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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Judgment reserved on : 13.5.2019*  
*Judgment pronounced on : 27.01.2020*

+ Co. A. No. 509/2018 in CO.PET. 885/2015

COL. P.K. UBEROI (RETD.) & ANR. .... Petitioner

Versus

VIGNESHWARA DEVELOPWELL

PVT. LTD & ORS. .... Respondent

Present: Mr.Shailendra Singh, Adv. for Vigneshwara Victim Welfare Association.  
Mr.Shashwat Jain and Mr.Sandeep Phogat, Advs. in CP 885/2015.  
Mr.Arunav Patnaik and Mr.Shikhar Saha, Advs. for Objectors-Mr.S.M. Puri.  
Ms.Anju Jain Advocate for Vingeshwara Barter Investors Association.  
Mr.Najimuddin Ahmed, Adv. for the applicant.  
Mr.R.K. Gupta, Adv. for the objector-Vipin Gupta HUF and Mr.Nitin Gupta, HUF.  
Mr.Abhishek Saket, Mr.Shahana Farah, Mr.Rahul Dubey and Mr.Chitral Gambhir, Advs. in CP 885/2015  
Mr.Siddhant Tripathi, Mr.Abhinav Mishra, Ms.Nivedita Chauhan and  
Mr.Karan Nagpal, Advs. for Vigneshwara Barter Investors Association.  
Mr.Arunav Patnak and Mr. Shikhar Saha, Adv. for the applicants in CP 885/2015  
Mr.Arjun Nanda, Mr.Amitabh Sinha and Ms.Aarzo Aneja, Advs. for the applicant in CA No. 505/2018in CP 885/2015  
Mr.Jay Salva, Sr. Adv.with Mr.Bharat Gupta, Ms.Shreya Rao and Mr.Vishesh Chauhan, Advs. for Investors Sangharsh Samiti

Mr.Sameer Jain and Mr.Angad Sandhu, Advocates for the Service Tax Department.  
Mr.Anish Dayal, Mr. Siddharth Vaid and Ms.Rupam Sharma, Advs. for ICT  
Mr.Kunal Sharma, Adv. for the OL  
Mr.Anil Grover, Adv. with Ms.Noopur Singhal, Adv. for DTCP,Haryana and HSIIDC  
Ms.Nipun Kapur, President, VVWA  
Mr.Ruchir Bhatia, Sr. Standing Counsel for Income Tax  
Mr.Manik Dogra, Mr.Dushyant Manocha and Ms.Ananaya Ghosh, Advs. for propounders/ex-management.

**CORAM:**  
**HON'BLE MR. JUSTICE JAYANT NATH**

**CA 509/2018 in CP 885/2015**

**JAYANT NATH, J. (JUDGMENT)**

1. This application is filed under section 391-393 of the Companies Act, 1956 by the promoters of Vigneshwara Developwell Private Limited and Vigneshwara Developers Private Limited praying for approval of the proposed Scheme of Compromise and Arrangement of the two companies with their respective members and creditors. Against the two companies in question, namely, Vigneshwara Developers Private Limited and Vigneshwara Developwell Private Limited winding up petitions were admitted and order appointing the OL as Provisional Liquidator were passed by this court on 22.7.2016 in CP No.534/2015 titled Naresh Chand Gupta and Anr. vs. Vigneshwara Developers Private Limited and in (the present petition) CP No.885/2015 titled Col.P.K.Uberoi (Retd.) and Anr. vs. Vigneshwara Developwell Private Limited.
2. It is pleaded that during pendency of the aforesaid proceedings by

permission of this court, the Ex.Management of the aforesaid companies engaged in mediation proceedings with the creditors. Large number of settlements have been concluded before the Delhi High Court Mediation and Conciliation Centre by the authorised representatives with the creditors. Based on the said settlement terms, it is pleaded that the present revival scheme has been filed which has been attached as Annexure D to the application. It is admitted that the promoters of the two companies i.e. Mr.Sunil Dhaya & Mr.Sanjay Dhayia are in judicial custody in connection with various proceedings said to have been initiated by unsecured creditors of the various companies.

3. It is pleaded that the two companies do not have any secured creditors. A copy of the certificate of the Chartered Accountant has been placed on record. Last audited balancesheets of the two companies for the year 31.3.2013 have also been enclosed. The class of unsecured creditors to whom the revival scheme is applicable have also been enclosed as Annexure J.

4. I may only note that after judgment was reserved and delivery of the present judgment was pending, NCLT passed an order on 10.10.2019 appointing an Interim Resolution Professional and declared a moratorium under section 14 of the IBC. The propounders of the Scheme filed a Writ Petition before this court titled Sunil Kumar Dahiya vs. Union of India being W.P.(C)11706/2019. This Court disposed of the petition on 8.11.2019 noting that this court is seized of the revival of the company stayed the operation of the order dated 10.10.2019 of NCLT until pronouncement of the judgment of this court or until the matter is decided by NCLAT. NCLAT was requested to consider the matter including the orders passed by the Company Court.

5. The NCLAT on 19.12.2019 adjourned the matter to 9.1.2020. The matter is said to be pending.

6. The present application came up for hearing on 23.4.2018 when notice was issued on the same to the non-applicants. On 12.10.2018, this court had noted the submission of learned counsel for the applicant that there are two projects of the respondent company, namely, Darson and Kisson I Valley Business Park at Plot No.CP02, Sector 8, Manesar, Gurugram which was allotted for development of a technology park. Similarly, another project by the name of Aquarious Business Park has also been developed at Village Begumpur Khatola, Sector-74, Gurugram. The plea of the learned counsel for the applicant was also noted that the applicant has entered into settlements before the Delhi High Court Mediation and Conciliation Centre with the Investors Sangharsh Samiti (Regd.) who has 523 Members on 4.12.2017. A settlement was also entered into with Vigneshwara Barter Investors Association (VBIA) which had 250 members and Vigneshwara Victims Welfare Association who had 300 members. Some individual agreements had also been entered into. It was pleaded that out of about 1437 unit buyers, 1180 have agreed to the settlement and have signed the settlement agreements before the Delhi High Court Mediation and Conciliation Centre. This court noted that as out of 1437 unit buyers 1180 had supported the scheme, 80% of the stated class of creditors have agreed to the compromise or arrangement. The Court also noted that the OL had filed a report stating that 41 claims had been received pursuant to the advertisement published in the newspaper for a total value of Rs.21.47 crores for Vigneshwara Developwell Pvt. Limited and 25 claims for the total value of Rs.7.93 crores received for Vigneshwara Developers Private Limited and

that all the claims were received from the allottees/unit buyers. This court hence dispensed with a meeting under section 391 of the Companies Act. Notices were directed to be issued inviting any objections from the effected parties. The applicant was also to put the scheme on the net.

7. Notice was also to be served on the Regional Director, Ministry of Corporate Affairs, CGO Complex. On 21.2.2019 notices were also issued to the Income Tax Department, Service Tax Department and Directorate of Account, State of Haryana. The OL was also directed to file his response.

8. I may first have a close look at the scheme filed. The scheme clarifies that there are two pending projects of the company. The first is iValley Business Project which is under the name and style of Darson & Kisson iValley Business Park at Plot No.CP 02, Sector 8, Manesar, Gurgaon which has about 10 acres land and was launched in 2007 for development of a Technology Park on Campus Development Norms. It is stated that Vigneshwara Developers Pvt. Ltd. has free hold marketable interest for 38,212 sq. metres as per HSIIDC Norms. Construction in the project was commenced and construction of Tower-C (Venus Tower) and Tower B-I and Tower B-II to the extent of 75% and 65% are respectively complete. The remaining towers have been constructed up to the ground floor level. A three level basement parking for the entire 10 acres stands completed. The company still has approximately 6 lakhs sq. ft. of the unsold inventory in the said project which can further go up to another 4 lakhs sq. ft. with approval of HSIIDC on account of potential increase in FAR. Second Project is Aquarius Project through the promoters of Vighneshwara Develop Well Pvt. Ltd. who controls the company Aquarius. Aquarius has rights and entitlements for development and construction of the said project and

license, approval and receipt from DTCP. This project has six towers. At the time of stoppage of work in 2014, underground basement up to level 3 has been completed. This project has approximately 19.5 lakh sq.ft of unsold inventory available.

9. Regarding settlement, the scheme envisages two different formulas. One being Formula for Category-1 and one being Formula for Category-2

10. Formula for Category 1 and Formula for Category 2 read as follows:-

“The claims of the Allottees under this category shall be settled for an amount, which is equivalent to his principal amount plus taxes, if any paid by such Allottee, *less* 40% of the assured return already paid to such Allottee by the Promoters / Companies from time to time  
("Formula - Category 1").

Formula - Category 2:

The claims of the Allottees under this category ("Formula - Category 2") shall be settled for an amount, which is equivalent to the difference between:

(a) the amount invested by each Allottee in the projects (*the principal amount plus any service tax I TDS paid*) plus simple interest @ 8.5% per annum calculated up to March 31, 2017 from the dates of their respective payments; and

(b) the amount received by such Allottee from time to time from the Companies and/or the Promoters, as assured return, plus simple interest @ 8.50% per annum calculated up to March 31, 2017 from the dates of their respective payments.

11. It is stated that upon determination of the settlement of amount, each of the allottees in terms of the Formula as elected by them, their claim would be settled by transferring/allotting space/FSI on as-is-where-is basis without any third party encumbrance to the allottees in either of the projects.

Regarding the Investors' Sangarsh Smiti allottees, as full and final settlement to the said allottees, the promoters will hand over sanctioned area on as-is-where basis in the iValley Project. Details are given in the scheme. Thereafter, the said allottees will at their own cost and through their own means construct further covered area on the said two towers, namely, Tower B-I and Tower B-II. The said allottees shall at their own cost and expense either by themselves or through a third party as they deem fit construct and develop the said towers B-I and B-II and the area as agreed in Tower-A in accordance with applicable laws. The promoters will obtain necessary approvals with regard to construction at their own cost. The promoters shall at their own cost and expense obtain water, sewerage and electricity permission and connections.

12. Similarly, the Vighneshwara Victims Welfare Association Allottees have elected their settlement amount to be determined as per Formula Category-2. As full and final settlement of the said allottees, the promoters have agreed to hand over tower marked as Media Max in Aquarius project to be developed in the proposed drawings of Aquarius Cyber Park I as described in the scheme. The promoters will get the drawings of the tower of G+22 approved from the competent authorities. The tower once completed will comprise 5,99,000 sq. ft. The cost of construction will be borne by the allottees. They may enter into a collaboration with any developer for the purpose of developing Media Max Tower. Promoters will apply for renewal of the license and will make best endeavour to get the approval within 90 days of the sanction of the scheme. The promoters shall also pay stamp duty and get the property/development rights registered directly by the original collaborator/land owners. Certain obligations are also put on the

**Vighneshwara Victim Welfare Association.**

13. Regarding Vighneshwara Barter Investors' Association, each of them has elected settlement according to Formula Category 1. As full and final settlement to the said allottees, the promoters will collectively allot the entire tower C (G+12 referred to as Venus Tower) in iValley project to the said Association on account of as-is-where-is basis. Structure of the Venus Tower is complete, however the inner partitions/walls, flooring, finishing, etc. are yet to be completed. It has a covered area of 2,65,151.23 sq. ft. The dues of HSIIDC and certain other government dues shall be cleared by the promoters along with other dues of any statutory authority within 90 days from the date of sanction of the scheme.

14. There are allottees who are not members of any association or have not initiated any claims against the company. They shall be entitled to seek settlement of such right/claim by electing to be part of any of the formulas either of Category 1 or Category 2 and the settlement amount by applying the elected formula shall be settled by the company by way of transferring appropriate area in any of these projects. Other details are stated in the scheme.

15. Pursuant to issue of notice inviting objections, number of objections have been received from allottees/unit buyers. I may note the salient objections raised to the scheme in question.

16. One set of objections have been filed by an Association i.e. Vigneshwara Victims Welfare Association who state that they have 400 members who have invested their hard-earned money in the said two companies. It is pleaded that the Scheme is a total eyewash as the source of funds to fulfil the demands made in the Agreements made by the two

companies are non-tangible. The following objections are raised:-

(a) It is pleaded that the two companies must come out with clear and concrete source of money which is required to be paid to the Director, Town and Country Planning, Haryana to get the license renewed and to get the one acre land transferred in the name of the applicants.

(b) It is further stated that there is no statement as to how the basic infrastructure such as sewage, water and electricity etc. which will cost money is going to be organised.

(c) There are various miscellaneous permissions which are also required for the purpose of revival of the project like charges to be paid to the authorities of which there are no details.

(d) It is stated that as per the settlement, one acre of land was agreed to be given to the objecting association. However, it is stated that this has no relevance if the applicant companies do not complete the project as the power given to the association has a major percentage of area which can be built as a part of the entire project and not on a stand alone basis.

(e) It is further stated that the Ex.Directors have purchased assets in the name of other group companies by using investors' fund. The OL should take over all the assets of the said companies and utilise them to fulfil the commitments as per agreements. The list of 19 such companies has been filed alongwith the objections.

(f) It is stated that false calculations of the projects have been given in paragraph D of the scheme.

(g) It is further stated that the aforesaid companies have promoters/Ex.Directors who have failed to disclose any concrete and reliable source of funds till date on the basis of which the scheme is sought to be

projected.

17. Three investors, namely, Group Captain S.M.Puri, Mr.S.N.Dasmahapatra and Mr.G.K.Uberoi have also filed their objections separately.

(a) They state that they have bartered their properties with group entities of Vigneshwara Group in lieu of allotment of units in the proposed projects. They were owners of certain properties and by an agreement had parted with the above property to one of the group companies of Vigneshwara Group. In return, as consideration, they were to receive space in the proposed buildings. It is stated that the objectors are pursuing the individual cases before appropriate courts in Gurugram against the said group companies of the Vigneshwara Group for cancellation of the sales of their respective barter properties. The said group companies are not before this court in the winding up proceedings.

(b) It is further stated that the project in question failed to abide by the Real Estate (Regulation and Development) Act, 2016.

(c) It is further stated that the Scheme envisages the companies transferring areas to investors association and these associations are responsible for development of buildings and allotment of space to individual members. It is stated that the promoter would be unable to obtain the said registration in respect of the projects and the same would not be RERA Compliant. Hence, such a Scheme would be illegal.

(d) It is further stated that multiple investigations and criminal proceedings are pending against the promoters of the Vigneshwara Group. It is pointed out that on 12.7.2017 Central Government has directed the SFIO to conduct an investigation against the Group Companies of Vigneshwara

Group under section 212 read with 210 of the Companies Act, 2013. Further, it is stated that there are multiple criminal proceedings pending against the Vigneshwara Group including proceedings pending with the Enforcement Directorate under the Prevention of Money Laundering Act, 2002. It is stated that the promoters of the Group have been laundering money from the funds raised from the public for acquisition of personal assets. The said propounders of the Scheme are habitual offenders and have caused grave loss to public at large. The proposed scheme, it is prayed, is not workable and is a fraudulent exercise being undertaken to have the promoters released from custody, pursuant to which there is grave risk that they will abscond.

(e) It is stated that the scheme contemplates disposal of the bartered properties which are owned by entities affiliated with the promoters for financing the revival scheme. The objectors herein are pursuing the cases for cancellation of sale of the bartered properties. Hence, the Scheme is not bona fide. Their group companies constitute separate legal entities and their assets cannot be illegally brought within the purview of the winding up proceedings.

(f) It is stated that the scheme assumes that all statutory authorities will grant the required clearances for the projects to be developed. It is pointed out that the license for the Aquarius projects issued by DTCP, Government of Haryana has expired. The Developers have been blacklisted by the Department. Similarly, in relation to Ivaliy Project, over 10 years have elapsed and the project has not been completed. Hence, it may not be possible for the promoters to seek any further extension of time to execute the project.

(g) It is further stated that the approvals from statutory/regulatory

authorities will require prior sanction of such authorities as well as payment of transfer charges including clearance of all pending dues. It has not been demonstrated as to how such approvals will be taken,

(h) It has been stressed that the promoters/companies lack the financial capacity to execute the scheme.

18. Wellone Wash and Clean Services Pvt. Ltd. have also filed their objections to the Scheme. It is stated that the debtor company Vigneshwara Developwell Private Limited owes a debt of Rs.21,87,782 as on March 2018 on account of maintenance services. Objections are being filed on the ground that the name of the applicant is not included in the Scheme of Settlement.

19. Objections have also been filed by Nitin Gupta, HUF through its Karta Nitin Gupta. Particularly, the following objections have been raised:

(a) No General Meeting of Buyers or Creditors was called which is mandatory under section 391(1) of the Companies Act.

(b) The respondent company has not filed list of creditors/unit buyers and their valuation of the credit so that the actual number of 3/4<sup>th</sup> of the value of creditors could not be ascertained.

(c) It is stated that as per the proposed revival scheme total allottees of the project are 1550 and supporters of the Scheme are 1050 allottees. Hence, the criteria of 3/4<sup>th</sup> of total allottees of the scheme supporting the scheme does not follow.

(d) It is stated that the respondent company has purchased a number of valuable immovable properties situated in Gurugram and other places in the name of his promoters and respective affiliates/associates. The list of 22 affiliates/associates is stated in the objections. These properties have been

purchased with the precious funds of the investors.

20. Objections have also been filed somewhat on the above grounds by various entities including Sh. Naresh Chand Gupta.

21. I have heard learned counsel for the parties.

22. Learned counsel for the objectors have reiterated their objections to the scheme. They have also relied upon judgment of this Court in *M/s JVG Leasing (Securities & Finance) and Ors, (2008)144 Company Case 780* to contend that where the proposed scheme is not viable or worthy of consideration this court should reject the same.

23. I may now deal with the objections.

24. Essentially, the Scheme revolves around two aspects. It deals only with allottees of flats/space. Allottees can be termed to be a class of creditors within section 391 of the Companies Act, 1956. This is so as they can be said to be a homogenous group with commonality of interest. The allottees are to be given space/unencumbered space in the semi-built/un-built areas. The construction is to be completed by one of the three named associations, namely, the Investors Sangharsh Samiti, Vighneshwara Victims Welfare Association and Vighneshwara Barter Investors Association. Those of the allottees who are not associated with any of the associations have the option of joining any of these associations. These associations have been given a right to enter into collaboration agreements and complete the construction.

25. The majority of objections centre around three facets. Firstly, mobilisation of funds, namely, as to whether the promoters would be in a position to mobilise funds to be able to get necessary statutory permissions/permission from DTCP, HSIIDC, etc. The second lot of objections is that the Scheme is nothing but a fraud by the promoters to try

and get released from their present detention in judicial custody on the plea that the court has approved a revival scheme. Thirdly, it was stressed that the Scheme does not have the requisite approval of 3/4<sup>th</sup> of value of creditors.

26. I may first deal with the issue of mobilisation of funds.

27. It has been strongly urged by the objectors that there is no clear and concrete source of money which is required to be paid to various statutory agencies including Director of Town and Country Planning. The promoters of the scheme have sought to clarify this aspect. The promoters of the scheme have pointed out that an escrow account has already been opened with the Registrar General of this court. The escrow account has a balance of Rs. 2.71 crores. A sum of Rs. 1 crore also stands deposited in this court in various winding up petitions. Further a sum of Rs.1.10 crore would be remitted by the propounders from their personal fund. Rs.1.44 crores is said to have been attached by various orders of the court. Further the propounders would liquidate Rs.1.5 crores from the fixed deposits held by sister companies. Further it is stated that the propounders can leverage unsold inventory. The iValley project has approximately 6,00,0000 sq.ft. of unsold inventory. The Aquarius project has approximately 19.5 lakhs sq. ft. of unsold inventory. It is admitted that DTCP has raised a demand of Rs. 44 crores in December 2018. However on audit reconciliation this demand comes to Rs. 19.44 crores as principal and the balance amount is towards interest and penal interest. After allowing benefits of policies after reconciliation, it is claimed that an amount of Rs.26.06 crores (approx.) will remain due and payable to DTCP. Similarly, HSIIDC has raised a demand of Rs. 32 crores in July 2018 towards enhanced charges. It is claimed that this is a miscalculation of land enhancement charges and on correct computation,

an amount of Rs. 18.5 crores would be found due to HSIIDC. It is claimed that disposal of unsold inventory will generate a fund of Rs. 250 to 350 crores in the course of 12 months. Above is the stated mechanism for raising funds for the revival scheme.

28. It is obvious that the promoters or the company doesn't have ready cash to show for the full scheme. Perhaps if they had the ready cash, the two companies would not be in the present plight. I may only observe that the undisputed fact is that the respondent company has approximately 6 lac sq.ft of unsold inventory in i-Valley Project and approximately 19.5 lac sq.ft. in Aquarius project. Some amount of cash is lying deposited in various accounts. Though it is probable that the full amount as claimed by the promoters of the Scheme may not be fully available to the promoters of the Scheme. However, in my opinion, once the Scheme is approved by the Court the propounders may be in a position to mobilise resources based on unsold inventory and to generate funds. I also cannot help noticing that out of 1437 allottees 1180 allottees have agreed to the Scheme voluntarily before the Delhi High Court Mediation and Conciliation Centre. As noted by the Supreme Court in *Meghal Homes (P) Ltd. Vs. Shree Niwas Girni K.K.Samiti and Ors.*, (2007) 7 SCC 753 this court is not to sit in appeal over the commercial wisdom of the majority of class of persons who with their open eyes have given their approval to the Scheme. I hence reject the contention about the revival scheme being bereft of any chance of success in the absence of any proved financial capacity of the propounders of the Scheme.

29. The next plea raised is that the Scheme is nothing but a facade by the promoters to try and get themselves released from the present detention in

judicial custody. I would not like to comment on the said objection. The courts dealing with the criminal matters would be the best courts to decide on the issue of bail or no bail to the said promoters. I would not like to pass any observations on the same.

30. As far as the plea about lack of support of 3/4<sup>th</sup> majority of unit-holders is concerned, in my opinion, the plea is misplaced. This court on 12.10.2018 had based on submissions made by the parties concluded that the scheme has the support of a majority in number representing 3/4<sup>th</sup> in value of the creditors. This order dated 12.10.2018 had not been challenged in any form. No objections or review has also been filed to state that this court had come to an erroneous decision that the scheme is supported by a majority representing 3/4<sup>th</sup> in the value of creditors of the class of creditors.

31. Even otherwise, as per the Scheme propounded there are total 1437 allottees of space which have been sold, 1180 number of allottees have entered into agreements with the promoters of the Scheme before the Delhi High Court Mediation and Conciliation Centre. It is clear that the number who have entered into a Settlement Agreement cross the figure of 75% of the said allottees. The above figures are sought to be challenged at this stage. In my view there are no basis for this challenge.

Accordingly, I do not find any merit in the said contention raised by some of the objectors and the same is rejected.

32. There are couple of more objections which I may note. Objections have been filed by Group Captain S.M.Puri, Shri S.Dasmahapatra and Shri V.K.Oberoi. It is their case that they have bartered their property with the respondent entities in lieu of allotment of units in the proposed projects. They have initiated suits in the appropriate courts in Gurgaon against the

group companies of Vigneshwara Group to whom they had handed over their properties for cancellation of sales and for barter of their respective properties. As the present respondents companies are not involved in the said litigation, in my opinion, the said objection cannot be an impediment to the present Scheme.

33. Another aspect is the objections filed by Vigneshwara Victims Welfare Association. The said Association has about 300 allottees. Most of these allottees have entered into a settlement with the promoters of the respondent company before the Delhi High Court Mediation and Conciliation Centre. Now, having entered into a settlement, at this stage, in my opinion, the said Association cannot be allowed to resile from their settlement agreement especially as nothing has changed since signing of the Settlement Agreement. The members of the Associations cannot be permitted walk out from the settlements entered into before the Delhi High Court Mediation and Conciliation Centre without any rhyme or reason.

34. Another objection has been filed by Wellone Wash and Clean Services Private Limited. It is their case that they are creditors of the company Vigneshwara Developwell Private Limited. However, they do not find any place in the Scheme of Settlement. A perusal of the Scheme would show that it is dealing with the allottees. As noted above, under section 391 of the Companies Act, allottees can constitute a class of creditors in terms of Section 391 of the Companies Act. As the said objectors, named, do not find place in the Scheme it is manifest that the Scheme does not cover the said objector and the settlement of their dues would take place in the normal course as per law after revival of the company or through the Official Liquidator as the situation develops.

35. Another plea that has been strongly urged by some of the Objectors is that the respondent company is not Real Estate (Regulation and Development) Act, 2016 (RERA) compliant. I may note that when these projects were launched the said statutory provision, namely, RERA was not in existence. It would now be for the propounders of the Scheme/the various associations as stated in the Scheme to take steps for making the Scheme RERA compliant.

36. On the above facts, reference may be had to the judgment of the Supreme Court in *Meghal Homes (P) Ltd. vs. Shree Niwas Girni K.K.Samiti and Others*, (*supra*) where the court held as follows:-

“45. Considerable arguments were raised on the role of the Court when a scheme under Section 391 of the Act was propounded for its consideration. The decision in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [(1997) 1 SCC 579] was relied on. That was a case of merger or amalgamation of two companies. Neither of the companies was in liquidation. This Court held that compromise or arrangement included amalgamation of one company with another. This Court also defined the broad contours of the jurisdiction of the Company Court in granting sanction to a scheme in terms of Section 391 and Section 393 of the Act. This Court laid down the following parameters:

- “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 an informed decision for approving the scheme in question. That the majority

decision of the class of voters concerned 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.”

46. We may straightaway notice that this Court did not have occasion to consider whether any additional tests have to be satisfied when the company concerned is in liquidation and a compromise or arrangement in respect of it is proposed. Therefore, it cannot be said that this would be the final word on any scheme put forward under Section 391 of the Act, whatever be the position of the company concerned. Even then, this decision lays down the need to conform to the statutory formalities, the power of the Court to ascertain the real purpose underlying the scheme, the bona fides of the scheme, the good faith in propounding it and that as a whole, it is just, fair and reasonable, at the same time emphasising that it is not for the court to examine the scheme as if it were an appellate authority over the commercial wisdom of the majority.

47. When a company is ordered to be wound up, the assets of it are put in possession of the Official Liquidator. The assets become *custodia legis*. The follow-up, in the absence of a revival of the company, is the realisation of the assets of the company by the Official Liquidator and distribution of the proceeds to the creditors, workers and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the ultimate step is taken or before the assets are disposed of, to accept a scheme or proposal for revival of the Company. In that context, the court has necessarily to see whether the scheme contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529-A of the Act. Of course, the court has to see to the bona fides of

the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the company in liquidation.

37. Similarly, in *Modiluft Limited vs. S.K.Modi, 2005 (123) DLT 413*, a co-ordinate Bench of this court held as follows:-

“40. I do not find that the scheme is inherently incapable of performance and unworkable. I would take note of some of the case law cited at the Bar, which would throw light on the approach to be adopted in such cases.

41. Dealing with such aspects, the Gujarat High Court (speaking through D.A. Desai, J. as His Lordship then was) and considering the matter in all its length and breadth in *re. Maneckchowk and Ahmedabad Manufacturing Co. Ltd.* reported (1970) 40 Comp. Cas. 819 made the following observations which would equally apply to the present fact situation:

“Even at the cost of repetition, it must be mentioned that the scheme is opposed by a very few creditors and an infinitesimally small number of shareholders. The fact that the scheme has been approved by a requisite majority of shareholders is undoubtedly a strong argument in its favour, unless it is shown that their approval was not obtained fairly and the terms of the scheme are not such as a reasonable man may accept. The approval of a scheme by statutory majority of creditors and members is not decisive of the matter. But it is equally true that due weight should be attached to the choice indicated by the creditors and members who are vitally interested in the company and the scheme affecting the company. Further, on the analysis of the votes cast at the meeting, the salient feature that comes out to the surface is that the scheme was opposed especially by those who, apart from the merits of the scheme, are personally opposed to Gopaldas Parikh and Linubhai Banker. The feud appears to be more between the blood relations rather than between the creditors and members who have offered their best commercial judgment to the scheme on its merits. It is an inescapable

conclusion that Chandulal Banker as a power of attorney holder of Shardaben, and Shantaben who is the principal contender, opposed the scheme tooth and nail not because he had the interest either of the company or creditors and members at heart but because he had to leave the active management when Gopaldas Parikh and Linubhai Banker stepped in and because of his personal vendetta against both of them. In this view of the matter it is not possible to accept the submission of Mr. Vakil that the scheme should not be imposed upon dissentient members.”

43. It is also trite law that the Court would not reject a scheme simply because there could have been a better scheme. *In re. Sussex Brick Co. Ltd.*, 1960 (1) ALL E.R. 773, the Court brushed aside this type of criticism of the scheme in the following manner:

“The applicant set out certain criticisms in his affidavit which undoubtedly show that a good case could be made out for the formulation of a better scheme, of a fairer scheme of a scheme which would have been more attractive to the shareholders, if they could have understood the implications of the criticisms. I have no doubt at all that a better scheme might have been evolved; but is that enough? Is it necessary to establish the validity of such an offer as put forward in the present case? A better and fairer offer might have been made, but the fact that the offer that was made is not one hundred per cent, fair or right is not the kind of unfairness with which MAUGHAM, J., was dealing *in re. Hoare & Co., Ltd*, I think that the scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. I do not think that merely finding items in the scheme or details of the scheme which are open to valid criticism is enough. A scheme can be effective to bind a dissenting shareholder without complying to the extent of one hundred per cent, with the highest possible standards of fairness, equity and reason. After all, a man may have an offer made to him and,

although he likes something better, may be prepared to accept it, because it is good enough in all the circumstances. It may well be that the grounds for criticizing the present scheme are not grounds of such a nature as to render the whole thing unfair in the sense intended by MAUGHAM, J., in *re. Hoare & Co. Ltd.* Where the statutory majority has accepted the offer the onus must rest on the applicant to satisfy the Court that the price offered is unfair. I have some information about the present share values. I have no information about what the present value of Sussex Brick Co. Ltd.'s shares is because they are no longer quoted, but there is no doubt that three shares in that company which were worth at the relevant dates something like 21s. 3d. have now been transposed into two shares in Redland Holdings Ltd., which are worth 43s. 1d. today on the Stock Exchange quotation. It is a rather curious result that a man who parts under compulsion with property, which all agree was worth something in the neighbourhood of 22s. should both now find himself in possession of property which, according to Stock Exchange quotations, is worth nearly twice that amount *i.e.* 43s. and should say that the exchange is unfair. It is a little hard to see that he has driven such a bad bargain. True, the scheme offers specific grounds for criticism, but in this connexion, 'unfairness' means patent unfairness, obvious unfairness, convincing unfairness, and that has not been established in the present case.

I am not satisfied that this scheme is unfair in the sense in which MAUGHAM, J., used that word in *re. Hoare & Co. Ltd.* and I decide that the application ought not to succeed."

38. Keeping in view the facts of this case, in my opinion, the Scheme as a whole is just, fair and reasonable. There is no violation of any statutory provisions. It is in the interest of justice that the Scheme is approved subject

to supervision of this court through a retired Judge of this Court.

39. The Scheme is accordingly approved subject to the following:-

(i) Mr. Justice Vinod Goel (Retd.) (Mobile No.9910384637) is appointed as the Court Appointed Supervisor to supervise implementation of the Scheme/ The Propounders would be entitled to implement the Scheme, as above, under supervision of the Court Appointed Supervisor.

(ii) The Court Appointed Supervisor will ensure that the initial task as stipulated in the Scheme are completed expeditiously in a time bound manner. The OL will permit the promoters to implement the Scheme, as stated above, under the supervision of the Court Appointed Supervisor.

(iii) The propounders of the Scheme will be permitted to open a separate escrow account where all revenues received pursuant to the revival scheme would be deposited. The escrow account would be operated under the supervision of the court appointed supervisor.

(iv) The Court Appointed Supervisor is empowered to pass any directions or orders to the promoters for the purpose of implementing of the Scheme.

(v) The functioning of the Scheme shall be reviewed by the Company Court after three months. If necessary, this court would be at liberty to pass further directions as the developments may require.

(vi) The fees of the Court Appointed Supervisor is fixed at Rs.1,00,000/- plus out of pocket expenses per month. This will be subject to enhancement thereafter, if required.

(vii) I have noticed that the Scheme in para 85 states that the statutory authorities including ROC, Income Tax Department, Service Tax Department and Value Added Tax Department would be directed not to initiate proceedings in respect of non-compliance on the part of the

companies, the promoters, Directors, Shareholders for a period of six months. The statutory authorities including DTCP, HSIIDC and Income Tax Departments were also to waive off interest/penalties charged/levied for non-compliance under applicable laws. I may only clarify that the Scheme is approved subject to a direction to the said departments may take a lenient view while dealing with the company keeping in view the attempts to revive the company.

40. With the above directions, application stands disposed of.

**JAYANT NATH, J**

**JANUARY 27, 2020/n**