

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 28.01.2016

Pronounced on: 29.02.2016

- + **CO. APPL.19-25/2005, C.M. APPL.5743/2005 & 7227/2006**
GURKIRPAL SINGH AND ORS.Appellants
Versus
RAMINDER PAL SINGH AND ORS.Respondents
- + **CO. APPL.26-32/2005, C.M. APPL.5745/2005, 6607-6608/2006 & 7207/2006**
GURKIRPAL SINGH AND ORS.Appellants
Versus
RAMINDER PAL SINGH AND ORS.Respondents
- + **CO. APPL.52/2005, C.M. APPL.8161/2005, 10201/2007, 8473-8474/2010, 6946/2011, 17051-17052/2012**
M/S. NORTHERN INDIA GOODS TRANSPORT CO. (P) LTD.Appellant
Versus
BEBAK SINGH AND ORS.Respondents
- + **CO. APPL.84/2005, C.M. APPL.12055/2005, 2358-2359/2007 & 10233/2007**
M/S. NORTHERN INDIA GOODS TRANSPORT CO. (P) LTD.Appellant
Versus
K.P. RAIS AND ORS.Respondents
- + **CO. APPL.53/2005, C.M. APPL.8164/2005, 5521/2010, 18904/2010 & 4813-4817/204**
M/S. NORTHERN INDIA GOODS TRANSPORT CO. (P) LTD.Appellant
Versus
MR. SUKHDEV RAJ SHARMARespondent
- + **CO. APPL.85-88/2005, C.M. APPL.12060/2005, 6621-6622/2006**

GURKIRPAL SINGH AND ORS.Appellants
Versus
M/S. NORTHERN INDIA GOODS TRANSPORT CO. (P) LTD.
.....Respondent

+ **CO. APPL.83/2005, C.M. APPL.12053/2005**
M/S. NORTHERN INDIA GOODS TRANSPORT CO. (P) LTD.
.....Appellant
Versus
NORTHERN CARRIERS PVT. LTD. AND ORS.
.....Respondents

+ **CO. APPL.33-39/2005, C.M. APPL.5757/2005, 6620/2006, 1039-1040/2012**
GURKIRPAL SINGH AND ORS.Appellants
Versus
ONKAR TEXTILES AND ORS.Respondents

+ **CO. APPL.89-92/2005, C.M. APPL.12072/2005, 6623-6624/2006, 14153/2007 & 4612/2011**
GURKIRPAL SINGH AND ORS.Appellants
Versus
M/S. NORTHERN INDIA GOODS TRANSPORT CO. (P) LTD.
.....Respondent

Through: Sh. Dayan Krishnan, Sr. Advocate with Sh. Nishant Datta, Advocate, for Administrator (Appellant in Co.App.52/2005, 84/2005, 53/2005 & 83/2005).

Sh. P. Nagesh and Sh. Ankit Jain, Advocates, for appellants in Co.App.19-25/2005.

Sh. Rajat Aneja, Advocate, for appellant in Co.App.89-92/2005.

Sh. Sudhanshu Batra, Sr. Advocate with Sh. Bhuvan Gugnani, Advocate, for respondent R.P. Singh

Sh. H.S. Jaggi, Advocate, for Co.App.52/2005.

Ms. Rekha Palli, Sr. Advocate with Ms. Punam Singh and Sh. S.A. Akhtar, Advocates, for Respondent No.2 in Co.App.53/2005.

Sh. Ashok Gurnani, Advocate, for Respondent No.7 in

Co.App.83/2005.

Sh. J.V.S. Raghavendra Sreyas, Advocate, for appellant in Co.App.33/2005.

Sh. A.S. Chandhiok, Sr. Advocate with Sh. Ashish Dholakia, Ms. Mansi Sharma, Ms. Mallika Ahluwalia and Sh. Mayank Banniyal, Advocates, for Respondent Nos. 1 to 3 in Co.App.33-39/2005.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. All these appeals under Section 483 of the Companies' Act, 1956 (hereafter "the Act") are directed against the common judgment and order of a learned Single Judge (hereafter referred to as "the Company Judge"), declining to invoke the jurisdiction under Section 392 of the Act.

2. The brief facts are that M/s. Northern India Goods Transport Company (Private) Limited (hereafter "the Company"), one of the leading and well known transporters in India at some point of time was incorporated in 1949. The balance sheets of the company as on 31.12.1966 reflected losses. This led to the company facing financial difficulties and several winding-up proceedings were filed by its creditors. The balance sheet for the period ending December 1966, reflected substantial assets of the company valued at ₹21,18,319.37/-. These assets were vehicles, buildings, rented buildings, godowns and other buildings, furniture and realizable outstanding amounts and advances. Several applications were moved under Sections 391 and 392 of the Act, proposing Schemes of Arrangement. Ultimately, by order dated 26.05.1978, the Scheme of Arrangement (hereafter "the

Scheme") was accepted with certain modifications, proposed by one Pritam Singh in C.A. 444/1974. Consequently, all winding-up petitions were adjourned *sine die* and were to be revived if the Scheme failed. The Court granted liberty to the parties and others interested in the Scheme to apply to it for directions necessary to implement it. When the winding-up proceedings were pending, on 21.01.1972, the Company Board superseded its own Board of Directors and appointed an Administrator to oversee the affairs and activities of the company. This appointment continued even after sanctioning of the Scheme. During the intervening period, the dues of all creditors were settled and apparently at the time the impugned judgment was delivered, the dues of income tax authorities were unpaid.

3. In this background of circumstances, several applications, (C.A. Nos. 323/1990, 324/1990, 471/1990, 472/1990, 610/1991, 612/1991, 634/1991, 750/1991 and 759/1993) were filed. The relevant claims in these applications were for directions to retrieve possession of various properties, of which the company was a tenant at some point in time. It was contended that the company was in possession of these premises and was using it for its business. The company contended that directions under Section 392 of the Act were necessary for the proper implementation of the Scheme.

4. The respondents were third parties and they contested the claim of the applicant/company on diverse grounds. Some of them alleged that they were lawful tenants of the premises, which was made over to them by the landlord after the previous tenant, i.e the company had been evicted. These third party respondents also stated that their possession was settled since they were paying rents to the concerned landlords. Additionally, it was urged that the

rent legislation applicable and in force in various States protected their possession and that the company could not seek recourse to Section 392.

5. The appellants had relied upon the order dated 26.05.1978, particularly, Clause 8 of the sanctioned Scheme which talked about the jurisdiction of the Company Court to oversee its implementation and the supervision and control to be exercised by the Court. The said stipulation reads as follows:

"That the Company Court shall have jurisdiction regarding the disputes between company's creditors, contributories and propounders regarding the amounts to be recovered under the scheme and the interpretation of the scheme. Any claim by or against the company shall be instituted before the Company Court. However, the Company Court will be free to direct the parties to get the matter decided in the ordinary civil court if it is found that the matter cannot be decided by the Company Court either because of its complexity or because it requires a trial on facts. The creditors will not have the right to interfere in the day-to-day work of the Company."

6. The appellants argued that the sanctioned Scheme overrides all contracts and had statutory effect; it modified the subsisting contracts between the company, its creditors as well as contributories. The rights and liabilities of company creditors as long as the Scheme was operational, was regulated by it. Consequently, the jurisdiction of the Civil Courts to adjudicate on disputes were overridden. It was also contended that the words "any claim" in para 8 referred to all claims by or against the company; the Scheme, therefore, made no distinction between ordinary civil disputes and those which fell within the exclusive jurisdiction of the Company Court. Thus, even disputes raised by third parties fell within the contemplation of the Scheme and were covered under Section 392. Furthermore, the

applicants urged that Schedule-A and Schedule-B of the order dated 26.05.1978 itself had specifically mentioned the properties; consequently, any dispute pertaining to these properties were to be adjudicated exclusively by the Company Court and no other forum. The company had relied upon a previous instance when certain godowns and other properties were transferred by the erstwhile Directors and persons in control of the company and used for their personal benefits. The Court had directed the Committee and the Administrator placed in charge of the management of the company to prepare an inventory and take charge of certain properties. It was urged that the retrieval of the godowns and other movables were integral to the efficacy and functioning of the sanctioned Scheme. Consequently, the Court had jurisdiction to entertain and adjudicate the disputes. The applicants had relied upon the judgements of the Supreme Court reported as *S.K. Gupta and Anr. v. K.P. Jain & Anr.* 1979 (3) SCC 54; *Sudershan Chit (India) Limited v. O. Sukumaran Pillai and Ors.* 1985 (58) Comp. Cas 633; *Divya Vasundhara Financiers Ltd. v. K.N. Samant* 1990 (69) Com. Cas. 646 and *J.K. (Bombay) (P) Ltd. v. New Kaiser-Hind Spg & Wvg. Co. Ltd. and Ors. Etc.* 1969 (2) SCR 866.

6. The respondent/objectors contended that the Court did not possess jurisdiction under Section 392 as alleged by the appellant. It urged that the Scheme had achieved its object and that the company's direct creditors had been paid off. There was no request for winding-up of the company or appointment of the Official Liquidator attached to the Court. It was also pointed out that over ₹70 lakhs was lying to the credit of the company and furthermore, an application - C.A. No.403/1997 was pending, where it was stated that the purpose of the sanctioned Scheme had been achieved. The

respondent also contended that the order of 26.05.1978 did not empower the propounders or the Administrator to file applications. The main objective to be achieved by the order was to ensure that the creditors' claims were satisfied. Since the raising of funds for satisfying the creditors itself was the main purpose and had a direct nexus with the company's business, the registered office at 4142, Naya Bazar, which was in occupation of an agent, were essential. It was in these circumstances that the Court had directed the recovery of such premises. It was pointed out that unlike the case of creditors, shareholders and contributors, whose views were considered at the stage of sanction of the Scheme; the rights and liabilities of third parties, particularly tenants, who secured the concerned premises from strangers who had no connection with the company except as previous landlords, could not be prejudiced in a proceeding before the Company Court as it was plainly without jurisdiction. The respondents relied upon *Union of India v. Asia Udyog Pvt. Ltd.* 1974 (44) Comp. Cas 359 as well as the decision in *Anand Finance Pvt. Ltd. v. Ram Lal Anand* 1977 (2) ILR (Del) 457.

7. The learned Single Judge, in the impugned judgment, was of the opinion firstly that Section 446(2) conferred limited jurisdiction upon the Company Court to adjudicate all claims against and by the Company after, and only after a winding-up order was made. The mere pendency of winding-up proceedings, concluded the learned Single Judge, would not empower the Court to exercise such jurisdiction. Thereafter, the learned Single Judge analyzed the provisions of Sections 391/392 and the purpose and objective of these provisions. The impugned judgment thereafter discussed the matter as follows:

".....Whether this power would carry in its sweep the power to adjudicate the claims of the company against third parties who were not parties to the scheme sanctioned? Relying upon the expression "any matter" occurring in Section 392(i) which stipulates that Court has the jurisdiction to make any order and give directions in regard to any matter, the submission of the learned counsel for the applicants was that for proper implementation of the scheme, eventualities and exigencies may arise which may require removing hitches and impediments and moving to Civil Court would cause delay and in fact, the purpose, Civil Court will have extensive and wide jurisdiction to issue directions even against third parties. Sustenance, for this submission, is drawn from the judgment of the Supreme Court in the case of S.K. Gupta (supra) and Divya Vaundhara Financiers Ltd. Vs.K.N. Samant [1990] 69 Comp Cas 646.

36. *However, it may be noted that in S.K. Gupta (supra) the Court was dealing with the aspect of modification of the scheme at the instance of the applicant who was not the original propounder. Whether such person could move application for modification of the scheme was the question for consideration before the court and dealing with this question, the Court held that Section 392 does not specify that a member or creditor or in the case of a company being wound up, its liquidator, can alone move the Court under Section 392. The Court took the view that the expression "any person interested in the affairs of the company" could moved the Court for necessary modification and the Court can make such modifications for proper implementation of the scheme. The question posed here is totally different. The relief is claimed against the third parties and matter does not related to the modification of the scheme. S.K. Gupta (supra) was considered in the case of Divya Vasundhara 1984 (56) Comp Cas 487 and after quoting relevant portion thereof the position was explained in the following terms:*

"In the forth place, if the power invested in a company court in s. 392 is held to be one akin to one under s.446(2), the company court will be

required to assume jurisdiction which it does not possess of adjudicating or determining the disputed rights between a company and the persons who are not parties to the scheme of compromise and/or arrangement as if it is a court of ordinary civil jurisdiction, irrespective of the question of the court itself and/or the territorial jurisdiction in the matter."

37. Similarly, in *Union of India v. Asia Udyog Pvt. Ltd. and Others* [1974] 44 Comp. Cas 359 this Court took the same view, though this judgment was rendered before the pronouncement of the Supreme Court judgment in *S.K. Gupta* (supra).

38. Therefore, if one has to go strictly as per the provisions of the scheme, the scheme would bind only different categories of shareholders, different categories of creditors as well as the company in question. The respondents in all these applications were not parties to the proceedings when the scheme of the propounder was sanctioned.

39. It may be, as contested by learned counsel for the Administrator and the applicants/propounder, that for proper functioning of the company, retrieval of these properties of which the company was the tenant is necessary. However, in the facts of this case the proper remedy for the company would be to file appropriate civil proceedings against the respondents in Civil Court. Application in proceedings under Sections 391-394 of the Act may not be proper inasmuch as the scheme is binding only on the parties and the respondent in all these applications were not the parties when the scheme was sanctioned. Thus, the respondents may have valid defence which will have to be adjudicated upon in appropriate proceedings. It is because most of these respondents have contended that they are lawfully indicated tenants and thus, they are protected by the provisions of rent legislations and thus, their eviction can be only when the ground for eviction as stipulated in the rent legislations is established in the proceedings before the Rent Controllers."

8. The learned Single Judge lastly concluded that Clause 8 of the sanctioned Scheme relied upon by the appellant/propounders could not confer jurisdiction. Interpreting the said condition, it was held that it enabled the adjudication of rights of parties if the disputes were of a complex civil nature which required trial on facts. As a result of this discussion, the applications were dismissed.

9. Learned counsel for the appellants urged that the impugned judgment is in error of law. It was argued that the learned Single Judge placed an erroneous interpretation of Clause 8 as well as Section 392. Learned counsel relied upon the orders dated 27.03.1980 and 28.11.1990 to urge that restoration of various godowns and offices to the company was an integral part of the objectives underlining the sanction of the Scheme itself. Likewise, orders of the Company Court dated 04.12.1984 and 29.01.1985 were relied upon.

10. Learned counsel argued that Clause 8 read with Section 392 provided a mechanism for the effectuation of the Scheme. The peculiarity of the business carried on by the company, i.e. transport, was such that godowns and other premises were essential for its functioning. During the pendency of long drawn proceedings, Directors of the company and their relatives had not only siphoned off the assets but colluded with previous landowners of the premises resulting in the surrender or abandonment of tenancies of the landlords with respect to the company. In many cases, subsequent tenants were the relatives of such Directors or those connected with them.

Analysis and Conclusions

11. It would be useful first to extract the relevant provisions of the Companies

Act, which are Sections 392 and 446 of the Act. They are reproduced below:

“392. POWER OF TRIBUNAL TO ENFORCE COMPROMISES AND ARRANGEMENTS. (1) *Where the Tribunal makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it - (a) shall have power to supervise the carrying out of the compromise or an arrangement ; and (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.*

(2) *If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.*

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446. SUITS STAYED ON WINDING UP ORDER (1) *When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] may impose.*

(2) *The [Tribunal] shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of - (a) any suit or proceeding by or against the company ; (b) any claim made by or against the company (including claims by or against any of its branches in India) ; (c) any application made under section 391 by or in respect of the company ; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company ; whether such suit or*

proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

*(3) 3 [***] (4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a high Court. "*

13. Both parties have extensively relied upon *S.K. Gupta (supra)*. The issue there was that after a Scheme was sanctioned under Section 391, the Court modified it under Section 392 by substituting a third party as proponents and rejected an application for winding-up of the company. The High Court permitted the substitution of the original propounder. The Supreme Court held that the modification constituted a change of a basic nature that could not be brought within the framework of Section 392. After considering the text of Sections 391 and 392 as well as previous decisions in *J.K. (Bombay) (supra)* and *Mansukh Lal v. M.V. Shah* 1976 (46) Comp. Cas 279, where the power of the Court to continue supervising of a compromise was termed as one extending to, “*unenvisioned, unanticipated, unforeseen or even unimaginable hitches, obstructions and impediments*” that affected the smooth functioning of a Scheme. The Supreme Court described the extent of the power to modify. It noticed that at the stage of framing and finalization of a scheme of compromise and arrangement, not all eventualities could be taken into account and in complex Schemes, there would be likelihood of impediments arising in the implementation. In such event, in the absence of power akin to one under Section 392, the company would be driven to seek recourse to the original procedure of obtaining sanction; a process which would be cumbersome and time consuming. Therefore, the Court noted:

“.....the legislature in its wisdom conferred power of widest amplitude on the High Court under s. 392 not only to give directions but to make such modification in the compromise and/or arrangement as the Court may consider necessary, the only limit on the power of the Court being that such directions can be given and modifications can be made for the proper working of the compromise and/or arrangement. The purpose underlying s. 392 is to provide for effective working of the compromise and/or arrangement once sanctioned and over which the Court must exercise continuous supervision[see s. 392(1)], and if over a period there may arise obstacles, difficulties or impediments, to remove them, again, not for any other purpose but for the proper working of the compromise and/or arrangement. This power either to give directions to overcome the difficulties or if the provisions of the scheme themselves create an impediment, to modify the provision to the extent necessary, can only be exercised so as to provide for smooth working of the compromise and/or arrangement. To effectuate this purpose the power of widest amplitude has been conferred on the High Court and this is a basic departure from the scheme of the U.K. Act in which provision analogous to s. 392 is absent. The sponsors of the scheme under s. 206 of the U.K. Act have tried to get over the difficulty by taking power in the scheme of compromise or arrangement to make alterations and modifications as proposed by the Court. But the Legislature foreseeing that a complex or complicated scheme of compromise or arrangement spread over a long period may face unforeseen and unanticipated obstacles, has conferred power of widest amplitude on the Court to give directions and if necessary, to modify the scheme for the proper working of the compromise or arrangement. The only limitation on the power of the Court, as already mentioned, is that all such directions that the Court may consider appropriate to give or make such modifications in the scheme, must be for the proper working of the compromise and/or arrangement.”

14. The Court also noticed Section 2(29) of the Act which defines the expressions, “modify” and “modification” as, “including making of

additions and omissions.” Thereafter, it was held:

“According to the definition 'modify' and 'modification' would include the making of additions and omissions. In the context of s. 392 'modification' would mean addition to the scheme of compromise and/or arrangement or omission therefrom solely for the purpose of making it workable. Reading s. 392 by substituting the definition of the word 'modification' in its place, if something can be omitted or something can be added to a scheme of compromise by the Court on its own motion or on the application of a person interested in the affairs of the company for the proper working of the compromise and/or arrangement, we see no justification for cutting down its meaning by a process of interpretation and thereby whittle down the power of the Court to deal with the scheme of a compromise and/or arrangement for the purpose of making it workable in course of its continued supervision as ordained by s. 392 (1).”

15. In *Sudershan (supra)*, the facts were that a company was ordered to be wound-up; that order was carried in appeal and the Division Bench kept it in abeyance. Thereafter a Scheme for compromise arrangement was propounded. During the implementation of the Scheme, it was necessary to recover certain dues and claims due to the company and an application was moved before the Division Bench, (which was then supervising the Scheme), seeking leave to sue under Section 446 of the Companies Act. The Division Bench rejected the application holding that no winding-up proceedings were pending. The Supreme Court, in the course of its judgment analyzed Section 446(2) as follows:

“Sub-sec. (2) of Sec. 446 confers jurisdiction on the court which is winding up the company to entertain and dispose of proceedings set out in clauses (a) to (d). The expression “court which is winding up the company” will comprehend the court before which a winding up petition is pending or which has made

an order for winding up of the company and further winding up proceedings are continued under its directions. Undoubtedly, looking to the language of Sec. 446 (1) and (2) and its setting in Part VII which deals with winding up proceedings would clearly show that the jurisdiction of the court to entertain and dispose of proceedings set out in sub-cl. (a) to (d) of sub-sec. (2) can be invoked in the court which is winding up the company.”

Later, the Court held that since the winding-up order was neither, “*quashed, set aside, cancelled, revoked nor recalled*” but merely “*kept in abeyance*”, it was in a state of suspended animation, but nevertheless continued to exist. However, it continued to exist. That did not imply that the power under Section 446(2) was not available. This textual interpretation, in the opinion of the Court, clarifies that if a winding-up order exists, the leave of the Court is to be sought to initiate or prosecute legal proceedings by or on behalf of the company or against it.

16. In the judgment reported as *K.N. Samant (supra)*, the Gujarat High Court held that even though the power under Section 392(1) is of wide amplitude, there are in-built limitations in the provision itself. The in-built mechanism can be invoked only for the purpose of working out a proper arrangement; it was further stated that:

“The power cannot be invoked for purposes of determination or adjudication of any right or interest claimed by a company against persons who are not parties to the scheme of compromise or arrangement, and who dispute such rights or interest in fact or in law.”

17. In *Reliance Natural Resources Ltd v Reliance Industries Ltd* 2010 (7) SCC 1, it was held by the Supreme Court (after considering the decision in *SK Gupta*) that:

“155. It is true that in paragraph 26 of the said decision it was stated that if "something can be omitted or something can be added to a scheme of compromise by the Court, on its own motion or on the application of a person interested in the affairs of the company" then there ought not to be any justification for restricting the meaning of the word of modification and whittle down the powers of the court. However, the next paragraph holds the key to the judgment that the "basic fabric" of the scheme ought not to be changed. The limit on the powers of the Court to modify by way of even additions or omissions as contemplated is that the "basic fabric" of the Scheme cannot be changed; and according to the said decision, even before a court could embark upon a mission of suggesting modifications it has to first determine what "modifications are necessary to make the compromise or arrangement workable." Any such determination first has to arrive at a conclusion that the Scheme has become unworkable in its entirety or in a portion thereof. Arrangements, by their very nature are complex processes involving many elements that may or may not work. In fact in S.K. Gupta (supra) this court recognized that to be the very reason why the legislature in India has given such a power to the courts; and such power can be exercised only to order those minimal modifications that would bring the aspect that is not working into a functional zone, with the proviso that at any rate such a modification cannot lead to a change of the "basic fabric" of the Scheme.”

17. This Court’s decision in *Asia Udyog* (supra) also noticed the limitations of Section 392 proceedings:

“20. While it is no doubt true that the extent of the power of the court under Section 392(1) of the Act of 1956 is much wider than that of Section 153A(1) of the Act of 1913, the grant of relief to the petitioner by direction to the respondent No. 1 to pay the petitioner the amount claimed by it would not be justified even with reference to the provisions of this section because it could not be said that in directing payment of the amount claimed by the petitioner the court was either supervising " the carrying out of compromise or arrangement" as contemplated by Clause (a) of the said sub-section or by taking any steps " for the proper working of the compromise or arrangement" as envisaged by

Clause (b) of that sub-section. This appears to be so because the scheme of amalgamation makes no provision regarding the manner in which the transferee-company would have to discharge the liability of the transferor-company and the only provision it contains is that of merger of the two companies and the consequential direction by which the liability of the transferor-company would become the responsibility of the transferee-company.

21. Even if the scheme of compromise or arrangement, whether between the company and its members or between the company and its creditors or any class of the members or creditors and whether for amalgamation, reconstruction of the company or for the payment of its creditors, made provision for the manner in which the creditors of a company have to be paid, as a compromise or arrangement between the company and its creditors normally would, it is doubtful if the court would have any power either under Section 392 or Section 394 of the Act of 1956 or under the corresponding provisions of the Act of 1913 to make the direction of the kind sought by the petitioner and become a forum capable of making a decree or an executable order having the force of a decree, which is what the appellant in effect seeks. Section 392 of the Act of 1956, which confers much wider powers on the court than were conferred under the Act of 1913, does not empower the court to make any such direction and the only effect of the sanction of the compromise or arrangement between the company and its creditors would be that the parties become bound by the terms of the arrangement but if in terms of the arrangement payment is not made it could only invoke Sub-section (2) of Section 392 and order the winding up of the company if it comes to the conclusion that the conditions of that sub-section have been satisfied. The court could not in such a case assume the role of an ordinary civil court for the enforcement of the creditors' right to payment as it could, for example, in a winding up, by virtue of the provisions of Section 446(b) of the Act of 1956 and its corresponding provision in the Act of 1913. These provisions obviously have no application to the case of an amalgamation.”

In this Court's decision in *Ram Lal Anand* (supra) a compromise and

arrangement visualized the vacation of a company's premises by one Mr. Anand. He did not comply with the terms of the scheme. The company moved an application for dispossessing him from the premises; it also sought damages for unlawful occupation. The Court held that since the first relief was spelt out in the scheme, he had to be evicted and issued an order to that effect. However, as regards the second relief, it was held that proceedings under Section 392 were not maintainable, noticing that such claims could be tried only under Section 446 upon application of certain preconditions, all of which were absent, because of the existence of a compromise and arrangement and not of a winding up order:

“None of these conditions is present. At one stage the winding up petition was pending but never a provisional liquidator was appointed. No winding up order has been made. The company can pursue its legal remedy in the ordinary way in a civil court.”

18. The Scheme as propounded originally read as follows:

“8. That the Company Court shall have the exclusive jurisdiction regarding the disputes between the Company, the creditors, contributors and the propounders regarding the recoverability of the amount and the interpretation of the of the Scheme. No action, settlement and compromise etc. of the Company shall be questioned in any other Court except the Company Court. The creditors shall not have any right to interfere in the working of the day-to-day affairs of the Company. The conduct of the legal proceedings for obtaining the possession of the premises of the Company shall exclusively be handled by the Board appointed by this Hon'ble Court or by the nominee of the Board.”

19. Later, after discussing the financial health of the Company and the nature of the Scheme, the Court sanctioned the Scheme with some modifications. At the same time, in the course of the judgment, the Company

Judge had expressed certain reservations in the following terms:

“This brings me to consider what should be done about the scheme. Strictly speaking I should not approve the scheme because the necessary material is not before the Court but the choice before the Court is also a very poor one because if the scheme is rejected and the company is wound up then I see precious little hope for the creditors because even the Committee of Management has not been able to get at the assets. On the other hand, how is the Court to comply with the requirements of Sec. 391(2) of the Companies Act. If the original board of Directors of the company has been responsible for not maintaining the books etc. then there would be a ground for refusing the scheme. Unfortunately, the present position has emerged when the Court itself had appointed a Board of Management consisting mainly of lawyers who have not been able to do much in the matter of recovering the assets or tracing out the same.

I, thus, feel that I should not reject the scheme merely because in this very special case the latest financial position is not before the Court.

Under the scheme the amounts of the creditors have to be paid according to a schedule which will enable 80 per cent being paid provided the godown at Naya Bazar is restored to the company. If the godown is not restored then the amount to be paid is 60 per cent. The payments are to be made in 10 instalments. The Company Court is to be given jurisdiction to decide the disputes between the company's creditors, contributories and propounders. It is stated as follows in paragraph 9 of the scheme:

“That the Interim Board has the complete confidence of the propounders and that Board along with S. Pritam Singh and S. Joginder Singh will run the company till the scheme moved works out”

There are a number of other provisions in the scheme which bring me to the question that if I approve the scheme what

changes I should make. I think I will proceed on the basis that this scheme cannot be rejected by me because without it there is little likelihood of anything being salvaged for the creditors. The only portion of the scheme that I find unworkable is the one which gives the Company Court exclusive jurisdiction regarding the disputes between the Company's creditors, contributories and propounders, i.e. Clause No.8. I think, this Clause has to be altered to read as follows:-

"That the Company Court shall have jurisdiction regarding the disputes between company's creditors, contributories and propounders regarding the amounts to be recovered under the scheme and the interpretation of the scheme. Any claim by or against the company shall be instituted before the Company Court. However, the Company Court will be free to direct the parties to get the matter decided in the ordinary civil court if it is found that the matter cannot be decided by the Company Court either because of its complexity or because it requires a trial on facts. The creditors will not have the right to interfere in the day-to-day work of the company."

The legal proceedings for obtaining possession of the premises of the company shall be handled exclusively by the Interim Board appointed by this Court at an earlier stage or by any nominee of that Board. The two additional directors S. Pritam Singh and S. Joginder Singh added to the Board under the next Clause will not be entitled to interfere in this procedure. The interim Board appointed by this Court at an earlier date may be substituted by other persons during the currency of the scheme by orders of this Court."

19. Some features of the Scheme were modified and directions were also issued by the judgment delivered on 27.03.1980. That judgment recounted the steps taken and directions made earlier to secure possession of a godown located at Naya Bazar. The legal proceedings emanating from it had found its way to the Supreme Court after appeals were disposed of. Further

directions/modification *inter alia* were to the following effect:

“H. The Administrator would take immediate steps for the reconstruction and completion of the accounts of the Company todate and have the same audited by an approved auditor. The Administrator would also prepare an inventory of godowns, offices, other moveable and immoveable property of the Company, which according to the record of the Company was owned or was in possession of the Company, make an investigation as to who was in possession of these properties, as also the circumstances in which and the authority under which the possession may have been delivered to or taken and to take all steps what may be necessary for the restoration of these properties to the Company for resumption of its business. The Administrator would also review the existing arrangements with regard to utilization of the various godowns and offices of the Company and obtain direction of this Court with a view to enter into proper arrangement in that behalf. The Administrator would also prepare a list of persons, who were entrusted with the funds of the Company from time to time and to require them to render complete account of disbursement, including in particular the sum of Rs.40,000/- said to have been paid to Pritam Singh by Balbir Singh and Rs.25,000/- to Miss C.M. Kohli, Advocate. The Administrator would submit to this Court a monthly report of the progress of work in relation to the above matters.”

20. The discussion of law previously in this judgment show that the power to modify a sanctioned scheme is essential for removing unanticipated obstacles and for its smooth functioning. The company, it must be noticed, was not facing winding up; no orders were made. Undoubtedly, certain interim orders were made during the pendency of winding up proceedings, to protect the properties of the company, including the tenancies, which inured in its favour. Some of these tenancies were in Delhi and others were in Gujarat and Amritsar. Those tenancies were surrendered, pursuant to eviction decrees issued by competent Courts/Tribunals. New tenancies were

created in those premises by the landlord; according to the appellants, those tenancies were sham and fraudulent, because the occupants were connected with the erstwhile directors of the company, who were responsible for its plight. The appellants argued that the tenancies were given up due to collusion of directors and landlords. They also argued that the decree for possession in some instances were executed, contrary to an injunction, which was operative during the pendency of winding up proceedings.

21. What in effect the appellants urge is that the Company Court must exercise its jurisdiction to supervise the scheme sanctioned in 1978 to evict tenants of premises *which are not owned by the company*. The judgments relied on are all instances where the *companies' properties, owned by it, were under occupation of tenants or trespassers*. Here, the company was a tenant. Furthermore, the tenancies were given up pursuant to lawful decrees, in legally maintainable proceedings, when concededly there never was an impediment to their institution, prosecution or execution. In other words, Section 446 *never operated, because there was never any winding up order.* Such being the case, there was no bar to the maintainability of such eviction proceedings, before the lawfully constituted tribunals empowered to try them. The culmination of those proceedings, in the form of eviction decrees took place – in some cases, in 1976 even before the sanction of the scheme under Section 391. In these circumstances, whatever be the intent or assumed intent of the propounder, the Company Court could never have exercised jurisdiction.

22. An aspect- and one important in this case, which was touched upon in *Sudershan (supra)*, in a tangential manner (because the issue was never

directly in question in that case) is that Section 446 of the Act applies only when a winding up order subsists. The next vitally important fact is that except Section 446 (and dependent on the conditions which are to be fulfilled as spelt out by it) there is no other power under the Companies Act, authorizing the Company Court to exercise universal jurisdiction, as it were, and adjudicate disputes concerning third parties' transactions with the company. Therefore, the power is, in a sense, *sui generis* and applicable only in the event of a winding up order being made. As correctly held by the impugned judgment, Section 446 and the phraseology it adopts precludes the exercise of a wide, unenumerated jurisdiction of the kind invoked by the appellants. Thus, Section 446 and the exclusive jurisdiction provided by it, subject to express preconditions, which regulate its exercise, rule out the existence of a wide, un-spelt residual jurisdiction under Section 392 which is both ubiquitous and unregulated. In other words, the maxim *exclusio unis est exclusio alterius* (which means "mention of one thing implies the exclusion of another") squarely applies to this case. This rule has been described by the Supreme Court in *D.R. Venkatachalam & Ors v. Dy. Transport Commissioner* AIR 1977 SC 842 as applying in the following manner:

“to cases where there is a single specified mode laid down for doing something in exercise of the legal power to do it. In that event, the specified mode-may, negatively, operate as a prohibition against what is not prescribed at all and is outside the statute.”

23. The other feature peculiar to this case is that the power of the Company Court to decide upon matters and disputes which do not directly relate to its jurisdiction, apart from being limited in its operation to what is expressly stated in Section 446, is also excluded in relation to matters and

causes which are to be tried by Tribunals and Courts of exclusive jurisdiction. Thus, it was ruled in *Indian Bank v Official Liquidator* 1998 (5) SCC 401 that even under Section 446, the Court does not possess the power to set aside the order of a tribunal constituted under a rent control legislation. The Court observed as follows:

“12. ... We wish to make it clear that under Section 446, no power is conferred on the Company Court to declare a decree of the competent court void- a prayer which is made by the Official Liquidator in the application out of which this appeal arises- so to that extent the application filed by the Liquidator in the Company Court is not maintainable.”

24. In view of the above reasons, this Court is of the opinion that the impugned judgment is sound and the Company Court acted correctly in refusing to exercise jurisdiction under Section 392 having regard to the nature of reliefs claimed by the appellants. The appeals, therefore, fail and are dismissed without order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

FEBRUARY 29, 2016