

(1992) 12 BOM CK 0011

In the Bombay High Court

Case No : Company Application No. 326 of 1992 in Company Petition No. 353 of 1992

Darshan Anilkumar Patel

APPELLANT

Vs

Gitaneel Hotels Pvt. Ltd. and others

RESPONDENT

Date of Decision : 16-12-1992

Acts Referred:

Companies Act, 1956 — Section 162, 433, 450, 450(1), 450(3)

Citation : (1993) 2 BomCR 440 : (1993) 95 BOMLR 462 : (1994) 81 CompCas 805

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : Mahendra Shah, for the Appellant; Aspi Chinoy, J.B. Chinai, Pravin Samdani and F.E. Devitre, for the Respondent

Judgement

D.R. Dhanuka, J.—This is an application for appointment of a provisional liquidator of the first respondent pending the hearing and final disposal of the petition for winding up of the first respondent-company. Some of the facts emerging from the record disclose a shocking state of affairs and prove at least prima facie that the second respondent and members of his group have indulged in various acts of manipulation amounting to subterfuge, fraud and acts purporting to jeopardise the assets of the company and lack of probity. Respondent No. 2, respondents Nos. 5 and 8 have purported to appropriate the valuable assets of the company to themselves personally and caused serious prejudice to the company and minority shareholders as would be obvious from the later part of this order. This is my strong prima facie finding for the purpose of this application.

2. On March 18, 1980, respondent No. 1 company (formerly known as "Gitaneel Hotels and Investments Pvt. Ltd.") was incorporated as a private limited company under the provisions of the Companies Act (1 of 1956). On April 9, 1980, the certificate of incorporation was issued by the Registrar of Companies.

The authorised capital of the company is Rs. 65 lakhs divided into 50,000 equity shares of Rs. 100 each and 15,000 preferential shares of Rs. 100 each. The issued and paid-up capital of the company is Rs. 35,01,000 divided into 35,010 equity shares of Rs. 100 each. Respondents Nos. 2 and 5 were the subscribers to the memorandum of association of the company, having initially subscribed five shares each. On July 1, 1980, the company entered into a partnership with Gitaneel Builders, a firm in which various members of the same family were partners, with 25 per cent. share in profits; 11 per cent. share in assets and liabilities and 25 per cent. share in losses. The said partnership firm of Gitaneel Builders was dissolved and all the assets and liabilities of the said firm were taken over as a going concern by the company as on March 31, 1981. 35,000 equity shares of Rs. 100 each, (fully paid-up) were allotted to the erstwhile partners of the dissolved firm in proportion to their credit balance with the dissolved firm as shown in the relevant annexure to the balance-sheet of the company for the period ended March 31, 1981. On the dissolution of the firm, Gitaneel Builders, its partners became shareholders of the first respondent-company in lieu of their credit balances with the dissolved firm. The company was established, inter alia, with an object to set up a residential hotel and carry on business in real estate as builders and developers. The company is the owner of a valuable plot of land situate at 85, Hill Road, Bandra, Bombay, admeasuring about 1,670 square metres. The total F.S.I. available in respect of the said plot is 24,012 square feet out of which F.S.I. of 17,600 square feet is already consumed in relation to construction of shopping arcade, etc. In the directors' report to the shareholders forming part of the annual accounts of the company for the period ended March 31, 1981, the above-referred facts are clearly set out. Schedule VIII appended to the balance-sheet of the company for the period ended March 31, 1981, also set out the particulars of allotment of shares to 16 persons named therein in lieu of their credit balance in the capital account of the dissolved firm of which the assets and liabilities were taken over by the company as a going concern. The paid-up capital of the company is held by members of the same family divided into two groups, i.e., the Jalgaon group represented by the petitioner, respondents Nos. 9 to 13 and the Bombay group represented by respondents Nos. 2 to 8. The history of formation of the company, its joining the firm of Gitaneel Builders in which most of the present shareholders were already partners, the taking over of the assets and liabilities of the firm on dissolution and allotment of shares to all the partners of the dissolved firm in the ratio of the credit balance in their respective capital accounts in the dissolved firm indicate that the company is a domestic company.

3. It appears from exhibit "B" to the petition that the late Shri Jinabhai Rajivbhai Patel had four sons and three daughters. Shri Bhagwandas Jinabhai Patel, the chairman and managing director, respondent No. 2 is so described in the board minutes of the company. Respondent No. 2 is one of the sons of the late Shri Jinabhai Patel. Shri Bhagwandas Patel leads the group of shareholders of the first respondent-company described by the parties in the pleadings as the "Bombay

group". Shri Vrajlal Jinabhai Patel, respondent No. 8 herein, belongs to the Bombay group of share-holders. Shri Surendra Vrajlal Patel is the sister's son of Shri Bhagwandas Jinabhai Patel, Shri Pravinchandra J. Patel and Shri Vrajlal J. Patel. Shri Surendra Vrajlal Patel is part of the Bombay group. Shri Pravinchandra J. Patel and Shri Anilkumar J. Patel and some of their family members including the petitioner form part of the Jalgaon group of shareholders of the first respondent-company. The shares of the company are held by members of the family of Shri Pravinchandra Jinabhai Patel and Shri Anilkumar Jinabhai Patel on the one hand and Shri Bhagwandas Jinabhai Patel and Vrajlal Jinabhai Patel, their family members and Shri Surendra V. Patel on the other hand. Some shares of the company are also held by Shri Mahendrabhai Kalyanjibhai Ghelani and Smt. Meenabehn Mahendrabhai Ghelani, practising advocates and solicitors of this court. The company has in all 17 shareholders only, 15 of the shareholders being family members belonging to the two groups and two of the shareholders being Shri Mahendra Kalyanji Ghelani and Smt. Meena Mahendra Ghelani. The late Smt. Maniben Jinabhai Patel, mother of Shri Bhagwandas, Shri Pravinchandra, Shri Vrajlal and Shri Anilkumar J. Patel held 1,105 shares in the first respondent-company. The shares held by the mother, the late Maniben J. Patel have now been transferred to the names of respondent No. 3 and respondent No. 4 belonging to the Bombay group. The petitioner and other members of the Jalgaon group have impugned the said transfer of shares formerly held by Maniben during her lifetime as a fraudulent transfer. According to the members of the Bombay group, the members of the Jalgaon group held 37.88 per cent. of the shares of the said company, the members of the Bombay group held 56.85 per cent. of the shares and the two lawyer members forming part of the Bombay group held 5.27 per cent. of the shares. According to the petitioner and supporting respondents, the shareholding of the members of the Jalgaon group in the said company works out to 39.9 per cent. This small dispute is not of much consequence for the purpose of determination of the application for appointment of a provisional liquidator. The fact remains that the complaining shareholders are a minority group having a substantial shareholding and the members of the Bombay group led by respondent No. 2 are majority shareholders, the ratio of their shareholding being about 38 per cent. on the one side and 62 per cent. on the other side. The dispute regarding alleged fraudulent transfer of shares held by the mother can be examined at a subsequent stage of the petition.

4. Thus, the company, in substance, appears to be a domestic company, formed or continued by various members of the family of the late Jinabhai as indicated above on the basis of mutual trust and confidence. The members of the Jalgaon group claim that their shareholding works out to 39.9 per cent. of the total paid-up capital of the company. At any rate, the shares held by the members of the Jalgaon group are not less than 37 per cent. of the total shares issued by the company.

5. It is unfortunate that the two groups of shareholders are on a warpath and the

affairs of the company are being managed by the majority represented by respondents Nos. 2, 5, and 8 on the board as if they are the owners of the assets of the company personally to the detriment of the company and the minority shareholders as would be obvious from a bare narration of the facts concerning the purported and alleged transactions of the years 1990, 1991 and 1992 propounded by respondent No. 2 and his group.

6. It is not disputed that one or other members of the two groups, i.e., the Bombay group and the Jalgaon group and/or their family members have also been carrying on business in partnership in several other names like Gitaneel Builders and Vikram Builders. It is not disputed that the same Individuals and/or their family members have also been carrying on business in partnership at Jalgaon in the name of True Food Corporation, Pharma Chem International and Patel Narayandas Bhagwandas. Members of the two groups held shares in certain other domestic companies of which the affairs are organised in a manner similar to the partnership firms. Respondent No. 14 is a limited company, of which Shri Bhagwandas J. Patel, Smt. Shardaben B. Patel (wife of respondent No. 2) Surendra V. Patel and Shri Mahendra K. Ghelani are directors. Respondents Nos. 2, 3, 4, 5, one Jayshree Surendra Patel (wife of respondent No. 5), respondent No. 6, respondent No. 7, respondent No. 8 and Jayesh Vrajlal Patel (son of respondent No. 8) held almost all the shares of respondent No. 14 company. For all practical purposes, respondent No. 14 can be described as a domestic company in which respondent No. 2 and members of his family or his group alone are shareholders. Respondent No. 2 and members of his group are almost exclusively interested in respondent No. 14 company to the exclusion of members of the Jalgaon group. The members of the Jalgaon group have substantial shareholding in the first respondent-company and no share in respondent No. 14. Thus, respondents Nos. 2, 5 and 8 act in dual capacity. Respondents Nos. 2, 5 and 8 are directors of respondent No. 1 company. Respondents Nos. 2, 5 and 8 are also substantial shareholders of respondent No. 14 and respondents Nos. 2, 5 and Shardaben (wife of respondent No. 2) and Shri Mahendra K. Ghelani are the directors of respondent No. 14. If the purported transactions alleged to have been between respondent No. 1 and respondent No. 14 during the pendency of subsisting disputes or on the eve thereof are challenged by the complaining minority shareholders as subterfuge and acts of manipulation, the court must scrutinise the allegations with care and anxiety even at this stage. Kiran International is a partnership firm, of which the only partners are as under :

- (1) Shri Bhupesh Bhagwandas Patel-son of respondent No. 2.
- (2) Smt. Shardaben Bhagwandas Patel-wife of respondent No. 2.
- (3) Smt. Jayshree Patel-daughter-in-law of respondent No. 2.
- (4) Kiran Bhagwandas Patel-daughter of respondent No. 2.

7. Thus, Kiran International is owned by the wife, son, daughter and daughter-in-

law of the chairman and managing director of respondent No. 1, the said Bhagwandas. Falgu International is a partnership firm, of which Shri Bhagwandas Patel and Shri S. V. Patel are partners.

8. On July 28, 1992, Shri Darshan Anilkumar Patel, a shareholder of the company, duly supported by respondents Nos. 9 to 13, presented Company Petition No. 353 of 1992 to this court for the winding up of the company herein and for other reliefs set out therein invoking section 433(f) of the Companies Act (1 of 1956). The petitioner has made several allegations against the members of the Bombay group in the petition which will have to be scrutinised at least prima facie to some extent for the purpose of deciding Company Application No. 326 of 1992, i.e., the application for appointment of a provisional liquidator. On the same day, i.e., July 28, 1992, the petitioner presented an application to this court for appointment of a provisional liquidator of the company with a draft judge's summons duly supported by an affidavit of the petitioner. On August 5, 1992, Shri B. N. Srikrishna J. accepted the said Company Petition No. 353 of 1992 and directed that the petition shall appear on board peremptorily for admission on August 26, 1992. The respondents appearing through other various learned counsel at the hearing of the petition waived service of notice of the said petition and application. On the same day, i.e., on August 5, 1992, B. N. Srikrishna J. passed an ad interim order appointing the Official Liquidator, High Court, Bombay, as provisional liquidator in terms of prayer (a) of the judge's summons and also granted an ad interim injunction in terms of prayer (c) of the said judge's summons. The judge's summons was made returnable on August 26, 1992. At the ad interim hearing of the application for provisional liquidator, several affidavits were filed and the application was vigorously contested. The parties were already fighting legal battles in respect of several partnership firms in the proceeding filed in this court u/s 582 of the Companies Act (1 of 1956), since April, 1992, or thereabouts.

9. Being aggrieved by the above-referred ad interim order dated August 5, 1992, appointing the official liquidator as provisional liquidator of the company, Gitaneel Hotels Pvt. Ltd. filed an appeal, being Appeal No. 584 of 1992. By its order dated October 7, 1992, the Division Bench of this court consisting of the learned Chief Justice, Shri P. D. Desai, and Justice Mr. S. H. Kapadia, it was directed that the judge's summons be heard expeditiously by the single judge of this court to whom the matter may be assigned by the learned Chief Justice. The Division Bench directed that affidavits in reply shall be filed by the contesting respondents by October 12, 1992, and affidavits in rejoinder shall be filed on or before October 17, 1992. The parties appear to have arrived at an understanding not to enforce the ad interim order of appointment of the provisional liquidator till the judge's summons was heard and disposed of.

10. This judge's summons alone was assigned to this court by an administrative order passed by the Chief Justice. The judge's summons has been heard for several days and for several hours on several occasions. A large number of

affidavits has been filed. Interim directions were given as applied for concerning inspection of documents, etc. Yesterday evening, i.e., December 15, 1992, at about 4.40 p.m. the hearing was concluded and the judgment started. The hearing of the judge's summons itself took considerable time. The court is just now informed that the admission of Company Petition No. 353 of 1992 with Company Petition No. 353 of 1992 is also assigned to this court for the purpose of considering the question of admission of the petition. Company Petition No. 353 of 1992 shall be placed on board for admission of the petition on Friday, December 18, 1992. It is not known whether the matter is ripe for hearing and whether the parties concerned have already filed their respective affidavits concerning the subject-matter of the admission of petition. In my opinion, it would not be proper to withhold delivery of judgment on this judge's summons at this stage. It must be stated as a fact that the judge's summons has been argued at great length with thorough preparation on all sides as if the company petition itself is being heard for final hearing. Having regard to the drastic relief sought for in this application, I have allowed the parties to file a number of affidavits and heard all parties concerned at some length. During the pendency of this application, several orders were passed and directions issued in connection with inspection of documents, etc. The affidavits filed on both sides are liable to be treated as part and parcel of the pleadings at least for purposes of deciding the application. Several documents, most material to the case, were withheld and suppressed by respondent No. 2 and members of his group. Inspection of incriminating documents referred to in the later part of this order has led to shocking disclosure. Most of these documents were neither referred to nor relied upon even in the affidavit-in-reply dated October 12, 1992.

11. Before I summarise the relevant facts concerning Company Application No. 326 of 1992 for appointment of the provisional liquidator and deal with the principal contentions of the parties on the merits of the application, it is necessary to deal with the preliminary contentions urged on behalf of the contesting respondents as set out hereinafter and summarise the relevant legal principles applicable to this case. Respondents Nos. 2, 5 and 8 have been the directors of the company throughout. None of the members of the Jalgaon group have been directors of the company at any point of time.

Section 450(1) of the Companies Act (1 of 1956) reads as under :

"At any time after the presentation of a winding up petition and before the making of a winding up order, the court may appoint the official liquidator to be liquidator provisionally."

Section 450(3) of the said Act provides that where a provisional liquidator is appointed by the court, the court may limit and restrict his powers by the order appointing him or by a subsequent order; but otherwise he shall have the same powers as a liquidator.

12. The provisions contained in section 450(1) of the Companies Act (1 of 1956),

are almost identical with the provisions contained in section 238 of the English Companies Act, 1948.

13. In exercise of the powers conferred by sub-sections (1) and (2) of section 643 of the said Act and all other enabling powers, the Supreme Court, after consulting the High Courts, has made the Companies (Court) Rules, 1959. Rule 106 of the said Rules reads as under :

"106. Appointment of provisional liquidator. - (1) After the admission of a petition for the winding up of a company by the court, upon the application of a creditor, or a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the court, if it thinks fit, and upon such terms as in the opinion of the court shall be just and necessary, may appoint the official liquidator to be provisional liquidator of the company pending final orders on the winding up petition. Where the company is not the applicant, notice of the application for appointment of provisional liquidator shall be given to the company unless the court, for special reason to be recorded (in writing), dispenses with the notice.

(2) The order appointing the provisional liquidator shall set out the restrictions and limitations, if any, on his powers imposed by the court. The order shall be in Form No. 49, with such variations as may be necessary."

14. Learned counsel for respondents Nos. 5 to 8 and 14 has submitted during the course of his submissions that the application for appointment of a provisional liquidator is not maintainable at this stage and the court has not jurisdiction to appoint a provisional liquidator unless the petition for winding up of the company is first admitted by the court. Learned counsel for the contesting respondents has submitted that the provisions of the Act and the Rules made thereunder must be read together and the application made by the petition for appointment of a provisional liquidator must be rejected as premature or adjourned for being heard after the question of admission of petition for winding up is decided by the court one way or the other. The provisions of the Act and the Rules must be read harmoniously and the rules must be interpreted so as to conform to the statutory provisions contained in the Act. The Companies Act (1 of 1956), makes clear and specific distinction between the stage of presentation of a petition for winding up and the stage when the petition is admitted and directed to be advertised. Several sections of the Act make the said distinction. The stage of presentation of the petition is anterior to the stage of admission. An order admitting the petition is appealable under the Act. Section 450(1) of the Act provides that the court has discretionary jurisdiction to appoint a provisional liquidator in an appropriate case at any stage after the petition for winding up is presented. In a gross case, such an order can be passed even ex parte immediately on presentation of the petition. Rule 106 of the Companies (Court) Rules, 1959, merely enables the court to appoint a provisional liquidator after admission of the petition. The said rule is procedural and cannot be construed so as to wipe out the statutory jurisdiction of the court u/s 450 of the Act to appoint a provisional

liquidator after presentation of a petition for winding up of the company and before admission thereof. No implied prohibition on the powers of the court can be spelt out from rule 106 of the Rules. The court ought not to accept such a construction of the rule which would make the rule ultra vires. Rule 106 of the Rules is procedural. Section 450 of the Act is a substantive provision dealing with the subject-matter of jurisdiction of the court to appoint a provisional liquidator of the company at any time after presentation of the petition. The words "at any time" used in section 450 of the Act are of considerable significance and cannot be ignored. In a situation where the court is prima facie satisfied as to jeopardy to the assets of the company or a strong case for appointment of a provisional liquidator is made out on some other relevant grounds, the court would be justified in appointing a provisional liquidator of the company immediately on the presentation of the petition, as provided in section 450(1) of the Act. It is, therefore, not possible to accept this preliminary contention urged on behalf of respondents Nos. 5 to 8 and 14.

15. Shri Sailesh Shah, learned counsel appearing for respondents Nos. 1 to 4, has invited the attention of the court to a judgment of Lord Romilly in the case of London, Hamburg and Continental Exchange Bank, In re [1866] LR 2 EQ 231, in support of his preliminary contention that the court is not entitled to appoint a provisional liquidator unless the company consents. Learned counsel specifically invited the attention of the court to the following passage from the judgment of Lord Romilly at page 236 of the abovereferred case. The relevant passage relied on by learned counsel from the said case reads as under :

"It is perhaps convenient that I should state what my practice is with reference to the appointment of a provisional liquidator. Where there is no opposition to the winding up, I appoint a provisional liquidator as a matter of course, on the presentation of the petition. But when there is an opposition to it, I never do, because I might paralyse all the affairs of the company and afterwards refuse to make the winding-up order at all. But when the directors themselves apply or do not oppose the winding up, then I appoint the provisional liquidator."

16. The abovereferred observation of Lord Romilly cannot affect the true and correct interpretation of the plain and simple language of section 450(1) of the Companies Act, 1956. The practice followed by our courts is to the contrary and not the practice followed by Lord Romilly. We never hesitate to appoint a provisional liquidator of a company in an appropriate case particularly when a strong prima facie case for winding up is made out and the court is of the view that it would be just, equitable and proper to appoint a provisional liquidator in the interest of the company, the complaining shareholders or creditors or the workmen's or public interest etc. Section 450(1) does not impose any such restriction or limitation on the exercise of the power vested in the company court while considering an application for appointment of a provisional liquidator. It is well-settled that discretionary power must be exercised on just and equitable considerations and the court can appoint a provisional liquidator of a company

only if it would be proper to do so after weighing all the pros and cons of the matter and after considering as to whether the petitioners have made out a strong prima facie case for winding up of the company. The mere possibility of the court taking a different view at the stage of final hearing of the petition for winding up or at the stage of consideration of "admission" of the petition can be no ground to deny jurisdiction to the court to pass appropriate interim orders in the interest of justice as contemplated u/s 450 of the Act. With respect, I do not agree with the views expressed by Lord Romilly in the abovereferred case.

17. Shri Sailesh Shah, learned counsel for respondents Nos. 1 to 4, also invited the attention of the court to the judgment of the High Court of Madhya Pradesh in the case of Kailash Prasad Mishra v. Medwin Laboratory Pvt. Ltd. [1988] 63 Comp Cas 810. Learned counsel submitted that the High Court of Madhya Pradesh had followed the dictum of Lord Romilly in the abovereferred case reported in [1866] LR 2 EQ 231. In my judgment, learned counsel is mistaken. The abovereferred judgment reported in [1866] LR 2 EQ 231 is merely referred to in the abovereferred Madhya Pradesh case and is not cited with approval. In the abovereferred case, the High Court of Madhya Pradesh held that the appointment of a provisional liquidator should not be resorted to except in special circumstances. The view taken by the High Court of Madhya Pradesh, with respect, merely means that the court should not lightly grant an application for appointment of a provisional liquidator. The court would not appoint a provisional liquidator of the company unless the court is satisfied that the passing of such an order is absolutely necessary. The court would not appoint a provisional liquidator merely because allegations are made in the petition against the management. To my mind, this judgment does not support the preliminary contention urged by Shri Sailesh Shah.

18. At the concluding stage of arguments, Shri Aspi Chinoy, learned counsel for respondents Nos. 1 to 4, who led Shri Sailesh Shah, made an altogether different submission on this aspect. Learned Counsel submitted that the jurisdiction of the company court to appoint a provisional liquidator in an appropriate case at any stage was not disputed by the contesting respondents. Relying on a passage from Pennington's Company Law, fifth edition, at page 867, learned counsel submitted that the company court can appoint a provisional liquidator only in limited categories of cases like "public interest" and in no other case. The relevant portion of the said passage reads as under :

"At any time after the presentation of a winding up petition the court may appoint the official receiver or any other fit person to be a provisional liquidator of the company. The purpose of making the appointment is to preserve the company's assets and to prevent the directors from dissipating them before a winding up order can be made. It has been said that a provisional liquidator will only be appointed if the company is the petitioner or if it consents to the appointment, or if the company is clearly insolvent, or if it is obvious to the court that a winding up order will be made. These dicta show the court's reluctance to

pre-judge the issue between the petitioner and the company by appointing a provisional liquidator before the hearing of the petition, but it has also been held that the court's power to appoint a provisional liquidator is not limited to such cases and may be exercised if there is an interest of the public to be protected ..."

19. In my judgment, the proposition formulated by Shri Aspi Chinoy is too wide and cannot be accepted by the court. In my opinion, the submission made by learned counsel is not covered by the aboveresferred passage. No such limited category or exceptions can be carved out by any court in matters left entirely to the judicial discretion of the court. The court may appoint a provisional liquidator of the company immediately on presentation of petition for winding up on that ground that it is necessary so to do in public interest. Some such cases are referred to in the formulation of statement of law by Pennington in his well known work on Company Law, fifth edition, at page 867. It does not follow therefrom that public interest is the only recognised ground which can form the basis for appointment of a provisional liquidator. It is neither possible nor desirable to exhaustively enumerate the situations in which a provisional liquidator may be appointed by the company court. I would, however, give illustration of cases where appointment of a provisional liquidator would be justified. Some such illustrative situations can be broadly listed as under :

(a) where the company is virtually insolvent or the substratum of the company has disappeared and a strong prima facie case is made out :

(b) where the assets of the company are in jeopardy;

(c) where it is proved by a strong prima facie case that the management representing the majority shareholders of the company is conducting the business of the company to the prejudice of the company and the minority shareholders as if their own contrary to normal business principles proving lack of probity and jeopardy to the interest of complaining shareholders :

(d) where the majority of the shareholders in collusion with each other are indulging in acts of manipulation and purported transactions which appear on their face to be a subterfuge or bogus;

(e) public interest;

(f) interest of company or shareholder as a class.

20. If prima facie it appears to the court that dissolution of the company is likely to be ordered at the final hearing of the petition for winding up, the court may take this prima facie view also into consideration as one of the relevant factors governing exercise of judicial discretion. Learned counsel for the contesting respondents have submitted that the court ought not to appoint a provisional liquidator of the company, whatever may be the nature of allegations and prima facie proof in support thereof until the petition is at first admitted, inter alia, on the ground that passing of such an order at the pre-admission stage of the petition would amount to pre-judging of the petition itself. Whenever the court is

required to pass an appropriate interim order after applying the criteria as to whether a prima facie case is made out on the merits, the court is bound to form an express opinion on the prima facie merits of the case. It is not quite accurate to state that the formation of a prima facie opinion on the merits of the petition for the purpose of deciding an application for appointment of a provisional liquidator amounts to pre-judging the petition itself on the merits. In any event, the provisions of section 450 of the Act cannot be nullified even if appointment of a provisional liquidator prior to admission of the petition in a proper case amounts to pre-judging of the petition to some extent. No application for interim relief can be decided by the court unless a prima facie view in respect of the merits of the claim in the main proceedings is formed at least to some extent. It is inherent in the judicial process.

21. Justice S. C. Pratap (as His Lordship then was), had an occasion to deal with an application for appointment of a provisional liquidator in a somewhat different context in the case of *In re: The Central India Spinning, Weaving and Mfg. Co. Ltd.*, . In this case, the company itself applied for appointment of a provisional liquidator. That, however, makes no difference to the analysis of legal principles laid down in that case. At page 228 of the said judgment Pratap J. observed that the jurisdiction of the court in this respect (meaning thereby in respect of appointment of a provisional liquidator) was discretionary and the discretionary jurisdiction must be exercised by the court carefully and judicially. In this case, it was further observed by our High Court in terms that in cases where there was an eminent risk and danger to the assets of the company, the court would be justified in appointing a provisional liquidator. To my mind, it is clear that the exercise of discretionary jurisdiction vested in the company court cannot be curtailed or restricted in the manner suggested by learned counsel on behalf of the contesting respondents. There is a variety of situations in which the court may reach the conclusion that the appointment of a provisional liquidator of the company would be justified. In such cases, it would be the duty of the court to grant the application for appointment of a provisional liquidator. I am in respectful agreement with the observations of Pratap J. in the abovereferred judgment.

22. It is of considerable relevance to refer to the judgment of Sir Robert Megarry V.C. in the case of *Highfield Commodities Ltd.*, *In re* [1984] 3 All ELR 884; [1985] 1 WLR 149 (Ch D). In this case, Sir Robert Megarry construed section 238 of the English Companies Act. Section 238, in so far as it is material, provides as under :

"The court may appoint a liquidator provisionally at any time after the presentation of a winding up petition."

23. At page 893 of the said judgment, the court observed as under [1985] 1 WLR 159 :

"As the judge said, section 238 is in quite general terms, I can see no hint in it

that it is to be restricted to certain categories of cases. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner."

24. I am in respectful agreement with the view taken by Sir Robert Megarry in the above case to the effect that the power conferred on the court u/s 450 of the Act cannot be restricted to a particular category of cases as sought to be suggested by Mr. Aspi Chinoy, learned counsel, appearing for some of the contesting respondents.

25. I have, therefore, no hesitation in rejecting the preliminary contention urged on behalf of learned counsel for the contesting respondents. I hold that the application for appointment of a provisional liquidator is maintainable in law at this stage and the same must be dealt with on merits.

26. Before I discuss the relevant grounds and facts having a bearing on this application for appointment of a provisional liquidator, it appears to be necessary to discuss the principles applicable to a petition of winding up on the "just and equitable" ground in a case like the one before us court. For the purpose of deciding the application for appointment of a provisional liquidator, I shall have also to address myself to the question as to whether the petitioner has made out a strong prima facie case for winding up the company whether on taking on overall view of the matter, it would be just and equitable, proper, reasonable and necessary to appoint a provisional liquidator as applied for and grant other interim reliefs as sought for. It must be clarified here and now that my prima facie view of the matter as expressed in the later part of this order is only for the purpose of this application and shall not preclude the parties from arguing their respective contentions on the merits at the hearing of the petition for admission or at the final hearing in accordance with law.

27. In Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, , P. K. Goswami J., speaking for the apex for the apex court, in para 33 of his judgment, observed that the words, "just and equitable" used in the said clause (not to be construed as ejusdem generis with the preceding five clauses) left the entire matter to the wide and wise judicial discretion of the court and the only limitations were contained in the content of the word "just and equitable" themselves. It is thus neither possible nor desirable to exhaustively lay down the categories of headings of situations in which the "just and equitable" clause can be invoked for winding up of a company. With this preface, it is desirable to illustrate at least a few situations in which the "just and equitable" clause for the winding up of company is sometimes invoked and the application thereof is upheld by the court. Para 1000 and para 1001 of Halsbury's Laws of England, fourth edition, at pages 594 and 595 of volume 7 thereof neatly illustrate some of the relevant categories within the scope and ambit of the "just and equitable" clause.

(A) "The just and equitable" clause for winding up of a company may be invoked

where the real structure of the company sought to be wound up in analogous to a partnership as understood in a company law. It is well-known that in such cases a company would be wound up by applying the principles applicable to dissolution of the partnership firms. On this aspect, the judgments of the House of Lords in the case of *Ebrahimi v. Westbourne Galleries Ltd.* [1973] AC 360 and the judgment of our Supreme Court in the case of *Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another*, are directly relevant. It was observed in the judgment of the Supreme Court in the case of *Hind Overseas Pvt. Ltd.* [1976] 46 Comp Cas 91 referred to hereinabove that where more than one family or several friends and relations together form a company and there is no agreement between the parties for active participation of members in management, the principles of dissolution of partnership cannot be liberally invoked. Principles applicable to dissolution of partnership are applied to the winding up of domestic companies in certain situations as indicated to some extent in the said judgment although no such categories can be exhaustively listed. The question to be asked is as to whether the apparent structure of the company is not its real structure and whether on piercing the veil of the company, it would be found that in reality it is partnership. Shri M. H. Shah, learned counsel for the petitioner, has invoked the principles applicable to dissolution of partnership firms in support of his submission that a prima facie case is made out for appointment of a provisional liquidator of the company. This is one of several submissions of Mr. M. H. Shah.

(B) The "just and equitable" clause is applicable in a variety of other situations. In para 1001 of Halsbury's Laws of England, fourth edition, it has been observed that where the directors of the company treat the business of the company as if it were their personal business and do not carry on the business of the company in the interest of the company or all its shareholders, or where the directors withhold information from shareholders in circumstances which give rise to suspicion to the effect and they are attempting to buy the shares of the minority and an undervalue, or where the misconduct of directors or promoters can only be successfully investigated in a winding up by the court, the "just and equitable" clause would be applicable. On this aspect of law, it is necessary to refer to the judgment of the Supreme Court in the case of *Rajamundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao* [1956] 26 Comp Cas 91; AIR 1965 SC 23. In para 8 of his judgment, Venkatarama Ayyar J., speaking for the Bench, observed as under (at page 97 of 26 Comp Cas) :

"Where nothing more is established than that the directors have misappropriated the funds of the company, an order of winding up would not be just or equitable, because if it is a sound concern, such an order must operate harshly on the rights of the shareholders. But if, in addition to such misconduct, circumstances exist which render it desirable in the interests of the shareholders that the company should be wound up, there is nothing in section 162(vi) which bars the jurisdiction of the court to make such an order."

In a given situation, the acts of misappropriation of funds by the directors by themselves or per se may be considered as ground for winding up of the company. It is a question of balancing of rival interests and the situation. If the court finds that an order of winding up in such a situation would hurt most of the shareholders the court may take action against defaulters-directors instead of passing an order of winding up. It all depends on the facts of each case.

In the abovereferred case before the apex court, the Supreme Court specifically and expressly approved the view taken by the Privy Council in the case of *Loch v. John Blackwood* [1924] AC 783. In this privy Council case, it was observed that the "just and equitable" clause for winding up of a company must operate if there was a justifiable lack of confidence in the management of the company's affairs. Lack of confidence in management must result from the conduct of the directors in regard to the company's business. If the minority shareholders make out a strong prima facie case to the satisfaction of the court that there is a justifiable lack of confidence in the management springing from misconduct, manipulation or subterfuge resorted to by the directors representing the majority of shareholders, the complaining shareholders would be entitled to invoke the "just and equitable" clause for the winding up of the company within the purview of the section 433(f) of the companies Act (1 of 1956), and seek appointment of a provisional liquidator. Shri M. H. Shah, learned counsel for the petitioner, has invoked this facet of the "just and equitable" clause also in support of his submission that a prima facie case for appointment of a provisional liquidator is made out in this case. Mere misappropriation or mismanagement or misconduct of directors may sometimes not be treated as sufficient ground for invoking "just and equitable" clause. What is in the interest of the shareholders as a class is also required to be examined and considered.

(C) Where the substratum of the company has almost disappeared and it is not at all possible for the company to carry on business in accordance with the objects clause contained in the memorandum of the company, the court may be justified in winding up the company under the "just and equitable" clause. Shri M. H. Shah, learned counsel for the petitioner, has also invoked this fact of the "just and equitable" clause in support of his application for appointment of a provisional liquidator.

28. Both learned counsel appearing for the contesting respondents have submitted that the court would not be justified in going behind the audited balance-sheets and profit and loss account of the company at this stage. Learned counsel of the contesting respondents have further submitted that if it can be shown that the petition is not filed by the petitioner bona fide but is filed only with a view to pressurise the majority group with an ulterior motive, the court must decline to grant the application for interim relief as sought for. Learned counsel have submitted that even before the filing of the petition, by their letter dated July 14, 1992, the members of the Bombay group had made a written offer to the members of the Jalgaon group of the effect that they would be willing

to purchase their shares at a value to be fixed mutually, or in the alternative at a value which may be fixed by a eminent architect or a chartered accountant. Learned counsel for the contesting respondents have submitted that the said offer shows the bona fides on the part of the contesting respondents. Learned counsel have further submitted that the total lack of response to their offer on the side of the petitioner and members of his group prove the mala fides on the Jalgaon group. Learned counsel have contended that in such a situation the irresistible inference would be that the members of the Jalgaon group are not interested in safeguarding their legitimate rights as shareholders but are bent upon attempting destruction of this company with the ulterior motives.

29. It has been further contended on behalf of the contesting respondents that the principles of dissolution of partnerships can never apply to the first respondent as the complainant group of shareholders were never concerned with the management of the affairs of the company and there was no agreement whatsoever between the two groups of share holders to share the management. It has been contended that "partnership principles" cannot be applied in a situation where there is no deadlock. It has been contended that the principles of dissolution of partnerships cannot be applied to this case merely because the company has taken over the assets and liabilities of the dissolved firm as on March 31, 1981, i.e., soon after its incorporation.

30. Both learned counsel for the contesting respondents have seriously disputed the allegation of the petition to the effect that the substratum of the company has disappeared. Learned counsel for the contesting respondents have submitted that they are willing to submit to an appropriate order of injunction.

31. The contesting respondents have denied the allegations of lack of probity, misconduct and manipulation, fraud, collusion and subterfuge.

32. In *Ebrahimi v. Westbourne Galleries Ltd.* [1973] AC 360, the House of Lords reversed the decision of the Court of Appeal and laid down the principles to be kept in mind while considering a petition for winding up a company under the "just and equitable clause". The said judgment is a leading authority on the subject of application of principles concerning the dissolution of partnership firms to winding up of limited companies more or less by analogy. At page 374 of the judgment, Lord Wilberforce observed as under :

"First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not to be reduced to the sum of particular instances."

33. At page 376 of the judgment, the House of Lords referred to and relied upon the dictum of the Privy Council in the case of *Loch v. John Blackwood Ltd.* [1924] AC 783. The Privy Council case was a case of a domestic company but not of deadlock. In this case, one of the directors has given grounds for loss of confidence in his probity and had shown that he regarded the business as his

own. At page 379, Lord Wilberforce observed that the words "just and equitable" were a recognition of the fact that a limited company was more than a mere legal entity and that there was room in company law for recognition of the fact that behind it, or amongst it, there were individuals, with rights, expectations and obligations inter se which were not necessarily submerged in the company structure. Lack of probity, loss of confidence resulting therefrom and the conduct of the managing director and majority shareholders in deliberately keeping the minority in ignorance of the financial position of the company in order to acquire their shares at an undervalue, are held in the Privy Council judgment in *Loch v. John Blackwood Ltd.* [1924] AC 783, as sufficient ground for invoking the "just and equitable" clause. In the same case, Lord Cross of Chelsea observed at page 383 as under :

"In some of the reported cases in which winding up orders have been made those who opposed the petition have been held by the court to have been guilty of a "lack of probity" in their dealings with petitioners. Thus in *Loch v. John Blackwood Ltd.* [1924] AC 783, the managing director and majority shareholder was deliberately keeping the minority in ignorance of the company's financial position in order to acquire their shares at an undervalue ..."

34. Shri M. H. Shah, learned counsel for the petitioner, relied on the observations made by the Supreme Court in the case of *State of U.P. and Others Vs. Renusagar Power Co. and Others*, to the effect that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited.

35. Shri. J. B. Chinai, learned counsel for respondents Nos. 5 to 8 and 14, cited the following judgments in support of his submissions. The ratio of these judgments shall have to be kept in mind while applying the relevant principles to the facts of this case for the purpose of deciding the application for appointment of a provisional liquidator made by the petitioner. It does not, however, appear to be necessary to discuss each of these judgments. The judgments cited are listed below for the sake of ready reference, if necessary :

Lokenath Gupta and Others Vs. Credits Private Ltd., , *Abnash Kaur Vs. Lord Krishna Sugar Mills and Others*, , *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, ; *In Re: Atul Drug House Ltd.*, ; *Gadadhar Dixit v. Utkal Flour Mills Pvt. Ltd.* [1989] 66 Comp Cas 188 (Ori); *Cini Industries and Recording Co. Ltd.*, *In re* [1942] 12 Comp Cas 215; AIR 1942 Bom 231 and *Malabar Industrial Co. Ltd. Vs. A. John Anthrapper*,

36. I have gone through all these cases and considered the ratio thereof.

37. I shall now summarise the material facts emerging from the petition and the affidavits filed at the hearing of the application for appointment of a provisional liquidator in so far as the same are relevant for deciding this application. It shall be necessary to consider as to whether the petitioner and supporting respondents have made out a strong prima facie case in support of the petition

for winding up the company and as to whether it would be just and equitable, reasonable and fair and absolutely necessary to appoint a provisional liquidator of the company and grant other appropriate reliefs.

(a) The company owns a plot of land situate at 85, Hill Road, Bandra, Bombay, admeasuring about 1,670 square metres. Instead of setting up a residential hotel, the company proceeded to construct a shopping arcade and construct other areas as per details broadly indicated in exhibit "F" to the petition. The company disposed of various shops and stalls, etc., on ownership basis.

(b) Sometime in or about the year 1986, respondent No. 14 was incorporated. The said company is purely a domestic company of which 94 per cent, of the shares are held by members of family of respondent No. 2 and members of the Bombay group. Members of the Jalgaon group do not hold any shares in the said company. Respondents Nos. 2, 3, 5 and 6 are the directors of respondent No. 14. Respondents Nos. 2, 5 and 8 are directors of the first respondent-company.

(c) On September 17, 1986, an agreement was arrived at between the first respondent-company and respondent No. 14, a copy of which is included in the compilation of documents filed by the petitioner. By the said agreement, the company granted leave and licence to respondents No. 14 in respect of a portion of the upper basement premises for installing and operating its safe deposit vault in Bandra for a period of nine years commencing from September 1, 1986, with an option to renew the same for a further period of nine years. A sum of Rs. 1,600 per month was fixed as licence fee. Clause 3 of the said agreement is of considerable significance in the context of the contentions raised on behalf of the petitioners and supporting respondents regarding lack of probity on the part of the management of the first respondent-company. By clause 3 of the said agreement, it was provided that respondent No. 14 shall deposit with and keep deposited with respondent No. 1 a sum of Rs. 30 lakhs as security free of interest and the said sum of Rs. 30 lakhs shall be deposited as under :

(a) Rs. 20 lakhs within one year from the date of the agreement;

(b) Rs. 10 lakhs within two years from the date of the agreement :

The condition of deposit of Rs. 30 lakhs free of interest forms part of the consideration in respect of the said transaction. Neither the said sum of Rs. 30 lakhs nor any part thereof was ever deposited by respondent No. 14. The management of respondent No. 1 led by respondent No. 2 never complied with the said condition. The said agreement dated September 17, 1986, was preceded by the board resolution of respondent No. 1, dated April 11, 1986. The minutes of the said board resolution clearly show that respondent No. 2 and respondent No. 5 alone were present at the board meeting and direct and substantial interest in respondent No. 14 was not disclosed to respondent No. 1 company. It is the case of the contesting respondents that on October 4, 1990, a supplemental agreement was arrived at between respondent No. 1 and respondent No. 14. Respondent No. 14 company is directly and substantially

managed and controlled by respondent No. 2 and his family members. A copy of the said supplemental agreement is included in the compilation of documents. It is purported to be provided by the said agreement that respondent No. 14 has not been able to get business in respect of booking of lockers in the vault as anticipated. Clause 3 of the said supplemental agreement or the purported agreement, if one may use the said expression, reads as under :

"In the circumstances, at the request of the licensee it is agreed that the deposit required to be made in pursuance of clause 3 (meaning thereby clause 3 of agreement dated September 17, 1986), will not be insisted upon by the licensor at least for another three years unless the licensee starts making profit or has bookings at least for 1,000 lockers."

The petitioner and supporting respondents have assailed both the agreement dated September 17, 1986, as well as the supplemental agreement dated October 4, 1990, as the purported transactions indicate lack of probity on the part of the management in support of their contention that the affairs of the company have been managed by respondent No. 2 and his group in a manner prejudicial to the company and its shareholders. I am not persuaded to examine the grounds of challenge in respect of the agreement dated September 17, 1986, as such. The transaction appears to me to be an old transaction and the possibility of implied consent or knowledge of the transaction on the part of shareholders belonging to the Jalgaon group cannot be ruled out. I am, however, satisfied that the agreement dated October 4, 1990, shows lack of probity on the part of the majority led by respondent No. 2 and the said supplemental agreement is grossly unfair and prejudicial to the interests of the first respondent company. I also do not consider it necessary to examine the legal effect of non-disclosure of interest on the part of respondent No. 2 and respondent No. 5 in the board meeting dated April 11, 1986, at this stage.

(c) Some time in the year 1989, respondent No. 1 entered into an agreement with respondent No. 15, whereby respondent No. 1 allowed respondent No. 15 to conduct a restaurant on the first floor of its property situate at 85, Hill Road, Bandra, Bombay. Respondent No. 15 is an outsider. I do not propose to examine the grievance of the petitioner and supporting shareholders in respect of this transaction also for the purpose of present application.

(d) Respondent No. 2 has admitted in para 4(g) of his affidavit dated October 12, 1992, that in or about February, 1992, the disputes and differences between the parties (meaning thereby members of the Jalgaon group and their relatives being partners or shareholders in allied firms or companies on the one hand and members of the Bombay group and their relatives being partners or shareholders in allied firms or companies on the other hand) commenced and series of litigations were filed by the parties against one another.

(e) It is averred in para 8 of the petition that in February or March, 1992, the petitioner and respondents Nos. 9 and 11 discovered that respondents Nos. 2 to

5 and their family or group members had perpetrated a massive fraud on the petitioner, respondents Nos. 9 and 11 and their group members in the matter of the affairs of Gitaneel Builders (India). On April 25, 1992, respondent No. 9 and his daughter one Kalpitta Patel filed Company Petition No. 225 of 1992, in this court for an order of winding up of the affairs and business of Gitaneel Builders (India) u/s 582/583 of the Companies Act, 1956, and applied for appointment of the official liquidator as provisional liquidator. Respondent No. 2, Bhagwandas J. Patel, the chairman and managing director of respondent No. 1 company herein, was respondent No. 6 in the said Company Petition No. 225 of 1992. On April 30, 1992, Jhunjhunwala J. passed a speaking order on the judge's summons taken out in the said petition, being Judge's Summons No. 265 of 1992. By the said order, the learned judge appointed the official liquidator as provisional liquidator of the said Gitaneel Builders (India). Gitaneel Builders (India) is a partnership firm and was treated by the parties in the said litigation as an unregistered company u/s 582 of the Companies Act, 1956. In the said order dated April 30, 1992, the learned judge referred to the deed of partnership dated September 25, 1986, providing that the bank account of the said firm/company would be operated by Bhagwandas representing the members of group "A" (meaning thereby the Bombay group) and Pravinchandra (respondent No. 9 herein) representing the members of group "B" (meaning thereby the Jalgaon group) and all transactions for sale of premises on ownership basis or otherwise would be effected by and under the joint signatures. The learned judge recorded a prima facie finding in the said order that Bhagwandas Jinabhai Patel acting in collusion with members of this group and with fraudulent intention had changed internal pages of the original of the said deed of partnership so as to oust Shri Pravinchandra and members of his group from joint control for the purpose of making secret profits, etc. I am not borrowing the findings of the learned judge for the purpose of this case. It shall, however, be necessary to take into consideration the factum of existence of various disputes between more or less the same parties while examining the grievance made by the members of the Jalgaon group in this application.

(f) Some of the members of the Jalgaon group have interest in another partnership firm, treated as an unregistered company, known as Vikram Builders, Respondents Nos. 2 to 5 in this petition are the partners in the said firm from the Bombay group. It is averred in para 12(d) of the petition that some time in the month of March, 1992, the petitioner discovered a massive fraud on the part of Bhagwandas and members of his group in relation to the affairs of Vikram Builders. Some time in the month of May, 1992, and prior to May 22, 1992, respondent No. 1, Shri Anilkumar J. Patel, in his capacity as karta of his Hindu undivided family filed Company Petition No. 290 of 1992 in this court for winding up Vikram Builders. The petitioners invoked the "just and equitable" clause for winding up the said unregistered company/firm. By an order dated May 22, 1992, the learned vacation Judge, Mr. Judge S. H. Kapadia, granted an ad interim injunction in terms of some of the prayers of the judge's summons taken out in

the said proceeding. It was recorded by the learned judge in his order dated May 22, 1992, that the managing partner, Mr. Bhagwandas Patel, was lying in hospital and it was necessary for the contesting respondents to obtain instructions.

(g) By its order dated July 21, 1992, the Division Bench dismissed Appeal No. 401 of 1992 arising from order dated April 30, 1992, passed by Jhunjhunwala J. on the judge's summons taken out by the petitioners in Company Petition No. 225 of 1992. By an order dated July 27, 1992, B. N. Srikrishna J. Passed an order for appointment of a provisional liquidator in Company Petition No. 241 of 1992 concerning Vikram Builders finding prima facie merit in the grievance of the members of the Jalgaon group to the effect that bogus transactions had been entered into to the prejudice of the company and its shareholders. By an order dated August 5, 1992, passed in Appeal No. 524 of 1992 the Division Bench dismissed the appeal filed by Vikram Builders against the order passed by B. N. Srikrishna J. appointing the provisional liquidator as liquidator of the said company. By an order dated August 5, 1992, B. N. Srikrishna J. granted an ad interim order after hearing the parties appointing the official liquidator as provisional liquidator of the first respondent-company.

(h) The upper basement of the property belonging to the company consists of built up area admeasuring about 7,500 square feet. About 2,500 square feet of the said built up area is given on leave and licence by respondent No. 1 to respondent No. 14 for its safe deposit vault under agreement dated September 17, 1986. The balance of about 5,000 square feet consists of a huge hall without any partition walls and without any division thereof in separate and independent units or otherwise. The company also owns shop No. 10 on the ground floor of the same property and units numbered as M-2, U-1 and U-2.

(i) Shri Bhagwandas J. Patel, the chairman and managing director of respondent No. 1, representing the majority group of shareholders, i.e., the Bombay group, has propounded the following purported transactions between the company and respondent No. 2 and members of his group. The petitioner and supporting respondents have assailed these purported transactions as subterfuge, acts of manipulation and as an attempt to impose totally bogus transactions on the company and its shareholders. The petitioner and supporting respondents have assailed the case propounded by respondent No. 2 on the ground of lack of probity as well as an act of attempted misappropriation of the assets of the company; contending also that the assets of the company are in jeopardy. The said purported transactions are as under :

(j) On May 22, 1992, respondent No. 1 is supposed to have entered into an agreement to sell units Nos. 1, 2, 3, 4 and 5 to Shri Bhagwandas J. Patel individually admeasuring 441.68 square feet for total consideration of Rs. 8,75,000. The alleged agreement is signed by Shri Bhagwandas J. Patel himself in his purported capacity of director of respondent No. 1 and by Shri Bhagwandas J. Patel himself in his purported capacity as supposed purchaser of the said alleged units. It is alleged that the company received a sum of Rs. 15,000 by

cheque from Shri Bhagwandas J. Patel on May 22, 1992, out of the said sum of Rs. 8,75,000. A mere glance at the said document is enough to show that the said transaction is in the nature of subterfuge and is completely bogus. A typed sheet is inserted in a printed document. The said purported document confers the right on the alleged purchaser to construct the partition walls and the right to sell, lease or dispose of the so-called units to a third party. The said purported document states that the alleged purchaser shall be liable to pay the balance of Rs. 8,60,000 to the company within a period of 18 months from the date the builders intimate to the purchaser about the change of user having been sanctioned by the Bombay Municipal Corporation. On May 22, 1992, Shri Bhagwandas J. Patel was lying in hospital. On May 22, 1992, Kapadia J. had passed an ad interim order in the proceeding concerning Vikram Builders with a prayer for appointment of a provisional liquidator. Prior to May 22, 1992, Jhunjhunwala J. had already appointed a provisional liquidator in respect of Geetaneel Builders (India). It is now alleged that a sum of Rs. 1,50,000 was paid by Shri Bhagwandas to the first respondent-company in further part payment of the balance of the amount in August, 1992. The company filed this petition with the averment that the entire upper basement save and except the portion of the premises occupied for safe deposit vault was lying vacant and was in the possession of the first respondent-company. The abovereferred purported document and the alleged transaction supposed to have been evidence thereby was not even referred to in the first affidavit in the reply of Shri Bhagwandas Patel dated July 30, 1992. The purported document and the names of the alleged buyers of the so-called units are not disclosed even in the affidavit dated October 12, 1992, made by Shri Bhagwandas Patel. The said purported documents amount to evasion of stamp duty and are inadmissible in evidence for all purposes. The document is liable to be impounded.

(k) Shri Bhagwandas J. Patel has alleged that on May 22, 1992, when he was lying in hospital, the company entered into similar agreement of sale in respect of units No. 6, 7, 8, 9, 10 and 11, forming part of the upper basement, admeasuring 453.81 square feet in favour of Shri S. V. Patel, another director of the company and another member of the Bombay group. The alleged consideration in respect of the said transaction is supposed to have been stipulated at Rs. 8,10,000. A sum of Rs. 15,000 is supposed to have been paid against the alleged transfer of possession with right to dispose of the units in favour of third parties. All the stipulations contained in the purported document dated May 22, 1992, in favour of Shri S. V. Patel are identical with the stipulations in the purported document in favour of Shri Bhagwandas J. Patel. The said purported document is reasonably assailable as a bogus document.

(l) Shri Bhagwandas J. Patel has also now alleged that on May 22, 1992, the company had entered into another agreement of sale in favour of his daughter-in-law, Mrs. Jyotika B. Patel, in respect of unit No. 16, admeasuring 114.56 square feet for consideration of Rs. 1,58,000 and possession of the said unit is supposed to have been parted with by the company to the said Mrs. Jyotika B. Patel on

receipt of Rs. 15,000 by the company. All the allegations on either side in respect of this transaction are identical. The said document is also a bogus document.

(m) Respondent No. 2 further alleged that on May 22, 1992, the company had entered into another agreement of sale in respect of units Nos. 17, 18, 19, 20 and 21 admeasuring in the aggregate 438.75 square feet for Rs. 8,92,000 in favour of Smt. Shardaben B. Patel (wife of respondent No. 2). It is now alleged by the management that the company is supposed to have parted with possession of the said units to Smt. Shardaben B. Patel on receipt of Rs. 15,000 coupled with the right to construct partition walls and to sell or dispose of the said units to any third party. All the allegations in respect of this purported transaction on either side are identical. Prima facie, the document and purported transaction are bogus.

(n) Respondent No. 2 has further alleged that on May 22, 1992, the company is supposed to have entered into a transaction in respect of unit No. M-2 on the mezzanine floor in favour of Bhupesh B. Patel (son of respondent No. 2) for a total consideration of Rs. 1 lakh. The company is supposed to have parted with possession in respect of the said unit in favour of the said son of respondent No. 2 on receipt of Rs. 15,000. Prima facie, the alleged document and the alleged transaction are bogus.

(o) Respondent No. 2 has now alleged that on June 1, 1992, the company had granted leave and licence in favour of Smt. Jayshree S. Patel in respect of unit No. 2, purporting to lease the said unit for a period of 10 years in favour of the said lessee at a rent of Rs. 300 per month. The said Smt. Jayshree S. Patel is the wife of Shri S. V. Patel, respondent No. 5. The said transaction is equally in the nature of subterfuge and an act of manipulation.

(p) Respondent No. 2 has further alleged that on June 1, 1992, the company had entered into an agreement in respect of unit No. U-1 with one Falguni B. Patel, daughter of Shri Bhagwandas Patel, purporting to create a lease in her favour for 10 years in respect of the said unit. Prima facie, the alleged document and the alleged transfer are bogus.

(q) The aforesaid documents relied upon by respondent No. 2 and members of the Bombay group were suppressed from the court and members of the Jalgaon group until forced to disclose the same in pursuance of the orders passed by this court from time to time. No reference is to be found to these documents in the affidavits of Shri Bhagwandas J. Patel dated July 30, 1992, or October 12, 1992.

(r) Respondent No. 2 has further alleged that on May 7, 1992 (much after the passing of the order dated April 30, 1992, by Jhunjhunwala J. in Judge's Summons No. 265 of 1992 in Company Petition No. 225 of 1992) the company granted a lease in respect of shop No. 10 on the ground floor of its property situate at 85, Hill Road, Bandra (West), in favour of respondent No. 14. No reference is to be found to this document in the affidavit dated July 30, 1992, or in the affidavit filed by respondent No. 14 nor a copy of the said alleged

document dated May 7, 1992, was made available to the court till recently. The said purported document now forms part of the compilation of documents. It is alleged by the contesting respondents that the said document was executed in pursuance of the board resolution dated April 25, 1992, at which Shri B. J. Patel and Shri S. V. Patel were present. It is alleged that at this board meeting, Shri B. J. Patel and Shri S. V. Patel, in their capacity as directors of respondent No. 14, had disclosed to Shri B. J. Patel and Shri S. V. Patel, in their capacity as directors of respondent No. 1, that the said directors were interested in respondent No. 14. The purported agreement dated May 7, 1992, is now described by learned counsel for the contesting respondents as an agreement to lease and not lease itself, perhaps in view of non-payment of proper stamp duty and lack of registration formalities. The said purported lease is supposed to be for a period of 10 years commencing from May 7, 1992, and the alleged rent is supposed to have been stipulated to Rs. 2,500 per month. It is also alleged that respondent No. 14 paid a sum of Rs. 3 lakhs as deposit to respondent No. 1. It is contended on behalf of the petitioner and the supporting respondents that ship No. 10 was the registered office of the first respondent-company. The allegation is denied by the contesting respondents. The purported transaction appears to me to be bogus and clearly an act of manipulation. Practically all these documents are liable to be impounded as understamped.

(s) It has also come to light that on October 15, 1991, the company is supposed to have entered into almost similar transactions in respect of units Nos. 11, 12, 13, 14 and 15 in favour of Kiran International, a concern of Shri Bhagwandas Patel for a total consideration of Rs. 7,90,000. It is alleged that on receipt of Rs. 2 lakhs, possession of these units was handed over by the company to Kiran International. Although the purported document in respect of this transaction is dated October 15, 1991, this transaction also appears to me to be equally bogus and an act of manipulation. In fact no units are in existence; no construction walls are constructed. Merely because some credit or debit entries are made in the book of account of respondent No. 1 at the instance of Bhagwandas and his group, it does not follow that all these transactions are bona fide or entered into in the ordinary course of business.

(t) It is the case of the petitioner and the supporting respondents that the prevailing market price of commercial premises at Bandra at the relevant time was not less than Rs. 5,000 per square feet and by the purported transactions, Shri Bhagwandas J. Patel wants to cause loss of Rs. 1,27,00,100 to the company in addition to causing loss to the company in a sum of Rs. 37 lakhs by attempting to enter into a lease in respect of shop No. 10 by the purported document dated May 7, 1992. It is not necessary for the court to ascertain the market rate prevailing at Bandra in this locality in respect of the commercial premises at the impugned transactions, on the face of it, are bogus.

(u) The contesting respondents suppressed even the minimum details in respect of the impugned transactions from the petitioner and members of the Jalgaon

group of a considerable time. All the affidavits filed at the hearing of the judge's summons shall have to be taken into consideration for the purpose of application for appointment of a provisional liquidator.

(v) The petitioner and members of the Jalgaon group have, inter alia, assailed the purported transactions dated October 15, 1991, May 7, 1992, May 22, 1992 and June 1, 1992, as an act of subterfuge and an act of manipulation on the part of respondent No. 2 and other directors. The petitioner and the contesting respondents contended that all these purported transactions show lack of probity on the part of the contesting respondents and the petitioner and the contesting respondents have established that there is clear danger to the assets of the company. The affairs of the company have been conducted or purported to be conducted in a manner most prejudicial to the company and the complaining share-holders and there is a clear attempt to appropriate or misappropriate the assets of the company. It has been contended that there is a justifiable lack of confidence in the management and majority shareholders. It is contended on behalf of the petitioner and supporting respondents that Bhagwandas J. Patel and members of his group have indulged in acts of fraud and in collusion with each other have purported to deal with the assets of the company as if the same are their personal assets. The petitioner has alleged that Shri Bhagwandas Patel and members of his group have no regard for business morality or for the interest of others. I find considerable merit in each of the submissions made on behalf of the petitioner and supporting respondents.

38. Shri Bhagwandas Patel has contended that the above referred premises, i.e., the so-called 21 units were lying unused and there is nothing surprising about the transaction between the company and the shareholder purchasers. Learned counsel for the contesting respondents made a half-hearted attempt to contend that the company was favoured by the alleged purchases by entering into the above-referred transactions. The bare narration of the above facts discloses a shocking state of affairs. The court thereupon enquired of learned counsel for the contesting respondents as to whether the parties would be willing to nullify the impugned transactions entered into after the disputes on behalf of Shri Bhagwandas Patel and his family members or members of his group. No reply was forthcoming. Very strange and unrealistic arguments were advanced on behalf of the contesting respondents to the effect that the disputes in respect of the first respondent-company had arisen only on July 28, 1992, and the impugned transactions having been entered into prior thereto cannot be and ought not to be suspected. It is not disputed that the same parties were litigating in respect of several allied firms/companies in this court since April, 1992. I find no merit in any of the submissions made on behalf of the contesting respondents. It was also contended by learned counsel for the contesting respondents that as far as third parties were concerned, they were bona fide purchasers without notice and the third party purchasers could not be dispossessed from the said units. In my opinion, each of the above-referred purported transactions is bogus and is in the nature of subterfuge or make-

believe. There is nothing bona fide about any of these transactions. It is not believable that any of the alleged purchasers are in possession of any of the alleged units. There is intrinsic evidence in the contents of the documents, now produced at a very late stage on behalf of respondent No. 2, that the purported documents are bogus and can never be considered as bona fide documents. Each of the alleged purchasers or lessees is respondent No. 2 or his relative or his own firm or concern. If respondent No. 2 and members of his group are to be believed, it would follow that after April 30, 1992, respondent No. 2 is supposed to have disposed of the assets of the company in his own favour and in favour of his relative. By applying the same standard, the alleged transaction dated October 15, 1991, is liable to be treated as equally bogus. Respondent No. 2 and members of his group perhaps planned the acts of manipulation even prior to February, 1992, or October, 1991. Even the supplemental agreement dated October 4, 1990, shows total lack of bona fides and fraudulent conduct on the part of respondent No. 2 and his group. In my opinion, a strong prima facie case is made out for the winding up of the company on the ground of lack of probity, acts of manipulation, carrying on of the business to the complete prejudice of the company and its shareholders. At any rate, a strong prima facie case is made out by the petitioner and supporting respondents for appointment of a provisional liquidator on the above-referred grounds alone.

39. Learned counsel for the petitioner has contended that the company has lost its substratum as obvious from the profit and loss account and the balance-sheets of the company. Learned counsel for the petitioner has pointed out that the company is supposed to have suffered losses in the years 1982-83, 1983-1984, 1985-86, 1987-88, 1988-89 and 1989-90 and a sum of Rs. 6,31,129 is the accumulated carried forward loss. Learned counsel for the petitioner has also invited the attention of the court to the balance-sheet of the company for the year ended March 31, 1987, and particularly to Schedule X appended thereto. The impugned item in Schedule X reads as under :

"Other income. - Value of the land received from Vikram Builders Rs. 68,56,000."

40. Learned counsel submitted that this transaction is nothing but a mystery and an act of manipulation. Learned counsel submitted that no particulars in respect of the land in question in respect whereof respondent No. 1 company is supposed to have received a sum of Rs. 69,56,000 are ever disclosed by the majority group. There is some force in the contention of Shri Shah. I have considerable suspicion. Nevertheless I am not prepared to go behind the audited balance-sheet at this state. I am also not convinced that the substratum of the company has disappeared and a prima facie case is made out for the winding up of the company on this ground also. If the impugned transactions are a subterfuge and make-believe, it follows that the company is possessed of substantial assets as its owner. I have gone through the "objects clause" from the memorandum of the company. The company is entitled to carry on business in real estate and

activities of the company need not be restricted to the plot situate at 85, Hill Road, Bandra, Bombay. Even the possibility of a residential hotel coming up cannot be ruled out, although no sufficient F.S.I. is available, in so far as the plot of the company situate at 85, Hill Road, Bandra, is concerned. It is contended on behalf of the contesting respondents that the company would be able to start the residential hotel by arranging for transfer of development rights from other owners as permissible under the Development Control Rules. It is not possible to accept the submission made on behalf of the petitions at this stage. Accordingly, I am not prepared to accept the submissions of the petitioner and supporting respondents in so far as this ground for appointment of a provisional liquidator is concerned.

41. Learned counsel for the petitioner and the supporting respondents has invoked principles analogous to dissolution of partnerships in support of his submission that a prima facie case for winding up of the company is made out. The petitioner has at the most an arguable case on this point. The contesting respondents have also an equally or perhaps more arguable case in support of their submission that the said principles are not applicable in this case. This is not a case where both groups have equal shareholding. This is not a case where both groups are in management. This is not a case where the members of the Jalgaon group claim a right to management. Having regard to the ratio of the judgment of the Supreme Court in the case of Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, , and the judgment of the House of Lords in the case of Ebrahimi v. Westbourne Galleries Ltd. [1973] AC 360, cited supra, I have reached the conclusion that this ground alleged on behalf of the petitioner is not strong enough to justify an application for appointment of a provisional liquidator. Having found that one of the grounds urged on behalf of the petitioner and supporting respondents is strong enough to justify the grant of the application for appointment of a provisional liquidator, I need not pursue the discussion any further.

42. Learned counsel for the contesting respondents has submitted that the petition for winding up filed by the petitioner lacks bona fides and the motive of the petitioner is to pressurise the majority shareholders and ruin the company. Both learned counsel for the contesting respondents have relied upon offers to purchase shares from members of the Jalgaon group contained in letter dated July 14, 1992, being exhibit "G" to the plaint, and letter dated December 2, 1992, addressed by advocates, N. N. Vaishnav and Company, advocates representing respondents No. 1 to 4, to Hiralal Thakker and Co., advocates representing the petitioner. The contesting respondents have made the said offer in court "with prejudice". By my order dated December 14, 1992, I had given an opportunity to the parties to submit their offers in sealed covers taking the rate at which they would be willing to purchase or sell their respective shares to the other group. The sealed covers submitted on both sides are opened in open court and the experiment totally failed. Both the sealed covers were resealed. The members of the Bombay group want the valuer to adjudicate upon the disputes

in respect of the bona fides or validity of the impugned transactions like the transactions dated May 7, 1992, May 22, 1992, June 1, 1992, and October 15, 1991, etc. The members of the Jalgaon group are not agreeable to leave this question to the arbitration of the valuer. Having given my anxious thought to this aspect of the matter, I have reached the conclusion that there is a serious attempt on the part of the Bombay group to purchase the shares of members of the Jalgaon group at a gross under valuation and prolong the matter. No useful purpose would be served by pursuing this discussion since the allegations made against the contesting respondents prima facie disclose a shocking state of conduct on the part of Shri Bhagwandas J. Patel, chairman and managing director of respondent No. 1 company, and members of his group. It is impossible to hold that the petition is filed by the petitioner with a view to ruin the company. In my opinion, the petition is filed by the petitioner and members of the Jalgaon group bona fide and the remedy pursued is a legitimate one and within the four corners of the Companies Act (1 of 1956).

43. Learned counsel for the contesting respondents has submitted that an order of injunction would meet the ends of justice and the official liquidator should not be appointed as liquidator of the company. Having regard to my prima facie conclusions in respect of misconduct of Shri Bhagwandas J. Patel and members of his group, it is not possible to accept this submission.

44. I have not dealt with minor points urged on either side as it is not necessary so to do.

45. In the result, I pass the following order :

(i) The judge's summons is made absolute in terms of prayers (a) and (c) with costs.

(ii) The official liquidator shall be entitled to exercise all the powers on behalf of the first respondent-company as contemplated under the Companies act (1 of 1956), without any limitation or restrictions, subject to the following specific directions :

(a) The official liquidator shall not dispossess respondent No. 14 in respect of premises forming part of the upper basement covered under agreement dated September 17, 1986, entered into between the company and respondent No. 14. The official liquidator shall not dispossess respondent No. 15 or other occupants from the premises on the first floor of company's property situate at Bandra. The Official liquidator shall not disturb the possession of occupants of shops and stall save and except in respect of shop No. 10. The official liquidator shall be entitled to exercise all the rights of the company for recovering rents and profits thereof to the same extent and in other respects as the company is entitled thereto.

(b) The official liquidator do take physical possession of shop No. 10 forming part of the property of the company at Bandra forthwith whoever may be found in possession thereof including by physical dispossession of respondent No. 14

therefrom if respondent No. 14 is found to be in possession thereof.

(c) The official liquidator do take physical possession of entire basement premises in whomsoever's possession the same may be found, i.e., premises including so-called units Nos. 1 to 21, units Nos. M-2, U-1 and U-2, as detailed in exhibit "C" to the affidavit of Shri Haribhai J. Patel dated November 18, 1992, except the portion of upper basement premises in occupation of respondent No. 4 as specified in agreement dated September 17, 1986.

(iii) Respondents Nos. 2 to 5 and 8 do pay to the petitioner a sum of Rs. 5,000 towards costs of judge's summons.

(iv) The official liquidator do execute this order forthwith and submit a compliance report to this court soon thereafter.

(v) Both learned counsel appearing for the contesting respondents apply for stay of operation of the order just passed in relation to appointment of official liquidator as provisional liquidator for sometime in order to enable them to consider their position, and carry the matter higher, if so advised. Learned counsel for the petitioner and supporting respondents oppose.

P. C. : Operation of the abovereferred order making the summons absolute in terms of prayer (a) and issue of consequential directions stayed till January 11, 1993, on the condition that complete status quo would be maintained by all the contesting respondents in the meanwhile and respondents Nos. 1 to 5 and 8 shall file written undertakings to maintain complete status quo in respect of assets, records, affairs of the company and in other respects. For this purpose, adjourned to December 18, 1992. Interim injunction in terms of prayer (c) shall be operative with immediate effect.

(vi) No one shall operate any of the bank accounts of the company without leave of the court till the official liquidator takes charge.

(vii) Shri Thakker submits that his client is apprehensive in respect of likely manipulation of books of account, and minutes books and requests that at the most the stay be restricted to the official liquidator taking charge of properties of the company. In order words, the petitioner applies for a direction that the official liquidator do take charge of books of account and records of the company forthwith.

Respondent No. 1 is directed to produce the current books and minutes book of the company before the court by 11 a.m. on December 17, 1992, for the purpose of issue of directions for initialing thereof by the associate of this court or the advocate for the petitioner as may be deemed fit.

Same appearance :

(viii) Undertakings given by respondents Nos. 1, 3, 4 and 5 are accepted. Time for filing written undertaking by respondent No. 8 is extended till December 28, 1992. In the meanwhile, oral undertaking of respondent No. 8 in the terms as

given by other respondents through his learned counsel, Shri J. B. Chinoy, is accepted.

(ix) Learned counsel appearing for the parties on both sides request that the hearing of Company petition No. 353 of 1992 be postponed till the third week of January, 1993. Request made by learned counsel is granted.

(x) The hearing of the company petition for admission has not yet commenced. According to the administrative order passed by the acting chief justice, this matter was assigned to this court with the prefix "during the currency of this assignment." The prothonotary and senior master are directed to place the matter before the learned company judge in the ordinary course on January 21, 1993.