
(2015) 07 AP CK 0003

In the Andhra Pradesh High Court

Case No : Company Petition Nos. 67 and 104 of 2006

Ajay Kumar Gupta Dochania

APPELLANT

Vs

Bhagyanagar Silk Mills Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 17-07-2015

Acts Referred:

State Financial Corporations Act, 1951 — Section 13, 29

Citation : (2015) 07 AP CK 0003

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : S. Ravi, Senior Counsel, for the Appellant; V.S. Raju, Advocates for the Respondent

Judgement

C.V. Nagarjuna Reddy, J.

A. Introduction

1. The parties and the subject matter of both these petitions are common and therefore they are being disposed of together.

2. The petitioner in C.P. No. 67 of 2006 and the petitioners in C.P. No. 104 of 2006 are shareholders of respondent No. 1 - company (hereinafter referred to as "the company"). Respondents in both the petitions are common. In both these petitions, the petitioners have prayed for winding up of respondent No. 1 - company.

B. The Pleadings

3. As the grounds on which both the petitions have been filed are identical, it will suffice if the averments in C.P. No. 67 of 2006 are referred to. The averments of the petitioner made in his affidavit filed in support of the company petition are briefly stated hereunder.

4. Respondent No. 1 is a private limited company incorporated on 18.10.1978 by three groups of individuals -- first group of individuals being father of the

petitioner (petitioner No. 1 in C.P. No. 104 of 2006), his children, family members, and his friends and associates; second group of individuals are the family members, friends and associates of the Managing Director of respondent No. 1 and the third group are friends and associates of respondent No. 2. The shareholding details of the company have been set out in detail, reference to which may be unnecessary except to the extent that each group of shareholders was allotted 1/3rd shares. The company was allotted Ac.2.30 gunts equivalent to 13,310 sq. yards at Phase-I, Jeedimetla, Medchal Mandal, Ranga Reddy District, on which it has built some sheds from the common funds pooled from the family members of the petitioner and the respondents. The business of the company was commenced in 1978-79 and term loans from the Andhra Pradesh State Finance Corporation (APSFC) and State Bank of India (SBI), Bible House Branch, Rashtrapathi Road, Secunderabad, were also obtained from time to time, after filing of proper charge with the Registrar of Companies. After three years of running of the business, the company started suffering losses and slowly started to dwindle and the commercial activity of the company thereafter was completely stopped and has ceased. The father of the petitioner, a very old and feeble man of eighty years of age was one of the Founding Directors and one of the First and Permanent Directors of the company under the Articles of Association and he has stopped taking interest in the affairs of the company since 1983.

5. That no meeting of the shareholders was ever formally held nor any notices of the General Meeting of the Company were ever sent to the father of the petitioner or his family members, friends or associates, including the petitioner. As the Office of the Registrar of Companies was undergoing major reorganization from Manual to Fully Computerized, in the transitory period no records of the company are available including the original records of the Memorandum of Association, the Articles of Association, the List of Directors and Members, and charges thereto, or as to Latest Annual Returns of the Company. However, from the fragmentary records available, it is understood that in the year 2002-03, the company had a total liabilities of Rs. 1,02,11,800/- comprised the paid up capital of Rs. 9,00,000/-, reserves and surplus of Rs. 3,08,000/-, secured creditors of Rs. 16,78,000/-, unsecured creditors of Rs. 73,32,000/-, and current creditors of Rs. 2,00,000/-. The assets of the company comprised Fixed Assets (land) valued at Rs. 23,92,000/- and miscellaneous expenditure account of about Rs. 78,26,000/-. Most of the cash balances and other reserves were siphoned out of the company illegally and unlawfully appropriated by respondent Nos. 1 and 2 without notice and knowledge of the father of the petitioner and other shareholders. All the machinery and other movable fixed assets of the company were also sold away and amounts thereof were siphoned out of the company and illegally and unlawfully appropriated by the said respondents. The objects of the company are also changed to include unconnected matters thereto without following procedures and by fabricating documents and records and by filing of forged and fabricated documents before the Registrar of Companies. The only tangible asset of the company is its immovable property being industrial sheds

F8A & B in the land admeasuring Ac.2.30 gts., at Phase-I, Jeedimetla, Medchal Mandal, Ranga Reddy District. The petitioner was surprised to note that on 3.4.2006 a public notice was published in Deccan Chronicle by Mr. M.V. Durga Prasad and S. Balvanth Reddy, Advocates, to the effect that the lands including the Industrial Sheds F8A & B, admeasuring 3342 sq. yards at Phase-I, Jeedimetla, Ranga Reddy District, were being sold by respondent Nos. 1 and 2 to another company namely, M/s. Mackel Technologies Incorporation. The petitioner and other shareholders have filed objection through their counsel. As the company has for long past ceased to be a viable commercial entity, it is just, equitable and necessary that the same be wound up under the provisions of the Act.

6. On behalf of the respondents, respondent No. 2 has filed a counter affidavit. Brief averments of the counter affidavit are as follows.

7. A preliminary objection was raised as to the maintainability of Company Petition No. 67 of 2006 on the ground that no shareholder by name Mr. Ajay Kumar Dochania exists in the company and therefore the petition for winding up is not maintainable.

8. That the company was incorporated on 12.10.1978 for the purpose of carrying on the business of manufacturing, processing, designing, printing, dyeing, weaving, spinning, bleaching, trading and ancillary etc. Immediately on its incorporation, the company has approached the Andhra Pradesh Industrial Infrastructure Corporation (APIIC) for providing land/shed for establishment of the unit. Having taken over the possession, a lease-cum-agreement of sale was entered on 16.1.1979 and possession was taken from APIIC. The company had set up the unit in the industrial area, Jeedimetla to pursue its activities. The company had also approached the institutions, namely, APSFC, for the term loans, and SBI, Bible House Branch, Secunderabad, for working capital requirements. The Founder Promoters, namely, Mr. Santosh Rungta and Mr. Vinay Agarwal had given personal guarantees and collateral securities for obtaining the loan from the APSFC and the SBI. The father of respondent No. 2, being a shareholder, had also given personal guarantee and also collateral security of his own house to the SBI. The other Promoter Director, namely, Mr. Amarnath Gupta, had never come forward to give either personal guarantee or collateral security in obtaining the loans from the Financial Institutions and SBI.

9. That one of the Founder Directors, namely, Mr. Amarnath Gupta, was looking after the purchase and sales of the unit. Due to diversion of funds and also supplying the finished goods to his own companies at cheaper rates, the company has suffered heavy losses and consequently the unit was not regular in repaying the loans to the APSFC and APIIC. The company was ultimately closed in the year 1983 and the APSFC seized it under Section 29 of the State Financial Corporation Act, 1951, in the year 1983. Due to the representation made by Mr. Santosh Rungta and respondent No. 2, the APSFC has lifted the seizure and allowed the unit to be given on lease and the lease proceeds have been directed

to be credited to the APSFC under consortium of APSFC, SBI and APIIC. Due to the hurdles created by the other Founder Director, namely, Mr. Amarnath Gupta, the lease could not be renewed and thereafter the unit was handed over to the APSFC. As the APSFC, SBI and APIIC have initiated legal action for recovery of outstanding dues to them, Mr. Amarnath Gupta, co-founder, had resigned on 29.5.1986 leaving the company at its peril and the other Directors had no other alternative except to defend the company, and infused some funds by raising loans from some of the shareholders for settling the outstanding dues of Rs. 24,84,062/- to APSFC as one-time settlement, Rs. 70,10,120/- to the SBI, and Rs. 30,22,475/- to APIIC during the period 2002-03. The other shareholders have also repaid the electricity bill dues to A.P. Central Power Distribution Company Limited to the tune of Rs. 3,43,270/- during the period 2004-06 and also paid the property tax. As the shareholders who have given the loans to meet the liabilities of the company were pressing for the repayment of their loans, the company has taken a decision to dispose of a part of the land, i.e., 3,243.66 sq. yards, out of 13,310 sq. yards, on 29.4.2006 by inviting the offers in the newspapers. One M/s. Mackel Technologies Incorporation has come forward to purchase the said property and accordingly sale deed dt. 29.4.2006 was executed in its favour and the proceeds from the sale were utilized to meet part of the liabilities. Mr. Amarnath Gupta, co-founder, having realized that the company has paid all the dues, instigated the petitioner to file the present winding up petition. The counter affidavit therefore sought dismissal of the company petition.

10. By order dt. 5.10.2012, this Court admitted the company petition and directed publication in newspapers. Accordingly, proof of publication was filed.

11. Both the parties have let in oral and documentary evidence.

On behalf of the petitioners, petitioner in C.P. No. 67 of 2006 examined himself as P.W.1. He has filed an affidavit in lieu of chief examination and also an additional affidavit in lieu of chief examination. He has got marked Exs. P.1 and P.12.

On behalf of the respondents, Mr. Santosh Rungta, Managing Director of the company, examined himself as R.W.1 and marked Exs. R.1 to R.15. Respondent No. 2 has filed his chief examination affidavit as R.W.2. However, as he has failed to present himself for cross-examination on several occasions, his chief examination affidavit was eschewed by order dt. 01.6.2015.

C. Submissions

12. At the hearing, Mr. S. Ravi, learned Senior Counsel appearing for the petitioners, has advanced two submissions namely, (i) that as the company has stopped the activity of printing, dyeing and processing of textiles, which was its main object, it has lost its substratum, and (ii) that the evidence on record clearly shows that the company has completely stopped its activities thereby rendering itself liable for winding up under Section 433(c) of the Act.

In support of his submissions he has placed heavy reliance on the judgment of the Supreme Court in Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others, AIR 1968 SC 772 : (1968) 38 CompCas 543 : (1968) 2 SCR 252 and a Division Bench judgment of this Court in Nagavarapu Krishna Prasad and Another Vs. Andhra Bank Ltd., (1983) 53 CompCas 73 .

13. Opposing these submissions Mr. V.S. Raju, learned counsel for the respondents, submitted that mere change of line of business would not lead to company losing its substratum. He has further submitted that even though the company has not pursued its main object of printing, dyeing and processing of textiles, it has amended its memorandum of association adding the object of the business in steel under the category of the "other objects" and that so long as any of its objects is pursued the company cannot be held to have lost its substratum. He has further submitted that due to non-cooperation of the petitioners, respondent No. 1 could not carry on its activities after the year 2006 and that the company intends to continue its activities in future. He has also submitted that the petitioners have filed the petition under Section 439(1)(c) of the Act and that therefore they cannot claim the relief of winding up under "just and equitable grounds" as envisaged under Section 433(f) of the Act.

In support of his submissions, he has placed reliance on the judgments in Narasaraopet Electric Corporation Ltd. and Another Vs. A. Ramachandran and Others, (1983) 53 CompCas 100 , Malabar Industrial Co. Ltd. Vs. A. John Anthrapper, (1985) 57 CompCas 717 : (1983) 2 ILR (Ker) 92 and In Re: Bilasrai Juharmal and Another, AIR 1962 Bom 133 : (1961) 63 BOMLR 815 : (1962) 32 CompCas 215 .

D. Points:

14. Having regard to the rival pleadings, the evidence of the parties and the respective submissions of the learned counsel for the parties, the following points arise for consideration.

"(i) Whether respondent No. 1 has lost its substratum?

(ii) Whether respondent No. 1 is liable to be wound up?"

E. Analysis

In Re. Point No. 1

a) Evidence

15. In his affidavit filed in lieu of chief examination, P.W.1 has reiterated the contents of the petition. In addition to the same, he has deposed that the commercial activity of the company has completely ceased and that it has not been carrying on the business for which it was incorporated for many years. That the balance sheet of the company for the year ending 31.3.2004 shows that it has suffered loss of Rs. 17,73,313/- and the unsecured loans due from the company as on 31.3.2004 was Rs. 1,24,15,190/-. P.W.1 has also referred to

various aspects of the alleged mismanagement of the company, a reference to which is not necessary.

16. In his cross-examination, counsel for respondent No. 1 has put suggestions to the witness to drive home the plea that due to misuse of his position as sales in-charge by supplying the material to his own company, petitioner No. 1 in C.P. No. 104 of 2006 has caused losses to the company. The respondents have also elicited from the petitioner that the company has availed loans from APSFC, SBI and APIIC, and the petitioners have not given any collateral security or personal guarantees for securing the loans. P.W.1 has admitted that the amended objects in Ex. P.2 referred to the company taking up the activities in aluminum casting, iron and steel. P.W.1 has denied the suggestion that the company is presently carrying on these activities. He, has, however, admitted that the company had repaid all its loans to financial institutions and banks. He has, however, expressed his ignorance whether the company has paid all its secured and other creditors.

17. In his evidence, R.W.1 has reiterated the averments in the counter affidavit. In his cross-examination R.W.1 has stated that he has not submitted any documentary proof in support of the allegations made against Mr. Amarnath Gupta in paragraph 8 of his chief affidavit. He has also deposed that he does not remember whether he has filed any material in support of the allegation against Mr. Amanrath Gupta that he has created hurdles in the process of renewal of lease of the company. He has further stated that the company has carried on the activities of manufacturing, processing, printing and dyeing of textiles during the years 2004 to 2006 and that from the year 2006 the company was stopped and Ex. P.4 balance sheet does not show that the transactions of purchases and sales were made in the year 2004. He has, however, stated that the company was carrying on activities on job work basis and therefore those transactions were not reflected in Ex. P.4.

18. R.W.1 has further stated that in 2005, transactions of purchase of steel were made and the said activity was added to the objects of the company. He has admitted that the activity in steel casting was an additional activity, which was not part of the main object of the memorandum of association of respondent No. 1 company. He has further deposed that the company did not file annual reports from the year 2007 before the Registrar of Companies due to non-cooperation of the other shareholders including the petitioners. He has denied the suggestion that non-filing of annual reports was only to avoid showing that the company is carrying on the business in the activity which does not form part of its main objects for which it was incorporated. The witness has admitted that he has not filed any document to show that the company is carrying on any activity subsequent to 31.3.2006.

19. The evidence on record as discussed above unequivocally establish two facts; namely (i) that the main objects of the company are to carry on business in manufacturing, printing, processing and dyeing textiles and that the said

business was carried on only for a brief period of about three years from 2004 to 2006, and (ii) that following the amendments of the memorandum of association whereby the activity in steel casting was included under "other objects of the company", some business was carried on by the company during the year 2006 in relation to that activity and even the said activity was completely stopped and the company has stopped carrying on any business subsequent to 31.3.2006.

b) Legal position

20. With the above discussion on facts in mind, let me now discuss the position in law.

Section 433 of the Act envisages various grounds for winding up of a company by the Court. For the present purpose, clauses (c) and (f) thereof, appear to be relevant. These clauses read as under:

433. Circumstances in which company may be wound up by Tribunal.-A Company may be wound up by the Tribunal -

(a)

(b)

(c) If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(d)

(e)

(f) If the Tribunal is of the opinion that it is just and equitable that the company should be wound up."

From the above reproduced provision, it would appear that if the company does not commence its business within a year from its incorporation or suspends its business for a whole year, the company is liable to be wound up under clause (c) of Section 433. Under clause (f), a company should be wound up if in the opinion of the Court such winding up is just and equitable. Significantly, the Act does not employ the word "substratum" and much less it has made loss of substratum as a ground for ordering winding up. However, umpteen number of judicial authorities, both English and Indian, have dealt with the concept of substratum and recognized its loss by a company as a ground falling under "just and equitable" ground for ordering winding up of a company.

21. Before referring to the case law, it is appropriate to refer to the meaning of the word "substratum". One of the dictionary meanings of the word "substratum" is "foundation" or "basis" (Oxford Dictionary Thesaurus & "Wordpower Guide", Indian Edition).

22. Baring v. Dix 1 Cox, 213 appears to be one of the earliest cases dealing with loss of substratum as a ground for winding up of a company. The brief facts of

the case are that a partnership firm was constituted for the purpose of spinning cotton under a patent. Though a patent was obtained, the firm failed to carry on the activity of spinning cotton. One of the partners wanted the firm to be dissolved. As the majority partners declined such request, a petition for winding up of the firm was filed. The firm was ordered to be wound up by holding that as the sole object was to work under a patent supposed to be valid at the time when the partnership was entered into, it turned out to be invalid and wholly useless and that therefore there was a complete destruction of the subject matter on which the partnership operates.

23. The ratio in *Baring v. Dix* 1 Cox, 213 (supra) was referred to and relied upon in *In Re Suburban Hotel Company* Law Rep. 2 Ch. A. 737. In that case, the company has established a hotel called "Hampstead Heath Hotel" and commenced its business in June, 1863. After making initial profit for one year, the company started incurring considerable losses. One of the shareholders has approached the Court for winding up of the company. Lord Cairns, LJ, has fully concurred with the view in *Baring v. Dix* 1 Cox, 213 (supra) and held:

"Lord Kenyon referred it to the Master to inquire and state whether the co-partnership business could now be carried on according to the true intent and meaning of the articles of co-partnership, and he declared that if the Master should report that it could not be so carried on, he should dissolve the partnership. The Defendant consented on that intimation to a dissolution. Now, if I may venture to say so, I entirely concur with the course which was there taken. That was a case which manifestly required the interposition of the Court. Two persons had agreed not to manufacture cotton generally, but to join in working under a particular patent. The sole object was to work under a patent supposed to be valid at the time that the partnership was entered into. It turned out to be wholly invalid, and wholly useless. There was, therefore, a complete destruction of the subject matter on which the partnership was to operate. If the Court were satisfied that that was the fact, I apprehend that it would be entirely competent to the Court to dissolve the partnership against the will either of the majority, or, as the case there was, of one of two partners."

The next decision referred to and relied upon by Lord Cairns, L.J., was the case of *Anglo-Greek Steam Company* Law Rep. 2 Eq. 1. Referring to the facts of the said case, the Court observed:

"The precise point there decided by the Master of the Rolls was, that the misconduct of the directions and of the managers of the company, though it might render them liable to a suit, was not a ground upon which the Court would consider it just and equitable to wind up the company. But his Lordship made these important observations. He said (Law Rep. 2 Eq. 5), "There are five different rules laid down in sect. 79, and the four previous rules are these." Then he enumerates the four previous rules which I have already mentioned. "Then the fifth is, "Whenever the Court is of opinion that it is just and equitable that the company should be wound up." In that case Lord Cottenham laid down, and I

have followed him, and all the other Courts I think have done the same, that these words are to be considered as referred to matters ejusdem generis with the four subject matters previously stated in the four previous rules. At the same time I am of opinion that this principle would be satisfied if it were established that the company never had a proper foundation, and that it was a mere fraud, what is commonly called a bubble company."

The Court further observed:

"I am, therefore, unable to find that any larger rule has been laid down, and I certainly do not think it desirable now to lay down a larger rule than that laid down by Lord Cottenham and followed the Master of the Rolls in the case of *The Anglo-Greek Steam Company* Law Rep. 2 Eq. 1 (supra), that if there be insolvency, or anything which is equivalent to a test of insolvency, if there be the circumstances that the company has not for a certain time commenced business, or has suspended business, that is a test given to the Court by which to prove that the business cannot be carried on, and in those cases the company may be wound up. It is not necessary now to decide it; but if it were shown to the Court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the Court might, either under the Act of Parliament, or on general principles, order the company to be wound up...."

(emphasis added)

24. The next in sequence is the judgment in *In Re Haven Gold Mining Company* XX Ch.D. 151 wherein the company was established for working a gold mine in New Zealand, and it turned out that the company had no title to the mine, and had no prospect of obtaining possession of it, except as to a small portion for a few months, although there were general words in the memorandum of association enabling the company to purchase and work other mines in New Zealand, and the large majority of the shareholders wished to continue the company. Lord Jessel, M.R. observed:

"...I think it is satisfactorily proved in evidence that there was no title at all in Eicke, and no title which he could give to the company to any portion of this mine to be worked as a mine."

"Well, then, is it to be tolerated that a majority of the shareholders of a company should bind the minority to go on when they have no title at all, merely because they think it possible they may get a title?....Then is not this exactly the case pointed out by Lord Cairns in *In re Suburban Hotel Company* Law Rep. 2 Ch. A. 737 (supra)," "where it is impossible to carry on the business for which the company was formed". It seems to me it is exactly that case.

...I think I may safely add that in my opinion this is a very strong case indeed, as strong a case as could very well be put to show that what has been called the substratum of the company has no existence in fact, and, therefore, that the

company's money, there being, as it appears, a very considerable sum of money to be dealt with, ought not to be applied to any such purpose as that which is suggested.

...we have here a plain case of utter failure, and a plain case in which the petitioners have a right to say, "Stop, divide what you have between those entitled to it, and do not involve me in a further speculation which I never consented to be a party to, and which can never be beneficial to anybody." It seems to me, for these reasons, an order ought to be made on this petition to wind up the company...."

(emphasis added)

Lindley, L.J., concurring with Jessel, M.R., and Brett, L.J., observed:

"The company was formed for the purpose of acquiring and working this mine, and upon the representation that they could acquire this upon certain terms. Neither the company nor their officers have had possession of this alleged mine, nor can they get possession at present; at all events, they have never had it, and they cannot therefore work the mine in the manner in which it was intended."

His Lordship further held as under:

"Upon that strict ground I think that the minority are entitled to say we insist upon a winding-up. The directors are themselves satisfied upon their own inquiries that it is hopeless to go on. It is not a controversy now as to whether there ought to be a compulsory winding-up as distinguished from a voluntary winding-up, because the majority do not want a winding-up. They say "No, we will go on in the speculative hope of getting this property somehow or other." I think the minority are not bound to embark in any such speculation as that. The majority not wanting to wind up voluntarily, but wanting to go on, the minority are entitled to say, "It is time to stop, and we are entitled to stop, the company." I am of opinion that they are right, and that it ought to be stopped. There will be the usual winding-up order."

25. In *Re German Date Coffee Company* [1882] XX Ch. D 169, the memorandum of association of the company stated that it was formed for working a German patent which had been or would be granted for manufacturing coffee from dates, and also for obtaining other patents for improvements and extensions of the said inventions or any modifications thereof or incident thereto; and to acquire or purchase any other inventions for similar purposes, and to import and export all descriptions of produce for the purpose of food, and to acquire or lease buildings either in connection with the above-mentioned purposes or otherwise, for the purposes of the company. The intended German patent was never granted, but the company purchased a Swedish patent, and also established works in Hamburg, where they made and sold coffee made from dates without a patent. Many of the shareholders withdrew from the company on ascertaining that the German patent could not be obtained; but the large majority of those remained

desired to continue the company, which was in solvent condition. Two shareholders filed a petition for winding up of the company. Kay, J., after referring to the judgments in *Baring v. Dix* 1 Cox, 213 (supra), *In Re Suburban Hotel Company* Law Rep. 2 Ch. A. 737 (supra) and *In Re Haven Gold Mining Company* XX Ch.D. 151 (supra), summed up the legal proposition as under:

"...Therefore the law so far is established thus, that if the whole substratum of the company is gone, it is within sect. 79 "just and equitable" that the company should be wound up."

Repelling the submission advanced on behalf of the company that they have works in Hamburg, which they acquired, and that there they are carrying on some manufacture of date coffee, but of course not under a German patent and that therefore no case was made out for winding up the company, Kay, J, held:

"...Here it is beyond all question that the German patent is not, and I must take it now cannot be obtained. Certainly, according to the memorandum of association of this company, the acquisition of a German patent and working under it was the main and principal object of the existence of this German Date Coffee Company. Any other thing in the memorandum, if there be any, seems to be subsidiary and auxiliary only to that object of working a German patent. Therefore it seems to me that the case comes within the *Suburban Hotel Company*'s case Law Rep. 2 Ch. A. 737 (supra) and the *Haven Gold Mining* case XX Ch.D. 151 (supra) rather than that of the *Langham Skating Rink* (5 Ch. D. 669), and that this is a case in which that which is, or rather was to be, the substratum, the main object of the company, to which all other objects are merely subsidiary and auxiliary, namely, the obtaining of a German patent for a particular invention, has completely failed. Therefore it seems to me that it is a case in which it would be beyond the purposes of this company to carry on the business which they now propose to carry on, and that I ought to regard the wish of the minority, who say we decline to be involved in the carrying on of a business which was really not contemplated by the memorandum of association at all."

(emphasis added)

26. Perhaps the last of the English Cases but not the least which needs reference is *In re Crown Bank* Vol. XLIV Ch. D. 634. Briefly stated the facts in that case are that the company was registered under the name of the Mid-Northamptonshire Bank, Limited. In addition to wide and general objects, the memorandum of association stated particularly numerous objects of diverse character in fifteen paragraphs. The first three paragraphs related to banking, discounting, and money-lending, and borrowing respectively; others referred to purchasing and developing land, investing and dealing in shares and securities, and promoting companies. The company commenced business as a country bank in Northamptonshire, with an office in London. After a short time its name was changed to the Crown Bank, Limited; it gave up its country offices, ceased to do

banking business, and carried on in London in addition to some land speculation and business connected with promoting a foreign company, the business of investing in shares and securities. On a petition by a shareholder to wind up the company on the ground that its main objects had failed, the Court held that the company was not carrying on a business authorized by the memorandum of association, and that it was just and equitable that the company should be wound up. North, J, speaking for the Court held:

"The ground on which a winding-up order is asked is, that in the opinion of the Court it is just and equitable that the company should be wound up. There are, it must be admitted, few instances where a winding-up order has been made where the circumstances could not be brought within a class ejusdem generis. The fact that the substratum of the company is gone is a well-defined cause for winding up a company, because it is just and equitable to do so."

The Court found the objections mentioned in the memorandum of association, so wide, in rhetoric it has put to the counsel for the petitioner whether the objects would not extend to authorizing the company to establish and work a line of balloons passing backwards and forward between the earth and the moon, the counsel admitted that he could not say that it would not. However, upon construing the memorandum, the Court held:

"...I hold that this memorandum does not contain powers to do things which are utterly at variance in every way with the business of banking in the largest sense, and that it cannot be construed to give them powers to do more than what is necessary for the purpose of carrying on a banking business such as was contemplated by them as shown by the name of the company and by the earlier transactions of that company.

In my opinion, therefore, what they are doing now, and what they have been doing for more than a year past, is something entirely outside the objects contemplated by the company, and for which they are authorized to carry on business."

27. Coming to the Indian Case law, Chagla, J., (as His Lordship then was), in *In Re: The Cine Industries and Recording Co. Ltd.*, (1942) 44 BOMLR 387 held:

"Therefore on the authorities the position seems to be that the substratum of the company is deemed to be gone when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss which has been construed by the Privy Council to mean that there is no reasonable hope that the object of trading at a profit can be attained, or (d) the existing and probable assets are insufficient to meet the existing liabilities."

28. In *Mohan Lal and Another Vs. Grain Chamber Ltd.*, Muzaffarnagar and Others, AIR 1968 SC 772 : (1968) 38 CompCas 543 : (1968) 2 SCR 252 , the Supreme Court held that the "substratum of the company is said to have

disappeared when the object for which it was incorporated has substantially failed, or when it is impossible to carry on the business of the Company except at a loss, or the existing and possible assets are insufficient to meet the existing liabilities."

29. In *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, AIR 1971 SC 2600 : (1972) 42 CompCas 125 : (1972) 1 CTR 193 : (1971) 3 SCC 632 : (1972) 2 SCR 201 the Supreme Court held:

"In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into."

On the facts of that case, the Apex Court agreed with the plea of the company it has not abandoned the objects of the core business and, there is no such allegation or proof and that in the facts and circumstances of the case the substratum of the company is not gone.

30. In *Kumarapuram Gopalakrishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Company Ltd.*, (1978) 48 CompCas 211 : 81 CWN 137 , the Calcutta High Court construed the word "substratum" as under:

"...The word "substratum" must have been chosen for the purpose of signifying the foundation of the company. Once that is taken away, the whole edifice which stands on it must crumble down. There cannot be any question of any repair work being done thereon. The question then would be of total destruction."

The Court however further held that "the substratum of the company cannot be said to have been destroyed even if after the main objects being destroyed, there would remain some other object or objects in the memorandum which the shareholders intend to make use of with the resources in their hands."

I would like to revert back to this decision a little later.

31. A Division Bench of this Court in *Nagavarapu Krishna Prasad and Another Vs. Andhra Bank Ltd.*, (1983) 53 CompCas 73 referred to the judgments in *In Re Suburban Hotel Company* Law Rep. 2 Ch. A. 737 (supra), *In Re Haven Gold Mining Company* XX Ch.D. 151 (supra) and *In Re German Date Coffee Company* [1882] XX Ch. D 169 (supra) and various other judgments, besides relying upon the learned authors *Gore-Browne on Companies*, (42nd Edn.) and *Gower's principles of Modern Company Law* (4th Edn.) summed up the legal position thus:

"In this connection a clear distinction has to be borne in mind between cases where the question arises whether an act of the board of directors is ultra vires the memorandum of association and the cases where the question arises whether the company has to be wound up because the substratum has gone. In the first case, as long as the memorandum of objects permits a company to carry on the business, the act complained of would not be ultra vires if it comes within the meaning of any one of its objects and it is immaterial whether any particular

object is the main object or not. On the other hand in considering the question whether the substratum of the company has disappeared and it is just and equitable to wind up the company, it is possible for the court to come to the conclusion that though the memorandum mentions several objects and the company is authorised to carry on several businesses, the main object is to carry on one or more businesses only.

The Division Bench has relied upon the following passages of the two learned Authors, Gore-Browne on Companies, (42nd Edn.) and Gower's principles of Modern Company Law, in paragraphs 32 and 33 of the judgment, and it is profitable to reproduce the same hereunder:

"32. In Gore-Browne on Companies, 42nd Edn., at p. 49, it is stated as follows:

"Moreover, a winding up order may be made even though the new activity is technically within the scope of an express power. Even if the memorandum provides that each of the powers conferred by the objects clause shall be a main object, the court may still find that the company has abandoned the real purposes for which it was founded."

33. In Gower's principles of Modern Company Law, 4thEdn., at p. 663, it is stated as follows:

"Where, for example, a company has sold its business or divested itself of its major assets, then even though the majority may wish to keep the company in existence and invest the proceeds under some valid power to do so, a dissenting shareholder may be entitled to say: "put an end to it, pay me my money"."

In paragraph 36, the Division Bench held as under:

"Even assuming that we are not right in our view that the main object of the company is banking business and that as it is not able to carry on that object in view of the Acquisition Act, the substratum of the company must be held to have disappeared, we are of the view that having regard to the facts and circumstances of the case, it is just and equitable to wind up the company within the meaning of s. 433(f) of the Companies Act. While considering the just and equitable clause, it has no doubt been settled in a series of decisions that if the substratum of the company is gone, it would be just and equitable to wind up the company. But it does not follow that that is the only ground on which the court can come to the conclusion that it is just and equitable that the company should be wound up. The expression "just and equitable" is of the widest import and this clause has been used in a wide variety of situations. In the leading case of *Loch v. John Blackwood Ltd.* [1924] AC 783 (PC), Lord Shaw of Dunfermline quoted with approval the following observations of Justice Neville, in *In re Bleriot Manufacturing Aircraft company* [1916] 32 TLR 253, 255, while making an order for winding up on the ground that the substratum of the company was gone (p. 701 of [1924] AC):

"The words, "just and equitable" are words of the widest significance and do not

limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstances...."

On the facts of the case the Division Bench found that even before the Banking Regulation Act, 1949 came into force prohibiting the banking companies from carrying on business in any other fields for about twenty six years of its incorporation the company has not carried on any business and therefore it has lost its substratum.

32. It is relevant to note at this stage that Section 13 of the Act deals with requirements with respect to memorandum of a company. This provision inter alia envisages that the memorandum must contain the objects. This provision was amended by the Companies (Amendment) Act, 1965. Prior to its amendment the provision has not classified the objects of the company into different categories. By the said amendment, it is made obligatory for the companies formed after commencement of the Amendment Act to specify in the memorandum (i) the main objects of the company to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects and (ii) other objects of the company not included in sub-clause (i).

33. The entire case law referred to by the learned counsel for both parties pertains to cases where the companies were incorporated prior to the Amendment Act, 1965. In all these cases, the Courts have made efforts to find out the main objects of the companies in order to decide whether substratum of the company was lost or not. In the instant case, no such effort need be put in for the simple reason that the company was incorporated after the Amendment Act came into force and respondent No. 1 has specifically mentioned the main objects in its memorandum of association.

34. Before considering the judgments cited by Mr. V.S. Raju, learned counsel for the respondents, I feel that the judgment in Kumarapuram Gopalakrishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Company Ltd., (1978) 48 CompCas 211 : 81 CWN 137 needs to be discussed.

The learned single Judge of Calcutta High Court having held that the word "substratum" must have been chosen for the purpose of signifying the foundation of the company and that once that is taken away the whole edifice which stands on it must crumble down and that there cannot be any question of any repair work being done there on and the question then would be of total destruction, however, has come to a diametrically opposite conclusion by observing as under:

"The substratum of the company cannot be said to have been destroyed even if after the main objects being destroyed, (if) there would remain some other object or objects in the memorandum which the shareholders intend to make use with the resources in their hands"

This conclusion of the learned Judge runs against the slew of precedents, both English and Indian, referred to above. Perhaps in line with this judgment, is the judgment cited by Mr. V.S. Raju, learned counsel for the respondents, in *Narasaraopet Electric Corporation Ltd. and Another Vs. A. Ramachandran and Others*, (1983) 53 CompCas 100 . In the said judgment no discussion was undertaken to find out whether the electricity supply business was the main object for which the company was incorporated and no specific finding was rendered that even if the main object was not pursued, whether the substratum of the company is not lost. This judgment was considered by the later Division Bench in *Nagavarapu Krishna Prasad and Another Vs. Andhra Bank Ltd.*, (1983) 53 CompCas 73 , and observed that there is no proper discussion of the question as to whether the substratum of the company had disappeared as the main object could not be carried on in view of the acquisition of the undertaking by the Government. Therefore, this judgment would not be of any help for the respondents.

35. In *Malabar Industrial Co. Ltd. Vs. A. John Anthrapper*, (1985) 57 CompCas 717 : (1983) 2 ILR (Ker) 92 , the Division Bench, comprising V. Khalid and V. Sivaraman Nair, JJ. has set aside the judgment of the single Judge in directing winding up of the company mainly on the ground that from the memorandum of association of the company it cannot be understood that plantation was the only activity in which the company can engage and that as the objects of the association are very widely worded, sale of an estate will not by itself render the substratum to disappear. Indeed, the Division Bench has referred to the observations of Bhagavati, J. (as His Lordship then was) in *Mohanlal Dhanjibhai Mehta Vs. Chunilal B. Mehta and Others*, AIR 1962 Guj 269 : (1962) 32 CompCas 970 : (1962) 3 GLR 165 wherein it was held that "in order to bring the case within the principle underlying substratum cases, it is not enough to show that the main or dominant object for which the company is incorporated has been abandoned or that there is no intention on the part of the company to carry out such object, but it must be proved that such object has become impossible of fulfilment either by reason of the subject-matter of the company being gone or for any other reason."

On a careful reading of this judgment, it would be evident that the Division Bench has not made any departure from the consistently held view by the Courts for centuries on the substratum principle.

36. In *In Re: Bilasrai Juharmal and Another*, AIR 1962 Bom 133 : (1961) 63 BOMLR 815 : (1962) 32 CompCas 215 (supra) , the Bombay High Court has construed the object clause of the memorandum of company which was incorporated prior to the Amendment Act, and held that on such construction working of the Akola Electric License was not the main or principal object of the company and that therefore it could not be said that the company was formed solely for the working of the Akola electric licence. Therefore, this judgment is not of any help to the respondents.

F. Summation of law

37. On a careful analysis of the English and Indian Case law, the legal position that could be summed up is that "loss of substratum" is a judicially recognized ground falling under "just and equitable" head for winding up of a company and that where from the memorandum of association the main object could be culled out and if the company abandons the main object and it becomes impossible to it to pursue the main object in future, the company is said have lost its substratum regardless of the fact that it pursues its other objects. In all such cases, the Court orders winding up of a company under "just and equitable" ground.

G. Conclusion

38. On the admitted case of the respondents, the company has completely abandoned its main object of carrying on business in printing, dyeing and process of textiles and there is no possibility of the company pursuing its main object in future. It is not even the pleaded case of the respondents that in future it will revive its activity relating to its main object. On the contrary, after amendment of its memorandum and articles of association by including the object of dealing in steel, under "other objects" the company has run the business in steel for about one year and even that business was completely stopped thereafter. The fact remains that the company has stopped all its activities both in the main business as well as in the other business from the year 2007. Therefore, this case falls under both clauses of Section 433; namely; clause (c) [if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year] and also clause (f) [if the Court is of the opinion that it is just and equitable that the company should be wound up]. This Court is mindful of the fact that by the time the petitioners have filed the company petitions, one year period for which the company suspended its business has not expired, but all through the pendency of these petitions, the company did not carry on any business for nine years.

39. At this juncture, the objection of the learned counsel for the respondents that the petitioners did not seek winding up of the company under clause (f) of Section 433 needs to be mentioned only to be rejected. In C.P. No. 67 of 2006 the petitioner has specifically referred to Section 433(f) read with Section 439(1) (c) of the Act. Even otherwise, the law is well settled that mere quoting of a wrong provision in the pleadings would not take away the jurisdiction of the Court to exercise its power which is otherwise conferred on it by the statute. (See *State of Karnataka Vs. Krishnaji Srinivas Kulkarni and Others*, (1993) 4 SCALE 683 : (1994) 2 SCC 558 : (1993) 3 SCR 971 Supp and *Ram Sunder Ram Vs. Union of India (UOI) and Others*, (2007) 9 JT 159 : (2007) 9 SCALE 197 : (2007) 13 SCC 255 : (2008) 2 SCC(L&S) 603 : (2007) 8 SCR 292 : (2008) 2 SLJ 23).

40. Even if the petition does not refer to a specific provision, if the substance of the averments makes a case fall under that provision, the Court is empowered to

read the provision into the pleadings. In paragraph 9 of the petition (C.P. No. 67 of 2006), the petitioner specifically averred that the object for which the company was established was printing, dyeing and processing of textiles; in paragraph 12 it was pleaded that after three years of commencement of the business the company started suffering losses and slowly started to dwindle and the commercial activity of the company was completely stopped and has ceased; in paragraph 18 it was alleged that all the machinery and movable fixed assets of the company were sold away; in paragraph 19 it was averred that the objects of the company are also changed to include the unconnected matters thereto without following the procedures; and in paragraph 23 it was averred that as the company has been for long past, ceased to be a viable commercial entity, it is just, equitable and necessary that the company be wound up. These averments in unmistakable terms clearly bring the petition under Section 433(f) of the Act. Applying the legal position as discussed above, to the facts of the case, this Court has no hesitation to hold that the company has lost its substratum.

Point No. 1 is answered accordingly.

In Re. Point No. 2

41. Having regard to the finding on Point No. 1, the inevitable consequence would be to wind up the company.

The point is answered accordingly.

H. Result

42. For all the reasons mentioned hereinbefore, the respondent-Company is ordered to be wound up. The Official Liquidator attached to this Court is appointed as the Liquidator of the respondent-Company. The petitioners shall deposit a sum of Rs. 25,000/- (Rupees twenty five thousand only) as the initial expenses to the credit of the Official Liquidator. The Official Liquidator is directed to take over the affairs of the respondent-Company.

The petitioners shall carry out publication of advertisement in two daily newspapers, viz., Times of India (English) and Eenadu (Telugu) of Hyderabad editions having circulation in the State of Telangana and file proof of the same within 30 days from the date of receipt of a copy of this order. They shall also cause to be delivered a certified copy of this order to the Registrar of Companies for the State of Telangana and the State of Andhra Pradesh, Hyderabad within 30 days from the date of its receipt.