PETITIONER:
S. K. GUPTA & ANR.

Vs.

RESPONDENT:
K. P. JAIN & ANR.

DATE OF JUDGMENT30/01/1979

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
KAILASAM, P.S.
KOSHAL, A.D.

CITATION:
1979 AIR 734 1979 SCR (2)1184
1979 SCC (3) 54
CITATOR INFO :
RF 1987 SC1023 (31)
RF 1991 SC1289 (14)

ACT:
Companies Act, 1956 (1 of 1956) Ss. 391 and 392-Scope of-Omission of the Original sponsor and substituting another whether would change the 'basic fabric' of the scheme.
Words & Phrases-'Modify'and 'modifications'-meaning of.

HEADNOTE:
The Companies Act, 1956 by s. 391 enables a member or a creditor of the company or a company which is being wound up, its liquidator, to make an application to the court proposing a compromise or arrangement between the company and its creditors or any class of them or between the company and its members or any class of them and seeking directions of the court to convene a meeting of each class of creditors and/or each class of members to whom the compromise or arrangement is offered. On the court giving the directions, the meeting would be convened in which the proposed scheme of compromise and/or arrangement would be submitted for consideration and each class will have to vote upon it and if the scheme is accepted by a majority in number representing three fourths in value of the creditors or members or class of members as the case may be, present and voting either in person or where proxy is allowed by proxy, such approved scheme has to be placed before the court for sanction of the court as envisaged in s. 391(2).

Under s. 392 of the Act, the High Court which has sanctioned the scheme has the power to supervise the carrying out of it and to give directions in regard to any matter or to make modifications in it as it may consider necessary for its proper working. But if the court is satisfied that the scheme cannot work satisfactorily with or without modifications, it can either suo motu or on an application of any person interested in the company's affairs order its winding up.

The holding company proposed a scheme of compromise/arrangement between its subsidiary and the unsecured creditors of the subsidiary company. After obtaining the approval of the shareholders the holding

company obtained the sanction of the company court. A large number of shares in the subsidiary company held by it and its claim for a sum of Rs. 23 lacs recoverable from the subsidiary company were transferred by the holding company to the appellants. The appellants then applied to the court to make an appropriate modification and/or grant further direction for implementing the scheme sanctioned by the court in respect of the subsidiary company by substituting them (the appellants) in place of the holding company as proponents of the scheme. The respondent in the mean while made an application to the company court under s. 392 of the Companies Act, 1956 to hold that the scheme sanctioned by the court could not work satisfactorily with or without modification and that, therefore, the court should
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make an order of winding up. The company judge allowed substitution of the appellants as proponents of the scheme and rejected the respondents' application for winding up of the subsidiary company.

On appeal by the respondents under s. 483 of the Companies Act a Division Bench held: (1) that since the substitution of a new propounder in a scheme sanctioned by the court in place of the original propounder was a change of a basic nature which would not be comprehended within the meaning of the expression "modification" in s. 392 and, therefore, the company judge could not have granted substitution of the propounder of the scheme without referring the proposed modified scheme to the creditors who approved the original scheme, (2) that since the transfer of the shares in favour of the appellants had not been effected in the company's registers, the appellants were not members of the subsidiary, (3) that the debt owed by the subsidiary to the holding company was not assigned according to law in favour of the appellants and, therefore, they were not creditors and (4) that not being either members or creditors of the subsidiary, the appellants had no locus standi to move an application under s. 392 for the modification of the scheme.

On the question whether the court had power to grant an application under s. 392 of the Act.

Allowing the appeal,

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HELD: 1. Though a large number of provisions of the Companies Act, 1956 are in pari materia with the provisions of Companies Act, 1948 of the U.K. there is no provision analogous to s. 392 in the U.K. Act. The court under the U.K. Act has no power to modify the scheme either at the time when it is offered for its sanction or at any time subsequent thereto. The Parliament has in its wisdom, conferred a power of wide amplitude on the High Court in India to provide for its continuous supervision of the carrying out of compromise and/or arrangement and also the consequential power to make the supervision effective by removing the hitches, obstacles or impediments in the working of compromise or arrangement by conferring power to give such directions for the proper working of the compromise and/or arrangement. [1193 D-F]

This power of widest amplitude being conferred on the High Court 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. [1195 C]

In the instant case the scheme is essentially a

compromise between the company and its unsecured creditors. The scheme when sanctioned does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors or members, as the cause may be. [1194 B-C]

J.K. (Bombay) Pvt. Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co Ltd. & Ors. etc., [1969] 2 SCR 866 at 891; referred to.

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2. Section 391(1) by a specific and positive provision prescribes who can move an application under it. Only the creditor or member of that company or a liquidator in the case of a company being wound up is entitled to move an application proposing a compromise or arrangement. By necessary implication any one other than those specified in the section would not be entitled to move such an application. [1194 D]

3. Sub-section (2) of s. 392 provides the legislative exposition as to who can move the court for taking action under s. 392. Reference to s. 391 in sub s. (2) of s. 392 merely indicates which compromise or arrangement can be brought before the court for taking action under s. 392. The reference to s. 391 in sub-section (2) of s. 392 does not mean that all the limitations or restrictions on the right of an individual to move the court while proposing a scheme of compromise or arrangement have to be read in sub-s. (2) merely because s. 391 is referred to therein. Unlike s. 391, s. 392 does not specify that a member or a creditor or in the case of a company being wound up, its liquidator, alone can move the court under s. 392. The legislature uses the expression 'any person, interested in the affairs of the company' which has wider denotation than a member or creditor or liquidator of a company. The ambit of the power to act under s. 392(2) is demonstrated by the provision that the court can suo-motu act to take action as contemplated by s. 392(1) or it may act on an application of any person interested in the affairs of the company. [1195 F-H]

Mansukhlal v. M. V. Shah, [1976] 46 Company cases 279 at 290-291; referred to.

4. If the court can suo motu act, it is immaterial as to who drew the attention of the court to a situation which necessitated court's intervention. Where the power is conferred on the court to take action on its own motion, the information emanating from whatever source which calls for court's attention can as well be obtained from any person without questioning his credentials, moving an application drawing attention of the court to a situation where it must act. The court may decline to act at the instance of a busy body but if the action proposed to be taken is justified, valid, legal or called for the capacity or credentials of the person who brought the situation calling for court's intervention is hardly relevant nor would it invalidate the resultant action only on that ground. When sub-s. (2) confers power on the court to act on its own motion, the question of locus standi hardly arises. [1197 C-E]

In the instant case while examining the question of locus standi after considering the provisions contained in sub-s. (2) the High Court wholly over looked the important provision therein contained, that the High Court can act on its own motion. [1197 F]

5. Even though section 391 and 392 are complementary they operate at different stages and have to be harmoniously read. [1197 G-H]

6. Winding up meaning civil death of a company, must be the ultimate resort of the court. A living workable scheme

infusing life into a sick unit is generally to be preferred to civil death of the company. There is no warrant for circumscribing the expression 'on the application of any person interested in the affairs of the company as to limit it to a member or a
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creditor. If the legislature used the expression 'member or creditor' in s. 391(1) and yet used an expression of wider denotation 'any person interested in the affairs of the company,' in s. 392(2), the legislative intention is clearly exposed in that any such person interested in the affairs of the company need not be limited or restricted to refer to a member or creditor. [1198 G-1199 A]

In the instant case, there is enough evidence on record that as between the holding company and the appellants the sale of shares is complete, and that the debt owed by the subsidiary to holding company has been assigned by the holding company to the appellants. The appellants therefore have requisite interest both in the subsidiary company and the scheme in respect of it, so as to enable them to maintain an application under s. 392(2), as being persons interested in the affairs of the company, and therefore the application for modification by them is maintainable. [1200 B-C]

7. The High Court was in error in holding that the appellants had no locus standi to maintain an application under s. 392(1). The words 'modify' and 'modification' have been defined in s. 2(29) of the Act to include the making of additions and omissions. Section 2(1) defines 'altered' and 'alteration' to include 'making of additions and omissions', while 'variation' is defined in s. 2(31) to include 'abrogation'. The definition of cognate words is noted to arrive at a true meaning of the word 'modification'. The noticeable feature is that it is an inclusive definition, and where in a definition clause he word 'include' is used, it is so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. [1200 H, 1201 D-G, H-1202 B]

Dilworth v. Commissioner of Stamps, [1899] AC 99 at 105; Jobbins v. Middlesex County Council, [1949] 1 KB 142; Indira Nehru Gandhi v. Raj Narain (1975) Suppl. SCC 1 at 97; Kalva Singh v. Genda Lal, [1976] 1 SCC 304 at 309; Cox v. Hakes, [1890] 15 AC 506; referred to.

8. 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. [1203 B]

9. The High Court misdirected itself when it resorted to dictionaries for the meaning of the expression 'modification' in s. 392 when the said term was defined in s. 2(29) of the Act itself. [1203 A]

In the instant case, the scheme is one by which a compromise is offered to the unsecured creditors of the company and whoever comes in as sponsor would be bound by it. Omission of the original sponsor and substituting another one would not therefore, change the 'basic fubric' of the scheme. [1203 E]

10. The court on which a duty is cast by s. 392(1) to supervise the working of compromise/arrangement must examine

the bona fides of the person applying to be substituted as sponsor, his capacity, his ability, his interest qua the company and other relevant considerations before substituting one sponsor for another. In a given case an application may be rejected if the
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court is of the opinion that the sponsor is not one who can be trusted with the implementation of the scheme. [1204 A-C]

In the instant case the appellants have applied for substituting them as sponsors of the scheme in place of the holding company. They claim to have purchased 44,000 shares out of 80,000 issued and subscribed equity shares of the company. The sponsor has taken an assignment of a debt of Rs. 23 lacs which the subsidiary company owed to the holding company from the holding company. The only objector is respondent holding 1,000 equity shares representing 1.25 per cent of the issued and subscribed capital. In pursuance to the court's order notice in the newspaper was inserted calling for objection to the application for substitution/modification. None including the petitioning creditor except the respondent lodged such an objection. The appellants agreed to implement the scheme and undertook to provide Rs. 3 lacs as liquid finance for implementation. The appellants therefore have a subsisting and vital interest in the fate and future of the subsidiary company and they are the appropriate persons who could and should be substituted in place of the original sponsor and there is no objection to granting their application. [1204 D-F, 1205 E, B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1217 of 1976.

Appeal by Special Leave from the Judgment and Order dated 16-7-1976 of the Delhi High Court in Company Appeal No. 15/76.

Y. S. Chitale, K. R. Khaitan, B. Mohan, and Praveen Kumar for the Appellants.

P. R. Mridul, R. L. Roshan, H. K. Puri and Vijai K. Bahl for Respondent No. 1.

Pramod Dayal and S. K. Gupta for Respondent No. 2.

R. M. Gupta and K. N. Bhat for Intervener/Dena Bank.

The Judgment of the Court was delivered by

DESAI, J-A private sector sick unit, Indian Hardware Industries Ltd. ('IHI' for short), engaged in manufacture of builders' hardware, now in a state of suspended animation since 1971, awaits the outcome of this appeal for infusion of life into it simultaneously providing a ray of hope to primarily the workmen who were rendered jobless and the unsecured and secured creditors whose hard earned money is locked up in it.

A few facts will put the problem raised in this appeal in focus and proper perspective. M/s. Delhi Flour Mills Ltd. ('DFM' for short) was the holding company of which IHI was the subsidiary. Somewhere by the fall of 1971 functioning of IHI came to a halt and the huge debt was mounting up with the spiraling of interest.
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As the shares of DFM were closely held by relations of respondent No. 1 referred to as 'Jain group' and as there were fratricidal disputes in Jain family culminating into a litigation in the High Court of Delhi, IHI languished for want of attention. In the meantime M/s. Indian Smelting & Refining Co. Ltd. ('petitioning creditor' for short) filed a

winding up petition against IHI in 1975 alleging that IHI was heavily indebted and was unable to pay its debts as and when they became due. After the dispute in the Jain family was resolved somewhere in 1974, a situation emerged in which one R. P. Jain and the members of his family acquired controlling interest in the holding company DFM. Once R. P. Jain came into saddle, the DFM as holding company proposed a scheme of compromise/arrangement between IHI and its unsecured creditors and after the scheme was approved, the proponent of the scheme submitted Company Petition No. 86/74 to the Company Court for according sanction to the scheme and by Order dated 15th October 1975 the scheme was sanctioned. Sometime after the scheme was sanctioned, DFM transferred its 44,000 shares of IHI and its claim to the tune of Rs. 23 lacs recoverable from IHI, to the present appellants S. K. Gupta and Mrs. Dropadi Gupta (referred to as 'appellants' hereafter). Thereafter the appellants filed Company Application No. 193/76 requesting the Court to make appropriate modification and/or granting further direction for effectively implementing the scheme sanctioned by the Court in respect of IHI by substituting the appellants in place of DFM as proponents of the scheme and imposing upon them the liability to implement the scheme under the supervision of the Court. A little while before this application was moved, respondent K. P. Jain filed Company Application No. 190/76 purporting to be under s. 392 of the Companies Act, 1956, inviting the Court for the reasons mentioned in the application to hold that the scheme sanctioned by the Court cannot be worked satisfactorily with or without modification and therefore an order winding up the Company should be made.

The Company Judge by his two orders in the two aforementioned applications dated 26th April 1976 granted the application of the appellants and modified the scheme by substituting the appellants as proponents of the scheme and simultaneously rejected the application of the respondent K. P. Jain for winding up the Company.

Respondent Jain preferred two appeals being Company Appeals Nos. 15 and 15/76 under s. 483 of the Companies Act. Both these appeals came up before a Division Bench of the Delhi High Court, and they were disposed of by a common judgment. The Division

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Bench was of the opinion that substitution of a new propounder in a scheme already sanctioned by the Court in place of the original propounder of the scheme was a change of a basic nature which would not be comprehended in the expression 'modification' as under s. 392 and, therefore, the Company Judge could not have granted such a substitution of the propounder of the scheme without referring back the proposed modified scheme to the creditors who had approved the original scheme. It was further of the opinion that though the transfer of 44,000 shares of IHI held by DFM in favour of the appellants may be complete as between the transferor and the transferee, the same would not clothe the appellants with the right of a member unless their names were put on the register of members maintained by IHI and that the same having not been done, the appellants were not members of IHI. It was further of the opinion that the debt owed by IHI to DFM was not assigned according to law in favour of the appellants and, therefore, they were not creditors, and in view of the language of s. 391 of the Companies Act, the appellants being neither members nor creditors of IHI, had no locus standi to move an application under s. 392 for modification of the scheme because in the

opinion of the Court s. 391 controls s. 392 and either a member or a creditor or in the case of a company being wound up, a liquidator alone can file an application for modification. In accordance with this opinion, the appeal preferred by respondent No. 1 being Company Appeal No. 15/76 challenging the order of the Company Judge which granted modification/substitution of appellants as proponents was allowed and the application of the appellants for substitution was rejected.

The Division Bench dismissed Company Appeal No. 16/76 preferred by respondent Jain against the order of the Company Judge refusing to make an order for winding up of the Company observing that even while dismissing the application for substitution of the present appellants, the Court was not in a position to come to an affirmative finding that the scheme cannot be satisfactorily worked with or without modification and the matter should be left to the Company Judge as to what future course of action should be taken in the matter.

The appellants preferred the present appeal by special leave against the decision of the Division Bench in Company Appeal No. 15/76 by which their application for substitution/modification was rejected.

Mr. S. S. Ray, learned counsel for the appellants urged that the Court committed a basic error in holding that the application for

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substitution/modification was not maintainable because the appellants were neither members nor creditors of the Company, IHI, thereby importing a narrower concept in respect of the locus standi of the present appellants to move the Court under s. 392 which restrictive approach would run counter to the power of widest amplitude conferred on the Court, namely, even to make modification suo motu or on the application of a person interested in the affairs of the Company. He further urged that the appellate Court clearly misdirected itself when it went in search of the meaning of the expression 'modification' in s. 392 by ransacking dictionaries completely overlooking the fact that in s. 2(29) of the Companies Act the words 'modify' and 'modification' have been defined and it is a well known canon of construction that unless the context otherwise requires, the definition of an expression given in a statute shall govern the meaning of the expression wherever used in the same statute. It was urged that the words "modify' and 'modification' for the purpose of s. 392 would include the making of additions and omissions and according to him additions and omissions in the context of s. 392 would and could only mean additions and omissions to the sanctioned scheme because s. 392 operates at a stage subsequent to the sanctioning of the scheme under s. 391(2). It was further urged that if the words 'modify' and 'modification' would include additions and omissions, the Court would have plenary power to substitute one proponent for the other if in the opinion of the Court the scheme cannot be worked satisfactorily without the necessary modification and in all such cases it would be imprudent to hold that the Court will have to fall back to the cumbersome procedure of s. 391 over again delaying for a considerable period the vital requirement of restarting a sick unit. It was submitted that the Court committed a fallacy in importing the concept of Constitution while interpreting a provision of the Companies Act.

Mr. Lal Narain Sinha on the other hand on behalf of the respondents, while conceding that in an emergency the Court

can act on the application of any person, ordinarily the Court would act on the application of a member or creditor of the Company and in this blurred area some light is shed by the provision contained in Rule 87 of the Companies (Court) Rules, 1959. Proceeding further, it was urged that ss. 391 and 392 constitute a code and, therefore, if there was a qualification for proposing a scheme under s. 391, the same qualification should be read in s. 392 and any other approach would be self-defeating. It was submitted that viewed from this angle, only a member or a creditor can maintain an application under s. 392 and as the appellants are neither members nor
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creditors of the Company, they have no locus standi to maintain the petition. He further urged that putting too wide a construction on the expression 'modification' in s. 392(2) would lead to such a startling result as could not have been within the contemplation of the legislature and that, therefore, in order to arrive at a true meaning of word 'modification', the Court should bear in mind the purpose and object behind using the expression or enacting the provision in which the expression is found. It was also contended that substitution of the original sponsor amounts to repudiation of the contract which the scheme represents between the proponent of the scheme and the Company and another person cannot be substituted in place of the original contracting party without the consent or affirmance of the second party to the contract and hence such a thing cannot be brought about by way of a modification under s. 392. The word 'modification' or 'modify', therefore, should be given a restricted meaning looking to the context in which it is used in s. 392 as has been done by the High Court.

Principal contentions advanced on either side turn upon the right to make an application and the power of the Court to grant an application under s. 392 of the Companies Act. Section 392 finds its place in Chapter V of the Companies Act bearing fascicules 'Arbitration, Compromise, Arrangements and Reconstructions'. Section 391 enables a member or a creditor of the Company or a Company which is being wound up, its liquidator, to make an application to the Court proposing a compromise or arrangement between the company and its creditors or any class of them or between the Company and its members or any class of them and seeking directions of the Court to convene a meeting of each class of creditors and/or each class of members to whom the compromise or arrangement is offered. On the Court's giving the directions, the meeting would be convened in which the proposed scheme of compromise and/or arrangement would be submitted for consideration and each class will have to vote upon it and if the scheme is accepted by a majority in number representing three fourths in value of the creditors or members or class of members as the case may be, present and voting either in person or where proxy is allowed, by proxy, such approved scheme has to be placed before the Court for sanction of the Court as envisaged in s. 391(2). Then comes s. 392 which may be reproduced in extenso:

> "392. Power of High Court to enforce compromises and arrangements-(1) Where a High Court makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it-
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> (a) shall have power to supervise the carrying out of the compromise or arrangement; and
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> (b) may, at any 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 Court aforesaid is satisfied that a compromise or 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".

At the outset it may be mentioned that though a large number of provisions of the Companies Act, 1956, are in pari materia with the provisions of Companies Act, 1948, of the U.K. ('U.K. Act' for short), there is no provision analogous to s. 392 in the U.K. Act. The Court under the U.K. Act has no power to modify the scheme either at the time when it is offered for its sanction or at any time subsequent thereto. The Parliament has in its wisdom, conferred a power of wide amplitude on the High Court in India to provide for its continuous supervision of the carrying out of compromise and/or arrangement and also the consequential power to make the supervision effective by removing the hitches, obstacles or impediments in the working of compromise or arrangement by conferring power to give such direction in regard to any matter or for making such modification in the compromise or arrangement as it may consider necessary for the proper working of the compromise and/or arrangement. Sub-s. (2) confers power on the Court to act under s. 392 either on its own motion or on the application of any person interested in the affairs of the company. What falls for consideration is the true meaning of the expression 'on the application of any person interested in the affairs of the company'.

The High Court was of the opinion that the appellants have no locus standi to maintain an application for modification/substitution of themselves as proponents of the scheme with a liability to implement the scheme as they were neither members nor creditors of the Company and according to the High Court, if a scheme of compromise or arrangement cannot be proposed by any one except a member or creditor, ipso facto, an application for modification of such scheme sanctioned by the Court under s. 391(2) could not be made by any one other than a member or a creditor.

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Section 391 envisages a compromise or arrangement being proposed for consideration by members and/or creditors of a Company liable to be wound up under the Companies Act, 1956. Compromise or arrangement has to be between creditors and/or members of the Company and the Company, as the case may be. It was always open to the Company to offer a compromise to any of the creditors or enter into arrangement with each of the members. The scheme in this case is essentially a compromise between the company and its unsecured creditors. The scheme when sanctioned does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is "to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity" (see J. K. (Bombay) Pvt. Ltd., v. New Kaiser-I-Hind Spg. & Wvg. Co.

Ltd. & Ors. etc.(1). Further section 391(1) itself by a specific and positive provision prescribes who can move an application under it. Only the creditor or member of that company or a liquidator in the case of a company being wound up is entitled to move an application proposing a compromise or arrangement. By necessary implication any one other than those specified in the section would not be entitled to move such an application.

When a scheme is being considered by the Court, in all its ramifications, for according its sanction, it would not be possible to com prehend all situations, eventualities and exigencies that may arise while implementing the scheme. When a detailed compromise and/or arrangement is worked out, hitches and impediments may arise and if there was no provision like the one in s. 392, the only obvious alternative would be to follow the cumbersome procedure as provided in s. 391(1), viz., again by approaching the class of creditors or members to whom the compromise and/or arrangement was offered to accord their sanction to the steps to be taken for removing such hitches and impediments. This would be unduly cumbersome and time consuming and, therefore, 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

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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.

Sub-section (2) provides the legislative exposition as to who can move the Court for taking action under s. 392. Reference to s. 391 in sub-s. (2) of s. 392 merely indicates which compromise or arrangement can be brought before the Court for taking action under s. 392. The reference to s.

391 does not mean that all the limitations or restrictions on the right of an individual to move the Court while proposing a scheme of compromise or arrangement have to be read in sub-s. (2) merely because s. 391 is referred to therein. Unlike section 391, s. 392 does not specify that a member or creditor or in the case of a company being wound up, its liquidator, can move the Court under s. 392. On the other hand, the legislature uses the expression 'any person interested in the affairs of the company' which has wider denotation than a member or creditor or liquidator of a company. In fact, the ambit of the power to act under s. 392(2) can be gauged from the fact that the Court can suo motu act to take action as contemplated by s. 392(1) or it may act on an application of any person interested in the affairs of the Company.

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In this context the observations of the Gujarat High Court, extracted hereunder, in Mansukhlal v. M. V. Shah,(1) can be referred to with advantage as it precisely lays bare the ambit and width of Court's power under section 392:

> "The framers of the company law in India have conferred statutory powers on the High Court to make such modifications in the compromise or arrangement as the Court may consider necessary for the proper working of the compromise and arrangement. The power of the widest amplitude has been conferred on the court under section 392(1) (b) and the width and the magnitude of the power can be gauged from the language employed in section 392 (1) (a) which confers a sort of a supervisory role on the court during the period the scheme of compromise or arrangement is being implemented. Reading clauses (a) and (b) of sub-section (1) of section 392, it appears that Parliament did not want the court to be functus officio as soon as the scheme of compromise and arrangement is sanctioned by it. The Court has a continuing supervision over the implementation of compromise and arrangement. Unenvisaged, unanticipated, unforeseen or even unimaginable hitches, obstruction and impediments may arise in the course of implementation of a scheme of compromise and arrangement and if on every such occasion, sponsors have to go back to the parties concerned for seeking their approval for a modification and then seek the approval of the court, it would be a long-drawn out, protracted, time-consuming process with no guarantee of result and the whole scheme of compromise and arrangement may be mutilated in the process. Parliament has, therefore thought it fit to trust the wisdom of the court rather than go back to the interested parties. If the parties have several times to decide the modification with the democratic process, the good part of an election machinery apart, the dirt may step in, the conflicting interests may be bought and sold, and, in the process, the whole scheme of compromise and arrangement may be jettisoned. In order, therefore, to guard against this eventuality and situation, which is clearly envisageable, Parliament has conferred power on the court, not only to make modifications even at the time of sanctioning the scheme, but at any time thereafter during the period the scheme is being implemented. Conceding that, before the Court sanctions the scheme, it partakes the character of an emerging contract between the

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> company and the creditors and members; once the court

approves it, it becomes a statutorily enforceable contract even on dissidents, with power in the court to modify, amend or correct or revise the contract the outer periphery or the limit on the power being that, after testing it on this anvil of probabilities, surrounding circumstances and the prevalent state of affairs, it can be done for the proper working of the compromise and arrangement, and subject to this limit on the Court's power, the power seems to be absolute and of the widest amplitude and it would be unwise to curtail it by process of interpretation".

If the Court can suo motu act, it is immaterial as to who drew the attention of the Court to a situation which necessitated Court's intervention. Where the power is conferred on the Court to take action on its own motion the information emanating from whatever source which calls for Court's attention can as well be obtained from any person without questioning his credentials, moving an application drawing attention of the Court to a situation where it must act. Undoubtedly, the Court may decline to act at the instance of a busy body but if the action proposed to be taken is justified, valid, legal or called for, the capacity or credentials of the person who brought the situation calling for Court's intervention is hardly relevant nor would it invalidate the resultant action only on that ground. Therefore, when sub-s. (2) confers power on the Court to act on its own motion, the question of locus standi hardly arises. The High Court while examining the question of locus standi, after combing the provision contained in sub-s. (2), wholly overlooked the important provision therein contained that the High Court can act on its own motion. It was, however, said in passing that sub-s. (2) enables the Court to wind up the Company and, therefore, the Court may act on its own motion or on the application of any person interested in the affairs of the company not for modifying the scheme or for any directions but for winding up the company. But when the Court is required to act under s. 392(1), the limitations and restrictions imposed upon the Court under s. 391(1) must be read in section 392(1) because the sections are complimentary to each other. This submission overlooks the two different stages at which sections 391 and 392 operate though they may be complimentary to each other. Two sub-sections of s. 392 have to be harmoniously read and sub-s. (2) clearly indicates the power of Court to take action suo motu while taking action under sub-s. (1). Again this approach is inconsistent with the language employed in s. 392(2) in that the Court can wind up the company

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under s. 392(2) if and only it is satisfied that the compromise and/or arrangement sanctioned by it cannot be satisfactorily worked with or without modifications. The Court has to reach an affirmative conclusion before acting under s. 392(2) that the compromise and/or arrangement cannot be worked satisfactorily with or without modification (see J. K. Bombay P. Ltd.) (supra). It follows as a corollary that if the compromise or arrangement can be worked as it is or by making modifications, the Court will have no power to wind up the Company under s. 392(2). Now, if the arrangement or compromise can be worked with or without modification, the Court must undertake the exercise to find out what modifications are necessary to make the compromise or arrangement workable and that it can do so on its own motion or on the application of any person interested in the affairs of the Company. If such be the

power conferred on the Court, it is difficult to entertain the submission that an application for directions or modification cannot be entertained except when made by a member or creditor. It would whittle down the power of the Court in that it cannot do so on its own motion.

Mr. Sinha referred to Rule 87 of Companies (Court) Rules and urged that it throws some light on the question as to at whose instance the Court can act under s. 392. The rule is procedural in character and at any rate the rule cannot circumscribe the power conferred by the section. Hence rule 87 is of no assistance.

Assuming that the Court would not act on its own, the next question is: could it act under s. 392(1) on the application of any person interested in the affairs of the Company ? Now, if the Court under s. 392(2) can order winding up of the company on the application of any person interested in the affairs of the company who need not be a member or a creditor, we fail to see how the Court cannot act on the application of such a person interested in the affairs of the Company either to give directions or to make modifications so as to make the compromise or arrangement workable. Winding up meaning civil death of a company, must be the ultimate resort of the Court. A living workable scheme infusing life into a sick unit is generally to be preferred to civil death of the company. There is, therefore, no warrant for circumscribing the expression 'on the application of any person interested in the affairs of the company' as to limit it to member or creditor. If the legislature used the expression 'member or creditor' in s. 391(1) and yet used an expression of wider denotation 'any person interested in the affairs of the company', the legislative intention is clearly exposed in that any such person interested in the affairs of the company need not be limited or restricted to refer to a
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member or creditor. It would, therefore, be necessary to ascertain whether the appellants would be comprehended in the expression 'any person interested in the affairs of the company'.

At one stage there was a threatened long argument to ascertain whether the appellants have become the members of the company or are the creditors of the company. The appellants contended that they and their friends have purchased 44,000 equity shares of IHI from its former holder DFM and they have also taken an assignment of the debt in the amount of Rs. 23 lacs owned by IHI to DFM from DFM. Respondent Jain contended that the assignment is not valid as it fails to comply with s. 130 of the Transfer of Property Act and as the names of the appellants are not put on the register of IHI, they have not acquired the status of member of IHI and, therefore, they being neither creditors nor members of IHI, they have no locus standi, to maintain the application under s. 392.

The stand taken by respondent Jain in this behalf is wholly ambivalent. Sometime after the scheme was sanctioned on 15th October 1975, the appellants assert that they purchased the 44,000 equity shares of IHI from DFM and they simultaneously took assignment of the debt. Thereafter respondent Jain filed Company Application No. 190/76 in which he sought a direction under s. 392(2) for winding up the Company. In inviting the Court to grant his prayer for winding up the Company, the averment made is that since the sanction of the scheme by the Court, DFM has sold its interest to Shri S. K. Gupta and others who wanted to operate the scheme as if they were the substitutes for DFM.

Another averment is that DFM was not entitled to sell its shares because it was the propounder of the scheme. Therefore, the raison d'etre for moving the application under s. 392(2) was the sale of shares of IHI held by DFM to the appellants. When the appellants filed Company Application No. 193/76 under s. 392(1), in order to show their newly acquired or subsisting interest in the scheme so as to enable them to move the application under s. 392, it was averred that the appellants have purchased 41,800 shares of IHI from DFM and the balance of holding of DFM to the tune of 2200 equity shares have been purchased by the nominee of the appellants. It is further averred that the amount standing in the name of DFM in the books of IHI also been taken over by the appellants. While replying to these averments in the application, respondent K. P. Jain in para 16 of his counter affidavit dated 29th March 1976 has stated that 'there is some understanding or agreement between the Delhi Flour Mills Co. Ltd. and Shri S. K. Gupta for the sale of the shares held by Delhi Flour Mills Co. Ltd., in the IHI and I have referred to
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it in my application CA. 190/76'. If the very alleged sale of the shares by DFM to the appellants gave cause of action to respondent Jain to maintain an application under s. 392(2) praying for an order for winding up of the company, what greater ambivalence could it disclose when it was contended on his behalf that the sale has not taken place ? There is enough evidence on record as is evident from the affidavit filed by DFM that as between DFM and the appellants the sale is complete. Similarly, there is evidence in the affidavit that the debt owned by IHI to DFM has been assigned by DFM to the appellants. In the face of this express position adopted by Jain, would it not clothe the appellants with necessary interest both in the company IHI and the scheme in respect of it, so as to enable them to maintain an application under s. 392(2) ? Appellants are certainly persons interested in the affairs of the company. For this additional reason the application for modification by them is certainly maintainable.

In the aforementioned circumstances we are not inclined to examine a very serious contention raised by Mr. Mridul who appeared at a later stage of hearing for the respondent Jain that unless names of the appellants are put on the register of IHI they do not become members and as the assignment on which the appellants rely does not comply with the requirements of s. 130 of the Transfer of Property Act, the assignee's title to the debt assigned has not become complete, and, therefore, the appellants are not creditors of IHI. We may in passing say that the factum of assignment or the sale of shares was never seriously questioned but we are prepared to proceed on the assumption that even if it be so, in the circumstances herein discussed and the ambivalence of respondent Jain the appellants could certainly be said to be persons sufficiently interested both in the company IHI and the scheme in respect of it so as to be able to maintain an application under s. 392(1).

Lastly in this connection it must be remembered that if DFM whose scheme was sanctioned and not challenged by respondent Jain, started implementing the scheme and after getting into the saddle by constituting the Board of Directors as desired by it, it could have transferred its shares to appellants and appellants could have as well taken over management and implemented the scheme and no one, at any rate, Respondent Jain holding only 1000 equity shares, i.e. 1.25% of the issued capital, could have objected to it.

The objection at this stage is equally futile. Therefore, with respect, the High Court was in error in holding that the appellants had no locus standi to maintain an application under s. 392(1).

The next important contention is that the sponsor or propounder of a scheme is such an integral part of the whole scheme or an impor-

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tant element of the 'basic structure' of the scheme that its substitution changes, alters or amends the scheme in almost its entirety and such a thing cannot be done by way of modification under s. 392. The word 'modification' must be given, according to the respondent and according to the High Court, a restricted and narrow meaning. The High Court, after reaching the conclusion that propounder of a scheme is 'the very life blood and soul of the scheme and on his going out the scheme itself becomes lifeless and inert', proceeded to examine the connotation of the word 'modification' as used in s. 392 and after referring to various dictionary meanings, reached a conclusion that the context and setting in which the word is used, it would only means a "small adjustment a minor or slight change, a qualification or limitation, alteration of a subordinate character", and substitution of a sponsor of a scheme is of such a vital nature altering, in the opinion of the High Court, the 'basic structure' of the scheme that such a three dimensional change would not be comprehended in the word 'modification' as used in s. 392. In reaching this conclusion the High Court referred to the meaning assigned to the word 'modify' in various dictionaries such as Webster, Black's Law Dictionary, et el. Unfortunately the High Court completely overlooked the obvious that the words 'modify' and 'modification' have been defined in s. 2(29) of the Companies Act as under:

> "2. Definitions-In this Act, unless the context otherwise requires-
>
> (29) "Modify" and "modification" shall include the making of additions and omissions".

It may also be mentioned that s. 2(1) defines 'altered' and 'alteration' to include making of additions and omissions, while 'variation' is defined in s. 2(31) to include 'abrogation'. The definition of cognate words is noted by us to arrive at a true meaning of the word 'modification'. The High Court nowhere refers in its judgment to the definition of 'modify' and 'modification' given in the very statute and proceeded to examine the content and meaning of the word used in a provision in the same statute which, unless the context otherwise requires, must bear the same meaning as set out in the definition section.

The noticeable feature of this definition is that it is inclusive definition and where in a definition clause the word 'include' is used it is

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so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include (see Dilworth v. Commissioner of Stamps). Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. But where the definition is an

inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect (see Jobbins v. Middlesex County Council). where the definition of an expression in a definition clause is preceded by the words 'unless the context otherwise requires', normally the definition given in the section should be applied and given effect to but this normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied (see Khanna, J. in Indira Nehru Gandhi v. Raj Narain). It would thus appear that ordinarily one has to adhere to the definition and if it is an expansive definition the same should be adhered to. The frame of any definition more often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible (see Kalva Singh v. Genda Lal).

Is there anything in the context and setting in which the word 'modification' is used in s. 392 to indicate that the legislature has not used the expression assigning the meaning to the word as set out in the definition clause? At least nothing was pointed out to us. Undoubtedly, as pointed out by Lord Hershell in Cox v. Hakes, that for the purpose of construing any enactment it is right to look, not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to
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be applied without some limitation. Even with this caution we find nothing in s. 392 or reading s.392 with s. 391, to cut down and restrict the meaning as has been attempted by the High Court completely ignoring the definition section.

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).

Strictly speaking, omission of the original sponsor and substituting another one would not change the 'basic fabric' of the scheme. The scheme in this case is one by which a compromise is offered to the unsecured creditors of the company and whoever comes in as sponsor would be bound by it. Undoubtedly a sponsor of the scheme enjoys an important place in the scheme of compromise and/or arrangement but basically the scheme is between the company and its creditors or any class of them, or the company and its members or any class of them, and not between the sponsor of the scheme and the creditor or member. The scheme represents a contract sanctified by Court's approval between the

company and the creditors and/or members of the company. The company may as well be in charge of directors and the implementation of the scheme may come through the agency of directors but that would not lead to the conclusion that during the working of the scheme the directors cannot be changed. If the scheme has to be ultimately implemented by the company as part of its contract and yet its directors can be changed according to its Articles of Association, we see no difference in the situation where a sponsor is required to be changed in the facts and circumstances of a case. Therefore, it is not possible to accept the submission that as and by way of modification one sponsor of a scheme cannot be substituted for another sponsor.

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We may not be understood to say for a moment that the Court can appoint any one as sponsor. The Court on which a duty is cast by s. 392(1) to exercise continuous supervision over the working of the compromise and/or arrangement must, in order to effectively discharge its duty, examine the bona fides of the person applying to be substituted as sponsor, his capacity, his ability, his interest qua the company and other relevant considerations before substituting one sponsor for another. In a given case an application may be rejected as the Court is of the opinion that the sponsor is not one who can be trusted with the implementation of the scheme but that is entirely a different thing from saying that the Court has no power to make such a substitution as and by way of modification of a compromise or arrangement.

Now to the facts of the case. The appellants have applied for substituting them as sponsors of the scheme in place of DFM. They claim to have purchased 44,000 shares out of 80,000 issued and subscribed equity shares of the company. As stated earlier, between the transferor and transferee of the shares, the transfer of the shares is complete and not even seriously objected to by the respondent as pointed out hereinbefore. The sponsor has taken an assignment of a debt of Rs. 23 lacs which IHI owed to DFM from the creditor DFM. A gain, as between the transferor and transferee the assignment is complete. The only objector is respondent holding 1,000 equity shares representing 1.25 per cent of the issued and subscribed capital. An advertisement was directed to be inserted by the order of the Court in newspapers in respect of the application for substitution-modification made by the appellants inviting every one interested in the company or in the scheme of compromise and/or arrangement to come and lodge objection, if it was so desired, against substitution/modification prayed by the appellants. None including the petitioning creditor except the respondent Jain has lodged such an objection. This procedure was also followed by the Gujarat High Court in Mansukhlal's (supra) case and by referring to that part of the judgment, the High Court held that judgment itself is an authority for the proposition that substitution of the sponsor is a vital change of a basic nature and cannot be ordered by the Court acting under s. 392 and must be referred to a meeting of the creditors or members. With respect, this is not a fair reading of the judgment. At pages 290-291, the scope and ambit of the power of the Court under s. 392 has been precisely set out and it is concluded that the power to modify would comprehend the power to substitute one sponsor for the other if he is found otherwise fit and competent. As an additional string to the bow, it was observed, as it

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is being done here also, that no one has come forward to

object to the substitution and that would further strengthen the hands of the Court. Such observation cannot be construed to mean that the Court lacks the power to make such a modification without reference back to the creditors and/or members, as the case may be. In the background of these unimpeachable facts the conclusion is inescapable that the appellants have a subsisting and vital interest in the fate and future of IHI and they are the appropriate persons who could and should be substituted in place of the original sponsor.

In passing it was said that the fate of the company should not be placed in the hands of the appellants and the lack of bona fides of the appellants becomes discernible from the fact that they tooth and nail opposed the very scheme which they now seek to implement. This is hardly a relevant consideration. A creditor may come and oppose a scheme being implemented by some person and yet may be interested in taking over the affairs of the company. This could hardly be treated as a disqualification of the appellants.

Lastly it may be mentioned that the appellants agree to implement the scheme. They undertake to bring Rs. 3 lacs as liquid finance for implementing the scheme. The question of the know-how was examined by the company Judge who has accepted their fitness to run the business and nothing was pointed out to us to depart from the same. Therefore, viewed from any angle, we see no objection to granting the application of the appellants for substitution/modification as sponsors of the scheme.

Accordingly, the judgment of the Division Bench dated 16th July 1976 in Company Appeal No. 15/76 is set aside and the order of the Company Judge dated 26th April 1976 in Company Application No. 193/76 is restored with costs throghout.

N.V.K. Appeal allowed.

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