
(1978) 06 CAL CK 0036
In the Calcutta High Court
Case No : Company Petition No. 561 of 1977

Bombay Gas Company Ltd.	Vs	APPELLANT
Hindustan Mercantile Bank Ltd.		RESPONDENT

Date of Decision : 08-06-1978

Acts Referred:

Banking Regulation Act, 1949 — Section 38, 44, 44(1), 49C, 5
Companies Act, 1956 — Section 173(2), 190, 433

Citation : (1980) 50 CompCas 202

Hon'ble Judges : Salil K. Roy Chowdhury, J

Bench : Single Bench

Advocate : R.C. Nag, Bhaskar Sen and Sudipta Sarkar, for the Appellant; S.B. Mukerjee, P.K. Das and Jayanta Mitra, for the Respondent

Judgement

Salil K. Roy Chowdhury, J.—This is a winding up petition presented by a contributory on the 26th of September, 1977, for the winding up of the company on the ground that the substratum of the company has gone, the company has ceased to carry on business for more than a year, and is not in a position to carry on any new business and it is just and equitable to wind up the company.

2. The undisputed facts are that the company was incorporated on the 5th of February, 1944, as a banking company as its name suggests and is governed by the Banking Regulation Act, 1949. The objects of the company as set out in the memorandum is verbatim reproduction of the objects which are provided in the various sub-clauses of Section 6(1) of the Banking Regulation Act, 1949. The petitioner alleged that it holds about 22% of the subscribed capital of the company. It appears that the company, by a resolution passed on the 28th of November, 1973, approved a draft agreement regarding the proposed transfer of the undertaking of the company to the United Bank of India Ltd. with its assets and liabilities as on 22nd of December, 1973. The Clause 15 of the said draft agreement provided as follows:

" 15. The transferor shall not carry on any business at any time after the date of

transfer except for the purpose of going to voluntary winding up. The major part of the amount payable to the transferor by the transferee, in terms of Clause 2 of these presents, shall be kept intact in a term deposit account or account with such nationalised bank or banks and for such period as the board of directors of the transferor may decide till such time as they are required for distribution amongst the shareholders of the transferor. Only such portion shall be kept in current account or in cash as may be necessary for meeting the day to day expenses of the transferor as may be decided by the board. The transferor shall take expeditious steps for going into voluntary winding up before the expiry of a period of three months from the date of transfer. It should be ensured that the liquidator to be appointed by the shareholders of the transferor is assisted in every way so that the ultimate distribution of the net assets of the transferor after meeting all the liabilities of whatsoever nature amongst the shareholders of the transferor is not delayed. "

3. It also appears that prior to the said resolution dated the 28th of November, 1973, there was a proposal by the management of the company at its 25th annual general meeting held on the 4th of June, 1969, to transfer its undertaking, together with its assets and liabilities, to the United Bank of India Ltd., prior to its nationalisation and with the consideration money for such transfer to carry on some other business. The petitioner filed a suit in this court for an injunction restraining the company from passing any resolution containing the above proposal. It appears that subsequently the said proposal was dropped by the company by a contract duly executed between itself and the United Bank of India Ltd. on the 4th of December, 1973. The undertaking and the assets and liabilities of the company were duly transferred to the United Bank of India at the close of the business as on 21st of December, 1973, for a sum of Rs. 50,00,905.40. It appears that since the said transfer of the banking business and undertaking of the company with effect from 22nd of December, 1973, the company had invested the said consideration money in "at call and short notice deposit" and been earning interest thereon. The petitioner appears to have all through insisted on the company to send it to voluntary liquidation and distribute the surplus assets among the contributories. In fact, it also made correspondence with the Reserve Bank of India for issue of necessary certificate u/s 44(1) of Banking Regulation Act, 1949. Ultimately, it appears that the notice of the 33rd annual general meeting of the company dated the 25th of August, 1977, was issued for holding the same on the 28th of September, 1977, inter alia, for a special business by a special resolution as would appear from the said notice.

4. But it appears that subsequently a special notice was received from a member of the company of its intention to move a proposed resolution at the said 33rd annual general meeting scheduled to be held on the 28th of September, 1977, and the same was published in the Statesman Calcutta, dated the 2nd of September, 1977, a special resolution proposed to change the name of the company by deleting the word " Bank " and also amendment of the object clause

proposed therein, subject to the permission of the Reserve Bank of India u/s 49C of the Banking Regulation Act, 1949, and also an ordinary resolution that, until such amendments, the board of directors of the company in supersession of all resolutions of the company be and hereby authorised to invest the funds of the company in such manner as it may think fit and proper in the best interests of the company. The petitioner challenged the said proposed resolution to be moved in the 33rd annual general meeting, which was resisted, to be held on the 28th of September, 1977, as illegal, invalid, void, mala fide, and inoperative on various grounds alleged in para. 23 of the petition, inter alia, that it is violative of Section 173(2) of the Companies Act, 1956, in the absence of an explanatory statement and it was contrary to the scheme of transfer of the undertaking of the company only to distribute the consideration money among the shareholders after sending the company into voluntary liquidation and after the said scheme of transfer being implemented. The petitioner, thereafter, presented the winding-up petition and the company appeared and filed its affidavit to show cause why the winding-up petition should not be admitted and the petitioner filed a reply. Thereafter, it appears that the matter was heard by Deb J. from time to time and ultimately appeared before me and the hearing started on the 10th of April, 1978, was adjourned from time to time for several days and, finally, the hearing is concluded.

5. The only question, it seems to me, arising in the present application whether the winding-up petition can be said to be an abuse of the process of the court at this stage. The petitioner's case is that the company being a banking company and the only business the company is authorised to carry on under its object clause read with Section 6(1) and various sub-clauses thereunder having gone after the undertaking and the only business of the company together with its assets and liabilities being transferred to the United Bank of India with effect from 22nd of December, 1973, in consideration of the sum of Rs. 55 lakhs odd, it must be held that the substratum of the company is gone and it is just and equitable to wind up the company. The petitioner also contended that the company has not carried on any business for more than one year as it can no longer carry on the business of banking under the Banking Regulation Act, 1949. Therefore, grounds for winding up of the company have been prima facie made out and the winding-up petition should be admitted. Whereas the company contended that the company is carrying on business other than its banking business of investment of the said amount which is permissible under the object clauses of the memorandum and, therefore, there is no ground for winding up the company. It is also contended that, under the Banking Regulation Act, 1949, the company is still a banking company and it cannot be wound up otherwise than what is provided in Section 38 of the Banking Regulation Act, 1949. It also appears that the company intends to change its name and its object clauses in the memorandum so as to carry on other businesses than the banking business subject to the permission of the Reserve Bank of India u/s 49C of the Banking Regulation Act, 1949, The resolution for change of name and alteration of the

objects clauses has been adjourned, pursuant to the order of this court till tomorrow at 10-30 a.m. and the other resolution of the 33rd annual general meeting, that is, for the voluntary winding up of the company, has been rejected by the shareholders at its meeting.

6. As the matter, which to my mind, appears to be confined within a very limited scope, has been argued at length as usual in Surajmal Nagarmal matters, by citing all decisions on the question of whether the substratum of the company is gone and all relevant and irrelevant correspondence and provisions of the Banking Regulation Act and the Companies Act have been referred to and placed before the court, thereby prolonging the hearing to such an extent, that it reflects a waste of public time with the power of money bag.

7. Mr. R.C. Nag with Mr. Bhaskar Sen and Mr. Sudipta Sarkar, for the petitioner, started with the history of the company, which is really a Surajmal Nagarmal concern and the dispute between the different groups of the partners of Surajmal Nagarmal. It is really one group of the partners of Surajmal Nagarmal infighting with the other group on the question of the company.

8. Mr. Nag, in his usual thoroughness and exhaustive elucidation of both facts and law, submitted that at the present stage there is very limited scope of enquiry by the court as to whether a prima facie case for winding up has been made out or not. He submitted, and in my view quite rightly, that the company is a banking company as it is admitted by both the parties and also the Reserve Bank of India. The consideration money obtained after its banking business together with all its assets and liabilities was transferred by the document dated the 4th of December, 1973, and keeping the said money at call and short notice would not amount to carrying on non-banking investment business and whether such business can be said to be authorised under the object clause of the memorandum of the company as it stands now. The petitioner has presented the winding-up petition on the grounds, (1) disappearance of substratum by reason of the company being a banking company within the meaning of the Banking Regulation Act, 1949, and governed by the said Act, (2) true interpretation of the memorandum according to the principles of interpretation laid down by the Division Bench decision in Kumarapuram Gopal Krishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Co. Ltd., , irrespective of the question whether the company is a banking company or not, and the next ground for winding up is that it is just and equitable and, lastly, on the ground that the company has suspended its business for more than one year. Mr. Nag submitted that, if one of the three grounds succeed on undisputed facts or on true interpretation of facts according to the correct principles of interpretation, a prima facie case for winding up is made out and, therefore, the winding-up petition cannot be said to be an abuse of the process of the court. Mr. Nag submitted that keeping the consideration money at short call and short notice cannot amount to carrying on business of investment or by itself a non-banking business. In any event, he submitted that such business cannot be legal business within the meaning of the

objects clauses read with the Banking Regulation Act. He submitted that the words " banking " and "banking company " are denned in Section 5(b) and (c) of the Banking Regulation Act, 1949. He also submitted that in Section 5A it has been provided that the said Banking Regulation Act, 1949, is to override the memorandum. Mr. Nag quite rightly referred to Section 6(1)(a) to (a), (o), 6(2), which provide the permissible business that can be carried on by a banking company. Mr. Nag referred to the Supreme Court decision in *Rustom Cavasjee Cooper v. Union of India* [1970] 40 Cmp Cas 325, where it has been held that the definition of " banking " in the said Banking Regulation Act, 1949, does not include other commercial activities which a banking institution may engage in and does not extend to trading activities which are not incidental to banking. Mr. Nag, therefore, submitted drawing my attention to the directors' report for the year ending 31st December, 1973, wherein it has been stated that all the assets and liabilities were transferred as on 21st of December, 1973, to the United Bank of India and the balance-sheet for the year ending 31st of December, 1973, shows the investment as "nil" whereas investment for the year ending 31st of December, 1972, shows Rs. 1,23,48,443. Therefore, Mr. Nag rightly submitted that no investment business has been carried on by the company, on its own showing, even up to the year ending 31st of December, 1976, as all the balance-sheets show investment as "nil". Mr. Nag submitted, and in my view quite rightly, that the compensation money was kept at call and short notice pursuant to the scheme as envisaged in Clause 15 which has been set out in the winding-up petition, para. 10, page 9, and it was not an independent business or in the ordinary course of banking business within the meaning of the objects clauses of the company's memorandum read with Section 6(1) of the Banking Regulation Act, 1949. Mr. Nag submitted that no special resolution has been passed u/s 149(2A) and, therefore, if any such business is carried on that would be illegal business. Mr. Nag submitted that the banking business by the company was no longer possible after the transfer of its assets and liabilities to the United Bank of India Ltd. as, admittedly, no permission or sanction by the Central Govt. has been given u/s 6(2) of the Banking Regulation Act, 1949. Mr. Nag also submitted that the auditor's report as set out in the balance-sheet for the year ending 31st of December, 1976, does not state that the company carries on investment business. Therefore, Mr. Nag submitted that, on the face of the company's own admission in the balance-sheet read with the provisions of the Banking Regulation Act, it must be held prima facie that the company has suspended its business since the banking business together with its assets and liabilities were transferred for consideration to the United Bank of India with effect from 22nd of December, 1973.

9. Mr. Nag thereafter submitted that the company's substratum had disappeared. Mr. Nag submitted that by reason of the Banking Regulation Act and the principles laid down for the interpretation of the memorandum in the *Burdwan Cutwa Railway Co. Ltd.*'s case by the Division Bench reported in *Kumarapuram Gopal Krishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Co.*

Ltd., the substratum must be held to have disappeared. Mr. Nag submitted assuming, but not admitting, that the memorandum can be altered, at the date of hearing of this application, the substratum has disappeared and, therefore, the ground for winding up has been made out. Mr. Nag submitted that in view of the definition of banking and Sections 5A, 6(1)(n), (o), 6(2) of the Banking Regulation Act, the company cannot carry on any other form of business. He further submitted that Clause (o) of the company's memorandum is a power and not an object which is incidental to the banking business of the company as suggested by its name and also according to the provisions of the Banking Regulation Act. He further submitted that the admitted need of change of name of the company and also alteration of the object clause in the articles amounts to admission of disappearance of substratum. Mr. Nag submitted that since the company is a banking company permission of the Central Govt. is necessary u/s 6(1)(o) of the Banking Regulation Act and the alteration of the memorandum u/s 17 of the Companies Act, 1956, with the sanction of the Company Law Board does not satisfy such requirement of the special statute, that is, the Banking Regulation Act, 1949. Mr. Nag submitted that u/s 44A, Sub-section (4), of the Banking Regulation Act, the scheme is binding on all and, therefore, the alteration of the memorandum is not permissible. In my view, Mr. Nag's contention that it is a scheme u/s 44A of the Banking Regulation Act cannot be accepted as the said section on its very wording in Sub-section (1) is not applicable to the facts of this case which is nothing but a transfer of the banking business of the company together with its assets and liabilities to a nationalised bank. Therefore, in my view, the said section has no application. Mr. Nag, therefore, submitted in view of Section 6(1)(n) read with Section 5A of the Banking Regulation Act, non-banking business cannot be carried on at all de hors the banking business. Mr. Nag submitted that on the true construction of the memorandum according to the principle of construction laid down in the said Division Bench decision in *Kumarapuram Gopal Krishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Co. Ltd.*, , it must be held that the substratum has disappeared. He submitted that the name of the company is important as laid down in the *Lawang Tahang Vs. Goenka Commercial Bank Ltd.*, , which is approved by the Division Bench decision in *Kumarapuram Gopalakrishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Company Ltd.*, . Mr. Nag also referred to a recent judgment delivered by me in *Setabganj Sugar Mitts*, which is also a *Surajmal Nagarmal* concern as to the disappearance for the main object wherein it was held that the substratum of the company was gone. Mr. Nag submitted that the decision cited by Mr. Mukherjee is not applicable to the facts of this case which has its peculiar facts having regard to the provisions of the Banking Regulation Act, 1949, which is applicable to a banking company. Lastly, Mr. Nag submitted that it is just and equitable to wind up the company.

10. Mr. Nag submitted that previously the company proposed to transfer its banking business and assets without voluntary winding-up. The same was resisted by the petitioner and it filed a suit and obtained injunction and the said

transfer did not take place at that time. Subsequently, the company transferred the said banking business together with its assets and liabilities to the United Bank of India in terms of the draft agreement and Clause 15 thereof, which is set out in para. 10 of the petition. The scheme of such transfer was that the company would not carry on any business at any time after the date of transfer except for the purpose of going into voluntary liquidation. It is also now an admitted fact that subsequent to the filing of the present winding-up petition the Reserve Bank of India has granted certificate u/s 44(1) of the Banking Regulation Act, 1949, being dated 26th September, 1977. Mr. Nag submitted that since the transfer of banking business with the assets and liabilities to the United Bank of India the company has never carried on any business. He again relied on the principles laid down in *Lawang Tahang Vs. Goenka Commercial Bank Ltd.*, and the *Kumarapuram Gopal Krishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Co. Ltd.*, . Mr. Nag submitted that the members have not received any dividend from the company. Mr. Nag also relied on the letter of the company dated 5th December, 1972, written to the Joint Chief Officer of the Reserve Bank of India, inter alia, stating that the company was agreeable not to carry on business in future after the completion of transfer of all the assets and liabilities of the bank to the United Bank of India save and except as may be necessary for the realisation of any outstanding assets of the bank. Mr. Nag submitted that from the above it is quite clear that the transfer of the banking business together with all its assets and liabilities to the United Bank of India by the company was solely on the basis that the company would be voluntarily wound up and the surplus assets will be distributed among the shareholders. Therefore, Mr. Nag submitted, this is a fit case where the company should be wound up on just and equitable grounds. Mr. Nag also "submitted that the alteration of the object clause of the memorandum of the company is not at all permissible in view of the provisions of Section 6(1)(c) and also Section 6(2) of the Banking Regulation Act, 1949. Mr. Nag also submitted that the proposed resolution for change of name and the object clause in the memorandum of the company in its annual general meeting, which was scheduled to be held on 28th September, 1977, is invalid as the notice is not in compliance with the statutory requirements of Section 173(2) read with other relevant provisions. He relied on an unreported decision of mine in Suit No. 763 of 1977 (*Gopal Krishna Bhagat v. Neiveli Ceramic & Refractories Ltd.*) dated 20th January, 1978, where in similar circumstances the notice was held to be bad and any resolution, which was sought to be passed by such invalid notice, would be void and illegal. Mr. Nag also submitted that no explanatory statement was either furnished or published as required under Sections 172(2) and 173(2) read with Section 190 of the Companies Act in respect of the proposed resolution in the annual general meeting for change of name of the company and alteration of the object clause. It is further submitted by Mr. Nag that the directors report for the year 31st December, 1976, has approved the voluntary winding up but the said resolution has been rejected by the shareholders at the meeting. That does not prevent the court from winding up the company having regard to the facts and circumstances of this case on just and equitable grounds. Mr. Nag submitted

that the provisions of Section 38 of the Banking Regulation Act do not override the provisions of the Companies Act u/s 433 for winding up of the company but what it really means is that if there is any conflict between the Companies Act and the Banking Regulation Act, the Banking Regulation Act will prevail. The same is also the provision in Section 2 of the Banking Regulation Act and Section 616(6) of the Companies Act, 1956. Mr. Nag relied on the principle of interpretation of non-obstante clause in a statute and referred to a decision in Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, and also the decision in Dwarkadas Agarwall Vs. Dharam Chand Jain and Others, , and the decision in Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another, , regarding the court's power to wind up a company on the grounds mentioned in Section 433 of the Companies Act. It appears to me that Section 38 of the Banking Regulation Act has only taken away the discretionary power of the court to wind up a company on the ground, i.e., unable to pay its debts, and in the case of a banking company the court shall wind up the company. Interpretation before the amendment of the Banking Regulation Act by introducing the word "notwithstanding" has practically made no difference in its effect and the decision in Dwarkadas Agarwall Vs. Dharam Chand Jain and Others, , in my view, regarding interpretation of the court's power to wind up still stands. Therefore, in my view, the court can wind up a banking company under the Companies Act subject to the provisions of Section 38 of the Banking Regulation Act. Therefore, Mr. Nag submitted, having regard to the facts of this case as enumerated above by him, and more or less admitted which cannot be disputed by the company, it cannot be said at this stage that the winding-up petition is an abuse of the process of the court as the substratum has gone, since, being a banking company, it cannot carry on any other business which is not connected with the banking business or incidental thereto as provided u/s 6(1) and Clauses (a) to (n) after the transfer of the banking business together with all its assets and liabilities to the United Bank of India with effect from 22nd December, 1977. The same is also reflected in the balance-sheet for the subsequent year. Secondly, on the facts of this case, it is just and equitable that the company should be wound up as, admittedly, the company suspended its business for more than one year. As keeping the consideration money as money at call and short notice does not amount to the company carrying on any business, therefore, the winding-up petition should be admitted and direction for advertisement should be given.

11. Mr. S.B. Mukherjee, appearing with Mr. P.K. Das and Mr. Jayanta Mitra for the company, submitted, firstly, that the company is a banking company and it is entitled to carry on any of the businesses in its objects clause and in fact it is carrying on the business of investment and earning profit on the consideration money as would appear from the balance-sheets of the company up to 31st December, 1974, 31st December, 1975 and 31st December, 1976. Mr. Mukherjee cited the leading decisions on the question whether a company's substratum has gone or not and for that purpose he cited a decision in Murlidhar Roy's case, AIR 1920 Cal 72, the decision in Kitson 6 Co. Ltd., In re [1946] 1 All ER 435, Mohan

Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others, , Taldua Rubber Co. Ltd., In re [1946] 2 All ER 763 and also cited a decision in Commissioner of Income Tax Vs. Bharat Nidhi Ltd., , in support of the contention that the company's substratum cannot be said to have gone as there are other objects clauses which authorise the company to carry on business. He also submitted that the shareholders of the company at its 33rd annual general meeting had rejected the resolution for voluntary winding up and the proposed resolution for change of the name and alteration of the objects clause of the articles of the company has been adjourned by this court from time to time pending the disposal of this application. Therefore, Mr. Mukherjee submitted that the winding-up petition cannot be said to be a bona fide one but a sheer abuse of the process of the court knowing fully well that the resolution will be passed for change of the name and alteration of the objects clause. Therefore, the petitioner is trying to put pressure on the company for the purpose of getting the value of his share paid by the company. Mr. Mukherjee also submitted that the court has power to wind up a company only u/s 38 of the Banking Regulation Act and not on any other ground u/s 433 having regard to the non-obstante clause in Section 38 of the Banking Regulation Act. But, in my view, the said contention cannot be accepted, as indicated before, as the provisions of the Companies Act will apply subject to the special provisions of Section 38 of the Banking Regulation Act, i.e., the grounds, except what is laid down in Section 38, for winding up of the company u/s 433 of the Companies Act are available for winding up of the company after the prima facie grounds are made out.

12. Mr. Mukherjee relied on the decision in Mcleod and Co. and Others Vs. S.K. Ganguly and Others, , where a scheme of application after a company was voluntarily wound up was rejected by the trial court but sanctioned by the appeal court subject to certain conditions. Therefore, Mr. Mukherjee submitted that even if the company's banking business, assets and liabilities are transferred, it can always carry on business according to the objects clause of the memorandum and by changing its name also subject to the provisions of the Companies Act and the Banking Regulation Act and such transfer cannot be a ground for winding up of the company, as the company can always start business after taking necessary steps as they are trying to do which the petitioner has prevented.

13. Therefore, Mr. Mukherjee submitted that, on the facts and circumstances of the case, it; cannot be said that the substratum of the company has gone or the company suspended its business for more than one year. He also submitted that no order for winding up can be made in the case of the company on just and equitable grounds having regard to the facts of this case.

14. Considering the matter very carefully at this stage it appears to me that the undisputed facts are that the company was and still is a banking company within the meaning of the Banking Regulation Act, 1949, the objects clause in the memorandum are in terms of Section 6, Sub-section (1)(a) to (n), and, therefore, in my view, the banking business is the paramount and main object

and business of the company and all other clauses are merely incidental or ancillary to the said banking business or, in some way or other, connected with the same. Those cannot be said to be an independent business as that is not permitted under the said Section 6 of the Banking Regulation Act. Further, it is quite clear from the provisions of Clause (o) of Sub-section (1) of Section 6 of the Banking Regulation Act that the Central Govt. by notification specified a form of business which would be lawful for a banking company to engage in. Sub-section (2) of Section 6 makes it further clear that a banking company cannot engage itself in any form of business other than what is referred to in Sub-section (1) of Section 6. However, it appears from Section 7 that no company or firm can carry on the business of banking in India unless the word " bank ", " banker," or " banking " is used. Therefore, the company, as it stands, can carry on banking business which includes the businesses specified in Section 6, Sub-section (1), only and no other business. It is an admitted position that in fact the company has not carried on any business, save and except after receiving the consideration money for transfer of its banking business together with the assets and liabilities with effect from 22nd December, 1973, and it has put the said consideration money at call and short notice and been earning interest. It is quite clear from the balance-sheet of the company for the year ending 31st December, 1974, 31st December, 1975, and 31st December, 1976, that there is no investment of the company or that the company is carrying on any business earning profit. It is only the interest and discount earned in respect of the money " at call and short notice " which is credited in the profit and loss account for those years.

15. Therefore, in my view, having regard to the peculiar facts of this case, the company being a banking company regulated by the Banking Regulation Act, 1949, and having ceased to carry on its banking business after the transfer of its banking business together with the assets and liabilities since 22nd December, 1973, it must be held to have ceased to carry on its banking business--being the only and main business--and, therefore, it must necessarily follow that the substratum of the company has gone. It cannot be said that the other objects which are in the memorandum in conformity with the provisions of Section 6(1) of the Banking Regulation Act are independent objects. Some of them seem to be mere powers and others seem, to be incidental and ancillary to the banking business and cannot be stated de hors the banking business of a banking company,

16. In that view of the matter the decisions cited by both the parties are of very little assistance to deal with the question involved in this case as the facts of this case seem to me to be somewhat peculiar and have no parallel in any of the decisions cited at the Bar by both the parties.

17. I may also mention here that Mr. Nag also cited some English decisions in *Hutton v. West Cork Railway Co.* [1883] 23 Ch D 654, which was followed in *Stroud v. Royal Aquarium and Summer and Winter Garden Society Ltd*, [1903]

89 LT 243 and *Parke v. Daily News Ltd.* [1962] 2 All ER 929; 32 Comp Cas 1060 (Ch D) in support of the proposition that after the transfer of the assets of the company, the company exists for the purpose of winding up only. Here, on the facts of this case, it also appears from the draft agreement for transfer, that the company, after its transfer, will not carry on any business except for the purpose of going into voluntary winding up and the consideration money will be kept in term deposit account or accounts with a nationalised bank and for such period as the board of directors and the transferor may decide as they are required for distribution amongst the shareholders of the transferor. The company represented to the Reserve Bank of India by its letter dated 5th December, 1972, that it was agreeable not to carry on any business in future after the completion of the transfer of all the assets and liabilities of the bank, meaning thereby the company, to the United Bank of India save and except as may be necessary for the realisation of any outstanding assets of the bank.

18. It also appears from the directors' report and also the notice of the annual general meeting dated 25th August, 1977, that there was special business in the agenda for passing the special resolution for voluntary winding up of the company subject to certificate being granted by the Reserve Bank of India u/s 44(1) of the Banking Regulation Act, 1949. In fact, subsequent to the presentation of this petition, the certificate u/s 44(1) of the said Act has been granted by the Reserve Bank of India, which is not disputed.

19. Therefore, on these facts alone, it appears to me that it is just and equitable to wind up the company having regard to the fact that the substratum of the company is gone. The company has not carried on any business since its banking business together with its assets and liabilities were transferred to the United Bank of India and the company made repeated representations to its shareholders that it will be put to voluntary winding up and, in fact, that was the agenda in the annual general meeting scheduled to be held on the 22nd September, 1978. It further appears to me that the subsequent special notice of special resolutions alleged to have been received from a member of the company for moving the resolutions for change of the company's name and also the alteration of the articles of the company is not in compliance with the statutory provisions and, prima facie, I am satisfied that the same violates the requirements u/s 173(2) read with Section 190 of the Companies Act and any resolution which is to be passed pursuant to such illegal and void notice must be held to be illegal and void.

20. Mr. Nag relied on a decision in *Gopal Krishna Bhagat v. Neiveli Ceramics & Refractories Ltd.*, dated 20th January, 1978, referred to earlier and that seems to be my view which also applies to the facts of this case. The special notice regarding the special resolutions sought to be passed for change of the company's name and alteration of the objects clause of the memorandum prima facie are not in compliance with the provisions of the Companies Act for such notices. There is also a dispute regarding the explanatory notice being served or

the same being mentioned in the notice published in the newspapers.

21. The principles regarding the interpretation of the objects clause in the memorandum which are now well settled and have been clearly laid down in the Division Bench decision of this court in *Kumarapuram Gopal Krishnan Ananthakrishnan v. Burdwan-Cutwa Railway Co. Ltd.* [1978] 48 Comp Cas 611, where Salil Kumar Datta J. observed as follows (pp. 624, 638):

"The question of substratum being gone thus depends on the true construction of the memorandum of association and each case has to be dealt with on its own merits.....The question then resolves to the interpretation of the memorandum of association of the company to find out if the company was incorporated for a particular object only. If so, in view of the disappearance of such business as in the case before us, the court has no other alternative but to pass an order for winding up. If, however, there be other objects, as important as the main object of the company, the principle laid down in *Kitson's case* [1946] 1 All ER 435 may be followed and the court may decline to wind up the company. Even if there be other objects not included as main objects of the company or as incidental or ancillary thereto, in view of the provisions of the clauses.....warranting inclusion of other objects in the memorandum, mere disappearance of the main objects, in our opinion, will not prevent the company from carrying on such other objects unless there be good grounds for winding up the company authorised by law. "

22. The case before the Division Bench was that of a railway company and it was held that after the undertaking of the company was taken over by the Government on payment of compensation, the substratum of the company was gone and the other clauses of the memorandum were merely incidental or ancillary to the company which was a running company.

23. In my view, the said principles also apply to the facts of this case, apart from the fact that the company is a banking company and is regulated by the Banking Regulation Act read with the Companies Act, 1956. The object of the company, if it is interpreted in the light of the provisions of Section 6 of the Banking Regulation Act, it must be held that the company was a banking company and the banking business being the main and paramount business of the company and the other objects in the memorandum being ancillary or incidental to such banking business, in short, without carrying on the banking business, it cannot carry on any other business specified in the memorandum as all other businesses are connected with the banking business. If the banking business, which is admittedly gone in the present case, it must be held that the substratum of the company is also gone. Further, in my view, having regard to the facts of this case, the transfer of the banking business together with its assets and liabilities by the company to the United Bank of India took place on the sole representation of the company that it will not carry on any business and the consideration money would be kept intact in a term deposit account or accounts with a nationalised bank till such time as they are required for distribution amongst the shareholders of the company. In fact, the company, so far, before the special

resolution for change of its name and objects clauses came up, gave effect to such representation and, therefore, it appears to me that, on the facts and circumstances of this case, it is just and equitable that the company should be wound up. The duty of the company court in applying the just and equitable clause u/s 433 of the Companies Act has been laid down by the Supreme Court in a recent decision in *Hind Overseas P. Ltd. v. R.P. Jhunjhunwalla* [1976] 46 Comp Cas 91. The relevant portion I am quoting here (p. 105):

" The principle of " just and equitable " clause baffles a precise definition. It must rest with the judicial discretion of the court depending upon the facts and circumstances of each case. These are necessarily equitable considerations and may, in a given case, be superimposed on law. Whether it would be so done in a particular case cannot be put in the straitjacket of an inflexible formula."

24. Then again (p. 105):

" It is now well established that the sixth clause, namely, "just and equitable", is not to be read as ejusdem generis with, the preceding five clauses. While the five earlier clauses prescribe definite conditions to be fulfilled for the one or the other to be attracted in a given case, the just and equitable clause leaves the entire matter to the wide and wise judicial discretion of the court. The only limitations are the force and content of the words themselves, " just and equitable ". "

25. Then again (p. 106):

" Section 433(f) under which this application has been made has to be read with Section 443(2) of the Act. Under the latter provision 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. "

26. Applying the same to this case it appears to me that after the substratum of the company having gone, as I have held hereinbefore, and after repeated representations by the company to voluntarily wind up the company in due course and distribute the surplus among the shareholders, it will be unjust and unequitable to allow any other course to be adopted after the lapse of about 4 1/2 years. Further, as I have already observed that the company still being a banking company in respect of which certificate u/s 44(1) of the Banking Regulation Act having been granted by the Reserve Bank of India, it is just and equitable to wind up the company and nothing else. In that view of the matter, which I am bound to take on the facts which can hardly be disputed, in my view, it cannot be said at this stage that the winding-up petition is an abuse of the process of the court. Therefore, I am passing the following order ;

27. The winding-up petition is admitted. There will be an advertisement once in the Statesman, once in the Basumati, and once in the Calcutta Gazette and the

matter to appear in the list on 24th July, 1978.

28. Stay asked for is refused.