
(1995) 12 AHC CK 0079
In the Allahabad High Court
Case No : Company Petition No. 19 of 1995

Kiran Sandhu and Others

APPELLANT

Vs

Saraya Sugar Mills Ltd. and Others

RESPONDENT

Date of Decision : 20-12-1995

Acts Referred:

Companies Act, 1956 — Section 397, 398, 433, 443, 443(1)

Citation : (1998) 91 CompCas 146

Hon'ble Judges : A.K. Banerji, J

Bench : Single Bench

Advocate : R. Sahani and Vineet Saran, for the Appellant; S.N. Verma and Krishna Murari for respondent No. 3 and M.G. Ramachandran and Anil Sharma for respondent Nos. 1, 2, 5 and Ors., for the Respondent

Final Decision : Dismissed

Judgement

A.K. Banerji, J.—The petitioners, who are the shareholders of Saraya Sugar Mills Ltd. (respondent No. 1), holding amongst themselves 35.7 per cent. shares, have filed this petition for the winding up of respondent No. 1 u/s 433(1)(f) of the Companies Act, 1956, on the ground that it is just and equitable to wind up the said company. They have further prayed that the official liquidator be appointed as the provisional liquidator to take charge of the assets of the company.

2. The relevant facts, as set out in the petition, are that the respondent-company was originally a partnership concern of Majithia family of which Sir Sundar Singh Majithia was the head. The partnership was made on August 21, 1944, between Lady Parson Kaur, widow of the late Sir Sundar Singh Majithia and her sons, namely, Surendra Singh Majithia, Sardar Surjeet Singh Majithia and the sons of a deceased son, Kirpal Singh, namely, Gur Nihal Singh Majithia and Dilip Singh Majithia. In the year 1956, the partnership business was converted into a private limited company and, subsequently, in the year 1974, it was made a public limited company. The said company after its incorporation in the year 1956 took

over as a going concern the other businesses being carried on by the members of the family in partnership including the business of Saraya Distillery, Saraya Oil Works and the business of Fairweathers. Apart from the same, the family was also carrying on in partnership, the business of Saraya Engineering Works (P.) Ltd. In the year 1971, pursuant to a decision of all the family members, it was mutually agreed to divide and partition the family business and properties amongst the various members of the family. The parties, therefore, by an agreement dated March 21, 1972, appointed one Sardar R. S. Bindra as the sole arbitrator. As per the said award which was made a rule of the court on January 3, 1974, various businesses including Saraya Distillery, Saraya Oil Mills and Saraya Engineering Works (P.) Ltd. and the business of Fairweathers were completely partitioned and allotted wholly to one or the other branch of the Majithia family. The shares in the respondent-company were distributed amongst all the branches of the family. On account of the said award in the shareholding of the various members of the Majithia family, respondent No. 1 was reallocated with the result the branch of the petitioners and respondent No. 3 held 33.6 per cent., the branch of Surendra Singh Majithia 52.6 per cent. and that of Surjeet Singh Majithia and others 13.8 per cent. Subsequently, Surendra Singh Majithia gifted 70,000 equity shares of respondents Nos. 1 to 6, grandchildren of Sardar Surjeet Singh Majithia, Sardar Gurlabh Singh Majithia and Sardar Gurjeet Singh Majithia. On the death of Sardar Surendra Singh Majithia in May, 1983, the rest of his 32 per cent. shares were distributed in accordance with his will out of which 25.6 per cent. shares came to the branch of Surjeet Singh Majithia. On account of the same, the said branch had absolute majority in the shareholding of the respondent-company. It appears that a dispute between the parties surfaced thereafter. According to the petitioners, taking advantage of its majority shareholding, Surjeet Singh Majithia and his son, Satyajeet Singh Majithia (respondent No. 2), managed to bring on the board their nominees so as to have complete control over the management of the company, and prevented petitioner No. 3, who, after the death of his father, was inducted as one of the directors of the company, from participating in the day to day management of the company. It is further alleged that respondent No. 2 committed defalcation of the accounts, misappropriation of the funds of the company and committed all kinds of oppression against the petitioners. In view of the same, petitioners Nos. 1 and 2 filed Company Petition No. 6 of 1986 before this court for the winding up of the company on the ground that it was just and equitable that the company be wound up. This petition was admitted. However, an amicable settlement was reached between the petitioners and the respondents which resulted in the signing of a memorandum of understanding (MoU), dated April 29, 1986, between respondent No. 5 of the first part, respondent No. 3 and petitioners Nos. 1 and 2 of the second part and petitioner No. 3 of the third part. As a result of the MoU, Company Petition No. 6 of 1985 was got dismissed as withdrawn and further petitioner No. 3 was nominated as a director on the board of directors and respondent No. 2 along with his father, Surjeet Singh Majithia, and brother resigned from the board. Respondent No. 3 was appointed chairman of the

company for a period of five years and respondent No. 5, Gurjeet Singh Majithia, was appointed managing director of the company for the same period. Further, according to petitioner No. 3, he was appointed as director-in-charge of the company for a period of five years with effect from June 8, 1986. However, this was not liked by respondent No. 2 who in connivance with respondent No. 5 and to discredit petitioner No. 3 got a false and fraudulent complaint filed against petitioner No. 3 and exerted pressure on petitioner No. 3 to resign and succeeded in getting his resignation as the director-in-charge of the company, though he continued to remain a working director during this period. In the place of petitioner No. 3, respondent No. 2 was appointed as a director contrary to the MoU dated April 29, 1986. Having acquired complete control of the management of the company and after having engineered the removal of petitioner No. 3 as a director of the company, respondent No. 2 in collusion with respondent No. 5 started diverting the funds of the company and acting against the interest of the shareholders of the company. As a result of mismanagement, the mill was brought to a stage of total ruination. They also withheld vital and relevant information from the petitioners and other shareholders. It has been stated in paragraphs 50 and 51 of the petition that on account of the mismanagement and the conduct of respondent No. 2, the substratum of the company was dissipating and there was oppression of the minority shareholders and large scale destruction of the official records of the company. On account of complete lack of probity on the part of the present directors, the mutual trust and confidence of the other shareholders was lost and, therefore, there was no other alternative readily available to them, but to seek the winding up of the company on the just and equitable ground.

3. Along with this petition, the petitioners also filed an application u/s 443(1) of the Companies Act read with Rule 9 of the Companies (Court) Rules, 1959, praying for an ex parte interim order to restrain the board of directors of the respondent-company from issuing any further equity shares or creating any further liability on the company with fresh borrowings from the institutions and the banks. While entertaining the petition during the vacations, this court had issued notice to the respondents calling for a counter affidavit within one month. It also passed an ex parte interim order restraining the company from issuing further equity shares or creating any further liabilities on the company with fresh borrowings from the banks and other financial institutions and from disposing of the fixed assets of the respondent-company in any manner. In response to the notice, an application (A-6) praying that the winding up petition be dismissed and the interim order passed by this court be vacated was filed along with a counter-affidavit on behalf of respondents Nos, 1 and 2. It has been stated on behalf of respondents Nos, 1 and 2 that the company petition has been filed by distortion and misstatement of facts and on the basis of wild and unfounded allegations against respondents Nos. 2 and 5. It has been further pleaded that petitioner No. 3 who was in charge of the affairs of the company between the period 1986 and 1992 completely mismanaged the affairs of the respondent-

company and the company suffered loss of 1.90 crores in the year ending March 31, 1992. A criminal complaint was filed against petitioner No. 3 and others and the management of the respondent-company by the cane-growers, and petitioner No. 3 had voluntarily resigned from his position as the managing director of the respondent-company and, thereafter, respondent No. 2 who was associated with the management and affairs of the respondent-company during the period 1979 to 1986 and as during this period, the respondent-company had progressed well and in the year ending October 31, 1986, had made a cash profit of 1.43 crores, he was called upon to join the board and to retrieve the deteriorating condition of the company. Since respondent No. 2 took over as director-in-charge of the affairs of the company in September, 1992, the position of the company has changed, all the liabilities have been paid up and, during the year ending March 31, 1994, the company had made a profit of Rs. 1.84 crores. The present petition for winding up on just and equitable grounds has been filed mainly by petitioner No. 3 out of frustration and in collusion with respondent No. 3 and petitioners Nos. 1 and 2 who are the daughters of respondent No. 3. The petition has been filed at a point of time when the company has negotiated an arrangement with the PICUP for financial assistance to modernise/replace some balancing equipments in order to achieve the enhanced utilisation of cane crushing capacity of the sugar unit at Sardar Nagar, District Gorakhpur. The petitioners are invoking the partnership on just and equitable grounds when there exists no legal or factual ground for the same. The petitioners together hold only about 25 per cent. of the total equity capital in the company. There is no equality of the shareholding and no deadlock in the management. The petition is not maintainable. Besides, it suffers from the guilt of laches.

4. The company is continuing to maintain its operation generating profits. Besides, the petitioners have deliberately not availed of the various alternative remedies available to them for redress of their grievances, if any, and, therefore, the petition is liable to be dismissed in terms of Section 443(2) of the Act. The allegation made in the petition that respondent No. 2 has surreptitiously sold large tracts of land belonging to the company, to various parties, was denied by the respondents and it was stated that certain persons have illegally encroached upon the land belonging to the company adjacent to the PWD land and these persons are in possession since prior to June, 1992. Respondent No. 2 has neither sold any land nor received any amount from the sale of land. Similarly, the allegation about dissipating the funds of the company or defalcation of the same or siphoning off of the profits of the company made against respondent No. 2 has been denied in the counter-affidavit as false and baseless.

5. On the date fixed by the court, respondent No. 3 put in appearance and prayed that necessary directions be given by the court for inspection of the minutes book of respondent No. 1 to enable respondent No. 3 to file a reply to the company petition. On the said application, necessary directions were given by the court to respondents Nos. 1 and 2 and respondent No. 3 has filed a reply (A-14) to the company petition. In the said reply, it has been stated, *inter alia*,

that complete inspection of all the relevant records was not given to the said respondent. As he wanted specially to see the relevant records regarding the disposal of the company's land respondent No. 3, therefore, had visited Sardar Nagar to find out the details as in a meeting of the board of directors held on December 4, 1992, when respondent No. 2 was appointed as the managing director, one of the items on the agenda pertained to disposal of surplus land of the company lying at different places. On his arrival at Sardar Nagar on September 11, 1995, along with his advocate, he got first hand information from the persons who had purchased the company land against cash payment that they have not received any document of title to confirm the sale though they have paid money for the said purpose. Respondent No. 3 was also handed over three registers by the sugar godown in-charge a perusal of which showed that the registers contained details of dalewise delivery of molasses off the record to Saraya Distillery managed by respondent No. 3. The record further showed that there had been large-scale illegal diversion of molasses from the sugar mill to the distillery managed by respondent No. 2 and in regard to which unofficial registers have been maintained. The company lands of high commercial value have been surreptitiously sold against cash payment to various persons without issuing receipts and the said monies received have not been accounted for in the records of the company, It has been further alleged that a locomotive belonging to the sugar mill has been dismantled and sold as scrap after the interim order dated June 15, 1995, had been passed by this court. It has been further stated that the counter-affidavit which has been filed on behalf of the company has not been approved by the board of directors or by respondent No. 3 who was the chairman and the director of the company. A meeting of the board of directors had been called for September 20, 1995, in which respondent No. 3 as chairman totally dissociated himself from the reply filed by respondent No. 2 to the petitioner and respondent No. 3 on behalf of himself and the company and respondent No. 5 removed respondent No. 3 as chairman of the board and respondent No. 12 was appointed the chairman instead. It has been further stated that the matter regarding the loan to be obtained from the PICUP was never put up before the board or discussed earlier and respondents Nos. 2 and 5 had incorrectly written to the PICUP that respondent No. 3 was not in a position to give any personal guarantee as he was seriously ill, which was totally incorrect. In short, from the reply of respondent No. 3, it would be manifest that the said respondent was supporting¹ the petitioners regarding the allegations of gross illegalities committed by respondent No. 2, which has resulted in loss of crores of rupees to the company and the shareholders. In reply, it has been categorically stated that respondent No. 1 is a partnership firm in the garb of a company, yet there is a total lack of mutual trust and faith amongst the shareholders and a complete lack of probity on the part of the directors. The said respondent has confirmed that the affairs of the company are being carried on in a clandestine manner destroying the mutual trust and confidence of the shareholders and the intention of respondent No. 2 was to take over complete control of the affairs of the company for his personal benefit and (to the)

exclusion of one segment of the shareholders.

6. A rejoinder affidavit has been filed to the counter-affidavit of respondents Nos. 1 and 2 by the petitioners in which mainly the allegations made in the petition have been reiterated. It has been emphasised that respondent No. 2 in collusion with respondent No. 5 has given a total go-by to the MoU dated April 29, 1986, and has even gone to the extent of saying that the name is not binding. It has been further emphasised that there is total mistrust between the majority shareholders represented by respondents Nos. 2 and 5 and other shareholders including the petitioners on account of which there is complete deadlock and the company cannot run under its present management. Though presently a public limited company, all the shareholders of the company belong to the Majithia family and there are no outsiders and it is actually in the form of a partnership though in the garb of a company, the partners of which in the real sense of the term are the members of the three branches of the Majithia family. In view of the same the provisions of Section 433(f) of the Act are attracted and this court can exercise its powers for the winding up of the company as the petitioners do not have any alternative remedy except to approach this court for the winding up of the respondent-company.

7. It is noteworthy at this stage that the petitioners have also during the pendency of this petition filed an application under Order 39, Rule 2A, read with Section 151 of the CPC alleging that respondent No. 2 in violation and disobedience of the interim injunction granted by this court dismantled and sold as scrap one steel locomotive belonging to the company and is also surreptitiously disposing of the fixed assets of the company against which a winding up order is being prayed for on the just and equitable ground and, therefore, this court may proceed to punish respondents Nos. 1 and 2 for contempt of court and not to hear the petition unless they purge themselves of the contempt. An application has also been filed on behalf of certain persons who claim themselves to be the purchasers of plots of land belonging to the company for being impleaded as parties to the company petition. They have filed affidavits stating that they have purchased the plots from the company by paying the amount demanded, but they have not given any deed showing their title to the said land.

8. I have heard Shri R. Sahani, learned senior counsel, assisted by Shri Vineet Saran, for the petitioner and Shri S. N. Verma, learned senior counsel, assisted by Shri Krishna Murari, on behalf of respondent No. 3 and Shri M. G. Ramachandran, learned senior counsel, assisted by Shri Anil Sharma, on behalf of respondents Nos. 1, 2, 5 and other respondents. I have also perused the affidavits filed by the parties and the record of this petition as well as Company Petition No. 6 of 1985, at the admission stage.

9. In support of his submission, learned counsel for the petitioner has referred to the various paragraphs of the petition and has mainly contended that though the apparent structure of the company is that of a public limited company, yet the

real structure is that of a partnership wherein erstwhile partners, who were the members of the Majilhia family, are the shareholders. Respondents Nos. 2 and 5 who among themselves hold the majority shares, are not only mismanaging the company, but have also committed such acts which call for an order u/s 433(f) of the Act. The acts of misconduct which have been alleged by the petitioners against respondent No. 2 and his group are :

(i) that land belonging to the company has been sold in plots to different parties without informing the board of directors or accounting for the same in the books by respondent No. 2 ;

(ii) that the molasses of the company has been diverted to the distillery belonging to respondent No. 2 ;

(iii) the employees of the distillery of respondent No. 2 have been employed in the respondent-company and the employees of the distillery have been brought on the board of directors of the respondent-company ;

(iv) the accounts maintained by respondent No. 2 do not depict the correct statement of affairs and despite the discrepancies being pointed out, no effort has been made to rectify the same, and

(v) the affairs of the respondent-company are being so run as if it were the private business of respondent No. 2 and his group.

10. On these allegations, it has been stated that the mutual trust and confidence between the majority shareholders and the petitioners is completely lost and the animosity and discord created has resulted in a deadlock. Therefore, it will not be in the interest of the minority shareholders to let the company carry on its business. As the company is really in the nature of a partnership, the principles which are applicable for dissolution of a partnership should also apply in the facts of the present case and it will be just and equitable to wind up the respondent-company. It has been further contended that though the minority shareholders are being oppressed by the group of respondents Nos. 2 and 5, the provisions of Sections 397 and 398 of the Act cannot be invoked as the minority shareholders themselves desire that the company be wound up. Therefore, the said provisions will not be an alternative remedy within the meaning of Section 443(2) of the Act. Learned counsel has strongly urged that there cannot be any better example of lack of probity on the part of respondent No. 2 and his group than this that the memorandum of understanding dated April 29, 1986, which was signed by all the shareholders, who were parties to Company Petition No. 6 of 1985, was sought to be repudiated by respondent No. 2 as a waste paper. Lastly, it has been contended that at this stage, the court has to decide, *prima facie*, on the basis of the averments made in the affidavits whether a case has been made out for the winding up of the company on the just and equitable ground. The court is not required to go into the evidence at the present stage. Learned counsel contended that from the averments made in the affidavits, a case for admission of this petition and for advertising the same has been made out.

11. In support of his submission, learned counsel for the petitioner has placed reliance upon certain observations made by the Supreme Court in the case of Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, wherein it has been held that when the shareholding is more or less equal and when there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding up on the just and equitable ground. In a given case, the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure, and on piercing the veil, it is found that in reality, it is a partnership. Learned counsel has also placed strong reliance upon the decision of the Division Bench of the Delhi High Court in the case of Eastern Linkers (P.) Ltd. v. Dina Nath Sodhi [1984] 55 Comp Cas 462(DL). In this case, following the decision of the Supreme Court in the case of Hind Overseas (P.) Ltd.'s case [1976] 46 Comp Cas 91(SC) and other decided cases, the court had, in the facts of the said case, invoked the partnership principles and had upheld the order of the learned single judge winding up the company under the provisions of Section 433(f) of the Act. Apart from the said cases, learned counsel has also placed reliance upon two other decisions of the Delhi High Court in the case of Bhaskar Stoneware Pipes (P.) Ltd. v. Rajinder Nath Bhaskar [1988] 63 Comp Cas 184(DL) and in the case of Moti Films (P.) Ltd. v. Harish Bansal [1983] 54 Comp Cas 856, wherein also the partnership principles were applied and orders were passed under the provisions of Section 433(f) of the Act.

12. Shri S. N. Verma, learned senior counsel appearing for respondent No. 3, has adopted the main submissions made by learned counsel for the petitioners and has contended that, though the respondent-company is now a public limited company, it is wholly a family concern wherein the members of the Majithia family are the shareholders. However, on account of some high-handed and illegal acts of respondent No. 2 in collusion with respondent No. 5, the minority shareholders have completely lost their faith in the majority and it is a state of distrust. Things have come to such a pass that respondent No. 2 in his affidavit before the court has gone to the extent of even challenging the rights of the chairman of the board of directors, respondent No. 3, to visit the factory at Sardar Nagar and has also made wild and reckless allegations against the said respondent who has been trying his best to avoid litigation and had made efforts even after the filing of this petition to get the dispute settled amicably. In a situation like the present when the parties have lost confidence then nothing remains in the company and it is desirable that it should be wound up. In support of his submission, learned counsel has placed reliance upon the decision of the Supreme Court in the case of Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743 and has submitted that if the company is making profits, this is no ground for refusing the winding up of the company if a case is made out for the same. Learned counsel has also

referred to the decision of the Chancery Division in *A and BC Chewing Gum Ltd., In re* [1975] 1 All ER 1017 (Ch D), where the minority shareholders' right established by the company's articles and shareholders agreement was repudiated by the majority and it was held that it would be just and equitable to wind up the company.

13. Shri M. G. Ramachandran, learned counsel appearing for the respondents has, however, contended that the principles of partnership will not apply to this public limited company. Though the business of the company started as a partnership in which different branches of the Majithia family were partners, however, the same came to an end with the incorporation of the company, and the articles of association, in the present case, are contrary to the basic tenets of partnership. That apart, learned counsel has contended that the award given by Shri Bindra sounded a death knell to what remained, if any, of the alleged partnership. Learned counsel for the respondents has further contended that the petitioners have alternative remedies and, in terms of Section 443(2) of the Act, they are acting unreasonably in not availing of the same. Besides, they have not come with clean hands and their conduct disentitles them to any equitable remedy. So far as the allegations of lack of probity, mismanagement, misappropriation are concerned, it has been submitted that they are mischievous, motivated and unsubstantiated. Lastly, it has been contended that in any event, this is not a case in which this court should exercise its discretion u/s 443 of the Act.

14. From the submissions made by learned counsel for the parties, what arises for consideration at the very threshold, is, firstly, whether the partnership principle can be invoked in the facts of the present case for winding up of the respondent company, secondly, whether in view of the allegations of gross mismanagement, lack of probity and oppression by the majority shareholders, the petitioners have an alternative remedy in terms of Section 443(2) of the Act by invoking Sections 397 and 398 of the Act, and thirdly, whether this court should admit this petition at this stage on the basis of the averments made in the affidavit filed by the petitioners and decide this case after looking into the evidence at the final hearing stage.

15. Before proceeding to consider the above noted points, it will be proper to notice the relevant provisions which require to be considered at this stage. Section 433 provides for the circumstances in which a company may be wound up by the court and lays down six grounds. In the present case, we are concerned with the sixth ground which has been mentioned in Clause (f) of Section 433 which lays down that a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company would be wound up. Similar provision is there in Section 222(f) of the English Companies Act, 1948. It is now well established that Section 433(f) of the Act is not to be read as being *ejusdem generis* with the preceding five clauses. Therefore, the just and equitable clause leaves the entire matter to the judicial discretion of the

court. However, this discretion is not unfettered and has to be exercised judiciously. It is noteworthy that similar provisions are there in the Indian Partnership Act. Section 44 of the said Act lays down that the court may dissolve a firm on the grounds enumerated in the said section. Clause (g) of Section 44 lays down that a partnership could be dissolved on any other ground which renders it just and equitable that the firm should be dissolved. Section 443(2) of the Act provides that when a petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners, and they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. As noticed above, the aforesaid petition has been filed u/s 433(f) of the Act which has to be read with Section 443(2) of the Act. In this connection, the provisions of Sections 397 and 398 of the Act may also be noticed which are preventive provisions in the Act to safeguard against oppression of the majority. Section 397 empowers 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 to apply to the Company Law Board for an order under this section and if the Board is of the opinion after having come to the conclusion that the member or members are being oppressed, that to wind up the company would unfairly prejudice the member or members though otherwise, the acts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, the Board with a view to bringing to an end the matters complained of may make such order as it thinks fit. Similar powers can be exercised by the Board u/s 398 if satisfied that the affairs of the company are being mismanaged.

16. While considering the first point mentioned above, what has to be seen is whether after the incorporation of the private limited company it can be said that the partnership continued in principle. For the said purpose, learned counsel for the parties have referred to the articles of association a copy of which has been annexed to the petition. I have considered the various articles as pointed out by learned counsel and I am of the view that there are certain articles which go to show that the same are contrary to the tenets of the principles of partnership and, therefore, it cannot be said conclusively that the partnership continued even behind the veil of the private limited company. Reference in this connection may be made to Articles 19, 20 and 21 wherein the transfer of shares has been envisaged. It appears from the said articles that no restriction on the transfer of shares was contemplated provided the shares were fully paid up. In the present case, there is no dispute that the shares were fully paid up. In this view of the matter, there was nothing to prevent any of the erstwhile partners or members of their branch to transfer their shares to any third person. This is not possible in the name of a partnership. Similarly, Article 48 of the articles of association speaks about the vote of members and states that one member shall have only one vote ; likewise Article 66 lays down that all questions arising at any meeting

of the board shall be decided by a majority of votes. Learned counsel for the petitioners has, however, referred to Article 74 of the said articles in which three managing directors of the company have been named, and it has been pointed out that the three managing directors represent the different branches of the family. However, this very article also reveals that the remuneration and perks of the three managing directors are not the same. Further, this article says that in case the total number of directors has to be increased, in that event, it shall be open to the directors to appoint any other director in addition to or substitute the existing directors on such remuneration as may be considered fit and proper. In view of the same, there is no question of any permanent managing director. From some of these articles, it is evident that the same contain no special feature of partnership or special feature regarding management rights. The articles also recognise the principle of majority both in the general meeting and in the meeting of the board of directors. In the absence of any special provision in the articles, any director can be removed by an ordinary resolution passed at the general meeting. That apart, even if the articles of association are ignored, the award given by Shri Bindra on July 29, 1972, on a reference being made to him on the written request of the parties, it is evident that the various family businesses have been partitioned and each branch has been provided for with a separate business. Learned counsel for the petitioners has contended that this award has not partitioned Saraya Sugar Mills which continues to remain a partnership business under the garb of a public limited company wherein all the shareholders of the family have been accommodated. The submission, therefore; is that it was not contemplated that the business of the respondent-company would be given to any particular group, but it should continue in the same manner as it was run during the partnership. I am unable to agree with this submission. The said award reveals that even the shareholding in the Saraya Sugar Mills (respondent No. 1) had been so divided as to give controlling interest to Shri Surendra Singh Majithia who was having 52.5 per cent. shares whereas the group of petitioner No. 3 and that of respondent No. 3 were given 16.8 per cent. shares each. It is noteworthy that the said award was accepted by all the groups and was also acted upon. This was not possible had it been a partnership as contended by the petitioners. As a matter of fact, this award indicates that the real intention was to give effect to the separation of the family and its businesses. It is further noteworthy that in May, 1978, Sardar Surendra Singh gifted 70,000 shareholding to different groups the maximum going to the group of respondents Nos. 2 and 5, and thereafter, vide his will he bequeathed the majority of his balance shares to the group of respondents Nos. 2 and 5 with the result, the present shareholding of the group of the contesting respondents Nos. 2 and 5 is currently 60 per cent. of the shareholding of respondent No. 1 whereas the shareholding of the group of petitioner No. 3 and respondent No. 3 including petitioners Nos. 1 and 2 is 40 per cent. Therefore, on an analysis of the articles of association as well as the award dated July 29, 1972, I am of the view that it was not intended by the parties that the partnership should continue after the incorporation of the company or at any rate after the award by which all the

businesses being run by the family were partitioned.

17. In view of my finding on point No. 1, the various decisions cited by learned counsel for the petitioners can be distinguished. In the case of *Eastern Linkers Pvt. Ltd. Vs. Dina Nath Sodhi*, which was strongly relied by learned counsel for the petitioners, the company was floated by two persons and it was run jointly by them on equal participation. The shareholding was equal and the remuneration and perks were also equal. Subsequently, on the basis of a meeting, which was held to be illegal, some persons, who were illegally inducted as shareholders, were elected in the board of directors. On those facts, a petition for winding up of the company by the aggrieved group was filed u/s 433(0 of the Act and invoking the just and equitable principle for winding up, the Division Bench of the Delhi High Court had upheld the order of winding up passed by the Company Judge. In the case of *Bhaskar Stonewares Pipes Ltd.* [1988] 63 Comp Cas 184 (Delhi), the petition was not confined u/s 433(f) of the Act only, but it was a joint petition invoking Sections 397 and 398 also. Though in the facts of this case, initially, there was a partnership among the members of the family and subsequently a private limited company was incorporated, the facts reveal that the four groups of the family headed by the brothers kept the proportions of their interest throughout despite various changes in the constitution of the firm and the incorporation of the company did not introduce any conceptual change in the family nature of the business or in the partnership concept under which it was working. The observations made in this case, therefore, were on the facts of the said case. In the case of *Moti Films (P.) Ltd* [1983] 54 Comp Cas 856, the Delhi High Court had held that the partnership principle would be prima facie attracted in the facts of the said case.

18. Consequently, the observations made in that case would also not apply in the facts of the present case wherein it has been held that the partnership did not continue after incorporation of the company and, in any case, after the award in the year 1972. Assuming anything remained of the partnership that too came to an end. Learned counsel for the petitioners has also relied upon the decision of House of Lords in the case of *Ebralnmi v. Westbourne Galleries Ltd.* [1973] AC 360 and certain observations made therein. In this case also though there was a prior partnership between two members, who later on formed the company, both the shareholder directors were sharing the profits equally as remuneration. Subsequently, the son of one of the directors was made a shareholder director. The father and the son combined and ousted the other director who not only ceased to be a director, but lost his right to share in the profit through the directors' remuneration. On these facts, the House of Lords applied the provisions of Section 222(f) of the English Companies Act, which is equivalent to Section 433(f) of the Companies Act, 1956, and ordered the winding up of the company on just and equitable ground. The facts of the present case are not the same. In the case of *A & BC Chewing Gum Ltd.* [1975] 1 All ER 1017 (Ch D) cited on behalf of respondent No, 3, the company was in substance a partnership and there was an agreement between the two groups of the petitioner and the

respondent to have equal control. The group of the respondents repudiated the petitioners' right established by the company's articles and the shareholders' agreement to participate in the management of the company. This repudiation was held to be totally unjustified and constituted a ground to invoke just and equitable principle for the winding up of the company. In this case also, the facts are distinguishable.

19. Learned counsel for the petitioners has also relied upon the observations made by the Supreme Court in the case of *Hind Overseas (P.) Ltd.* [1976] 46 Comp Cas 91. The relevant passage on which the petitioners were relying has been quoted above. It may, however, be mentioned that the Supreme Court in the said case has summarised the entire legal position as to the application of the partnership principle and in the facts of the said case had held that Section 433(f) would not apply and, therefore, refused to wind up the company. That apart, there is another aspect of the matter. The dissolution of the partnership principle has been applied to companies on the ground that it is a domestic or family company or on the ground of complete deadlock. In the present case, as already held above, though initially, the company started as a partnership belonging to the Majithia family, but subsequently after the incorporation of the company as a private limited company, it lost the character of a partnership as some of the basic tenets of the partnership principles were given a go-by. Thereafter, by means of an award what had remained of the partnership character that too has dissolved. Therefore, the partnership principle ceased to apply so far as the respondent-company was concerned. So far as complete deadlock is concerned, it has been observed in the case of *Hind Overseas Private Limited Vs. Raghunath Prasad Jhunhunwalla and Another*, that the dissolution of partnership principle has been applied to companies either on the ground of complete deadlock or on the ground of domestic or family companies. The complete deadlock is where the board has two real members or the ratio of shareholding is equal. *The Yenidje Tobacco Co. Ltd.* [1916] 2 Ch 426 (CA) and *Loch v. John Blachwood Ltd.* [1924] AC 783 (PC) illustrate these types. In the domestic and family companies courts have applied the dissolution of partnership principle where shareholdings are more or less equal and there is ousting not only from the management, but from the benefits as shareholders. Lack of probity has to result in prejudice to company business affecting the rights of complaining parties as shareholders and not as directors.

20. Applying the principle laid down above in the facts of the present case, it would be noticed that here the shareholding has never been equal. Initially, *Surender Singh Majithia* was having the major shareholding. Subsequently also by means of the award of the year 1972, *Surendra Singh Majithia* was given dominant control over the affairs of the company and was holding the maximum shares. Subsequently, by means of gift and by bequeathing his shares by his will the shareholding of respondents Nos. 2 and 5 and their group is 60 per cent. whereas those of petitioner No. 3 and the group of respondent No. 3 including petitioners Nos. 1 and 2 is 40 per cent. There is, therefore, no deadlock type

situation in the facts of the present case. Complete deadlock can arise in a case where the shareholding is equal. That apart, in the case of Hind Overseas (P.) Ltd. [1976] 46 Comp Cas 91, the Supreme Court has also observed that where more than one family or several friends and relations together form a company and there, is no right as such agreed upon for active participation of members who are sought to be excluded from the management, the principle of dissolution of partnership cannot be liberally invoked. (emphasis* supplied). From the articles of association it is evident that no right of active participation of all the members belonging to different groups of shareholders has been specified. Similarly, the right of petitioner No. 3 to work as managing director of the company has been excluded from the management by removing him from the directorship (assuming that he was so removed and had not voluntarily resigned) that cannot be one of the grounds for dissolution of partnership u/s 433(f) of the Act. For the aforesaid reasons, I am prima facie of the view that it would not be proper to invoke the provisions of Section 433(f) of the Act as the principles of partnership will not apply to respondent No. 1. This brings up the question whether the petitioners have an alternative remedy in terms of Section 443(2) of the Act in the facts of the present case. As already noticed above, the petitioners have in their petition and especially, in paragraphs 50 and 51 thereof, have made allegations of gross mismanagement, lack of probity and oppression on the part of the group of respondents Nos. 2 and 5 against the petitioners. The allegations made are squarely covered under Sections 397 and 398 of the Act. Apart from the same, one of the main grievances of the petitioner, and respondent No. 3 who is now supporting the petitioners, is that the contesting respondents have not only acted contrary to the memorandum of understanding dated April 29, 1986, which was entered into when a similar company petition like the present one had been filed before this court as Company Petition No. 6 of 1986, but they have also repudiated the same by stating it to be a waste paper. The question, therefore, is whether the petitioners could on those allegations file a petition under Sections 397 and 398 of the Act before the Company Law Board, and if the same could be filed, in that case, should the petition be dismissed under the provisions of Section 443(2) of the Act. As already noticed above, learned counsel for the petitioners has vehemently urged that the provisions of Sections 397 and 398 of the Act could not be applied by them as the minority shareholders in the present case are not saying that to wind up the company would prejudice them. On the contrary, they are praying that the company be wound up. I am, however, unable to agree with the submissions made by learned counsel for the petitioners and respondent No. 3 that in the facts of the present case, the provisions of Sections 397 and 398 of the Act cannot be invoked by them as an alternative. It has been held by the Gujarat High Court in a well considered judgment in the case of In Re: Atul Drug House Ltd., :

"The question of alternative remedy even when the partnership principle is invoked must assume great importance when the winding up is sought on just and equitable grounds. In order to do justice to the petitioner who is invoking

jurisdiction of winding up under the just and equitable rules, the court could not do injustice to a solvent company by public advertisement which would necessarily result in irreparable and irreversible harm. This is the most material distinction between bankruptcy proceedings and the winding up proceedings. This is why the Legislature in terms enacted in Section 443(2), when such jurisdiction of winding up is invoked on just and equitable grounds, that the court may refuse to make up an order if it is of the opinion that some remedy is available to the petitioner and they are acting unreasonably in seeking to have the company wound up instead of pursuing such remedy. The Legislature has introduced Sections 397 and 398 in the Act which gave ample powers to the court, by passing all the necessary orders u/s 402 compelling even purchase of the shares or interest of any member of the company by other members or the termination of the agreement between the company on the one hand and the office-bearers or others and for passing any just and equitable orders so that a solvent concern would continue working in cases where the affairs of the company are conducted in a manner prejudicial to public interest or in an oppressive manner to the members concerned. The Legislature must, therefore, be taken to have clearly intended that the winding up jurisdiction even on partnership line should be invoked at the instance of a contributory in such a solvent company only when there would be irresolvable deadlock, because of something in the constitution itself. Such a situation of irresolvable complete deadlock would arise by reason of the very constitution itself in case equally divided holdings of partners in a quasi-partnership when by reason of only acting as per the constitution a deadlock would be created without an oppression or mismanagement which could be remedied under Sections 397 and 398 of the Act..... When the partnership principle is not applicable and the matter has to be decided on the ground of lack of probity in the conduct of the company's affairs which has resulted in justifiable lack of confidence, the question of alternative remedy must obviously assume very great importance as such cases would clearly be covered by reason of the oppressive conduct or mismanagement u/s 397 or Section 398."

21. Respectfully agreeing with the aforesaid observations, I am of the view that as the partnership principle was not applicable in the facts of the present case, as already found above, it has now to be considered whether the petitioners can invoke the provisions of Sections 397 and 398 before the appropriate forum and seek their remedy, if any. It is noteworthy that in the petition itself, the petitioners have only regularly stated in paragraph 51 thereof that they have no other alternative remedy available except to seek the winding up of the company on just and equitable grounds. They have not clearly stated as to why the remedy under Sections 397 and 398 cannot be taken to be an efficacious alternative remedy especially in view of the allegations of mismanagement and misappropriation, lack of probity on the part of the majority shareholders. In the arguments also, learned counsel for the petitioner and respondent No. 3 has contended that Sections 397 and 398 of the Act are not alternative remedy

within the meaning of Section 443(2) as the minority shareholders themselves do not say that to wind up the company would prejudice their rights but, on the contrary, they assert that the company should be wound up and, therefore, the provisions of Sections 397 and 398 will not be an alternative remedy for them. In the case of *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.*, it was held that for attracting the provisions of Section 397 of the Act what was required to be shown was, firstly, that there was just and equitable cause for the winding up of the company, and that the majority shareholders were oppressing the minority shareholders. It was further laid down that the Act has not defined what is oppression for the purposes of this section and it has left to courts to decide on the facts of each case whether there is such oppression as calls for action under this section. In the present case, the petitioners have themselves asserted in the petition and have contended on the allegations made in the petition that there was misappropriation, mismanagement, lack of probity and arbitrary actions on the part of respondent No. 2 and his group. Apart from the same on account of loss of confidence, mutual distrust and strained relation among the majority and minority shareholders, there was a deadlock on account of which it was just and equitable to wind up the company. These allegations have been made in the petition and were controverted vehemently by the contesting respondents. There is presently no evidence in proof of the said allegation. I am of the view that as the petitioners themselves were alleging that it was just and equitable to wind up the company on the allegations made by them and further that being in minority, they were being oppressed by the majority group, the provisions of Sections 397 and 398 of the Act would be attracted. In view of the same, the winding up petition was liable to be dismissed u/s 443(2) of the Act. In the case of *Lokenath Gupta v. Credits (P.) Ltd.* [1968] 38 Comp Cas 599 it was held by the Calcutta High Court that where there are alternative remedies available for redress of the grievances set forth vide Sections 163, 167, 210 and 220 of the Companies Act, it is not just and equitable to order the winding up of the company. However, it shall be open to the petitioners to invoke their alternative remedies before the appropriate forum. Though learned counsel for the parties have advanced lengthy arguments on the basis of the allegations and counter allegations made against each other in various affidavits filed before this court, I refrain myself from giving any finding with regard to the same as I am of the view that as the petitioners have alternative remedy, it shall be open to them to raise all those questions before the appropriate forum and, therefore, it would not be proper for this court to give any finding with regard to the same.

22. Learned counsel for the petitioners has, however, contended that at this stage, the court has only to see whether a prima facie case has been made out by the petitioners and, thereafter, admit the petition and the evidence can be led by the parties at the time of final hearing and, therefore, the court should not decide this case finally at this stage. I am unable to agree with the said submission. There is nothing in Section 443 of the Act to indicate that the court cannot refuse to make an order of winding up at any stage prior to the hearing of

the company petition. On the contrary, under Sub-section (1), the court can on hearing the winding up petition dismiss it summarily and under Sub-section (2) can refuse to make an order of winding up if it is of the opinion that some other remedy is available to the petitioners and they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. There is no restriction or limitation to the effect that an order under subsection (2) can be made only after taking evidence at the time in inquiry or at the conclusion of the inquiry. Similar view has been taken by the Kerala High Court in the case of Jose J. Kadavil v. Malabar Industrial Co. Ltd. [1986] 59 Comp Cas 969. Therefore, this submission of learned counsel for the petitioner is also without force.

23. Apart from what has been stated above, there is another aspect of the matter which is equally important. Relief u/s 433(f) of the Act based on just and equitable clause has been held to be in the nature of last resort when other remedies are not efficacious enough to protect and general interest of the company. The Supreme Court in the oft-quoted case of Hind Overseas (P.) Ltd. [1976] 46 Comp Cas 91 has observed as follows (at page 107) ;

"It is not a proper principle to encourage hasty petitions without first attempting to sort out the dispute and controversy between the members in the domestic forum in conformity with the articles of association. There must be materials to show, when the "just and equitable clause" is invoked, that it is just and equitable not only to the persons applying for the winding up, but also to the company and all its shareholders. The company court will have to keep in mind the position of the company as a whole and the interest of the shareholders and see that they do not suffer in a fight for power that ensues between two groups."

24. In the facts of the present case, it will be noticed that the petitioners did not make any attempt to bring their grievance before the domestic forum. There is nothing to show that before the board or in the annual general meeting the allegations, which are being made, were raised. All that the petitioners have stated in the petition is that petitioner No. 3 had written a letter to the managing director pointing out certain discrepancies in the accounts and seeking explanation about the same. It is, however, not disputed that petitioner No. 3 did not even attend the annual general meeting personally. All the allegations, therefore, that are being made in the petition were not put before the domestic forum or discussed. At all the relevant time, since 1986, respondent No. 3 has been the chairman of the company. The decisions have been taken by the board. Allegations have been made about respondent No. 2 having sold land of the company soon after he became the managing director in the month of October, 1992. Allegations have also been made that petitioner No. 3 was forced to resign as the managing director on September 10, 1992, and also ceased to be a director since September 30, 1992. Respondent No. 3, who is the father of petitioners Nos. 1 and 2 and supporting the present petitioners, did not raise any grievance with regard to the same. Petitioner No. 3 also took no action since

1992 till the filing of this petition in June, 1995, for redressal of grievance. According to the petitioners, respondent No. 2 was removed from the board on account of certain action taken by him by means of the memorandum of understanding of the year 1986. No explanation has been given as to why respondent No. 2 was called back in the year 1992, and petitioner No. 3 removed without there being any objection from the side of the petitioners and respondent No. 3. According to the petitioners themselves, it was at that stage that a breach of memorandum of understanding was made by respondent No. 5 and his group. If that be so, why the same was not pointed out or contested at that very stage. There is no explanation with regard to the same in the petition. Some submissions, however, were made in this regard, but the same were without any foundation. It is well settled that an order u/s 433(f) is passed on equitable considerations and it is also a discretion of the court to be exercised in the facts and circumstances of each case. There is no strait-jacket formula that on the mere allegations made with regard to mismanagement, misappropriation or lack of probity, the court would hold that it is just and equitable to wind up a company. On the contrary, there are numerous decisions some of which have been cited by learned counsel for the respondents to show that mere mismanagement or misconduct or even misappropriation on the part of the directors or the managing director is no ground for winding up. A general allegation of oppression of the minority shareholder is not a ground. Similarly, a mere statement in the petition for winding up that the respondents have illegally diverted the funds and assets of the company into their own pockets or have misappropriated funds and vouchers have been manipulated does not amount to a statement of material facts and particulars, and such a plea cannot be looked into by the court. For such allegations, appropriate remedy is provided in the various provisions of the Act itself (see *Abnash Kaur Vs. Lord Krishna Sugar Mills and Others*, , *Lokenath Gupta and Others Vs. Credits Private Ltd.*, and *Gadadhar Dixit v. Utkal Flour Mills (P.) Ltd.* [1989] G6 Comp Cas 188 (Orissa).

25. There is another aspect of the matter which has to be kept in mind while exercising discretion. Allegations have been made in the counter affidavit that the present petition has been filed mala fide as petitioner No. 3 has been removed from directorship and he is looking for a vendetta against respondent No. 2 who is presently, the managing director. Allegations have also been made that petitioner No, 3 was removed as during his regime as managing director, the company had suffered heavy losses. The court is not going into the said allegations at this stage as this matter can also be gone into if and when the petitioners choose to approach the appropriate forum for redressal of their grievances under Sections 397 and 398 of the Act or if the matter is raised before the domestic forum or any other appropriate authority under the Act. However, it has to be kept in mind that the respondent company is engaged in the manufacture and sale of sugar which is classified as an industry in the high priority sector, It has been stated (that) the respondent company directly employs 1,400 persons and also provides indirect employment to substantial

number of persons such as farmers and farm workers who are engaged in the activity of growing sugarcane. The respondent-company must naturally be contributing to the State exchequer by way of excise duty, sales tax and other levies which is alleged to be over rupees five crores per annum. This is also admitted that from the time respondent No. 2 has taken over as managing director of the company, the company made a profit of Rs. 1.84 crores whereas in 1991-92 when the petitioner No. 3 was in-charge the company suffered a loss of Rs. 1.90 crores. At this stage, it is not necessary to go into the reason for the loss, but nevertheless the fact remains that for the year 1993-94, the company has made a profit of Rs. 1.84 crores. It is, therefore, a profitable concern. In view of the said facts, the court must exercise its discretion in favour of running the respondent-company rather than to wind it up. That apart, it cannot be lost sight of that petitioners Nos. 1 and 2, who are the married daughters of respondent No. 3, only hold a small moiety of shares. They have never been in the management of the company. As shareholders, they can only be interested that the company may run in profits so that they get their dividends regularly. So far as petitioner No. 3 is concerned, his individual shareholding is negligible keeping in view the shares being held by the other parties. In such a situation, on the mere allegations made in the petition specially by a party who may be nursing some personal grievance, it will be most unfair to wind up the company against the wishes of the majority shareholders, more so when the company is running in profit. The Supreme Court has held, in the case of Hind Overseas (P.) Ltd [1976] 46 Comp Cas 91, that a prima facie case has to be made out before the court can take any action in the matter. Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company, if ultimately, the application has to be dismissed. The interest of the applicant alone is not of predominant consideration. The interest of the shareholders of the company as a whole apart from those of other interests, has to be kept in mind at the time of consideration as to whether the application should be admitted on the allegations mentioned in the petition.

26. As a result, in view of the aforesaid reasons, this company petition fails and is dismissed with costs which I assess at Rs. 2,000. However, it is made clear that any observation made by me while deciding this petition shall not be taken as an expression of opinion on the merit of the allegations and counter allegations made by the parties, if the petitioners choose to approach the appropriate forum under Sections 397 and 398 of the Act or any other appropriate forum as provided in law and the said proceedings shall be decided on merits.