

(2000) 08 CAL CK 0021

In the Calcutta High Court

Case No : Appeal No. 255 of 1993 (Company Petition No. 254 of 1988)

Bagree Cereals (P.) Ltd. and Others

APPELLANT

Vs

Hanuman Prasad Bagri and Others

RESPONDENT

Date of Decision : 25-08-2000

Acts Referred:

Companies Act, 1956 — Section 17, 397, 397(2), 398, 402

Citation : (2001) 105 CompCas 465 : (2001) 2 CompLJ 397 : 105 CWN 729

Hon'ble Judges : Dipak Prakas Kundu, J;Ajoy Nath Ray, J

Bench : Division Bench

Advocate : Poddar, for the Appellant;Nag, for the Respondent

Judgement

1. We have heard at length an appeal and a cross appeal from the judgment of the court below which was delivered on March 22, 1993, some two years after conclusion of arguments there.

2. The matter was first opened and heard before another learned judge, who unfortunately retired, and then before the learned judge the case was heard out again ; the matter was also sometimes mentioned, which went on from time to time and ultimately the judgment was delivered.

3. The application which was disposed of was an application made both u/s 397 and Section 398 of the Companies Act, 1956. At that time the High Court had jurisdiction to decide these matters and the substitution of the Company Law Board in the place of the High Court had not then come. Such substitution occurred in 1991.

4. The arguments made on behalf of the appellants, being M. L. Bagri and his group, ranged for about a day and half in the beginning after which we called upon Mr. Nag to argue the case of the petitioner in the court below who, along with his family being wife and daughter are the cross appellants before us. Mr. Nag argued for some 15 days. In reply we could not hear Mr. Poddar, appearing for the appellant, for more than even one day in all, because we felt that the

judgment appealed from has gone astray on such a basic and elemental matter, that hearing the parties any further would be a sheer wastage of time. We felt this matter to be very unfortunate that although the papers before us today run into several thousands of pages and although the most laborious arguments and counter arguments were prepared both in the court below and for our assistance, yet one of the essential and basic characteristics of the very sections upon which the application was founded was never paid any due attention by any of the persons involved in the matter of deciding the case.

5. We propose to indicate outright the elementary and essential point upon which we feel, there has been a serious and unbridgeable gap left, which disentitles the company petitioners from any relief at all.

6. Sub-section (2) of Section 397, as it stands today is set out below :

"(2) If, on any application under Sub-section (1), the Company Law Board is of the opinion :

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members ; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up ; the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."

7. The substitution of the Company Law Board for the court came by the Companies (Amendment) Act, 1988, and it has operated with effect from May 31, 1991.

8. Thus, for our case, which started in 1988, the word "court" should be read in the place of the words "Company Law Board" in the above sub-section. A bare reading of the said sub-section shows that under Sub-clause (b) of the above sub-section, two matters must be positively made out. These are as follows :

(i) that to wind up the company would unfairly prejudice the member or members who have the grievance and are the applicants before the court ; and

(ii) that otherwise, the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up.

9. It does not take much learning or much legal art to see that a petitioner to be successful u/s 397 has to make out a case for just and equitable winding up. If that case cannot be made out, if the facts fall short of the case upon which the company court, which is a court of equity feels that the company should be wound up on just and equitable grounds, then and in that event no relief can be had by the petitioners in regard to Section 397.

10. It is possible for the adversary group to resist the conclusion of just and

equitable winding up. It might be shown by the adversaries that winding up the company is neither just nor equitable and that an order for winding up would be unfair and unjust to the contending adversaries. If they succeed in showing this, no relief can be had u/s 397.

11. Even if the adversaries fail in showing this, i.e., they fail in showing that a winding up order on just and equitable ground would unfairly prejudice the adversaries, even then relief, inter alia, u/s 402 does not automatically follow as a consequence of success u/s 397. The petitioner u/s 397 has to satisfy the court on a further point. He must satisfy the court that although the facts are such that a just and equitable winding up of the company is called for, yet were the petitioners to apply for such a winding up and were the petitioners to be even successful in such a petition, yet such order of winding up would unfairly prejudice the petitioners u/s 397 themselves. That is why they come u/s 397 and they do not apply u/s 433(f), which is the section for just and equitable winding up.

12. In short, for the court to grant relief u/s 397, the respondents must fail to show that just and equitable winding up would unfairly prejudice them and the petitioners must succeed in showing that just and equitable winding up would, even if granted, unfairly prejudice the petitioners.

13. In the judgment in the court below which we have carefully scrutinised, there is no finding at all that a just and equitable winding up would unfairly prejudice H. P. Bagri or his group. There is not even an address of the court's mind to this important and jurisdiction founding issue. This is unfortunate, because the same point was discussed only as a point of pleading, i.e., whether winding up will unfairly prejudice the petitioners is pleaded.

14. The shareholding of H. P. and his group is well under 20 per cent. The shareholding of the adversaries, who might be conveniently looked upon as being led by H. P.'s elder brother Mungilal Bagri, is well above 80 per cent. The adversaries are well equipped to pass even a special resolution. In view of this type of shareholding, why a just and equitable winding up will unfairly prejudice the applicants H. P. become an even more important question. We shall explain this further below.

15. The judgment of Umesh Chandra Banerjee J. came up for hearing of the appeal once earlier before the Division Bench of Bhagabati Prasad Banerjee J. (as his Lordship then was) and Ronojit Kumar Mitra J. However, although the appeal was opened and arguments were made, the appeal did not reach finality. We find from the judgment delivered at that stage by Ronojit Kumar Mitra J. speaking for the Division Bench that a certain preliminary point on pleadings was set at rest by the Division Bench. Needless to mention, what the Division Bench has once set at rest a Division Bench cannot again enter into. That preliminary issue was also very closely connected with this aspect of the case which we are discussing now, and it is important to give all the details here.

16. Before the earlier Division Bench, it was argued that the Section 397/ 398 petition must fail on a preliminary point of pleading. It was, amongst other things, brought to the notice of the Division Bench that when Rule 88 and Form 43 of the Companies (Court) Rules, 1959, are properly looked into, it would be seen that even the petition of H.P. was not appropriately framed and it did not contain the necessary averments. Thus, it was argued before the Division Bench that although on this point of pleadings the application was not summarily dismissed by the first court, yet the appeal should succeed on this preliminary issue alone. The above rule and form require, amongst other things, an allegation to be made, that winding up the company will unfairly prejudice the applying members.

17. The judgment of the earlier Division Bench was pronounced on March 11, 1998.

18. In the manner we read that ten-page judgment of the earlier Division Bench, we are of the opinion that it was clearly laid down by that Bench that throwing out a petition on the mere technicality of pleadings, and deficiencies in pleading contained in the petition would not serve the ends of justice. At the end of the judgment it was said that the contention of the appellant in so far as the maintainability of the petition was concerned, as argued by way of a preliminary point, was rejected. The Division Bench ordered that the appeal would be heard on the merits other than the preliminary points.

19. The maintainability of the petition under Sections 397 and 398 is, therefore, no longer in issue nor need we consider the averments contained in the petition in the light of the above rule and form referred to in the Companies (Court) Rules.

20. It is of the utmost importance to note, and we were disturbed to find some confusion during arguments even in this clear matter, that a point of pleading, even if decided in favour of the applicant, does not automatically mean that the substance of the application is also proved or finally set at rest on the merits on that very same point. In other words, even if there is sufficient averment or notice given by H. P. in the final pleadings and papers before the court that winding up on just and equitable grounds would unjustly be prejudicial to him, yet that part of the pleadings and the content of the notice to that effect has to be established in the court and the learned judge has to come to a positive finding on that aspect of the matter so as to assume jurisdiction to grant relief. On the merits the earlier Division Bench made no pronouncement. There is no pronouncement by the earlier Division Bench as to whether a just and equitable winding up would, in this case, unjustly prejudice H. P. and his group or not. We have to come to an appropriate finding on this aspect of the matter ourselves as it has to be set at rest once for all after due discussion of it.

21. It would not be appropriate after the passage of so many years merely to remand the matter to the trial court for reaching a finding on the substance, and not merely on pleadings, as to whether a winding up order would unfairly

prejudice H. P. and his group. The materials were all before the trial court ; there have been more important materials brought on record even after the decision was given by the first court. These materials taken together leave no manner of doubt in our minds that the applicants were asking in substance for money and money alone. There is nothing to show how H. P. and his group would be prejudiced if the company in question were to be wound up, the debts paid off and then the assets sold for sharing on a pro rata basis as per the shareholding of H. P. and others.

22. Let us state a few facts why we think this to be so. A lot of materials were placed before us by Mr. Nag on the point of share valuation. There are many ways in which shares can be valued. It might be on the basis of the book value and the balance-sheets and a consideration of the assets and liabilities of the company as appearing in the papers. On the basis of such examination of account books and papers it is possible to value the net worth and then to value the shares of the aggrieved parties on a pro rata basis.

23. Sometimes such pro rata valuation is discounted to a certain degree when minority shareholdings are valued because a minority holding if sold out in the market is not likely to get the full pro rata worth.

24. Mr. Nag was at pains to demonstrate before us that what the trial court really ordered was not a valuation upon consideration of the books of account only. Mr. Nag sought to make out that the order in effect meant an investigation into the assets of the company itself by an examination not merely of the books, but also the physical examination and verification of the real property and other property held by the company. Mr. Nag was at pains to emphasize that according to him there are many valuable godowns owned by the company and that real property should be valued for properly valuing his clients' shares. There are other aspects of the case where the claim for money made by H. P. shows its face, but those we shall have to discuss later.

25. Now, on a winding up Mr. Nag's clients would get exactly what Mr. Nag is asking for. If the company is to be wound up, all its assets must be put up in the market and then after meeting all liabilities, whatever the assets can fetch would be shared pro rata amongst the shareholders including H. P.

26. Not only would a winding up order not unjustly prejudice the company petitioner, but what the company petitioner wants by way of relief is really the relief of separation from other shareholders as on winding up of the company and realisation of its assets.

27. There is already a valuation of shares made by a valuer, one S. P. Basu which is on record. Mr. Nag's clients have applied for setting aside of the valuation. That valuation is made upon an examination of the books and the papers of the company. The value of each share is found to be a little under Rs. 60. This does not at all satisfy Mr. Nag's clients. Mr. Nag showed us interlocutory orders passed by the appellate court where the question of acceptance or otherwise of the

valuer's report was specifically kept reserved for consideration at the time of final disposal of the appeal.

28. Mr. Nag's clients are really as much aggrieved by the judgment under appeal as his adversaries are M. L. and his group would rather have it that the company petition were completely dismissed. H. P. and his group, however, want that the trial court order should be, at least sufficiently clarified, if not modified, for the purpose of ordering a share valuation not merely upon investigation of accounts but upon a wholesale investigation of the company's assets, especially real assets.

29. The cross-objections leading to the cross appeal of H. P. contain an important ground, being ground No. 36 which submits that the learned judge should have directed valuation of shares of the appellant-company to be made on the basis as if the appellant-company was being wound up on the date of valuation ; as cross objection No. 37, it is submitted that the learned judge should have directed valuation of shares to be made on the break up method basis on the market value of all assets and properties of the appellant-company.

30. We are unable to see how, on this case run by H. P. in the court below and thereafter before us, it can at all be said that he would be unjustly prejudiced or unfairly prejudiced if the company were to be wound up.

31. Sometimes it so happens in minority petitions that asking the question whether the company petitioner will be unjustly prejudiced on winding up, becomes an obviously unnecessary and empty exercise.

32. Such is the case where two groups of nearly equal shareholding fight with each other for the control of the company. If one were to wait during a battle of this type, and ask, if the company petitioners have made out the case that winding up of the company will unfairly prejudice them, the querist would be met with a simple and straightforward answer, that nobody wants a winding up, the two sets are fighting for the company not its winding up.

33. An example of a case of this nature, where the parties do not even have to advert to this issue, is the case of Ramashankar Prosad and Others Vs. Sindri Iron Foundry (P) Ltd. and Others, which is a celebrated Division Bench judgment of our High Court. In vain one would look at the reports to find an answer to the question if the company petitioners have made out the case that just and equitable winding up will unfairly prejudice them because the question does not arise in a case of that nature.

34. Not so here, however, where with a small shareholding unable to resist even the passing of a special resolution by the adversaries, H. P. cannot ever hope to control the company. There are indeed prayers in his petition that there should be a scheme and he should get back his directorial position, but if he gets money on the pro rata basis of assets, clearly he would rather have the money than have the doubtful satisfaction of being on the board of directors with a host of

hostile blood relations.

35. Again it might be that winding up of the company is no solution for the minority shareholders, because the worth of the company shares has been reduced to almost a mere nothing by the misdeeds of those very persons against whom the minority complains. This is the situation of *Scottish Cooperative Wholesale Society Ltd. v. Meyer* [1959] 29 Comp Cas 1 (HL), really the first case which reached the House of Lords after Section 210, corresponding to our later introduced Section 397 was put into the Companies Act, 1948, in England. The reference of that case is *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1958] 3 All ER 66 : [1959] 29 Comp Cas 1 (HL).

36. In that case the subsidiary, of which the aggrieved petitioners were substantial shareholders, was reduced to a position of worthlessness, because of the misdeeds of the holding company, and those who controlled it. A winding up of the subsidiary would serve no purpose as, upon winding up, the aggrieved shareholders would get a mere nothing. Lord Denning said as follows (page 32 of 29 Comp Cas) :

"But such an order would unfairly prejudice the respondents because they would only recover the break-up value of their shares. So, instead of petitioning for a winding up order they seek to invoke the new remedy given by Section 210 of the Companies Act, 1948."

37. Then his Lordship went on to say that a useful order which enables the court to do justice to injured shareholders (page 33) : "is to order the oppressor to buy their shares at a fair price ; and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression". Thus, although the shares of the company at the time of hearing were practically worthless, yet the appellants were ordered to purchase the respondents' shares at ? 3 15s. each.

38. We find from this instructive case that the point of inadequacy of a winding up petition was both discussed and explained.

39. In company matters it is not wise to try and see the whole of the future. New facts and new cases are constantly arising. However, so long as Sub-section (2) of Section 397 remains unaltered in India, a case must be made out by the aggrieved petitioners that winding up would not serve his purpose at all. It might be made out in any manner the company petitioner sees fit and proper ; or the question might be shown to be an inappropriate and unnecessary question in the facts and circumstances of the particular case before the court, but if the question is not an unnecessary one, as here, then the aggrieved petitioner must obtain a favourable answer to it before getting relief.

40. We note here that in the case of *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.* [1981] 51 Comp Cas 743 (SC), it was said at page 778 of the reports as follows :

"In an application u/s 210 of the English Companies Act, as u/s 397 of our Companies Act, before granting relief the court has to satisfy itself that to wind up the company will unfairly 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 should be wound up."

41. Then again our Division Bench, delivering judgment in the case of Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others, observed as follows at paragraph 5 of the judgment (p. 128) :

"It is also necessary to emphasise that the court has to form an opinion on two essential points that are set out in Section 397(2) of the Act. These two points are first, the one that I have already stated, viz., that the company's affairs are being" conducted in a manner oppressive to any member or members of the company and, secondly that to wind up the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. It is imperative that the court's opinion on both these points must be formed in the affirmative before any order could be made u/s 397 of the Companies Act."

42. When quoting from the above authorities we are aware that these dicta were not at the root and foundation of the decisions given either by the Supreme Court or by the Division Bench. But these statements are there and the section is also there. Such authorities as we have been able to lay our hands upon, and such as could be produced by the considerable industry of learned counsel appearing for both the sides, we give here.

43. We are, therefore, of the opinion that on this ground alone, i.e., that the company petitioners have not shown that a winding up order would unjustly prejudice them, the application u/s 397 was liable to be dismissed. If the clamouring for money which has become more clear before the appellate court were to be there before the trial court, it would be all the more compelled to dismiss the Section 397 part of the petition on this ground alone.

44. Again and again we put this fundamental and elementary aspect of the question to Mr. Nag to find out what, if anything he could say or think of, in support of his client's case, in support of showing that a winding up order would not serve his client's purpose.

45. Mr. Nag gave us several authorities in this regard to show that by passing an order u/s 397 the court avoids a winding up, He showed us a Division Bench judgment in Pramod Kumar Mittal Vs. Andhra Steel Corporation Ltd. and Others, and took us to the passage on the right column at page 647 (page 794 of 58 Comp Cas). He relied on the white paper leading to the adoption of Section 210, amongst others, of the English Companies Act, 1948. This is usually known as the Cohen Committee report. That command paper was presented to the English Parliament in June, 1945. At paragraph 60 of the said report it was said as

follows :

"In many cases, however, the winding up of the company will not benefit the minority shareholders, since the break-up value of the assets may be small, or the only available purchaser may be that very majority whose oppression has driven the minority to seek redress."

46. The prescience shown in this paragraph is peculiarly brought out by the Scottish Co-operative Wholesale Society Ltd.'s case [1959] 29 Comp Cas 1 (HL). There the oppressors bought the shares and there the oppressors had brought down the share value of the minority to a mere nothing. However, we do not find in this part of the report anything which would relieve the company petitioners to show why winding up will unjustly prejudice him. He might show it by showing the fallen value of the company's share but show it he must.

47. Mr. Nag then said that the process of liquidation is a long drawn and dilatory process. There can be seen, liquidation of companies going on for inordinately long periods. He argued that even if this company is sent to liquidation, there is no knowing when his clients will get any money, if anything at all.

48. We are unable to see any force in this argument. Where this argument to hold good in this case, it would hold good in every case. The petitioner might well come and say that what I want is really a winding up of the company but I am not asking for winding up because the process of winding up is too slow. Such a plea could never be accepted by a court. Winding up must be shown to be unfairly prejudicial to the company petitioner on the basis that, even a fair and expeditious winding up would not be likely to materially benefit the aggrieved party.

49. Before we come to the aspect of oppression and mismanagement and whether it was just and equitable in the facts and circumstances of the case to wind up the company at all, we must give some facts of this case for proper appreciation of the legal points.

50. H. P. joined the company some time in the early seventies. Up to the mid-eighties, matters were more or less smooth. Trouble started some time in or around 1985 leading to commencement of proceedings by H. P. in 1988, starting from the month of May that year.

51. The grievances made by H. P. as apparent from the judgment and papers are, in brief, as follows :

(i) That the registered office of the company was shifted from the congested posta area to a multi-storeyed building called Chatterjee Polk on Jawaharlal Nehru Road and then again shifted back from there.

(ii) That a certain amount of wheat quota for which above Rs. 17,00,000 was deposited by the company was allowed, contrary to Control Orders, to be lifted by a sister concern.

(iii) That a certain loan, payable to H. P., a little under Rs. 6,00,000 was sought to be paid back by the company by seeking to make a book adjustment, trying to show a payment to another company Sumati in extinguishment of the liability of H. P. to Sumati on the oral instruction of H. P. that the debt to him be paid instead to Sumati.

(iv) Another complaint was that certain roller boxes, about 14 in number were sold off at an aggregate price of Rs. 96,000, although those had been acquired in 1980 at a cost of Rs. 75,000. The complaint was that the boxes were still usable and unnecessarily sold.

(v) It was also complained that a large amount of commission, of the order of Rs. 20,00,000 or so, although receivable by M. L. Bagri and/or his son, was got paid by Mitsubishi to the company so as to avoid tax incidence to M. L. himself, who utilised the losses of the company for setting off of the profit, treating the company as M. L.'s own.

(vi) A very important complaint was that the continuing directorship of H. P. Bagri was sought to be terminated without giving him appropriate notices of board meetings ; the terminations were alleged to be of no effect and the stoppage of remuneration and of directorial benefits, improper and illegal.

52. Before we deal with these six main items of complaint, we once again make it clear that in our opinion, the entire company petition is liable to be rejected for not entering a finding by the lower court that winding up will unjustly prejudice the applicant ; and because, in the facts and circumstances we have explained above, it is impossible for us to enter such a finding in favour of H. P. and his group either.

53. However, a party having come to court and having fought litigation by spending time, money and effort for long 12 years should at least know the full reasons why his company petition is bad. This is the principal reason why we proceed further to deal with these matters.

54. It is important to note that although the company petitions under Sections 397 and 398 usually join those two sections and that although these two sections are often mentioned in the same breath in dealing with company matters, these are widely different sections. Section 397 seeks to prevent oppression and Section 398 seeks to prevent mismanagement. Let us illustrate how this distinction might become material.

55. Let us take the point of shifting of registered office from Posta to Chatterjee Polk and back to Posta. There is nothing in this complaint, and we make that clear in the very beginning, so as to remove any possible confusion arising out of the next discussion. The company petition mentioned that access to the registered office was blocked to H. P. But there is absolutely nothing to substantiate this allegation. There were never any "gun-das", there was never any assault, there was never any manhandling of the person of H. P., nothing at

all. We mention this because these things are not unknown in the minority actions.

56. Be that as it may, the shift of registered office itself might be, where there are materials, a complaint primarily u/s 397 or a complaint primarily u/s 398. If the company suffered not much loss because of the shifting and the shifting back, but it was undertaken to put oppressive pressure and pain upon the petitioner, the complaint would sound in a Section 397 grievance. If on the other hand the shifting and the shifting back were acts of bad company management, causing perhaps loss to the company by way of wasted expenditure and loss of business, then and in that event the complaint would sound more in the nature of a Section 398 grievance. We make it clear that in company matters it is not always easy to maintain a strict distinction and categorise complaints either u/s 397 or u/s 398 ; very often the same complaint has both the aspects. But the essential difference between the two sections must be borne in mind.

57. The difference between the two sections does not stop there. It has further legal and historical differences.

58. The primary legal distinction between Section 397 and Section 398 in founding the jurisdiction of the company court is this, that before granting relief for complaints which sound in oppression, the court must form an opinion of the appropriateness of a just and equitable winding up.

59. Not so with Section 398.

60. It is not an easy matter to prove circumstances requiring a just and equitable winding up of the company. That Section 398 does not contain this stringent requirement as a jurisdictional condition, must be borne in mind if the company court is to apply the correct law to the facts and circumstances of a particular case.

61. We have mentioned that the first court did not address its mind as to why winding up will be unjust to the complainants.

62. Even though the first court did address its mind to the aspect as to whether it would at all be just and equitable to wind up the company, it did so, and we say this with that respect which is due, in an incorrect and slipshod manner.

63. The finding of just and equitable winding up as appropriate in the circumstances is to be found only at one place and in one sentence. Even reading the judgment as a whole, and giving it all the benefit that every High Court judgment deserves, when it is being considered at the appellate stage, we are unable to come to the conclusion that the appropriateness of just and equitable winding up upon all the facts and circumstances of the case, as might have a bearing upon the issue, was a question to which the first court addressed its mind, as such, giving it the due importance that such an issue deserves.

64. The only finding of just and equitable winding up is to be found at only one

place where the court discussed the non-attendance of H. P. at three meetings.

65. In the original judgment which is 52 pages long and which we have examined to check whether it is correctly typed in the paper book the single sentence about just and equitable winding up is to be found at the end of the first paragraph at page 49. It reads as follows :

"In my view, it is just and equitable that the company should be wound up which is sine qua non for granting relief under Sections 397 and 398 of the Companies Act."

66. It is unfortunate that the finding of the jurisdictional issue should contain a patent legal error. Granting of relief for complaints appropriately made u/s 398 does not require the making out of a case that it is just and equitable to wind up the company.

67. The above legal error is not an accidental slip which we should in fairness overlook. This is because, in the judgment there is no attempt to separate the complaints as to whether they fall more under the oppression head of Section 397 or under the mismanagement head of Section 398.

68. See how the lack of this distinction, which was neither understood (we say this again with that respect which is due) nor applied, creates confusion in dealing with a particular issue.

69. If the Mitsubishi commission of Rs. 23,00,000 is considered, it can hardly be a matter of mismanagement of the company to bring into its till money which is not even its due. No loss is shown to accrue to the company because of the bringing in of this commission. Mismanagement of the company, therefore, does not appear to be an appropriate complaint under this head. It has, therefore, got to be an oppressive act or it is not an appropriate head of complaint in this case at all. We do not see how paying the company of which H. P. was and still is a shareholder can be said to be oppressive to H. P. or his group. Because the first court proceeded in a sort of general excitement about the complaints, it failed to apply the necessary reason to the facts and circumstances.

70. We do not propose to deal with the complaints mentioned under the six items narrated above, excepting in a manner sufficiently to dispose of the broad aspect of those complaints. About the registered office shift and payment of commission into the company's till, we will not discuss the facts any further as further discussion is unnecessary.

71. When we said that Section 397 is historically different from Section 398 also we had a particular course of legislation undertaken in England in our mind, that is, from 1948 itself, which was the year of the first introduction of Section 210 into the English Companies Act. The law as to oppression and mismanagement has never been the same in India and in England. When this is borne in mind, and when Mr. Nag appearing for H. P. cited English decisions freely whenever decided, be those decisions modern or even very modern we cannot help

pointing out these distinctions for general benefit. English company law in minority matters now, has become so widely different from Indian law that before relying on any modern English decision, the distinction between the corporate laws prevailing in the two countries must and should be borne in mind,

72. We trace out the history of company legislation in this respect so that, in future, disturbing reliance placed on pure English decisions might not trouble courts as those have troubled us.

73. Minority actions were designed to counteract the rule in *Foss v. Harbottle* [1843] 2 Hare 461. That was a case reported in or about 1843 some nine years before the first comprehensive corporate legislation was promulgated in England.

74. A perusal of that case, which is easily available in the English Reports is very interesting because it shows the wanton manner in which the company property was dealt with. Yet, the complainant got no relief in that case. The reason was that, the company property was dealt with in accordance with company law ; because the complainant was in a minority, none of his complaints would ever stand ground in the corporate forum ; an appropriate majority resolution could always be taken to ratify whatever had been done by the managers of the company property.

75. The wanton dealing with company property, therefore, brought no adverse consequence to those who were at the helm of affairs of the company. This was the rule in *Foss v. Harbottle* [1843] 2 Hare 461. Understood in simple terms by us, dictating as we do, these lines a few yards from the flowing Ganges, the rule simply was that if the company wishes to throw its property into the Ganges, the company and the managers of the company are free to do so like any other individual person.

76. This rule held good in England and in India from 1843 until 1948, although many people made many grievances and many judicial minds were clamouring for appropriate exceptions to this strict ancient rule of complete *laissez faire*. We have already mentioned the Cohen Committee Report which, amongst other things brought about Section 210 of the English Companies Act, 1948. It was designed to provide a remedy to minority shareholders for the purpose of relieving them from oppression, and also for relieving them from the grief of the rule in *Foss v. Harbottle* [1843] 2 Hare 461,

77. From 1948 to 1956, when the Companies Act was passed in India, the rule in *Foss v. Harbottle* [1843] 2 Hare 461 prevailed in India but not in England.

78. The report of the Parliamentary Committee of 1952 which resulted in the Companies Act of 1956, was handed up to us by Mr. Nag.

79. He also gave us the Supreme Court case of *Raymond Synthetics Ltd. v. Union of India* [1992] 73 Comp Cas 762 where the court has ruled as extremely significant, the contemporaneous construction placed upon an ambiguous section by the administrators entrusted with the task of executing the statute, the

interpretation of which is in issue. The Report of the Company Law Committee, 1952, adopted, in regard to oppression Section 210 of the English Companies Act. Its remark at page 149 of the Report was as follows :

"We accordingly recommend the enactment of two sections :

(i) to provide for a remedy for the oppression of minorities on the lines of Section 210 of the English Act, 1948 ; and

(ii) to provide for a remedy in cases of mismanagement of company affairs in a manner prejudicial to the interests of the company."

Thus the English Section 210 was materially adopted almost as such in our Section 397. But we went ahead in our company legislation and we provided also a remedy for mismanagement of companies by way of Section 398 also, which was not there in the English Act of 1948.

Thus after 1956, Indian statutory law has two minority actions ; it was again materially different from English law, because the mismanagement section had come into the Indian statute book only.

Both Section 210 and our Section 397 contained the essential requirement of the finding of a just and equitable winding up.

80. In England these sections have undergone a radical change now. No longer is there any necessity for minorities to prove the case of just and equitable winding up. No longer need they prove the case of oppression ; all that the minority needs to do now is to show a case of unfair prejudice. The minority remedy in England has become flexible and easily available but not so in India. This happened in England in 1980 and continued thereafter. Whenever a case from England is relied upon as to minority rights and that case relates to a decision after 1980, we would say, Indian readers, beware. The case has to be read in the light of English law and we can use only those parts of the judgment which are applicable to our law, the difference in company statutes in the two countries notwithstanding. Mr. Nag, and we say this with respect, unfortunately did not bear this distinction in mind all the time, if at all.

81. Before enactment of the English Act of 1980 there was another command paper which was the Jenkins Report. Mr. Nag again helped us with copies of the relevant portions of this white paper. At page 75 of that paper at the end of paragraph 201 it was noted as follows :

"It is pointed out that a case for winding up under the just and equitable rule at the instance of a contributory is difficult to establish and it is suggested that there is no sufficient reason for making the establishment of such a case an essential condition of intervention by the court."

82. Then at paragraph 204 the Committee made the following remark with regard to Section 210 :

"The intention underlying Section 210 was to cover complaint not only to the effect that the affairs of the company were being conducted in a manner oppressive but also to the effect that those affairs were being conducted in a manner unfairly prejudicial to the interest of those members."

83. After the Jenkins Committee Report England got Section 75 of the Companies Act, 1980. Sub-section (1) of Section 75 is as follows :

"75. Power of court to grant relief against company where members unfairly prejudiced.--(i) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

84. There is no necessity to establish just and equitable winding up. There is no necessity to establish oppression. All that one needs to establish is unfair prejudice. The power of the court to grant relief, as maintained in other sections in England, which we need not unnecessarily quote here, remains as wide as those were before.

85. Mr. Nag gave us amongst other cases the single Bench decision in the case of R.A. Noble and Sons (Clothing) Ltd., In re [1983] BCLC 273 (Ch D).

86. That was a case, where the petitioner sought relief u/s 75 of the Companies Act, 1980, or in the alternative, an order for winding up of the company on the ground that it was just and equitable to do so.

87. The winding up order the petitioner did not get ; what the petitioner got was merely an order for reimbursement of fitting out a certain shop which was in use by the company.

88. In England, this remedy by 1983 had become flexible, the power of the judge to remedy almost any wrong by passing order just and fair was available ; all that the petitioner had to establish was a case of unfairness coupled with prejudice to himself.

89. In the case of R. A. Noble and Sons (Clothing) Ltd., In re [1983] BCLC 273 (Ch D), there is a quotation given by Nourse J., of a certain sentence written by Slade J., Bovey Hotel, In re (then an unreported judgment). The said sentence is reproduced at page 290 of the reports and runs as follows :

"For my own part, while I can think of many hypothetical cases that might fall within Section 75 but would not fall this Section 210, I can think of no hypothetical cases which though giving rise to the court's jurisdiction u/s 210, would not give rise to such jurisdiction u/s 75."

90. This short sentence demonstrates clearly and, with respect, most helpfully, that the unfair prejudice section being Section 75 is much easier to establish

than the oppression, section which was Section 210, and which in all material parts, still is Section 397 in our country.

91. After 1980 the English Parliament enacted the Companies Act, 1985, where the unfair prejudice section is Section 459 and the section containing the powers of the court is Section 461. If one were to look at the very modern minority cases in England one would find a reference neither to Section 210 nor to Section 75 but to Sections 459 and 461. We need not quote these sections as further research into comparative law between the two countries is unnecessary for our purpose.

92. We now take the point of removal from directorship, as that was, in our opinion, the strongest factual part of the case of H. P. This part of the case is intimately connected up with another aspect of company law, which is just and equitable winding up, on the principle and idea that the private company, a family company, quite often is a sort of quasi-partnership,

93. Before we go on to the law, we give the brief facts in this regard.

94. From the time H. P. joined the company in or about 1971, he had directorial status. When we looked at the first resolution giving him such status and we considered the wording of that resolution, we had some doubts as to whether it spelt out directorial status or not. But it would be most unjust to H. P. to rule at this distance of time that he did not have directorial status even at the beginning, because for nearly 15 years after his first joining he enjoyed the directorial position including remuneration and perquisites. Mr. Nag gave a lot of authorities for the proposition that a director by any other name still remains a director and it is his function which makes him so. As we accept this line of Mr. Nag's argument and as there are not really any contrary authorities of importance in this regard, we do not find it necessary to discuss the authorities in this regard.

95. A director H. P. was, but the question is whether he remained as such in 1988 when he commenced the company action.

96. The last board meeting which H. P. appears to have attended was held on August 19, 1985, but apparently he did not thereafter attend the meeting on November 16, 1985. Thereafter, there is no correspondence to indicate that he went to the corporate office or felt like keeping himself connected with the day-to-day management of the company. Mr. Nag showed us differences in dates even in the case of the respondents as to from when, according to them, H. P. ceased to be a director. Mr. Nag emphasised that the notices of the board meetings were allegedly sent to H. P. under certificate of posting and he said that there are a lot of suspicious materials even in the certificates and the statements given by the postal authorities themselves in regard to such certificates.

97. Near the end of the year 1988 the company by a general resolution terminated the payment of any further remuneration by way of directorial

remuneration to H. P. The respondent's case in the court below, and the appellant's case before us was that notices under certificate of posting were issued not only in the year 1986 or thereafter but that this practice had been followed even earlier. They also said that H. P. did not make any contemporaneous complaints by way of writing letters to the company or to the other directors stating that he is not being called to attend directors' meetings. There is only one letter of complaint written by H. P. at this time and that too, to the Registrar of Companies. The respondent submitted that even though H. P. might contend that his attending the general meeting, intended, inter alia, to stop further payment of directorial remuneration to him, would yield no result, as he could never out-vote a resolution by the less than 20 per cent. holding of H. P., yet that general resolution was duly passed and thereafter a claim to directorial remuneration can no longer be made.

98. On the facts of this part of the case, were we to treat this as a ground for just and equitable winding up, we would have to rule, that unless a case for quasi-partnership by way of facts was made out, the respondents would have no case to answer for a petition for just and equitable winding up. Even if a case for quasi-partnership is made out, what the position will be in Indian law is still somewhat a matter for discussion and debate, into which we shall enter later.

99. The reason why we say that termination of directorship, even by suppression of notice, or termination of directorship by a bulldozer like show of majority, would not entitle the terminated person to petition for just and equitable winding up is, that there is an appropriate remedy by way of a company suit, which can give the terminated director every relief. If notice has been suppressed, he can file a suit for injunction and declaration and get himself reinstated as a director. If he has been removed from directorship by outvoting of the majority, and the case is not a case of quasi-partnership, then the company cannot be wound up on just and equitable grounds, the expulsion notwithstanding.

100. In a hearing of a company petition for just and equitable winding up, the court always has to pay attention to Sub-section (2) of Section 443 which reads as follows :

"443(2). Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

101. It should not be very difficult to see that termination of directorship or stopping of directorial remuneration of a single director, if remediable by a suit, cannot ordinarily found a petition for just and equitable winding up. It would be shocking to one's sense of justice if a director, even if illegally terminated, could bring his grievance as to termination to such a pass that the company itself would be wound up for that single isolated act, even if it were doing good

business and even if the director could obtain each and every adequate relief in the suit court. In Robin Hollington's book on Minority Shareholders' rights which Mr. Nag cited (1990 edition), at page 33, winding up a company on ground of exclusion of a shareholder from salaried office has been suggested as a remedy, to be ". . . drastic".

102. The law as to just and equitable winding up needs a slight historical examination at this stage.

103. The section of just and equitable winding up was there in the Indian Companies Act, 1913 ; the section in that Act was Section 162 which runs as follows :

"162. A company may be wound up by the, court.--(i) if the company has by special resolution resolved that the company be wound up by the court ;

(ii) if default is made in filing the statutory report or in holding the statutory meeting ;

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

(iv) if the number of members is reduced, in the case of a private company below two or, in the case of any other company, below seven ;

(v) if the company is unable to pay its debts ;

(vi) if the court is of opinion that it is just and equitable that the company should be wound up."

104. Under sub-heading (vi) the just and equitable jurisdiction was preserved.

105. However, the jurisdiction to wind up on just and equitable grounds was not exercised on the broad and general bases before the case of *Loch v. John Blackwaad, Limited* [1924] A. C. 783 (PC).

106. The rule that the courts followed before this decision was that the just and equitable sub-section would be construed ejusdem generis. The courts never used this sub-section as giving the company court a wide and general equity power to wind up like the Chancery Courts wielded in the matter of winding up partnerships. The best way to see how the change of just and equitable jurisdiction came about and how the court started using this jurisdiction in all its breadth and scope, is to read the following passage from a book written by Mr. S. C. Sen, deceased, Barrister and Senior Advocate, when he was practising as a well-known and colourful member of the company Bar at Calcutta. The passage is to be found at page 256 of a small book called "The New Frontiers of Company Law", published by the Eastern Law House in 1971, in which he unreservedly drew upon his considerable learning" on the subject of corporate jurisprudence. The said passage runs as follows : "just and equitable :

A company may be wound up by the court if the court is of the opinion that it is

just and equitable that the company should be wound up. Until 1924 the juridical view was that Sub-clause (f) was to be construed as ejusdem generis with the other five clauses. In *Loch v. John Blackwood, Limited* [1924] A. C. 783 (PC), the Judicial Committee decided that the clause was not to be construed as ejusdem generis. Lord Shaw stated in the course of his speech "it seems plain enough that beyond these cases there is the whole category of fraudulent administration under which company's property might be imperilled or transferred into the pockets of directors, when the case for winding up would be of supreme urgency. Yet if the arguments as to ejusdem generis were sound, it would logically exclude such a case from the grounds for winding up which is absurd". Since then, the doctrine of just and equitable has developed in various directions."

107. Although the general jurisdiction of just and equitable winding up started to grow from the mid 1920's, the treatment of a company as a partnership, in reality and in its essence, had started, by a curious historical twist, some ten years earlier, in the case of *Yenidje Tobacco Company, Limited, In re* [1916] 2 Ch. D 426.

108. That was a case of almost equal shareholding of the two groups. Thereafter many cases have come to court where companies have been shown to have a partnership aspect. In most of these cases the company has been the result of a transformation of an initial partnership into a company.

109. The partnership aspect is retained in the mutual understanding but the legal relationship obtaining between the parties is transformed from that amongst partners, to that amongst shareholders, may be controlling shareholders, may be office holding shareholders each case being different on facts to some degree.

110. Often relied on in courts of law is the celebrated case of *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A. C. 360 (HL), decided nearly 57 years after the *Yenidje Tobacco Company, Limited, In re* [1916] 2 Ch. D 426. Lord Wilberforce's judgment in that case can be read, with respect, with pleasure and profit at any time. The case is to be found reported at *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All ER 492 : [1973] A. C. 360 (HL). It is a decision given upon Section 210 of the 1948 English Act and, therefore, would have persuasive value in interpretation of Section 397 of our Act. That was a case of three Mahomedans operating an art gallery in London, where two of them, being father and son attempted to oust the third one contrary to the expectations amongst partners. That was a case also where relief was prayed for u/s 210, and alternatively winding up was also asked for. No relief u/s 210 was given but it was held both by Plowman J. and the House of Lords that the company deserved to be wound up. This was also a case where the business was originally a partnership.

111. No doubt if H. P. was in the position of a partner of M. L. Bagree and he was being sought to be bulldozed out of the board by M. L. Bagree by using M. L.'s superior voting power, H. P. could rely upon the decision of *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A. C. 360 (HL) to sustain the case of just and

equitable winding up.

112. But the case of *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A. C. 360 (HL) was not decided by the Supreme Court of India but by the House of Lords of England. The case has been considered by the Supreme Court in the case of *Kilpest P. Ltd. v. Shekhar Mehra* [1996] 87 Comp Cas 615. The court considered the case of *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A. C. 360 (HL) at length. The facts of the case were summarised in the judgment at page 619 of the Reports. The court said near the end of the judgment at page 622 as follows :

"The promoters of a company, whether or not they were hitherto partners, elect to avail themselves of the advantages of forming a limited company. They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi-partnership should, therefore, not be easily accepted."

113. Such a submission, i.e., that the company was a quasi-partnership, was not accepted by the Supreme Court in the case above. In the manner we venture respectfully to read the above judgment, the law in India as regards this aspect of company law is, that a person who would have relief on the basis that a company is a quasi-partnership, has a stiff up-hill case before him to prove. The court will not easily treat the company as a quasi-partnership. Strong facts are needed so that the court might invoke partnership principles in the arena of company law.

114. In the light of this let us see what the facts here are. The company was not built up by M. L. and H. P. The company was M. L.'s company and H. P. came and joined it. M. L. had separated from his ancestors in the mid 50's and had built up his own business. H. P. was in the U. S. A. in 1970. A lot of family litigation was getting settled in or about that time. In 1971 H. P. came and joined M. L.'s company as a director.

115. There is no contemporaneous correspondence to show that M. L. and H. P. started working together from 1971 in the capacity as partners in essence. There is nothing to show that H. P. built up the company in question along with M. L. The only document which Mr. Nag could rely upon, assuming we can look into it at all, is in the shape of the doubtful evidence contained in an Income Tax assessment order where the coming of H. P. from U. S. A. is recorded.

116. Mr. Poddar wished to rely upon the many Income Tax orders showing the absence of any trace of partnership with H. P., but we did not allow him further to burden the already burdened materials which today run into probably 3,000 pages.

117. We are quite convinced that upon the law which prevails in India on this subject and on the facts which are made out in this case, a winding up on just and equitable grounds cannot be had by H. P. on the footing that he had entered into a quasi-partnership with his elder brother. The youngest brother H. P. was

and still is. He was allowed to join perhaps because he was a younger brother. This also we might accept, but these facts fall far short of establishing a strong case of quasi-partnership.

118. We are of the opinion that the case of just and equitable winding up could not at all be sustained on the facts of alleged directorial ouster.

119. Coming now to the other head of complaint about wheat quota allotment we find that the facts in this regard disclose neither oppression nor mismanagement. At the material time, the company in question was under a lock-out and, therefore, the wheat quota worth about Rs. 17 lakhs was allowed to be lifted by a sister concern. It was said that this was in violation of a control order. We do not find that anybody was proceeded against in regard to such alleged violation. The learned judge in the court below did not even come to a positive finding about this transfer of wheat quota. This is what was said :

"How can the wheat be transferred--under what circumstances these loans were granted--these are matters which require thorough and detailed investigation and enquiry for the purpose of ascertaining the real financial position of the company ; the allegation of manipulation of accounts and fictitious nature of the accounts seems to be justified in the facts and circumstances of the case, particularly having regard to the conduct of the respondent and the method and manner of keeping accounts holding board meetings and dealing with the company's affairs to the exclusion of the petitioner."

120. As the wheat quota was lifted by the sister concern, the company in question was shown to be having an asset by way of debt as against that sister concern. In the manner this part of the case was dealt with, it seems to us that the facts regarding wheat quota were left undecided and a little jumbled up with the other aspect of exclusion from the board of directors.

121. We do not find how the company has suffered loss by taking a debt and giving the wheat quota to a sister concern. We do not see how H. P. has been oppressed because the wheat quota has been lifted by a sister concern. On these facts we would not find a case in favour of H. P. either on Section 397 or on Section 398.

122. The only other factual aspect which requires to be dealt with is the payment made by the company to Sumati, in alleged extinguishment of the debt owned by the company to H. P. The company's case is that H. P. owed money to Sumati (of the order of 5,00,000) and, upon the instruction of H. P., money was paid by the company to Sumati so that H. P. does not have to pay to Sumati and the company does not have to pay to H. P.

123. Oral instructions given by H. P. are hotly denied by him.

124. In the same month as H. P. started these company proceedings, i.e., May, 1988, H. P. had started a winding up case against another Bagri company being Bagri Synthetics Ltd. The winding up notice resulted in an order dated August 21,

1989, by way of which H. P. was relegated to a suit and a sum of Rs. 5,74,662 was directed to be deposited. The suit was thereafter duly heard. The suit was decreed by one of us by a judgment and decree dated February 5, 1992, which was upheld by the appellate court on December 12, 1995.

125. We see here that when H. P. applied for winding up for non-payment of money by Bagri Synthetics to him, the company, i.e., Bagri Synthetics Pvt. Ltd. had taken the defence that they are not liable to repay the loan as they have, under instructions from Hanuman Prasad Bagri paid the money to one Brut Trading Co. Ltd. ; the company court found the proper order to be a relegation to a suit with a direction for deposit.

126. In broadly similar circumstances as to payment of H. P.'s money under H. P.'s instructions to another person than H. P. himself, H. P. makes a complaint in this company petition, this time asking not for winding up, but for relief u/s 397 or Section 398.

127. We are of the opinion that if a debt remained owing to H. P. from the company being the present company, i.e., Bagri Cereals Pvt. Ltd. it would be unreasonable for H. P. to ask for a just and equitable winding up of the company ; filing a suit would be proper, or filing an application for winding up, as he had done in the other case not on the grounds of just and equitable winding up but on the ground of the company's inability to pay debts after service of statutory notice.

128. We advisedly do not enter into further details of facts as the above broad aspects are quite sufficient for a just disposal of these factual parts of the case.

129. Apart from the appeal there are several applications made before us. One is for setting aside of the valuation report of S. P. Basu which we have already mentioned. Another is for payment of directorial remuneration. We have already opined that if directorial remuneration had not been legally stopped (but we are of the opinion that the resolution was duly passed in this regard), even then H. P. should have filed a suit and he could not ask for just and equitable winding up. We mention with all the necessary emphasis, as we are mentioning alternative remedies here once again, that we are of the opinion that the principles of Section 443(2) apply with equal force, to cases and decisions u/s 397, when the deciding authority decides whether the company is to be wound up on just and equitable grounds as those principles apply to a petition for winding up on the just and equitable ground fair and proper.

130. Since we are proposing to dismiss the company petition altogether the applications made in aid of the appeal or of the company petition itself must all fail. Before we part with this case we must set out the ordering portion of the judgment under appeal as that has been the subject of discussion and comments before us :

"The board of the company is superseded. Mr. Ashim Ghosh, a senior member of

the Bar, is appointed administrator to take possession of the statutory books, papers and documents lying at the registered office at 207, Maharshi Debendra Road, Calcutta, as also at 33A, Chowringhee Road, Calcutta 15, and Canel East Road, Calcutta and also at the other offices of the companies. The administrator shall run the day-to-day business of the company until the time mentioned hereinafter with the assistance of an Advisory Committee consisting of J. P. Bagri and H. P. Bagri. The administrator would be entitled to a monthly remuneration of Rs. 3,000 and he would be at liberty to appoint a clerk at a remuneration not more than Rs. 300. Mr. S. P. Basu, c/o. M/s. P. M. Mukherjee and Co., No. 11, Old Post Office Street, a chartered accountant and auditor on the panel of this court is hereby appointed to investigate into the accounts of the company and to value the shares of the company. The remuneration of the auditor shall be fixed by the administrator and is to be paid from out of the funds of the company. The remuneration of the administrator and his clerk shall also come out of the funds of the company. The audit and the valuation be made as expeditiously as possible.

There shall also be a declaration that petitioner No. 1 continues to act as executive director of the company and is entitled to the remuneration as also money equivalent of perquisites as is available to a director as of date. The administrator is also directed to pay the same. It is further ordered that upon investigation of accounts, adjustment of accounts be effected and in the event of any sum found due and payable by one of the directors, the same be paid. The auditor upon consideration of the accounts shall prepare a valuation report so far as the shares are concerned as on the date of presentation of this appeal and upon adjustment of accounts petitioner No. 1 is directed to sell his shares to the respondents together with the shares of petitioner No. 1's group members. It is only upon payment of the value of shares by the respondents to the petitioner that the administrator shall stand discharged. Each party to pay and bear its own costs. The administrator, auditor and all parties are to act on a signed copy of the operative portion of the minutes of this order on the petitioner's undertaking to draw up, complete and file this order,"

131. The first point from the ordering portion which strikes one is that although the board of the company was superseded and an advisory committee consisting of J. P. and H. P. is constituted yet the administrator is directed to pay the money equivalent of the perquisites of a director to H. P., who is declared as continuing to act as executive director.

132. In our opinion, there cannot be a director acting and drawing director's perquisites even when the board is superseded.

133. Regarding the date for valuation of share we find that the judgment records that those are to be valued "as of the date of the presentation of this appeal".

134. Clearly there was no appeal before the learned judge, and this is a slip, but we have felt a little embarrassed because the date of valuation of shares is a

very important part of Section 402 relief, and now there is also an appeal before us.

135. These minor infirmities we mention because so many days have passed in examination of this judgment before us. We are convinced that the judgment must be set aside and the company petition must be dismissed. We do so hereby. As H. P. goes back empty-handed to his family after losing a long drawn battle we are unable to follow the usual rule of awarding costs along with the result.

136. All interim orders will stand vacated with immediate effect.

137. All pending applications stand dismissed.

138. All administrators and special officers will stand discharged with immediate effect.

139. Stay of operation of this order is prayed for by Mr. Basu but in view of the lack of findings on jurisdictional issues in the judgment under appeal and in view of the poor factual materials brought before the court to make out a case of just and equitable winding up, or oppression, or mismanagement, the prayer is unhesitatingly refused.

140. All parties and all others concerned to act on a signed xerox copy of this order on the usual undertakings.