
(1978) 04 CAL CK 0034

In the Calcutta High Court

Case No : Appeal from Original Order No. 179 of 1975

Kumarapuram Gopal Krishnan Ananthakrishnan

APPELLANT

Vs

Burdwan-Cutwa Railway Co. Ltd.

RESPONDENT

Date of Decision : 04-04-1978

Acts Referred:

Companies Act, 1956 — Section 149(2A), 433
Limitation Act, 1963 — Article 137

Citation : (1978) 48 CompCas 611 : 82 CWN 774

Hon'ble Judges : Sankar Prasad Mitra, C.J.; Salil Kumar Dutta, J

Bench : Division Bench

Advocate : S.B. Mukherjee and T.K. Basu, for the Appellant; S.C. Sen, P.K. Sen, B. Gupta and Ashutosh Law, for the Respondent

Final Decision : Allowed

Judgement

Salil Kumar Dutta, J.—This is an appeal from the judgment and order of Ramendra Mohan Datta J., dated March 21, 1975 (see page 211 supra) whereby the application of the Registrar of Companies for winding up the company was dismissed.

2. The respondent-company (hereinafter referred to as " the company "), a public company, was incorporated on November 29, 1913, and the main objects for which the company was established as set forth in the memorandum of association are as follows :

" 3(a) To construct, complete, equip and make ready for public traffic and to work, maintain and carry on a line of railway between the towns of Burdwan and Cutwa in the district of Burdwan in Bengal and to undertake the construction, completion and making ready for traffic of such line and to form junctions with the East Indian Railway and to pay for the plans and survey made of the railway to be constructed and the cost of providing and maintaining police for the protection thereof and to make arrangements with the Secretary of State for India in Council, through the Government of India, Railway Department, for the

working and carrying on the said railway and any extension or branches thereof, and with a view thereto to enter into the agreement referred to in Clause 2 of the company's articles of association.

(b) To carry the said agreement into effect and to undertake all the obligations and stipulations thereof, with or without modification. "

3. The other objects, which have some relevance, are embodied in Sub-clauses (d), (e), (g), (n), (q), which are as follows :

" (d) To equip, maintain, and work by steam, electricity or other power the said railway or any other railway belonging to the company or which the company may possess a right to run over and work.

(e) To carry on the business of tramway, railway, omnibus and van proprietors and carriers of goods and passengers and manufacturers of and dealers in tramway carriages, trucks, locomotives, accumulators, dynamos and other engines and other chattels, effects and conveniences required for the making, maintenance, equipment and working of railways.

(g) To carry on the business of refreshment, caterers and contractors and ice merchants in all their respective branches.

(n) To sell the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular, for shares, debentures or securities of any other company having objects altogether or in part similar to those of this company.

(q) To borrow and raise money in such manner as the company shall think fit and in particular by the issue of debentures or debenture-stock perpetual or otherwise charged upon all or any of the company's property (both present and future) including its uncalled capital, and to apply the moneys so raised or any part thereof for all or any of the purposes of the company; to make, accept, endorse, execute and issue promissory notes, bills of exchange, debentures and other negotiable or transferable instruments and to invest the money of the company not immediately required upon such securities as may from time to time be determined. "

4. On April 5, 1917, the company entered into an agreement with the Secretary of State for India in Council, the relevant clauses whereof are as follows :

"Duration of contract.

2. This contract shall continue in force until it shall be determined under any provision hereinafter contained in that behalf. Construction of railway.

3. The company shall construct, complete and make ready and fit for opening for public traffic throughout on a route to be selected and determined by the Secretary of State, a railway from Burdwan to Cutwa with such stations, station yards, sidings, crossing places, bridges, viaducts, offices, warehouses, houses for

employees, rolling stock, fixed and movable machinery, tools and plant, office furniture and equipments, conveniences, and works as will be necessary or proper for the purposes of the said railway either as regards the due working of the same or as regards the performance of the same and the protection of the same from destruction or injury by inundation, tempest, or otherwise.

Miscellaneous.

37. The company shall not at any time during the continuance of the contract without the sanction in writing of the Secretary of State first obtained, engage in or carry on or apply capital to any business other than the business provided by this contract to be carried on by the company and business incidental or subsidiary thereto, or participate or co-operate with any person, company or corporation in carrying on any business other than as aforesaid. Determination of contract and matters consequent thereon.

45. The Secretary of State may determine this contract in manner hereinafter mentioned (that is to say) : --

(1) If the company shall fail to complete the said railway and make the same ready to be opened for public traffic throughout by the 1st day of January, 1916, the Secretary of State notwithstanding any grants of further time, or any negotiation between the Secretary of State and the company, may determine this contract, by giving to the company notice in writing of such determination (which notice is herein referred to as notice of determination) and the contract shall determine on the date of such notice being given.

(2) The Secretary of State may by giving to the company notice in writing of not less than 12 months prior to any of the date next hereinafter mentioned (which notice is herein referred to as notice of purchase) determine this contract (if then subsisting) either on the 31st day of March, 1946, or on the 31st day of March in the last year of any subsequent period of ten years..... "

5. The main and paramount object, according to the Registrar, was to construct, complete and run the railway between Burdwan and Cutwa and to do all necessary things in respect thereof and the other objects were connected with and incidental to the main object of running the railway. The company had been operating the railway in terms of the said agreement and with effect from April 1, 1966, the entire business undertaking of the company with all assets were taken over by the Government of India. A sum of Rs. 17.8 lakhs was paid by the Government to the company as consideration compensation in 1966-67, out of which a sum of Rs. 16 lakhs was lent and advanced by the company to J. Mantosh and Miss D. Mantosh. According to the Registrar, they were closely associated with the Bajorias, who had the control of the company, in their joint business ventures wherein the moneys were invested. The moneys received as consideration or compensation were thus diverted to companies controlled by Bajorias instead of returning them to the shareholders.

6. The Registrar's further case was that the company's main and, in fact, the only business, being taken over by the Government, the substratum of the company had gone and the company was liable to be wound up. The money-lending business indulged in by the company was wholly illegal, void and ultra vires the company, as the company by its memorandum of association was not authorised to carry on such business, as it could not be said to be a business incidental to the business of the company and the company's auditors in their report of February 28, 1973, noted that the loans might require the approval of the shareholders by a special resolution as provided in Section 149(2A) of the Companies Act, 1956. The company was a habitual defaulter in filing statutory documents while for defaults for financial years 1968-69 and 1969-70, prosecution cases were filed before the Chief Presidency Magistrate, Calcutta, in which the company and its directors pleaded guilty and were convicted. A number of other prosecutions for such defaults for subsequent years had been initiated and they had been pending. In the meantime there had been complaints from the Bombay Shareholders' Association as also one Ashburner, as executor of his mother, a shareholder, about the non-distribution of the amount to the shareholders.

7. The company passed a special resolution on March 13, 1972, according its approval u/s 149(2A) of the Companies Act to the commencement of the business of carriers. The company, pursuant to provisions of Section 370, also passed another resolution authorising it retrospectively to make loans to any body corporate on such terms and conditions as the Board would deem fit whether or not under the same management within 30% of its paid up capital and free reserves and also beyond with approval of the Central Government. The balance-sheet and profit and loss account of the company for 1967-68 to 1969-70 indicated that no business of carriers of goods was carried on at all, while on enquiry the company by its letter of May 28, 1973, informed that till then bills for Rs. 70,000 were raised on account of business of carriers. There was no legal business which the company was authorised to carry on and in fact carried on since.

8. On March 28, 1973, the company filed with the Registrar a copy of the special resolution passed at a general meeting on March 26, 1973, altering Clause 3 of its memorandum of association by inserting the following objects clauses, subject to the confirmation by the High Court u/s 17 of the Act. They are as follows :

"(v) To carry on the business of buyers, sellers, dealers, exporters, importers, balers and pressers of jute, jute cuttings, jute rejections, hemp, cotton and any other fibrous materials, hides, skins, oil seeds and any seeds and products and of goods or merchandise made thereof.

(w) To acquire and hold and otherwise deal in shares, stock, debentures, debenture-stock, bonds, obligations and securities issued or guaranteed by any company constituted or carrying on business in India or elsewhere.

(x) To lend money, either with or without security and generally to such persons and upon such terms and conditions as the company may think it."

9. This was done with a view to legalise all its illegal acts by way of ultra vires loan transactions entered into between the company and its associated concerns. Thereafter, the company filed Company Petition No. 155 of 1973 u/s 17 of the Act for confirmation of the said alterations. The application was opposed by the Registrar and was dismissed by Salil Kumar Roy Chowdhury J. on November 15, 1973, holding that the application was not a bona fide application, made solely for the purpose of avoiding the consequences of ultra vires acts and to forestall the Registrar from taking steps for winding up the company. It appears that an appeal has been preferred to this court being Appeal No. 125 of 1974 which was on our peremptory list to be taken up for hearing after the disposal of this appeal.

10. The Registrar, in view of the above, submitted the case before the Regional Director, Company Law Board, Calcutta, for sanction under Sub-section (5) of Section 439 of the Companies Act, 1956, for presenting a winding-up application. The Regional Director, by notice dated February 13, 1974, gave an opportunity to the company to make its representation against the prayer of the Registrar to file a petition for winding up the company and the representation was duly made. By order dated July 27, 1974, the Regional Director accorded sanction to the Registrar to present the winding-up petition. The Registrar obtaining the sanction filed an application u/s 433 of the Act on the grounds that, (i) the company had suspended business for over one year as mentioned in Clause (c), and as also (ii) that as provided in Clause (f), it is just and equitable that the company should be wound up as the substratum of the company had gone since the whole of the business for which the company was incorporated to carry on had become impossible on the taking over of the same by the Government. This application was registered as Company Petition No. 373 of 1974.

11. The application was opposed by the company by filing an affidavit-in-opposition by Dharendra Nath Banerjee on February 21, 1975. It was stated therein that purchase price of rupees 16,82,703 was received by the company during April, 1966, to December, 1968. The board of directors invested the amount of Rs. 16 lakhs with Mantoshes who were not closely connected with Bajorias against security of valuable landed properties at Alipore valued at Rs. 24 lakhs. It was stated that the company had been repaid Rs. 9.27 lakhs as principal and Rs. 5.25 lakhs as interest and such investments were made as authorised under Clause 3, Sub-clause (q), of the memorandum of association of the company.

12. The company at its meeting on March 13, 1972, accorded its approval to the commencement of the business of carriers u/s 149(2A) and also authorised retrospectively u/s 370 its board to make any loan to any body corporate whether under same management or not. The Regional Director issued a notice on May 2, 1972, calling upon the company to make representations against the prayer of the Registrar for sanction to move a petition for winding up the

company on the ground that the company suspended its business for more than a year and that it was just and equitable that the company should be wound up. In reply, the company informed the Regional Director that the company then was engaged in the business of carriers approved by the shareholders u/s 149(2A) and no sanction accordingly should be given. No steps were taken in the matter on the basis of this notice.

13. The company thereafter commenced business in April, 1972, and had been carrying on the business of carriers of goods which had high prospects. It was denied that money-lending business was ultra vires the company since it was authorised by Sub-clause (q) of Clause 3 of the memorandum which authorised the company to invest its funds not immediately required. It was said that Ashburner had sold his shares and the acts of the company were ratified by the shareholders at its meeting of March 26, 1973. It was said that, due to closure of the company, balance-sheets for 1970-71 could not be prepared though it was in course of audit with tentative profit of Rs. 2 lakhs for 1971. It was denied that the substratum of the company was gone while the shareholders at the meeting held on March 26, 1973, duly approved of the business undertaken by the company which was revealed in the balance-sheet for 1969-70. It was also denied that the company div(sic) its funds to companies controlled by Bajorias.

14. It was further stated that the order u/s 17 was the subject-matter of the appeal and was distinct from the present application. The company complained that no sufficient opportunity was given to represent its case as contained in its letter of April 16, 1974, despatched on April 27, 1974, nor any opportunity to represent its case orally before the Regional Director was given. While no report of the Registrar of Companies was even disclosed, a similar notice of May 2, 1972, was also received from the Regional Director to which a reply was given by the company on June 1, 1972. No further steps were taken obviously because the Regional Director was satisfied that the company did not suspend its business nor was it just and equitable to wind up the company. Nondisclosure of materials which weighed with the Registrar prevented the company from making proper representation as the company had not suspended its business for more than one year nor did any ground exist for winding up the company u/s 433(f). It was further alleged that Regional Director acted mechanically without applying his mind on extraneous and irrelevant materials. The company obtained a rule for quashing the sanction of the Regional Director in constitutional writ jurisdiction but the rule was discharged as there was an alternative remedy. The company denied that its substratum had gone or that it had suspended business for more than one year. The company submitted that in the premises no order should be made on the application which accordingly should be dismissed.

15. In his affidavit-in-reply affirmed on March 4, 1975, the appellant reiterated that money-lending business was ultra vires the company and the Companies Act and there was no clause for authorising the company to carry on such business particularly when the substratum had gone. The money-lending business could

never be said to be incidental to the main business of running the railways. It is reiterated that the funds of the company were dissipated in illegal investments in allied concerns instead of refunding the amount to shareholders. Before the Regional Director the representation was made that the company was carrying on the business of carriers of goods and thereupon the Registrar started enquiry which delayed the filing of the application for winding up and the small amount of business as carriers was only to prevent liquidation. No documents or returns had been filed with the Registrar beyond those for the year 1970 in support of the statements about the company.

16. It was further stated that the representation of the company dated April 16, 1974, was considered by the Regional Director and there was no occasion or request for any oral representation. As the company intimated that it was carrying on the business of carriers of goods, certain particulars were asked for on April 27, 1973. Immediately thereafter, the petition u/s 17 of the Companies Act, 1956, was filed. The Registrar was advised not to take any steps for winding up the company till the disposal of the said application. There was no question or occasion for the satisfaction of the Regional Director that the company had not suspended its business or that it was not just or equitable that the company should be wound up as contended. It was reiterated that the company suspended its business since 1966 and was not carrying on any lawful business under its existing memorandum of association. It was denied that the sanction of the Regional Director was given mechanically or without application of mind on irrelevant or extraneous matters or that the winding-up petition was motivated to frustrate the business of the company.

17. The petition came up for hearing before R.M. Dutt J. who was of opinion, relying on the decisions of the Supreme Court, that whether substratum of a company had gone or not, the interest of the shareholders and creditors should be kept in view. Even if the main business has failed, if there be other objects which the company is permitted to pursue, the same even if of lesser volume, should be permitted to be carried on and the majority of the shareholders are the best judges to decide how best to run the company in the circumstances. The court further held that there being no creditors to the company and the shareholders having intended to carry on such business with large sums lying accumulated, the company's substratum cannot be said to have gone. When under the memorandum of association no other business can be undertaken, the foundation on which the whole of the company stands crumbled and the case would be one of total destruction. Such state of affairs, if allowed to continue, would affect the interest of the shareholders. If, however, there remain some other object or objects in the memorandum, the substratum of the company cannot be said to have been destroyed, if the shareholders as the best judges, intended to make use of the resources of the company.

18. The question of substratum being gone thus depends on the true construction of the memorandum of association and each case has to be dealt on

its own merits. It was held that Sub-clause (o) permitted the company to undertake various other businesses besides the business of railways carried on so long and it was within the objects of the company to carry on, as it had been carrying on the business of carriers by boat and the shareholders' consent was duly obtained u/s 149(2A) of the Companies Act, 1956.

19. The court further held that suspension of business for more than one year could not be a ground for winding up, as the company had resumed business, the material date being the date of the winding-up petition. In the context of the resumption of business by the company, the Regional Director should have taken into consideration that, while there were no creditors, the majority of the shareholders did not seek refund of the money and resolved for carrying on the business while the objection came from an insignificant number of shareholders. Further, if ultra vires business was undertaken at some point of time, such action would not be a ground for winding up as there are provisions under which suitable action could be taken. The Registrar was satisfied in 1972 about the position but on the same materials pursued the matter further in 1973. The court felt that in the premises it was not just and equitable that the company should be wound up and accordingly the discretion should not be exercised in favour of winding up the company. The application was accordingly dismissed by the order under appeal.

20. This appeal, as already stated, is against this decision. The company, as we have seen, has no creditors and a majority of the shareholders had approved by special resolution the continuance of the business in other spheres. The dissenting shareholders, who are alleged to have made complaints to the Registrar, form, as alleged, an insignificant part of the shareholders and are not before the court. As the shareholders are the best judge to decide about the business of the company, it is contended that the court should not stand in the way to frustrate the decision of the shareholders to carry on the business with funds in its hands. This fact weighed with the learned trial judge when he referred to the decision in *Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others*, in which the court observed that in making the order for winding up on the ground that it is just and equitable that a company should be wound up, the court should consider the interest of shareholders as well as creditors.

21. There can hardly be any dispute that the interest of the shareholders as also creditors should be taken into consideration when the winding up is sought for on ground that it is just and equitable to do so. Even if the shareholders approve of the resumption of other business and the company has in fact started such business, it does not mean or imply that, the company will be entitled to carry on such business when such action is otherwise ultra vires its memorandum of association or the provisions of the Companies Act, 1956. The decision of the shareholders will receive due support from the court in considering a winding-up application, only when such decision to carry on a particular business has the

warrant of law and within the ambit of its memorandum of association and not merely because it has the support of its shareholders or creditors or is otherwise to their interest or benefit. A consensus of the shareholders or creditors will not override the provisions of law and the Companies Act, 1956, as also the earlier Acts provide for governmental authorities who work as sentinels to ensure and secure the compliance with the provisions of law by the company and its board of directors. It is not a case of waiving a fraud by the majority of shareholders as was the case in *In re Haven Gold Mining Company* [1881] 20 Ch D 151 (CA), but the prevention of ultra vires acts by a company.

22. u/s 433, the circumstances, amongst others, in which the company may be wound up by the court, are:

" (c) If the company... ...suspends its business for a whole year.

(f) if the court is of opinion that it is just and equitable that the company should be wound up. "

23. The business contemplated under Clause (c) is a business which, a company is authorised to carry on in terms with its memorandum of association. Such business cannot include a business which is ultra vires its powers and is thus illegal and unauthorised or otherwise prohibited by law.

24. Taking the earlier ground for consideration it appears that the business of running the railways by the company which was till then its only business, as it was to be under the agreement with the Government, was taken over with effect from April 1, 1966. The company received the major part of the compensation shortly thereafter and invested Rs. 16 lakhs out of the amount with Mantoshes, according to the company, as temporary measure. On the assumption that this investment was ultra vires the memorandum of association, as contended by the Registrar, such business in loans cannot be said to be the legal business" carried on by the company and thus has to be left out of account.

25. The company's case is that in pursuance of the special resolution dated March 13, 1972, the company commenced the business of carrier of goods in boats and barges by way of inland navigation from April, 1972, and at the material time had been carrying on the said business. The special resolution for alteration of the memorandum of association including the business of money-lending has not been confirmed by this court, though an appeal from the order of refusal is pending.-- As at present advised, the resolution is not effective and does not authorise the company to carry on the business covered by the special resolution. The company has relied on its Sub-clause (e) of the memorandum of association, which, it is contended by Mr. Bhaskar Gupta, learned counsel for the company, unequivocally authorises the company to carry on business of carriers.

26. Mr. S.B. Mukherjee, learned counsel for the appellant, the Additional Registrar of Companies, who, as duly authorised for the purpose, really sought for sanction for moving the court for winding up the company, contended on the

other hand that Sub-clause (e) provides for business as are incidental to and connected with the main and only business of the company, namely, the running of railway between Burdwan and Cutwa. In fact, the business of carriers of goods and passengers through other means of transport is also carried on by all railways as an incidental part of the business of public transport and it cannot be said that the Sub-clause authorises the carrying on of business as carriers as an independent business.

27. As has been laid down in Palmer's Company Precedents, volume II, 17th edition, on conspectus of judicial decisions, the statement of the objects of Clause 3 of the memorandum affirmatively determines what shall be the powers of the company with all powers reasonably requisite or incidental to or consequential on the attainment thereof. The statement further restricts the powers of the company to those thus conferred, save so far as other powers are given by statute. As to the construction of objects clause it has to be in accordance with the rules generally applicable to the construction of written documents. The whole document has to be read, the words must have their ordinary significance, unless, when so applied, they produce an inconsistency or an absurdity or inconvenience, technical words are to be treated *prima facie* as being in technical sense and the words must be understood with due reference to the subject-matter. In all cases the object is to arrive at the intention as expressed by the words used.

28. The main object of the company, as we have seen, is to work, maintain and carry on a line of railway between Burdwan and Cutwa for public traffic which "obviously includes transport of goods and to enter into an agreement with the Government for the purpose. The other sub-clauses, reading as a whole, appear to centre round the working of railways and all other business incidental or ancillary thereto, even assuming that these sub-clauses authorise the company to take up the business of any other railway. Further, even on a wide interpretation, the business of carriers of goods and passengers as expressly provided in Sub-clause (e) is to be carried on by the media of tramways, railways, omnibus, vans and by no other. The business of carriers of goods that is being carried on by the company is " by boats and barges by way of inland navigation " as stated in the explanatory statement of the special resolution dated March 13, 1972, quoted in paragraph 13 of the affidavit-in-opposition on behalf of the company. This business of carrier of goods, through " boats and barges by way of inland navigation " as an independent and distinct business, could not be the intention of the shareholders of the company, as such type of business by any media other than tramway, railway, omnibuses or vans, which have been expressly mentioned in specific manner, find no place in Sub-clause (e) or other objects clauses of the memorandum, keeping in view the rules of construction laid down by the judicial authorities as indicated earlier. Carried to logical conclusion, the business of carriers by navigation would include starting of business of transport over high seas through ships and liners which is not the express or implied intention as revealed in the objects clauses of the

memorandum. The business of carriers of goods is thus ultra vires the powers of the company, at least by inland navigation, and cannot be taken into consideration as only the business authorised and legal can be taken into account in considering if the company has suspended its business for the whole year.

29. As to the loans advanced by the company to Mantoshes, reliance has been placed on Sub-clause (q) providing power on the company " to invest the money of the company not immediately required upon such securities as may from time to time be determined ". This provision does not authorise the investment of practically the entire funds of the company in investments which were ultimately diverted to concerns controlled by the persons who had been controlling the company as specifically alleged by the Registrar to which there is only a mere general denial. Further, " securities " in the sub-clause in the context of the sub-clause obviously mean and imply stocks for temporary investments and not investments in immovable properties, the recovery of money wherefrom might be a time consuming process. The investments accordingly are also ultra vires the powers of the company and such illegal business even if carried on by the company which may not affect the liabilities of third parties to the company in respect thereof, cannot be taken into consideration when considering whether the company has suspended its business for the whole year. As we have seen only the business which a company is authorised to carry on under its memorandum or by statute can be taken into account in considering the company's claim that it has not suspended its business in meeting the case for its winding up on that account. The special resolution of March 13, 1972, authorising the board retrospectively to make loan to any body corporate under same management in terms of Section 370 is of no consequence since the investments, as we have seen, are ultra vires the company and such acts cannot be regularised or made legal in" the manner sought to be done by the special resolution.

30. In considering whether the company has suspended its business for the whole year, the material time, according to the learned judge, should be the date when the order is to be passed as was held in *In re Kitson & Co. Ltd.* [1946] 1 All ER 435 (CA). It has been laid down in *Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others*, that primarily the circumstances existing as at the date of the petition must be taken into consideration for determining whether a case is made out for holding that it is just and equitable that the company should be wound up. It appears to us that there can be no hard and fast rule or uniform principle as applicable to all cases for fixing the relevant date for computing the suspension of business by the company and it will depend on the facts of each case. It may be that due to internecine disputes or for any statutory prohibition or pending litigation or any other supervening circumstances the company suspends business for the whole year. It may be that at the time the petition is made or the matter is being heard or order is to be passed even by the appellate court, the company has resumed business with high promise, or is in flourishing activity in legal, authorised and bona fide business. In such state of

affairs, it will be a travesty of law and against public interest to order the winding up of the company and the grounds for winding up are not to be taken as traps to strangle the industry or business which the company may be carrying on bona fide and as authorised by law.

31. In this connection it has to be noted that the company, lastly, filed with the Registrar its balance-sheet and profit and loss account for the year 1969-70 and for non-filing of balance-sheets for subsequent years the company and its directors have either been convicted or proceedings are pending. At the initial stage of the hearing of this appeal this court asked the company's counsel in the course of argument to produce for its consideration, the latest balance-sheet and the profit and loss account filed with the Registrar, but unfortunately no such papers or documents were produced before the court to appreciate the current state of affairs of the company, to find out any extenuating circumstances which might impel the court to use a discretion in favour of the company which such company may deserve in equity.

32. A point has arisen as to whether the company should be directed to be wound up on the application of the Registrar for any act of misbehaviour of the directors themselves. It was held by the learned judge that if the directors misbehaved themselves there are other remedies to the shareholders to stop it and it would be quite wrong that partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely, the directors, are misbehaving themselves. It was held in Kitson's case [1946] 1 All ER 435 (CA) that if the directors are doing anything improper the shareholders can get rid of the directors or stop them by means of an injunction. It was not putting it too high to say, as observed by Greene M.R., in the said case that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation. The judgment was delivered in February, 1946, but since then the Companies Act of 1948 in the United Kingdom was brought into consolidate the earlier Companies Acts and there were certain amendments to it under the Companies Act of 1967, which had been incorporated in the 1948 Act. u/s 165, Clause (b), the Board of Trade has been empowered to appoint inspectors to investigate into the matters of the company whether its business is being conducted with intent to defraud its creditors or otherwise for a fraudulent or unlawful purpose or those connected with formation or management of the company's affairs are guilty of fraud, misfeasance or other misconduct. u/s 169(3) the Board of Trade has been given power to present a petition for winding up the company, if the court thinks it just and equitable that it should be wound up when the Board of Trade considers it to do so by reason of circumstances mentioned in Section 165(b). It thus appears that the decision cited may not apply in a fit case in the context of the new legislation referred to above for winding up the company if in the opinion of the Board of Trade it is expedient to do so. Similar powers have been given by our Companies (Amendment) Act of 1965 to the Registrar of Companies. The Companies Act, 1956, was intended, inter alia, to ensure the maintenance of

minimum standard of good behaviour in company promotion and management and the 1965 Amendment Act was intended, inter alia, to ensure the better fulfilment of the purposes of the Act. In the circumstances referred to, u/s 433 it will, therefore, be not correct to say that even if the board of directors indulge in unlawful business which would imply suspension of the company business during the period or even when the substratum of the company is gone so that it is just and equitable to wind up the company, the court would be incapable of passing such order in a fit case referring the shareholders to the courts of law or the Registrar to other penal provisions of the Act against the directors carrying on illegal business. In the premises in a fit case the Registrar has been empowered to file a petition to winding up on grounds, inter alia, of Clauses (c) and (f) of Section 433 while it will be too much to expect the minor shareholders to approach the court for such or other remedy.

33. The next contention that has been urged is that the Regional Director gave no reasonable opportunity to the company to make its representation before granting sanction to the Registrar for presenting petition for winding up the company. It will be seen from the correspondence disclosed that as early as 1971, the Bombay Shareholders' Association made a complaint to the Registrar stating that the company had received compensation from the Government, but the company had been silent in respect of distribution thereof to the shareholders in spite of reminder. Complaint was also made by one Ashburner, another shareholder, to the same effect. It appears that on May 2, 1972, the Regional Director issued a notice to the company to show cause why sanction should not be given to the Registrar for filing a petition in court for winding up the company in view of the fact that the company had suspended business for the whole year and of the Registrar's opinion that it was just and equitable that the company should be wound up. To this letter the company replied that it had been carrying on business of carriers of goods since April, 1972, and a copy of the special resolution passed on March 13, 1972, was forwarded. It appears that on 28th of May, 1972, in reply to the Registrar's letter the company again reiterated that the amount of the business of carrier of goods was about Rs. 70,000 and the accounts ending with March, 1971, would be forwarded after the accounts are finalised. It may be mentioned that on March 25, 1973, the company held its 64th annual general meeting in respect of the accounts for the year ending 31st March, 1970, and passed a special resolution by altering the memorandum of association by inserting three sub-clauses as (v), (w) and (x) for carrying on the business in jute, cotton fibre materials, oil seeds, etc., business in shares and security as also the business of lending money. The Registrar requested the company to intimate the amount of business that was carried on till then and the company was thereafter reminded again. On May 4, 1973, the company presented an application to this court for confirmation of alteration of the memorandum of association as approved by the shareholders as aforesaid. This application was dismissed by Salil Kumar Roy Chowdhury J. on November 15, 1973. Thereafter, on February 13, a fresh notice was given to the

company by the Regional Director to show cause why sanction should not be accorded to the Registrar to present the petition for winding up. To this notice the company replied on April 16, 1974, stating that Clause 3(o) of the memorandum authorised the company to carry on the business of carriers of goods and approval to the commencement of the said business was given by the shareholders u/s 149(2A) by a special resolution passed on March 13, 1972. The company also stated therein that it had been carrying on business of carriers of goods in boats and barges by way of inland navigation which was still continuing. The company then intended to diversify its activities and passed special resolution by altering the memorandum of association as aforesaid on 25th March, 1973, and confirmation for the aforesaid alteration was sought for by the petition in the court u/s 17 of the Act which, however, was dismissed on 15th November, 1973, and the appeal preferred therefrom was still pending in this court. It was accordingly stated that there has been no occasion for granting to the Registrar sanction for winding up the company on grounds (c) and (f) u/s 433. Further, no grounds had been disclosed to the company by the Registrar. It was accordingly submitted that the permission should not be granted. This representation, though dated April 16, 1974, was received by the Regional Director on May 3, 1974, and it is obvious that this representation was before the Regional Director when he accorded the sanction on July 27, 1974. While granting the sanction, the Regional Director had stated that after considering the representation made by the company, he was of opinion that the company had suspended its business for more than one year and that it was just and equitable that the company should be wound up.

34. It has been contended before us by Mr. Gupta that the company was not given the proper opportunity before sanction was granted to the Registrar in the context of the facts referred to above. It appears that the company's representation was duly considered by the Regional Director and the position taken by the company in the said representation obviously was not acceptable to the said authority. It cannot accordingly be said that there was no opportunity given to the company to make its representation. It may be that the Registrar's report was not given to the company along with the notice of the Regional Director to show cause why the sanction should not be given. There is no provision in law for giving the report of the Registrar to the company at that stage and the notice of the Regional Director asking the company to make the representation itself indicated the purport of the grounds on which winding up of the company was sought for. The company also understood the petition and it dealt with the same in its representation of April 16, 1974, stating that the business of carriers of goods had been commenced by it with the sanction of the shareholders u/s 149(2A) from April, 1972, which business was still continuing. However, as the company wanted to diversify its activities, the memorandum of association was altered by authorising the company to take up new business subject to confirmation by the court. Accordingly, in the aforesaid circumstances, there was no occasion for winding up of the company on grounds of Clauses (c)

and (f) of Section 433. At this stage, the company did not contend that in the absence of the report of the Registrar it could not file its proper representation nor that it was not given sufficient opportunity to do so. It is also to be remembered that the Regional Director is to be satisfied, *prima facie*, about circumstances relating to the affairs of the company that the sanction should be given to the Registrar for presenting the petition for winding up of the company. The ultimate order for winding up is to be passed by the court on hearing the parties on the consideration of the materials as may be adduced before it in such circumstances. It is not necessary that the Regional Director should give the personal hearing which was also not asked for and/or that anything more than affording an opportunity of making its representation by the company as enjoined under Sub-section (6) of Section 439, as was done in this case, was necessary as submitted by Mr. Mukherjee.

35. It is also stated that the Regional Director issued a notice on May 2, 1972, calling upon the company to make representation, if any, on the request of the Registrar for accord of sanction for winding up the company on grounds that the company had suspended business for more than one year and that it was just and equitable that the company should be wound up. The company gave replies to the Regional Director showing that it carried on business of carriers of goods pursuant to the special resolution u/s 149(2A) passed on May 30, 1972. The said notice was not pursued further and obviously the Regional Director was satisfied that no sanction should be granted as submitted by the company. Curiously enough, it was said, the second show-cause notice on similar terms was issued to the company on February 13, 1974, which was obviously inspired by certain observations made by Salil Kumar Roy Chowdhury J., on November 15, 1973, while rejecting the company's application for confirmation of the alteration in the memorandum of association approved by the shareholders by the special resolution dated March 26, 1973. This contention is not correct either on fact or in law. It will appear from the correspondence disclosed that there has been further representation since the first show-cause notice from a shareholder of the company and for distribution of the amount to shareholders and the company's reply was that it had been carrying on lawful business of carriers of goods since April, 1972. There was a complaint from another shareholder and further enquiry was made by the Registrar and in consequence and in the attending circumstances of commencement of new business, the second show-cause notice was issued. It may be stated that in the judgment referred to above the court was of opinion that the main and paramount business of the company was to carry on railway business and by the purchase of the business by the Central Government, the substratum of the company was gone, a circumstance in which the company is always wound up by court as being just and equitable to do so, and the Regional Director must have taken note of the said judgment in which there was no impropriety. The Regional Director was always required to consider any request from the Registrar to sanction the winding up of the company on such materials as might be disclosed or discovered from time to time in respect

of the same company. There can be no question of any estoppel in exercise of such power by the Regional Director who is only to grant sanction for presenting the petition for winding up but the ultimate decision will be of the court under the law.

36. There is also no strength in the contention that the order of the Regional Director should be the speaking order. By granting sanction he does not determine or decide any question at issue against the company but records his prima facie and administrative satisfaction for sanction for presenting the winding-up petition which by itself does not affect any civil right of the company.

37. The point of limitation has also been raised on behalf of the company contending that the undertaking of the company was acquired on April 1, 1966, and the major part of the compensation or cost of acquisition was paid by 1968, so that the question of company being wound up on the ground of substratum having gone should have been filed within a period not beyond three years from the date the company, according to the Registrar, was to be deemed to have suspended its business and/or the substratum of the company had disappeared.

38. Article 137 of the Limitation Act, 1963, has been made applicable to all applications in court under any Act as has been held in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, . The contention of the company, however, is misconceived as the limitation starts from accrual of the right to apply. The right to apply accrued only on the grant of sanction by the Regional Director on behalf of the Central Government u/s 439(6) and the petition has been filed shortly after the grant of sanction under the Companies Act. There is no question of limitation involved in the premises.

39. The real matter of controversy between the parties is on the question as to whether the substratum of the company had gone with the acquisition or taking over of the railway business of the company. The circumstances in which winding up is sought for is that it is just and equitable that the company should be wound up in view of the disappearance of the substratum of the company. Since the decision in *Suburban Hotel's case* [1867] 2 Ch App 737, it has been held over years by courts that, if the substratum of the company is gone, that might render it as just and equitable to make a compulsory winding-up order. As has been stated in *Palmer's Company Precedents*, volume II, page 29 (17th edition), it is now possible to say on authority that the substratum of the company is deemed to have gone when, (i) the subject-matter of the company is gone ; (ii) the object for which it was incorporated has substantially failed; or (iii) it is impossible to carry on a business of the company except at a loss.

40. We shall now consider the decisions cited at the bar on the point. In *In re Haven Gold Mining Company* [1881] 20 Ch D 151, the company was established for working a gold mine in New Zealand and it turned out that the company had no title to the mine and had no prospect of obtaining possession of it except a small portion for few months. A winding-up order was made, although there were

general words in the memorandum of association enabling the company to purchase and work other mines in New Zealand. The court was satisfied that the subject-matter of the business for which the company was formed has substantially ceased to exist, as was the case in *Suburban Hotel Co.* [1867] 2 Ch App 737 and a winding-up order was made even though the large majority of shareholders wanted the company to exist and the company was solvent.

41. In *In re German Date Coffee Co.* [1882] 20 Ch D 169 (CA), it was laid down that the substratum is gone when the main " purpose " has become impossible. This company was incorporated for working a patent which it failed to acquire and intended to work patents or unpatented articles which was held to be impermissible in law and accordingly it was held just and equitable for the company to be wound up.

42. In *Cotman v. Brougham* [1918] AC 514 (HL), Lord Parker observed that the name of the company, being part of the memorandum, can be considered in construing the memorandum of association except where the operative part of the memorandum is clear and unambiguous. While name is susceptible of alteration, such alteration cannot diminish or enlarge a company's powers. Further, the name may be very material if it be necessary to consider what is the company's main and paramount object in order to see whether its substratum is gone. In *In re Indian Mechanical Gold Extracting Company* [1891] 3 Ch 538 (Ch D), the court while confirming an alteration of memorandum of association enlarging the area of the company's operations, imposed a condition that the name of the company, which confined its activities to one country, should also be altered so as no longer to contain such a suggestion.

43. Mr. Gupta strongly relied on the decision in *In re Kitson & Co. Ltd.* [1946] 1 All ER 435 (CA), where the Court of Appeal was considering an order for winding up the company. The company was incorporated in 1899 and the objects of the company according to its memorandum were, (i) to acquire and take over as a going concern a business carried on elsewhere under the style of K. & Co.; (ii) to carry on the business of general engineering. The company took steps to sell the business of K. & Co. while its subsidiary, B. & Co., carrying on similar type of business, was under requisition by the Government. Greene M.R., delivering the leading judgment, observed (page 438):

"...in these substratum cases that there is every difference between a company which on the true construction of its memorandum is formed for the paramount purpose of dealing with some specific subject-matter and a company which is formed with wider and more comprehensive objects. "

44. The learned judge observed that when a company is formed to exploit a mine, the court must construe the language used with reference to the subject-matter, namely, a mine. If the mine cannot be acquired or the mine turns out to be no mine at all, the object of the company is frustrated as the subject-matter ceased to exist. If the main object of the company is to acquire and work a

patent as in *German Date Coffee's* case [1882] 20 Ch D 169 (CA) and it fails to acquire the patent, to compel the shareholders to remain bound together in order to work some other patent or make un-patented articles is to force them into a different adventure to that which they contracted to be engaged in together. But when we come to a subject-matter of a totally different kind like the carrying on of a type of business, then, so long as the company can carry on that type of business, it seems that *prima facie* at any rate it is impossible to say that its substratum is gone. On a true construction of the memorandum of association, it was held impossible to limit the paramount object of this company to the specific business of K. & Co. so as to lead to the result that as soon as K. & Co.'s business was sold the substratum of the company had gone. It was accordingly held that the main and paramount object of the company was to carry on engineering business. It was further noted that what the court was concerned with at the appellate stage was the position of the company on the date of the winding-up order. During the hearing at the trial, the business of B. & Co. was derequisitioned and the intention of the board being to reopen the works of B. & Co., it was held that, as a result of what happened during the trial, it was impossible to hold that the substratum of the company had gone.

45. In *Bell Houses Ltd. v. City Wall Properties Ltd.* [1966] 2 QB 656; [1966] 36 Comp Cas 779 (CA), in interpreting the objects clauses of the memorandum of association, it was held that the contract which was entered into by the company's board with the defendant to pay the company procuration fee for introduction of a financier was *intra vires* the company. Clause (c) provided that the company could carry on any other trade or business whatsoever which could, in the opinion of the board of directors be advantageous to be carried on by the company in connection with or as ancillary to the above business or the general business of the company. In this decision the court did not base their opinion on the theory of main business of a company or business ancillary to its main business.

46. In considering an application u/s 17(1) of the Companies Act, 1956, the Gujarat High Court in *In re Motilal Hirabhai Spinning, Weaving and Manufacturing Co. Ltd.* [1970] 40 Comp Cas 1216 noted that the company was started as a textile mill and carried on the business of manufacturing cotton textiles for over 52 years. It closed down in 1941 due to financial difficulty, and derived its income by leasing out the land in its possession. In 1969, it passed a special resolution to start such diverse activities as manufacturer of photographic materials and pharmaceuticals and to set up hotels. The proposed alterations were contended to be covered by Clauses (a) and (d) of Section 17(1) and the court observed that there should have been some business in *presenti* but as the company was not carrying on any business, it was not possible to alter the memorandum of association as prayed for, particularly in view of the attending circumstances, as each clause represented an independent business, and it was obvious that the board did not apply their commercial judgment.

47. In *Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another*, the Supreme Court was considering the applicability of the principles of dissolution of partnership for winding up the company u/s 434(f). Though not strictly relevant for our purpose certain observations made therein are applicable to the matter before us. The court quoted with approval the following passage in *Baird v. Lees* [1924] SC 83:

" I have no intention of attempting a definition of the circumstances which amount to a " just and equitable " clause. 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 provide 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 shareholder, 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. "

48. The Supreme Court referred to the decision in *Ramanandi Kuer v. Kalawati Kuer* AIR 1928 PC 2, where the board pointed out that a positive enactment of Indian legislature is to be interpreted in accordance with its provisions uninfluenced by the previous state of law or the English law upon which it may be founded. Similar is the case before us as our Companies Acts are fundamentally based on the Companies Acts of the United Kingdom. The Supreme Court observed that we shall have to adjust and adapt, limit or extend the principles derived from English decisions, entitled as they are to great respect, suiting the conditions of our society and country in general with the general interests of shareholders primarily in view.

49. The court further observed (page 105).

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

50. Mr. S.C. Sen contended that the decisions cited by Mr. Mukherjee on behalf of the Registrar are outmoded and inapplicable in the context of present day social and economic conditions. The concept of substratum as having disappeared on the basis of a paramount or main object is obsolete and has eroded. Such concept not being of law but of equity, on account of change of social and

economic conditions and of State thinking is no longer applicable. The basic principle in the context of attending social and economic condition is substitution of strict legal rights by higher claims of society. It is also the responsibility of the State to keep industry alive if otherwise flourishing, the only exception being absolute deadlock in the conduct of affairs of the company. If there is some prospect, the company should not be wound up and the court can neither be blind to realities nor strictly adhere to the measure of law bereft of humanism, social welfare, equity and fairness with which justice should always be associated.

51. Mr. Mukherjee on the other hand contended that the conception relating "just and equitable" ground for winding up have received shape over years. Far from there being an erosion, the statutory provisions indicate adherence to such accepted norms. Section 13 provides the requirements with respect to memorandum of association and under Sub-clause (d) of Sub-section (1), the memorandum shall state the main objects to be pursued by the company and objects incidental or ancillary to the attainment of such objects. The memorandum shall also state other objects not included as main objects or objects incidental or ancillary thereto. It is thus obvious that even if main objects or those incidental or ancillary thereto, for which the company is incorporated, disappear and there are other objects in the memorandum, the court will take into consideration if such other business could be and is being conveniently carried on keeping in view the interest of shareholders and creditors. Before passing a winding-up order the court will obviously take into account all attending circumstances, as is inevitable in a discretionary order, including a consideration of equity and fairness as also social welfare.

52. The question then resolves to the interpretation of the memorandum of association of the company to find out if the company was incorporated for a particular object only. If so, in view of the disappearance of such business as in the case before us, the court has no other alternative but to pass an order for winding up. If, however, there be other objects, as important as the main object, of the company, the principle laid down in Kitson's case [1946] 1 All ER 435 (CA) may be followed and the court may decline to wind up the company. Even if there be other objects not included as main objects of the company or as incidental or ancillary thereto, in view of the provisions of Clause (d)(ii) of Section 13(1) warranting inclusion of other objects in the memorandum, mere disappearance of the main objects, in our opinion, will not prevent the company from carrying on such other objects unless there be good grounds for winding up the company authorised by law.

53. On examination of the memorandum of the association of the respondent-company there can be no doubt that the main object of the company was to run the railway as public transport between Burdwan and Cutwa. In fact, the agreement provided that, so long as the agreement to run the railway continued to be in force, the company could not undertake any other business which by implication meant that there was no prohibition to carry on other business if the

specific business of running the railway between the two places named became non-existent. The other businesses referred to Sub-clauses (d), (e) and (f) which are relevant, while other sub-clauses refer to powers of the company, all centre round railway. Sub-clause (e) is the only clause which contains provisions for carrying on business of tramway, railway, omnibus and van proprietors, and carriers of goods and passengers. These businesses appear to us to be incidental to the railway business and not independent business as contended by the company, as railways have also to take assistance of other modes of transport on occasions while engaged in the business of public transport and railways are inevitably mentioned in Sub-clauses (j), (k), and (1).

54. Even if it is accepted that the company is entitled to carry on only other railway business on the acquisition or taking over of the railway business in 1966, no such business has been undertaken by the company during the material time nor any steps had been taken to start such business. It is also a fact to be taken into account that the railways on all major routes for a long time had been taken over and run by the Central Government. For railways in small gauges there may be some railways still run by private sector but there is no possibility in the absence of any material to indicate that it is still possible to carry on the railway business elsewhere. In this situation it appears that there is no escape from the position that while the subject-matter of the company as disclosed in its name is gone, the object for which the company was incorporated had substantially failed and it is no longer possible to carry on the business of railways. The substratum of the company is, therefore, gone which accordingly renders it just and equitable to wind up the company.

55. As to the contention that the Registrar should not be permitted to dislocate the business carried on erstwhile by the company and create unemployment thereby against social interest, it is to be noted that while its last wage bill disclosed is Rs. 600 for 1970-71, the company had indulged in ultra vires business during this long period thereby frittering away the cash of the company, admittedly to a considerable and major extent even if its statement of recovery is believed. Further, the company has not produced before this court, in spite of requisition, the balance-sheets and profit and loss accounts over all these years from April 1, 1970, for which there can be no defence. The court accordingly is deprived of an opportunity to assess the financial position of the company and even on equitable and in social interest, there could be no extenuating circumstances to use the discretion in favour of the company if it was possible to do so. In this state of affairs there is obviously no scope for use of any discretion in favour of the company.

56. The appeal accordingly is allowed and the judgment and order under appeal are set aside. The winding-up petition is admitted. We direct advertisements once in the Calcutta Gazette, once in the Statesman and once in Basumati. There will be no advertisement for one week. The petition is returnable before the learned company judge eight weeks hence.

57. There will be no order for costs in the circumstances.

Sankar Prasad Mitra, C.J.

58. I agree.