

(1975) 03 CAL CK 0025
In the Calcutta High Court
Case No : Company Petition No. 373 of 1974

Kumarapuram Gopalakrishnan Ananthakrishnan	APPELLANT
Vs	
Burdwan-Cutwa Railway Company Ltd.	RESPONDENT

Date of Decision : 21-03-1975

Acts Referred:

Companies Act, 1956 — Section 149(2A), 433

Citation : (1978) 48 CompCas 211 : 81 CWN 137

Hon'ble Judges : Ramendra Mohan Datta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ramendra Mohan Datta, J.—In this application the petitioner, Registrar of Companies, contends that the substratum of the company, on the basis of which it was incorporated, has gone and, as such, it is just and equitable that the company be wound up.

2. The assets of the company were taken over by the Government of India on April 1, 1966. The company received compensation to the extent of a sum of Rs. 17.8 lakhs. In the months of January and May, 1968, the company granted several loans out of the said sum to the total extent of about Rs. 16 lakhs to Mr. J. Mantosh, Mrs. Mantosh and Miss Daisy Mantosh upon the security of the landed property owned by them and on interest at the rate of 10% per annum.

3. It is contended that the payment of the said money by way of loan in favour of the said persons was illegal, void and wholly ultra vires the memorandum of association of the company. It is further urged that the said loan had been advanced in contravention of Sub-section (2A) of Section 149 of the Companies Act, 1956, and, accordingly, the auditors of the company made a qualified report dated February 28, 1973, on this point.

4. Prior to this, in 1971 the Registrar had complained that the Bombay Shareholders' Association by their letter dated August 16, 1971, and another

shareholder by the name of J.D. Ashburner by his letter dated April 12, 1971, lodged complaints regarding the non-distribution of the compensation money received by the company from the Government of India. According to the Registrar of Companies the only activity of the company consisted of earning interest from the said loan and in respect of certain fixed deposit amounts with the State Bank of India as would appear from the profit and loss account and from the balance-sheet relating to the financial years 1967-68, 1968-69 and 1969-70. The Registrar has further referred to the directors' report annexed to the balance-sheet of the company as on March 31, 1969, which, inter alia, provides to the following effect:

"Your directors have since thought over the business of carriers of goods which will be proper for your company. Clause 3(e) of the memorandum of association of the company allowed authority to the company to take up the business of carriers of goods ; a special resolution is being moved for consideration of the members of the company and your directors recommend for the approval of the special resolution by the members of the company."

5. It appears that the said special resolution was moved and the shareholders had duly passed the same on March 13, 1972. It further appears from the balance-sheet of the company and also from the company's letter dated May 28, 1973, addressed to the Registrar of Companies, West Bengal, that the company had raised bills to the extent of Rs. 70,000 in respect of this business as carriers of goods. The said special resolution u/s 149(2A) of the Companies Act, 1956, which was duly passed by the shareholders enabling the board of directors to the commencement of business of carriers of goods was duly filed with the Registrar of Companies along with the explanatory statement in respect of the said resolution.

6. In March, 1973, the company wanted to alter its memorandum of association and passed a special resolution in respect thereto for the confirmation of the High Court u/s 17 of the Companies Act, 1956. The company thereby wanted to diversify its activities, inter alia, in jute, hides, skins, oilseeds and to deal in shares, stock, debentures and to lend money with or without security and generally to such persons and upon such terms and conditions as the company might think fit. The company thereupon made an application u/s 17 but the same having been opposed on behalf of the Registrar of Companies the court after due consideration thereof dismissed the said application with costs. An appeal, which has been preferred from the said judgment and order, is still pending.

7. Upon the facts and circumstances of this case the Registrar of Companies obtained the sanction of the Regional Director, Company Law Board, Calcutta, and made this application for winding up on the ground, inter alia, that the company has suspended its business for more than one year and that it is just and equitable that the company be wound up as the substratum of the company had gone with the taking over of the entire railway business by the Government of India.

8. On behalf of the company it is contended that the objects Clause in the memorandum of association of the company specifically empowered the company to carry on business as carriers of goods and also to invest the money which was not required immediately by the company. Sub-clauses (e) and (q) of Clause 3 of the memorandum of association of the company provided as follows :

" (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.

(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 money so raised or any part thereof for all or any of the purposes of the company ; to make, endorse, execute and issue promissory notes, bills of exchange, debentures and other negotiable or transferable instruments and to invest the moneys of the company not immediately required upon such securities as may from time to time be determined."

9. It is contended on behalf of the company that admittedly the company has been carrying on business under the said two sub-clauses. It cannot be said that any part of the business now carried on by the company is ultra vires the memorandum of association. It is true that the business of carriers of goods had been done to the extent of Rs. 70,000 only, yet, the fact remains, that such business is being carried on lawfully in terms of the objects clauses of the company. Furthermore, the investment of the said sum of Rs. 16,00,000 cannot be called an ultra vires transaction on the part of the company because the company could lawfully invest such money which was not immediately required by the company. Accordingly, it is contended that the substratum of the company cannot be said to have gone nor can it be contended by the Registrar of Companies that the company had suspended its business for more than one year. Reliance is placed on the recent two Supreme Court cases on the basis whereof it is contended that under such circumstances it could not be said that the substratum of the company had been destroyed.

10. In the case of *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.* [1972] 42 Comp Cas 125, 135, the Supreme Court, while dealing with the question whether or not the substratum of the company has gone, observed :

" The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the court is reluctant to hold that it has no such prospect."

11. The Supreme Court took into consideration the fact that the company had reasonable prospect of business and resources. It was also observed in that page

that in determining whether or not the substratum of the company had gone, the objects Clause of the company's memorandum and the case of the company on that question would have to be looked into. In that case also the machinery of the company was sold but the company intended to enter into some other profitable business with the sale proceeds of such assets of the company.

12. In the case of Seth Mohan Lal v. Grain Chambers Ltd. [1968] 38 Comp Cas 543 the Supreme Court considered the question whether the substratum of the company was destroyed. That was a case where the company was doing a substantial business by entering into forward transaction in "futures" in gur. By the passing of an order prohibiting entering into transaction in " futures" in gur the said substantial business of the company was lost. The fact that there were other objects as well in the objects Clause in the memorandum of association was taken into consideration. The company had immovable property and liquid assets of the total value of Rs. 2,54,000. The Supreme Court also took into consideration the fact that there was no evidence that the company was unable to pay its debts. At page 557 the Supreme Court observed :

" The company could always restart the business with the assets it possessed, and prosecute the objects for which it was incorporated. It is true that because of this long drawn out litigation, the company's business has come to a standstill. But we cannot on that ground direct that the company be wound up. "

13. The Supreme Court held that, in the facts and circumstances of that case, it was not just and equitable that the company should be wound up. At page 557, it was also observed as follows:

" In making an order for winding up on the ground that it is just and equitable that a company should be wound up, the court will consider the interests of the shareholders as well as of the creditors. Substratum of the company is said to have disappeared when the object for which it was incorporated has substantially failed, or when it is impossible to carry on the business of the company except at a loss, or the existing and possible assets are insufficient to meet the existing liabilities. "

14. It follows from the above observations of the Supreme Court that, in considering whether the substratum of a company has gone or not, the court should have due regard to the interest of the shareholders as well as of the creditors. Even if the main business for which it was incorporated has substantially failed yet if there would be other objects which would permit the company to carry on its business activities, even though the same might be of lesser volume and/or importance, the same should be allowed to be carried on. That is permissible on the principle that the majority shareholders are the best judges to decide how best to run the company under such circumstances. If there would be creditors their wishes also would have to be taken into consideration in deciding the question.

15. This is not a case where the company has large debts and the liabilities far

exceeded the assets. This is not a case where it is impossible to carry on the business of the company except at a loss. The question of substratum is not being considered on such basis in the present case. The main contention is that the railway business for which it was essentially incorporated long time back having been taken over, there is no other business to be done by the company. Hence this is a case where the question whether the substratum of the company has gone or not would be considered from the point of view of the objects Clause in the memorandum of association. By construing the memorandum it is to be found whether the company is in a position to carry on its business activities with the remaining objects, if there would be any. I have already set out the relevant sub-clauses, being Sub-clauses (e) and (q) of the memorandum of association.

16. Mr. Mukherjee first contends that the very name of the company would suggest that it was formed for the purpose of carrying on the said railway business. The other objects were all ancillary to the main object of running the business of the said railway. Mr. Sen, on the other hand, contends that Sub-clause (e) of the objects Clause clearly empowers the company to carry on the business as carriers of goods and passengers besides carrying on business of tramway, railway, omnibus and so on. No doubt the company had been running the said railways as its primary business until the same was taken over by the Government but the fact remains that the company had been empowered by its memorandum to undertake several other businesses as well. In fact, the company has actually undertaken the business of carriers of goods and passengers by boat and doing business in that manner cannot be said to be ultra vires the memorandum of association. As stated above, although the turnover of such business is much smaller in comparison to the railway business carried on so long, yet that should be a matter of no difference or effect in winding up cases.

17. There being no creditors and the shareholders having intended to carry on such business and there being large sums lying accumulated in the till of the company, the company's substratum cannot be said to have gone.

18. In the case of *Re Kitson & Co. Ltd.* [1946] 1 All ER 435 (CA), the memorandum of association was construed to mean that the company was empowered to carry on an engineering business of a general nature and as such the disposal of the business of Kitson & Co., which had been acquired about 16 years ago, did not amount to a destruction of the substratum of the company. In construing such memorandum Lord Greene M.R. observed at 438 as follows :

"First of all, the form of the memorandum is the common form where a business is being acquired. It sets out in the usual way the acquisition of the business as the first step which the company is going to undertake. We are not considering now whether failure in 1899 to acquire the business of Kitson & Co. would have destroyed the substratum of the company. It might possibly have been thought that unless it got this business it was not really starting its career in the way in which the shareholders bargained it should be started ; but the question we have to decide is whether, that business having been acquired 46 years ago, the

disposal of it last year amounted to a destruction of the substratum. In my opinion, the main and paramount object of this company was to carry on an engineering business of a general kind. It was such a business that was carried on by Kitson & Co., and I cannot bring myself to construe this memorandum as limiting the paramount object and restricting the contemplated adventure of the shareholders to the carrying on of what could be called the business of Kitson & Co. The impossibility of applying such a construction seems to me to be manifest when one remembers that a business is a thing which changes. It grows or it contracts. It changes ; it disposes of the whole of its plant; it moves its factory ; it entirely changes its range of products, and so forth. It is more like an organic thing. "

19. To my mind, in the case before me also the Sub-clause (e) of the memorandum of association should be regarded as empowering the company to undertake various other businesses besides the business of railways which was being carried on so long. It empowered the company to carry on the main business of carriers of goods and passengers and it is quite within its objects Clause if the company had been carrying on the business of inland navigation as the carriers of goods by boat. If the name is not suitable to the objects Clause which is now being put into action the company can certainly take proper steps to have it changed but it should not be ordered to be wound up on that ground.

20. In the case of Egyptian Salt & Soda Company v. Port Said Salt Association [1931] 1 Comp Cas 285 (PC), the principle of construction of the memorandum of association of the company was laid down and at page 292, it was observed as follows :

" A memorandum of association like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs. It must be borne in mind that the purpose of the memorandum is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise, and for this information they are entitled to rely on the constituent documents of the company..... The intention of the framers of the memorandum must be gathered from the language in which they have chosen to express it."

21. In the case of Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI) and Another, , Chakravartti C.J. sitting with S.R. Das Gupta J. considered a case where also the railway company was taken over by the Government of India from the company concerned. There also the company was formed for the purpose of constructing and maintaining a railway between Bukhtiarpur station and Rajghirkund in the State of Bihar. There was an agreement between the promoters and certain local authorities and in pursuance of that agreement the company established the said railway. The said railway line was connected with the then East Indian Railway and as such there were some mutual adjustments between the said two railways. As a result of such an inter-change of traffic the Union of India became entitled to a sum of Rs. 5,22,313-12-6. The company was

taken over by some authority. The company having failed to pay the dues of the Union of India a statutory notice was served and thereupon a winding-up petition was filed by the Union of India on the ground that the company was unable to pay its debts and that the substratum of the company had gone. The appeal court at page 514 of the said report observed :

" Whether the substratum of a company is gone and the object with which it was formed has become impossible of further pursuit, is usually the proper concern of only its shareholders and contributories; a creditor cannot properly be allowed to use it as a ground for breaking up the company, unless, by the disappearance of the substratum, the recovery of his debt has been imperiled."

22. Their Lordships relied on the case of *In re Eastern Telegraph Co. Ltd.* [1947] 2 All ER 104 : [1948] 18 Comp Cas 46 (Ch D). In the English case by a statute the Treasury compulsorily acquired the shares of the company which had in its turn purchased the physical assets which belonged to the company. Certain preference shareholders made an application for winding up on the ground that the substratum of the company had gone. In the English case it was considered whether a failure of the objects of the company had occurred by reason of the compulsory acquisition of shares by the Treasury. It was found therein that the effect of the agreement was to convert the company from an operating telegraph and cable company into a company holding shares in an operating company with like objects. It was also found as a matter of fact that the effect of the passing of the Cable and Wireless Act, 1946, was to sever compulsorily and for good all the connection of the company with the business of cable and telecommunications with which it had been previously concerned. It was also found, as a matter of fact, that it could not be said absolutely that the company ceased to carry on business inasmuch as it continued its business as a holding company. Accordingly, the company could not be said to have been acting ultra vires in doing the said business in terms of its memorandum. It was, accordingly, held that the substratum of the company had not gone. Jenkins J. considered many decisions on the point including the observations of Lord Greene M.R. from the case. *In re Kitson & Co. Ltd.* [1946] 1 All ER 435 (CA), where the Master of the Rolls said :

" It must be remembered 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."

23. Jenkins J. further observed that the question whether the substratum of the company had gone or not was one which depended, or might depend, on the construction of the memorandum of association. In deciding the case before him, Jenkins J. took into consideration the fact that there was no allegation that the directors were going to adventure the moneys of the company on some speculative undertaking of which nobody ever thought when the company was

formed or when the shares were subscribed for. He also took into consideration the fact that it was not a case of the contemplated object failing ab initio nor was it a case of confiscation of a foreign concession, or discovery that a believed title to property abroad had no existence. It was observed--See [1948] 18 Comp Cas 46 (Ch D) : [1947] All ER 104.

" The company here has been expropriated on terms of receiving compensation by a supervening Act of the legislature. That was an event to which the company had necessarily to bow. It had no option but to comply with the terms of the Act."

24. The learned judge then observed :

" It seems to me that the proper people to look after that matter are the directors of the company, who are directors also of all the other companies in the group, and who are well acquainted with the undertaking of Cable and Wireless Ltd. It seems to me that it would be quite wrong at this juncture to make a compulsory order which would have the effect of removing them from office, and which would bring in a liquidator who, capable and expert as he might be, would not have the same knowledge as the directors have."

25. In the aforementioned case of *In re Kitson & Co. Ltd.* [1946] 1 All ER 435 (CA), the business of Kitson & Co. was sought to be sold to a purchaser. It was argued that the substratum of the company was destroyed thereby. The purchase of Kitson business in the beginning was expressed to be the first in sequence of the company's objects and all other powers and objects specified in the memorandum were considered to be regarded as ancillary to the carrying on of that business. The observation of Lord Greene M. R. dealing with such case has already been set out above. The Master of the Rolls found that the company had a subsidiary which was carrying on similar type of business but at that time its factory and premises apparently were under requisition to the Admiralty who were using them as a warehouse but even then the same was not taken into consideration. What was taken into consideration was the fact that the subsidiary was possessed of a factory and machinery. It was also taken into consideration that pending a petition, and in between two adjournments, an agreement was entered into for the purpose of the company acquiring and taking over to itself the business of the subsidiary. The Court of Appeal observed that what it was concerned with for the moment was what was the position of the company at the date of the winding-up order. To quote the language of Lord Greene M.R. appearing at page 439 1

" This agreement was entered into subject to the consent of the shareholders. It seems to me that, if the agreement had gone through and this company had proceeded to carry on the business of Balmforth which it would acquire under the agreement, a business of the same nature as that which Kitson's had carried on, it would have been quite impossible to say that the substratum of the company had gone. It might have been a good or a bad transaction for the company to enter into from a business point of view ; but that is the last sort of thing that

this court is concerned with in winding up cases."

26. The Court of Appeal allowed the appeal, the effect whereof was that the petition for winding up was dismissed.

27. In the case of *In Re: Bengal Flying Club Limited*, the same question came up for consideration before Ray J. (as he then was, now the Chief Justice of India). In that case, the main business of flying activities and its assets were acquired by the Government. The court even under such circumstances took into consideration the fact that the club had other activities and there was the intention to publish a journal and the question of distribution of the compensation money by the directors rather than by the liquidator being involved and on that basis refused to entertain the contention that the company's substratum had gone.

28. In the case of *Lokenath Gupta v. Credits Private Ltd.*, an unreported judgment of Ray and S.K. Mukherjee JJ. delivered on May 12, 1969, in Company Petition No. 27 of 1964 it was alleged in the petition that the company was formed for the purpose of purchasing trucks but no business was carried on and, therefore, the substratum of the company was gone. In the affidavit-in-opposition it was stated that the company had the intention to carry on business. The Division Bench observed :

" As long as there is an intention to carry on business and it transpires that there are objects of the company which could be carried out, a winding up should not in my opinion be allowed in the facts and circumstances of the present case. It has been held by the Supreme Court in the recent decision in the case of *Seth Mohan Lal v. Grain Chambers Ltd.* [1968] 38 Comp Cas 543, that if a business can go on and can grow, winding up should not be resorted to."

29. Ray J. (as he then was, now the Chief Justice of the Supreme Court), in delivering the judgment of the Bench, considered the aforesaid Supreme Court case and applied its principle in such clear, lucid and simple language. I have already discussed the other Supreme Court case, the judgment whereof was also delivered in the Supreme Court by Ray J. (as he then was, now the Chief Justice of the Supreme Court).

30. Mr. Mukherjee, appearing on behalf of the petitioner, Registrar of Companies, West Bengal, cited the case of *A. Ramachandran and Another Vs. Narasaraopet Electric Corporation Ltd. and Another*, , where the entire undertaking of the company was acquired by the Government of Madras and the compensation to the extent of Rs. 1,06,977 was paid to the company. The company ceased to carry on any business for it had no other business objects. The preference shareholder applied for winding up. On those facts the principle laid down by the Supreme Court in *Mohan Lal's* case [1968] 38 Comp Cas 543 was applied. It was held that the objects for which it was incorporated had failed and it was impossible to carry on the business of the company any longer and on those facts winding up was ordered.

31. In *Lawang Tahang Vs. Goenka Commercial Bank Ltd.*, it was held that the power of the court to send the company into liquidation under the just and equitable Clause could not be canalised and should be left to the discretion of the court with reference to the facts and circumstances of that case. In the facts and circumstances of that particular case, the company was ordered to be wound up on the ground that the substratum of the company had gone as well as on the broader ground that it was just and equitable that the company should not be allowed to continue even though there had been no suspension of business of the company. G.K. Mitter J. (as he then was, later in the Supreme Court) discussed the case of *In re Kitson & Co. Ltd.* [1946] 1 All ER 435 (CA), where Lord Greene M. R. was of the opinion that the substratum of the company had not disappeared in that case because it had a subsidiary which was in the process of carrying on a similar type of business under the circumstances discussed above. But the said principle could not be applied by the learned judge because the facts of the case did not allow him to do so. His Lordship found as a fact that in the case before him the company's main and paramount object was not only to carry on a banking business but the objects Clause did not permit the company to do any other business. His Lordship's attention was drawn to the case of *In re Crown Bank* [1890] 44 Ch D 634 (Ch D), where North J. held that the name of the company was a very important matter. It was argued before G.K. Mitter J. that the company's name would suggest that it was only to carry on banking business and that was an important factor for the court's consideration. Apart from that the court also took into consideration the fact that circumstances existed which prompted the court to hold that it was just and equitable to wind up the company. His Lordship applied the principles laid down by the Judicial Committee in the case of *Loch v. John Blackwood Ltd.* [1924] AC 783 (PC). The court took into consideration the facts of that case and found that the directors of the company were nominees of the Goenka group of shareholders and were content to allow the Goenka concerns to have the full benefit of the entire share capital and moneys of the company. For years they had taken no steps to realise the loans given by the company to the said concerns and it was reasonable to infer that they were not interested in doing so. His Lordship observed that so long as the directors were allowed to function they would look into the interest of the Goenka group alone while the petitioners would not get any profits from their investments. His Lordship observed : *Lawang Tahang Vs. Goenka Commercial Bank Ltd.*, :

" In my view it is right and proper that such a state of affairs should be put an end to and that justice and equity require that the company should be wound up so that its assets may be speedily realised and made available for distribution among the shareholders."

32. Mr. Mukherjee has also relied on the case of *In re Hindusthan Co-operative Insurance Society Ltd.* [1961] 31 Comp Cas 193 : 65 CWN 68 (Cal) in which by the Life Insurance (Emergency Provisions) Ordinance of 1956 the management of the controlled business of the company vested in the Central Government.

That was the only business of the company. The company, however, as a separate legal entity remained as before with all its rights and obligations. Under such circumstances the compensation money was paid and it was held on the construction of the memorandum and the articles of association of the company that the principal object of the company was insurance and all others were ancillary to it and the court held that the principal business having gone, the very substratum of the company also disappeared and it was held, that that alone would justify the winding up of a company under the just and equitable rule. That was a case where the application was made under Sections 397, 398, 399 and 402 of the Companies Act, 1956, for various reliefs claimed therein and one of the points was whether, in the facts and circumstances of the case, the substratum of the company was gone or not.

33. Reliance has also been placed on an unreported judgment of Sabyasachi Mukharji J. delivered on December 24, 1973, in the matter of Setabganj Sugar Mills (Private) Ltd. v. Tolaram Jalan, where the learned judge in dealing with an application for stay of the winding up considered the question whether the substratum of the company was gone. The learned judge took into consideration the fact that the company had remained dormant for over six years and that the shareholders did not frame any scheme for carrying on any new venture of the company. It is to be noted that neither the Supreme Court cases, as referred to hereinbefore, nor the Division Bench judgment of our court were placed before the learned judge.

34. Reliance was also placed on another unreported judgment delivered on February 7, 1972, by Roy Chowdhury J. in Company Application No. 193 of 1970 connected with Company Petition No. 230 of 1970 (Anil Kumar Himatsingha v. Assam Plywood Ltd). That was an application for stay of winding up petition. In that case, the Division Bench judgment in Lokenath Gupta's case (Comp. Pet. No. 27 of 1964--12-5-1969), and the Supreme Court judgment in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., were cited. The learned judge applied the principle laid down in the said Supreme Court case and held that the substratum of the company was not destroyed in the facts and circumstances of that case.

35. Examining the principles enunciated in the substratum cases, it appears to me that whether or not the company's substratum has gone in a case, such as is before me, would primarily depend on the true construction of the memorandum of the company in so far as its objects are concerned. Each case has to be dealt with on its own merits. If a company is formed for the purpose of acquiring a particular venture and if at the inception there comes a supervening impossibility to carry on such business for some reason or other, then certainly that is the factor which should be taken into consideration to decide the question of substratum being destroyed but in a case where in respect of such an objects Clause the company had done business with such main object and in the course of such business either if it is taken over or if it is sold out by a resolution of the

company, that by itself will not affect its substratum. The expression " substratum of the company has gone " has a special significance. The word " substratum " must have been chosen for the purpose of signifying the foundation of the company. Once that is taken away, the whole edifice which stands on it must crumble down. There cannot be any question of any repair work being done thereon. The question then would be of total destruction. In other words, under the memorandum no further business can be undertaken and everything comes to a standstill. If such a state of affairs would be allowed to continue that would go to affect the interest of all concerned both of the shareholders and of the creditors. Under such circumstances, it becomes just and equitable that the company be wound up so that the assets, if any, might be distributed after meeting the liabilities of the company. The substratum of the company cannot be said to have been destroyed even if after the main objects being destroyed, there would remain some other object or objects in the memorandum which the shareholders intend to make use of with the resources in their hands. Under such circumstances, it does not matter as to whether the prospect of such new venture would be bright or dim. That is a matter resting with, the company, its directors and its shareholders. They are the best persons to decide how best to strengthen the remaining pillars so that the main edifice might again get full support from them. It is only when the condition of the edifice would be such that to continue its existence would seriously endanger its pillars and consequently the edifice itself, then the court will consider in favour of holding that the substratum of the company has gone. The date of the order in such a winding-up petition would be the only material date when the condition of the edifice has to be examined. It would not be considered as conclusive that the company suspended its business since quite some time past. That would depend on whether or not the company had been doing business on that date. In my opinion, the author of the expression must have had in his mind the above considerations when he introduced the expression in the company law jurisprudence.

36. Mr. P.C. Sen next contends that neither the Registrar of Companies nor the Central Government in obtaining and/or in according sanction, have acted bona fide. When the first show-cause notice was served on the company in 1972 the company replied thereto and duly satisfied the Registrar as to the nature of business which was being carried on by the company in accordance with the memorandum of association of the company. The Registrar of Companies being satisfied did not take any further action on that. Thereafter, on identical ground, a second show-cause notice was served on the company. The company again replied thereto but, in spite thereof, the Registrar of Companies proceeded to obtain sanction from the Central Government this time and actually obtained such sanction. It is contended that it was the duty of the Registrar to place before the company the materials on which the Registrar wanted to proceed. The company was not given any opportunity to deal with the letter dated March 15, 1973, written by a shareholder by the name of Chunilal G. Shah who held only

three shares of Rs. 100 each. The company duly protested against such action and in fact took out a writ petition to stop the said sanction being obtained in such a manner. In the said writ application under Article 226 of the Constitution of India the question as to the legality of the sanction given by the Central Government was left open to be decided in this application.

37. From the documents disclosed by and on behalf of the Registrar of Companies it appears that on August 16, 1971, the joint Hon. Secretary of the Bombay Shareholders' Association wrote to the Registrar of Companies, West Bengal, as follows :

"Ref : 425/71

Dated August 16, 1971.

The Registrar of Companies, West Bengal, Narayani Building, 27, Brabourne Road, Calcutta-1.

Dear Sir,

Re . Burdwan-Cutwa Railway Co. Ltd.

With reference to your letter No. T.S. I/2462 dated 26th April, 1971, we have to point out that at the instance of some of the shareholders of the company we have written several letters to the chairman enquiring whether the company had received full amount of compensation from the Government and to let us know the probable time when the company would be able to distribute the same to the shareholders.

As a result of our letters having remained unanswered we draw your pointed attention to the said matter, but regret to find that you have also overlooked in answering the said queries.

May we therefore request you to let us know how the matter stands to enable us acquaint the shareholders who are pressing for the said information."

38. The Registrar has also disclosed the letter dated 12th April, 1971, written by a shareholder, one J.D. Ashburner, to Macleod & Co. Ltd., the managing agents of the company, a copy whereof was forwarded to the Regional Director, Company Law Board, Ministry of Commerce & Industries, New Delhi, complaining about not getting any reply to the queries made to the company's said managing agents. It is, inter alia, provided therein as follows :

" In your report dated 31st March, 1967, you have stated that you have received from the Government Rs. 16,32,703 and the balance of the amount under dispute to be recovered comes to about Rs. 1,47,000. Subsequently in December, 1968, the Government paid further Rs. 50,000. Now the balance remaining is only Rs. 97,000."

39. On 27th April, 1973, the Additional Registrar of Companies wrote to the company as follows :

" Sirs,

I have to refer to this office letter of even No. dated 29th March, 1973, and regret to say that no reply from your end has been received as yet. Please intimate the amount of business of carriers of goods done till date enclosing certified copies of the accounts, if any, maintained separately.

I am also to draw your attention to this office letter dated 20th March, 1973, and to request you to forward a copy of the agreement dated 5th April, 1971, between you and the Secretary of State in duplicate.

You are also requested to forward a copy of your reply, if any, furnished to Shri Chunilal G. Shah in reply to his letter.

An immediate action is requested."

40. Thereafter on May 28, 1973, the company's director wrote to the Registrar of Companies, West Bengal, in reply to the Registrar's letter dated April 21, 1973, inter alia, as follows :

" Dear Sir,

We acknowledge the receipt of your letter dated 27th April, 1973, and have to state as under.

With reference to your query regarding the amount of business of carriers of goods we have to advise you that the company has so far raised the bills to about Rs. 70,000 on this account. Certified copies of this account will be sent to you as soon as the accounts for the year ended 31st March, 1973, are finalised.

With reference to para 2 of the said letter, we are arranging to send to you the copies of the agreement with the Secretary of State shortly.

As regards para 3 of the said letter, we are enclosing a copy of our letter dated 22nd March 1973, which we had written to Mr. Chunilal G. Shah, in reply to his letter."

41. The next document disclosed by the Registrar along with his previous notice is the letter dated February 13, 1974, sent by the Regional Director, Eastern Region, Department of Company Affairs (Company Law Board), whereby the company was called upon to make its representation, if any, against the said prayer for sanction made by the Registrar of Companies, West Bengal, within one month from the date of service of the said notice. The next document is the order dated July 27, 1974. The Regional Director accorded sanction to the Registrar of Companies, West Bengal, for applying for winding up of the company on the grounds mentioned in Clauses (e) and (f) of Section 433 of the Companies Act, 1956. In according such sanction the Regional Director, inter alia, stated as follows:

" And whereas after considering the representation made by the said Burdwan-Cutwa Railway Company Limited I am of the opinion that the company

suspended its business for more than one year and that it is just and equitable that the company should be wound up."

42. Mr. P.C. Sen has relied on the similar notice which was issued on May 2, 1972, by the same authority whereunder the company was asked to make its representation and the reply sent by the company on June 1, 1972, which, inter alia, reads as follows :

"The company at present is carrying on the business of "carriers of goods " pursuant to the special resolution passed u/s 149(2A) of the Companies Act, 1956, in the annual general meeting held on 13th March, 1972. A copy of the said special resolution has already been filed with the Registrar of Companies, West Bengal, as required under the law.

In the circumstances, the question of according sanction on the Registrar of Companies, West Bengal, to take steps as per representation made to you does not arise.

We further have to state that the company is functioning and is carrying on its business as has been approved by the shareholders in the said annual general meeting.

We trust, you will very kindly appreciate the facts as enumerated above and will not accord any sanction as has been designed by the Registrar of Companies, West Bengal."

43. By its letter dated May 28, 1973, the company intimated the Registrar of Companies pursuant to the enquiry made by the Registrar, inter alia, that the company had till then raised a bill of about Rs. 70,000. Mr. P.C. Sen has also relied on the company's letter dated March 16, 1974, which reads as follows:

" Dear Sir,

Your letter No. RD/T/2596, dated 13th February, 1974.

We acknowledge having received on 15th February, 1974, your letter referred to above.

In this connection, we would like to invite your attention to our letter dated 1st June, 1972, addressed to you by the company which contains reply to the query similar to which you have raised in your above-mentioned letter. However, we will like to represent our case further in detail for which we request you very kindly to extend the time by a month.

We trust, you will very kindly appreciate the facts and will not accord any sanction as has been desired by the Registrar of Companies, West Bengal.

Thanking you."

44. Mr. Sen contends that in pursuance of the similar notice a reply was sent in 1974, by referring to the earlier letter dated June 1, 1972. By receiving the said

letter dated June 1, 1972, neither the Central Government nor the Registrar of Companies proceeded further in the matter, obviously because they were satisfied with the bona fides of the explanation furnished by the company. It appears that since 1972, the position of the company altered to some extent in the sense that the shareholders' consent was obtained as required u/s 149(2A) of the Companies Act, 1956. The fact that the said authorities refrained from taking any action in winding up would go to suggest that they were satisfied with the explanation given by the company, viz., that they were carrying on some business in accordance with the objects mentioned in the memorandum of association. At any rate, they were convinced that the company was carrying on some business, may be, of much lesser volume than what it was doing before.

45. To my mind, it is incumbent upon the Company Law Board to apply its mind in according its sanction but in this case the said authority had signally failed to do so. The said authority proceeded on the basis that the company had suspended business for more than one year. That by itself is not a ground for making an order for winding up of the company specially when admittedly the company had resumed carrying on its business and is now a going concern. It cannot be said under the present circumstances that the company has no intention to carry on its business or that it is not likely to carry on its business. The fact that the company has resumed its business is also a factor to be taken into consideration by the court in considering whether it is just and equitable that the company be wound up. In the facts and circumstances of this case the court cannot help but take into consideration the fact that the shareholders of the company have expressed their mind in favour of the continuance of the business which the company is carrying on with their approval which was obtained by holding the meeting u/s 149(2A) of the Companies Act, 1956.

46. In the case of Registrar of Companies Vs. Suraj Bachat Yojna Private Ltd. and Others, , the Registrar of Companies filed a petition for winding up of Messrs. Suraj Bachat Yojna Private Ltd., on the ground that the financial position of the company was found unsatisfactory on a scrutiny of the balance-sheet of the company for a particular year. The company was incurring losses since its incorporation. The total losses accumulated to Rs. 62,88,177 up to the year March 31, 1969, as against the paid up capital of Rs. 5,600. The net tangible assets of the company on that date were valued at Rs. 1,86,492.70 while the liabilities amounted to Rs. 2,44,409.47. One of the issues was whether the sanction accorded by the Regional Director, Department of Company Affairs, Kanpur, u/s 439(5) of the Companies Act, 1956, was invalid. At page 347 of the said report it is observed that the delegate of the Central Government, while according sanction, has a solemn duty to perform of informing himself about the true position of the company in the light of the explanations made by it. The explanations have to be considered with a judicial mind and outlook and are not to be discarded off-hand unless considered to be flimsy, fallacious or frivolous. On behalf of the company it was proved that the company showed a profit of Rs. 4,000 in the balance-sheet for the year ending March 31, 1971, and the balance-

sheets showed that the losses were decreasing every year and ultimately the company was on the way to make profits. On those materials the learned judge of the Punjab and Haryana High Court concluded that the Registrar of Companies and the Regional Director, Company Law Board, did not correctly form the opinion that the company was unable to pay its debts and in according their sanction to make the application for winding up.

47. In the instant case, before me, it is difficult to appreciate how the Company Law Board could accord its sanction on the materials placed before it. They ought not to have acted on the basis of a few letters received on behalf of some of the shareholders who formed a negligible part of the entire body of shareholders. They ought to have taken into consideration the fact that the majority shareholders were intending to carry on the business of the company and did not want to get back the money received by way of compensation but wanted to apply the same in continuing the company's business. If they had enquired into the matter more in detail they would have found out that Chunilal G. Shah was the holder of only three shares of Rs. 100 each. With a little effort they could have known that the Bombay Shareholders Association did not have anything to do with the company and in the absence of the actual shareholders complaining about such investment of the compensation money, the said authorities should have ignored the said letter of the Bombay Shareholders Association. In any event, those materials were there before the said authorities in 1972, when they refrained from taking any action on similar ground. It is also stated in court that the complainant, Ashburner, ceased to be a shareholder on the date of the presentation of the petition. It is quite apparent that the mind of the said authorities were agitated because of the said complaints and/or enquiries made on behalf of the said shareholders and, more so, because it was found that the said money was invested by the company for a long time without doing any business excepting investing the same to earn small amount of interest. They should have considered that if the company would engage itself in ultra vires transaction which is ultra vires its memorandum of association that would not give rise to a ground for winding up the company at the instance of the Registrar of Companies because there are other provisions whereunder suitable action can be taken in respect thereto. (See [1871] 6 Ch App 176 at page 184--Irrigation Company of France, In re)

48. To my mind, the Registrar of Companies should have taken into consideration the fact that there are no creditors of the company and the further fact that so far as the shareholders were concerned they had expressed their intention that the company should carry on its business activities with the money that was lying invested and the further fact that the objections on behalf of the shareholders, referred to above, were either vague as in the case of the Bombay Shareholders Association's letter, or negligible as in the case of J. Ashburner. They should have taken into consideration the fact that the company has enormous capital with which the company can carry on its business activities. In 1971-72, the Registrar was satisfied about the position but in 1973, on

practically the same materials the Registrar pursued the matter further to obtain the sanction of the Central Government. To my mind, in the facts and circumstances of this case, the wishes of the shareholders and the directors of the company should have been considered more favourably by the Registrar of Companies in favour of the company which should have been allowed to carry on its business activities.

49. With the above observations I think that it is not just and equitable that the company should be wound up and as such the discretion of the court should not be exercised in favour of winding up the company and, accordingly, the application is bound to be and is dismissed but in the facts of this case this court thinks that there will be no order as to costs.