SUPREME COURT OF INDIA

Infrastructure Leasing & Financial Services Limited

Vs.

B.P.L. Limited

C.A.No.2701 of 2006

(Anil R. Dave and Dipak Misra JJ.)

09.01.2015

JUDGMENT

DIPAK MISRA, J.

1. BPL Limited, the respondent herein, was incorporated under the Companies Act, 1956 (for brevity 'the Act") and on 16.4.1963, certificate of incorporation in the name of the company as British Physical Laboratories India Pvt. Ltd. was issued. The company became deemed public company and the word "Private" stood deleted with effect from 24.3.1981. Subsequently, the name of the company was changed to BPL Limited and fresh certificate of incorporation was issued by the Registrar of Companies on 16.3.1992. In the year 1982 the company had diversified its activities into Consumer Electronics, Colour Television Receivers, Black and White TV Receivers and Video Cassettes Recorders. The company embarked on various diversifications, expansion programmes and had facilities for manufacture of television, Alkaline batteries, colour monitors, etc. It also entered into the arena of manufacturing of refrigerators and electronic components through associate companies and had grown into a diversified group with multiple products and services. Due to manifold reasons, the company faced cash flow constraints which adversely affected its operations. It suffered a loss of Rs.287.8 crores in the last 18 months for the period ending on 30.09.2003 as there was decline of sales of goods. Due to the said loss, the debt of the company increased to 1494.57 crores as on 31.03.2003. As many a international brand had entered into the Indian market, the respondent company in order to keep pace with the technological advancement in the field of business initiated a comprehensive restructuring of its operations which primarily involved rejuvenating its main business through a joint venture with "Sanyo Electric Co. Ltd.", Japan and accordingly entered into a shareholder

agreement. In terms of the agreement the BPL had to transfer its existing CTV business undertaking to the joint venture constituting BPL brand for CTV business manufacturing services, marketing and distribution. Both the companies BPL and Sanyo had equal partnership in the ratio 50:50 in the joint venture. The CTV business was valued at Rs.368 crores and BPL was required to invest approximately Rs.46 crores in the joint venture company and to receive a net cash inflow of Rs.322 crores. Initially, BPL proposed a scheme of arrangement which was finally modified and in the said scheme various business institutions and banks were involved. There were 36 creditors whose names featured in the scheme.

2. After approval of the scheme the respondent filed an application under Section 391 (1) of the Act read with Rule 9 the Companies (Court) Rules, 1959 seeking permission for holding a meeting for consideration for approval of compromise or arrangement proposed to be made between companies and the creditors. The second prayer had been made for orders governing the procedures to be complied with. There were 15 respondents. After the application was filed forming the subject matter of MCA No. 84 of 2004 notices were issued and many financial institutions filed their counter affidavits/objections. The present appellant, Infrastructure Leasing & Fin. Services Ltd., which was the 8th respondent, filed its counter- affidavit and in it, had raised objections to the prayer for stay of various proceedings before number of forums including Debt Recovery Tribunal, etc. on the foundation that the Memorandum of Association of the company does not authorise it to enter into any arrangement as proposed; that the scheme concealed more than it revealed, for when such a drastic transformation was taking place it was imperative that there had to be exhaustive disclosure; that the application filed under Section 391 of the Act was totally silent as to how and on what basis the valuation of Rs.368 crores had been arrived at, which agency had done the valuation and at whose instance the valuation was done; that the scheme did not mention whether the BPL had any other option to raise the capital when retaining CTV business; that no detailed information had been furnished in the application or in the proposed scheme of arrangement as to on what basis the various percentage payments which were proposed to be made to the unsecured creditors were arrived at by the company; and that the company court had no jurisdiction to stay the criminal prosecution under exercise of its power under Section 391 (6) of the Act.

3. BPL filed a reply stating, inter alia, that very purpose of Section 391(6) of the Act is that till effective consideration of the scheme and finalization of the scheme under Section 391 of the Act there has to be a stage of abeyance from all aspects so that the Company Court can examine the workability of the same and grant

requisite relief. As regards the non- disclosure by BPL, it was asserted that the disclosure had been adequately made, for what was proposed to be transferred to the joint venture company was the colour television business of the BPL and brand associated with it and the residual company would retain the other business of the group such as medical electronics, batteries, components, etc. It was also put forth that Price Water House Coopers (PWC) was appointed by the ICICI at the instance of all lenders and PWC had assessed that the residual company could sustain a debt to the extent of Rs.480 to 520 crores and the report submitted by PWC was already in possession of the lenders including 8th respondent therein. It was alleged as the operation had been stagnated for a period of two years the valuation made by the PWC was absolutely fair. Be it stated, some of the respondents filed affidavits supporting the scheme and some others opposing the same, from many an angle. The learned Company Judge taking note of the factual matrix, the submissions advanced at the Bar, the proceeding before the DRT and the criminal cases, referred to the maintainability of the scheme and came to hold that the application preferred under Section 391(1) was maintainable; that the court had the jurisdiction to consider the application filed under Section 391(1) of the Act, even for the purpose of convening a meeting of its creditors and its jurisdiction was not affected solely because an application had been filed before the Debt Recovery Tribunal; that the company Court in exercise of power under Section 391(6) has no jurisdiction to stay the criminal proceeding initiated under Section 138 of the Negotiable Instrument Act or the proceeding pending before the Debt Recovery Tribunal under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; that it is for the creditors at the first instance to consider the scheme proposed and only the approved scheme by the required majority is to be considered by the court for grant of sanction under Section 391 (2) of the Act; that there is a distinction between Section 391(1) and 391(2) of the Act regard being had to the language employed therein and if the contentions mentioned in the proviso to sub-Section (2) of Section 391 of the Act had to be considered at the stage of Section 391(1) that will amount to reading the latter provision to the earlier one; and that the distinction which has been set forth in various sub-Sections have to be appositely understood because there are various phases till the scheme is approved and each stage has its own room to operate. After so stating the court referred to the stand of the 8th respondent and came to hold as follows:- "49. The 8th respondents among other things also taken up the contention that at all material times they were only an unsecured creditor of the applicant-Company and according to them, they are wrongly impleaded in C.A. No. 1718/2004. Accordingly to them, the short-terms loan was granted on terms and conditions agreed upon by the parties and on a reading of Clause 15 of the

terms and conditions security to be created by the Hewlett Packard (India) Ltd. through an ascrow account which will separately open. According to them, no account was opened subsequently and no amount was channelised through the account as contemplated by the mechanism prescribed. Hence, no security was created in favour of the 8th respondent. These conditions were raised in an additional affidavit filed by the 8th respondent. The applicant-company has also filed an additional affidavit answering those conditions. In the additional reply affidavit filed on 24/1/2005 the applicant-company has averred that the contention that they are only unsecured creditors was raised during agreement and the affidavit was also filed during the course of arguments. The applicant- Company took copies of the documents creating charge in favour of the 8th respondent. They have produced Annexure-X hypothecation deed which is executed in 2001. Copies of Form No. 8 return dated 1.1.2001 and Form No. 13 return dated 1.1.2001 filed with the Registrar of Companies are produced as Annexures-Y and Z. Annexures-AA in a copy of the letter ILES (8th respondent) dated 4.7.2001. It is the contention of the applicant that from the above it is clear that there is a charge in respect of he specified assets of the applicant-company in favour of the 8th respondent. Annexure-X is an unattested deed of hypothecation executed by the Applicant in favour of the 8th respondent. The applicant is described as "Borrower". This is a hypothecation deed creating exclusive charge involving all monies and right, title and interest, to be received from and or payable by Hewlett Packard Ltd., towards sale of colour monitors, to the borrower as security for the said facility arranged by the 8th respondents as security for the payment by the borrower of the balance outstanding. Annexure-Y is Form No.8 filed by the applicant-Company under Section 125 of the Companies Act. The hypothecation deed executed by the applicant-Company in favour of the 8th respondent is an instrumental creating a charge and amount secured is contained as Rs. 150 millions. It shows that the above charge was registered with the Registrar of Companies as per the provisions of the Companies Act. Annexure-Z is From No. 13 in which the amount secured is shown as Rs. 150 million. Annexure-AA is the letter of consent by the 8th respondent which shows that the 8th respondents has offered for providing short-term loan facility upto Rs. 150 million and the term loan facility is enclosed in the Annexure. The loan facility availed by them to the BPL Ltd. is also to be considered as part of the above-mentioned facility. Annexure-AA attached therein would show that the lender is 8th respondent and the borrower is BPL Ltd. and the purpose for which the loan advanced is to meet working capital requirements and the security offered is first and exclusive charge on receivables of Hewlett Packard (India) Ltd. It is also seen that the applicant-Company has to undertake to complete all formalities towards creation of charge

and the escrow arrangement within 30 days from the date of disbursement. The proposal made even as per the Scheme of Arrangement is to apply to all existing charge holders and 8th respondent is one such charge holder, to whom the Scheme is extended.

> 50. In the light of the above facts, I do not find any merit in the contention that the Scheme proposed will not cover the 8th respondent or that they are not secured creditors, to whom the Scheme will not apply. "

3. Be it stated, the court did not accept the contention that the scheme could not be worked out on the ground that the scheme was entitled to be amended either in the meeting or even subsequently by the Court and it was not the stage to suggest any amendment and accordingly contentions raised by the respondents in that regard were kept open.

4. On the basis of the aforesaid analysis, the Company Judge held that MCA No. 84/2004 was maintainable and other applications seeking grant of stay were sans merit and accordingly dismissed the same. Certain applications were kept to be considered at a later stage. The prayer of the respondents that they were not covered by the scheme proposed by the amendment and they are not secured creditors was rejected. Ultimately the Company Judge issued the following directions:-

> "54. M.C.A. No. 84/2004 is allowed. It is ordered that a meeting of secured creditors (working Capital Lenders and Term Lenders) be convened and held at the Registered office of he Applicant Company at Palghat on 16.04.2005 at 2.00 P.M. for the purpose of considering and if thought fit, approving with or without modification of he compromise/arrangement proposed as Annexure-G as modified by Annexure-N to be made between the Company and the creditors abovenamed.
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> 55. Mr. Justice T. V. Ramakrishnan, a Retired Judge of the High Court is appointed as the Chairman for the Meeting
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> 56. Notice convening the above meeting shall be published in all editions of Economic Times, Indian Express and Malayala Manorama giving 21 days clear notice.
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> xxx xxx xxx

58. That the value each member/creditor shall be in accordance with the books of the Company and in case of dispute, the Chairman shall determine the value."

5. Being aggrieved by the aforesaid order, the 8th respondent filed Company Appeal No. 5 of 2005. Before the appellate Court, it was contended that Section 391 of the Act, although refers to the power of companies to make arrangements with creditors and members, such compromise could have only been possible between a company and its creditors or any class of them, and when an application was filed before the court, where it had been possible to find out that the arrangement was not intended to be made with a homogeneous class, the court should have accepted the objection so raised. It was also urged, ignoring the same, a binding order, could not have been issued. It was contended that the meeting was proposed to be held between the company and its secured creditors and even if it was to be presumed that the appellant initially was a secured creditor, it had been disrobed of the said status consequent to subsequent developments, including an arbitration award, well before the application came to be filed in the court.

6. The appellant argued that though as required by the hypothecation deed, Form Nos. 8 and 13 thereof had been submitted before the Registrar of Companies, yet no further action was taken by BPL Ltd. to fulfil the agreed arrangement between the parties. It was asserted that as per the deed of hypothecation, the borrower was obliged to open an escrow and no-lien account with a designated bank, and was to undertake to deposit all the receivables from Hewlett Packard India Ltd. in the said escrow account only, however, no escrow account had been opened and the agreed arrangement remained only on paper. The escrow mechanism was the essence of the agreement, but it had never been put into operation and, therefore, it was not permissible for BPL Ltd. to contend that the appellant was a secured creditor and the original claims of the appellant could not have been watered down.

7. The next contention that was advanced in the company appeal was that even if it could have been assumed that because of the hypothecation deed, at one point of time, the appellant could have been considered as a secured creditor, the position had changed because of the arbitration award which has been passed on consent. Emphasis was laid on the fact that there was an agreement recorded in the award that the criminal proceedings would not be pursued and more importantly it was a settlement of money claim and nothing remained in respect of the claims on hypothecation, which originally had been entered into by the parties. Thus, the status of a secured creditor thereby irrevocably had been metamorphosed. Relying on the authority Deva Ram v. Ishwar Chand[1], a submission was advanced that on

principles gatherable from Order II, Rule 2, of CPC, after the award had come into existence, it would not have been possible for the appellant to pursue his claims on the basis of the hypothecation deed, for the rights of the parties got crystallised to a pure and simple money claim, and hence, the security earlier offered and created had lost its relevance and transformed itself to a decree debt.

8. Apart from the above contentions, it was also propounded that the appellant deemed to have relinquished rights of hypothecation security and being a party to the proceedings, BPL Ltd. could not have turned round and put forward a technical contention that the appellant continued to be a secured creditor. To buttress the said stand, reliance was placed upon the dictum laid down in K.V. George v. Secretary to Government, Water and Power Department[2].

9. The aforesaid contentions were resisted by the counsel for the BPL that the order passed by the learned company Judge was absolutely flawless; that the stand that the appellant was no more a secured creditor because of the award passed between the parties was totally devoid of any merit; that the scheme or arrangement was approved in the meeting of the secured creditors held by the Chairman and the appellant company had been issued a substantial sum but it had refused to accept the same; that the appellant remained a secured creditor for all legal purposes and hence, it was bound by the scheme in question.

10. The Division Bench adverted to the deed of hypothecation executed by the BPL in favour of the appellant company and opined that the appellant- company had failed to take follow up action to get an escrow account; that the formalities relating to creation of charge had been duly followed; that in the arbitration award there was no reference that BPL had agreed to lift the charge created; in the absence of the agreed position that the charge be got lifted, and the appellant continued to be a secured creditor and passing of the arbitration award did not create any change in the status. The Division Bench appreciating the contentions further came to hold that the appellant was a secured creditor after the hypothecation deed was executed; that once the charge had been created it continued to bind the parties till steps were regressed; and that the finding recorded by the learned company Judge was unexceptionable. That apart, the Division Bench also took note of the fact that the persons who had to be adversely affected were not parties to the appeal. Being of the view, it dismissed the appeal. The said judgment and order are the subject matter of assail in this appeal.

11. We have heard Mr. Shyam Divan, learned senior counsel for the appellant and Mr. V. Giri, learned senior counsel for the respondent. It is submitted by Mr. Divan

that that once an arbitral award has been passed on consent between the parties it extinguishes the status of the appellant as a secured creditor and it stands on a different footing altogether. It is further urged that the registration as a secured creditor does not bind the appellant and, more so, when the arbitral award has come into existence. It is his submission that after the parties settled by way of arbitration, the conceptual requisites of a secured creditor became non-existent. Learned senior counsel would further put forth that the hypothecation had never become operational as is evident from various documents on record and hence, the analysis made by the High Court is absolutely fallible. It is contended that once the deed of hypothecation is not fructified, mere registration as a secured creditor with the Registrar of Companies would not confer on the appellant the status of a secured creditor and, in any case, the said registration would not bind it. It is canvassed by him that once the appellant has accepted the award as passed by the arbitrator, it operates as res judicata against the respondent company to treat the appellant company as a secured creditor. That apart, urges the learned senior counsel, the principles inherent in Order II, Rule 2 would be attracted and the High Court has completely erred by totally brushing it aside. The learned senior counsel, to support his submissions raised by him, has referred to various provisions of the Companies Act and placed reliance on the authorities in Firm Chunna Mal Ram Nath v. Firm Mool Chand Ram Bhagat[3], Jagad Bandu Chatterjee v. Nilima Rani[4], Indian Bank v. Official Liquidator, Chemmeens Exports (P) Ltd[5]., Ranganayakamma v. K.S. Prakash[6] and Jitendra Nath Singh v. Official Liquidator and ors.[7] Mr. Giri, learned senior counsel appearing for the respondent, resisting the aforesaid proponements, would submit that the arbitral award, whether passed on consent or on contest, has the status of a decree but such a decree does not extinguish the charge and thereby does not disrobe the status of a secured creditor. Learned senior counsel would contend that despite the relinquishment made by the appellant, it would not take away the legal status conferred by it in law. Emphasis has been laid on the issue of registration before the Registrar under Sections 138 and 139 of the Act and how the record establishes that the status and the arbitral award will not change the registered status. It is contended by Mr. Giri that by no stretch of imagination, the principle of resjudicata would apply to the case at hand, for the proceedings are of different nature. He would also urge that the lis would not be hit by the bar created under Order II, Rule 2 of the CPC. Learned senior counsel has commended us to the decisions in Lonankutty v. Thomman and Another[8], Harbans Singh and others v. Sant Hari Singh and others[9], and Indian Bank v. Official Liquidator, Chemmeens Exports (P) Ltd. and others[10].

12. From the narration of facts and the contentions which have been highlighted, it is clear that two facts are beyond dispute. First, the appellant stands registered as a secured creditor of the respondent company on the record of the Registrar of Companies under the Act; and second, the arbitral tribunal has passed an award on the basis of consent and it has the status of a decree which is executable in law. Keeping in view these two undisputed facts, we have to appreciate the rival submissions raised at the Bar. In this context, reference to relevant portions of Sections 391 and 393 of the Act would be appropriate. They are as follows:

> "391. (1) Where a compromise or arrangement is proposed-
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> (a) between a company and its creditors or any class of them; or
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> (b) between a company and its members or any class of them; the Court may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs. (2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under Section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, [pic]in the case of a company which is being wound up, on the liquidator and contributories of the company:

13. Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251, and the like."

xxxxx xxxxx xxxxx "393. (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under Section 391,-

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular, stating any material interests of the directors, managing directors, managing agents, secretaries and treasurers or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and insofar as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid."

14. Sub-Section (1) of Section 391 stipulates that a compromise or arrangement can be proposed between a company or its creditor or any class of them or between a company and its members or any class of them. It need not be between all the creditors or all the members. Contextually, "class of creditors" or "class of members" has a different meaning and connotation. It gains significance when the question of approval of scheme under the Act arises for consideration. While dealing with the approval of a scheme, the Company Court is required to direct holding of meeting of the said class of creditors or members concerned and only when the scheme is approved by the majority in number representing 3/4th in value by the class of creditors, or members present either in person or through proxy, the same becomes binding on the said class of creditors or members. Once there is a voting and the 3/4th majority has voted in favour of the scheme, it is binding on those who have dissented and had voted against the scheme or those who remained silent.

15. While analyzing the scope and ambit of the powers of the Company Court in respect of Section 391 and 393 of the Act and the role of the Court a two- Judge Bench in Miheer H. Mafatlal V. Mafatlal Industries Ltd.[11] has observed thus:-

"Before sanctioning such a scheme even though approved by a majority of the concerned creditors or members the [pic]Court has to be satisfied that the

company or any other person moving such an application for sanction under sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to sub-section (2) of that section. So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391(1)(a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the voters concerned so that the parties concerned before whom the scheme is placed for voting can take an informed and objective decision whether to vote for the scheme or against it. On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the scheme concerned placed for its sanction."

16. Thereafter, the Court referred to Section 392 of the Act. The said provision deals with the supervisory jurisdiction of the Company Court. It is necessary to reproduce the same:

"392. (1) Where a High Court 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 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 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.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under Section 153 of the Indian Companies Act, 1913 (7 of 1913), sanctioning a compromise or an arrangement."

17. In the said context, the Court posed the question whether it has the jurisdiction of an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not and whether the majority creditors or members, through their respective class, have approved the scheme as required under sub-Section (2) of Section 391. It observed that the nature of compromise or arrangement between the company and the creditors and the members has to be kept in view, for it is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote. Therefore, the Court does not act as a Court of Appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned and further the Court has neither the expertise nor the jurisdiction to dig deep into the commercial wisdom exercised by the creditors and the members of the company who have ratified the scheme by the requisite majority. The Court eventually held that it has the supervisory jurisdiction which is also in consonance with the language employed under Section 392 of the Act. In that context, the Court referred to the observations found in the oft-quoted passage in Buckley on the Companies Act, 14th Edn. It is as follows:

"In exercising its power of sanction the court will see, first that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme."

18. The Court also referred to the decision in Alabama, New Orleans, Texas and Pacific Junction Rly. Co. Re[12] to cull out the principle relating to the power and jurisdiction of the Company Court which is called upon to sanction the scheme of arrangements or compromise between the company and its creditors or shareholders. The observations of Lindley, L.J. as quoted in the said authority read as under:

"What the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the minority has been acting bona fide. The court also has to see that the minority is [pic]not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can reasonably be taken by businessmen. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve it."

19. The observations of Fry, L.J. were also reproduced. A reference was made to the decision in Anglo-Continental Supply Co. Ltd. Re[13] and the judgment by a three-Judge Bench in Employees' Union V. Hindustan Lever Ltd.[14] and eventually, the following principles were culled out: "In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at [pic]an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub- section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to

promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

20. The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction."

21. In this context, we may usefully refer to Palmer's Treatise on `Company Law, 25th edition, wherein delineating with the concept of class, it has been stated thus:-

"What constitutes a class:

The court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the company to decide, in accordance with what the scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking the risk that the classes which are fixed by the judge, usually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, and we emphasize the words 'in the result', they reveal inadequacies, the scheme will not be approved'. If, e.g., rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be

> treated differently under the scheme, such groups must be treated as separate class for the purpose of the scheme. Moreover, when the company has decided what classes are necessary parties to the scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the scheme. In that case it is not the practice to hold a meeting of that class, but to make the class a party to the scheme and to obtain the consent of all its members to be bound. It is, however, necessary for at least one class meeting to be held in order to give the court jurisdiction under the section."

22. In this regard, reference to a passage from Sovereign Life Assurance Co. Ltd. v. Dodd[15], as stated by Bowen, L.J., would be apt. It reads as follows:

> "it seems plain that we must give such a meaning to "Class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

23. The purpose of the classification of creditors has its significance. It is with this object that when a class has to be restricted, the principle has to be founded on homogeneity and commonality of interest. It is to be seen that dissimilar classes with conflicting interest are not put in one compartment to avoid any kind of injustice. For example, an unsecured creditor who has filed a suit and obtained a decree would not become a secured creditor. He has to be put in the same class as other unsecured creditors (See Halsbury's Laws of India, 2007, Vol. 27). The aforesaid being the position relating to the status of a class, at this juncture, it is necessary to appreciate the basic facts which are determinative in the case at hand. As the exposition of facts would uncurtain, the appellant company had extended a short-term loan facility of Rs.150 million to the respondent company on 4.7.2001; that the respondent company had executed a deed of hypothecation in favour of the appellant hypothecating by way of an exclusive charge of the monies and right, title and interest relating to amounts, both present and future to be received or payable by M/s. Hewlett Packard Ltd.; that the respondent had filed Forms 8 and 13 and the charge by way of hypothecation was duly registered with the Registrar of Companies; that the appellant had initiated an arbitration proceeding which eventually resulted in the consent award dated 1.7.2004 whereby the arbitral tribunal directed a sum of Rs.48,683,710/- as due on 30.06.2004 along with interest @ 20% p.a. on the principal amount of Rs.36,360,000/- from 01.07.2004 till realization; that the award stipulated due discharge of the liability on payment of

Rs.36,360,000/- in four instalments for the purpose of which post-dated cheques were issued; that there was a postulate that in case of default of payment of any instalment, the entire amount may become due and payable and the appellant would be entitled in law to execute the award for recovery of the entire due without prejudice to and in addition to entitlement to institute criminal proceedings under the Negotiable Instruments Act; that the respondent failed to pay the first instalment of Rs.17,500,000/- on or before 30.09.2004; that on 30.09.2004 the respondent filed a petition under Sections 391-394 of the Act for sanction of the scheme; that the appellant initially filed objections to the scheme in the form of a counter affidavit on 25.11.2004 on merits and thereafter at a subsequent stage on 20.1.2005 filed an additional affidavit stating, inter alia, that it was an unsecured creditor; that an affidavit was filed in oppugnation asserting that the appellant was a secured creditor, regard being had to the hypothecation deed and the registration having been effected with the Registrar of Companies; that meeting of the secured creditors and guarantors was held on 6.4.2005 and a Chairperson was appointed; that the said order was challenged by IndusInd Bank Ltd., WTI Bank Ltd. and Bank of Rajasthan Ltd. in appeals but the same were dismissed by the Division Bench on 17.06.2005; that the appellant preferred an appeal which was dismissed by the judgment on 17.1.2006, which is impugned herein; that the scheme which has been amended was put to vote and was duly approved by the three-fourth of the secured creditors present and voting in value terms; and that the Court has approved and accepted the modified Scheme.

24. We have, hereinabove, referred to the fact that the Scheme was amended and approved in the meetings held by the secured creditors. For the sake of completeness, we think it appropriate to reproduce how the learned Company Judge had approved the Scheme.

> "(i) The scheme of arrangement as amended by amendments approved at the meeting of the secured creditors on April 16, 2005, being Annexure D1 to the Company Petition No. 13/2004 is sanctioned so as to be binding with effect from 31.03.2003, on the petitioner company and all of its secured creditors and preference shareholders, including any secured creditor and preference shareholders that may have obtained any decree, order or direction from any court tribunal or any other authority, without any further act or deed by the petitioner company, in respect of the outstanding debt of the petitioner company as of March 31, 2003 to all its secured creditors and preference shareholders, which amount shall be as has been determined on the basis of the figures agreed and accepted between the petitioner company and each of the secured creditors at the meeting of the secured creditors

convened and held on April 16, 2005, and hence the figure as was specified in the application filed by the petitioner Company under section 391 (1) of the Companies Act stands/ modified accordingly.

(ii) The petitioner Company shall within 30 days after the date of sealing of this order cause a certified copy thereof to be delivered to the Registrar of Companies, Kerala of registration.

(iii) On the coming into effect by the Scheme of Arrangement being filed by the petitioner Company with the Registrar of Companies, Kerala and with effect from 31.03.2003, the outstanding debt of the petitioner company owed to all secured creditors and Preference Shareholders as of 31.03.2003 shall be restructured on the terms and conditions and in the manner provided for in the Scheme of Arrangement as annexed in Annexure D1 to the petition.

(iv) The total outstanding debt of the petitioner company to all is Secured Creditors and Preference Shareholders as of 31.03.2003 of the petitioner Company shall be restructured under the scheme of arrangement and all rights and liabilities relating to such outstanding debt to secured Creditors and Preference Shareholders as of 31.03.2003 shall stand created under the Scheme of Arrangement. In addition, the petitioner company and the Secured Creditors and Preference Shareholders shall enter into any documentation that may be required, only to give formal effect to the restricting and for the modification of the security contemplated by the Scheme of Arrangement, and to govern the prospective/ongoing relationship between the petitioner Company and its Secured Creditors and Preference Shareholders (including covenants of the petitioner company, supervision of the management of the petitioner Company, Event of Default etc). However, upon the Scheme of Arrangement coming into effect, in the absence of the formal documentation referred to above, the rights obligations and privileges of the petitioner Company and the Secured Creditors and Preference Shareholders shall be governed by the provisions of the Scheme of Arrangement as detailed in Annexure D1 to the petition.

(v) Any legal or other proceedings pending against the petitioner Company, in India or abroad, relating to any of the outstanding debt, of the petitioner company to Secured Creditors and Preference Shareholders shall, on the effectiveness of the Scheme of Arrangement, be terminated and the rights, obligations and liabilities of the parties shall be governed by the terms of the Scheme of Arrangement.

25. That the parties to the compromise of arrangement or other persons interested shall be at liberty to apply to this court for any directions that may be necessary in regard to the working of the Compromise or arrangement and that the said company do file with the Registrar of Companies a certified copy of this order within 14 days from the date.

26. Keeping in view the factual backdrop, we have to appreciate the principal contentions. The seminal contention of the appellant is that it does not fall into the class of secured creditors, for it had initiated the arbitration proceeding and an award has been passed on consent which is a simple money decree and, therefore, the deed of hypothecation, even if assumed to be executed at one point of time, has become irrelevant. To elaborate, the status of the appellant had changed from a secured creditor to that of an unsecured creditor. On this foundation, a stance has been taken that the principles of Order II, Rule 2, C.P.C. would be applicable as the appellant would be debarred to issue on the basis of the charge of hypothecation. Emphasis has been laid on the factum that there having been a change of status, the appellant company cannot be clubbed with the secured creditors as a class and even if it is kept in homogenous category of secured creditors, it should still fall under a separate class, regard being had to the fact it has obtained an award from the arbitral tribunal. In this context, it is to be seen that whether the arbitration award has the effect of obliterating or nullifying the status of the appellant and making him an unsecured creditor as a consequence of which it would not be able to sue on the basis of a charge created in its favour. What is contended by Mr. Divan, learned senior counsel for the appellant is that any further lis would be hit by principles enshrined under Order II, Rule 2 as well as by resjudicata. It is urged by him that the claim of the appellant company having been heard and decided in a formal proceeding, i.e. the arbitration, it is binding and, therefore, the principle under Order II, Rule 2 would come into play. For the said proposition, he has drawn inspiration from Deva Ram (supra). The Court, after analyzing the Order II, Rule 2 CPC, observed thus:

> "A bare perusal of the above provisions would indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit as Order II Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause."

27. In that context, reference was made to Palaniappa Chettiar v. Alagan Chettiar[16]. The Court also observed that the Rule requires the unity of all claims based on the same cause of action in one suit but it does not contemplate unity of separate causes of action. If, therefore, the subsequent suit is based on a different cause of action, the rule will not operate as a bar. For the said purpose, reliance was placed on Arjun Lal Gupta V. Mriganka Mohan Sur[17], State of Madhya Pradesh V. State of Maharashtra[18], and Kewal Singh V. Mt. Lajwanti[19]. In this regard, immense emphasis has been placed by Mr. Divan, learned senior counsel, on the authority in Official Liquidator, Chemmeens Exports (P) Ltd. (supra), especially paragraphs 13, 15 and 18. Paras 15 and 18 which have been pressed into service with immense inspiration read as follows:

> "The aforementioned preliminary decree was passed by the Court even though the Official Liquidator raised the plea in the written statement that the charge created on the Company's property was void under Section 125 of the Act. But it may be that the plea was not argued at the hearing. However, what is clear from the material on record is that no appeal was [pic]filed against the said preliminary decree by the Official Liquidator and the preliminary decree has attained finality.
>
> xxxx xxxx xxxx In Suryakant Natvarlal Surati v. Kamani Bros. Ltd.[20] the Company created a charge under a mortgage in favour of the trustees of the Employees' Gratuity Fund. The creditors, by a preliminary decree of 3-12-1977 were entitled to receive the amount secured on the property of the [pic]Company; the Court fixed 8-12-1988 as the date for redemption and ordered that in default of payment of the sum due by that date, the property was to be sold by public auction. On an application made on 16-2-1978, the Company was ordered to be wound up by an order dated 3-8-1979. As default in payment of the decreed amount was committed, the mortgagees applied for leave of the Court under Section 446 to execute the decree against the Official Liquidator by application dated 10-7-1981. Three contributories sought injunction against taking any further action on the ground that the charge created by the Company was not registered under Section 125 of the Companies Act, therefore, the mortgagees should be treated only as unsecured creditors. Their application was dismissed by a learned Single Judge. On appeal, speaking for the Division Bench of the Bombay High Court Justice Bharucha (as he then was) laid down, inter alia, the principle that the question of applicability of Section 125 had to be decided on the terms of the decree - whether the unregistered charge created by the mortgagor was kept alive or extinguished or replaced by an order of

> sale created by the decree; if upon a construction of the decree, the Court found that the unregistered charge was kept alive, the provisions of Section 125 would apply and if, on the other hand, the decree extinguished the unregistered charge, the section would not apply. We are in respectful agreement with that principle. We hold that a judgment-creditor will be entitled to relief from the Company Court accordingly."

28. Relying on the said passages, it is urged that when the award has been passed on consent and has the status of a decree that makes him an unsecured creditor, for it has attained finalilty. To appreciate the said submission, the quoted passages are to be appositely appreciated. As is evident, this Court has concurred with the view expressed by the Bombay High Court in Suryakant Natvarlal Surati (supra). The Division Bench of the Bombay High Court had opined that the question of applicability of Section 125 of the Act has to be decided on the terms of the decree - whether the unregistered charge created by the mortgagor was kept alive or extinguished or replaced by an order of sale created by the decree; if upon a construction of the decree, the Court found that the unregistered charge was kept alive, the provisions of Section 125 would apply and if, on the other hand, the decree extinguished the unregistered charge, the Section would not apply. To elucidate, it would depend upon the terms of the decree. In the case at hand, the learned Arbitrator has passed an award on consent. It is trite that it has the status of a decree but there is nothing expressed in the award that the decree has extinguished the charge. It was not extinguished because the award does not say so. To have a complete picture, we think it necessary to reproduce the relevant portion of the operative part of the award:

> "I. Award on admission in the sum of Rs.48,683,710/- (due as on June 30, 2004) in favour of the Claimants against the Respondents together with further interest @ 20% p.a. on the principal sum of Rs.36,360,000/- from 1st July, 2004 till payment and/or realization.
>
> II. The aforesaid Award against the Respondents shall be marked as fully satisfied in the even of the Respondents making payment to the Claimants of the sum of Rs.36,360,000/- in the following installments:-
>
> Rs.17,500,000/- on or before 30th Septemebr, 2004 Rs.6,287,000/- on or before 15th April, 2017 Rs.6,287,000/- on or before 15th April, 2018 Rs.6,287,000/- on or before 15th April, 2019 III. Simultaneously with the signing of these Consent Terms, the Respondents have handed over to the Claimants one post dated cheque in favour of the Claimants for

Rs.17,500,000/- and 3 post dated cheques in favour of the Claimants for Rs.6,287,000/- each falling due on the date of the respective instalments.

IV. The Respondents hereby agree and undertake that the Respondents shall make payment of the said sum of Rs.36,360,000/- to the Claimants as per the Schedule set out in Clause 2 above and shall honour the post dated cheques on their respective due dates. This undertaking is given by the Respondents after satisfying themselves that they have the financial ability to make the said payment on the respective due dates.

V. In the event of the Respondents committing default in payment of any of the installments including the last installment on the due date for any reason whatsoever, the entire dues together with interest as provided on Clause I hereinabove and outstanding due and payable by the Respondents to the Claimants as on that date shall become forthwith due and payable by the Respondents to the Claimants and the Claimants shall be entitled to forthwith execute the Award against the Respondents and recover the entire dues. In that even, any installments/s paid under Clause 2 will be first appropriated towards the interest payable under Clause I without prejudice and in addition thereto, the Claimants shall also be entitled to institute criminal legal proceedings against the Respondents including for dishonor of cheque/s under the provisions of the Negotiable Instruments Act, 1881."

29. In view of the aforesaid conclusions, in the award, we have no scintilla of doubt that the decision in Official Liquidator, Chemmeens Exports (P) Ltd. (supra) is distinguishable.

30. In this backdrop, we are to analyse whether the deed of hypothecation would continue in spite of the arbitration award. Mr. Divan submitted that it would not survive because of the provisions contained in Order II, Rule 2 of the CPC. We have already referred to the decree and distinguished the decision in Official Liquidator, Chemmeens Exports (P) Ltd (supra). In this context, reference to Order XXXIV Rule 14 and 15 of the CPC would be apposite. They read as follows:

14. Suit for sale necessary for bringing mortgaged property to sale - (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882(4 of 1882), has not been extended.

15. Mortgages by the deposit of title-deeds and charges - (1) All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882 (4 of 1882).

(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount may be realized by sale of that property in execution of that decree.

The said provisions came to be interpreted in S. Nazeer Ahmed V. State Bank of Mysore and Others[21]. Referring to the said provisions, the Court held the suit for enforcement of mortgage could be filed even when in the earlier civil proceedings, the plaintiff had omitted to sue on the basis of equitable mortgage and in such cases, principle of constructive resjudicata or Order II, Rule 2 would not apply. The two-Judge Bench has opined that in such cases a suit for enforcement of the mortgage would lie under Order XXXIV notwithstanding that in the earlier suit the plaintiff had not asked for enforcement of the mortgage. As the factual matrix in the said case would unfurl, the Bank had advanced a loan by hypothecating a bus and further by equitable mortgaging two items of immovable properties. It had at first filed a suit for recovery of money and sought to proceed against the hypothecated bus which could not be traced and recovered. In the said suit, the Bank had not prayed for a decree under Order XXXIV on the basis of mortgage. There was an attempt to enforce the mortgaged property in the execution proceeding but the same was rejected as no decree of mortgage has been passed. Thereafter, the Bank, the respondent therein, instituted another suit for enforcement of equitable mortgage. The second suit was held to be maintainable, regard being had to the language employed in Rules 14 and 15 of Order XXXIV, holding, inter alia, that said Rules had been enacted to protect the mortgagor, etc. and, therefore, the plea of constructive resjudicata relying upon Order II, Rule 2 of the Code was erroneous. The two-Judge Bench held that for Order II, Rule 2 to apply, the cause of action in the two suits should be similar and the bar of constructive resjudicata, as was held, was not applicable. Analysing the facts, the Court held:

"That apart, the cause of action for recovery of money based on a medium-term loan transaction simpliciter or in enforcement of the hypothecation of the bus available in the present case, is a cause of action different from the cause of action arising out of an equitable mortgage, though the ultimate relief that the plaintiff Bank is entitled to is the recovery of the term loan that was granted to the appellant. On the scope of Order II Rule 2, the Privy Council in Payana Reena Saminathan v. Pana Lana Palaniappa[22] has held that Order II Rule 2 is directed to securing an exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they [pic]may arise from the same transactions. In Mohd. Khalil Khan v. Mahbub Ali Mian[23], the Privy Council has summarised the principle thus: (IA pp. 143-44) "The principles laid down in the cases thus far discussed may be thus summarised:

(1) The correct test in cases falling under Order II Rule 2, is 'whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation for the former suit'. (Moonshee Buzloor Ruheem v. Shumsoonnissa Begum[24]) (2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. (Read v. Brown[25]) (3) If the evidence to support the two claims is different, then the causes of action are also different. (Brunsden v. Humphrey[26]) (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (Brunsden v. Humphrey) (5) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers 'to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour'. (Chand Kour v. Partab Singh[27]) This observation was made by Lord Watson in a case under Section 43 of the Act of 1882 (corresponding to Order II Rule

2), where plaintiff made various claims in the same suit."

A Constitution Bench of this Court has explained the scope of the plea based on Order II Rule 2 of the Code in Gurbux Singh v. Bhooralal1. It will be useful to quote from the headnote of that decision: (SCR Headnote pp. 831-32) "Held: (i) A plea under Order II Rule 2 of the Code based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. It is for this reason that a plea of a bar under Order II Rule 2 of the Code can be established only if the defendant

files in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits. In other words a plea under Order II Rule 2 of the Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. Without placing before the court the plaint in which those facts were alleged, the defendant cannot invite the court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. On the facts of this [pic]case it has to be held that the plea of a bar under Order II Rule 2 of the Code should not have been entertained at all by the trial court because the pleadings in Civil Suit No. 28 of 1950 were not filed by the appellant in support of this plea.

(ii) In order that a plea of a bar under Order II Rule 2(3) of the Code should succeed the defendant who raises the plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more than one relief; (iii) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed."

It is not necessary to multiply authorities except to notice that the decisions in Sidramappa v. Rajashetty[28], Deva Ram v. Ishwar Chand[29] and State of Maharashtra v. National Construction Co.[30] have reiterated and re-emphasised this principle."

31. Applying the said test to the present case, it can be stated with certitude that there is no shadow of doubt that the consent award in an arbitral proceeding would not bar a suit for enforcement of the charge for the same reasons and it would not be hit by Order II, Rule 2 CPC. We are absolutely conscious that the present case does not relate to a charge as engrafted under Section 100 of the Transfer of Property Act, or simply for equitable mortgage. In the present case, the charge is by hypothecation and relates to movable property. Needless to say, provisions of Rules 14 and 15 of Order XXXIV would not be directly applicable but the principle inherent under the said Rules, as enunciated would be applicable. In fact, the ratio laid down in S. Nazeer Ahmed (supra), as we understand, makes it equally applicable to different causes of action. The said principle would apply, if we accept that the cause of action is distinct. The next aspect we shall advert to is the applicability of doctrine of resjudicata. In Deva Ram (supra), the Court while dealing with the said doctrine has opined thus:

> "Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "Interest reipublicae [pic]ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "Nemo debet bis vexari pro una at eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised."

32. Mr. Divan, learned senior counsel has also drawn our attention to Harbans Singh (supra) wherein it has been held that when no appeal was preferred by the Union of India, while accepting the award in favour of the first respondent therein, it had attained finality and thus the principle of resjudicata was applicable. Reliance has also been placed on Ranganayakamma (supra).

33. The said plea has been advanced on the foundation that the controversy between the parties having been finally put to rest by the arbitral award, the respondent would not have dragged the appellant to the said proceeding as that would vex him twice. The issue before the Company Court was quite different than that was before the Arbitral Tribunal. True it is, it has the status of a decree which is executable, as a decree having gone unchallenged, but the lis of framing a Scheme under the Act is of different character. It could not have been directly or substantially in issue before the learned Arbitrator. That apart, we have already held the status of the appellant as a secured creditor has not changed. Therefore, in our considered opinion, the plea of resjudicata which has been canvassed by the learned senior counsel for the appellant does not commend acceptance and we so hold.

34. Mr. Divan, learned senior counsel has drawn our attention to Section 63 of the Contract Act. To buttress the applicability of the said provision, he has commended us to the decision in Firm Chunna Mal Ram Nath (supra). The relevant portion reads as under:

> "The contentions raised on these sections were as follows. The respondents, relying on Sections 39 and 63, said that the appellants had put and end to the agreement and had expressly dispensed them from delivery at all. The appellants contended that Section 63 applied only where there was an agreement to dispense or a contract, supported by consideration to do so, and

> that in any case it could only operate, when the party dispensing had performed his part of the contract and only something remained to be performed on the other side, unless dispensed with Abaji Sitaram Modok v. Trimbak Municipality 28 B. 66; 5 Bom. L.R. 689. They further said that, if they had been wrong in refusing in advance to accept bales, this repudiation had not been accepted by the respondents, and, therefore, the contract remained alive and ought to have been performed. It is evident that the alleged dispensation under Section 63 is by itself a complete answer, unless the absence of contract or consideration is fatal, for the appellants again and again dispensed with the performance by the respondents of their promise to deliver the goods contracted for and they cannot recover damages for the breach of a promise touching the performance of a thing they wholly dispense with.

35. In Abaji Sitaram Modok v. Trimbak Municipality[31], Chief Justice Jenkins deals with Section 63, and holds that the promise mentioned in Section 63, can, only do the acts he is by that section empowered to do, if there be an agreement (as defined by 2(e)) amongst the parties to that effect. At page 72 of the report of this case the learned Judge is reported to have expressed himself thus:-

> Therefore we hold that assuming there was a legal resolution and that it was communicated as alleged, still inasmuch as a dispensation or remission under Section 63 requires an agreement or contract, the resolution was of no legal effect since the provisions of s.30 of Bombay Act II of 1884 have not been observed.

36. With this their Lordships are unable to agree The language of the section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines. On this they agree with the learned Judges of the High Court."

37. He has also drawn inspiration from Jagad Bandu Chatterjee (supra), wherein after referring to the observations of Lord Russell of Killowen in Dawson's Bank Limited V. Nippon Menkwa Kabushiki Kaisha[32] and the well known work of Sir William P. Anson "Principles of the English Law of Contract", 22nd Edn., the Court opined thus:

> "In India the general principle with regard to waiver of contractual obligation is to be found in Section 63 of the Indian Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it

> any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in Waman Shriniwas Kini v. Ratilal Bhagwandas & Co.[33] that waiver is the abandonment of a right which normally everybody is at liberty to waive. "A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon [pic]the right".....

38. The stress on the aforesaid decisions by the learned senior counsel is to highlight that the respondent have waived the hypothecation by accepting the arbitration award. The said submission has its own fallacy. The arbitral award was passed on consent and from the same it would be inappropriate to deduce that the hypothecation stood annulled. In this context, we may fruitfully refer to Sections 176 and 177 of the Contract Act, 1872, which pertain to the rights of pawnee on default made by the pawnor. The said provisions read as under:

> 176. Pawnee's right where pawnor makes default. - If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.
>
> If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.
>
> 177. Defaulting pawnor's right to redeem - If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them, but he must, in that case, pay, in addition, any expenses which have arisen from his default."

39. The aforesaid two provisions when read in a conjoint manner clearly establish that a pledge does not get extinguished and, in fact, continues even when the pawnee has sued and recovered a part of the debt without enforcement of the pledge or the security. As per Section 176, when the pawnor makes default in making the payment, the pawnee may bring a suit upon the debt or promise and

retain the good(s) pledged as a collateral security. A pawnee has both collateral and concurrent rights and can institute a suit for the purpose of realization of the said debt or promise while retaining the goods as a collateral security. Section 176 also makes it clear that it is the discretion of the pawnee and it gives an option to him and merely because pawnee has filed a suit for recovery, that would not affect or destroy the charge or the right of the pawnee in respect of a pledged goods or the collateral security. Thus, it is within the domain of discretion of pawnee to file a suit for recovery of a debt and yet retain the collateral security or pledged goods. It would not bar or prohibit a pawnee from subsequently selling the pledged goods or the collateral security. It is pertinent to mention here that there is a difference between a hypothecation and a pledge. In the case of a pledge, the security is in possession of the pledge, but in the case of hypothecation, the possession remains with the owner i.e. the pawnor. Though such a distinction exists, yet it is an accepted legal principle that hypothecation is treated as a sub-species of pledge and virtually has the same legal effect. In this context, reference to a passage from Lallan Prasad V. Rahmat Ali and another[34], would be seemly. "17. There is no difference between the common law of England and the law with regard to pledge as codified in sections 172 to 176 of the Contract Act. Under section 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain the goods pledged as security for payment of a debt and under section 175 he is entitled to receive from the pawner any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right under section 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner. So long, however, as the sale does not take place the pawner is entitled to redeem the goods on payment of the debt. It follows therefore that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and therefore if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. If it were otherwise, the result would be that he would recover the debt and also retain the goods pledged and the pawner in such a case would be placed in a position where he incurs a greater liability than he bargained for under the contract of pledge. The pawnee therefore can sue on the debt retaining the

pledged goods as collateral security. If the debt is ordered to be paid he has to return the goods or if the goods are sold with or without the assistance of the court appropriate the sale proceeds towards the debt. But if he sues on the debt denying the pledge, and it is found that he was given possession of the goods pledged and had retained the same, the pawner has the right to redeem the goods so pledged by payment of the debt. If the pawnee is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Where the value of the pledged property is less than the debt and in a suit for recovery of debt by the pledgee, the pledge denies the pledge or is otherwise not in a position to return the pledged goods he has to give credit for the value of the goods and would be entitled then to recover only the balance".

40. More than eight decades back, the Bombay High Court in Gulamhusain Lalji Sajan V. Clara D'Souza[35], while dealing with the applicability of Section 176 of the Contract Act to a case of hypothecation, had opined thus: "Under S.176, Contract Act, the pledge has a right to bring a suit against the pledgor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged in giving the pledgor reasonable notice of the sale.

41. It is clear under the law applicable to cases of a pledge that the creditor has two rights which are concurrent, and the right to proceed against the property pledged is not merely accessory to the right to proceed against the debtor personally. For the pledge may have a right to sue for sale of the property even in the absence of a right to sue for a personal decree.

> The same principles would apply to the case of hypothecation or mortgages of moveable property."

42. Be it noted, in the said case reliance was placed on Nim Chad Babu v. Jagabandhu Ghose[36] and Mahalinga Nadar v. Ganapathi Subbien[37]. We will be failing in our duty if we do not advert to the issue that the appellant shall remain as a secured creditor, for it was registered as such under the Registrar of Companies. The formalities for creating the charge having duly followed, the Division Bench has referred to the Form No. 8 and 13 and also adverted to the power of Registrar to make entries of satisfaction and release, as provided under Sections 138 and 139 of the Act. It has also expressed the view that in the absence of any proceeding, the status of the company as a secured creditor continues. After registration of the deed of hypothecation, if a condition subsequent is not satisfied, that would be in a different realm altogether. In any case, the finding has been

recorded that the respondent was not at fault and, in any case, that would not change the status of the appellant as a secured creditor.

43. In view of the aforesaid analysis, we are of the considered opinion that the appellant cannot be treated as an unsecured creditor and it is not permissible for him to put forth a stand that it would not be bound by the Scheme that has been approved by the learned Company Judge. The aforesaid conclusion of ours leads to the inevitable dismissal of the appeal, which we direct. However, in the factum and circumstances of the case, there shall be no order as to costs.

[1] AIR 1996 SC 378
[2] AIR 1990 SC 53
[3] AIR 1928 PC 99
[4] (1969) 3 SCC 445
[5] (1998) 5 SCC 401
[6] (2008) 15 SC 673
[7] (2013) 1 SCC 462
[8] (1976) 3 SCC 528
[9] (2009) 2 SCC 526
[10] (1998) 5 SCC 401
[11] (1997) 1 SCC 579
[12] (1891) 1 Ch 213
[13] (1922) 2 Ch 723
[14] (1995) Supp (1) SCC 499
[15] 1892 (2) Q.B. 573 CA
[16] AIR 1922 PC 228
[17] AIR 1975 SC 207
[18] AIR 1977 SC 1466
[19] AIR 1980 SC 161
[20] (1985) 58 Comp Cas 121 (Bom)
[21] (2007) 11 SCC 75
[22] (1913-14) 41 IA 142
[23] (1947-48) 75 IA 121
[24] (1867) 11 MIA 551
[25] (1888) 22 QBD 128
[26] (1884) 14 QBD 141
[27] (1887-88) 15 IA 156 : ILR 16 Cal 98 (PC)
[28] (1970) 1 SCC 186
[29] (1995) 6 SCC 733
[30] (1996) 1 SCC 735

[31] 5 Bom. L.R. 689
[32] 62 IA 100, 108
[33] (1959) Supp 2 SCR 217, 226
[34] AIR 1967 SC 1322
[35] AIR 1929 Bom. 471
[36] [1894] 22 Ca. 21
[37] [1902] 27 Mad. 528