

*Judgement Sheet*

**IN THE HIGH COURT OF SINDH AT KARACHI**

**J.M. NO. OF 35 of 2001**

Date of hearing: 5-12-2001

Petitioners: M/s. Makhdoom Ali Khan, Dr. Mohammad Farogh  
Naseem and Sardar M. Aijaz Khan, Advocates.

Creditors: Mr. Arshad Tayabally and M/s. Mehmood Y.  
Mandviwala and Ch. Ejaz Ahmed, Advocates.

**Zia Perwez, J:-** The brief facts giving rise to the present petition filed under section 284 to 288 of the companies ordinance, 1984 ordinance are that the petitioner, incorporated in 1980, has been engaged in the business of manufacture and sale of cement. It is alleged that in order to expand and optimize its manufacturing capacity, the petitioner obtained financial facilities from Banks, DFIs, Leasing Companies and Modarabas. Due to certain facts giving rise to force majeure the petitioner faced temporary financial crisis. After protracted litigation the majority of DFIs, Banks and Leasing Companies agreed to a Scheme of Arrangement, proposed by the petitioner, for the purposes of restructuring the outstanding debts against the petitioner. In pursuance of this the present petition was filed seeking directions to the creditors, as per the list attached, to meet and finalize the proposed Scheme of Arrangement, while thereafter seeking approval/sanction thereof from this Court. Collaterally injunction has also been sought that in pursuance of the proposed Scheme of Arrangement all matters and proceedings pertaining to the petitioner be suspended/stayed. Along with the main petition applications were moved for interlocutory injunction under section 284(5) of the 1984 ordinance and for directions to call and hold a meeting under chairmanship of one Mr. Salman Rasheed, FCA under Rules 953 to 955 of the Sindh Chief Court Rules (OS) read with Rule 55 of the Companies (Court) Rules, 1997, in the petition alongwith the interlocutory applications it was alleged that the statutory majority of 75% as required under section 284 of the 1984 Ordinance had been fulfilled since more than 80% of the majority creditors in question had consented to the said Scheme of Arrangement.

2. The matter came up for hearing before a learned company Judge of this Court i.e. Anwar Mansoor Khan J, as he then was, on 26.7.2001 when he was pleased to grant the application for temporary injunction and holding of the meeting of the creditors, after due notice in the press with further direction that in addition to Mr. Salman Rasheed chairing the meeting, the official Assignee of this Court i.e. Mr. Bashir Memon be present as an observer and file his report. In pursuance of the referred order a meeting was convened on 4.9.2001 at 10 a.m. at the Head office of the National Bank of Pakistan situated in the National Bank of Pakistan Building, I.I. Chundrigar Road, Karachi, after notices in the press appearing in the dailies Jang, Dawn, Jasarat and The News on 16.8.2001.

3. The Scheme of Arrangement was put before the meeting as required and it was approved by a thumping majority of the creditors in question (details discussed below) which was more than the statutory majority of 75% required under section 284 of the 1984 ordinance. As such the petitioner moved an application for the sanction of the Scheme under Rule 60 of the Companies (Court) Rules, 1997 read with sections 284 (2) and 285 of the 1984 ordinance, being CMA no. 2571/2001. in response M/s. Citi Bank NA, Soneri Bank Ltd, Standard Chartered Grindlays Bank Ltd, and Standard Chartered (hereafter referred as the objectors) filed objections to the petition and moved applications under order 26 rules 9 and 11 read with section 151 CPC that a local commissioner be appointed so as to conduct a legal and financial audit of the books of account and record of the petitioner in respect of the finance/leasing facilities availed by the petitioner alongwith the securities created in the favour of various creditors.

4. Heard M/s. Makhdoom Ali Khan, Dr. Mohammad Farogh Naseem, and Sardar M. Aijaz Khan Advocates for the petitioner, Mr. Arshad Tayabaly Advocate for the consenting creditors and M/s. Mehmood Y. Mandviwala and Ch. Ejaz Ahmed Advocates for the objectors (non consenting creditors), and perused the record and law on the subject.

5. The objections raised by Mr. Mehmood Y. Mandviwala to the sanctioning of the Scheme are as follows:-

a). the matter pertaining to default of the petitioner vis-à-vis DFIs/Banks having been finalized by the Banking Court and the same having culminated in dismissal of the appeals of

the petitioner before the Division Bench of this court as also the Hon' ble Supreme Court (judgment reported in 2001 SCMR 1341). The attempt by the petitioner through the instant petition is malafide. The reason of malafides being that the sale proclamation having been published on 7.7.2001; the present petition filed on 26.7.2001 is belated having been filed at the eleventh hour with a view to stall execution proceedings;

b). Under section 27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereafter referred to as the 2001 Ordinance), any proceedings, judgment or decree passed by the Banking Court cannot be revised, reviewed or recalled by any other Court except in appeal under section 22 of the 2001 Ordinance. Through the present petition the petitioner seeks modification and alteration of the orders/judgment / decrees/proceedings finalized by the Banking Court. As such any assumption of jurisdiction under section 284 of the 1984 Ordinance would violate the finality, clause contained in the 2001 Ordinance. Further reliance is placed upon section 7(4) of the 2001 Ordinance which provides that no Court other than the Banking Court shall have jurisdiction in relation to the matters falling within the scope of the Banking Court including execution of decrees. It is contended that as the matter concerns execution of the decrees, the Company Judge has no jurisdiction. Reliance is also placed upon section 4 of the 2001 Ordinance which gives the said Ordinance an over-riding effect on all or any other law inconsistent therewith. In particular reference is invited to the following judgments, wherein it has been contended that a special law overrides general law and since in the present case the 2001 Ordinance is a special law it overrides the 1984 Ordinance which is a general law:-

i). Industrial Development Bank of Pakistan V. Allied Bank of Pakistan and other. (PLD 1986 SC 74) (77 at page 81)

ii) Solidaire India Ltd. V. Fairgrowth Financial Services Ltd. and others (2001 (3) SCC 71) (74-75) = (1997) 89 CC (SC) 547

iii) Sheikh Khalid Mehmood V. Banking Tribunal, NWFP Peshawar and another (1997 CLC 1812) (b)

iv) Abdual Razzaq Butt V. Kalsoom Bibi (1999 MLD 30)

c). in the facts and the circumstances of the case the prerequisites of section 284 of the 1984 Ordinance have not been met since:-

- i). The class is inadequate in the present case since the Scheme has lumped together secured/unsecured creditors, with and without decrees, and secured creditors having inferior charges over the mortgaged assets of the petitioner and the leasing creditors. It is contended that all these categories constitute different classes for which there cannot be a common Scheme of Arrangement. It is contended that the Objectors have a first pari-passu charge over the petitioner's assets and through the Scheme even inferior creditors will have equal access to the mortgaged assets of the petitioner. On the question that the Scheme violates the concept class as propounded under section 284 of the 1984 Ordinance, reliance is placed upon AIR 1997 SC 506 at page 528 2<sup>nd</sup> column last para, 1999 CLC 1037 at page 1042 para 8, 1991 MLD 841 at page 850 and (1892) 2 QB 573 at page 582 last line until page 583;
- ii). There is inadequacy of information provided to secured creditors as there is no independent valuation of the petitioner;
- iii). Inadequate information is placed before the Court as decrees passed in the banking cases alongwith the orders in the execution proceedings have not been placed before this Court;
- iv). The Scheme would be extremely unfair to the Objectors since it would dilute the securities provided by the petitioner to the said objectors. To the plea that additional securities have been pooled in and the assets as mortgaged have been added up by the Leasing Companies and DFI's, Reliance has been placed upon section 70 of the Transfer of section 70 of the Transfer of property Act, 1982 which provides that any subsequent increase to the mortgage property will be for the benefit of the mortgagee. As such the addition in the assets cannot be claimed by the other creditors/Leasing Companies on their account and the same are only available as securities to the Objectors.

Reliance has been placed upon a Surveyor's report i.e. Joseph Lobo appointed in Execution Applications Nos. 237/2000 and 156/2000. It is also contented that the assets added to the mortgaged properties in pursuance of finance leases are not separate and identifiable. As such the said Leasing Companies cannot claim any benefit thereof towards their securitization. Reliance is placed on AIR 1941 Pesh 49, AIR 1933 Rangoon 195 and AIR 1935 Lah 350;

- v). The Objectors will lose control over the securities in view of issuance of Term Finance Certificates (TFC's)
- vi). Under the Scheme of Arrangement the Objectors will get less money than the decretal amounts;
- vii). The Scheme is not workable, is opposed to public policy and economic feasibility and forces the Objectors to lend an additional financing of Rs.150 million;
- viii). The Leasing Companies get far more than the decretal amounts.

6. Before deciding the objections raised by the Objectors it would be more convenient and necessary to state the salient features of the Scheme which are as follows:-

- (a) Grant of additional financing to the petitioner by the Creditors (being a sum of Rs. 150 million) for optimization and fuel substitution for Line-1 project of the Petitioner;
- (b) The substitution of obligation of the Petitioner in respect of the existing liabilities with Term Finance Certificates (TFC's) to be issued by the Petitioner in the amounts of the restructured liabilities upon terms and conditions specified in the Scheme of Arrangement;
- (c) Pooling of securities available with the Creditors to be shared amongst all Creditors on a pari passu basis;
- (d) The suspension/stay of all legal proceedings by the Creditors against the Petitioner's pending issuance of TFC's and settlement/satisfaction of all claim of the Creditors

and the legal proceedings upon issuance of TFC's in terms of the Scheme of Arrangement;

- (e) Constitution of an Executive Committee to facilitate the monitoring of the financial and operational affairs of the Petitioner during the subsistence of the restructured liabilities and the TFCs.

(7) The objection as regards malafides raised by the objectors does not seem to carry any force. The only reason attributed is that the present petition had been filed at a belated stage when the entire execution proceedings were in an advanced stage and for that matter advertisements for sale had appeared inviting bids/offers. There is nothing contained in the Scheme under section 284 of the 1984 Ordinance so as to prescribe any time limit. In fact the Scheme of Arrangement can be formulated and put up for sanction of the Court at any stage subject of course to any third party rights which may have been created by way of sale in pursuance of execution proceedings. Admittedly in the present case only an advertisement has appeared without creation of any third party rights. Hence the argument touching upon malafides is rejected.

8. The second objection of Mr. Madviwalla that any assumption of jurisdiction in the present case would violate sections 27, 7(4) and 4 of 2001 Ordinance also seems out of order. Through the present Scheme of Arrangement recoveries of outstanding debts is being facilitated with the collateral attempt to keep the Petitioner alive. There is nothing in the Banking Laws or the Civil Procedure Code which mandates that no attempt should be made to keep a Company alive. In the present Scheme of Arrangement there is also no attempt to reduce the decretal amount or the amounts owed by the petitioner to Banks/DFI's and Financial Institutions. As such the present proceedings can by no means be construed as being in conflict with the decrees/orders or judgment passed by the Banking Court or any appeals thereto. As such sections 27, 7(4) and 4 of the 2001 Ordinance either stand violated nor there is any conflict thereof with section 284 of the 1984 Ordinance. This is not the first time when the legislature in its own wisdom has provided for banking laws to co-exist with the provisions in the companies' jurisdiction for rehabilitation and restructuring. Under the Companies Act, 1913 sections 153 and 153A had provided for facilitation of arrangements and compromise in a manner similar to section 184 of

the 1984 Ordinance. While the Companies Act, 1913 occupied the filed sections 3, 6(4) and 11 of the Banking Companies (Recovery of Loans) Ordinance, 1979 co-existed which provided for overriding of the Banking Laws, ouster of jurisdiction of other courts in matters to which the Special Court (i.e. Banking Court) and jurisdiction and finality attached to the orders /judgments/decrees of the Special Court i.e. Banking Court, respectively, in a manner similar to the arrangement envisaged under the 2001 Ordinance. Upon the advent of the 1984 Ordinance, the Banking Tribunals Ordinance, 1984 was also brought in the field which also provided for overriding effect of the banking laws (section 3), ouster of jurisdiction of other courts (section 5(3)) and finality attached to orders of the Banking Tribunal including execution proceedings (sections 10 and 11). However, the law-makers in their own wisdom enacted section 284 of the 1984 Ordinance and the two schemes co-existed. Even under the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 section 3 contained the overriding clause, section 7(4) provided the ouster clause and section 27 provided the finality clause. The law-makers legislated the banking law regime without any amendment in the scheme of section 284 of the 1984 Ordinance. Even in India, under the Indian Companies Act, 1956 sections 391, 392, 393, 394 provide for enforcing a scheme of arrangement for the purposes of reconstruction and rehabilitation of companies. In the province of East Pakistan V. Siraj-ul-Haq Patwari PLD 1966 SC 854 the Honorable Supreme Court has been pleased to observe that laws should be interpreted in a manner so as to be saved rather than destroyed. Unless and until there is a clear cut conflict which is irreconcilable, the courts should lean in favour of the harmonious interpretation so as to avoid any conflict and keep the laws operating in their occupied fields in order to avoid any provision becoming redundant or surplus (see PLD 1963 SC 663). The interpretation offered by the learned counsel for the Objectors would leave section 284 of the 1984 Ordinance and the entire scheme for any restructuring and rehabilitation redundant. There is no conflict between the banking laws and the scheme of section 284 of the 1984 Ordinance. The two co-exist as they have co-existed before. S such the objection regarding jurisdiction is hereby repelled.

9. The other set of objections raised by the learned counsel for the Objectors touch upon the argument that the present Scheme of Arrangement does not fulfill the preconditions of section 284 of the 1984 Ordinance. Before an attempt is made to discuss the objections it would be first important to underscore the

principles governing the said section 284. From the judgments cited by both the sides including Lipton (Pakistan) Ltd. and another, (1989 CLC 818). Main Hamidul Haq and others Vs. Taj Company Ltd. (1991 MLD 841), Application under Sections 153 and 153-A, Companies Act, 1913 Vs. Messers Hunza Central Asian Textile and Woolen Mills Ltd. (PLD 1976 Lah. 850), (AIR 1937 Bom. 423), (AIR 1959 Cal. 679), Lakmichand Vs. Janardhan and another (AIR 1932 Rangoon 154), I re Maneckchowk and Ahmedabad Manufacturing Co. Ltd. (1970) 40 CC 819 (Guj), India Flour Mills, I re (1934) 4 CC 137 (Sindh), (1994) 79 CC 110 (Cal), Japlaiguri Banking and trading Co. Ltd., In re (1935) 5 CC 335 Miheer H. Mafatlal V. Mafatlal Industries Ltd. (1996) 87 CC 792 (SC) = Miheer H. Mafatlal V. Mafatlal Industries Ltd., (AIR 1997 SC 506) and Re. Sussex Brick Co. Ltd., (1960) All England Law Reports 772, the following principles are deducible with regard to the exercise of jurisdiction u/s 284 of the 1984 Ordinance and analogous provisions:-

- (a) The jurisdiction of the Court in this regard is neither appellate nor revisional but only supervisory in nature;
- (b) The statutory majority must be present;
- (c) The Company should consent to the Scheme of Arrangement;
- (d) The Court would see as a whole whether the Scheme is fair. For this purpose it would not launch any investigation or consider each and every provision of the Scheme of Arrangement minutely. The Court would lean in favour of honouring the wishes of the majority;
- (e) Onus is on the Objectors to establish that the Scheme is malafide or unfair. As regards the latter, unfairness per se would not be enough unless and until the unfairness is patent, obvious and convincing;
- (f) Court would prefer to keep the Company alive so as to sanction the Scheme rather than allow the Company to go into liquidation;
- (g) Decree-holders and non-decree-holders do not constitute separate classes and as such it is not necessary to have different meetings in relation thereto;

- (h) There should not be a differential treatment based upon discrimination between Creditors of the same class;
- (i) The Court will not go into commercial merits or viability of the decision reached by the majority;
- (j) Separate meeting of sub-class of shareholders are only required if separates terms and conditions are laid down in the Scheme in their regard;
- (k) A class of shareholders would mean where there is a commonality of interest, which will be when the respective interests are not so dissimilar so as make it impossible for them to consult each other.

10. The first objection of Mr. Mandviwala that since the Objectors are the first ranking pari passu charge-holders, they cannot be treated as a class alongwith other persons holding inferior charges and as such the statutory majority of 75% is not present, is opposed to the admitted facts on record. In the present case there were 12 Banks/DFI's having the first ranking pari passu charge, 8 of them have obtained decrees. Out of the 8 decree holders, 5 have consented, while 3 are objecting to the present proceedings. If different classes, as perceived by the Objectors, are examined, the voting trends in favour of the Scheme of Arrangement would be as follows:

- (i) First ranking pari passu charge-holders decrees considered) 88% have consented (filed on page 1239 second part of the file as Annexure 'C')
- (ii) First ranking pari passu charge-holders who also have decrees based upon decretal amounts. 82.33% have consented
- iii) Total Creditors who participated in the meeting. 89% have consented (result filed by the Official Assignee alongwith report as also confirmed by the report of the chairman Mr. Salman Rasheed.

11. The above would categorically point out that even of a separate class, as contended by the Objectors is taken, the percentage of the consenting Creditors would be well above the

statutory majority of 75% envisaged in section 284. In any event the manner in which the voting has taken place, DFIS, Banks And Leasing Companies have been considered as a class, which interests are not so dissimilar so as to fail the test of commonality. At the end of the day all the DFIs, Banks and Leasing Companies would be interested in securing recoveries of their outstanding debts. As such they can safely be considered to be a class.

12. To the argument of the Objectors that through the impugned Scheme their securities would get diluted, reference may be made to Annexure 'E' at page 1343 of the Second Part of the Court file which confirms that before the Scheme the security coverage of debt was 59% for the first ranking pari passu charge holders, whereas after the Scheme of Arrangement in question the said security coverage ratio has gone upto 166% due to provision of additional securities and pooling thereof by the Petitioners and other Creditors. The argument that the amounts calculated in the Scheme of Arrangement are not known and for this purpose an audit ought to be arranged, a statement is made by Mr. Arshad Tayebaly, representing the consenting Creditors who are in a big majority, that the working arrangement is fair and acceptable to the Creditors represented by him, who are similarly placed as the Objector. It is also an admitted position that in the Scheme of Scheme of Arrangement there is no discrimination whatsoever and no one is being offered any preferential treatment. Also the amounts have been calculated by taking into account the outstanding debts as shown by each DFI/Bank/Leasing Company in its own books, which figures have been supplied to the State Bank of Pakistan by such DFIs/Banks and Leasing Companies themselves. In any event the power and jurisdiction of the Court does not call for any investigation or questioning the commercial merits and viability of the Scheme. All that the Court is to consider is that the Scheme is fair and reasonable. The Objectors in the present case have not been able to discharge the heavy burden cast upon them to establish categorically that the Scheme is inequitable and unfair, especially considering that there is not waiver of any amount and the Objectors alongwith other creditors will get even more that the decretal amounts. As already pointed out above the Court has to lean in favour of the majority, if the same is large enough so as to keep the Company alive. The objection that the assets added to the mortgaged properties by the Leasing Companies would have to be considered as security for the Objectors only and reliance upon section 70 of the Transfer of Property Act seem misplaced. In terms of the said provision it is only when the mortgagor adds his own assets to the existing

mortgaged assets that the mortgagee can claim benefit u/s 70. In the present case the assets which have been added in the finance leases are owned by the Leasing Companies and not by the Petitioner and as such the Objectors cannot claim accession to such assets. Mr. Arshad Tayebaly has also contended that the leased assets are separate, identifiable and removable and that against the report of M/s. Joseph Lobo objections have been filed by the Petitioner. When the thumping majority of the consenting creditors, who also constitute the first ranking pari passu charge-holders, confirm through Mr. Tayebaly that the Scheme of Arrangement is fair and reasonable, the burden on the Objectors to show the Scheme to be inequitable would become even more onerous requiring a very high standard of proof, which has not been forthcoming from the Objectors Admittedly the Objectors are given the same terms as the first ranking pari passu charge-holders, as also others, represented by Mr. Tayebaly. Not only this but in JM 36 of 2001 (i.e. in the case of Saadi Cement Ltd), this court has already sanctioned the same Scheme which is the subject matter of the petition, while finding the same to be fair and reasonable, in which none of the Objectors as in the present case filed any objections. As objections were not filed to the Scheme in JM 36/2001 it would confirm that the persons who did not initially consent to that Scheme later acquiesced thereto i.e. by not filing objections and found the same to be fair and reasonable. Some of the Objectors who have raised objections in the present petition were also concerned persons in JM 36/2001 and in having failed to raise any objections therein, their stance in the present case becomes inconsistent.

13. Looking to the facts and circumstances of the matter the listed applications are disposed of, the petition is allowed as prayed and the Scheme of Arrangement in question is hereby sanctioned and approved. This is, of course, subject to the following conditions:-]

- i) That the Objectors will not be forced to raise or lend any additional facility contrary to their wishes.
- ii) The petitioners shall issue Term Finance Certificates in favour of the objectors equal to the amount payable in pursuance to the scheme to mature on the dates of the payments to be made to the objectors and deposit the same with the Nazir of this Court. The TFS shall only be liable to encashment and recoverable by the Nazir as per rules of this Court in case of delay in payment.