PART IX

ARBITRATION, ARRANGEMENTS AND RECONSTRUCTION

ARBITRATION

283. *Power of companies to refer matters to arbitration.* (1) A company may by written agreement refer to arbitration, in accordance with the Arbitration Act, 1940 (X of 1940) an existing or future difference between itself and any other company or person.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any term or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their director or other managing body.

(3) The provisions of the Arbitration Act, 1940 (X of 1940), shall apply to all arbitrations between companies and persons in pursuance of this Ordinance.

Synopsis

1. Scope.
2. Arbitration Act, applicability of.

1. Scope. Section 283 empowers a company to refer to arbitration an existing difference between itself and any other company or person. But a share-holder of a company has no such right against the company.[1]

2. Arbitration Act, applicability of. The Arbitration Act alone applies to all references to arbitration made by limited liability companies.[2]

Cause of action arising at place where Arbitration Act not applicable. Section 283 does not empower a Court situated in a local area to which the Arbitration Act has not been extended, to apply the provisions of the Arbitration Act to arbitrations between companies or between companies and third persons.[3] Where however an offer was accepted by the Insurance Company at *C* where the Arbitration Act was applicable but the cause of action arose at *M* where the Act was not applicable. It

1. AIR 1937 Mad. 405=171 Ind. Cas. 690.
2. AIR 1936 Pesh. 44 (DB)+AIR 1933 Lah. 44 (DB).
3. AIR 1921 Lah. 555=32 PLR 44=132 Ind Cas. 399.

was held that the offer having been accepted at *C*, a suit could have been filed at *C* in respect of the subject-matter in dispute and under section 2, Arbitration Act, that Act applied and the Court at *M* had no jurisdiction to entertain the application.[4]

COMPROMISES, ARRANGEMENTS & RECONSTRUCTION

284. *Power to compromise with creditors and members.* (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company 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, as the case may be, present and voting either in person or, where proxies are allowed, 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 or the class of creditors or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company:

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 and the like.

(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar within thirty days and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order

4. AIR 1937 All. 208=ILR 1937 All. 234=167 Ind Cas. 897 (DB).

has been made and filed as aforesaid, or in the case of a company not having a memorandum to every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with sub-section (3), the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine which may extend to five hundred rupees for each copy in respect of which default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as it thinks fit and proper until the application is finally disposed of.

(6) In this section the expression "company" means any company liable to be wound up under this Ordinance and the expression "arrangement" includes a re-organisation of the share-capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

285. *Power of Court to enforce compromise and arrangements.* (1) Where the Court makes an order under section 284 sanctioning a compromise or an arrangement in respect of a company, it 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 is satisfied that a compromise or arrangement sanctioned under section 284 cannot be worked satisfactorily with or without modification, it may, either of its own motion or on the application of the registrar or 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 305.

(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 Ordinance sanctioning a compromise or an arrangement.

Synopsis of sections 284 and 285

1. Scope.
2. Compromise or arrangement.
3. Persons entitled to apply for sanction.
4. Court meeting.
5. Assent of majority of share-holders or creditors.
6. Creditors, meaning or.
7. "Class" of members or creditors.
8. Voting by proxy.
9. Sanction by Court.
10. Scheme involving reduction of capital.
11. Company being wound up.
12. Unregistered and foreign companies.
13. Principles governing exercise of power by Court.
14. Effect of sanction.
15. Stay of proceedings.
16. Appeal.

1. **Scope.** Where a company situate in the jurisdiction of Sind High Court is sought to be merged with a company within the jurisdiction of Lahore Court. The arrangement would amount to winding of the former company. Therefore the Lahore Court would not have jurisdiction in the matter.[5]

Where an application was made for amalgamation of petitioner-Company No. 1 into petitioner-Company No.2 and their members and submitting Scheme of Arrangement for Amalgamation was duly approved by overwhelming majority of members of both the Companies. Scheme provided for all relevant aspects of such amalgamation and settling all questions relating to their respective assets, liabilities and other obligations. No objection having been raised against proposed amalgamation from any quarter including their creditors and employees and petitioners having complied with all legal requirements and formalities, the Court allowed amalgamation of petitioner No.1 into petitioner No.2 and their members in terms of Scheme of Arrangement for Amalgamation annexed with the petition and eventual dissolution of petitioner-Company No.1 without winding up so as to take effect from the date on which ordinary shares of petitioner No.2 are allotted to the holders of the ordinary shares of the petitioner No.1.[6]

2. **Compromise or arrangement.** A compromise has been described as an agreement terminating a dispute between the parties as to the right of one or both of them, or modifying the undoubted rights a party which he had difficulty in enforcing.[7] As compared with the word 'compromise' it is not necessary for an

5. NLR 1982 Civ. 556=PLD 1982 Lah. 566=PLJ 1982 Lah. 34.
6. PLD 1997 Kar. 230.
7. PLD 1976 Lah. 850=PLJ 1977 Lah. 10+(1893) 1 Ch. 477+(1893) 1 Ch. 844+(1917) 1 Ch. 341.

"arrangement" that there should be some dispute or controversy.[8] The word 'arrangement' includes reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.[9] It will include agreements which modify rights about which there is no dispute and which can be enforced without difficulty.[10] However, a scheme of arrangement does not provide an alternative mode of liquidation, which the law allows the statutory majority of creditors to substitute for winding-up, whether voluntary or under the Court. The incidents of scheme of arrangement and of winding up are distinct both in principle and in consequence.[11]

Consent of Company necessary. Order under S. 284 can be passed where the proposal for compromise or arrangement is between the company and the creditors or class of creditors, etc., and it is inherent in S. 284 that Company must consent to the proposal made. The Court cannot approve a scheme unless it is proposed by the company or if it is proposed by someone else, unless the company has consented to it by a resolution passed in the general meeting.[12]

Alteration or modification of rights of different classes of shares. Where it is a condition of the memorandum of a company that the rights and privileges given to various classes of shares by it are liable to modification or alteration, a variation in the rights attaching to particular classes of shares for the time being would not amount to a compromise or arrangement with the members.[13] But where there is no such provision in the Article the special rights attached to a class of shares may lawfully be altered by the machinery of a scheme of arrangement and the Court may sanction a scheme which involves alteration of class rights.[14] As a rule when modification of class rights is sought to be made through intervention of Court under section 284. Such modification or variation can be achieved by going through the procedure prescribed in section 284. In other words, if separate class meetings as envisaged in section 284 are held that is enough. It is not necessary in such cases to have recourse to section 108 or the modification of the rights clause in the articles because such modification is a part of a scheme of arrangement or reorganisation which is dealt with in section 284 and is made with the sanction of the Court.[15]

Alteration of capital structure of company. The whole purpose of section 284 is to reconstitute the company without the company being required to make a number of applications under the Companies Ordinance for various alterations which may be required in its Memorandum and Articles of Association for functioning as a reconstituted company under the scheme. The company is, therefore, not required to make a separate application under the Companies Ordinance for alteration of Memorandum and Articles of Association to show the

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8. AIR 1957 Trav-Co. 51 + AIR 1934 Sind 54 (There must be give and take in a compromise).
9. AIR 1960 Cal. 637 (DB).
10. PLD 1976 Lah. 850 = PLJ 1977 Lah. 10.
11. AIR 1961 Punj. 550.
12. 1991 MLD 841 = PLJ 1991 Lah. 448 = NLR 1991 Civ. 260.
13. AIR 1935 All. 310 = 57 All. 810 (DB).
14. AIR 1960 Cal. 637 (DB).
15. AIR 1959 Cal. 672.

new share capital such as an alteration can be sanctioned under the scheme itself. In my view it is open to the Court while sanctioning a scheme under section 284 to make an order whereby the Memorandum and Articles of Association of the company stand amended to reflect new capital structure.[16]

3. Persons entitled to apply for sanction. The directors of a company who are authorised to manage the business and exercise all the powers can properly and validly make a proposal under section 284 in the name of the company.[17] This is so even where it would involve an alteration of the memorandum or the articles, they do not require to be authorised in advance by a resolution of the general body of the company.[18]

Managing agent. Where the terms of the agency agreement are wide enough to confer such power on the managing agents and there is nothing in the constitution of the company also to cut down the amplitude of the terms of that agreement the managing agent can validly make a petition to the Court for the sanction of a proposed scheme. There is nothing in the law itself which is against his having such power.[19]

Share-holders or creditors. An arrangement or a compromise can be proposed by share-holders or creditors.[20] It is to be seen that the statute makes the majority of the creditors or a class of creditors bind the minority, it exercises a most formidable compulsion upon dissentients, or would be dissentient creditors and it there fore requires to be construed with care so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do or of making a mere jest of the interest of the minority.[21]

Company being wound up. In the case of a company which is being wound up, the section does not confer any exclusive right on the liquidator to make an application under it. The company itself or a member or a creditor could also apply just as they could when the company is a going concern.[1]

Foreign company. A member of a creditor of a foreign company has the right to present an application under section 284 to a Court in Pakistan before which proceedings for the winding up of the company are pending and that court has jurisdiction to entertain the application although it has not passed orders to wind up the Company. In such a case the right to make an application is not restricted to the liquidator.[2]

4. Court meeting. Power vested in Court is a discretionary power and has to be exercised applying its judicial mind and after being satisfied about the merits of the application. Court should not pass an order unless it is satisfied that it is a fit

16. PLD 1984 Kar. 225.
17. AIR 1934 Sind 54=28 Sind L. R. 213.
18. AIR 1928 Bom. 80.
19. AIR 1928 Bom. 80.
20. AIR 1964 All. 473 (DB).
21. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260.
1. AIR 1952 Trav-Co. 243=ILR 1952 Trav-Co. 319 (DB).
2. AIR 1939 Mad. 318.

case to do so. Court is not intended to act as a post office with no discretion or power to call a meeting, while considering an application under section 284(1) the Court is to receive satisfaction as to the prima facie case that the compromise or arrangement is genuine, bona fide and would be in the interest of the creditors of the company. The Court is to be satisfied about the justness for a direction to the shareholders or creditors to meet together to consider the proposal, if any. Order under section 284 can be made only if the Court considers the feasibility or otherwise of the proposed scheme and bona fide of the applicant.[3] It is not obligatory on the part of the Court to pass an order asked for in the application under sub-section (1) irrespective of the consideration whether the proposed arrangement justifies such an order or not.[4] An application under section 284(1) must disclose all relevant information as to the Company's entire assets and liabilities so as to enable the Court to Judge whether the proposed scheme is reasonable.[5] But the application need not be dismissed simply because the proposed scheme is not based on correct information regarding the affairs of the company as on the date on which the affidavit was made. It would be open to the Court to call for a report and on the basis of that information amend the scheme and circulate it with the report for consideration by the general body of creditory.[6]

When application may be dismissed. Although the Court has a certain discretion under sub-section (1), it cannot refuse to order a meeting unless the proposals themselves are *ultra vires* the Ordinance or they are incapable of modification in view of ascertained facts and therefore it would only be a waste of time and expenditure to circulate them.[7] Thus in the case of a company which was wound up on the ground of the tyranny of the majority over a helpless minority, the Court would refuse to order a meeting to consider a scheme of arrangement which suggests a change in the voting power that would not lead to any change in the ultimate result.[8] Similarly the Court, when it is proceeding with an application under section 305 for the winding up of a company, particularly so when the winding up is sought on the ground of the inability of the company to repay its debts, is not bound and should not in fact call a meeting of the members and creditors of the company under section 284(1) to consider any scheme put forward by the company. It is open the company if it desires that the Court should take into consideration the wishes of the members and creditors, to produce before the Court evidence of their wishes. When the evidence is so produced the Court will, as required by section 320, take it into account in deciding whether there ought to be a compulsory winding up or not.[9]

Notice. Notice of any scheme proposed in the Court of one particular country should go to all creditors wherever they may be in other countries so that they can

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3. 1991 MLD 841 = PLJ 1991 Lah. 448 = NLR 1991 Civ. 260.
4. AIR 1952 Trav-Co. 243 (DB) + ILR (1949) 1 Cal. 53 (Court before granting leave must be satisfied that the scheme is reasonable and practicable).
5. ILR (1949) 1 Cal. 53.
6. AIR 1939 Mad. 318.
7. AIR 1939 Mad. 318.
8. AIR 1952 Trav-Co. 243 = ILR 1952 Trav-Co. 319 (DB).
9. ILR (1954) 4 Raj. 338.

if they like come in and participate in the distribution under the scheme.[10] But the Court need not issue notice before ordering a meeting of the class of creditors with whom it was proposed to make an arrangement. Where the Chairman certifies to the Court that notice of the application and of the meeting has been sent to and acknowledged by all depositors, there is sufficient compliance with the law and the arrangement cannot be impugned on the ground that the meeting was not duly called.[11]

Where objection was taken that no documentary proof, was provided in support of petition under section 287 as to whether requirements of section 286(1) with regard of issue of notice alongwith necessary statements setting forth terms of amalgamation, was supplied. Statement of Chief Executive of one of two amalgamating companies through his affidavit that amalgamation was approved by majority of shareholders of company present in annual general meeting was sufficient to meet objections taken to approval of amalgamation scheme.[12]

Procedure of meeting. Though 'Court meetings' are to be held subject to the directions of the Court, in the case of meetings of the members of a company, the articles of the company, in so far as they are applicable, would govern all matters in relation to which the Court has not given express directions. A liquidator or receiver is in the same category as the executors or administrators of a deceased member or the trustees in bankruptcy of a bankrupt member and they can vote at the meeting only when the articles of the company do not prevent their voting at meetings. Where there are prohibitory provisions in the articles any vote given by them must be disallowed.[13]

5. Assent of majority of share-holders or creditors. Section 284 provides that where a compromise or arrangement is proposed between a company and its members or any class of them, the Court may order a meeting of the creditors or class of creditors or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs. Sub-section (2) of section 284 provides that the compromise will be subject to sanction if a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, agree to any compromise or arrangement.[14] Where a scheme is before the Court for sanction it is its duty to see that the resolutions were passed by the statutory majority in accordance with sub-section (2), considering that the majority required under section 284(2) is less than the majority required by section 108.[15] The Court is bound to scrutinise the scheme of arrangement involving alteration of rights of share-holders with care. But the absence of the approval of the scheme by the majority required in section 108 is no bar of the sanction of the scheme of arrangement under section 284.[16]

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10. ILR (1949) 1 Cal. 52.
11. AIR 1934 Sind 54 = 28 Sind L R 213.
12. NLR 1993 UC 49.
13. AIR 1928 Bom. 80.
14. NLR 1979 Tax 31.
15. 62 Cal. W N 836.
16. AIR 1960 Cal. 637 (DB)

Where a scheme is approved by the requisite majority, sub-section (2) allows the decision of the majority to bind the minority provided it does not act oppressively on the minority.[17]

Voting. The proper method of ascertaining the wishes of the creditors is to take into account the value of each creditor's debt, and not to give equal voting strength to each creditor irrespective of the value of the debt due to him.[18]

In a meeting held under section 284 written acceptance of arrangement by those share-holders and creditors who are not present either in person or by proxy, cannot be taken into account to make up majority in number representing three-fourths of share-holders and creditors.[19] Where a member is present at the meeting by proxy only and the proxy is successfully impeached, he cannot be considered to have been present at all at the meeting for the purposes of the majority required under section 284.[20]

Arrangement made by Directors. A scheme of arrangement which does not contemplate the doing of things which are *ultra vires* the powers of the company can be ratified by the majority of the share-holders even though it has been entered into by the directors of the company acting beyond their powers. When such a ratification has been made the minority cannot successfully challenge the scheme except on the ground that the majority had acted for its own interest or that the whole thing is fraudulent.[1]

Modification of approved scheme. Where the scheme as approved by the share-holders was modified in view of the new situation arising subsequent to such approval; it was held that the share-holders' approval to the modifications was necessary before the Court could sanction it.[2]

Merger of company. Where shareholders of both companies in separate meetings voted in favour of scheme of amalgamation. It was held that provisions of section 284(2) had been complied with and there did not appear to be any hurdle in way of sanction of amalgamation scheme.[3] Where scheme of amalgamation was approved and accepted by overwhelming majority of members of petitioner Companies, present in number and in value at meetings held separately under orders of High Court. Exchange ratio in the scheme of amalgamation was found to be fair and reasonable on consideration of factors necessary to be taken into consideration by the Chartered Accountants of companies desirous to be amalgamated. Books of accounts and report of Chartered Accountants was not objected to by anyone. There was no allegation of lack of bona fide on part of majority of members, or that minority has been overridden and coerced into accepting scheme of amalgamation. Sanction was accepted to the proposed scheme of amalgamation.[4] Where petitioner filed an application for approval and sanction of proposed merger of company with

17. AIR 1952 Cal. 133 (DB).
18. 54 Cal. W N 80.
19. AIR 1917 Oudh 58.
20. AIR 1928 Bom. 80.
1. AIR 1951 Punj. 70.
2. AIR 1929 PC 256.
3. NLR 1989 CLJ 219.
4. 1989 CLC 818=PLJ 1989 Kar. 333.

company *A* and a notice was published in daily newspapers for filing objections. No objection was raised by any creditor or any other person. Out of 10 creditors 9 filed no objection papers. The resolution was found to have been passed unanimously and pursuant to Court direction. In the circumstances calling of meeting of creditors was not necessary.[5]

Section 56, Income-Tax Ordinance does not override provisions of sections 284, 287, Companies Ordinance. Therefore notice issued by Income Tax to defunct-company after its merger with the principal company was illegal.[6]

Bifurcation of business. When the share-holders of the petitioner Company propose to bifurcate the business into two independent businesses and if there is no objection from the creditors or if their position is not prejudiced by the proposed scheme of re-arrangement the Court should not stand in the way of the Company's seeking sanction of the scheme of re-arrangement.[7]

6. Creditors, meaning of. The creditors whose names appear in the books of the company should be considered as creditors. Creditors whose names did not appear in the books have to show to the satisfaction of the Court that they are creditors.[8]

Depositors of specified chattel. Even contingent or prospective creditors are no doubt creditors within the meaning of the Companies Ordinance but a person who has merely deposited specified chattels with a company for safe custody cannot be considered to be either a contingent or prospective creditor of the company. When he alleges fraudulent conversion of those shares by the company he no doubt has claim for unliquidated damages in tort against the company but that would not be sufficient to treat him as a creditor of the company under the Ordinance.[9]

Bank. A person who has deposited money in a bank stands in the position of a creditor of a bank.[10] Even a depositor whose money has been attached under Order 21, Rule 46, Civil P.C. would continue to be a creditor so far as the bank is concerned even after the attachment.[11] The payee or the holder of a demand draft issued by a bank on one of its branches is an ordinary creditor of that bank for the purposes of a scheme under which it is working and can demand payment only in accordance with the provisions of that scheme. He may however show that he is not bound by the scheme by specifically pleading and proving that the money was paid into the bank under a special agreement creating a trust or an agency.[12]

7. "Class" of members or creditors. The assent given to a scheme by one class of persons affected by it cannot bind a different class which is also affected by the scheme but which has not assented to it at a meeting separately held for that

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5. NLR 1985 Civ. 688+1983 CLC 1424+NLR 1984 UC 202.
6. NLR 1985 Tax 30.
7. PLD 1984 Kar. 225.
8. AIR 1950 Cal. 399.
9. AIR 1948 Cal. 242=49 Cr. L. J. 397.
10. AIR 1951 Punj. 79.
11. ILR (1956) 8 Assam 301 (DB).
12. AIR 1960 Punj. 281 (DB).

class as required by the Ordinance.[13] If any dispute is settled by a compromise between a company and a contending party by which the undoubted rights of a party are modified or there is an arrangement which modifies rights of a particular party about which there is no dispute, the party whose rights are modified will form a class since their rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. On the other hand, a party which benefits from the modification of the rights will have absolutely similar interest or to put it differently the rights of the members of that party will not be so dissimilar as to make it impossible for them to consult together with a view to their common interest. In the present case, the interest of share-holders except themselves cannot be company to purchase the shares of other share-holders who want the similar to the interest of the share-holders whose rights are intended to be purchased particularly when the latter category is not agreeable to being divested of their shares in the Company. The dispute being between the Company on the one hand and the petitioners on the other, and the resolution of the dispute being intended by a method coercing the said petitioner to part with their shares, the interest of the two parties cannot be said to be similar and they cannot be deemed as one class. If a meeting for approval of the proposed compromise or arrangement is to be held, it must be the meeting of the class which would be affected by the proposed compromise or arrangement, i.e. the meeting of only the petitioners.[14]

"Class"--meaning of. The word 'class' is vague and to fund out what is meant by it one must look at the scope of the section which is a section enabling the Court to order a meeting of a class of creditors to be called[15] and that it must be given such a meaning as will prevent the section being worked in such a manner as to result in confiscation and injustice.[16] Broadly speaking a group of persons would constitute one class where it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as class should ordinarily be homogeneous and must have communality of interest and the compromise offered to them must be identical. This will provide rational indicia for determining the peripheral boundaries of classification.[17] 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.[18] Where several persons have deposited money with a company on the same terms and under similar agreements the whole body of them can be regarded as constituting one class of creditors for the purpose of section 284.[19] Merely because some of the members falling within a class had also additional interest would not make it necessary to constitute them into a separate group and hold a meeting of such members. Their additional interest cannot prevent them

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13. AIR 1936 Cal. 162 (DB).
14. PLD 1976 Lah. 850=PLJ 1977 Lah. 10.
15. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260.
16. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260+PLJ 1977 Lah. 10=PLD 1976 Lah. 850+AIR 1942 Cal. 578 (DB).
17. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260.
18. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260+PLJ 1977 Lah. 10=PLD 1976 Lah. 850+AIR 1942 Cal. 578 (DB)+AIR 1936 Cal. 162 (DB)+AIR 1934 Sind 54.
19. AIR 1934 Sind 54=28 Sind L R 213.

from voting at the same meeting although that would induce the Court to look with care and caution at the effect of what was done at the meeting.[20]

Creditors, class of. The reason for dividing the creditors into different classes is that they have different interests. If different state of facts exist among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.[1]

All unsecured creditors who may have filed suits or obtained decrees are to be deemed to be of the same class as other unsecured creditors.[2] It is not necessary to convene a separate meeting of the decree-holders creditors and other creditors in order to make a scheme binding also on the former.[3]

Share-holders, classes of. Holders of party paid shares who have paid the uncalled balance in advance and receive interest, cannot be treated as belonging to the same class as holders of fully paid shares.[4] It must, however, be noted that section 284 does not deal with the classification of shares. It deals with classes of members or classes of creditors in a dispute between the company and the class of members or the creditors. The classification therefore had to be made keeping in view the parties to the dispute which is required to be settled. In some cases indeed the share-holders holding a particular class of shares may form a class, but it would be unduly restricting the scope of 'class' to limit it to persons holding a particular class of shares.[5]

8. Voting by proxy. Section 284 does not prescribe any particular form of proxy or fix any time within which it must be lodged. It only gives a general right to vote by using any proper form of proxy and the proxies need not be sent to the company's office before a meeting.[6] The scrutineers appointed to help chairman whose decision under order of Court is to be final as to admissibility of any proxy at the statutory meeting of creditors under section 284 have no *locus standi* to file a petition for direction as to the validity of certain proxies used at the meeting.[7]

Person representing companies. Unless there is some special provision of law, a company which is not a physical person cannot "be present" at any place "in person". The definition of 'person' in the General Clauses Act can be of no assistance in interpreting the words "to be present in person", and the difficulty in the way of a company being present in person can be obviated only by statutory provisions or rules having the force of law. There is no such procedure in the Companies Ordinance, 1984. A resolution by the directors of a company authorising a director or some other person to represent the company at the

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20. AIR 1928 Bom. 80.
1. AIR 1942 Cal. 578=ILR (1942) 2 Cal. 85 (DB).
2. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260.
3. AIR 1937 Lah. 442+AIR 1942 Cal. 442+AIR 1937 Cal. 401 (Interest of decree-holder is not so dissimilar to the interest of unsecured creditors to compel his being treated as belonging to different class--Case decided before sub-section (6) was amended)+AIR 1937 Cal. 124+AIR 1935 Cal. 777.
4. (1910) 1910-2 Ch. 477.
5. PLD 1976 Lah. 850=PLJ 1977 Lah. 10.
6. ILR (1949) 1 Cal. 127.
7. AIR 1932 Rang. 96=10 Rang. 189.

creditors' meeting does not make him "present in person" in law for that company at the meeting.[8] The votes cast by him in person on their behalf without filing a proxy in the meeting of the unsecured creditors are invalid and inoperative,[9] and the delay on the part of the opposing creditors in not taking objections to the validity of the votes in such a case cannot justify the chairman or the Court in disobeying the requirements of section 284 (2) and refusing to entertain the objection at a late stage.[10]

Orders of Courts. The statutory right under section 284 is a general right of voting by proxy at a meeting. It is not limited to the use of the proxy form settled by Court or to proxies lodged before the meeting. The directors are bound to use the proxies received by them pursuant to the order of the Court for or against the scheme.[11] The Courts have ample power under section 284 to settle a form of proxy. The settling of the form is a part of the conduct of the meeting.[12] A proxy used at a meeting under section 284 which departs substantially from the form settled by the Court, is invalid.[13]

Who may be proxy. A proxy would not entitle its holder to be present and vote at a meeting unless he himself belongs to the same class as the class of persons whose meeting it is.[14]

9. Sanction by Court. A Court will prefer a just, equitable and reasonable scheme of arrangement, by which the company may exist and flourish in time, to a compulsory liquidation where the chances of payment in full and with reasonable expedition are very slim.[15] An order under section 284 by the High Court can be made only if the Court considers the feasibility or otherwise of the proposed scheme and bona fides of the applicant. Where neither the reasonableness nor the feasibility nor the utility of the proposed scheme had been established and proposal had not got the consent of the company either through the ex-management or through the Board of Administrators, no case was made out for sanction of compromise or arrangement proposed.[16]

Under section 284, there cannot be a provisional sanction or a partial sanction or sanction with a condition.[17]

Amalgamation of companies. Court before granting sanction for amalgamation of companies has to satisfy itself that provisions of statutes have been complied with; and that the majority of amalgamating Companies has been acting bona fide. Court has also to see that minority was not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce.

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8. AIR 1962 SC 1192.
9. AIR 1959 Pat. 293 (DB).
10. AIR 1962 SC 1192.
11. (1934) 103 L J Ch. 316.
12. AIR 1928 Bom. 80+AIR 1932 Rang. 154 (DB) (Rule of High Court fettering or restricting jurisdiction of Court to settle the form of proxy is *ultra vires* and inoperative).
13. AIR 1928 Bom. 80.
14. AIR 1950 Cal. 399.
15. AIR 1958 Punj. 30+AIR 1932 Rang. 154 (DB).
16. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260.
17. AIR 1950 East Punj. 111=ILR 1949 East Punj. 421 (FB).

Court has further to look at the scheme of amalgamation and see whether same is one, as to which persons acting honestly and viewing the scheme laid before them in the interest of those whom they represent take a view which can be reasonably taken by businessmen.[18] In a case the Court sanctioned a proposed scheme for amalgamation or merger, when resolutions were passed by the respective Board of Directors of petitiner-companies, resolutions of share-holders of companies were passed at Extraordinary General Meeting and no-objection certificates from respective creditors were attached with the merger scheme.[19]

Reduction of capital. The Court can sanction by one and the same order a scheme which involves also a reduction of capital.[20]

Alteration of memorandum or Articles of Association. There is no express requirement under section 284 that before the Court could sanction a scheme involving the alteration of the memorandum and the articles of a company, proceedings should have been taken by the company to have them altered. It would result in inconvenience if the terms of that section were to be cut down by section 20.[1] But the Court cannot bypass the requirements of section 284 and sanction a compromise for the alteration of the Articles of Association by a consent order.[2]

Scheme must be approved by statutory majority. The court in determining whether the compromise or arrangement should be sanctioned by it must see that the resolutions are passed by the statutory majority in value and number in accordance with section 284(2).[3]

Where the facts already on the record make it clear that the scheme has not been approved by statutory majority, the Court cannot refuse to consider the objection taken on the ground for the first time even at the late stage of the final hearing of the matter. But if the objection is not available on the very face of record and some further investigation would be required to determine it, the Court will not allow it to be taken at that stage without first considering questions like prejudice, laches and the unnecessary protraction of the proceedings.[4]

Notice of meeting. The jurisdiction of the Court to sanction a scheme is in no way affected by the non-service of notice of meeting held in pursuance of its order.[5]

Enforcement of scheme. Section 284 confers jurisdiction on Courts to deal with a scheme, but how the scheme, when sanctioned, can be rendered effective and operative on the company as a whole does not affect the jurisdiction of the Court to deal with it.[6] The section does not contemplate or confer any power on the company Court to reserve to itself the jurisdiction to make future orders on matters arising under or out of the scheme. To proceedings under the section the special provisions

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18. 1989 CLC 818=PLJ 1989 Kar. 333.
19. 1989 CLC 1323=NLR 1989 Civ. 581.
20. ILR (1949) 1 Cal. 127+53 Cal. W N 207.
1. AIR 1928 Bom. 80.
2. AIR 1956 Mad. 586.
3. (1934) 103 L J Ch. 316+AIR 1962 Guj. 305.
4. AIR 1959 Pat. 293 (DB).
5. AIR 1937 Cal. 507.
6. AIR 1939 Mad. 318.

of Order 14, Rule 6 or section 90 or Order 36 of the Civil P.C. cannot be applied and hence it is not open to company Court to arrogate to itself the special powers and jurisdiction conferred by those provisions on the Civil Courts.[7]

Retrospective effect may be given to sanction. Merger of companies can take place with retrospective effect and not from date of sanction by High Court. Liability to pay tax of defunct company would pass on to transferee company as from date on which merger actually takes place. Income-Tax Department would have no *locus standi* to insist that defunct-company existed even after it was declared to be non-existent by High Court. Income-Tax Authorities cannot be heard to say that they not being a party to proceedings before High Court were not bound by the merger order. If this contention were to be accepted then no sanctity could be attached to merger order and for that purpose whole exercise in obtaining it would be quite an otiose act.[8]

Modification of sanctioned scheme. Where a scheme which is not of the kind mentioned in section 287 or 289 is sanctioned otherwise than in the course of a winding up, the Court sanctioning the schemes has no jurisdiction or power as the Company Court to entertain any application for modifying the scheme, and this jurisdiction cannot be conferred on the Court even by providing in the scheme for reservation of powers to the Court to entertain such subsequent applications. Any application for the modification of a scheme sanctioned under section 284 must be treated in the same manner as if it is a fresh application for sanction of a scheme under section 284 and all the requirements of the aforesaid section must be duly satisfied before such modification can be sanctioned.[9]

Foreign Court, scheme sanctioned by. Where a scheme has been sanctioned by the Courts of one country the Courts of other countries, if they are satisfied that the sanctioned scheme is a fair and reasonable one, would pass ancillary orders only on similar applications pending before them.[10]

10. Scheme involving reduction of capital. Where no creditor or member of company opposed petition for reduction of capital. Scheme of arrangement being in the interest of creditors, the Court confirmed reduction of capital and sanctioned scheme of arrangement.[11]

The Court can sanction by one and the same order a scheme which involves also a reduction of capital.[12] Where reduction of capital forms part of the scheme of re-arrangement. These two considerations are interlinked with each other and the overall duty of the Court is to satisfy itself that the scheme of re-arrangement together with the reduction of capital is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve and might reasonably consider to be fair and equitable. The scheme was unanimously approved and all share-holders of the petitioner-Company are also

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7. PLD 1957 Dacca 554+AIR 1950 East Punj. 111 (FB).
8. NLR 1985 Tax 30.
9. PLD 1957 Dacca 554.
10. ILR (1949) 1 Cal. 53.
11. PLD 1984 Kar. 225.
12. ILR (1948) 1 Cal. 127+53 Cal. W N 207.

members of the transfer-Company. Therefore, the affairs of the petitioner-Company are not being conducted in a manner prejudicial to the interest of its members or public at large and hence there is no impediment to the sanctioning of the scheme.[13] But there is no hard and fast rule that one application has to be made for the sanction of the scheme and for confirmation of the reduction of capital if they are to be regarded as integral part of one arrangement. In some cases two separate applications are made to make the proceedings less cumbrous.[14] The reduction can be allowed only when the decision can prudently be arrived at by the businessmen in the interest of the business of the Company and not for the confiscation of shares and the test of reasonableness of the scheme is whether it is regarded by reasonable people, conversant with the subject as beneficial to both sides and not only to those who are making it.[15]

Procedure. A scheme involving a reduction of capital cannot be sanctioned by a Court unless the procedure for reduction of capital has been followed.[16] Therefore if arrangement for compromise is proposed between a company and a class of members, it must be agreed to by the majority representing three-fourth in value of that class and not by three-fourth of the majority of all the members of the company. If a scheme of reduction involves an alteration of right to a class of shares and by the Memorandum or Articles, the consent of a meeting of the class is required, the Court will not approve the reduction of capital of the class, on the consent obtained by the vote of the holders of a majority of the shares of the class who did not act in good faith in the interest of members of the class generally but who wished to promote some other interest of their own such as their interest as holders of a different class of shares.[17]

Grounds for reduction of capital. Reduction of capital may be allowed only if it is covered by the grounds set out in section 96 or on grounds analogous to it. If a matter is not covered by section 96 or grounds analogous of it, it cannot be brought within the place of section 284.[18]

11. Company being wound up. Section 284 clearly shows that the machinery provided by the section is available where there is and where there is not a winding up in progress and the section would apply to the going concern as well as one in the process of winding up.[19] The Court can sanction a scheme presented to it even though the company has been ordered to be wound up in the winding up petition made subsequent to the presentation of the scheme to the Court.[20]

Matter to be considered. In considering a scheme only the wishes of creditors and contributories have to be consulted and not the wishes of any person who may

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13. PLD 1984 Kar. 225.
14. AIR 1959 Cal. 672.
15. PLD 1976 Lah. 850=PLJ 1977 Lah. 10.
16. AIR 1960 Cal. 637 (DB)+ILR (1949) 1 Cal. 127+AIR 1956 Pat. 364 (DB) (Direction of Court under section 153 by itself is insufficient to give effect to a scheme which involves reduction of capital)+AIR 1952 Cal. 133 (DB)+53 Cal. W N 207.
17. PLD 1976 Lah. 850=PLJ 1977 Lah. 10.
18. PLD 1976 Lah. 850=PLJ 1977 Lah. 10.
19. 7 DLR 325 (DB)+AIR 1937 Bom. 423.
20. AIR 1939 Mad. 58 (DB).

have propounded a scheme.[1] The Court is in no way bound as a matter of course to sanction a scheme for a company which has been wound up merely because the scheme has the consent of the legal representative of the member on whose petition the order for winding up was passed.[2]

12. Unregistered and foreign companies. Where in order to extend Section 284 to unregistered companies it was sought to widen the meaning of the expression "liable to be wound up" so as to embrace very company whatever its nature for the winding up of which provision is contained in the Companies Ordinance. It was held that section 284 does not apply to an unregistered company, unless a winding up order, although not actually made, is in the process of being made.[3]

Foreign company. Where a company with its registered office in India but branches in Pakistan applied for the approval of a scheme for its winding up. It was held that a High Court in Pakistan had jurisdiction under section 284 in respect of the petitioner-company though the registered office of the petitioner-company was in a foreign country.[4]

13. Principles governing exercise of power by Court. A mere agreement on the part of the members or share-holders is not enough for the acceptance of a scheme. It is ultimately for the Court either to sanction it or not to sanction it.[5] The plea that where arrangement or compromise was proposed, the Court should preferably direct calling of the meeting of the creditors and thereby leave it to the creditors or members to consider the reasonableness, utility or practicability of the proposal made as they were the best protectors of their own interest, has no merit.[6] The Court will sanction only a bona fide and workable scheme.[7] Although the Court would not generally refuse to sanction a scheme unanimously passed by the creditors and members yet it would not, without scrutinising it blindly give its sanction.[8] Before sanctioning a scheme under the section the Court has to see that the provisions of the statute have been complied with, the persons present at the meetings have acted bona fide and done nothing injurious to the interest of the classes whom they represented, that, the arrangement is fair and reasonable as regards the interest of all concerned. The Court has a wide discretion in the matter, but it will reject the scheme only where it is shown that there was something wrong.[9] The petition for confirmation of a scheme or compromise must place all

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1. AIR 1932 Bom. 73=56 Bom. 16 (DB).
2. AIR 1952 Trav-Co. 243=ILR 1952 Trav-Co. 319 (DB).
3. PLD 1949 Lah. 242=PLR 1948 Lah. 209 (*Diss:* AIR 1939 Mad. 318) (*But see:* AIR 1935 Lah. 779 (SB)).
4. 2 DLR (1950) 177 (*Rel.* AIR 1939 Mad. 318. *Diss.* 53 CWN DR 85)+AIR 1939 Mad 318+AIR 1951 Punj (Simla) 145 (FB)+AIR 1949 All. 778 (DB)+54 Cal W N (2 DR) 201 (53 Cal W N (1 DR) 85, *Dissented from*). (*But see:* PLD 1949 Lah. 242=PLR 1948 Lah 209).
5. AIR 1930 All. 330 (DB).
6. 1991 MLD 841=PLJ 1991 Lah. 448=NLR 1991 Civ. 260.
7. AIR 1916 Mad. 1218 (DB)+AIR 1952 Cal. 133+ILR (1948) 2 Cal. 404.
8. ILR (1949) 1 Cal. 127+AIR 1952 Cal. 133 (DB)+AIR 1940 Mad. 621 (Fact that majority approved will merely carry weight with the court while considering the question).
9. AIR 1933 Lah. 51+AIR 1959 Pat. 293 (DB)+ILR (1949) 1 Cal. 127+AIR 1948 East Punj. 38+ILR (1948) 2 Cal. 404+AIR 1937 Cal. 507 (DB) (Regularity of the meeting held under the provisions of the section including proper service of notice of meeting and the conduct of

proper materials before the Court to show that the scheme or arrangement is one which would be accepted by an ordinary, reasonable and prudent man of business. The onus of showing that any scheme is unreasonable is on the objectors.[10]

Under section 284 the Court does not simply register the resolution come to by the creditors or the share-holders as the case may be. But if the creditors are acting on sufficient information and with time to consider what they are about, and they are acting honestly they are much better judges of what is to their commercial advantage than the Court can be.[11] Therefore the Court is not justified in entering into the reasons which led to the creditors agreeing under the scheme to give up a part of their dues where it finds that the meetings had been properly held and that both provisions of law and directions of Court in that respect had been compiled with.[12]

Interference by Court. The Court would be slow to interfere with a meeting unless either a 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.[13] It is to be noted that the responsibility of the Court while sanctioning a scheme is very high especially when the creditors or share-holders who attended the meeting in person or by proxy and approved the scheme by the requisite majority constitute only a fractional part of the general body of creditors or share-holders as the case may be. The Court will reject a scheme when the object of the scheme is to prevent investigation into transactions which require it or there is flagrant failure or disregard of law in the management of affairs of the company or if it is satisfied that there had been either a material miscarriage or oversight or some material facts had been intentionally withheld from or otherwise not placed before the meeting,[14] or where the scheme is opposed to public interest or commercial morality,[15] or where the arrangement necessarily involves the doing of any act which is *ultra vires* the company but also schemes which would involve in any statutory body which is one of its creditors, doing an act beyond its powers.[16]

Reasonableness of scheme. Even if the statutory requirements have been complied with, that does not mean that the Court must sanction the scheme as a matter of course. The legislature has purposely left discretion with the Court in this respect. The Court should apply its judicial mind to the scheme and reach a conclusion of its own. It must consider whether it is in the interest of the company as a whole and of the class of persons for whom the majority acts and whether the scheme is such that it must be pushed through. Therefore, the correct approach to a case is to bear in mind that the Court is neither called upon merely to register a decision of the majority, nor is it called upon to act in such a manner that the

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the meeting itself has to be considered by court)+AIR 1935 Cal. 777+AIR 1932 Rang. 154 (DB).

10. AIR 1952 Cal. 133 (DB)+AIR 1932 Rang. 154=10 Rang. 438 (DB).
11. AIR 1934 Sind 54=28 Sind L R 213.
12. AIR 1948 East Punj. 38=ILR 1948 East Punj. 81.
13. AIR 1952 Cal. 133 (DB).
14. ILR (1948) 2 Cal. 404.
15. ILR (1949) 1 Cal. 127.
16. AIR 1956 All. 14=ILR (1956) 1 All. 568.

minority will create a stalemate and thereby retard the progress which the majority has legitimately and reasonably a right to expect and make. The Court must test the scheme not from the point of view of a lawyer or an accountant or any expert, but it must look at it from the point of view of a reasonable and a fair-minded person. When dealing with a company which is dealing in commerce or industry or with similar activities, the scheme has not necessarily to be looked at from the point of view of a prudent commercial man. But in every case, the Court must be satisfied that the majority is acting honestly and with due care and caution that the decision will be binding upon the minority. If the Court finds that the majority is acting in a mala fide manner, then, it is the duty of the Court to protect the minority from the tyranny of the majority. The Court will not view the scheme with a view to find out whether it is an ideal scheme. The Court will consider it bearing in mind the fact that commercial people, when they have got to deal with a number of points, some of them difficult to decide, are likely to emphasise some points on some occasions or in some situation and to minimise or ignore them on some other occasions or situations. Therefore, the scheme has not got to be scrutinized by the Court with such care with which an expert will scrutinise it; nor will approach it in a carping spirit with a view to pick holes in it. It must be tested from the point of view of an ordinary reasonable share-holders, acting in a businesslike manner, taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question. Whilst in some rare and exceptional cases, the Court may take into consideration subsequent events to protect the interest of the company or the share-holders, as a general rule, the Court should consider the resolution on the footing of the circumstances which were in existence at the time when the scheme was formulated, deliberated upon and approved.[17] It follows that where there is nothing unreasonable or unfair in a scheme as between several classes of creditors, the Court would respect the expressed opinion of the majority of creditors and give effect to it.[18] The power of the Court to sanction a reasonable scheme is in no way dependant upon its making provision for the dissentients.[19]

Burden of proof or reasonableness. This initial burden is on the petitioner to show that, prima facie, the scheme is fair and reasonable such as a prudent and reasonable share-holder would approve of and not object to.[20]

Modification of scheme. It is not the function of the Court to substitute its own scheme for the scheme presented to it for sanction and if the Court is of opinion that unless some radical amendment is effected or the scheme is fundamentally altered it ought not to be sanctioned, it is the duty of the Court to reject the scheme.[1] The Court cannot *suo motu* impose any condition which will operate by way of modification of the scheme especially in the absence of the consent of the

17. AIR 1962 Guj. 305+AIR 1959 Cal. 679+AIR 1958 Punj. 30.
18. (1893) 1893-3 Ch 385+(1890) 44 Ch D 402.
19. AIR 1937 Bom. 423.
20. AIR 1962 Guj. 305 (*Diss:* AIR 1959 Cal. 679).
1. AIR 1932 Rang. 154=10 Rang. 438 (DB).

persons who entered into the arrangement with the company.[2] However, the Court can modify a scheme approved by the share-holders and the creditors where they have such power by express conferment from the share-holders and the creditors.[3] But even in that case the power of modification reserved for the Court cannot be exercised to alter the scheme beyond recognition.[4]

14. Effect of sanction. A scheme of sanction obtains statutory operation when it is sanctioned by the Court.[5] A scheme, even though sanctioned by the majority under sub-section (2), is not effective and binding on the share-holders or creditors unless it is confirmed by the Court.[6] Where a scheme cannot be challenged in collateral proceedings except on the ground of absence of jurisdiction in the Court which sanctioned the scheme, a party whose grievance with the scheme is based only on the ground that the Court in sanctioning it had given a wrong decision or made a wrong order must seek his remedy to have the scheme rectified according to law in an appropriate proceeding.[7]

Scheme is binding on all. A scheme when sanctioned by the Court binds all the members and creditors of the company and no one of them can avoid its effect on the ground of his non-attendance at the meeting in which it was passed or of his having voted against the scheme.[8]

A creditor of the company has no right to demand and obtain payment otherwise than in accordance with terms of the scheme which has been sanctioned by the Court.[9] Hence the application in liquidation of a lessee, who had assigned his lease to the company with an indemnity against liability under the lease, to have a sum provided to meet his liability for rents, royalties and breaches of covenant cannot succeed.[10]

Finality of scheme. A scheme which is sanctioned and the order is perfected becomes final so far as the Court which sanctioned it is concerned.[11] Where one

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2. AIR 1934 Cal. 816 (DB). It is usual in a scheme of arrangement between a company and its creditors to empower someone, whether a liquidator or an officer of the company to assent to any modification imposed by Court).
3. AIR 1956 All. 14 (Court cannot modify when expressly prohibited. Even when power has been conferred it can use it only judiciously and not arbitrarily. A modification which adversely affects the interest of a member or creditor should not be made).
4. 53 Cal W N 207.
5. AIR 1937 Cal. 381.
6. PLR 1949 Lah. 209=AIR 1949 Lah. 48+AIR 1952 Cal. 133 (DB)+AIR 1948 East Punj. 38.
7. AIR 1938 Cal. 337=ILR (1938) 2 Cal. 30.
8. AIR 1937 Lah. 442 (Non-attendance even though due to non-receipt of notice of meeting is not a ground on which effect of valid scheme can be avoided)+ILR (1948) 2 Cal. 404.
9. 51 Cal. W N 791 (He cannot apply for winding up of company on the ground of its inability or failure to pay debt. But the scheme will not prevent him as a contingent or prospective creditor to apply under section 166 for the winding up on any of the grounds mentioned in section 162)+AIR 1942 PC 6+ILR (1956) 8 Assam 301 (DB) (Money in deposit with bank attached under Order 21, Rule 46, Civil P C.--Scheme sanctioned subsequently--Attaching creditor who gets merely the right of depositor can obtain payment only in accordance with scheme).
10. (1895) 1895-1 Ch 267.
11. ILR (1949) 1 Cal. 253.

Judge of the Court has sanctioned a scheme another Judge exercising equal jurisdiction cannot declare that the order sanctioning the scheme is, to the extent that it affects a particular person, a nullity.[12] A scheme cannot be challenged in collateral proceedings except on the ground of absence of jurisdiction in the Court which sanctioned the scheme. A party whose grievance with the scheme is based only on the ground that the Court in sanctioning it has given a wrong decision or made a wrong order must seek his remedy to have the scheme rectified according to law in an appropriate proceeding.[13]

Where a sanctioned scheme is pleaded in bar of the execution pending before it, the Court cannot go behind the scheme. The function of the executing Court in regard to the scheme should be limited to the question of the jurisdiction of the Court which sanctioned it and its effect on the execution proceedings.[14]

Execution of decree in contravention of scheme. Where during the execution of a decree against the company a scheme of composition is filed under the section the execution of the decree cannot proceed. The fact that the decree sought to be executed was passed long before the scheme of composition, makes no difference.[15] The plea that a consent decree obtained by a creditor against the company had been superseded by the scheme sanctioned by the Court under the section could be taken by the company when the decree is sought to be executed by the decree-holders.[16] A creditor is bound by an arrangement between the company and its creditors made under section 284. The omission of the Company to raise a plea to this effect at the original trial is not fatal so as to bar its being raised, in execution proceedings.[17]

Set off, right of creditor to. There is nothing in section 284 to indicate that the making of an application under it has the effect of wiping off the right of a debtor under the provisions of the Civil P.C. to claim a set off against the company.[18]

Payment of creditors. In a scheme which fails to expressly fix a time within which creditors would be paid, the law implies a condition that the payment would be made within a reasonable time.[19] There is no bar to a company paying off debts earlier than on the dates prescribed by a scheme sanctioned by the Court.[20]

Scheme, when becomes effective. A scheme sanctioned by the Court takes effect from the date of the meeting of the creditors in which it was arrived at and

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12. AIR 1937 Cal. 401.
13. AIR 1938 Cal. 337=ILR (1938) 2 Cal. 30.
14. AIR 1937 Cal. 507 (DB)+AIR 1938 Cal. 337 (Scheme sanctioned by Court has the force of judicial pronouncements).
15. AIR 1936 Cal. 282.
16. AIR 1937 Cal. 211 (A scheme framed under the section is not an adjustment of decree and therefore the omission to record it under Order 21, Rule 2 will not bar the company from raising the plea in execution).
17. AIR 1934 Lah. 515
18. AIR 1960 Assam 191.
19. 51 Cal W N 791.
20. AIR 1953 Assam 107 (DB) (Decree-Company paying some amounts before date on which it is bound to pay under the scheme--Payments cannot be regarded as waiver by company of its privileges under the scheme).

not from the date of sanction.[1] Where a person who had a deposit in a bank borrowed on the security of that deposit a certain sum and the deposit matured long before the scheme was sanctioned; it was held that the terms of the scheme bound him as a creditor only in respect of the balance of the deposit that remained after deducting the amount of the debt he had to pay to the Bank.[2]

Surety. The composition of a debt due by the company in accordance with a scheme of reconstruction sanctioned by the Court does not discharge the surety from his liability for the debt.[3]

Winding up application by creditor. A creditor bound by the scheme sanctioned by the Court can apply for the winding up of the company on the ground of default in filing a statutory report, or in holding of statutory meeting or any other ground which the court thinks just and equitable.[4]

Foreign creditors. An order of a Pakistan High Court sanctioning a scheme in respect of a company would not bind the creditors of the company abroad; and the would be free to resort to action against the company in the Courts of that country.[5] Similarly where a foreign Court, refusing to recognise a scheme sanctioned by a Court in Pakistan, orders winding up of branches of the bank in the foreign country, a creditor of the bank at one of those branches cannot get the benefit of the scheme. He has to be content with participating in the winding up scheme.[6]

15. Stay of proceedings. A stay under sub-section (5) will affect only proceedings against the company and its directors and officers as representing the company in its operation. It will not affect any proceedings against the directors and officers for something done by them in their personal capacity in private life such as a criminal breach of trust in respect of chattels entrusted to them.[7]

An order staying the commencement and continuation of all suits and proceedings until final disposal of the petition for a scheme under section 284 affects both secured and unsecured creditors of the judgment-debtor company,[8] and the order continues to be in force even after the scheme is sanctioned by a final order and without a formal order making it absolute.[9]

When stay may be granted. Proceedings initiated by a person against a company can be stayed under sub-section (5) only when the questions raised therein

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1. NLR 1985 Tax 30+AIR 1919 PC 9+ILR (1938) 1 Cal. 121 (DB)+AIR 1916 Oudh 276 (DB).
2. AIR 1917 Lah. 386 (DB) (Fact that bank suspended payment before the deposit matured does not affect the right of the depositor).
3. AIR 1940 Bom. 247 (DB) (Creditor receiving back the debt half in cash and half in shape of preference shares--*Held* he could recover other half from the surety whose liability is co-extensive and not alternative).
4. 51 Cal W N 791.
5. 52 Cal W N 882 (Proper function of foreign Court in an action brought before it is to pass ancillary orders so that composition of entire debt of the company would be facilitated)+ILR (1949) 1 Cal. 53.
6. AIR 1954 Cal. 45.
7. AIR 1948 Cal. 242=49 Cr. L.J. 397.
8. AIR 1953 Assam 107=ILR (1952) 4 Assam 189 (DB).
9. AIR 1953 Assam 107 (DB) (Such an order is vacated only if the scheme is refused).

are referable to his status of a creditor or a member of a company and not otherwise.[10]

The Court can, under this section, stay the execution of a decree and restrain the decree-holder from proceeding further with the execution when there is a valid scheme of compromise between the company and its unsecured creditors.[11]

Winding up petition. Where during the pendency of an application under this section a petition for winding up also was made; it was held that as a winding up order, if made, would not interfere with the power of the Court to consider the proposed scheme there was no reason why the winding up application should be stayed pending the disposal of the application under the section.[12]

16. Appeal Where an order sanctioning a scheme has been completed and filed by the Court it becomes final and a party aggrieved has only the remedy of an appeal against it. In a proper case the Court can for sufficient cause extend the time for preferring an appeal.[13]

Scheme involving reconstruction of company. An order which sanctions the reconstruction of a company by its dissolution and creation of a new company is an order under section 284 read with section 287 and is as such appealable although the process involves the transfer of the properties of the dissolved company to the new company and the reduction of the liabilities of the former company.[14]

Execution of decree. The order of the Court overruling objection of the company to the execution of a decree on the ground that it had been superseded by a scheme sanctioned by the Court is appealable under section 47 of the Civil P.C.[15]

Who may appeal. Only a member or creditor of the company can file an appeal against an order under this section. Where during liquidation proceedings of a company a person propounds a scheme for carrying out the proceedings and that person is neither a member nor a creditor but is merely one who would be benefited if the scheme is sanctioned, he cannot appeal against the order of the Court rejecting the scheme.[16]

Forum for appeal. When Company Judge exercises jurisdiction he does it under the provisions of section 7. The authority authorised to hear appeals from

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10. AIR 1948 Cal. 242 (Share-holder of bank claiming relief in respect of certain chattels deposited by him and which he alleges have been wrongfully converted--*Held* proceedings cannot be stayed because his claim for relief is as a customer and not as a share-holder).
11. AIR 1936 Cal. 662 (The injunction would remain in force until the scheme remains in operation).
12. AIR 1939 Mad. 58.
13. ILR (1942) 1 Cal. 253.
14. AIR 1942 Cal. 578 (Reconstruction of Insurance company by its dissolution and creation of new company--Court's jurisdiction under section 153, Companies Act is not affected by Insurance Act--Scheme involving transfer of fund deposited by dissolved company and reduction of contracts of insurance--Order sanctioning scheme is one under sections 153 and 153-A and appealable).
15. AIR 1953 Assam 107=ILR (1952) 4 Assam 189 (DB).
16. AIR 1952 Bom. 78=56 Bom. 16 (DB).

appealable decisions of a Single Judge of a High Court when exercising original jurisdiction is the High Court and not to the Supreme Court.[17]

286. *Information as to compromises or arrangements with creditors and members.* (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 284--

(*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 interest of the directors including the chief executive 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 in so far as, it is different from the effect on the like interest 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.

(2) Where the compromise or arrangement affects the rights of debenture-holders of the company, the said statement shall give the like information and explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the meeting, every creditor or member so entitled shall, on making an application in the manner indicated by the notice, be furnished by the company, free of charge, with a copy of the statement.

(4) Where default is made in complying with any of the requirements of this section, the company, and every officer of the company who knowingly and wilfully is in default, shall be liable to fine which may extend to two thousand rupees; and for the purpose of this sub-section any liquidator of the company and trustee of a

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[17] AIR 1962 SC 119.

deed for securing the issue of debentures of the company shall be deemed to be an officer of the company:

Provided that a person shall not be liable under this sub-section if he shows that the default was due to the refusal of any other person, being a director, including chief executive, or managing agent or trustee for debenture-holders, to supply the necessary particulars as to his material interests.

(5) Every director, including the chief executive, or managing agent of the company and every trustee for debenture-holders of the company, shall give notice to the company of such matters relating to himself as may be necessary for the purposes of this section and on the request of the company shall provide such further information as may be necessary for the purposes of this section; and, if he fails to do so within the time allowed by the company, he shall be liable to fine which may extend to one thousand rupees.

287. *Provisions for facilitating reconstruction and amalgamation of companies.* (1) Where an application is made to the Court under section 284 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies or the division of any company into two or more companies, and that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company"), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters, namely:--

(*a*) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(*b*) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interest in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(*c*) the continuation by or against the transferee company or any legal proceedings pending by or against any transferor company;

(*d*) the dissolution, without winding up, of any transferor company;

(*e*) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(*f*) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and, in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the registrar for registration within thirty days after the making of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine which may extend to one thousand rupees.

(4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

(5) In this section the expression "transferee company" does not include any company other than a company within the meaning of this Ordinance, and the expression "transferor company" includes any body corporate, whether a company within the meaning of this Ordinance or not.

Synopsis

1. Scope.
2. Scheme for amalgamation or reconstruction.
3. Assets of company, transfer of.
4. Rights, transfer of.
5. Suits pending when scheme sanctioned.
6. Stamp duty.

1. **Scope.** Amalgamation or merger of companies or corporations is a matter which relates to incorporation or regulation of companies.[18] Scheme by company for transfer of its undertaking to a new company formed by amalgamation of several companies and for reorganisation of rights of and distribution of assets among different classes of share-holders can be sanctioned by Court even if it involves winding up and *ultra vires* acts.[19] However, the Court cannot in a scheme of the kind not falling within this section insert a clause of the nature contemplated under clause (*f*) of sub-section (1) of this section.[20]

Both companies applying for amalgamation. Where an application was made for amalgamation of petitioner-Company No. 1 into petitioner-Company No.2 and their members and submitting Scheme of Arrangement for Amalgamation was duly approved by overwhelming majority of members of both the Companies. Scheme provided for all relevant aspects of such amalgamation and settled all questions relating to their respective assets, liabilities and other obligations. No objection having been raised against proposed amalgamation from any quarter including their creditors and employees and petitioners having complied with all legal requirements and formalities, the Court allowed amalgamation of petitioner No.1 into petitioner No.2 and their members in terms of Scheme of Arrangement for Amalgamation annexed with the petition and eventual dissolution of petitioner-Company No.1 without winding up so as to take effect from the date on which ordinary shares of petitioner No.2 are allotted to the holders of the ordinary shares of the petitioner No.1.[21] Where amalgamation scheme has been approved by Board of Directors of both companies, as also by their share-holders unanimously. Creditors of both companies have no objection to proposed amalgamation. In such a case, meeting of Directors or members would not be necessary as it would serve no useful purpose.[1] Where both companies applied for amalgamation whereby whole undertaking, properties and liabilities of *'P'* Limited were to be taken over by and transferred to *'AA'* Limited in consideration of issuance of specific number of shares to the shareholders of *'P'* Limited. Proposed scheme of amalgamation had been made out as approved by overwhelming majority, both in number and value of the members of both the companies, and statutory requirements had been satisfied. Petition for amalgamation had been widely advertised and no objection had been received. Small minority of members who had not attended Extraordinary General Meeting of two companies in which motions for approval of amalgamation were passed had also not appeared in Court. Case was thus made out for grant of sanction to the proposed scheme of amalgamation. It was directed that *'P'* Limited would stand dissolved without winding up on the date on which ordinary shares of *'AA'* Limited were allotted to the holders of ordinary shares of *'P'* Limited in accordance with the scheme of amalgamation.[2]

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18. AIR 1953 Cal. 695.
19. AIR 1937 Bom. 423.
20. AIR 1950 East Punj. 111 (FB) (In such cases the parties should assert their rights under the scheme only in regular suits or other proceedings permissible in law).
21. PLD 1997 Kar. 230.
1. NLR 1993 UC 49.
2. 1991 CLC 523=PLJ 1991 Kar. 204.

Territorial jurisdiction. Where a company situate in the jurisdiction of Sind High Court is sought to be merged with a company within the jurisdiction of Lahore High Court. The arrangement would amount to winding up the former company and the Lahore High Court does not have jurisdiction in the matter.[3]

2. Scheme for amalgamation or reconstruction. Under Company Law in cases of reconstruction of companies, Court has to consider and ascertain amongst other matters, the question whether the proposed scheme will serve the public interest. One of the principal items on which the Court has to receive satisfaction is, whether considerations of public interest ought; in the opinion of the Court, to override the decision of the creditors or shareholders and that the Court has also to consider the fact that the large number of employees and their families stand to gain and this will be in the public interest if the scheme was successfully worked. Moreover the Court has to be satisfied whether it would be conducive to commercial morality or not to sanction the scheme.[4] Where an order under section 287 provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets are by virtue of that order, without more, transferred to and vest in the transferee company and the liabilities of the former company are also cast upon the transferee company.[5] Where permission from the Controller of Capital Issues had been obtained on basis of which share capital of companies was to be restructured as per break-up value of shares as on specified date. Merged company was to take over all assets properties and liabilities of the companies and would be listed with the Stock Exchanges. Companies to be merged, had proposed and undertaken that their officers, executives, employees and workers would become officers, executives, employees and workers of the merged company on the existing terms and conditions. Companies had specifically undertaken that wages and facilities of subordinate staff would be governed by the respective peace agreement during the validity of existing agreements with the respective Collective Bargaining Agents. Companies had undertaken to treat the two Workers' Unions as separate units and would stand by their commitment. Wage privileges and safeguards provided for by both the Companies would not be withdrawn. Court sanctioned the scheme for amalgamation/merger of companies into a new company by the name as proposed in the scheme. Approving the meetings held, by both the petitioner companies, Court sanctioned the scheme for amalgamation/merger of companies into a new company by the name as proposed in the scheme.[6]

An application for permission to call a meeting to consider and approve a scheme of reconstruction should not be rejected on the ground that there is a strong opposition to it where the company has no liabilities at all but has ample assets on the other hand.[7] But where a scheme of amalgamation was passed at a meeting at which one of the share-holders who had a big interest in the capital could not

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3. NLR 1982 Civ. 556=PLD 1982 Lah. 566=PLJ 1982 Lah. 34
4. PLD 1988 Lah. 1=PLJ 1988 Lah. 42=NLR 1988 SD 403.
5. AIR 1951 Mad. 209=ILR 1951 Mad. 111 (FB).
6. 1989 CLC 1323=NLR 1989 Civ. 581.
7. AIR 1953 Trav-Co. 357 (DB) (Nor are the facts that reconstruction is un-necessary or that it would place the surplus assets at the disposal of original members or that it would result in the loss of assets relevant to the question of sanctioning the application. Such application is not to be dealt with by the Courts as though it is an application for sanction of a scheme).

exercise his vote by proxy because of some technical defects and the majority which passed the scheme possessed only a fraction of the capital of the company and further they had special reasons of their own for supporting it, but the condition of the company did not warrant the ordering of its liquidation, the Court directed the holding of another meeting of the members of the company to consider the scheme of arrangement afresh.[8]

Bifurcation of company, scheme for. Where share-holders of company proposed to bifurcate business into two independent businesses. Creditors neither objected to bifurcation nor their position was prejudiced. The sanction of scheme of re-arrangement by the company was justified in the circumstances.[9]

Retrospective effect may be given to merger. Merger of companies can take place with retrospective effect and not from date of sanction by High Court. Liability to pay tax by defunct company would pass on to transferee company as from date the merger actually takes place. Income-Tax Department would have no *locus standi* to insist that defunct company existed even after it was declared to be non-existent by High Court. Income-Tax Authorities cannot be heard to say that they not being a party to proceedings before High Court were not bound by merger order. If this contention were to be accepted then no sanctity could be attached to merger order and for that purpose whole exercise in obtaining it would be quite an otiose act.[10]

Scheme not falling under this section. A scheme for reconstitution which in essence is nothing but a scheme for its voluntary liquidation without the intervention of the Court should be rejected.[11] Similarly a scheme for the reconstruction of a company without any liability to the members for its losses cannot be given effect to under the law.[12]

Modification of scheme. There is no power in the company Court under section 287 to alter or modify a scheme which it has already sanctioned, completed and filed.[13]

3. Assets of company, transfer of. Section 287 (1)(*a*) to some extent overrides ordinary law of contracts under which assets alone can be assigned but not the liabilities and duties arising under the contract. Therefore where an order under section 287 provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets are by virtue of that order, without more, transferred to and vest in the transferee company and the liabilities of the former company are also cast upon the transferee company.[14] Thus a scheme by which one Bank transfers its assets to another Bank and the latter Bank undertakes to pay the deposits of the former Bank is not *ultra vires* of the Banking Company and is not illegal.[15] In this context it is to be noted that a payee or holder of a

8. AIR 1958 Punj. 30.
9. PLD 1984 Kar. 225.
10. NLR 1985 Tax 30.
11. AIR 1930 Lah. 777 (DB) (Court in such case should order its winding up).
12. AIR 1958 Ker. 315.
13. ILR (1949) 1 Cal. 253.
14. AIR 1951 Mad. 209=ILR 1951 Mad. 111 (FB).
15. AIR 1951 Punj. 79.

demand draft on another branch of the bank issuing the draft is to be regarded only as an ordinary creditor entitled to receive payment in accordance with the scheme sanctioned under section 287 and under which the bank is working. In order to claim more than any other ordinary creditor he must show that the bank received the money from him in trust.[16]

4. **Rights, transfer of.** The right to sue for damages for breach of contract is within the wide definition of 'property' in section 287(4), and may be transferred.[17] However the transfers effected by the vesting order made under section 287 are in essence only transfers *inter vires* and not transfers by operation of law. Therefore no right or property can be transferred by such an order which under the law is not transferable or assignable.[18]

5. **Suits pending when scheme sanctioned.** Where the Court ordering the sanction of a scheme of amalgamation directed that any suit or other legal proceeding instituted by or against the transferor company be continued by or against the transferee company; it was held that the latter was entitled under the order itself to continue a suit instituted by the former independently of the provisions of Order 22, Rule 10 of the Civil P.C.[19]

6. **Stamp duty.** Deeds transferring the assets and liabilities of a company although done in pursuance of the order of Court under section 287 are merely acts of parties. As such they are not exempt from payment of stamp duty.[20] Notification No. 1 D/- 16th January, 1937, issued by the Central Board of Revenue, was designed to facilitate reconstruction of a company or amalgamation of two companies which are more or less under the same ownership so that they should be able to re-arrange their affairs without being saddled with liability, for payment of stamp duties. A company wishing to claim relief from stamp duty under the provisions of the notification must satisfy the officer concerned (1) that the document evidences the transfer of properties between companies limited by shares and that shares of the transferee company are in the beneficial ownership of the transferor company to the extent of 90 per cent. Shares must be in the beneficial ownership of the transferor company but legal ownership is not necessary.[1]

288. *Notice to be given to registrar for applications under section 284 and 287.* The Court shall give notice of every application made to it under section 284 or 287 to the registrar and shall take into consideration the representation if any, made to it by the registrar before passing any order under any of these sections.

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16. AIR 1960 Punj. 281.
17. AIR 1959 Cal. 352 (DB).
18. 100 Cal L Jour 70 (Transfer of a mere right to sue for damages upon the breach of contract will be hit by section 6 (*e*) of the Transfer of Property Act and therefore such a right cannot be assigned by a vesting order made under section 153-A of this Act).
19. AIR 1959 Cal. 353 (DB).
20. AIR 1951 Mad. 209 (FB) (Deeds transferring movables and promissory notes—Consideration partly in the shape of cash and party in the shape of covenants entered into by transferee—Proper stamp duty payable is under Art. 23 and not Art. 22 of the Stamp Act).
1. AIR 1957 Punj. 261 = ILR 1957 Punj. 1505 (DB).

289. *Power and duty to acquire shares of share-holders, dissenting from scheme of contract.* (1) Where a scheme or contract involving the transfer of shares or any class of shares in any company (in this section referred to as "the transferor company") to another company (in this section referred to as "the transferee company") has, within one hundred and twenty days after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within sixty days after the expiry of the said one hundred-twenty days, give notice in the prescribed manner to any dissenting share-holders that it desires to acquire his shares; when such a notice is given the transferee company shall, unless, on an application made by the dissenting share-holder within thirty days from the date on which the notice was given, the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving share-holders are to be transferred to the transferee company:

Provided that, where shares in the transferor company of the same class as the shares whose transfer is involved are already held as aforesaid by the transferee company to a value greater than one-tenths of the aggregate of the value of all the shares in the company of such class, the foregoing provisions of this sub-section shall not apply, unless--

(*a*) the transferee company offers the same terms to all holders of the shares of that class (other than those already held as aforesaid) whose transfer is involved; and

(*b*) the holders who approve the scheme or contract, besides holding not less than nine-tenths in value of the shares (other than those already held as aforesaid) whose transfer is involved, are not less than three-fourths in number of the holders of those shares.

(2) Where, in pursuance of any such scheme or contract as aforesaid, shares or shares of any class, in a company are transferred to another company or its nominee, and those shares together with any other shares or any other shares of the same class, as the case may be, in the first mentioned company held at the date of the transfer by, or by a nominee for, the transferee company or its

subsidiary comprise nine-tenth in value of the shares, or shares of that class, as the case may be in the first-mentioned company, then--

(*a*) the transferee company shall, within thirty days from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement), give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class, as the case may be, who have not assented to the scheme or contract; and

(*b*) any such holder may, within ninety days from the giving of the notice to him, require the transferee company to acquire the shares in question:

and where a share-holder gives notice under clause (*b*) with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving share-holders were transferred to it, or on such other terms as may be agreed, or as the Court on the application of either the transferee company or the share-holders think fit to order.

(3) Where a notice has been given by the transferee company under sub-section (1) and the Court has not, on an application made by the dissenting share-holder, made an order to the contrary the transferee company shall, on the expiration of thirty days from the date on which the notice has been given or, if an application to the Court by the dissenting share-holder is then pending, or, if an application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the share-holder by any person appointed by the transferee company and on its own behalf by the transferee company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which, by virtue of this section, that company is entitled to acquire; and the transferor company shall--

(*a*) thereupon register the transferee company as the holders of those shares; and

(*b*) within thirty days of the date of such registration, inform the dissenting share-holders of the fact of such registration and of the receipt of the amount or other consideration

representing the price payable to them by the transferee company:

Provided that an instrument of transfer shall not be required for any share for which a share warrant is for the time being outstanding.

(4) Any sums received by the transferor company under this section shall forthwith be paid into a separate bank account to be opened in a scheduled bank and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sums of other consideration were or was respectively received.

(5) The following provisions shall apply in relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company, namely:--

(*a*) every such offer or every circular containing such offer or every recommendation to the members of the transferor company by its directors to accept such offer shall be accompanied by such information as may be prescribed;

(*b*) every such offer shall contain a statement by or on behalf of the transferee company disclosing the steps it has taken to ensure that necessary cash will be available;

(*c*) every circular containing, or recommending acceptance of, such offer shall be presented to the registrar for registration and no such circular shall be issued until it is so registered;

(*d*) the registrar may refuse to register any such circular which does not contain the information required to be given under clause (*a*) or which sets out such information in a manner likely to give a misleading, erroneous or false impression; and

(*e*) an appeal shall lie to the Authority against an order of the registrar refusing to register any such circular.

(6) Whoever issues a circular referred to in clause (*c*) of sub-section (5) which has not been registered shall be punishable with fine which may extend to two thousand rupees.

Synopsis

1. Validity of section.
2. Acquisition of shares of dissentient minority.
3. Duty of Court.
4. "Within four months."

1. Validity of section. Section 289 cannot be struck down as in any way infringing upon the right guaranteed by the Constitution to all citizens to acquire, hold and dispose of property as they like.[2]

2. Acquisition of shares of dissentient minority. The object of section 289 is to prevent the deadlock which would otherwise arise when a minority of share-holders opposes a scheme which the majority considers to be advantageous.[3] It is to bring the dissentient share-holders in line with the majority and force them to part with their shares, if the specified conditions are fulfilled.[4] The principle underlying the section is that where a company obtain nine-tenth of the shares or class of shares under a scheme of arrangement, it can compel the dissentient minority to part with its shares. Conversely the dissenting share-holders are also entitled to compel the company to acquire their shares as well and on the same terms.[5] However the section imposes no compulsion on the company to acquire all the shares when a scheme has been accepted by the statutory majority. It is left to the option of the company to decide as to the dissenting members whose shares it would acquire. There is no choice however to the company in the matter of acquiring the shares after it has given such notice.[6]

Acquisition of shares by private agreement. The section imposes no legal bar on the transferee company to acquire by private negotiations any number of shares with the consent and on the terms settled with the share-holders themselves.[7]

Effect of acquisition. The removal of names of share-holders on compulsory transfer of their shares under this section cannot be said to be not for sufficient cause within the contemplation of section 152 of the Ordinance.[8]

3. Duty of Court. Section 289 does not confer any right on the Court to consider the merits of the contract so far as it concerns the majority of share-holders who have accepted it. In their case the matter is complete.[9] The Court has power under the section only to decide as to whether the dissentient share-holder or share-holders should be compelled to part with his or their shares or not.[10] The Court would when an application is made under section 289, proceed on the assumption

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2. AIR 1957 Mad. 341 (A share is no doubt a movable property but it is not such property which has been brought into existence without the aid of legislative enactments. The bundle of rights and obligations, which a share represents are all created by the statute and when the same statute imposes restrictions no questions of any infringement of a fundamental right can arise in the case).
3. AIR 1957 Mad. 341 = ILR 1957 Mad. 614.
4. AIR 1956 Pepsu 86.
5. AIR 1959 Punj. 232.
6. AIR 1956 Pepsu 86.
7. AIR 1956 Pepsu 86.
8. AIR 1959 Punj. 232.
9. AIR 1943 Bom. 325 (DB) + AIR 1957 Mad. 31 + AIR 1956 Pepsu 86.
10. AIR 1956 Pepsu 86.

that the scheme and the offer which has been approved by the requisite majority of the share-holders of the transferor company is a fair one and the onus of showing that it is not so and therefore their shares should not be compulsorily acquired lies on the dissentient share-holders who have made the application.[11] It has to be affirmatively established by them that notwithstanding the view of a very large majority of the share-holders the scheme was unfair.[12] The Court would be justified in not accepting the opinion of the majority of share-holders where their view is based on misrepresentation or there has been some unfair dealing or the majority of share-holders have some interest conflicting with that of the minority.[13] But a wrong basis of valuation adopted under a scheme for the purpose of shares of a company by itself will not be sufficient to allow the application of a dissentient member under section 289. There must in addition be proof that the valuation has affected the reasonableness of the offer.[14]

Value of shares cannot be fixed by Court. On an application made under section 289 the Court has only a very limited power. It can either dismiss the application or allow it, but it cannot fix the fair value of the shares and direct the company to acquire the shares from the member at that price.[15]

4. "Within four months". A company can validly fix a shorter period than one hundred and twenty days and require a share-holder to accept its offer within that period. The phrase "within one hundred and twenty days after the making of the offer", indicates not a fixed period to the end of which the offer must remain open but a maximum period during which the event contemplated, namely, approval of the offers by the holders of not less than nine-tenths in value of the shares whose transfer is involved must occur, if the right of the transferee company to acquire the share of a dissentient share-holders is to arise. To say that something must be approved within one hundred and twenty days appears to allow any day within that period to be fixed for such approval.[16] Where company *B* purchased the business of company *A* and amalgamated *A* company with itself. Under the terms of the arrangement share-holders of *A* company were entitled to receive shares in the amalgamated company. A form of application was sent to them for signature. The form contained a request for the allotment of shares, an agreement to accept the same and an authority to the amalgamated company to insert the name of the applicant in the register of share-holders. It was held that the allotment to one *A* who was one of such applicants was complete by the terms of the arrangement between the two companies as soon as the resolution accepting his application was entered in the Book.[17]

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11. AIR 1957 Mad. 225 (An applicant who has neither alleged nor proved that the majority had acted under inducement of fraud or misrepresentation or that they had acted unfairly or oppressively cannot succeed only by showing that as an effect of the scheme the transferee company derives substantial advantages) + AIR 1943 Bom. 325.
12. AIR 1959 Punj. 232.
13. AIR 1943 Bom. 325 (DB) (Action under section 153 not limited to the class of cases where there is fraud or misrepresentation) + 1949-1 All E R 1013.
14. AIR 1943 Bom. 325 = ILR 1943 Bom. 581 (DB).
15. AIR 1957 Mad. 225 + AIR 1943 Bom. 325 = ILR 1943 Bom. 581 (DB).
16. (1955) 1955-3 All E R 733.
17. (1872) 13 Eq. 474.

PART X

PREVENTION OF OPPRESSION AND MISMANAGEMENT

290. *Application to Court.* (1) If any member or members holding not less than twenty per cent of the issued share capital of a company, or a creditor or creditors having interest equivalent in amount to not less than twenty per cent of the paid up capital of the company, complains or complain, or the registrar is of the opinion, that the affairs of the company are being conducted, or are likely to be conducted, in an unlawful or fraudulent manner, or in a manner not provided for in its memorandum, or in a manner oppressive to the member or any of the members or the creditors or any of the creditors or are being conducted in a manner prejudicial to the public interest, such member or members or, the creditor or creditors, as the case may be, the registrar may make an application to the Court by petition for an order under this section.

(2) If, on any such petition, the Court is of opinion--

(*a*) that the company's affairs are being conducted, or are likely to be conducted, as aforesaid; and

(*b*) that to wind-up the company would unfairly prejudice the members or creditors.

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of purchase by the company, for the reduction accordingly of the company's capital or otherwise.

(3) Where an order under this section makes any alteration in, or addition to, a company's memorandum or articles, then, notwithstanding anything in any other provision of this Ordinance, the company shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; and the alterations or additions made by the order shall be of the same effect

as if duly made by resolution of the company and the provisions of this Ordinance shall apply to the memorandum or articles as so modified accordingly.

(4) A copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within fourteen days after the making thereof, be delivered by the company to the registrar for registration; and if the company makes default in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to fine which may extend to five thousand rupees and to a further fine not exceeding one hundred rupees for every day after the first during which the default continues.

(5) The provisions of this section shall not prejudice the right of any person provision to any other remedy or action.

Synopsis

1. Scope and object.
2. Oppression and mismanagement.
3. Who may apply.
4. When relief may be granted.
5. Fraud by Directors.

1. Scope and object. Prerequisites for making order under section 290, and conditions to be satisfied for making order in terms of section 290, are that Company's affairs were conducted or were likely to be conducted in manner specified in section 290(1) of the Ordinance; and that winding up of company would unfairly prejudice members or creditor.[1] Therefore, proceedings under section 290 were to be resorted to when it was complained that affairs of Company were being conducted in an unlawful or fraudulent manner or in a manner not provided for in Memorandum of Company or in manner oppressive to members or creditors or were being conducted in a manner prejudicial to public interest. Only those allegations falling within the purview of sections 410 to 415, could be examined and determined in such proceedings. Violations of other provisions of law and liabilities incurred thereunder could not be gone into during proceedings under section 290, Companies Ordinance.[2] In proceedings under this section the interests of the company are paramount and therefore they cannot be compromised by the parties in any manner as they choose.[3]

Object of section. Object behind provision of section 290, appears to be that affairs of the company must be conducted in a lawful manner and strictly in accordance with the Memorandum and Articles of Association of the Company.[4] The section is intended to avoid winding up, if possible, and keep the company

1. 1996 CLC 1863=NLR 1996 Civ. 315.
2. 1993 CLC 1413=NLR 1993 UC 476.
3. AIR 1958 Mad. 587=ILR 1958 Mad. 838 (DB).
4. 1992 MLD 668.

going while at the same time relieving the minority share-holders from acts of oppression and mismanagement.[5]

Offences of which cognizance may be taken. High Court in those proceedings which are essentially of summary nature, may take cognizance of offences falling within the purview of section 413 but is not competent to take cognizance of other offences alleged to have been committed by Directors under Companies Ordinance as well as under Pakistan Penal Code.[6]

Consent order. Controversies with regard to a consent order cannot be agitated in proceedings under section 290.[7] Therefore in view of consent order by a Court that shares in a company left by Muslim deceased be distributed amongst heirs of deceased in accordance with Shariat, other controversies could not be agitated under S. 290. In case any rights were available to petitioners, they could agitate the same in appropriate proceedings in accordance with law.[8]

Proceedings under Rent Restriction Law against Company. Proceedings under Sindh Rented Premises Ordinance (1979) against a Company without leave of High Court would not be maintainable.[9]

Proceedings filed before enforcement of Ordinance. There is a marked difference between phraseology of S. 153-C of the Companies Act and S. 290 of the Companies Ordinance. To proceedings filed prior to coming into force of Ordinance, XLVII of 1984, provisions of S. 290 of the Ordinance would not be applicable.[10]

Prerequisite qualification for making petition under section 290 against mismanagement and malpractice in Company is that petitioner must hold 10% of issued share capital of such Company. In absence of any proof of such prescribed share capital, petition filed by petitioner under sections 235 to 237 of Companies Act, 1913, could not be treated under section 290 of Companies Ordinance, 1984.[11]

2. Oppression and mismanagement. Provisions of sections 290 to 294, confer vast and undefined powers on Courts while dealing with prevention of oppression and mismanagement of companies' affairs. Such powers, unless the contrary was established, would include, essentially as interim but rarely as ultimate measures, jurisdiction to prohibit any proceedings against the company except with the leave of the Court.[12] Therefore, if any member of a company complains or the Registrar is of the opinion that the affairs of the company are being conducted in an unlawful or fraudulent manner or in a manner not provided for in its memorandum may make an application to the Court for an order under

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5. 1994 CLC 2197 = NLR 1994 CLJ. 433 + AIR 1960 Mad. 338.
6. 1994 CLC 403 = NLR 1993 Civ. 722.
7. NLR 1989 UC 679 = PLD 1988 Kar. 446 = PLJ 1988 Kar. 505.
8. PLD 1988 Kar. 446 = PLJ 1988 Kar. 505 = NLR 1989 UC 679.
9. NLR 1996 AC 444.
10. 1987 CLC 2263 = NLR 1989 AC 195 (DB).
11. 1987 CLC 577 = NLR 1987 Civ. 177.
12. PLD 1994 Kar. 358 = NLR 1994 CLJ 528 (DB).

section 290 of the Ordinance and jurisdiction to entertain such an application is only vested in the High Court under section 7.[13]

The word "oppressive must prima facie be given its ordinary sense and the question whether the conduct complained of is oppressive to a member or members as such must be determined in that sense.[14] The oppression complained of should at the lowest involve a visible departure from the standards of fair dealing and the violation of the conditions of fair play on which every share-holder who entrusts his money to a company is entitled to rely. In other words the complaining share-holder must be under a burden which is unjust or harsh or tyrannical. A persistent and persisting course of unjust conduct must be shown.[15] The words "the affairs of the company are being conducted" suggest prima facie a continuing process and is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company *de facto* or *de jure*. It is not essential to a case of oppression that the alleged oppressor is oppressing in order to obtain pecuniary benefit. If there is oppression it remains oppressing even though the oppression is due simply to the controlling share-holder's desire for power and control and not with a view to his own advantage in the pecuniary sense.[16]

Discrimination. There is no reason for holding that this section is necessarily confined to cases of discrimination though it is to be expected that cases calling for its application would most usually take that form.[17]

Directors may complain of oppression. There may be oppression from the point of view of member directors where a majority share-holder proceeds on the strength of his control over the voting power to act contrary to the decision of or without the authority of the duly constituted Board of Directors of the company,[18] or to unjustly remove a Director from office. Thus where a resolution passed by majority share-holders for reduction of director's number from five to three was patently made by the majority for the purpose of getting rid of the petitioner, holding 20% shares, as a director. The Court did not permit such exercise of right by majority to deprive the petitioner of directorship and of right to be part of management of company.[19]

Working arrangement. Working arrangement envisaged under section 290 cannot be pressed into service in a situation involving oppression of 50% shareholders of company.[20]

Delay in making application. In case of oppression and mismanagement, person aggrieved is required to agitate the matter without delay. Where delay was allowed to occur between alleged irregularities and filing of petition under section 290 then not only the same would call for summary dismissal of such petition on

13. 1997 CLC 970.
14. 1959-1 WLR 62.
15. AIR 1960 Mad. 338.
16. 1959-1 WLR 62.
17. 1959-1 WLR 62.
18. 1959-1 WLR 62.
19. PLD 1983 Kar. 45.
20. NLR 1994 Civ. 15 = PLD 1993 Kar. 322.

account of laches, but possibility could not be ruled out that during the intervening period company in question, might have regulated its affairs properly.[21]

Proof of. Where petitioner's contention relating to oppression and mismanagement of company's affairs could not be spelt out from the report of Chartered Accountants appointed for the purpose. Petition was dismissed.[1]

Enforcement of prior arrangement after conversion of company. For answering the question whether the partnership analogy applies or any implied or express agreement amongst parties to hold shares in a given proportion or to control management can be enforced after conversion of the company into public limited company, reference will have to be made to the provisions of the Company Law and the Articles of Association of the Company as these will prevail and the relationship between the members qua the directors will have to be regulated accordingly. With the removal of restriction on the right to transfer shares and by transfer and issue of new shares to the public the company naturally becomes broad-based. This in certain situations may result in disturbing the equilibrium in the shareholding and in exclusion of one group or the other from the management and control of the affairs of the company. So after conversion into a public company or in a public limited company neither the terms of implied or express agreement can prevail nor the status existing prior to the change over ought necessarily be maintained in violation of the provisions of Company law and the Articles of Association. Any valid and bona fide change in the status with reference to the shareholding cannot be complained of under 'just and equitable' clause as change in the management is inherent in the principle of transferability of shares and invitation to public to subscribe to shares. Some of the important principles are that unwise, inefficient or careless conduct of a d ctor in pursuance of his duties cannot give rise to a claim for relief under section. 290. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity or to conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder and not as a director or employee of the company. It is also clear that where the 'just and equitable jurisdiction' has been applied, the circumstances have always been such as to warrant the interference that there has been at least unfair conduct, abuse of powers and an impairment of confidence in the probity with which the affairs of the company were being conducted as distinguished from mere resentment on the part of minority at being outvoted on some issue of domestic policy.[2]

3. **Who may apply.** Section 290 confers right on member or members holding not less than twenty per cent. of the share capital or a creditor or creditors having interest equivalent in amount to not less than twenty per cent of the paid-up capital of the Company as well as on the Registrar in the given situation, to move an application to the Court for the relief contemplated therein.[3] Member holding not less than 20 per cent of issued capital of company may make an application to court that affairs of company are being conducted or likely to be conducted unlawfully or

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21. 1992 MLD 668.
1. 1992 MLD 668.
2. PLD 1988 Lah. 1 = PLJ 1988 Lah. 42 = NLR 1988 SD 403.
3. 1993 CLC 1915 = NLR 1933 Civ. 388.

in fraudulent manner or in a manner not provided for in its memorandum.[4] Where number of shares held by plaintiff falls short of twenty per cent. of the total issued share capital of company, plaintiff is not qualified to initiate proceedings under section 290 either before the Registrar, Joint Stock Companies or the High Court.[5] Persons permitted to apply under this section are a member or members holding not less than twenty per cent of the issued share capital of a company or a creditor of the Company[6] and the oppression complained of by him must be oppression of some part of the members including himself in their or his capacity as a creditor, member or members of the company.[7]

A petition under this section can be maintained only by a person or persons who are shown as members in the register of the company. Persons who have yet to establish factum of being shareholders of the Company would have no *locus standi* to move High Court under section 290 for issuance of directions.[8] If the persons who wish to file such a petition are not shown as members in the register of the company rightly or wrongly, they must first have the register rectified before they can bring a petition.[9] Where petitioner adduced prima facie satisfactory evidence in his favour, Rectification may be ordered and he would become entitled to apply under this section.[10] But where petitioner's case was that respondents had transferred their entire interest in the company to him and other members of his group, provision of section 290 would not be applicable for rectification of register of members.[11] A person whose application for rectification of the register has been already dismissed by the Court, cannot instead of filing a suit to establish his right, seek the same relief under the guise of an application under this section.[12]

Director illegally removed from office. A director who seeks relief on the ground that he had been removed from office by an *ultra vires* resolution passed at a meeting of the Board of Directors can invoke the powers of the Court or the Registrar under this section.[13]

4. When relief may be granted. An order under section 290 cannot be passed unless the facts proved are such that they would also justify the passing of order for the winding up of the company in the alternative.[14] However it must be noted that the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the "just and equitable" rule but only to those cases of that character in which there is an element of oppression.[15] In other words in an application under section 290, before granting relief the Court has to satisfy itself that to wind up, the company will unfairly

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4. NLR 1994 Civ. 15=PLD 1993 Kar. 322.
5. PLD 1990 Kar. 198=NLR 1992 CLJ 557.
6. 1987 CLC 2079.
7. 1959-1 WLR 62.
8. 1987 CLC 2079.
9. AIR 1960 Punj. 427.
10. NLR 1993 CLJ 23.
11. PLD 1992 Kar. 210=NLR 1992 UC 579=1992 CLC 2273.
12. AIR 1960 Punj. 427.
13. AIR 1958 Punj. 190=ILR 1958 Punj. 481.
14. AIR 1956 SC 213 (1956 Andh L T 207, *affirmed*).
15. 1959-1 WLR 62.

prejudice the members complaining of oppression but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company be wound up and that the circumstances relied on must exist at the date of hearing of the petition. The petitioner who is seeking equity must not himself be guilty of questionable conduct and must not be abusing the process of Court or for ulterior purpose.[16]

Relief under section 290 cannot be granted unless Court comes to the conclusion that winding up order under section 305 can be made. But filing of criminal cases/complaints against petitioner, does not give the petitioner any right to move the Court for winding up of company under section 305 or for taking action under section 290.[17] The purpose of Section 290 is to avoid winding up of company if possible. Company would not be wound up if winding up of company would unfairly prejudice not only share-holders but also creditors.[18] Therefore, the Court may, if satisfied that allegations contained in application under section 290 are correct, and that winding up order would unfairly prejudice members or creditors, order (*i*) regulating conduct of affairs of company in future, or (*ii*) purchase of shares of any members by other member or by Company. In case of purchase of shares of any members by Company, Court may further order as to reduction of capital or otherwise.[19]

The section applies to a stage before the order for winding up is passed and has no operation in a case where such an order has been passed long before.[20]

Merely because a share-holder could have sought relief under this section, the Courts would not hesitate to order on his petition winding up a company on just and equitable grounds when an application under section 290 would not have been of much use to the petitioner.[1] Where application for winding up of Company was made by Directors controlling forty per cent of equity in such company, hitherto having equal share in management of affairs of Company. Record showed that respondent Directors were intending to assume full control of management of Company. Apprehension in mind of petitioner Directors that they would be deprived of their share in management of Company appeared to be fully justified. Complete lack of confidence coupled with embittered feelings left no room for reproachment between parties. Election of new Chairman in view of equal number of Directors of Company opposing each other would not be possible. Company's affairs justified passing of winding up order. Order of winding up was to take effect after expiry of specified period within which both parties would have option to either purchase shares of other party or bifurcate the Company on terms to be mutually agreed between them. Failure of parties to come to any understanding within specified time would result in winding up of Company.[2] But where the remedy under this section is effective but is not utilized with interior motives, Court may not give relief of winding up. Thus where minority share-holders have

16. PLD 1988 Lah. 1 = PLJ 1988 Lah. 42 = NLR 1988 SD 403.
17. PLD 1983 Kar. 45.
18. NLR 1996 UC 796.
19. NLR 1994 Civ. 15 = PLD 1993 Kar. 322
20. AIR 1952 Trav-Co. 243 = ILR 1952 Trav-Co. 319 (DB).
1. 64 Cal. W. N. 228.
2. 1991 CLC 589.

effective remedy under provision of section 290, Companies Ordinance for relief against mismanagement and oppression. Material on record, however, indicated that minority share-holders were acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. Court declined to wind up the company.[3]

Relief to affectees pending petition under this section Pendency of proceedings under section 290 before High Court, does not in any way place any restriction whatsoever on Government or its authorities to come out with any scheme of relief to affectees of company.[4]

Simultaneous petitions under this section and for winding-up. The mere fact that petitions under section 290 and section 305 were filed simultaneously does not by itself disentitle petitioner to relief under section 305.[5]

Dispute of parties 'inter se', settlement of. Provision of S. 290 of the Ordinance, however, could not be invoked by any party for settlement of disputes between the parties *inter se*.[6]

Right of party to be heard. Hearing could be claimed by a party when there is any likelihood of causing prejudice to a right vested in that party. When no such right vests or subsists in that party, providing of hearing to such party is not at all required.[7]

Relief where both share-holders and creditors are prejudiced. Where winding up of company would unfairly prejudice not only the shareholders but also the creditors. Taking over the business of the company by specified Modarba companies who were financially and professionally sound parties by floating Modarba Management Company was the only viable proposal. The Court directed Joint Registrar of Companies in the interest of justice that the amount received as profit/interest by depositors be adjusted against the principal amount of deposit and after adjusting the amount so received, if any amount remained payable out of the principal amount, the same would be paid *pro rata* depending on the total amount realised, out of the assets of the Company in question and its susidiary Companies.[8]

5. **Fraud by Directors.** Although a petition under this section does not seek relief against the delinquent directors, the Court is entitled to and should ordinarily investigate into the charges levelled against them in the larger interest of the company.[9]

A share-holder whose complaint against a sale of the company's property is based on the ground of the managing director's fraud in colluding with the auction-purchaser to allow him to purchase it at an unconscionably low price has a specific remedy under section 290. He has no *locus standi* to file an application under Order

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3. 1991 MLD 124=NLR 1991 Civ. 582.
4. NLR 1997 UC 34.
5. PLD 1983 Kar. 45.
6. 1992 MLD 668.
7. 1993 CLC 1915=NLR 1993 Civ. 388.
8. 1994 CLC 2197=NLR 1994 CLJ 433.
9. AIR 1958 Mad. 587=ILR 1958 Mad. 838 (DB).

21, Rule 90, Civil P.C., to get the sale set aside.[10] An application which expressly alleges the existence of continuous mismanagement of a type ruinous to the security of the company cannot be treated as an application based on mismanagement which has ceased and rejected as not covered by the power of the Court under section 290 merely because it mentions certain acts of defalcations of an ex-director to illustrate the mismanagement alleged.[11]

Fraud on depositions. High Court could not provide relief to affectees who had lost their deposits in Company due to fraudulent conduct of business by Company unless and until it found buyers of properties owned by Company and its subsidiaries. Such relief would also have to be limited to the extent of amount available with it after sale of those properties. Pendency of those proceedings, however, in no way would place any restriction whatsoever on Government or its Authorities to come out with any scheme of relief to affectees of Company.[12]

291. *Powers of Court under section 290.* Without prejudice to the generality of the powers of the Court under section 290, an order under that section may provide for--

(*a*) the termination, setting aside or modification of any agreement, howsoever arrived at between the company and any director, including the chief executive, managing agent or other officer, upon such terms and conditions as may, in the opinion of the Court, be just and equitable in all the circumstances;

(*b*) setting aside of any transfer, delivery of goods, payment, execution or other transactions not relating to property made or done by or against the company within three months before the date of the application which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference; and

(*c*) any other matter, including a change in management, for which in the opinion of the Court it is just and equitable that provision should be made.

292. *Interim order.* Pending the making by it of a final order under section 290 the Court may, on the application of any party to the proceedings, make such interim order as it thinks fit for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable.

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10. AIR 1955 Mad. 486=ILR 1956 Mad. 49 (DB).
11. 1956 Andh L T 207 (DB).
12. 1994 CLC 403=NLR 1993 Civ. 722.

1. **Scope.** This section empowers court to pass such interim orders as it thinks fit regulating conduct of affairs of company upon such terms and conditions as are just and equitable. Just and equitable are necessarily equitable considerations and may, in a given case, be super imposed on law. Whether it would be so done in a particular case cannot be put in strait-jacket of an inflexible formula. Where an interim order was sought for holding a meeting convened through a notice which has been challenged by the opposite party. It was held that discretion vesting in Court is to be exercised in a just and equitable manner and not arbitrarily and capriciously but requirements of O. 39 Rr. 1 & 2, C.P.C. are not attracted to exercise of powers under section 292 because nothing has been brought on record to demonstrate that working of company would come to a complete halt if meeting convened through impugned notice is not held. Similarly it has not been explained as to how and what provisions of the Ordinance, would be violated if meeting in question was not held till hearing of main petition.[13]

293. *Claim for damages inadmissible.* Where an order of the Court made under section 290 terminates, sets aside, or modifies an arrangement, the order shall not give rise to any claim whatever against the company by any person for damages or for compensation for loss of office or in any other respect, either in pursuance of the agreement or otherwise.

294. *Application of certain sections to proceedings under this Part.* In relation to any application under section 290, sections 410 to 415 *mutatis mutandis* apply as they apply in respect of winding up.

295. *Management by Administrator.* (1) If at any time a creditor or creditors having interest equivalent in amount to not less than sixty per cent of the paid up capital of a company, represents or represent to the Authority that:--

(*a*) the affairs or business of the company are or is being or have or has been conducted or managed in a manner likely to be prejudicial to the interest of the company, its members or creditors, or any director of the company or person concerned with the management of the company is or has been guilty of breach of trust, misfeasance or other misconduct towards the company or towards any of its members or creditors or directors;

(*b*) the affairs or business of the company are or is being or have or has been conducted or managed with intent to defraud its members or creditors or any other person or for a fraudulent or unlawful purpose, or in a manner oppressive of any of such person or for purposes as aforesaid; or

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13. PLJ 1996 Kar. 1029=1996 CLC 1926.

(*c*) the affairs of the company have been so conducted or managed as to deprive the members thereof of a reasonable return; or

(*d*) any industrial project or unit to be set up or belonging to the company has not been completed or has not commenced operations or has not been operating smoothly or its production or performance has so deteriorated that--

(*i*) the market value of its shares as quoted on the stock exchange or the net worth of its share has fallen by more than seventy-five per cent of its par value; or

(*ii*) debt equity ratio has deteriorated beyond 9 : 1 ; or

(*iii*) current ratio has deteriorated beyond 0·5:1; or

(*e*) any industrial unit owned by the company is not in operation for over a period of two years or has been in operation intermittently or partially during the preceding two years; or

(*f*) the accumulated losses of the company exceed sixty per cent of its paid up capital;

and request the Authority to take action under this section, the Authority may, after giving the company an opportunity of being heard, without prejudice to any other action that may be taken under this Ordinance or any other law, by order in writing appoint an Administrator, hereinafter referred to as the Administrator, [14][within sixty days of the date of receipt of the representation, from a panel maintained by it on the recommendation of the State Bank of Pakistan] to manage the affairs of the company subject to such terms and conditions as may be specified in the order.

Explanation. For the purposes of clause (*c*), the members shall be deemed to have been deprived of a reasonable return if, having regard to enterprises similarly placed, the company is unable to or does not, declare any or adequate dividend for a period of three consecutive years [15][:]

[16][Provided that the Authority may, if it considers it necessary so to do, for reasons to be recorded, or on the application of the creditors on whose representation it proposes to appoint the Administrator, and after giving a notice to the State Bank of Pakistan,

14. Ins. by Ord. 57 of 1984, S. 7.
15. Subs. by Ord. 57 of 1984, S. 7.
16. Add. by Ord. 57 of 1984, S. 7.

appoint a person whose name does not appear on the panel maintained for the purpose to be the Administrator].

(2) The Administrator shall receive such remuneration as the Authority may determine.

(3) On and from the date of appointment of the Administrator, the management of the affairs of the company shall vest in him, and he shall exercise all the powers of the directors or other persons in whom the management vested and all such directors and persons shall stand divested of that management and powers and shall cease to function or hold office.

(4) Where it appears to the Administrator that any purchase or sales agency contract has been entered into, or any employment given, patently to benefit any director or other person in whom the management vested or his nominees and to the detriment of the interest of the general members, the Administrator may, with the previous approval in writing of Authority, terminate such contract or employment.

(5) No person shall be entitled to, or be paid, any compensation or damages for termination of any officer, contract or employment under sub-section (3) or sub-section (4).

(6) If at any time it appears to the Authority that the purpose of the order appointing the Administrator has been fulfilled, it may permit the company to appoint directors and, on the appointment of directors, the Administrator shall cease to hold office.

(7) Save as provided in sub-section (8), no suit, prosecution or other legal proceeding shall lie against the Administrator for anything which is in good faith done or intended to be done by him in pursuance of this section or of any rules made thereunder.

(8) Any person aggrieved by an order of the Authority under sub-section (1) or sub-section (10), or of the Administrator under sub-section (3) may, within sixty days from the date of the order, appeal against such order to the Federal Government.

(9) If any person fails to deliver to the Administrator any property, records or documents relating to the company or does not furnish any information required by him or in any way obstructs the Administration in the management of the affairs of the company or acts for or represents the company in any way, the Authority may by order in writing, direct that such person shall pay by way of penalty a

sum which may extend to one million rupees; and, in the case of a continuing failure or obstruction, a further sum which may extend to ten thousand rupees for every day after the first during which the failure or obstruction continues.

(10) The Authority may issue the directions to the Administrator as to his powers and duties as it deems desirable in the circumstances of the case, and the Administrator may apply to the Authority at any time for instructions as to the manner in which he shall conduct the management of the company or in relation to any matter arising in the course of such management.

(11) Any order or decision or direction of the Authority made in pursuance of this section shall be final and shall not be called in question in any Court.

(12) The Federal Government may, by notification in the official Gazette, make rules to carry out the purposes of this section.

(13) The provisions of this section shall have effect notwithstanding anything contained in any other provision of this Ordinance or any other law or contract, or in the memorandum or articles of a company.

296. *Rehabilitation of companies owning sick industrial units.* (1) The provisions of this section shall apply to a company owning an industrial unit which is facing financial or operational problems and is declared as a sick company by the Federal Government.

(2) After a company is declared as a sick company under sub-section (1), any institution, authority, committee or person authorised by the Federal Government in this behalf may draw up a plan for the rehabilitation, reconstruction and reorganisation of such company, hereafter in this section referred to as the rehabilitation plan.

(3) Without prejudice to the generality of the foregoing provision, the rehabilitation plan, may, in addition to any other matter, provide for all or any of the following--

(*i*) reduction of capital so as to provide for all or any of the matters referred to in section 96 or reconstruction, compromise, amalgamation and other arrangements so as to provide for all or any of the matters referred to in section 284 or section 287 or section 289;

(*ii*) alteration of share capital and variation in the rights and obligations of share-holders or any class of share-holders;

(*iii*) alteration of loan structure, debt rescheduling or conversion into shares carrying special rights or other relief and modification in the terms and conditions in respect of outstanding debts and liabilities of the company or any part of such loan, debts or liabilities or variation in the rights of the creditors or any class of them including any security pertaining thereto;

(*iv*) acquisition or transfer of shares of person who are or have been sponsors or otherwise managing the affairs of the company on the specified terms and conditions;

(*v*) issue of further capital including shares carrying special rights and obligations relating to voting powers, dividend, redemption or treatment on winding up;

(*vi*) removal and appointment of directors (including the chief executive) or other officers of the company;

(*vii*) amendment, modification or cancellation of any existing contract; or

(*viii*) alteration of the memorandum or articles or changes in the accounting policy and procedure.

(4) The rehabilitation plan shall be submitted for approval to the Federal Government which shall, unless it otherwise decides for reasons to be recorded, cause it to be published in the official Gazette for ascertaining the views of the share-holders, creditors and other persons concerned within a specified period.

(5) Before approving the rehabilitation plan, the Federal Government shall take into consideration the views relating thereto received from any quarter within the specified period.

(6) On the approval of the rehabilitation plan by the Federal Government, its provisions, with such modification as may be directed by the Federal Government, shall become final and take effect and be implemented and shall be valid, binding and enforceable in all respects notwithstanding anything in this Ordinance or any other law or the memorandum or articles of the company or in any agreement or document executed by it or in any resolution passed by the company in general meeting or by its directors, whether the same be registered, adopted, executed or passed, as the case may be, before or after the commencement of this Ordinance.

(7) Any provision contained in the memorandum, articles, agreements, documents or resolutions as aforesaid shall, to the extent to which it is repugnant to the provisions of this Ordinance or the rehabilitation plan, become void.

(8) No compensation or damages shall be payable to any one for any matter or arrangement provided for in, or action taken in pursuance of, the rehabilitation plan.

(9) The Federal Government may vary or rescind rehabilitation plan from time to time and issue such directions as to its implementation and matters ancillary thereto as it may deemed expedient.

(10) The Federal Government or any authority or other person authorised by the Federal Government in this behalf shall supervise the implementation of the rehabilitation plan and may issue such directions to the parties concerned as may be deemed necessary by such Government, authority or person, as the case may be.

(11) Whosoever fails to give effect to, carry out or implement the rehabilitation plan or any matter provided for therein or any direction issued under sub-section (10), shall be liable to imprisonment of either description for a term which may extend to two years and fine not exceeding one million rupees and in case of a continuing failure, to a further fine not exceeding five thousand rupees for every day after the first during which the failure or default continues.

(12) Until a rehabilitation plan has been approved by the Federal Government and is in operation, the provisions of this section shall not prejudice or affect the power or rights of a company or its share-holders or creditors to enter into, arrive at or make any compromise, arrangement or settlement in any manner authorised by this Ordinance or any other law for the time being in force.

(13) The rehabilitation plan approved by the Federal Government and any modification thereof shall, unless otherwise directed by it, be published in the official Gazette and a copy thereof shall be forwarded by the Federal Government to the registrar who shall register and keep the same with the documents of the company.

(14) The Federal Government may, by notification in the official Gazette, make rules to carry out the purposes of this section.