
(1989) 03 KL CK 0049
In the High Court Of Kerala
Case No : C.P. No. 28 of 1988

K.P. Chackochan and Another

APPELLANT

Vs

Federal Bank and Others

RESPONDENT

Date of Decision : 27-03-1989

Acts Referred:

Banking Regulation Act, 1949 — Section 10A, 10B, 20, 30, 35B
Companies Act, 1956 — Section 176, 391, 392, 397, 398

Citation : (1989) 66 CompCas 953

Hon'ble Judges : K.P. Radhakrishna Menon, J

Bench : Single Bench

Advocate : C.M. Devan and K.R. Venkiteswaran, for the Appellant; B.S. Krishnan, K.P. Dandapani, C.K.S. Panicker, C.K. Koshy, P. Gopalakrishna Nair, P.V. Madhavan Nambiar, T.R. Raman Pillai, F. Thomas, Mathai M. Paikeday, C.C. Thomas and K.K. Usha, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Radhakrishna Menon, J.—An application presented u/s 397, read with Section 399, of the Companies Act, 1956, for the following reliefs:

" (a) The meeting scheduled to be held on August 30, 1988, of the company be conducted by appointing an advocate Commissioner to supervise the election at the Municipal Town Hall, Alwaye;

(b) To declare that the proxies obtained by the company on August 28, 1988, be declared invalid and non-existent ;

(c) To conduct the business to be transacted on August 30, 1988, without taking into consideration of the proxies obtained by the company on August 28, 1988 ;

(d) To pass such other orders as this Hon"ble Court may deem fit and proper in the circumstances of the case."

2. The sum and substance of the allegations in the petition is that the chairman

and the directors in using the machinery of the bank to get their candidates elected as directors (to fill the vacancies caused on the retirement of directors by rotation) has conducted the affairs of the company in a manner oppressive to the minority shareholders including the petitioners.

3. Before I go into the merits of the case, I shall deal with the preliminary point raised by the company and the other contesting respondents, namely, whether the petition is maintainable in law.

4. The case set up by the respondents in this regard has two aspects, (1) the company, being a banking company, any question pertaining to its management requires to be considered under the provisions contained in the Banking Regulation Act, 1949, for short, "the Act", (2) to maintain a petition u/s 397 of the Companies Act, the petitioners are bound to obtain the consent in writing of those 100 members/shareholders mentioned in Sub-section 1(a) of Section 399 and who have not figured as petitioners, so that the petition could be said to be one on their behalf and for their benefit also. Since the consents in writing of the said members have not been produced, the petition is liable to be dismissed.

5. The first aspect: Learned counsel for the contesting respondents, dilating on this, submitted as follows:

The rights of the shareholders in regard to the management of a banking company are circumscribed by the provisions of the Act. The activities of the board of directors are governed by the special provisions contained in the Act. A specific reference, however, requires to be made to the provisions contained in Part III of the Act which governs matters relating to suspension of business and winding up of banking companies. Since the Act is a consolidating Act, the Act is a complete code in itself as regards the matters it deals with. After the coming into force of the Act, a banking company can be wound up only under the provisions contained in Part III of the Act. That means, now, a petition to wind up a banking company u/s 433 of the Companies Act is not possible. If that be the position in law, a petition u/s 397, since the same is enacted with the intention of avoiding winding up on the "just and equitable" ground (see Section 433(f) of the Companies Act), is not maintainable.

6. Learned counsel for the petitioners, on the other hand, contended that inasmuch as the provisions of the Act are only in addition to and not in derogation of the Companies Act, the respondents shall not be heard to say that a petition u/s 397 which was enacted with the object of safeguarding the interest of the shareholders is not maintainable. Amplifying this aspect, learned counsel submitted that it is enough for a petitioner u/s 397 to show that the oppressive acts of the majority shareholders have brought about circumstances which warrant a winding up of the company on the "just and equitable" ground and not that circumstances warranting a winding up of the company do in fact exist. In support of this argument he relied on a decision of the Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.* [1965] 35 Comp Cas 351.

7. To consider the aforesaid competing arguments, it is necessary to study the scope of the provisions of the Act relating to the management and the winding up of a banking company vis-a-vis the provisions under the Companies Act pertaining to the management and winding up of non-banking companies.

8. A question immediately would arise as to what was the reason for the enactment of a special statute relating to banking companies.

9. An effective answer to this question cannot be had unless one is prepared to probe into the evolution of banking laws in India. It is interesting to note in this regard that, in the past, India had no special piece of legislation governing banking companies. There was, therefore, a persistent demand for bringing out a comprehensive enactment to govern the banking companies and this resulted in the amendment of the Indian Companies Act, 1913, incorporating Part X-A therein containing provisions governing matters which are peculiar to the business of banking. However, there was no special procedure for banking companies, particularly relating to their winding up. Certain special provisions relating to banking companies were, therefore, introduced in the Companies Act by the Indian Companies (Amendment) Act of 1936. These newly introduced provisions, however, were only regulatory in nature. This amendment also did not meet the purpose and, therefore, the Reserve Bank of India framed a draft bill as far back as 1939, the precursor of the Banking Companies Act, 1949. This 1949 Act was passed to consolidate the law relating to banking companies. The need for this Act was realised due to the fact that certain undesirable features in banking, developed in the meantime, had come to stay. Banks were then being connected with non-banking companies in that many of the directors of banking companies were in fact controlling some non-banking companies. This resulted in the interlocking of shares. Banking companies, therefore, could manipulate the finances at the disposal of non-banking companies. To put it in a nutshell, the main features were;

" the grant of loans to persons connected with the management of companies without adequate security, extensive window dressing at the time of preparing balance-sheet and, in general, a tendency to utilise the bank's funds to the detriment of the interest of the depositors."

10. The Banking Companies Act, 1949, notwithstanding, the directors of banks who were mostly industrialists could influence the banks in granting indiscriminate advances to non-banking companies, firms or institutions in which these directors had substantial interest. These and other acts of mismanagement in the running of the banks resulted in the imposition of "social control" on banking companies. The "social control " was imposed through Act 58 of 1968 which amended the Banking Regulation Act. The preamble to the Amending Act 58 of 1968 reads:

"An Act further to amend the Banking Regulation Act, 1949, so as to provide for the extension of social control over banks and for matters connected therewith or

incidental thereto, and also further to amend the Reserve Bank of India Act, 1934, and the State Bank of India Act, 1955."

11. The Amending Act introduced radical changes in certain provisions of the Act. The additional controls and restrictions as imposed by the Amending Act can broadly be stated as under :

1. Constitution of the board of directors of a banking company --to the effect that the directors having special knowledge and practical experience in respect of certain specified subjects related to banking, are in majority over the directors who are merely industrialists as popularly known (Section 10A of "the Act").

2. Management of the affairs of a banking company by a whole time chairman who has special knowledge of and practical experience in the working of a bank or financial economic or business administration (another encroachment by experts over industrialists), (Section 10B of the Act).

3. Restrictions of loans and advances by a banking company to its directors or to a company or firm in which a director is substantially interested or to an individual for whom a director is a guarantor (Section 20 of the Act).

4. Additional powers conferred on the Reserve Bank of India to enforce and supervise the social control (mainly Sections 30, 35B, 36(1)(d) and 47A of the Act).

5. Punishment for (a) obstructing any person from lawfully entering or leaving a bank, (b) holding demonstration within a bank, and (c) acting to undermine depositors' confidence in a bank (Section 36AD of the Act).

6. Special powers of the Central Government to acquire undertakings of banking company when it is satisfied on a report from the Reserve Bank that the banking company has committed certain defaults and that it is necessary to do so (Part 11C, Sections 36AE to 36AJ of the Act) (see Tannan on Banking Law and Practice).

12. It would thus be seen that the provisions of the Act are intended to protect the interest of the depositors.

13. The differences noticeable between the Act on the one hand and the Companies Act on the other require to be considered in this context. Non-banking companies, it is by now well established, deal with the money of the stockholders who own a share in the assets, who appoint their own directors "for better or for worse" and whose liabilities are also limited. The banking companies, it should be remembered, deal with money of the depositors who have no security other than the solvency of the banking company and its sound dealings with their money. As observed by the Supreme Court "ex facie, the banking companies must be regulated somewhat differently, the interests of the depositors must be paramount and the winding up of such companies depends upon other considerations, chief among which is the desire to pay off the

creditors as far as possible in full or at least equitably. The action is thus dictated not from any abstract consideration of a long-range view of the future ability of a bank to pay its creditors but its ability to pay them at any given time." (See Joseph Kuruvilla Vellukunnel Vs. The Reserve Bank of India and Others, .

14. As to why special provisions to wind up a banking company were enacted (Part III of the Act), it is profitable to refer to the following observations of the Supreme Court in Joseph Kuruvilla Vellukunnel Vs. The Reserve Bank of India and Others, :

"When the Banking Companies Act was passed in 1949, it was explained in the note on clause 37, which corresponded to Section 38, that the provisions of the Indian Companies Act in respect of liquidation of companies did not seem to be suitable for banking companies, that a bank's business being of an over-the-counter kind, the bank has to meet immediately its liability and a provision for winding up of the banking company when it refuses to meet a lawful demand within a stated time, was necessary. It WAS also stated that the Reserve Bank was given authority to apply for the liquidation of a banking company, if its affairs were conducted to the detriment of the interests of the depositors."

15. A banking company, therefore, could be wound up only under the provisions of Part III of the Act and not u/s 433 read with the allied sections contained in the Companies Act.

16. Regarding the management of the company : After the imposition of "social control" by the Amending Act No. 58 of 1968, no shareholder of a banking company, unlike the shareholder of an ordinary company could complain that the affairs of a banking company are conducted in such a way that one group of shareholders is getting a benefit against the other, and, therefore, the business of the banking company is liable to be suspended. A reference in this connection to Sections 10A 10B, 20 30 35B, 36(1)(d), 36AD, 36AE, 36AJ and 47A of the Act is profitable.

17. I shall now deal with some of the salient provisions. Section 10A provides that not less than fifty-one per cent, of the total number of members of the board of directors of a banking company shall consist of persons who shall have special knowledge or practical experience in respect of one or more of the following matters, namely :

(1) accountancy, (ii) agriculture and rural, (iii) banking, economy (iv) co-operation, (v) economics, (vi) finance, (vii) law, (viii) small-scale industry,

(ix) and any other matter the special knowledge of, and practical experience in, which would, in the opinion of the Reserve Bank, be useful to the banking company. This provision further insists that out of the aforesaid number of directors, not less than two shall be persons having special knowledge or practical experience in respect of agriculture and rural economy, co-operation or small-scale industry. Such persons, however, shall not have substantial interest

in, or be connected with, whether as employee, manager or managing agent, of any company, not being a company registered u/s 25 of the Companies Act, 1956, or any firm, which carries on any trade, commerce or industry and which, in either case, is not a small-scale industrial concern, or shall not be proprietors of any trading, commercial or industrial concern, not being a small-scale industrial concern. No director of a banking company, by whatever name called, shall hold office continuously for a period exceeding eight years notwithstanding anything to the contrary contained in the Companies Act, 1956, or in any other law for the time being in force. Similarly, a chairman or other whole-time director of a banking company who happens to be removed from office as such chairman, or whole-time director, as the case may be, under the provisions of the Act, shall also cease to be a director of the banking company and shall also not be eligible to be appointed as a director of such banking company, whether by election or co-option or otherwise, for a period of four years from the date of his ceasing to be the chairman or whole-time director, as the case may be. If the above requirements are not fulfilled at any time, the board of directors shall reconstitute such board so as to ensure that the said requirements are fulfilled, and for the purpose of reconstituting the board in the manner indicated above, if it is necessary to retire any director or directors, the board may, by lots drawn in such manner as may be prescribed, decide which director or directors shall cease to hold office and such decision shall be binding on every director of the board. This section further provides that where the Reserve Bank is of opinion that the composition of the board of directors of a banking company is such that it does not fulfil the requirement, namely, not less than fifty one per cent. of the total number of members of the board of directors of a banking company shall consist of persons who are having special knowledge or practical experience in any one or more of the matters stated hereinbefore, the Reserve Bank has a right, after giving to the banking company a reasonable opportunity of being heard, to direct the banking company to so reconstitute its board of directors as to ensure that the said requirement is fulfilled; and if, within two months from the date of receipt of such an order, the banking company does not comply with the directions, that bank can, after determining by lots drawn in such manner as may be prescribed, the person who ought to be removed from the membership of the board of directors, remove such person from the office of the director and appoint a person who has special knowledge of the matters referred to above, as a member of the board of directors in the place of the person so removed, whereupon the person so appointed shall be deemed to have been duly elected by the banking company as its director. Every appointment, removal or reconstitution duly made, and every election duly held u/s 10A shall be final and shall not be called in question in any court. Similarly, every director elected or, as the case may be, appointed under this section shall hold office until the date up to which his predecessor would have held office, if the election would not have been held, or, as the case may be, the appointment had not been made. It is further provided that no act or proceeding of the board of directors of a banking company shall be invalid by reason only of any defect in the composition thereof

or on the ground that it is subsequently discovered that any of its members did not fulfil the requirements of this section. Section 10B provides that the chairman will be entrusted with the management of the whole of the affairs of the banking company notwithstanding anything contained in any law for the time being in force or any contract to the contrary. The chairman, of course, shall exercise his powers subject only to the superintendence, control and direction of the board of directors. It is imperative that the chairman of the board of directors shall be a person who has special knowledge and practical experience of the working of a banking company, or of the State Bank of India or any subsidiary bank of a financial institution, or financial, economic or business administration ; provided, however, a person shall be disqualified for being a chairman if he is a director of any non-banking company except a director of a subsidiary of the banking company or director of a company registered u/s 25 of the Companies Act, 1956, or is a partner of any firm which carries on any trade, business or industry, or has substantial interest in any other company or firm, or is a director, manager, managing agent, partner or proprietor of any trading, commercial or industrial concern, or is engaged in any other business or vocation. If the Reserve Bank is of opinion that any person who has been elected as the chairman of the board of directors of a banking company is not a fit and proper person to hold such office, it has the power, after giving to such person and to the banking company a reasonable opportunity of being heard, by order in writing require the banking company to elect or appoint any other person as the chairman of the board of directors and if, within a period of two months from the date of receipt of such order, the banking company fails to elect or appoint a suitable person as chairman of its board of directors, the Reserve Bank may, by order, remove the first-mentioned person from the office of the chairman and appoint a suitable person in his place whereupon, the person so appointed shall be deemed to have been duly elected or appointed, as the case may be, as the chairman of the board of directors. The chairman, thus appointed, shall hold office for the residue of the period of office of the person in whose place he has been so elected or appointed. This right of the Reserve Bank is without prejudice to the provisions of Section 36A A. The banking company and the chairman against whom an order of removal is made may, if so advised, within thirty days from the date of communication to it or to him of the order, prefer an appeal to the Central Government and the decision of the Central Government thereon, and subject thereto, the order made by the Reserve Bank, shall be final and shall not be called in question in any court. Section 10-BB provides that where the office of the chairman of a banking company is vacant, the Reserve Bank may, if it is of opinion that the continuation of such vacancy is likely to adversely affect the interests of the banking company, appoint a person, who possesses the qualifications prescribed under Sub-section (4) of Section 10-B as the chairman and where the person so appointed is not a director of such banking company, he shall, so long as he holds the office of the chairman, be deemed to be a director. A chairman and the directors appointed by the Reserve Bank u/s 10-A shall not be required to hold qualifying shares in the banking company. It is important, in

this context, to note that the provisions of Sections 10A and 10B are to have overriding effect over all other laws, contracts, memorandum and articles of association, etc. Notwithstanding any thing to the contrary contained in Section 77 of the Companies Act, no banking company shall grant any loan or advance on the security of its own shares, etc., as provided for u/s 20. Without obtaining the prior permission of the Reserve Bank, no banking company shall open a new place of business and transfer an existing place of business. The accounts and balance-sheet of a banking company are required to be prepared as provided for u/s 29 of the Act. The balance-sheet and the profit and loss account shall be audited by a qualified accountant. The auditor shall be one who was appointed after obtaining the previous approval of the Reserve Bank. The auditor is bound to act under the directions of the Reserve Bank in respect of the matters made mention of in the direction. Section 35B provides that no amendment of any provision relating to the maximum permissible number of directors or the appointment or reappointment or termination of appointment or remuneration of a chairman, a managing director or any other director, whole-time or otherwise or of a manager or a chief executive officer by whatever name called, whether that provision be contained in the company's memorandum or articles of association, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or by its board of directors shall have effect unless approved by the Reserve Bank. Similarly, no appointment or reappointment or termination of appointment of a chairman, a managing or whole-time director, manager or chief executive officer by whatever name called, shall have effect unless such appointment, reappointment or termination of appointment is made with the previous approval of the Reserve Bank. The functions and powers conferred on the Reserve Bank by Section 36 of the Act deserve special mention. It has the power to direct the company to call a meeting of its directors, etc., if it is found that the affairs of the banking company are being conducted in a manner detrimental to the interests of the banking company or its depositors. It can depute one or more of its officers to watch the proceedings at any meeting of the board or of any committee or of any other body constituted by it; require the company to give an opportunity to the officers so deputed, to be heard at such meetings and also require such officers to send a report of such proceedings to the Reserve Bank. I do not wish to burden this judgment by referring to more such provisions of the Act pertaining to the management of a banking company.

18. It can thus be seen from these provisions that " the Act, at every turn, makes the Reserve Bank the authority to sanction, permit, certify, accept, report, advise, control, direct, license and prohibit. There is hardly any provision where the Reserve Bank's judgment is not made final vis-a-vis a banking company except rarely where an appeal to the Central Government would lie". (See Vellukunnel's case [1962] 32 Comp Cas 574 (SC)). It is clear, therefore, to my mind, that the object with which these provisions were enacted will get frustrated if the business of banking companies is even now said to be governed

by the provisions of the Companies Act.

19. Having understood the scope of the Act thus, let us see whether a banking company can be wound up under the "just and equitable" ground. "Just and equitable" ground is defined by Section 433(f) of the Companies Act. It is true that,, under this clause, a company can be wound up "whenever lack of confidence is rested on a lack of probity in the conduct of the affairs of the company". (See *Loch v. John Blackwood Ltd.* [1924] AC 783 . Similarly, where there is mismanagement and there is practical difficulty in not getting it remedied, it is a proper case for winding up on this ground (see *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, ; likewise, where there is a deadlock in the management and where the substratum of the company is gone or its only business has become impossible. To put it differently, before an order for winding up under "just and equitable" ground is passed, the court, after taking into account all the facts and circumstances of the case, shall see whether there is any disorderliness of that magnitude in the management and conduct of the company warranting an order to wind up the company.

20. The question that requires an answer now is: could it be said that, after the imposition of "social control" by the Amending Act No. 58 of 1968 making the Reserve Bank the ultimate authority in matters of the management of banking companies, a banking company is liable to be wound up under the "just and equitable" ground. My answer to this question is an emphatic "no", because, notwithstanding anything contained in any law for the time being in force or any contract to the contrary, the whole affairs of a banking company vest in the chairman who, virtually, is appointed by the Reserve Bank. There is, therefore, no possibility of suspension of business or the chairman managing the affairs of the company with the intent of benefiting one group of shareholders as against others. It is relevant, in this context, to make a special reference to the provisions contained in Part III of the Act. As the caption shows, these provisions govern the suspension of the business and winding up of banking companies. The High Court, on an application from the Reserve Bank, can suspend the business of a banking company provided the conditions stipulated u/s 37 are satisfied. The winding up of a banking company, after the introduction of Part III, can be ordered only on the ground that the banking company is unable to pay its debts or if an application for its winding up has been made by the Reserve Bank u/s 37 or under Sub-section (2) of Section 38. The non-obstante clause in Section 38, namely, "notwithstanding anything contained in Section 391, Section 392, Section 433 and Section 583 of the Companies Act, 1956" indicates that the provisions of the Companies Act pertaining to the winding up of a company should, as they are derogatory to or inconsistent with these provisions, give way to the provisions of the Act in that regard. A reference to Part IIIA, particularly to Section 45A, is relevant in this context. The section says that the special provisions for speedy disposal of winding up proceedings contained in Part IIIA shall override all other laws including the Companies Act. That means, that after the introduction of the provisions in Part III and Part IIIA of the Act, no banking

company can be wound up under the "just and equitable" ground or any other ground enumerated u/s 433 of the Companies Act except on the ground of being unable to pay its debts mentioned in Section 38 of the Act. That that is the intention of the Legislature is also clear from the provisions of Part II, IIA and IIB of the Act mentioned supra, making the Reserve Bank of India the controlling authority in regard to the management of a banking company subject to certain rights of appeals conferred on aggrieved parties by the Act, to the Central Government.

21. From the above discussion, it is clear that no banking company today can be wound up under "just and equitable" ground. If that be the position, no petition u/s 397 is maintainable because, as observed by the Supreme Court in *Rajahmundri Electric Supply Corporation's case* [1956] 26 Comp Cas 91, where the facts proved do not make out a case for winding up u/s 162C (corresponding to Section 433(f)), no order u/s 153C (corresponding to Section 397) can be passed. It should, in this connection, be remembered that Section 397 of the Companies Act, 1956, is intended to avoid winding up of a company under the "just and equitable" ground, if possible, and keeping the company going but at the same time relieving minority shareholders from the acts of oppression and mismanagement by the majority shareholders. In other words, the power u/s 397 is intended to prevent a winding up under the "just and equitable" ground within the meaning of Section 433(f) of the Companies Act. A reference in this connection to two decisions, one of the Madras High Court in *K.R.S. Narayana Iyengar v. T.A. Mani*, AIR 1980 Mad 338 and one of the Allahabad High Court in *Kaghunath Swarup Mathur v. Harswarup Mathur* [1970] 40 Comp Cas 282, is profitable. From the law declared by the Supreme Court in *Rajahmundri Electric Supply Corporation's case* [1956] 26 Comp Cas 91, it is clear that Section 397 provides an alternative remedy to the minority shareholders who could, on the said ground of oppression by majority shareholders, seek a winding up of the company u/s 433(f), that is, on the "just and equitable" ground. That oppression of minority shareholders will be treated as a "just and equitable" ground where those who control the company abuse their powers to such an extent as to seriously prejudice their interest is, no more, a moot question. (See *Anglo-Continental Produce Co. Ltd., In re* [1939] 1 All ER 99 (Ch D)). Briefly stated, the object in enacting Section 397 is to salvage a company which otherwise is liable to be wound up under the "just and equitable" ground (Section 433(f)). At this juncture, it is profitable to keep in view the opinion of Lord Clyde, Lord President in *Baird v. Lees* [1924] SC 83 quoted with approval by the Privy council in *Loch v. John Blackwood Ltd.* [1924] AC 783. The opinion reads [1939] 1 All 103:

" I have no intention of attempting a definition of the circumstances which amount to a "just and equitable" cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain

principles of commercial administration defined in the statute which provides some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts, would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the court to wind up the company."

22. But, in the case of a banking company, it is the Reserve Bank which factually controls the company (as is seen from the discussion supra) and, therefore, the question of the minority shareholders or any part of the shareholders being oppressed does not arise at all. A proceeding u/s 397, therefore, cannot be taken cognizance of by the court if the company involved is a banking company.

23. Finding it difficult to grapple with this situation brought about by the provisions of the Act, learned counsel for the petitioners argues that the above provisions of the Act notwithstanding, Section 397 and other provisions pertaining to the management and the winding up of companies under the Companies Act are available for being pressed into service by an aggrieved shareholder although the company involved is a banking company. In support of this argument, he made reference to the provisions of Section 2 of the Act and contended that the said provisions are only in addition to and not in derogation of the Companies Act. That means, according to the counsel, all the provisions of the Companies Act applicable to winding-up proceedings, are available and consequently, Section 397 can be invoked by aggrieved shareholders for redressal of their grievances. This argument of learned counsel that the provisions of the Act are not to be interpreted as in derogation of the provisions of the Companies Act, but in addition thereto, is due to his apathy to take note of the existence of the essential qualification embodied in Section 2, namely, "save as hereinafter expressly provided". See *Central Bank of India v. Their Workmen* [1959] 11 FJR 57. To the same effect is Section 616 of the Companies Act. The newly introduced provisions of the Act by Amending Act 58 of 1968, pertaining to the management of a banking company and its winding up, in my judgment, will come under the qualifying clause in Section 2 of the Act, namely, "save as hereinafter expressly provided ". It should, in this connection, be remembered that; the Act is one to consolidate and amend the law relating to banking in the country and that a consolidating Act is a code by itself in regard to the matters dealt with therein. See *Ravulu Subba Rao v. CIT* [1956] 27 ITR 164. In short, any proceeding concerning the management of a banking company and the one for the winding up of the same could be maintained only on establishing the requirements prescribed under the respective provisions of the Act. To the said extent, the provisions of the Act, in my view, are not in addition to, but in derogation of, the Companies Act. Section 45A of the Act also can profitably be referred to in this connection. The above argument of learned counsel for the

petitioners is, accordingly, rejected. The petition u/s 397, therefore, is not maintainable.

24. The second aspect of the preliminary point: To maintain a petition u/s 397, the petitioner shall disclose facts showing that the requirements prescribed u/s 399 of the Companies Act have been satisfied. To make it appear that the said requirement has been satisfied, the petitioners along with the petition have filed a document containing the signatures of 160 shareholders. This document, according to the petitioners, reflects the consent in writing of the said shareholders. We shall now see what is the requirement that should be satisfied by a petitioner u/s 397. A reference in this connection to Section 399 is profitable. Sub-section (3) of this section provides that where any members of a company are entitled to make an application in virtue of Sub-section (1), any one or more of them having obtained the consent in writing of the rest (Clause (a) of Sub-section (1) provides that to maintain a petition u/s 397 in the case of a company having share capital, not less than 100 members of the company shall be there) can make the application on behalf and for the benefit of all of them. The condition that the " consent in writing " of those who have not figured as petitioners shall be obtained is a condition precedent and, therefore, if the petition is not supported by the "consent in writing" of those shareholders, the same is not maintainable. The document aforesaid was pressed into service by the petitioners to show that the above requirement is satisfied. On a perusal of this document, it is clear that there is nothing there to show that the rest of the members have given their "consent in writing". On the other hand, CAW 1 who is one of the signatories to the said document has positively stated that he, his wife and some other signatories who are his relations have not given their " consent in writing " for the filing of the petition. The petitioners have not chosen to examine any of the signatories despite the evidence of CAW1. To say that one has given his " consent in writing ", it should also be proved that he or she gave his consent after having understood the contents of the petition. A reference in this connection to the admission of the petitioners in paragraph 9 of the reply-affidavit dated October 13, 1988, is profitable. It reads :

" There is no express consent given by them to the petition ".

25. In the absence of such proof, even if there is a " consent in writing", the same may not satisfy the requirements of Section 399. Here, there is no such evidence ; for that matter, there is no proper pleadings even in this regard. For this reason also, I am of the view that the petition is" not maintainable.

26. Now, I shall deal with the merits of the case : Facts essential and requisite for the purpose of this lie in a narrow compass. The 57th annual general meeting of the company, to elect the directors to fill the vacancies caused by retirement by rotation, was scheduled to take place on August 30, 1988. Exhibit A-2 is the statutory notice issued in this regard. Note (1) appended to exhibit A-2 provides that a member entitled to attend and vote at the meeting is entitled to appoint a proxy to attend and vote instead of himself. The note further says that the

instrument appointing a proxy shall be deposited at the registered office of the bank not later than 48 hours before the time for holding the meeting which as per exhibit A-2, is fixed at 10 a.m. on August 30, 1988. A proxy need not be a member. As per this notice, proxies, therefore, should be deposited before or at 10 a.m. on August 28, 1988. This time happens to fall on a Sunday and, therefore, the first petitioner handed over exhibit A-6 letter to the secretary of the bank with a view to ascertain as to whether the proxies could be deposited till 10 a.m. on August 28, 1988. The secretary made exhibit A-6(a) endorsement which reads:

"As last 48 hours falls at 10 a.m. on August 28, 1988, Sunday, proxies will be accepted only up to 5 p.m. on August 27, 1988 ".

27. The petitioners, it is said, therefore, hurriedly collected the proxies and deposited them at the registered office of the company before 5 p.m. on August 27, 1988. When they went to the registered office of the bank for lodging the proxies, they saw on the notice board a note by the chairman that proxies in connection with the election can validly be deposited at or before 10 a.m. on August 28, 1988. This note, it is contended, enabled the fourth respondent, who is one of the contestants, to deposit the proxies he had collected, including from those who had originally given proxies to the petitioners, at 10 a.m. on August 28, 1988. The proxies deposited later would automatically supersede the proxies lodged earlier and, therefore, the proxies deposited by the petitioners before 5 p.m. on August 27, 1988, would get automatically superseded by the proxies deposited on August 28, 1988. This situation brought about by the note issued by the chairman with the blessings of the directors who informally met in connection therewith, helped the nominees of the company (fourth respondent and another) for the election to get a march over the nominees of the petitioners. It is further stated that since the directors who wanted the chairman to issue the note represent the majority shareholders, it must be held that this action of the directors is in a manner oppressive to the minority shareholders including the petitioners. The directors used the services of the officials of the bank to collect the proxies from the shareholders including those who had given proxies to the petitioners' candidates, for the benefit of the official candidate and this conduct of the board of directors, representing the majority shareholders, reflects the misuse of the official machinery resulting in oppression of the minority shareholders. The company and the chairman have filed separate counter-statements disputing the above allegations. So is the case with the fourth respondent. They have emphatically denied the above allegations.

28. From the above, it is clear that the act of oppression pleaded is the undue interest taken by the chairman and some of the directors to see that their nominees are elected as directors. These statements may perhaps constitute an isolated act of oppression, assuming they constitute an act of oppression, but not in any way an act of oppression continuing down to the date of the petition.

29. Is this isolated act of oppression sufficient to maintain a petition u/s 397,

assuming the petitioners can press that section into service in this case ? An incidental question arising for consideration in this connection is this: Without a revocation in writing, could it be said that a vote given in accordance with the terms of an instrument of proxy is invalid ?

30. Regarding the first question, the law is well-settled. In order to grant the relief u/s 397, a petitioner must show three things : (1) the facts pleaded justify the making up of a winding-up order on the "just and equitable " ground, but the winding up would unfairly prejudice the shareholders including the petitioners who support; the petition but an order passed u/s 402 of the Companies Act would grant them appropriate relief. (2) the affairs of the company are being conducted in a manner oppressive to some part of the members/shareholders including the petitioners. It is to be noted here that the section does not require that the oppressed members should be the majority. "Shareholders with a minority beneficial interest may, by having voting control, be able to oppress those with the majority, beneficial interest". The oppression complained of must be suffered by the shareholders in their capacity as shareholders and not in their character as directors. The expression employed in the section " the affairs of the company that are being conducted" indicates, not isolated acts of oppression "but a continuing process, and one continuing down to the date of the petition ". It is pertinent to note that it is not enough if it is established that the company's affairs have been conducted unwisely or inefficiently or carelessly. Under such circumstances also, a shareholder can contend that he has lost confidence in the manner in which the affairs of the company are conducted. That is not sufficient. That is not oppression ; " nor is resentment at being outvoted a ground for relief under this section". (3) To wind up the company would unfairly prejudice the oppressed members.

31. It should, in this connection, be remembered that it is imperative that the petitioner shall clearly plead these things; or else, for want of pleadings, the petition will be dismissed. (See Buckley on the Companies Acts, 14th edition. Vol. one, pages 490 to 493, Shanti Prasad Jain v. Kalinga Tubes Ltd., [1965] 32 Comp Cas 351 (SC) and Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743 (SC). Alongside, we should keep in view the law pertaining to " proxies ". A reference in this connection to Article 88 of the articles of association is relevant. It reads:

" A vote given in accordance with terms of an instrument of proxy shall be valid notwithstanding the previous death of the principal, or revocation of the proxy or transfer of the shares in respect of which the vote is given, provided no intimation in writing of the death, revocation or transfer shall have been received at the office or by the Chairman of the meeting before the leader. This article is verbatim Regulation 63 of Table A of Schedule 1 to the Companies Act. Section 28 of the Companies Act is profitably to be referred to in this connection. This section provides that the articles of association of a company, limited by shares, may adopt one or any of the regulations contained in Table A of Schedule 1. It,

therefore, follows that the rights of the shareholders, mentioned u/s 176 of the Companies Act in regard to the appointment of another person (whether a member or not) as his proxy to attend and vote instead of himself, are governed by Article 88. This article is nothing but a replica of Regulation 63 of Table A of the Companies Act, as we have already seen. The shareholders are bound by this article because "the articles constitute a contract between the company and a member in respect of his rights and liabilities as a shareholder ..." (See Halsbury's Laws of England, Hailsham edition, para 118, at p. 71, Volume 7). If that be so, a vote given by a shareholder, in accordance with the terms of an instrument of proxy, shall be valid notwithstanding the revocation of the proxy, provided no intimation in writing of the revocation has been received at the office or by the chairman of the meeting before the vote is given. I am fortified in this view by a ruling of Russell J. in *Spiller v. Mayo (Rhodezia) Development Co.* [1926] CWN 78. The learned judge has observed thus:

".....Two points had been urged by Mr. Gordon Brown on behalf of the plaintiff why these votes should not have been objected to. The first point was there had been in fact no intimation of any revocation at all. In this Lordship's opinion that could not be sustained. (Why his Lordship said so was in fact there was a revocation in these words : " I hereby withdraw the proxy that I have lodged with the company against the reappointment of Mr. C. F. Rowsell as a director"). The second point was in his view a more formidable one. It was said that no intimation of the revocation was received before the meeting. In his Lordship's opinion, if English language meant anything, the article required that in order to invalidate the vote, intimation in writing of the revocation must be received at the office before the meeting, and in his view that must mean before the commencement of the meeting.....""(See also pages 184 and 185, Shackleton on the Law and Practice of Meetings, Seventh edition).

32. It may, in this connection, be noted that a proxy which is said to be a subsequent proxy can either be without any date or may bear the same date. In such cases, how could a chairman of the meeting decide which proxy supersedes which ? Under such circumstances, only an intimation in writing of the revocation reaching the registered office of the company before the meeting would help the chairman to decide the question as to which proxy should be taken into account. It, therefore, follows that want of revocation in writing, in view of Article 88 of the articles of association (corresponding to Regulation 63 of Table A of Schedule 1 to the Companies Act), makes the proxy given subsequently inconsequential.

33. Learned counsel for the petitioners nonetheless contended that if two proxies are given, the latter one revokes the earlier one. In support of this argument, he pressed into service the following passage from Halsbury's Laws of England, Hailsham edition. Volume 7, para 577, at page 341 :

"Ordinarily, a proxy can be revoked at any time before its use and if two are given, the latter one revokes the earlier one. "

34. This statement, without anything more, no doubt, supports the above argument of learned counsel. But that is not the position if the articles of association provide for such a contingency is clear from the following principle, stated again in Halsbury:

" The articles of a company usually provide, however, that a proxy is valid notwithstanding its revocation unless notice of the revocation is received before the meeting at which it is used ".

35. This passage, as is seen from the footnote, is a replica of Article 73, Schedule 1, Table A, Part I of the English Companies Act 1948, corresponding to Regulation 63, Table A, Schedule I to the Companies Act, 1956. We have already seen that the rights of a shareholder to vote by proxy recognised u/s 176 of the Companies Act is guided by Article 88 of the articles of association (corresponding to Regulation 63 of Table A of Schedule I to the Companies Act, 1956). The above argument of learned counsel in this regard, therefore, is rejected. There is yet another aspect that should be borne in mind in this context and it is this: There is nothing in law to exclude Sunday in the computation of the 48 hours and, therefore, a proxy delivered on Sunday for a meeting to be held on Tuesday that is 48 hours later would be valid provided the receipt of the proxies at the time stated could be identified in some way. (See Shackleton on the Law and Practice of Meetings, Seventh edition, page 183).

36. Having understood the law regarding the lodging of proxies thus, let us see whether any of the acts of the chairman under the alleged blessings of the directors, as contended for by the petitioners, could be said to be oppressive to the petitioners and the minority shareholders represented by them. We have already seen that the fact that 48 hours before the meeting falls on a holiday is liable to be ignored for the purpose of lodging proxies. Ignorance of law in this regard perhaps may be the reason for the issuance of exhibit A-6(a) note by the secretary and the note pasted on the notice board by the chairman. This may perhaps enable one to contend that the company's affairs have been conducted inefficiently or carelessly. The chairman, under such circumstances, can be said to have acted bona fide and in the interest of the members in issuing the note. It is relevant, in this context, to note that none of the parties has produced any letter of revocation of the proxies in the proceedings. That means, assuming that the fourth respondent managed to get a second proxy from shareholders who had given the proxies to the petitioners and which were lodged at the registered office at 10 a.m. on August 28, 1988, the said proxies cannot be said to supersede the earlier proxies. Under these circumstances, I am of the view that the allegation that the affairs of the company have been conducted in a manner which is prejudicial to the minority shareholders is not sustainable in law. Even otherwise, assuming that what is stated would constitute an oppressive act, even then, as already observed that is only a solitary instance not continuing down to the date of the petition. I am, therefore, of the view that the petitioners have not been successful in establishing the oppressive act of the chairman in the conduct

of the affairs of the company warranting any order u/s 402 of the Companies Act.

37. The company petition, in the light of the findings above, is liable to be dismissed. I accordingly, dismiss the same with costs, which I fix at Rs. 3.000.

38. As per the interim directions issued by this court, the chairman, in the presence of observers appointed by this court, had conducted the election. Ordinarily, it would have been enough to direct the chairman to announce the results. But, in view of the various allegations regarding the collection of proxies by the contesting parties and particularly the complaint of the plaintiff (the arguments were heard along with the arguments in this petition) and in the larger interests of the banking company, I am of the view that the following directions require to be issued :

1. The retiring directors who are allowed to continue in office as per directions of this court shall cease to be directors from today.

2. The chairman, with the approval of the board, can, if so advised, co-opt two directors and they can function as directors until election is conducted at the next annual general meeting.

3. The election aforesaid shall be conducted before September 30, 1989.

4. Subject to the above directions, all interim orders issued during the pendency of the company petition stand vacated.

39. Taking note of the following observations of the Supreme Court in the order in SLP Nos. 14060-64 of 1988 dated December 1, 1988, this judgment is kept in abeyance till April 8, 1989.

" It is, however, desirable that the order passed by the learned company judge will not be given effect to for a period of three weeks after the order is passed."

40. It is, however, made clear that this direction will not, in any way, revive the interim orders passed u/s 403 and dismissed today by me.

41. Issue photostat copy on usual terms.