Scheme as null and void at the very threshold, necessary directions may be issued to the Company to hold separate meeting for the Debenture Holders holding more than 2000 debentures as this class of debenture holders is absolutely a different class having no connection whatsoever with the other Term Lenders as well as Working Capital Lenders. Their institutions are different, their nature of security is different and in all respect, they cannot sit together and take any decision in the meeting and hence, as per the decided case law, direction may be issued by this Court to hold separate meeting for the Debenture holders.

20. In support of his submission, he has relied on the decision of this Court in the case of **SHREE**

BANSIDHAR PVT. LTD. V/S. O.L. OF M/S. SHREE
BANSIDHAR SPG. AND WVG. MILLS PVT. LTD. in Company
Application No. 67 of 2004 wherein the Scheme proposed by the Company was rejected by the Court at the very threshold. An appeal preferred against the said decision by way of O.J. Appeal NO. 31 of 2004 was also not pressed by the Company and the same was withdrawn with a liberty to move the Company Judge by review application. He has, therefore, submitted that this Court has an ample power to reject the Scheme at the very threshold. Alternatively, he has submitted that this Court may issue direction for convening the separate meeting of the two separate Classes of Creditors.

21. Ms. Dharmishtha N. Raval, learned advocate appearing for UTI has initially prayed for time to place certain evidence on record so as to show that the Scheme is in violation of the provisions of law as well as the guidelines issued by SEBI. In the alternative, she has adopted the arguments

of Mr. N.K. Pahwa and strongly opposed the Scheme. In addition to this, she relied on the decision of this Court in the case of MOTOROL (INDIA) LTD., In re. (2001) 103 COMPANY CASES 389 wherein this Court has held that in view of the serious allegations made regarding non-refund of the sum of Rs. 1.80 Crores in respect of non-purchase and non-installation of the two windmills out of the four windmills for which advance was made by the financier and in view of the fact that out of the unsecured creditors to the tune of Rs. 20.90 Crores, unsecured creditors to the tune of Rs. 10.29 Crores had not only filed winding up petitions but were also opposing the proposed scheme this was not a fit case for granting the prayer made by the applicant Company for convening the meetings of the creditors and the shareholders of the applicant company. The Court was unable to give any prima facie finding that the scheme was bona fide and in the interest of the Company. This application was, therefore, liable to be

rejected.

22. In rejoinder to the arguments canvassed by Mr. Pahwa as well as by Ms. Dharmishtha N. Raval, learned Senior Counsels Mr. Mihir Thakore & Mr. S.N. Soparkar for the Company have submitted that there is no question of declaring the Scheme as null and void at this stage. The arguments which are canvassed by the Objectors can certainly be considered at the time when substantive petition is filed by the Company. Even with regard to the alternative prayer made by Mr. Pahwa, Mr. Mihir Thakore & Mr. S.N. Soparkar have submitted that the Court should not entertain this prayer at this stage as the issue regarding what constitutes a Class is more or less settled by the Division Bench of this Court as well as by the Apex Court in the case of MAFATLAL INDUSTRIES LIMITED, (1996) 87 COMPANY CASES 705 and 87 COMPANY CASES 792 respectively. The division Bench of this Court as well as the Apex Court both have quoted with

approval the relevant passage from *Palmer's Company Law, 24th Edition*, in respect of the issue as to what constitutes a class. The Court observed that in *Palmer's Company Law, 24th Edition*, the principle which is germane for constituting a separate class of members or creditors requiring a meeting in pursuance of the directions of the Court under the English law has been enunciated thus : What constitutes a Class ? The Court does not itself consider at this point what classes of creditors or members should be made parties to the Scheme. This is for the Company to decide, in accordance with what the Scheme purports to achieve. The application for an order for meetings is a preliminary step, the application taking the risk that the classes which are fixed by the Judge, unusually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, and we emphasise the words "in the result" they reveal inadequacies, the

Scheme will not be approved. The same thing has been reiterated by the Hon'ble Apex Court in the case of MIHEER H. MAFATLAL V/S. MAFATLAL INDUSTRIES LIMITED, (1996) 87 COMPANY CASES 792

and after quoting the said paragraph from *Palmer's Company Law, 24th Edition*, the Court observed that it is, therefore, obvious that unless a separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened. Mr. Mihir Thakore & Mr. S.N. Soparkar have, therefore, submitted that in view of these observations, even the alternative prayer should not be granted by this Court.

23. After having heard the learned Senior Counsels, Mr. Mihir Thakore & Mr. S.N. Soparkar with Mr. Sunit S. Shah for the Company and Mr. Navin K. Pahwa and Ms. Dharmishtha N. Raval for the

Objectors, Peerless and UTI respectively in both these applications and after having considered their rival contentions, factual background and circumstances leading to the present application filed by the Company and the authorities cited before the Court, the Court is of the view that it is not just and proper for this Court to reject this application at the very threshold, filed by the Company seeking direction for convening the meeting of the Scheme Lenders to consider the Scheme of Compromise and Arrangement between the Company and Scheme Lenders, on the ground that it is malafide moved and it is fraud on the Debenture holders holding more than 2000 debentures of the Company who are reduced to minorities in the present Scheme because of fraudulent classification and placing them in the same class, with Term Lenders and Working Capital Lenders and hence, the present Scheme is illegal and null and void, as alleged by the objectors. The Court has discussed this issue at length in the earlier part

of this judgment, by referring to the relevant statutory provisions and decisions of this Court and other High Courts as well as the Hon'ble Supreme Court. The Court, however, finds itself unable to prima facie, hold that the application moved by the Company is not sustainable or is palpably in contravention of the provisions of the Act, which restrains the Court from showing any indulgence in issuing directions to convene the meeting, as observed by this Court in its judgment dated 24.02.2005 in Company Application No. 1 of 2005 in the case of Shree Rama Multitech Limited. It is, however, very obvious that the Company has moved the present application to get through the Scheme of a newly created class, namely, "Scheme Lenders", by a requisite statutory majority at the meeting so as to bind the Debenture holders holding more than 2000 debentures of the Company. But, this fact by itself is not enough to outrightly reject the Scheme especially when such minority will have an opportunity to discuss and

deliberate at the Scheme and even if the Scheme is approved at the meeting by requisite statutory majority, despite their valid and strong objections, they will again have an opportunity to raise their grievance before the Court when substantive petition is filed by the Company for confirmation of the Scheme.

24. This leads to the another issue raised before the Court in relation to the constitution of class. The Company has earlier proposed the Scheme for four different class of Debenture holders. Three different class of Debenture holders have approved the Scheme at the meetings and the same were duly sanctioned by the Court. However, with regard to the Scheme of fourth class of Debenture holders holding more than 2000 debentures, the Chairman of the meeting held on 25.06.2005, has filed his report of even date and recorded the Company's submission therein that considering the current status of project implementation and the option

given to small debenture holders approved by this Court, the Company made the best possible efforts to work out an option acceptable to all concerned parties but did not succeed. Since the Company is required to comply with certain conditions of CDR proposal to restart and complete the project within the next three months, the Company has proposed a new Scheme which is in line with CDR proposal and proposed to withdraw the said Scheme. The representative of ICICI Bank Limited, a Debenture holder, who was also acting as Proxy for IDBI Limited and IFCI Limited, with the permission of the Chair expressed their support to the new Scheme proposed by the Company which is in line with CDR proposal and agreed for the withdrawal of the existing scheme, which they did not approve since it was not as per the term of CDR proposal. He was supported by representatives of State Bank of Indore, State Bank of Mysore, Essar Steel Limited, India Holdings Limited, India Securities Limited etc., collectively holding 59.79% of value

of votes. The representatives of UTI, Peerless and LIC Mutual Fund, on the other hand, requested the Chairman for voting of the Scheme as per the order of this Court and did not support the withdrawal of the Scheme. They collectively hold 40.21% of value of votes. The Debenture Trustees also requested the Debenture holders to reexamine and reconsider the options given by the Company and Trustees will approach the Company for the possibility of improving the option. Since there was no unanimity amongst the Debenture holders for the withdrawal of the Scheme, the Scheme was put to vote as per the order of this Court and since none of the Debenture holders present at the meeting supported the Scheme, the Scheme has not been agreed to by all the Debenture holders.

25. The above Report submitted by the Chairman with regard to earlier Scheme makes it amply clear that the Company is not in a position to get the requisite support to the present Scheme which is

less favourable to the Debenture holders holding more than 2000 debentures if they are treated as a separate class and separate meeting is held for them. To overcome this difficulty, the Company placed them in the category of "Scheme Lenders" in the new Scheme along with Term Lenders and Working Capital Lenders and same terms are offered to all of them under the Scheme. The Court is mainly and vitally concerned with the issue as to whether the Court should examine the justification of constitution of this Class, namely, "Scheme Lenders" at this stage or reserve it for its decision at a later stage when substantive petition, if any, is filed by the Company. Here, the oft-quoted passage from *Palmer's Company Law*, 24th Edition, which is duly approved by the Division Bench of this Court as well as by the Hon'ble Apex Court in *Mihir Mafatlal's* case (Supra) throws some light. The principle enunciated is that the Court does not itself consider at this point what classes of Creditors

or members should be made parties to the Scheme. This is for the Company to decide in accordance with what the Scheme purports to achieve. The application for an order for meetings is a preliminary step, the application taking the risk that the classes which are fixed by the Judge, unusually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, they reveal inadequacies, the Scheme will not be approved. This principle further clarifies that if there are different groups within a Class, the interests of which are different from the rest of the Class, or which are to be treated differently under the Scheme, such groups be treated as separate classes for the purpose of Scheme. Based on this, one may argue that though, under the Scheme, all Scheme Lenders are not treated differently, the interests of Debenture holders are different from the interest of Term Lenders and the Working Capital Lenders and hence,

Debenture holders are to be treated as separate classes for the purpose of Scheme. But, this is not the stage at which the Court pronounces its judgment on this issue. It is only for this reason, the alternative prayer of the Objectors to give directions for convening the separate meeting of Debenture holders holding more than 2000 debentures, is not entertained at this stage.

26. The other issues which are raised by Mr. Pahwa and Ms. Raval are in respect of the merits of the Scheme which cannot be gone into at this stage as the Scheme Lenders can discuss all these issues at the meeting and even they can raise the same objections in the meeting. If the meeting rejects the Scheme, there is no question of seeking any sanction of this Court. But, in any case, if the Scheme is approved by the requisite majority at the meeting, the petition will have to be filed before this Court and at that stage, the Court would certainly consider all these aspects of the

Scheme and would also go into the merits of the Scheme. The Court, therefore, inclines to issue directions to convene the meeting and accordingly, the Court hereby issues the following directions :-

1.A meeting of the Scheme Lenders of the Applicant Company shall be convened and held at the Registered office of the Applicant Company at Khambhalia Post, P.O. Box 24, Dist. Jamnagar – 361 305, Gujarat, **on Thursday, the 28th day of July, 2005 at 3.00 p.m.** for the purpose of considering, and if thought fit, approving with or without modification, the arrangement embodied in the Scheme of Arrangement and Compromise between Essar Oil Limited and its Scheme Lenders.

2.At least 21 clear days before the day appointed for the meeting to be held as aforesaid, an advertisement convening the said meeting

indicating the day, the date, the place and time aforesaid and stating that copies of the said Scheme of Arrangement and Compromise, the statement required to be furnished pursuant to Section 393 of the Companies Act, 1956 and Form of Proxy can be obtained free of charge at the Registered office of the applicant Company or at the office of its Advocate, Mr. Sunit Shah, 25 Jain Society, Near Pritamnagar Akhada, Ellisbridge, Ahmedabad, be inserted once in Times of India, Ahmedabad Edition and Phulchhab, Rajkot Edition. Publication of the Advertisement in the Gujarat Government Gazette is dispensed with.

3. In addition, at least 21 clear days before the date of the meeting to be held as aforesaid, a notice convening the said meeting, indicating the day, the date, the place and time aforesaid, together with a copy of the said Scheme of Arrangement and Compromise, a copy of the

Statement required to be furnished pursuant to Section 393 of the Companies Act, 1956 and the prescribed Form of Proxy, shall be sent by prepaid letter post under Certificate of Posting addressed to each of the Scheme Lenders of the applicant Company at their respective last known addresses. The notice shall be sent to the Scheme Lenders of the applicant Company with reference to the list of persons appearing on the record of the Applicant Company as on 20.06.2005.

4.The settling and/or approval of the advertisement, the form of Notice and the Statement to accompany the Notice by the Registrar of this Court is dispensed with.

5.**Mr. K.N. Venkatasubramanian**, Director of the applicant Company, and failing him **Mr. Dilip J. Thakkar**, Director of the applicant Company, shall

be the Chairman of the aforesaid meeting to be held on **Thursday, the 28th day of July, 2005**. The Chairman so appointed, is hereby directed to put the Scheme to vote, and count the votes of Term Lenders, Working Capital Lenders and Debenture holders separately without any adjournment. Over and above this, the Registrar General of this Court is hereby directed to depute Registrar or any Senior officer of equivalent cadre as an Observer at the meeting to see that the proceedings at the meeting can be conducted in lawful manner and correct reporting of the meeting be made to this Court by the Chairman in his report. The Registrar or any other Senior Officer so appointed shall file his affidavit to this effect before the Court on or after the conclusion of the meeting and/or preparation and filing of the Report by the Chairman before this Court.

6.The Chairman appointed for the aforesaid meeting

do issue the advertisement and send out the notices of the meeting referred to above. The Chairman is free to avail the services of the applicant Company or their Officers or Servants or Agents or any other agency for carrying out the said direction. It is further directed that the Chairman of the meeting shall have all powers under the Articles of Association of the Applicant Company and under the Companies (Court) Rules, 1959 in relation to conduct of meeting including an amendment to the aforesaid Scheme of Arrangement and Compromise or resolutions, if any, proposed at the aforesaid meeting by any person(s) and to ascertain the decision of the aforesaid meeting on the poll.

7.The quorum for the meeting of the Scheme Lenders shall be five (5) persons present in person.

8.The voting by proxy be permitted, provided that the proxy in the prescribed form duly signed by

the person entitled to attend and vote at the meeting is filed with the Applicant Company at its Registered office at Khambhalia Post, P.O. Box 24, Dist. Jamnagar – 361 305, Gujarat, not later than 48 hours before the meeting.

9.The value of each Scheme Lenders shall be in accordance with Appendix-B to the Scheme of Arrangement and Compromise and where the same is disputed, the Chairman shall determine the value for purposes of the meeting and his decision in that behalf shall be final.

10.It is further directed that the Chairman do report to this Court the result of the said meeting within 14 days of the conclusion of the meeting, and the said report shall be verified by his affidavit.

27. In view of the aforesaid directions, both these Company Applications are accordingly disposed off,

without any order as to cost.

[K.A. PUJ, J.]

Savariya