

(1999) 11 BOM CK 0019
In the Bombay High Court
Case No : Company Petition No. 77 of 1990

Jer Rutton Kavasmaneck and others

APPELLANT

Vs

Gharda Chemicals Ltd. and others

RESPONDENT

Date of Decision : 22-11-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 19, Order 23 Rule 1, Order 6 Rule 17, Order 7 Rule 11
Companies (Court) Rules, 1959 — Rule 6
Companies Act, 1956 — Section 25, 397, 398, 402, 403

Citation : (2000) 1 ALLMR 280 : (2000) 2 BomCR 56 : (2000) 1 BOMLR 553 : (2001) 106 CompCas 25 : (2000) 3 MhLj 320

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : Aspi Chinoy, N.H. Seervai and Z. Bharucha instructed by Dhru and Co, for the Appellant; V.R. Manohar, K.L. Desai instructed by Maneksha and Sethna, T.N. Subramaniam, P.R. Diwan instructed by Rustomji and Ginwala, T.N. Subramaniam, P.R. Diwan instructed by Purnanand and Co., for the Respondent

Judgement

S.S. Nijjar, J.—The respondent No. 1, Gharda Chemicals Limited "Company" for short) is a Company originally incorporated on March 6, 1967 as a Private Limited Company by shares. From August 17, 1988, it has become a deemed public company by shares by virtue of section 43-A of the Companies Act, 1956, hereinafter referred to as "the Act". The petitioners among themselves hold approximately 27 per cent of the shares. The remaining 73 per cent of the shares are held by respondent Nos. 2 to 13. The company petition has been filed under sections 397 and 398 for appropriate reliefs under sections 402 and 403 of the Act. Thereafter the petition has been amended under orders of this Court in Company Application No. 77 of 1991. Further amendments are also sought in Application Nos. 130 of 1993 and 658 of 1999. A number of other applications have also been filed for various other reliefs including declaration of dividend. An application has also been filed by respondent Nos. 1, 2 and 4 u/s 402 of the Act seeking directions that one or the other groups ought to be directed to buy out

the other group in view of the circumstances prevailing in the Company.

2. By an order dated 23rd July, 1999, Radhakrishnan, J., had directed that the main company petition be taken up peremptorily for hearing and final disposal on 19th August, 1999. In view of the above, the respondents did not press for any ad-interim relief. Since the assignment changed before company petition could be heard, it was directed that the respondents would be at liberty to move the Court for ad-interim order in Company Application No. 466 of 1999. The matter was directed to be placed before the Regular Judge taking Company matters on 26th August, 1999. It is in these circumstances the company petition along with the applications have come up for hearing before this Court.

3. In Company Application No. 77 of 1991, Dhanuka, J., by an order dated 13th March, 1992 allowed some of the proposed amendments and disallowed some. In pursuance of the aforesaid order, the amendments have been duly carried out.

4. The matter came up for hearing for the first time on 26th October, 1999. At that time, Mr. Manohar, learned Counsel appearing for respondent Nos. 1 to 4, submitted that the company petition is not maintainable. He submitted that the petition ought to be dismissed by exercising powers under Order 7, Rule 11 (a) as disclosing no cause of action. He submitted that even accepting the averments in the petition in toto, no case has been made out u/s 397 of the Act. So far as the plea with regard to mismanagement is concerned, the learned Counsel has pointed out to the order of Justice Dhanuka dated 25th April, 1991 where it is observed as follows:

"The 1st respondent has built up large resources. It has been fairly stated by the learned Counsel on behalf of the petitioners that the petitioners are not complaining of any mismanagement of the affairs of the said Company and the petitioners are not invoking section 398 of the Companies Act."

In view of the above it is submitted by Mr. Manohar that the allegations pertaining to mismanagement ought not to be considered by this Court even whilst considering as to whether or not they would also form part and parcel of series of events leading to oppression. It was also mentioned by Mr. Manohar that the jurisdiction of this Court under sections 397 and 398 of the Act has been taken away with effect from 31st May, 1991 on the setting up and coming into operation of the Company Law Board. He submitted that since the company petition was filed on 13-2-1990, circumstances/events occurring on or before 13-2-1990 can only be looked at. He further submitted that for this purpose only the unamended petition can be looked at. The amendment having been carried out by virtue of order dated 13th March, 1992 cannot be looked at whilst considering the question as to whether the company petition discloses a cause of action. Mr. Manohar has submitted that u/s 397 of the Act, the petitioners have to make out both the grounds, that is to say, of oppression and that it would be just and equitable to wind up the Company. However, acts of oppression and mismanagement do not necessarily have to be equated with the just and

equitable Clause, otherwise it will obliterate ground (b) of section 397 of the Act.

5. For the proposition that only the facts pleaded in the unamended petition can be looked at Mr. Manohar had relied upon the following judgments.

(i) Kalinga Tubes Ltd. and Others Vs. Shanti Prasad Jain and Others, ,

(ii) Shanti Prasad Jain Vs. Kalinga Tubes Ltd., ,

(iii) Rajamundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao, XXVI Com.Cas. 91.

Mr. Manohar submitted that if the unamended petition be looked at, then clearly no case has been made out and the petition deserves to be dismissed as disclosing no cause of action. According to Mr. Manohar, the first incident relied upon by the petitioner pertains to the year 1975. This incident pertains to the deceased father of petitioner No. 2, Mr. R. Kavasmanek was the original member. He died on 5-2-1977. He submitted that the petition has been filed 13 years after the death of Mr. Kavasmanek, hereinafter referred to as "the deceased. Oppression cannot possibly relate to lineal descendants of a member, Oppression has to be of the member. The deceased had filed B.C.C. Suit No. 6360 of 1975 against the respondent Nos. 1 to 4 which was settled. Thus the issue is closed.

6. The second incident relates to delay in transmission of 3,360 shares of the deceased. Mr. Manohar stated that the first letter asking for the transmission of the shares is dated 18th September, 1989, 12 years and 6 months after the death of the deceased. The Company, however, transferred the shares on 9th February, 1990. This, according to Mr. Manohar, cannot amount to oppression. At best it is a ground of mismanagement. The petitioners having already stated before Dhanuka, J., that they are not pressing the grounds of mismanagement cannot be permitted to complain of the same.

7. The third incident relates to the withholding the fixed deposit receipt of Rs. 90,000/- belonging to petitioner No. 3. A Winding up Petition No. 494 of 1983 was filed by petitioner No. 3. In this petition, consent terms were entered into, thus this issue is also settled. In any event, it is submitted by Mr. Manohar that the acts of withholding of the amount of the fixed deposit was an act against a creditor. Oppression can only be complained of by a member of the Company. Even otherwise the petition is filed in 1990, 7 years after the event. These three incidents, according to Mr. Manohar, ought to be ignored as being obsolete and being individual in nature. They cannot form a part of chain of events to lead the Court to the conclusion that majority is trying to oppress the minority.

8. The Fourth incident, according to Mr. Manohar, is totally false which relates to the issue of transfer of 8065 equity shares at a premium of Rs. 200/- each in the latter half of 1985. It is submitted that no such issue had been made. Mr. Chinoy, leaned Counsel appearing for the petitioners, has fairly stated that this allegation is inaccurate but it was made inadvertently on the basis of a document which was not subsequently followed up by the Company.

9. The other submissions made by Mr. Manohar and Mr. Subramaniam related to the interpretation of Article 57 of the Articles of Association. It has become necessary to construe Article 57 in view of the transfer of 3000 shares of Noshir Warden to respondent No. 2. According to the petitioners, the shares had been transferred contrary to the procedure prescribed under Article 57. According to Mr. Manohar, Article 57 is not relevant at all when shares are transferred intra members. Even otherwise it is submitted by Mr. Manohar that both the sides, petitioners as well as respondents, had transferred shares on a number of occasions without complying with Article 57 of the Articles of Association. Thus it is submitted that the petitioners are now estopped from saying that Article 57 would apply to transfer of shares even when the same are transferred by one member to another. It is the submission of Mr. Manohar that Articles of Association of a Company have to be strictly construed in favour of free transferability of the shares. For this proposition, the learned Counsel has relied on number of authorities. According to Mr. Manohar, the shares are property which are inherently transferable and this right to transferability is conferred both by the Companies Act as well as by Article 51 of the Articles of Association. Any restriction on the transferability of shares whether in a private or Public Limited Company must be found expressly and mentioned in the Articles of Association. It is not permissible to imply restrictions which are not to be found or clearly spelt out in the Articles of Association. For this proposition the learned Counsel has relied on the case of *Delavenne v. Broadhurst*, 1931 Cd 234. In this case it is held as follows:

"We propose first to state the principles as we understand them. By section 22 of the Companies Act, 1862, which is reproduced as section 22 of the Companies (Consolidation) Act, 1908, it is provided that the shares in a Company under these Acts shall be capable of being transferred in a manner provided by the regulations of the company. The regulations of the Company may impose fetters upon the right of transfer. In the absence of restrictions in the articles, the shareholder has by virtue of the statute the right to transfer his shares without consent of anybody to any transferee, even though he be a man of straw, provided it is a bona fide transaction in the sense that it is an out and out disposal of the property without retaining any interest in the shares....."

The same principle is enunciated in (*Re Smith and Fawcett Limited*), 1942(1) Ch. Division page 304 at page 306 where it is stated:

"..... in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been last consideration, it means, I apprehend, nothing more than that the shareholder has such a prima facie right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to cut down, must be cut down with satisfactory clarity..."

There are many other cases laying down the same principle. It is submitted by

Mr. Manohar that Article 57(a) does not prohibit a transfer to a non-member as is sought to be argued by the petitioners. The shares have to be offered to the members in the first instance on a pro rata basis. Any shares which are not taken by a member are again offered to the other members again on a pro rata basis. If there are some shares still remaining after the second round, they have to be treated as untaken shares. According to Article 57, the untaken shares can be sold to non-members within a period of one year of the notice. The fetter which is sought to be pleaded by the petitioners is not warranted by the terminology used in Article 57 of the Articles of Association. That being the position, the transfer of 3000 shares to respondent No. 2 is perfectly legal and valid and cannot amount to an act of oppression.

10. Thereafter the sixth incident relates to a Circular dated 24th August, 1989 in which respondent No. 2 had requested all the shareholders to sell their shares to Gharda Foundation, hereinafter referred to as "the Foundation", at the price of Rs. 1200 per share or to gift the same to the Foundation. It is submitted by Mr. Manohar that this was a circular issued to all the shareholders. It was voluntary. It did not single out the petitioners only. In view of the voluntary nature of the circular it can only be termed as an appeal to the shareholder to help the Company in establishing the Foundation. This Foundation was set up as a section 25 Company by respondent No. 2. It is true that only respondent No. 2 and respondent No. 2's wife are to be the Directors of the Foundation. Mr. Manohar submits that this by itself cannot amount to an act of oppression.

11. The Seventh incident relates to the notice dated 6th January, 1990 for holding of the E.O.G.M. on 5-2-1990, inter alia, for amendment of Article 57 of the Articles of Association of the Company. It is submitted that the amendment was necessary as the unamended Article was proving to be cumbersome. In any event, Articles of Association can always be amended with the approval of the members of the Company. Therefore, this cannot be said to be an act of oppression. It is further submitted by Mr. Manohar that the main thrust of the petition is on the dividend squeeze which is alleged to have been applied by the respondents in order to pressurise the petitioners to sell the shares commencing from 1988 till the filing of the petition. It is pleaded that despite high earnings respondent No. 2 is ensuring that the Company does not declare dividend of over 30% and thus members are on one hand subjected to crippling tax liability and on the other hand denied their legitimate dues to share in the profitability of the Company. It is also pleaded that the Foundation is nothing but a tax dodge on the part of the respondents. Mr. Manohar has submitted that it is a settled proposition of law that dividend squeeze by itself cannot lead to the conclusion of oppression. There has to be a continuous chain of events following one upon the other to constitute oppression. Here even if the petition is accepted in toto, the requirements of section 397 of the Act are not satisfied. He, therefore, submits that the petition deserves to be dismissed on the ground that it discloses no cause of action under Order 7, Rule 11 (a) of the Civil Procedure Code.

12. Mr. Subramaniam has adopted the arguments of Mr. Manohar. He has also laid stress on the provisions of Articles 51, 54 and 59(b) of the Memorandum and Articles of Association. He has submitted that Article 57(a) deals inter alia with the transfer of shares to lineal descendants. It is not applicable to intra-member transfer of shares. Article 51 provides for the transferability of the shares subject to any restrictions which may be placed in the Memorandum and Articles of Association. According to Mr. Subramaniam Article 54 provides a complete bar to transfer of shares to an infant, insolvent or person of unsound mind. Article 59 (b) deals with transfer of shares to the employees. Thus wherever special procedure was to be prescribed it has been prescribed under the Memorandum and Articles of Association otherwise the transferability of the shares is dealt with under Article 51. Mr. Subramaniam has also submitted that the petition ought to be dismissed on the ground that the petitioners have tried to mislead this Court with regard to the issue of 8065 shares. The learned Counsel has further emphasised that the events mentioned in the petition relate to years 1975, 1977, 1983 and 1985. These, according to the learned Counsel, are disjointed and stale events which cannot be taken as a ground for maintaining a petition u/s 397 of the Act. He has also emphasised that oppression has to be of the shareholder and not of any individual who is not a member of the Company.

13. In reply, Mr. Chinoy, learned Counsel appearing for the petitioners, has submitted that a totally false picture of the case of the petitioner is sought to be projected by Mr. Manohar and Mr. Subramaniam. The events which are sought to be described as disjointed would clearly show that there have been continuous efforts by respondent No. 2 to take control of the Company by firstly trying to oppress the deceased and thereafter trying to oppress the petitioners. It is submitted that the forerunner of the Company was a partnership between the deceased and respondent No. 2. The Company was formed in March, 1967 by the deceased and respondent No. 2 to acquire and/or purchase as a going concern the business of the partnership firm. The deceased and the second respondent were the first Directors of the Company and were not liable to retire by rotation. The deceased was in fact the Chairman of the Company. The Company was a glorified partnership constituted by the deceased and the second defendant on the basis of close family ties and mutual confidence. He has stressed upon the close personal relationship between the parties. Dr. K.H. Gharda, respondent No. 2 is the real brother of the late Mrs. Coomi Warden and Mrs. Jer Kavasmaneck. The deceased was the real brother-in-law of respondent No. 2 being the husband of Mrs. Jer Kavbasmaneck, petitioner No. 1. On his return from U.S.A. in the early 1960, after securing a Masters Degree and a Doctorate in Chemical Engineering. Dr. Gharda was desirous of setting up a manufacturing unit but was unable to do so for back of funds. Dr. Gharda requested his late mother Ratanbai Gharda, his late sister Mrs. Coomi Warden and the deceased to invest their funds and join him in partnership. Thus, on 28th April, 1962 Gharda Chemical Industries, a partnership firm was constituted under a Deed of Partnership dated 28th April, 1962, As per the deed of partnership, the total capital contributed for

the partnership was 2,50,000. Rs. 1,00,000 (40 per cent) was contributed by the deceased, Rs. 50,000/- (20%) by the mother of respondent No. 2 viz. late Bai Ratanbai and Rs. 50,000/- (20 per cent) was contributed by late Mrs. Coomi Warden. Dr. Gharda also contributed Rs. 50,000/ (20%). Dr. Gharda was to look after the development of technical processes, production and marketing of products. Thus although he had contributed only 20 per cent of the capital, he was entitled to a 40% share of the profits, whilst the remaining 60% was divided amongst the others with the deceased having a 30 per cent share of the profits. The partnership deed expressly provided that the name and goodwill of the business would belong to the partners in proportion to their interest and that the heirs of any partners who die would have an option to continue as a partner of the said firm. The partnership firm was reconstituted on 14th January, 1966. The profit sharing ratio was changed so that Dr. Gharda had a 45% share whilst the deceased had a 35% share and the late Mrs. Coomi Warden had a 20% share. Otherwise the terms and conditions of the deed continued to be the same as of 28th April, 1962. On 6th March, 1967 Gharda Chemicals Ltd. was registered and incorporated under the Companies Act. The purpose of this Company was to acquire the partnership firm as a going concern. The deceased and Dr. Gharda each subscribed to 5 shares of Rs. 100 each. Apart from the above Rs. 1,000/- no capital contribution was made in cash. However, the partners of the firm were issued fully paid up shares amounting to Rs. 2,00,000/-. Dr. Gharda was allotted 1100 shares, the deceased was allotted 600 shares and Mrs. Warden was allotted 300 shares.

14. It is submitted by Mr. Chinoy that the company is nothing but a glorified partnership. There was a special underlying/under standing/agreement embodied in the Articles of Association of the Company that its ownership would vest in the members without disturbing their proportionality in shareholding. This, according to Mr. Chinoy, was the very basis of the formation of the Company and it was for this reason that Article 57 was specially included in the Memorandum and Articles of Association. By now transferring the 3000 shares to respondent No. 2 the principle of proportionality will be totally obliterated and the very purpose of forming a company would be frustrated. According to Mr. Chinoy, there was also a further special underlying obligation on the members of the Company and those in management and control that its business affairs would be conducted bona fide in the interest of all the shareholders. The personal relationship, the trust and confidence flowing from the relationship and the special underlying obligations and understanding were the fundamental basis of the incorporation and continued existence of the contract. Thus the exercise of power by those in management was subject to equitable consideration of a personal character. After the death of the deceased, respondent No. 2 continued in virtual sole management and control of the company. The company prospered and substantial benefits were given to its members by way of dividends. In fact, the book value of the Company's shares was Rs. 479 per share and the company had declared dividend amounting to 27.19% in 1986. The petitioners had not

applied for transfer of the shares of the deceased for a long time as the estate duty formalities were pending. It was when the necessary certificate was issued, the application was made for transfer. The Company had prospered by leaps and bounds since 1988. Realising the prosperity of the Company, respondent No. 2 intensified the efforts to compel the petitioners to sell their shares. The price offered in the so called appeal was Rs. 1200/- per share whereas the market value of the share was in the region of Rs. 4005/-. After 1988 a number of events were orchestrated by respondent No. 2 to oppress the petitioners. According to Mr. Chinoy, the basic facts pertaining to oppression are pleaded even in the unamended petition. They have, however, been further amplified by amendment which has been granted by Justice Dhanuka by his order dated 13th March, 1992. Looking at these averments it is submitted by Mr. Chinoy that the petition cannot be dismissed at the threshold on the ground that it does not disclose a cause of action. On particular aspects it is submitted by Mr. Chinoy that since 1988 the dividend has been deliberately reduced by respondent No. 2 to a meagre amount of approximately 2 per cent in the years 1988, 1989 and 1990. In contrast to this in the year 1986 dividend was 27.19%. According to the learned Counsel, dividend squeeze as an instrument of oppression has been recognised by the English as well as the American Courts. Learned Counsel has relied upon commentaries of certain English authors as well as a number of decided cases. I am not going to make any reference to these learned authorities and judgments as in my view, the matter has to be disposed of without going into the relative merits of the cases put forward by the parties. Mr. Chinoy has also laid stress on the fact that respondent No. 2 is deliberately misconstruing Article 57 of the Articles of Association. 3000 shares of the Warden have been transferred by respondent No. 2 to himself. This has destroyed the proportionality principle underlying the formation of the Company. According to the learned Counsel, this in itself is sufficient to show that the majority is acting directly against the interest of the minority shareholders. Learned Counsel has also submitted that the Foundation has been set up by respondent No. 2 only as a device to get over the tax difficulties. He has illustrated the points by making reference to certain pleadings. It is pleaded as a consequence of the retained profits the book value of the shares increased from Rs. 479/- per share in 1986 to Rs. 6599/- per share in 1990. This resulted in the petitioners wealth tax liability increasing tremendously. The meagre amount of dividend declared for the years 1988, 1989 and 1990 being 2.13%, 1.14% and 2.20% of the net profits was not even sufficient to pay the wealth tax on the shares. For the years 1988-90 the total tax liability of the petitioners on the shares was Rs. 36.75 lakhs. As against that during these years the petitioners received only 13.07 lakhs as dividend. Thus the petitioners actually had a shortfall of Rs. 23.67 lakhs on their investments. The second respondent Dr. Gharda on the other hand was able to meet the tax liability on his shares by reason of the commission/salary received by him and his family from contracts entered into with the Company. All these facts are specifically pleaded in the amended petition. It is submitted that the consequence of this deliberate dividend squeeze was to deny the petitioners

any share in the prosperity and the profits of the Company. It also resulted in subjecting them to crippling tax liabilities in respect of the shares. This fact coupled with the transfer of the 3000 shares of the Wardens to respondent No. 2 himself contrary to Article 57 clearly leads to the conclusion that the minority is sought to be oppressed by the majority. The fact that the shares could not have been transferred without complying with Article 57 of the Memorandum and Articles of Association is evident from the notice which has been given for the E.O.G.M. on 15-2-1990. In this notice the Memorandum and Articles of Association is sought to be amended on the ground that it is cumbersome. If Article 57 did not apply to intra member transfers, then there is absolutely no necessity whatsoever for amending the Articles of Association. Apart from this, respondent No. 2 has tried to force the petitioners to sell their shares to the Foundation at a ridiculously low price. The only reason why Dr. Gharda is prepared to donate all his shares to the Foundation is that he and his wife would be the only Directors of the Foundation. Therefore, the notice cannot be treated as an appeal as is sought to be projected by Mr. Manohar. There is another event in the chain of events which would prima facie show that an effort has been made to oppress the petitioners i.e. the delay in transfer of the shares of the deceased from September, 1989 to 9th February, 1990. The shares were transferred only 6 days prior to the scheduled Extraordinary General Meeting. Clearly all out efforts had been made to make the petitioners sell the shares belonging to them. Mr. Chinoy has submitted that the petition cannot be dismissed at this stage on the ground that it discloses no cause of action, if one keeps in mind the pleadings which are noticed above.

15. I have considered the arguments put forward by the learned Counsel for the parties. The position with regard to amendment of the pleadings is no longer res integra. The law has been clearly set out in the case of *Khimji M. Shah v. Ratilal D. Modi and others*, 1988 Mh.L.J. 38 and 1990(67) Comp.Cas. 185. In that case it is clearly held as follows:

"6. Mr. Chinoy who appeared for respondents Nos. 1, 2 and 4 to oppose the amendments, stated that he had no objection to respondents Nos. 6, 7 and 8 being added as party-respondents to the Company Petition No. 573 of 1984. He, however, submitted that rest of the amendments should not be allowed because, according to him, these amendments deal with the events subsequent to the filing of Company Petition No. 573 of 1984. It is his contention that such subsequent events cannot be gone into in deciding a Company petition under sections 397 and 398 of the Companies Act. In support he relied upon a decision in the case of *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, . In this case the applicants had obtained the consent of not less than 1/10th of the members of the Company while filing a petition under sections 397 and 398 of the Companies Act. After the petition was presented some of the shareholders withdrew their consent. The Court held that this subsequent withdrawal of consent is not relevant if the petition had the support of the requisite number of members at the time when the petition was presented. This

case does not support the contention of Mr. Chinoy. The judgment merely states that if a petition is validly filed and complies with all the requirements of sections 397 and 398 of the Companies Act at the date when it is filed, any subsequent withdrawal of consent by some of the shareholders would not invalidate the petition. The decision does not set out that subsequent events cannot be looked into in deciding a petition under sections 397 and 398 on merits.

7. The second case relied upon by Mr. Chinoy was that of *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, reported in 1965(35) Com.Cas. 351. The Court there held that it is necessary in a petition under sections 397 and 398 of the Companies Act to show that the conduct of the majority shareholders was oppressive to the minority as members. Also, the events had to be considered not in isolation but as a part of a consecutive story. It said "There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members". Mr. Chinoy emphasised the words "up to the date of petition" and submitted that only conduct up to the date of the petition can be looked at in such a petition. I am unable to agree. The judgment points out that there should be a course of conduct which could be considered as oppressive to some of the members, burdensome, harsh and wrongful and such conduct should continue till the date of the petition. Stray acts which may amount to such burdensome conduct cannot be enough. There should be continuous course of conduct upto the date of petition. The judgment does not deal with any subsequent conduct after the date of filing of the petition. It merely says that if there is no such conduct continuing till the date of the petition, the petition would fail. From this a conclusion cannot be drawn that if there are any subsequent acts of oppression or mismanagement after the date of the filing of the petition, those cannot be incorporated in a petition by way of amendment.

8. Under Rule 6 of the Companies (Court) Rules, 1859 the provisions of the Code of Civil Procedure, so far as applicable shall apply to all proceedings under the Companies Act. The provisions relating to amendment of pleadings would, therefore, apply to amendment of pleadings under the Companies Act. There is no bar to an amendment which incorporates subsequent events if the amendment is otherwise necessary for proper determination of issues between the parties. In the case of *Promode Kumar Mittal v. Southern Steel Ltd.*, reported in 1980(5) Comp.Cas. 555 the Calcutta High Court observed in a petition under sections 397 and 398 of the Companies Act that the Court can take notice of all subsequent events to grant reliefs finally after trial in a company matter and the interim orders passed from time to time by the Court in all applications, the meetings held under the Chairman appointed by the Court, and the resolutions passed by majority shareholders and directors present therein are all relevant. In the case of *Inder Kumar Jain v. Osra Bottling Co. (P.) Ltd.*, reported in 1977(47) Comp.Cas. 194 the Delhi High Court has held that on an analogy of Order VI, Rule 17 of the Code of Civil Procedure, the High Court has power to grant leave to amend a pleading in a petition u/s 397 or 398 of the Companies Act, 1956 for

relief against mismanagement or oppression in the affairs of a Company. In the case of *Bastar Transport and Trading Co. v. Court of Wards*, reported in AIR 1955 Nag 78 the Court has held that the provisions of the Code of Civil Procedure, so far as applicable, would govern proceedings under the Companies Act also. There is thus no provision under the Companies Act which prohibits a Court from looking at subsequent events in a petition under sections 397 and 398 of the Companies Act."

Thus, it becomes evident that it is permissible to bring on record by amendment not only the facts pertaining to the events upto the filing of the petition but also subsequent events. Mr. Manohar had, however, submitted that this judgment does not take note of the law laid down by the Supreme Court in the case of *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.*, of the judgment, the Supreme Court observed as follows:

"35. Nor is there any ground for holding that because of the change which took place in the management after July, 1958 it was likely that the affairs of the Company would be conducted in a manner prejudicial to its interests. The change that took place after July, 1958 was that the appellant no longer remained the Chairman of the Company and the Patnaik and Loganathan groups practically managed the company without the appellant. But as the High Court has pointed out there were no facts before the Court to come to the conclusion that the change in management was likely to result in the affairs of the Company being conducted in a manner prejudicial to its interests. In this connection reliance is placed on certain matters which transpired after the application was filed on September 14, 1960. These matters however cannot be taken into account for the application has to be decided on the basis of the facts as they were when the application was made. Besides as the High Court has pointed out, it has not been shown that in view of certain actions taken by the new management without consulting the appellant, the Company was landed in any difficulty and loss of profit which would show mismanagement of its affairs."

I am of the considered opinion that the judgment in *Khimji M. Shah* [supra] has correctly interpreted the law laid down by the Supreme Court. Even the Supreme Court in *Kalinga* has held that facts and events leading upto the filing of the petition are relevant. Keeping the aforesaid proposition of law in view, the Court is now required to see as to whether sufficient facts have been pleaded to make out an arguable case of oppression as well as mismanagement. It is a settled proposition of law that whilst exercising powers under Order 7, Rule 11 the courts act with utmost caution. Dismissal of a petition at the threshold leads to very serious consequences. The courts in India as well as in England have been very reluctant to reject the plaint at the threshold. Order VII, Rule 11 (a) of the C.P.C. provides that the Court may reject the plaint/petition if it discloses no cause of action. Similar provision occurring in Rules of Supreme Court Order 18, Rule 19 in England was considered in the case of *Drummond-Jackson v. British Medical Association and others* 1970 All.E.R. 1094 wherein Lord Pearson

observes as follows:

"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases....."

Similar views expressed by other Judges are also noticed in that judgment which are as follows.

"In *Nagle Feilden* 1966(1) All.E.R. 695 Danckwerts, L.J., observes:

"The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the Court."

Salmon, L.J., at page 697 observes:

"It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable."

Thus the Rule appears to be that the plaint can be rejected in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court. The plaint should not be struck out unless the case is unarguable. In the same judgment Sir Gordon Willmer at page 1105 observed as follows:

"The question whether a point is plain and obvious does not depend on the length of time it takes to argue. Rather the question is whether when the point has been argued, it has become plain and obvious that there can be but one result."

Thus it becomes clear that the petition could be struck out only if the case put forward is unarguable. In my view, the petition has raised a number of substantial questions of law. Mr. Chinoy has referred to a large number of authorities, English as well as American, which seem to propound a view that dividend squeeze can be accepted in principle as indicative of oppression. On the other hand, Mr. Manohar had cited a number of cases to show that declaration of dividends is purely a commercial matter. It has to be decided by the management as to how much dividend has to be paid. Mr. Manohar has also highlighted that the dividend is usually related to the face value of the shares. In fact, Mr. Manohar had handed over a chart to show that the quantum of amount received by way of dividend by the petitioners has in fact increased. He had also made a pointed reference to the fact that the petitioners are not actively participating in the management of the Company. They can, therefore, hardly complain about the increase in the emoluments of respondent No. 2. He had submitted that keeping these facts and circumstances in view, no material had been placed on the record by the petitioners which would lead this Court to the conclusion that the minority has been oppressed.

16. There are two diametrically opposed propositions given on the interpretation of Article 57 of the Articles of Association. As noticed earlier, it is the claims of the respondents that Article 57 does not apply to intra member transfers. On the other hand it has been pleaded as well as argued that the shares have to be sold only to the members in order to maintain the principle of proportionality which was the underlying idea of the incorporation of the Company.

17. Keeping the aforesaid facts and circumstances in view, it would not be possible for this Court to hold that the petition is demurrable. Once the petition is held to be maintainable, the petitioners are entitled to bring on record all matters which are germane to decide the issue of oppression. The Orissa High Court in the case of Kalinga Tubes Ltd. and Others Vs. Shanti Prasad Jain and Others, framed various issues in paragraph 7 of the judgment. Issue No. 1 was as follows:

"(i) Is the petition demurrable and liable to dismissal in limine?"

The Division Bench noticed the submissions in paragraph 8 of the judgment made by the learned Attorney-General to the effect that the petition does not make out a case under sections 397 and 398 of the Act and the petitioner could not be permitted to supplement the allegation by subsequent affidavits filed. It is noted by the Division Bench that the petition was filed on 14th September, 1960. The Company filed its counter affidavit on 19th September, 1960. Respondent No. 2 filed his rejoinder on 2nd December, 1960. The Court had earlier ordered that by 15th February, 1961 all rejoinders should be filed. The petitioner filed all rejoinders on 8th February, 1961. On 17th March, 1961 respondent No. 2 filed another affidavit without the leave of the Court and on 13th April, 1961 the petitioner filed a counter affidavit in reply to this affidavit without leave of the Court. The learned Attorney-General contended that the subsequent affidavits filed by the petitioner should not be taken into consideration to supplement the averments made in the petition and that the petition is demurrable. The ratio of the judgment is in paragraph 10 which is as follows:

"10. On a summary of the legal position, it is sufficiently clear that in a petition under sections 397 and 398 of the Act, all material facts must be pleaded. If the facts transpiring on the date of the petition and alleged in the petition are not sufficient to make out a case for winding up on just and equitable ground, then facts arising subsequent to the filing of the application cannot be resorted to for the purpose, and the absence of allegations on the pleadings cannot be substituted by further evidence either by affidavits or oral and documentary evidence."

From a perusal of the judgment, it becomes abundantly clear that the Orissa High Court was not dealing with a case of amendment of the petition. It was dealing with two affidavits which had been filed pertaining to the facts which had already been pleaded. This is apparent from paragraph 11 of the judgment which is as under:

"11. In this case the entire question is academic. We called upon the learned Attorney-General to give us a list of new facts which were not alleged in the criminal petition but were introduced by subsequent affidavits. Mr. Choudhury furnished us a list and on examination we find that essentially the subsequent affidavits filed by the petitioner either repeat the material facts already pleaded in different forms or supply some fresh materials in reply to the materials given in the counter affidavit of the contesting respondents. It is, therefore, not necessary to examine in detail as to in what manner the departure has been made in the pleading as essentially, in our view, there has been no departure in material facts. The subsequent affidavits are more or less pieces of evidence in support of the averments of material facts pleaded in the petition. Respondent 2 also filed a subsequent affidavit, as already stated, even without permission of the Court. Most of the subsequent affidavits merely place facts already pleaded by both parties. The subsequent affidavits would, therefore, be taken into consideration, but facts transpiring subsequent to the petition would be excluded from consideration."

Thus the two affidavits were treated as pieces of evidence in support of the averments of material facts pleaded in the petition. The two affidavits were, therefore, taken into consideration excepting the facts transpiring subsequent to the petition but the subsequent events were excluded only for the purpose of deciding the question of whether the petition is demurrable. I am of the opinion that once the Court comes to the conclusion that the petition is maintainable then subsequent events can also be considered in order to do complete justice between the parties and to make appropriate orders for removing the oppression.

18. The aforesaid judgment of the Division Bench was taken to the Supreme Court by way of appeal. The judgment of the Supreme Court in Shanti Prasad Jain Vs. Kalinga Tubes Ltd., . A perusal of this judgment shows that the Supreme Court was not dealing with a case of amendment. Mr. Manohar had submitted that the issue was squarely raised in paragraphs 8 and 9 of the judgment and it was answered in paragraph 35 in the negative. I am unable to accept this proposition. The Supreme Court was not considering a case of amendment. It was only considering as to whether subsequent facts can be looked into on the basis of affidavits filed by the parties. The Single Judge of the Orissa High Court had allowed the petition. The appeals were allowed by the Division Bench. The Supreme Court dismissed the appeals against the judgment of the Division Bench. In paragraphs 8 and 9 of the judgment of the Supreme Court, there is no mention of the additional affidavit which had been filed in the Orissa High Court. The observations made in paragraph 35 relate to the relevance of the facts as on the date of the filing of the petition for deciding as to whether or not the petition is demurrable. These observations are of no avail to the respondents in the present case as I have come to the conclusion that there are sufficient pleadings to make out an arguable case and that the petition is not a demurrable. The judgment of the High Court in Khimji (supra) has also been considered by the Gujarat High Court. Similar issue arose in the Gujarat High Court in Company

Applications Nos. 3 of 1993 and 755 of 1993 in Company Petition No. 62 of 1986. A learned Single Judge of the Gujarat High Court took notice of the fact that the Company petition has been subsequently amended as per order dated 23-1-1992 in Company Application No. 50 of 1987. Thereafter certain litigation was pending between the parties in the City Civil Court, Bombay which was decided by a consent order dated 1-12-1992. Certain matters were also pending in the Gujarat High Court. In the meantime the petitioner preferred Company Application No. 3 of 1993 in the Company Petition No. 62 of 1986 for incorporating paragraphs 17.9 to 17.28 and also for adding certain prayer clauses to the effect that the resolution of the Company dated 10-11-1992 be set aside. Another application being Company Application No. 755 of 1993 in Company Petition No. 62 of 1986 was filed. Judge's Summons were also taken out for permitting the petitioner to amend the Petition No. 62 of 1986 on 3rd September, 1993. The proposed amendment was for challenging Resolution dated 10th November, 1992 and the issue of prospectus dated 24th August, 1993. This was clearly a case of bringing subsequent events on the record in order to establish the facts already pleaded in the petition.

19. The learned Single Judge of the Gujarat High Court noticed the judgment of the Madras High Court in the case of S. Narayanan and others v. Century Flour Mills Ltd. and others 1987(1) Com.L.J. 25. In that case section 397 of the Act was being considered by the Madras High Court. Certain transactions had taken place subsequent to the filing of the petition which was sought to be brought on record by amendment. It was submitted that the subsequent allegations cannot be looked into nor are the applicants entitled to rely upon them. While repelling the said submissions, the Court observed as follows:-

"Section 397 provides that any member of a company who complains that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members may apply to the Court for an order under that provision, if the Court is of opinion that the Company's affairs are being conducted prejudicially to public interest or in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members; but that otherwise the facts would justify the making of winding up order on the ground that it was just and equitable that the company should be wound up, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit. It is useful to notice that there is no limitations on the reliefs to be granted by the Company Court under this provision. For, the provision enables the Court to make such order as it thinks fit with a view to bringing to an end the matters complained thereof. The emphasized portion of the above said provision will clearly indicate that any application under that provision shall satisfy the Court that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members till the application is taken up for hearing. In other words, it is the persistence of such conduct by the persons in management of the company that it will enable the application

under that provision to approach the Court and seek the remedy therein. The subsequent events will amount to pieces of additional evidence to support the petition laid u/s 397 and 398 of the Act. If such subsequent evidence were not taken into account at the time when the application under sections 397 and 398 of the Act was taken up for disposal, it is not unlikely that the Court would be flooded with as many applications under the said provisions as there are subsequent conducts on the part of the company. Above all, it causes no prejudice to the respondents as long as the respondents are given all opportunities to adduce rebuttal evidence regarding those subsequent events or transactions."

The learned Single Judge thereafter noticed the judgment of the Delhi High Court in the case of B.R. Kundra and others v. Motion Pictures Association, Delhi and others 1978(48) ComP.Cas. 536. Relying on the aforesaid two judgments, the learned Single Judge permitted the amendments incorporating therein the subsequent events.

20. This judgment of the learned Single Judge was taken in Appeal before the Division Bench being O.J. Appeal Nos. 26 of 1993 to 30 of 1993 with Civil Application Nos. 54 of 1993 to 58 of 1993. The Appeal was decided by a Division Bench consisting of G.T. Nanavati & B.C. Patel, JJ. The Division Bench whilst upholding the judgment of the learned Single Judge noticed the submissions made before the learned Single Judge to the effect that the facts and events which are sought to be introduced as additional facts and grounds establishing the mismanagement and oppression are already made in the petition. It was also averred that the amendments seek to bring events which have transpired recently i.e. subsequent to the filing of the petition and which have a necessary and direct bearing on the manner in which respondent Nos. 2 and 3 have and are continuing to mismanage the company and oppress its shareholders. It was also submitted that the amendment was on the same subject matter and the amendment was also with a view to avoid multiplicity of proceedings. It was further contended that the new events indicating a fresh cause of action for filing a new petition would not come in the way of the petitioner in getting the petition amended as the same was meant for supplementing the main contention. It was contended before the Division Bench that amendments ought not to have been granted as it would attract the provisions of Order 23, Rule 1. It was further submitted that as there is a fresh cause of action, proceedings would not be maintainable in view of the amendment under the Companies Act and the forum for the grievance would be the Company Law Board. It was further submitted that the subsequent events are not relevant for deciding the issue in question. It was contended that the additional evidence should be the evidence in addition to the evidence already on record in the form of original pleadings. New material should partake the same character and content as the original petition. As the allegations are altogether different and have no nexus or relevance to the original allegations, the applications ought to have been rejected. It was further submitted that as per the provisions contained in sections 397 and 398 of the

Companies Act, petition has to be decided on the facts existing on the date of presentation of the petition and the Court was not concerned with continuous course of conduct. In paragraph 9 of the judgment the Division Bench noticed the judgment of the Supreme Court in Kalinga Tubes and held as follows:

"We have gone through the decisions cited by the learned Counsel. So far as provision regarding withdrawal of the suit is concerned, it is required to be mentioned that the order passed by the Court need not be express and the provisions of Order 23, Rule 1 have to be read with the application and the order passed thereon. It is required to be noted that the subject matter of the amendment application is not the same. The learned Counsel relying upon the decision in the case of M/s. Kalinga Tubes Ltd. v. Shanti Prasad Jain 1964(1) Com.L.J. 117, submitted that petition is required to be decided on the averments made in the application itself. We have gone through the decision reported in 1990(67) Comp Cas 185 wherein it is held that provisions of the CPC in so far as applicable shall apply to all the proceedings under the Companies Act. It is open for Court to take notice of all subsequent events to grant relief finally after the trial of the Company matter, as held by the Calcutta High Court in the case of Pramode Kumar Mittal v. Southern Steel Ltd. 1980(50) ComP.Cas. 555."

The Division Bench was referring to the judgment of this Court in the case of Khimji M. Shah (supra). The Division Bench also held that it is necessary that with a view to see that there is no multiplicity of proceedings, amendments should be allowed. The aforesaid decisions of the Division Bench makes it clear that the decision of the Supreme Court in Kalinga was not dealing with the case of amendment application and is, therefore, not applicable to the facts and circumstances of this case.

21. At this stage the Court is not required to decide the petition on merits. The petition could be held to be demurrable only if the claim put forward cannot be established even if all the allegations made in the petition are accepted to be true. Such is not the position here. Very complicated questions of fact and law have been raised. It is only at the final hearing of the petition that the Court would be able to decide this issues as to whether the dividend squeeze could amount to an oppression. The Court would also have to decide as to whether or not transfer of shares made in contravention of the Articles of Association would amount to an act of oppression. The Court would also have to decide as to whether or not the remuneration received by respondent No. 2 is an act of oppression. These are all matters which require detailed consideration and have to be decided on merits at the final hearing of the petition.

22. In view of the above, the preliminary objection raised by Mr. Manohar is hereby rejected.

Certified copy expedited.

Private Secretary is permitted to issue an ordinary copy of this order to the parties.

23. Preliminary objection rejected.