
(1992) 12 AP CK 0024

In the Andhra Pradesh High Court

Case No : Company Petition No's. 6 and 11 of 1983

P.S.V.P. Vittal Rao

APPELLANT

Vs

Progressive Constructions Private Limited
 Yuva Bharti
Steels Vs Progressive Constructions Private Limited

RESPONDENT

Date of Decision : 28-12-1992

Acts Referred:

Companies Act, 1956 — Section 397, 398, 433, 434, 434(1)

Citation : (1992) 12 AP CK 0024

Hon'ble Judges : Immaneni Panduranga Rao, J

Bench : Single Bench

Judgement

Immaneni Panduranga Rao, J.—Company Petition No. 6 of 1983 is filed for winding up of the respondent-company, viz., Progressive Constructions Private Limited (hereinafter referred to as "PCPL"), on the grounds of lack of probity and mismanagement in the conduct of the affairs of the company.

2. It is alleged in the petition that the petitioner is a partner of Progressive Engineering Company, Hyderabad (hereinafter referred to as "PEC") which is a partnership firm constituted for carrying on business as contractors and builders of dams, buildings and flats, etc., at Hyderabad, Madhya Pradesh and Uttar Pradesh. The said firm had sixteen partners including the petitioner. The petitioner's case is that disputes started between him and the other partners of PEC; that the other partners made an attempt to expel the petitioner from the partnership; that there is no provision in the partnership deed for such expulsion of a partner; that the petitioner who had been to Vijayawada in September, 1980, was confined to bed and that taking advantage of his absence and his inability to take part in the affairs of the firm, the other partners of PEC claimed to have called for a meeting on 1.6.81 and claimed to have resolved to form a company by transferring all the assets and liabilities of the partnership business as a going concern to the new company; that in accordance with that decision, it would appear that the respondent company (PCPL) was constituted and was

registered with the Registrar of Firms, Hyderabad, on 23.12.81; that at a meeting said to have been held on 26.12.81 a resolution is claimed to have been passed authorising the transfer of the partnership firm - as a going concern to the respondent-company; that notices for the meeting said to have been held on 1.6.81 and 26.12.81 have not been given to the petitioner and that the alleged transfer of the partnership firm in favour of the respondent-company is illegal, fraudulent, inoperative in law and hence is null and void.

3. The petitioner further contended in the petition that PEC was constituted under a partnership deed, dated 2.10.77 which did not provide for transferring the concern or business to any third party; that no notice was given to the petitioner before the decision was taken for transferring the assets and liabilities of the firm and that the other partners have acted in absolute lack of bona fides and the majority decision was taken wholly with a view to preclude and prevent the petitioner from participating in the partnership or enjoying the fruits thereof. Since there is no valid or legal transfer in favour of the respondent-company and the attempt to transfer is not only prohibited, but also is an attempt to exclude a partner and further the agreement, dated 9.1.82 being void and inoperative, the petitioner contends that the respondent-company is liable to be dissolved.

4. The respondent filed a counter-affidavit denying the material averments pleaded in the company petition and pleading as follows :

5. The petitioner, M. Rajendra Prasad (RW2) and others were carrying on the partnership business in the firms under the names, Yuva Bharathi Chemicals (herein-after referred to as "YBC") and Yuva Bharathi Steels (hereinafter referred to as "YBS") of which the petitioner is a managing partner; that the business of YBC and YBS ended in heavy liabilities resulting in threats of recovery from their bankers and State Financial Corporation; that between 3.4.81 and 17.9.81 - a sum of about Rs. 8,00,000 was diverted from PEC to the accounts of YBC and YBS as desired by the petitioner and RW2; that the said amount was debited to the accounts of the petitioner and RW2 equally in the books of accounts of the firm; that by 9.1.82 which is the date of conversion of respondent-company, the petitioner became a debtor to company to the tune of Rs. 2,65,477.30 and that since the petitioner did not have any credit balance as on 9.1.82 when the respondent-company was formed, the petitioner could not be allotted any shares in the respondent-company. The respondent further pleaded that for the meetings held on 1.6.81 and 26.12.81 by PEC, due notices dated 2.5.81 and 5.12.81 were sent to all the partners including the petitioner under certificate of posting; that all the other partners except the petitioner attended the meetings; that the petitioner abstained himself from attending the meetings; that the conversion and transfer of the assets of the erstwhile firm to the respondent-company was done in accordance with law; that the petitioner is neither a contributory nor a creditor and that it is neither just nor equitable to grant the relief sought for.

6. On the above pleadings, the following issues have been settled for

determination :

- (1) Whether the petitioner is a creditor of the company within the meaning of section 439(b) of the Indian Companies Act ?
- (2) Whether the petitioner is a debtor of the company ?
- (3) Whether it is just and equitable to order winding up of the company ?
- (4) Whether the company petition is maintainable in view of the various suits pending in the civil courts wherein the parties were agitating their respective rights ?
- (5) Whether the company petition is maintainable in view of O.S. No. 616/83 on the file of the Court of the I Addl. Judge, City Civil Court, Hyderabad, a suit for dissolution and rendition of accounts of the firm, Progressive Engineering Company ?
- (6) Whether on the facts and circumstances of the case the company petition is liable to be dismissed without enquiry ?
- (7) Whether the petitioner has any locus standi to file the company petition and the same is bona fide ?
- (8) To what relief ?

7. Company Petition No. 11 of 1983 is filed by YBS and YBC against the PCPL for winding up of the respondent-company on the allegations that the petitioner firms made various advances in respect of construction work from time to time to PEC which amounted to Rs. 5,78,366 as on 30.9.80; that with subsequent credits the total amount due to YBC and YBS amounted to Rs. 6,57,206.45; that YBC and YBS were demanding the repayment of the said sum from PEC, but, there was no reply; that it is learnt that the respondent-company was formed to take over the assets and liabilities of PEC; that after the formation of the company, the petitioners sent statutory notice, dated 2.5.83, by certificate of posting calling upon the respondent to pay the amounts due; that though more than three months have elapsed, there has been no reply and that the company has, therefore, become liable to be wound up under sections 433(e) and 434(1)(a) of the Companies Act.

8. The respondent filed a counter-affidavit denying the material averments made in the company petition and pleading that the petitioners in the company petition are no other than the natural brothers of P. S. V. P. Vittal Rao (the petitioner in C.P. No. 6/83); that the said Vittal Rao and M. Rajendra Prasad (RW2) who are the partners of PEC are answerable to the monies diverted from PEC to YBC and YBS to liquidate the debts due by the said firms to the Andhra Bank; that, thereby Vittal Rao became a debtor to the tune of Rs. 4,36,000.00; that by a deed of transfer, dated 9.1.1982, the assets of PEC were duly transferred to the respondent-company; that Vittal Rao instituted O.S. No. 616 of 1983 on the file of Vacation Civil Judge, City Civil Court, Hyderabad; that the said Vittal Rao got a

suit filed by his nephew in O.S. No. 495 of 1983 on the file of the Court of the II Additional Subordinate Judge, Vijayawada; that notice dated 2.5.83 was not addressed by the petitioners to the respondent calling upon the respondent to pay the amounts due and that the allegation that the respondent-company is insolvent and is unable to pay the debts is absolutely false.

9. On these pleadings, the following issues have been framed for determination :

(1) Whether the petitioners are creditors within the meaning of section 433(e) read with section 434(1)(a) of the Indian Companies Act and within the meaning of section 439(b) ?

(2) Whether the respondent-company is indebted to the petitioners in a sum exceeding Rs. 500 as on the date of the petition and if so, what is the amount due ?

(3) Whether the petitioners made demand requiring the respondent to pay the sum of Rs. 6,56,306.45 as due to the petitioners and has served the said demand of the company by causing it to be delivered at its registered office requiring the company to pay the said sum due to the petitioners ?

(4) If so, whether the respondent admits the liability ?

(5) Whether the petitioners have issued the statutory notice of 21 days ?

(6) If so, whether the respondent-company has complied with the said notice as per law ?

(7) Whether the company petition is not maintainable without adding the partners of the petitioner-firm as parties to the company petition ?

(8) Whether the petitioners have no locus standi to file the company petition ?

(9) Whether the amount alleged to be due to the petitioners is admitted by the company and whether the company is not able to meet the said liability ?

(10) Whether C.P. No. 11 of 1983 is not maintainable in view of the suits filed by the respondent against the said firm claiming Rs. 4,36,000 from the said firms and other legal proceedings pending in the lower courts ?

(11) Whether the petitioners are in fact put up by the petitioner in C.P. No. 6 of 1983 on the file of this court for his benefit ?

(12) Whether the company petition is bad and not maintainable on the ground that no leave of the court u/s 439(b) of the Companies Act was sought and obtained and no petition for leave of admission was filed ?

(13) Whether the present petition is bad in view of the pendency of the suit O.S. No. 1065 of 1984 on the file of the 11 Additional Judge, City Civil Court, Hyderabad ?

(14) Whether the respondent-company is liable to be wound up under sections

433(e) and 434(1)(a) and section 439(b) of the Indian Companies Act ?

(15) To what relief ?

10. Since the winding up of the company sought for in both the company petitions is one and the same, a joint enquiry is conducted in both the company petitions. The petitioner in C.P. No. 6 of 1983 examined himself as PW 1 and he shall be referred to hereinafter either as PW1 or Vittal Rao.

Issue Nos. 1, 2 and 7 in C.P. No. 6 of 1983

11. These three issues can be dealt with together, because, if the evidence let in by the petitioner in C.P. No. 6 of 1983 proves that he is a creditor of the company, then he cannot be a debtor of the company. The finding on issue No. 1 thus determines issue No. 2 also. Whether the application filed is bona fide or not depends upon the findings on issues 1 and 2. The petitioner in C.P. No. 6 of 1983 who examined himself as PW1 deposed that after he passed B.E. degree in mechanical engineering from Bangalore in 1972, he got a job in Fagerupner Automobiles, West Germany; that M. Rajendra Prasad (RW2) was his classmate and room-mate in the Engineering College at Bangalore; that M. Rajendra Prasad and his uncle Mr. Ankineedu prevailed upon him not to go to Germany promising bright future in India by starting business alongwith Rajendra Prasad and doing business and that they have started YBC and YBS; that they have undertaken civil contracts business; that seeing their performance in civil contracts business Mr. K. S. Rao who is the sister's husband of Mr. Ankineedu and uncle of Mr. Rajendra Prasad asked them to join with him as partners and started a new firm in the name of Yuva Bharathi Constructions; that Mr. K. S. Rao (RW4) started PEC in the beginning in the year 1966; that himself, Rajendra Prasad and some other relatives of K. S. Rao joined PEC in the year 1977 as partners and that the reason for taking him (PW1) as a partner in PEC is, because the firm wanted to expand business in large scale and the firm also required more solvency of the partners to tender for huge works. The petitioner filed Exh. A-6 and stated that it is the letter addressed by K. S. Rao to the Income Tax Officer, "A" Ward, Circle I on 24.8.78. He identified the signature on Exh. A-6 as that of K. S. Rao.

12. PW1 further deposed that he has contributed Rs. 4,00,000.00 as his share capital in PEC; that Mr. K. S. Rao has written Exh. A-7 letter to him on 11.4.81 and sent it to him by post in Exh. A-8 envelope; that he was associated with PEC as a creditor even before he joined as a partner of the firm; that after he became a partner, the advances made by him to PEC were converted as his capital in PEC; that Exhs. A-9 to A-13 are the capital statements submitted by K. S. Rao to the Income Tax Department; that though according to Exh. A-5, partnership deed his share was 6 per cent, K. S. Rao and Rajendra Prasad agreed to give him 2 per cent each from out of their respective shares, thus enhancing his share to 10 per cent in PEC; that till 31.3.81, he paid Rs. 2,80,000.00 towards his share capital to PEC; that Rajendra Prasad wrote to him (Exh. A-14 letter) reminding him to pay the balance of Rs. 1,20,000 to complete his share of Rs. 4,00,000

and that in response to Exh. A-14, he has paid the balance of Rs. 1,20,000 on 10.4.81 for which he was not given a receipt.

13. PW1 further deposed that when he joined as a partner of PEC, the loan facilities enjoyed by PEC were not sufficient; that after he joined in the firm as a partner, PEC secured more facilities and financial limits from the bank by giving more personal property security of the partnership; that he has also furnished his valuable properties as security to the banks to enable PEC to raise financial limits and that Exh. A-26 is the statement of valuation of security submitted to the Income Tax Officer "B" Ward, Circle No. 4, Hyderabad. PW1 stated that the security bonds executed by him for securing bank limits have not been returned to him. According to PW1, after he joined, the firm as a partner, the firm got substantial civil work in Andhra Pradesh, Madhya Pradesh and Uttar Pradesh and that the profits of the firm increased and the bank limits were also increased. PW1 stated that he worked at the site of Nizamsagar; that in respect of work at Nizamsagar, he got admiration from the persons concerned and the public also; that Mr. K. S. Rao (RW4) also realised the dynamic work done by him; that because of that admiration, Mr. K. S. Rao stopped sending men and supplying material, for carrying out the work with a view to belittle PW1; that, therefore, he diverted the funds from YBC to Nizamsagar Project and carried out the work; that the civil work in Bargi, Madhya Pradesh, was one of the major works taken up by the firm PEC and that he (PW1) arranged the bank loans, finances, machinery, vehicles, men and material for the execution of that work and that by that work, PW1's reputation has increased. According to PW1, because of the above reasons, personal clash developed and that Mr. K. S. Rao became inimical to him. PW1 stated that he was attending to the work of acquiring of machinery, vehicles, men and material and was attending the tenders and the liaison works with the connected departments of PEC, YBC and YBS at Hyderabad and other places.

14. In support of the contention that PW1's capital as on 1.4.81 was Rs. 2,80,000, PW1 relied upon the recitals in Exh. A-14 letter written by RW2 to PW1 on 1.4.81. RW2 admitted that Exh. A-14 letter, dated 1.4.81 was written by him. During his cross-examination, RW2 stated that in item 20 of Exh. A-14, he wanted PW1 to pay Rs. 1,20,000 in order to make-up for the deficit capital of Rs. 4,00,000. RW2, however, added that since none of the partners brought Rs. 4,00,000, they have abandoned the idea and that even PW1 did not bring the money. In view of the admission of RW2 that he addressed Exh. A-14 letter calling upon PW1 to bring an amount of Rs. 1,20,000 in order to make-up the deficit of Rs. 4,00,000 towards his capital, it follows that PW1 had to his credit the capital of Rs. 2,80,000. During the course of cross-examination of RW4, he only stated that he does not know anything about Exh. A-14 letter written by RW2 to PW1; that he is not aware of item 20 mentioned in Exh. A-14 and that RW2 made the requisition in item 20 in Exh. A-14 without his knowledge.

15. PW1 filed Exhs. A-322 to A-391 discharged promissory notes in support of

his contention that he has raised necessary funds to pay Rs. 1,20,000 as demanded in Exh. A-14 and other amounts. The only comment made against these promissory notes is that the discharges on the promissory notes are not properly proved and that he (PW1) is unable to give the door numbers of his creditors. PW1 stated that all the promissory notes were discharged by him between 1982 and 1987 from out of his agricultural income and also other income.

16. To prove the payment of Rs. 1,20,000 apart from the discharged promissory notes, PW1 produced his personal accounts contained in Exh. A. 331 showing the details of amounts borrowed by him and also the payment of Rs. 1,20,000 made by him towards investment in PEC towards capital through Nanda for being given to RW4, Exh. A-331 is challenged on the ground that it is not maintained as a regular account book. But, PW1 explained that he has made the entries as his personal account.

17. PW1 also placed reliance upon Exh. A-7 letter said to have been addressed by RW4 to PW1 which acknowledges the receipt of Rs. 1,20,000 towards his capital. RW4 has denied his signature on Exh. A-7. Thereupon, RW4 was confronted with his signatures in Exs. A-6, A-1006, A-23, A-24, A-246, A-990 and A-991. RW4 in his cross-examination admitted his signature in Exh. A-1006. The evidence of PW1 that Exhs. A-23 and A-24 were addressed by Mr. K. Sambasiva Rao to the Income Tax Officer and Andhra Bank respectively is not challenged in the cross-examination. RW4 when confronted with Exhs. A-23 and A-24 in his cross-examination did not deny the signatures contained therein. PW1 deposed that Exh. A-246 Income Tax return; dated 22.9.80 of YBC was signed by Mr. K. Sambasiva Rao and marked his three signatures as Exhs. A-246(a), A-246(b) and A-246(c). The evidence of PW1 with regard to the signatures of RW4 on Exh. A-246 is not challenged in the cross-examination. It is significant to note that RW2 tried to deny the signatures in Exh. A-246 as belonging to RW4. But, RW4 himself in his cross-examination did not deny his signatures. He only pleaded ignorance whether the signature on Exh. A-246 is his or not. Exh. A-990 which is the Income Tax receipt of PEC, dated 16.9.80 was marked during the cross-examination of RW4. But, he did not deny his signature in Exh. A-990. Exh. A-991 is the personal Income Tax return for the year 1980-81 filed by Mr. K. S. Rao on 28-9-80. He admitted his signature on Exh. A-991.

18. Though so much of cross-examination was made with regard to the comparison of signature contained in Exh. A-7 with the signatures contained in the seven documents referred to above and asserting that the signature contained in Exh. A-7 is that of RW4 only, no steps have been taken to send the document to a hand-writing expert to prove that Exh. A-7 is a forgery. It is, therefore, open to the court to compare the signature in Exh. A-7 with the admitted signatures of RW4 in Exhs. A-6, A-1006 and A-991. The signatures, appear to be identical and I feel that taking advantage of the fact that in some

documents Sri K. S. Rao has mentioned the letters "Rao" legibly, he has denied the signature in Exh. A-7. Section 73 of the Indian Evidence Act empowers the court to compare the signatures of the person by whom it purports to have been written or made with the admitted or proved signatures of that person. The Supreme Court held in *Fakhruddin v. State of M. P.* AIR 1967 SC 1326, that even in a case where expert's opinion is given with regard to the proof of writing, the court must see for itself and come to its own conclusion whether it can safely be held that the two writings are by the same person. The Supreme Court thus lays down that comparison of the writing by the court is one of the methods of proof of writing or signature.

19. The learned counsel for the respondent commented that it is impossible to believe that RW4 could have written Exh. A-7 letter on 11.4.81 in such cordial terms to PW1, because, admittedly, by then misunderstandings have cropped up between him and PW1. But, RW4 himself admitted in his cross-examination, dated 21.10.91 that there were some mis-understanding between PW1 and the firm, but, there were no disputes between him and PW1 even by 14.7.82.

20. At another stage of cross-examination RW4 tried to press into service the theory that Exh. A-7 was brought into existence on blank paper. That theory cannot be accepted, because, PW1 left for Vijayawada in the third week of August, 1980, to attend the marriage of his brother's daughter and afterwards he fell ill there and was confined to Vijayawada. He deposed that because after the marriage he had developed ulcer, severe joint pains and giddiness, he was not able to attend to the business activities. When PW1 had gone to Vijayawada to attend the marriage of his niece and subsequently was confined to Vijayawada due to ill-health, it is most improbable that he would have carried with him any blank papers containing the signatures of Mr. K. S. Rao which could have been utilised for bringing into existence Exh. A-7 letter. PW1 has filed Exh. A-8 cover to prove that Exh. A-7 letter dated 11.4.81 was received by him. That cover bears the postal mark of 11.4.81 on the stamps and the postal stamp, dated 13.4.81 of Vijayawada, on the reverse. RW4 did not file any other document which was despatched in Exh. A-8 cover to PW1's address at Vijayawada. From the above discussion I feel that Exh. A-7 is a genuine letter sent by RW4 to PW1. I accordingly find that Exh. A-7 also proves the acknowledgement of Rs. 1,20,000 paid by PW1 towards balance of his capital investment in PEC, thus, corroborating PW1's contention that his capital investment in PEC was Rs. 4,00,000.

21. PW1 has also relied upon Exh. A-18 letter purporting to have been signed by RW2. But, RW2 at the first instance denied the authorship of Exh. A-18. His signature contained in Exh. A-18 is marked as Exh. B-140. When he was specifically confronted with the signature in Exh. A-18, RW2 replied that he was not signing like that and that he did not sign Exh. A-18 letter. He, however, stated that he was signing as in Exh. A18 earlier. For the specific question put to him as to when he stopped signing as in Exh. B-140, he replied that he does not

remember. Thereupon he was confronted with the signatures in Exs. A-20, A-22 and A-240. He admitted that the signatures in Exh. A-20, A-22 and A-240, which are his admitted signatures, are similar to what is contained in Exh. B-140. Having been cornered like that in the cross-examination and having admitted that the signature contained in Exh. B-140 is similar to his signatures in Exs. A-20, A-22 and A-240, while stating that the signature contained in Exh. A-18 might be his signature, RW2 tried to explain that he was giving blank signed papers to PW1 suggesting thereby that PW1 might have brought into existence Exh. A-18 on a blank signed paper. While discussing Exh. A-7, I have already observed that PW1 who went to Vijayawada to attend to the marriage of his niece and who was detained there due to his ill-health would not have had any opportunity to carry the blank signed papers with him in order to bring into existence Exh. A-18. To challenge the correctness of RW2's statement that he was signing as in Exh. B-140 earlier but not by the date of Exh. A-18 and to contradict his statement that after 15.4.81 he never signed as in Exh. B-140, he was confronted with his signature in Form No. 12 appended to Exh. A-923, dated 12-7-83 [marked as Exh. A-924(a)], his signature dated 24-6-81, in Exh. A-926 [marked as Exh. A-926(a)] and his signature in Form No. 11-A of YBC for the year 1982-83 marked as Exh. A-927(a). He admitted that the signatures Exh. A-924(a), Exh. 926(a) and Exh. A-927(a) are similar to Exh. B-140. Thus it is amply established by the detailed cross-examination of RW2 and confronting him with his signatures in various documents that his admitted signatures both prior to the date of Exh. A-18 are identical with the signature found in Exh. A-18. It is evidently to get over the effect of his admission that he has invented the theory of blank paper. RW2 did not speak of his giving blank papers with his signatures in his chief-examination. PW1 filed Exh. A-19 cover and stated that it is the cover in which Exh. A-18 letter was sent to Vijayawada address. Exh. A-19 bears the postal stamps of 15.4.81 on the postage stamp and bears the stamp of Vijayawada, dated 17.4.81 on the reverse. RW2 did not file the office copy of any other letter, dated 15.4.81 which could have been sent in Exh. A-19 cover. For all the above reasons, I hold that Exh. A-18 is the letter addressed by RW2 to PW1 to his Vijayawada address acknowledging the receipt of Rs. 1,20,000 in response to his letter, dated 1.4.81 in order to make the capital of Rs. 4,00,000 in PEC.

22. The evidence of PW1 that in response to Exh. A-14 letter, dated 1.4.81 addressed by RW2, he has paid Rs. 1,20,000 to make up the capital investment of Rs. 4,00,000 is amply established by the documentary evidence contained in Exhs. A-332 to A-391 discharged promissory notes produced by PW1 and the admissions contained in Exh. A-7 letter addressed by RW4 and Exh. A-18 letter addressed by RW2.

23. In order to show that PW1 was debtor of the company as on 9.1.82, the learned counsel for the respondent relied upon the entries in page No. 5 of Exh. B-162 which is the account of PW1 in the ledger of PEC firm which shows a debit of Rs. 2,65,477.30. The said debit entry is arrived at after debiting Rs. 3,84,630.07 to the account of PW1 on 9.1.82.

24. The learned counsel for the respondent submitted that the entries in Exh. B-162 cannot be looked into, because so far as the respondent-company is concerned it is an account book entry of a third-party and, therefore, it does not bind the respondent. Exh. B-162 was not shown to PW1 when he was in the witness box. It is only when RW2 was being examined that Exh. B-162 was pressed into service. It is not as if Exh. B-162 was filed in response to any summon or notice issued by the petitioner for production of the account books. That being the case, the respondent-company having voluntarily filed Exh. B-162 as an exhibit, cannot be permitted to contend that it is an entry in the account books of a third-party and as such; the respondent is not bound by the entries therein. The company came into existence having allegedly taken over the business of PEC as a going concern and the very basis of excluding PW1 from any share in the company is the entries contained in Exh. B-162. So it is not open to the respondent to disown the entries contained in Exh. B-162.

25. The respondent's case is that PEC paid Rs. 8.10 lakhs on behalf of YBC to Andhra Bank in discharge of its debts; that at the time of finalisation of accounts of PEC, it was found that a total sum of Rs. 7,69,230 was outstanding from YBC to PEC and that the said amount was directed to be adjusted against the two principal partners of YBC, viz., PW1 and RW2, in the books of PEC. The learned counsel for the respondent submitted that by May or June, 1981, YBC and YBS were practically defunct firms; that Exh. A-88 letter was addressed by Andhra Bank to PW1 demanding payment of the debt and that as YBC and YBS could not generate any funds to discharge their debts, PEC has discharged the debts due to Andhra Bank on account of pressing demand by Andhra Bank. The learned counsel for the respondent relied upon Exs. B-151 to B-156. A reading of the letters Exs. B-152 to B-156 shows that PW1 was making efforts to expand the work of YBC and YBS by investing money and he also requested RW2 to invest some more money in those firms for the expansion of the business. Therefore, the contention that YBC and YBS were completely sick units cannot be accepted.

26. The learned counsel for the respondent relied upon the decision of the Privy Council in *Musammatt Rajeswari Kuar v. Rai Bal Krishan XIV Indian Appeals 142*, and argued that the accounts books must be admitted in toto and that it is not open to a party to accept some items which are made in his favour and reject other items. The petitioner (PW1) does not admit the entries in Exh. B-162. But, when the respondent has filed the ledger to the court, it is open to PW1 to refer such of the entries which are in the nature of admissions on the part of the respondent-company or to show how the entries made in Exh. B-162 are incorrect and, hence, no value can be placed upon them.

27. The contention of RWs 2 and 4 is that there were oral demands by the Andhra Bank pressing for payment of debts due from YBC and YBS. But, in Exh. A-88 notice issued by Andhra Bank to PW1, there is no reference to any demands made earlier for discharging the debts. RW4 deposed that because Sanyasi Rao who is an officer of the Andhra Bank came and wept before him and requested

for the discharge of dues to Andhra Bank, at his instance, the funds of PEC were diverted towards the discharge of Andhra Bank debts of Rs. 8.10 lakhs. Admittedly, PW1 did not authorise RW4 for making any such payment. RW4 tried to depose that he has done so at the instance of RW2. But, the entries in Exh. B-162 show that by the time of the alleged authorisation given by RW2, he was having debit balance in the accounts whereas PW1 was having credit balance. Therefore, the statement of RW4 that he made payments of the amount of PEC to Andhra Bank at the request of RW2 cannot be accepted. There is no request, either oral or in writing, by YBC or YBS to PEC to advance monies to Andhra Bank. Bank account in the books of PEC has not been produced in proof of payment. In Exh. B-162, it is stated that cash has been paid. But, the cash book has not been filed into court to corroborate that fact.

28. The learned counsel for the respondent placed reliance upon section 25 of the Partnership Act and contended that every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he was a partner. Relying upon that provision, the learned counsel for the respondent argued that PW1 is bound by the act done by the firm and his liability is both joint and several. The learned counsel for the respondent argued that even if the entire liability of Rs. 7,69,230 was debited to the account of PW1 on 9.1.82, it is perfectly lawful and PW1 has no right to challenge the same. That contention can be accepted only if all the partners of YBC and YBS have taken the decision to discharge the debt of YBC and YBS through the medium of PEC had authorised payment of the debt due to Andhra Bank. Section 25 of the Partnership Act only refers to the acts of the firm. In this case, the decision of diverting funds of PEC for discharging the debts due by YBC and YBS to Andhra Bank was not taken by YBC or YBS or its partners, but, it was taken by RW4 in his individual capacity. It is elicited from RW4 in the cross-examination that the Andhra Bank did not give notice to make payment of the alleged overdues from YBC; that one of the officers of Andhra Bank, viz., Sanyasi Rao had gone to RW4 and wept before him stating that his employment was in jeopardy because of YBC account and he requested RW4 to bail him out; that the partners of YBC were not present when Sanyasi Rao wept before RW4; that he asked Sanyasi Rao to go and meet partners of YBC for getting payment towards overdues; that Sanyasi Rao told him that PW1 has not bothered to react favourably even if Sanyasi Rao lost his job; that thereupon RW4 asked RW2 for the solution and that at the request of RW2 asking RW4 to see that PEC makes some temporary adjustment, he (RW4) instructed PEC to make some payments. When further questioned, RW4 deposed that RW2 only told him orally that PEC might make payment on behalf of YBC to Andhra Bank towards its dues by way of temporary adjustment. Though RW4 deposed that he would verify whether RW2 had given any written instructions in this regard, he has not produced any such written instructions given by RW2.

29. The above evidence of RW4 in his cross-examination shows that RW4 admittedly did not consult PW1 with regard to the discharge of the dues of YBC by PEC and that RW4 has taken the decision and instructed PEC to make some

payments. The above evidence of RW4 thus makes it clear that it is not "an act of the firm", the liability of which can be fastened to PW1. I, therefore, hold that the debiting of the amount of Rs. 3,84,630.07 in the ledger account of PW1 in Exh. B-162 is totally unauthorised and cannot be considered as a valid debit entry.

30. The entries in page 5 of Exh. B-162 do not show that on the date of alleged transfer of PEC firm into a private limited company called PCPL, PW1's share of goodwill and investment allowance reserve were taken into consideration. The Supreme Court held in *Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another*, that goodwill of a firm is an asset. Section 48 of the Partnership Act points out the mode of settlement of accounts between the partners; section 55 of the Partnership Act lays down that in settling the accounts of a firm, the goodwill shall be included in the assets. Admittedly, the goodwill of PEC firm was not taken into consideration while determining the share of PW1. Exh. A-221(b) which is said to be the take-over balance sheet as on 9.1.82 values the goodwill of the firm at Rs. 50,00,000. This document was summoned at the instance of PW1 from the Income Tax Department. Exh. A-240 which is the balance sheet of PCPL as on 10.1.82 contains a note which is marked as Exh. A-240 (a) that the goodwill was not purchased by PEC from any other person, but has built up the same by itself. Exh. A-240 also values the goodwill at Rupees 50,00,000. PW1 has admittedly 6% share in PEC. Though PW1 contended that RW2 and RW4 have agreed to surrender their share of 2% each in favour of PW1, there is no document excepting Exh. A-16 evidencing such promise and except the ipse dixit of PW1, there is no other evidence supporting that claim. I do not propose to place reliance upon Exh. A-16, because, P. V. Radhakrishna Murthy, the brother of PW1, did not go into the witness box to speak the fact that Exh. A-16 letter was received by him and that Exh. A-17 is the envelope in which Exh. P-16 letter was received by him. Thus, Exh. A-16 is not duly proved. I, therefore, hold that PW1 has not substantiated his contention that he is entitled for 10% share in PEC. Calculating PW1's share of goodwill at 6%, it comes to Rs. 3,00,000.

31. Another item for which PW1 laid claim is the investment allowance reserve which is shown in Exh. A-77 balance sheet of PEC at Rs. 21,15,907.11. That amount constitutes the amounts taken out of the profits by the firm from time to time and have been reserved to meet any contingency. It is in the nature of undistributed profits by the firm and, therefore, at the time of dissolution or taking of accounts that amount is liable to be distributed to the partners in proportion to their shares. RW2 admitted in his cross-examination that the investment allowance reserve was not taken out of profits, but was taken out from the value of assets. Investment allowance reserve was not included in the profits at the time of settling the accounts on 9.1.82. I, therefore, hold that PW1 is entitled for 6% share therein which comes to about Rs. 1,26,000 towards his share of investment allowance reserve.

32. The petitioner's counsel further argued that PW1 is entitled for rupees 3,00,000 towards his share of pending claims, Rs. 1,00,000 towards his share in work in progress, Rs. 2,10,000 towards his share of works to be billed and Rs. 96,957 towards the difference in the profits credited as per the assessment order. PW1 is no doubt entitled for a share in all the above amounts. But they are not ascertained sums as on 9.1.82. At the time of alleged conversion of PEC into PCPL, a provision must have been made for PW1's share in the above categories for which PW1 is entitled for 6% share. Even after the amount was ascertained, no attempt was made by PCPL to pay the due share of PW1. However, inasmuch as the amounts due under heads of pending claims, work in progress, works to be billed and difference in the profits credited as per the assessment order by the Income Tax Officer were not ascertained on 9.1.82, there may be justification for PEC for not including those claims to determine PW1's share. But, there is absolutely no justification for not taking into account PW1's share in goodwill and investment reserve while closing the account of PW1 on 9.1.82. Relying upon the above admitted items, I hold that PW1's share of the goodwill and investment allowance reserve come to Rs. 4,26,000.

33. The learned counsel for the respondent argued that there are no bona fides in filing this petition, because of the delay of 18 months in filing the company petition. PW1 has explained in his evidence that he has made some attempts to arrive at an amicable settlement; that the negotiations which went on for a few months have ultimately failed; that Mr. Ratnam Chowdary, brother-in-law of RW 2, and brother of Seshagiri Rao, a partner of PEC, attempted to settle the matter; that nothing has come out after the mediation efforts made by them; that thereupon he decided to go to the court; that as he had no money and all the monies and properties were locked up in the firm, he wanted to raise loans from his friends and relatives; that as he was not successful in securing help to raise loans from his friends and relatives, he went to USA and raised necessary funds and that after returning to India in the end of March, 1983, and having come to know about the alleged conversion of PEC into PCPL, he filed the Company Petition and also O.S. No. 616 of 1983 on the file of the City Civil Court on 23.5.1983. PW1 was not cross-examined on these aspects to show that the explanation offered by him for the delay in filing the company petition is false or baseless. It cannot, therefore, be said that there is any lack of bona fides on the part of PW1 in prosecuting his legal remedy by filing the company petition.

34. In view of my findings, that PW1 has invested Rs. 4,00,000 towards his capital, that debiting of Rs. 3,84,630.07 to the account of PW1 is un-authorised and from the failure to credit the share of goodwill and investment allowance reserve of PW1, I hold that PW1 cannot under any circumstance be treated as a debtor of the company. On the other hand, he is a creditor of the company and a deemed contributory. I accordingly find on issue No. 1 that the petitioner is a creditor of the company within the meaning of section 439(b) of the Indian Companies Act. I find on issue No. 2 that the petitioner is not a debtor of the company and I find on issue No. 7 that the petitioner has locus standi to file the

company petition and that the same is bona fide.

Issue No. 3 in C.P. No. 6 of 1983

35. PW1's case is that because of the personality clash that has cropped up between him and RW4, the latter became inimical to him; that RW4 has directed RW1 to obtain his signature on the deed of dissolution of partnership; that PW1 refused to sign unless he (PW1) was told what was the amount payable to him; that on 5.9.81, Mr. Ankineedu, Madusudhan Rao, RW2 and others came to Vijayawada and threatened him and his brothers with dire consequences if PW1 did not submit to their dictates and sign the dissolution deed; that PW1 insisted that unless the amount due to him was settled, he would not sign the dissolution deed and that thereupon RW2 and others abused him and warned him and his family with dire consequences. According to PW1, having failed in his attempts to make PW1 sign the dissolution deed RW4 has invented the idea of converting PEC into PCPL and eliminating PW1, from the company.

36. PW1 deposed that the firm PEC was not dissolved by adopting any legal formalities; that no notice of dissolution of partnership was given at any time by any of the partners; that the accounts of the partnership firm were not settled; that the amounts due to him were not determined or settled or paid and that consequent on the alleged conversion, the transferred assets and liabilities of the firm of PEC were not communicated to him. He further deposed that prior to the conversion of PCPL, there was neither settlement of accounts nor dissolution of partnership firm of PEC.

37. PW1 stated that he was an active partner of PEC; that he was given the facilities such as car, phone at the residence and salary of Rs. 2,000 per month on par with RW2 with perks and that the same facilities were enjoyed by RW4 also, because in the firm PEC those three alone were engineers and active partners. RW4 contradicted the evidence of PW1 by deposing that he did not assign any work to him (PW1) in PEC. But, that statement of RW4 is contradicted by his own letter Exh. A-6 addressed by RW4 to the Income Tax Officer on 24.8.78 explaining the reason for taking PW1 and RW2 as new partners in PEC. PW1 deposed that when he joined as a partner of PEC, the loan facilities enjoyed by PEC were not sufficient; that after he joined in the firm as a partner, PEC secured more facilities and financial limits from the banks by giving more personal property securities of the partners and that as a partner he also furnished his valuable properties as security to the banks to enable PEC to raise its financial limits. His evidence is corroborated by Exh. A-26 statement of valuation of securities submitted to the Income Tax Officer alongwith Exh. A-25 letter, dated 28.1.83, showing that PW1 and his brothers have offered land in an extent of Ac 20-81 cents in Krishnanagar village, the value of which was shown as Rs. 3,64,100.

38. PW1 deposed that PEC obtained several civil contract works of which Nizamsagar Project was one; that he worked at the site at Nizamsagar; that in

respect of his work at Nizamsagar, he got admiration from the persons concerned and the public also and that Mr. K. S. Rao started developing ill will on account of that. To prove PW1's active participation in the business activities, of PEC he filed Exhs. A-45 to A-51, A-565, A-568, A-616, A-625, A-629 and A-468. He deposed that RW1 has written those documents. RW1 did not deny the authorship of most of those documents. PW1 has also filed Exhs. A-523 and A-626 with regard to the works at Nizamsagar. Exhs. B-181 and B-182 show that after PW1 has joined as partner of PEC, the business has increased. The bank facilities have also substantially increased. Exh. A-177 which is the inspection report shows that 74 cents of land belonging to PW1 and brothers has been offered as security. The contention of RW4 that PW1 was not entrusted with any work with PEC cannot, therefore, be correct.

39. I have already referred to the evidence of PW1 to the effect that on 5.9.81, Mr. Ankineedu, Madhusudan Rao (father of RW2), RW2 and others went to Vijayawada to the office of Sri Hanumanthkalivara Prasad Babu Chemicals Private Limited, Gandhinagar, Vijayawada, and threatened him and his brothers with dire consequences if PW1 did not submit to their dictates. When RW2 was in the witness box, he admitted that in September, 1981, he met PW1 at Vijayawada and that his father and his uncle Sri Ankineedu accompanied him in the said visit to Vijayawada. But he tried to explain that he went there to discuss with PW1 the issues regarding the settlement of dues of YBC and YBS to the banks and as to why PW1 did not attend the meeting of partners of PEC in June, 1981. If really that is the purpose of RW2 visiting Vijayawada, there is no reason as to why he should be accompanied by his father and uncle. It is suggested to RW4 in the cross-examination that there were mediation talks at the instance of PW1 and that they have failed because of his adamant attitude towards PW1. It is also, suggested to him that in August, 1981, he sent RW1 to threaten PW1 to sign on the dissolution deed of PEC without settling his account and that when that endeavour failed, he sent RW2 and his brothers-in-law to threaten PW1.

40. RW4 when specifically questioned whether there were differences between him and PW1 between April, 1981, and July, 1981, he admitted that there were differences between them but he would verify and state the period when differences arose between them. He is, however, definite that those differences arose prior to 9.1.82.

41. PW1's case is that because he has not conceded to the demand of RW4 made through RWs 1 and 2 to sign in the dissolution deed, RW4 has invented the device of converting PEC into a company and excluding him as a partner of the firm. According to RWs 2 and 4, two meetings of partners were held on 1.6.81 and 26.12.81 in addition to several other meetings and that Exh. B-141 is the minutes book showing the minutes of the partners of PEC. According to him, both these meetings were held at Yellareddiguda and that Exh. B-141 is the only minutes recorded by the partners of PEC. RW2 admitted that he did not sign any notices personally for the meetings held on 1.6.81 and 26.12.81. Exhs. B-158

and B-159 are certificates of posting with respect to PW1's address at Hyderabad alongwith two others. They bear the same handwriting. Exhs. B-157 and B-160 are the certificates of posting addressed to PW1 to Vijayawada address. They are written by the same person. The respondent relied upon those documents to show that notices for the meetings, dated 1.6.81 and 26.12.81 were duly despatched to all the partners of PEC including PW1. To demonstrate that the notices alleged to have been sent to the meetings on 1.6.81 and 26.12.81 are manipulated subsequently, the learned counsel for the petitioner relied upon Exhs. A-946, A-948, A-950 and A-951. In Exhs. A-946 and A-948, the address of Y. Seshagiri Rao is given as care of Yuva Bharathi Constructions, Saloor. But in Exhs. A-950 and A-951 which are the certificates of posting, Y. Seshagiri Rao's address is shown as care of Yuva Bharathi Chemicals, Saloor. The same mistake occurring in the certificates of posting on the two occasions is quite unusual and lends support to the comment made by the learned counsel for the petitioner that Exhs. A-946, A-948, A-950 and A-951 were all brought into existence at the same time.

42. The authors of Exhs. B-157 to B-160 were not examined though objection was taken at the time of their marking as to proof. When PW1 has asserted that he has not received the notices for the meetings, dated 1.6.81 and 26.12.81, the respondent company has not taken steps to examine the person who has written the certificates of posting or the person who has actually posted those letters. RW2 admitted that in Exh. B-142 it is not stated that the notice was handed over to him personally and Exh. A-947 is the certificate of posting filed by the respondent to show that the notice has been sent to three persons including RW2. He has stated that he must have received the letter Exh. B-142 sent by post to him at Barginagar. But, he has not produced the cover and the letter sent to him to his address at Barginagar. Through the original of Exh. A-70 letter, dated 27.4.81 PW1 intimated PEC that he would be staying at Sri Kali Gardens, Nambur Road, Guntur District for about six weeks. Similarly, through the original of Exhs. A-68, dated 28.11.81, he has intimated PEC that he was going to Gudivada and he was likely to be there for about four weeks. RW2 did not deny the receipt of Exhs. A-68 and A-70. He does not remember where he was in the last week of November, 1981, and stated that he will have to check-up where he was in the last week of April, 1981. He, however, deposed that the letters addressed to his office, will be received by the office. It is suggested to him that PW1 had informed RW2 of his correct address in April, 1981, and November, 1981, and that PEC did not send any meeting notices to the address intimated by him. In Exhs. A-68 and A-70, it is mentioned that the attention of those letters was drawn to RW4. But, RW4 in his evidence did not deny having received Exhs. A-68 and A-70. The copies of the notices sent to other partners or the covers received by them for the meetings held on 1.6.81 and 26.12.81 were not produced.

43. On a careful consideration of Exhs. A-68, A-70 and B-157 to B-160. I agree with the submission made by the learned counsel for the petitioner that

purposely. PEC did not send the notices to PW1 to the places where he was residing at that time, but has manipulated the records to show as if notices for the meetings dated 1.6.81 and 26.12.81 were sent to PW1. Exh. B-142 does not show that the purpose of calling for the meeting, dated 1.6.81 was to discuss about the conversion of PEC into a private limited company. The minutes of the meetings, dated 1.6.81 were marked as Exh. B-141. When the notice for the meeting dated 1.6.81 does not disclose that the purpose of meeting was to discuss about the conversion of PEC into a private limited company, it is not explained how that subject could be discussed in the meeting, dated 1.6.81. Exh. B-141 does not reflect that with the permission of the chair, this matter was moved by any of the partners under item No. 3 in Exh. B-142, viz., any other matter moved by any of the partners. On the other hand, Exh. B-141 reads that the suggestion of converting the firm into a private limited company has emanated from RW4. When the attention of RW2 was brought to Exh. B-142 (drawn ?), he admitted that there is no direct reference to any proposal for converting PEC into a different form. Even then he did not say that the matter was discussed in the meeting, dated 1.6.81 having been moved by any of the partners. On the other hand, Exh. B-141 reads that the only purpose of the meeting, dated 1.6.1981 was to discuss about the conversion of PEC into a private limited company. Exh. B-161 minutes for the meeting, dated 26.12.81 show that a private limited company named and styled "Progressive Construction Private Limited" has been incorporated and a Certificate of Incorporation No. 3337 of 1981-82, dated 23.12.81 was issued by the Registrar of Companies, Andhra Pradesh, Hyderabad. But, the notice dated 4.12.81 issued for the meeting dated 26.12.81 reads as if Progressive Construction Private Limited has already come into existence and that the purpose of the meeting was to go through the memorandum and articles of association of PCPL and to approve the transfer deed for conversion of the firm into PCPL.

44. Exh. B-164 which is the transfer deed said to have been executed on 9.1.82 narrates that all the partners present at the meeting held on 26.12.81 have unanimously approved the transfer of all the assets and liabilities of the firm as on 9.1.82 to the company PCPL and have also approved the draft of the agreement. This is a clear misstatement of fact, because neither Exh. A-161 nor Exh. B-163 shows that the decision to transfer the assets and liabilities of firm as on 9.1.82 to PCPL was taken on 26.12.81. On the other hand, the minutes dated 4.1.82 of PCPL show that the resolution for taking over all assets and liabilities of the firm, namely, PEC as on 9.1.82 as the company's assets and liabilities effective from the said date was passed in the meeting dated 4.1.82.

45. The petitioner challenged the validity of Exh. B-164 - transfer deed dated 9.1.82 as not being a genuine document and brought about subsequently. RW4 in his evidence deposed that RW2 was present at the time of execution of the transfer deed dated 9.1.82; that he signed the document at his office at Yellareddiguda and that the balance sheets were available to him on the same night, i.e., 9.1.82. He denied the suggestion that the signatures in Exh. B-164

were not dated in the document, because, it was not executed on 9.1.82. RW2 asserted that Exh. B-164 was signed on 9.1.82 during day time, but, he does not remember whether they went to notary's office or the notary came to their office for executing the document. He again gave a prevaricating statement that both K. S. Rao and himself signed Exh. B-164 simultaneously, but, he does not remember whether they signed that document on 9.1.82. He, however, stated that the witnesses also signed alongwith them. He does not also remember whether Mr. Ganapathi Rao, the notary, signed on the same day alongwith them or not. He denied the suggestion that Exh. B-164 was prepared in 1983 and was notarised in 1983 after due attestation ante-dating the document as 9.1.82. But, this denial has no value, because, RW4 admitted that the signatures in Exh. B-164 were made not in the presence of a notary and that as desired by the financial institutions, he got Exh. B-164 notarised in 1983. Section 8(a) of the Notaries Act lays down that one of the functions of a notary by virtue of his office is to attest the execution of any instrument. Exh. B-164 bearing the endorsement of the notary as attested by him and the further endorsement that the document has entered as serial number 1843 of 1983 in the notarial register shows that the said notary could not have testified or bore witness to the signatures of the executants of the documents, namely, RW4 as the managing partner of PEC and RW2 as managing director of PCPL, if they have really signed that document on 9.1.82 as alleged by them. The notary himself was not examined to explain this discrepancy. The non-examination of the notary coupled with the circumstance that none of the parties to Exh. B-164 has put the date underneath their respective signatures only leads to the conclusion that it was prepared and attested in 1983 on the date on which it was entered as serial number 1843 of 1983 in the notarial register of Sri M. Ganapath Rao, notary. This is further confirmed by the admission made by RW4 in his cross-examination that the figures contained in page 200 of Exh. B-162 which is the profit and loss account as on 9.1.82 do not tally with the figures in Exh. A-221(a).

46. There is also no proper transfer of immovable properties belonging to the firm to the company. Exh. B-174 which is the inspection report of Hyderabad branch as on 15.6.83 points out that consequent on the taking over of the defunct firm PEC by PCPL, the Andhra Bank has not obtained specific letter from the newly formed company acknowledging the liabilities due to the bank and which were taken over by PCPL. The conduct of PCPL in not executing any fresh document creating a charge on its properties to enjoy the credit facilities from the bank shows that the alleged taking over on 9.1.82 cannot be correct.

47. It is stated that on 9.1.82, Exh. A-77 balance sheet was prepared which is said to be the going concern balance sheet. It is further stated that at the time of taking over Exh. A-221(b) balance sheet was prepared. The original balance sheet said to have been prepared at the time of taking over of PEC is marked as Exh. A-221(b) and its xerox copy is marked as Exh. A-182. RW2 has spoken to this fact in his evidence. RW2 deposed that M/s. Anjaneyulu and company must have done the auditing on 9.1.82. When his attention was drawn to Exh. A-77

and Exh. B-182, he was forced to admit that in Exh. A-77 goodwill is not included in the assets column, whereas in Exh. A-182, goodwill is referred to in assets column. He also admitted that there is difference in the total of assets and liabilities in Exh. A-77 and in Exh. A-182. The discrepancy between those two documents could not be explained. When PW3 was examined as a witness, it was not elicited from him whether he has audited the accounts of PEC and prepared the balance sheet or on what date he has given the certificate. This disproves the statement of RW4 that on 9.1.82, the accounts for the period ending 9.1.82 were finalised in the day time; that accountants have prepared the profit and loss account; that the auditors have also taken part in the auditing and that on 9.1.82 itself Exh. B-162 was finalised. RW4 tried to depose that in the evening of 9.1.82 Exh. A-221(b) was prepared. If the above statement of RW4 is correct, there is no reason for the discrepancy existing in Exh. A-77 balance sheet as on 9.1.82 filed in City Civil Court and Exh. A-221 (b) balance sheet filed before the Income Tax Officer. Thus, judging from any point of view, I hold that Exh. B-164 is not a true and valid document brought into existence on 9.1.82.

48. The above prevaricating statements in the evidence of RWs 2 and 4 and the filing of different profit and loss account before the Income Tax Department confirms the contention of the petitioner that fraud had been played in the formation of PCPL and that in support of the alleged taking over, there has been complete manipulation of accounts.

49. Another submission made by the learned counsel for the petitioner to prove that the company PCPL is a make-believe affair is that PEC was made on 9.1.82. RW2 in his evidence deposed that PEC has ceased to exist from 9.1.82 and that there is no dissolution deed between the partners of PEC after 9.1.82. He stated that he will have to verify whether all the partners have met and settled their accounts. To contradict the evidence of RWs 2 and 4 that PEC did not exist subsequent to 9.1.82, the learned counsel for the petitioner placed reliance upon Exh. A-172 which is an enclosure to Exh. A-169 which shows that two transactions dated 9.8.1982 were entered into in the name of PEC and the cheques or demand drafts enclosed therewith were sent to Andhra Bank, Bhopal and Varanasi for collection. Exh. A-173 which is the inspection report of Hyderabad branch reads that even by the date of that report, namely, 16.8.83, the limits were not yet transferred from the firm account, but operations were being allowed in the old name only, though the assets and liabilities of the firm stood transferred to a private limited company as from 9.1.82. Exh. A-223 is a letter, dated 22.2.82 addressed by PEC to the Income Tax Officer with regard to the withholding of an amount of Rs. 46,983 and requesting the Income Tax Officer to refund the amount. This letter is said to have been signed by RW1 for PEC. Exh. A-25 is the letter, dated 28.1.83 addressed by PEC to Income tax Officer furnishing various details as required by the Income Tax Officer in his letter dated 11.1.83. Exhs. A-936 is the letter, dated 25.2.83 addressed by PEC, signed by its accountant, to the Income Tax Officer with regard to the assessment for the year 1983-84. Exh. A-937 is another letter, dated 19.2.83

addressed by PEC signed by its accountant to the Income Tax Officer furnishing some information with regard to the assessment year 1982-83. This document was summoned from Income Tax Department. Exh. A-939(c) is the letter dated 23.2.82 addressed by National Projects Construction Corporation Limited to PEC, Anpara camp, with regard to the certificate of deduction of Income Tax for payments made to PEC under Income Tax Act. Exh. A-939(e) is the letter addressed by the office of the Executive Engineer, Bargi Left Masonry Dam, Barginagar, on 5.3.83 to PEC, Barginagar, intimating that a certificate of deduction of Income Tax alongwith the statement of payment made from April, 1981, to February, 1982, was sent alongwith that letter as desired. The petitioner has thus conclusively shown by authentic documentary evidence that PEC continues to exist even after 9.1.82 and that the theory of taking over of the firm by PCPL is false.

50. RW4 stated in his evidence in cross-examination that after the formation of PCPL he has not been actively involved in its affairs. But, that statement of RW4 is contradicted by the following documents. Exh. A-312 letter, dated 10.5.83 addressed by PCPL to Corporation Bank reads that the shareholders felt that Sri K. S. Rao could once again manage the affairs of the company and made a request for banking facilities assuring that the company would like to shift from Andhra Bank to Corporation Bank in a phased manner. Exh. A-313 is the letter addressed by Corporation Bank, Siddiambar Bazar branch to its head office at Mangalore recommending for sanction of the limits applied for by the company in view of the fact that the shareholders of the company felt that Sri K. S. Rao could once again manage the affairs of the company. Exh. A-81 contains the list of articles, etc., found and prepared by the Advocate-Commissioner on 16.4.84 in the premises of PCPL. The eighth sheet of that list shows that the Commissioner found a letter addressed by PCPL dated 17.1.84 from Royghat addressed to Sri K. S. Rao. During the cross-examination of RW4, when his attention was drawn to Exh. A-81, he admitted that reference to Mr. K. S. Rao in paragraph 15 must be referable to him only. He was also shown Exh. A-870 which is the written statement filed by RW1 in O.S. No. 616 of 1983. He admitted that the reference to Mr. K. Sambasiva Rao in paragraph 2 of Exh. A-870 should have been only to him (RW4). Exh. A-918 is the interim report filed by the Commissioner in I.A. No. 1466 of 1984 in O.S. No. 163 of 1984 in the Court of the Subordinate judge at Vijayawada. It is stated therein that when the Commissioner entered into one room, Sri K. Sambasiva Rao obstructed him from taking the inventory by stating that he is one of the directors of the Andhra Bank and that it is his personal office room. The report further shows that after police inspectors came to the respondent's premises, Sri K. Sambasiva Rao (RW4), Kameshwar Rao (RW1) and Sri M. Ankineedu left the respondent's premises. The inventory was taken by the Commissioner on 16.4.84. Exh. B-174 shows that for the assessment year 1984-85, RW4 was paid consultancy fee of Rs. 90,000 and for the assessment year 1985-86, RW4 was paid consultancy fee of Rs. 10,000. Such huge amounts would not have been paid to RW4 by PCPL unless he was

taking active part in the affairs of PCPL. The above documents falsify the declaration made in Exh. A-157 that Sri K. S. Rao has retired as managing director and also as director of PCPL with effect from 4.1.82 and his statement in cross-examination that after the formation of PCPL he has not been actively involved in its affairs.

51. The next aspect focused by the learned counsel for the petitioner is about the mismanagement of the company. Exh. A-248 is the assessment order dated 27.3.86 of PCPL for the year 1983-84. The return filed by the assessee disclosed a net loss of Rs. 6,79,227.00. The Income Tax Officer after pointing out various irregularities has arrived at the total income of Rs. 21,56,619.00 and made a demand for Rs. 17,52,330.00. Exh. A-183 is the assessment order of PCPL dated 31.3.87 for the assessment year 1984-85. It shows that the assessee-company filed its original return of income on 3.2.84 declaring its total loss at Rs. 45,37,400 and it has filed a revised return on 15.4.85 declaring its total loss at Rs. 42,49,749.00. But the Income Tax Officer has arrived at the total taxable income of the company at Rs. 80,76,871 and made a net demand of Rs. 66,95,057. Exh. A-184 is the Income Tax assessment order of PCPL, dated 29.3.88 for the assessment year 1985-86. The assessee filed a return declaring loss of Rs. 35,02,248 on 12.4.85 and again filed a revised return on 27.3.86 declaring a loss of Rs. 23,33,900. The Income Tax Officer after making various calculations and rejecting the return has arrived at the total income of Rs. 1,31,15,065 and made a demand of Rs. 1,28,44,003. These documents show that the Income Tax returns were filed claiming that the respondent-company has been suffering loss year after year, but the Income Tax Officer negating that contention has declared that the company was earning huge profits in the assessment years referred to above.

52. It is elicited from RWs 2 and 4 during their cross-examination that though the sites at Barkatpura and Khairatabad belong to the company, the presence of those sites was suppressed in the books of accounts though the loans were obtained from the banks. From Exh. A-219 which is the second annual report of PCPL for the year 1982-83, it is seen that Barkatpura and Khairatabad sites were not included in the schedule. Similarly, from Exh. A-220 which is the first annual report for the year 1981-82, it is seen that the fixed assets of the company are not included in the schedule. Exh. A-77 which is the going concern balance sheet of PEC as on 9.1.82 filed by the respondent in City Civil Court, Hyderabad, gives the value of machinery as Rs. 1,42,60,790.38, whereas Exh. A-221(b) which is the take over balance sheet of PEC as on 9.1.82 gives the value of the machinery as Rs. 94,50,105.70. This variation is not properly explained by RWs 2 and 4.

53. Another act of misconduct complained of against the company is that even after the alleged dissolution of the firm and formation of private limited company, RWs 2 and 4 who were at the helm of affairs of PCPL did not release the properties of PW1 but continued the security given by him for obtaining loans from the banks. RWs 2 and 4 could not explain under what authority they could

continue the encumbrance on the properties of PW1 and his brothers after PEC was dissolved and PW1 was not given a place as shareholder in PCPL. The above facts clearly establish the complaint of misconduct against RW4.

54. Section 75(1) of Companies Act lays down that whenever a company having a share capital makes any allotment of its shares, the company shall within thirty days thereafter file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and occupations of the allottees, and the amount, if any, paid or due and payable on each share. But, in this case, the return as to allotment of shares was not filed within thirty days after the allotment. On 4.1.82, RW4 resigned as managing director and in his place RW2 was appointed as managing director. This fact was intimated to the Registrar of Companies on 27.5.1983 far beyond the prescribed period of thirty days after passing the resolution. Exh. A-159 shows that on 11.1.82, RW2 was allotted 110 shares otherwise than in cash. RW2 confirmed this fact in his evidence. But, Exh. A-79 counter-affidavit filed by B. Dhanunjaya Rao in I.A. No. 632 of 1983 in O.S. No. 616 of 1983 on the file of the I Additional Judge, City Civil Court, Hyderabad, states that the shares were allotted to RW2 as he had paid cash. RW2 stated in his cross-examination, dated 18.3.91 that Mr. Dhanunjaya Rao was the power of attorney agent for the respondent-company duly authorised by him (RW2), and what all Mr. Dhanunjaya Rao stated in the affidavits is correct. RW2 stated that item No. 1 marked in Exh. A-159 was drawn by him from Progressive Builders and item Nos. 2 to 4 were loans from agriculturists. Thus, there is a contradiction which has not been duly explained.

55. It is seen from the composition of PEC and PCPL that excepting PW1 and K. S. R. Murthy, the father-in-law of B. K. Rao (RW1), all others are the caste-men of RW4. RW4 admitted in his cross-examination that most of the partners of PCPL are related to him. This statement he was forced to make after searching cross-examination referring to the names in Exh. A-148 and eliciting the relationship between those persons and RW4. It is thus clear that having eliminated PW1, RW4 converted PCPL into a purely family concern belonging to him. This shows that the act of eliminating PW1 on the pretext that he is a debtor of the firm is a mala fide act of RW4. This is further affirmed by the circumstance that clause 14 of Exh. A-5 partnership deed only makes the provision for retirement of a partner from the partnership business after giving six months notice, but, no provision is made in Exh. A-5 for expulsion of a partner from the partnership business. Section 33 of the Partnership Act empowers the expulsion of a partner from a firm by majority of partners, provided they exercise in good faith that power conferred by contract between the parties. As I have observed already, there is no contract between the parties for such expulsion. Even otherwise, Exh. B-141 and B-161 do not show that the majority of the partners have taken any decision to expel PW1 from the partnership. Therefore, the only method by which a partner can be pushed out of the partnership is by dissolution of partnership. A Division Bench of Patna High

Court held in *Ramnarayan and Others Vs. Kashinath Jagnarain and Another*, , that section 33 of the Partnership Act only applies where the power of expulsion has been reserved in the articles of the partnership and where the power has been exercised in good faith by all the partners whose concurrence might be necessary under the articles of the partnership. Their Lordships further held that section 33 does not apply to the case of the expulsion of a partner in direct breach of the contract of partnership.

56. From the findings arrived at by me that PEC did not send notices to PW1 for the meetings, dated 1.6.81 and 26.12.81 to the places where he was residing at the relevant time; that Exh. B-164 transfer deed, dated 9.1.82 is not a true and valid document brought into existence on that day; that there is no proper transfer of immovable properties belonging to the firm to the company; that fraud has been played in the formation of PCPL; that in the process of alleged taking over, there has been manipulation of accounts; that PEC is continuing to exist even after 9.1.82; that the formation of PCPL is only a make-believe affair and that there is proof of active involvement of RW4 after the formation of PCPL in the affairs of the company. It follows that the dissolution of the firm PEC is neither true nor valid and that the same partnership firm continued its business in the garb of a private limited company called PCPL.

57. The learned counsel for the petitioner, relying upon the decision in *In Re Yenidje Tobacco Company, Limited* (1916) 2 Ch D 426 (CA), *Davis & Collect Ltd., In re* (1935) 5 Comp Cas 467, *Ebrahimi v. Westbourne Galleries Ltd.* (1972) 2 All ER 492 (HL), *Re A & BC Chewing Gum Ltd : Topps Chewing Gum Ine v. Coakley* (1975) 1 All ER 1017, and *Rezinotty Properties Ltd.* (1984) 3 All ER 754 dealing with the interpretation of the clause "just and equitable" occurring under the English Companies Act and the decisions in *Great Indian Motor Works Ltd. v. Chandi Das Nundy* (1953) 23 Comp Cas 287 , *Jaldu Anantha Raghurama Arya alias Rama Rao v. East Coast Transport & Shipping Co.* (1958) 28 Comp Cas 20 , *Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another*, , *Eastern Linkers (P) Ltd v. Dina Nath Sodhi* (1982) 2 Comp LJ 669 (Del) : (1984) 55 Comp Cas 462 (Del), arising under the Indian Companies Act, 1956, argued that the words "just and equitable" cannot be read as *eiusdem generis* with the preceding clauses occurring in section 222(f) of the English Companies Act and section 433(f) of the Indian Companies Act and inasmuch as there is lack of probity and mismanagement in the conduct of the affairs of the company, PCPL is liable to be wound up.

58. On the other hand, the learned counsel for the respondent, relying upon the decision in *State of Andhra Pradesh Vs. Hyderabad Vegetable Products Co. Ltd., Hyderabad*, , argued that in the absence of proof that the object of trading at a profit could be realised and in the absence of proof that the object for which the company was incorporated had substantially failed and it is impossible to carry on the business of the company except at a loss, the court has no jurisdiction to order winding up of the company. He further argued that when PCPL is

admittedly prospering in its business and is earning huge profits, there is no question of winding up the company and no grounds are made out for winding up the company.

59. The learned counsel for the respondent also placed reliance on an unreported decision of our High Court of B. P. Jeevan Reddy J. (as he then was) in Company Petition Nos. 2 and 3 of 1982.

60. The learned counsel for the respondent relying upon the decision in *Re Fildes Bros Ltd.* (1970) 2 Comp LJ 173 (Ch D) : (1970) 1 All ER 923 (Ch D), argued that in a petition for winding up, the facts prevailing on the date of hearing only should be considered and the petitioner should be confined to the allegations in the petition. He also relied upon a Division Bench decision of Calcutta High Court in *Jagannath Gupta and Co. Private Ltd. Vs. Mulchand Gupta*, , which held that the order for winding up must be confined to grounds set out in petition and that the allegations and circumstances of date of petition should alone be looked into. But, as held in *Virendra Singh Bhandari v. Nandlal Bhandari & Sons* (1982) 52 Comp Cas 36 (MP), though the cause of action must be laid in the petition itself and the court will confine its enquiry to those facts and allegations, if subsequent events constitute relevant circumstantial evidence to reinforce the allegations made in the petition, the court is not debarred from examining those facts and circumstances. In this case, voluminous oral and documentary evidence has been let in by both the parties and even the documents from the civil court, Income Tax authorities, banks and Reserve Bank of India were summoned. It is, therefore, not a case where the respondent is taken by surprise about the nature of inquiry conducted in the company petition. I, therefore, hold that the subsequent events constituting relevant circumstantial evidence to reinforce the allegations made in the petition can be looked into by the court.

61. It is true that in *In re Yenidje Tobacco Company Limited*, supra, while affirming the decision of Astbury, J., the Bench held that if the grounds for dissolution of the partnership exist, the same principle ought to be applied where there was in substance a partnership in the guise of a private company. In that case, the position amounted to a complete deadlock and, therefore, their Lordships held that it was "just and equitable" that the company should be wound up. The principle enunciated in *In re Yenidje Tobacco Company Limited*, supra, has been approved by the Supreme Court in *Hind Overseas Pvt Ltd v. R. P. Jhunjhunwalla*, supra. Though the Supreme Court stated that the principles laid therein are sound principles depending upon the nature, composition and character of the company, on merits, it was found that the case before the Supreme Court was not a case, where winding up could be ordered. The Supreme Court has held that in a given case, the principles of dissolution of partnership may apply squarely in the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality, it is a partnership. The learned Judges of the Supreme Court, however, held that in view of sections 397, 398 and 443(2) of Companies Act, the relief u/s 433(e)

based on the just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company. The learned Judges further held that the Company Court will have to keep in mind the position of the company as a whole and the interests of the shareholders and see that they do not suffer in a fight for power that ensues between two groups. In this case, no doubt, there is no fight for power between two groups and it is a case of one group dominating and eliminating PW1 from the partnership.

62. A Division Bench of Delhi High Court, following the decision of the Supreme Court held in *Eastern Linkers (P) Ltd v. Dina Nath Sodhi* (1982) 2 Comp LJ 669 (Del) : (1984) 55 Comp Cas 462, supra, that in a given case, principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure, and on piercing the veil, it is found that in reality, it is a partnership. In that case, the Division Bench observed that shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there was no hope or possibility of smooth and efficient continuance of the company as a commercial concern. It is under those circumstances that the learned judges held that there may arise a case of winding up on "just and equitable" ground. In the case before the Delhi High Court, the issue of shares for the benefit of Bali and the ouster of Sodhi was held to be an act of personal aggrandisement by Bali to completely control the company and thus bring about a material change in the management of the company. In the present case, the expulsion of PW1 is, no doubt, an illegal and unauthorised act. But, that circumstance did not bring about a material change in the management of the company. Admittedly, RW4 was the managing director of PEC while it was a partnership and though RW2 was styled as the managing director of PCPL, it is brought out in evidence that RW4 continued to take active part in the affairs of the company subsequent to 9.1.82. Thus no material change was brought about in the management of the company by virtue of the conversion of PEC into PCPL. There is no deadlock in the company on account of lack of probity in the management of the company and there is smooth and efficient continuance of the company as a commercial concern.

63. A Division Bench of Kerala High Court in *Malabar Industrial Co. Ltd v. John Anthrapper* (1985) 57 Comp Cas 717, came to the conclusion that even in the case where the only asset of a company was to be sold, the court would be very slow in ordering winding up when the petitioner before it had other efficacious remedy or that the company was solvent enough to engage itself in other profitable activities with the sale proceeds of the asset. The Division Bench has reiterated the principle laid down by the Supreme Court by holding that the relief u/s 433(F) is in the nature of a last resort, thus obliging the court to give relief to the party only under compelling circumstances. The unreported decision of B. P. Jeevan Reddy J., in *Company Petition Nos. 2 and 3 of 1982* is not a case where a pre-existing partnership was converted into a private limited company. The

learned judge held that the differences between the shareholders of directors, as the case may be, have not affected the working of the companies. The learned judge further observed that it is not denied that they are, and they continued to make profits and there is no deadlock in the management. It is under those circumstances, the learned Judge ultimately held that it was not a case for winding up.

64. Applying the above principles to the present case, it is evident that this is a case of pre-existing partnership among PW1, RWs 2 and 4 and others. I held that the conversion of the partnership into a private limited company is illegal, unauthorised and mala fide. The Supreme Court in *Hind Overseas Pvt. Ltd v. R. P. Jhunjhunwalla*, supra, empowers the court to pierce the veil in order to find out whether in reality, it is a partnership. The conversion being thus non est, it follows that the firm of PEC is still deemed to be continuing in existence in the garb of a private limited company, namely, PCPL. The petitioner has established beyond doubt that there is utter lack of probity and mismanagement in the conduct of the affairs of the company. There is, absolutely, no scope of the petitioner and RWs 2 and 4 pulling on together any longer as partners of the firm. There is loss of mutual faith and confidence in one another. Clause 5 of Exh. A-5 partnership deed narrates that the partnership of PEC is a partnership at will. I, therefore, hold that it is a fit case for directing dissolution of the firm PEC on just and equitable ground u/s 44(g) of the Indian Partnership Act.

65. The next question for consideration is whether the Company Court can give such a direction in a petition filed for winding up ? The learned counsel for the petitioner relied upon the decision of the Supreme Court in *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*, in support of his contention that the Company Court is empowered to pass any order other than winding up and give suitable directions in a company petition. The learned counsel for the respondent tried to distinguish that case by arguing that it is a case filed u/s 397 of the Companies Act complaining of acts of oppression and the Supreme Court held that though the party had failed to make out a case of oppression, the court had power to do substantial justice between the parties. The learned counsel for the respondent contended that the decision of the Supreme Court in *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.* (1982) 1 Comp LJ 1 (SC) cannot have any application to a case for winding up filed u/s 433(f) of the Companies Act. That contention cannot be accepted in the light of the specific wording in section 443(1)(d) of the Companies Act. A reading of section 443 of the Companies Act leads to the conclusion that dismissing the company petition or making an order for winding up the company are not the only two orders that are contemplated under that section. Section 443(1)(d) empowers the Company Court to make "any other order that it thinks fit".

66. If RWs 2 and 4 alone were the partners of PEC alongwith PW1 and they constituted the shareholders of the PCPL, as a consequence of the mala fide act

committed by them, the normal order that should have been made in a case like this is to wind up the company. Such a course will have far-reaching and deleterious effect on PCPL which is a going concern. There is ample documentary evidence and also the admissions of RWs 2 and 4 that the company has secured various contract works in not only Andhra Pradesh, but also in Madhya Pradesh and Uttar Pradesh. The winding up of the company will also create a blot on the company in the business field. Under these circumstances and having regard to the interests of other shareholders who might not have shared the mala fide intention of expelling PW1 without justification from the partnership, thereby putting him to unnecessary agony and hardship, I feel that instead of taking the extreme step of winding up the company, a just and equitable order should be passed by directing dissolution of the erstwhile partnership which is still continuing to exist and is making enormous profits.

67. This, no doubt, results in PW1 being entitled to a share in the profits of PCPL though there is no contribution on his part for earning profits for the company. In the firm PEC, PW1, RWs 2 and 4 alone were engineers and active participants in the affairs of the firm. Most of the other partners were also given share though they were not entrusted with any work. I have observed already that the property given by PW1 and his brothers as security is still being utilised by the company for securing banking loans. Hence, the company is liable to share the profits with PW1 in spite of the fact that he has not contributed for the profits of the company. This is a penalty which the company has to pay for the malafide act committed by RW4 in expelling PW1 illegally and without his consent.

68. From the above discussion, I find on this issue that instead of ordering winding up of the respondent-company, it is just and equitable to dissolve the firm PEC and direct settlement of accounts among its partners as per the shares enumerated in Exh. A-5 Partnership Deed.

Issue Nos. 4 and 5 in C.P. No. 6 of 1983

69. The learned counsel for the respondent vehemently argued that the company petition is not maintainable in view of the various suits pending in the civil courts including O.S. No. 616 of 1983 on the file of the Court of the I Additional judge, City Civil Court, Hyderabad, wherein the parties were agitating their respective rights. PW1's case is that he has been wrongly excluded as a shareholder when PCPL was formed and that the company was formed only to eliminate him, because, he had refused to voluntarily retire from the firm PEC. The civil court has no jurisdiction to wind up the company and take into consideration the accounts of the company. In fact, in Exh. A-993 which is the written statement filed by the second defendant in the Court of the I Additional Judge, City Civil Court, Hyderabad, it is pleaded in paragraph 19 that since the questions raised in paragraph 21 of the plaint are legal in nature and as they relate to company matters, the questions can be decided only by the High Court in a company petition, and in fact, company petitions have been filed and they are pending. It is further pleaded that the civil court has no jurisdiction to go into those

questions. In paragraph 26 of the same written statement, it is further reiterated that the second defendant in that suit being a body incorporated under the Indian Companies Act, the civil court has no jurisdiction.

70. During the pendency of the company petition, the petitioner filed C.A. No. 286 of 1987 seeking transfer of civil suits to the High Court for being tried and determined alongwith company petition. In the counter-affidavit filed to that company application, the deponent therein, viz., Sri B. Dhanunjaya Rao (who is admittedly the power of attorney agent), while denying the assertion that the suits and the company petitions are inter-linked or inter-connected, pleaded that the questions to be decided in the company petition are different from the issues to be decided in the suit; that the reliefs are not common and that there is only one respondent in the company petition whereas there are 19 defendants in the suit. The deponent further denied the allegation that the matters directly and substantially in issue in the company petition and the suit are the same. Basing on those allegations in the counter affidavit, C.A. No. 286 of 1987 was dismissed. It is not open to the respondent to take a different stand at this stage and to contend that in view of the pendency of the civil suits, the company petition is not maintainable. The respondent cannot be permitted to approbate and reprobate. Having taken the definite stand that the civil court has no jurisdiction to entertain the controversy between the parties, it is not open to the respondent to set up a defence in the company petition that because of the pendency of the civil suits, the company petition is not maintainable. I, therefore, find on these two issues that the company petition is maintainable in spite of the pendency of various suits pending in the civil courts where the parties are agitating their respective rights and the pendency of O.S. No. 616 of 1983 on the file of the Court of the I Additional judge, City Civil Court, Hyderabad which is a suit for dissolution and rendition of accounts of the firm PEC.

Issue No. 6 in C.P. No. 6 of 1983

71. This issue has become redundant in view of the fact that an elaborate inquiry was conducted in the company petition and both the parties have let in voluminous oral and documentary evidence. I, therefore, hold that there is no need to consider this issue in the light of the elaborate inquiry already conducted in the company petition.

Issue No. 3 in C.P. No. 11 of 1983

72. This company petition is filed on the allegations that on 2.5.83, the petitioners sent a 21 days" statutory notice by certificate of posting calling upon the respondent to pay the amounts due; that though more than three months had elapsed, there had been no reply and, therefore, it shall be deemed that the respondent company is unable to pay its debts and hence is liable to be wound up u/s 433(e) of the Companies Act. During the evidence, PW1 has marked Exh. A-301 and A-303 which are the notices issued by P. V. Radhakrishna Murthy to PEC. Alongwith Exh. A-303, he has enclosed a statement of account. Exhs. A-302

and A-304 certificates of posting show that the originals of Exh. A-301 and A-303 were sent to RWs 1, 2, and 4. They cannot be considered as statutory notices as contemplated u/s 434(1)(a) of the Act, because they are not addressed to the respondent-company.

73. PWI filed Exh. A-305 which is the office copy of the notice, dated 2.5.83 issued by P. V. Radhakrishna Murthy and P. V. S. Koteswar Rao addressed to PCPL. Exh. A-306 certificate of posting shows that the original notice was by certificate of posting to RWs 2 and 4 care of PCPL. Exh. A-306 further shows that the original of Exh. A-305 notice was sent to RW1 also. It is held by Madras High Court in *B. Vishwanathan v. Seshasayee Paper and Boards Ltd.* (1997) 3 Comp LJ 209 (Mad) : (1992) 73 Comp Cas 137 that the statutory notice must be served on the company at the registered office and on failure to comply with the statutory requirements as to notice, the petition for winding up cannot be ordered. The learned Judge further held that unless the statutory notice served on the company u/s 434(1)(a) of the Companies Act is in conformity with the mandatory requirements of section 434(1)(a) of the Act, the presumption under the section as to the company's inability to pay its debts cannot be raised and that where the notice was not served on the company at its registered office, but on its managing director, the notice does not conform to the mandatory requirements of section 434(1)(a) of the Act. In this case, the service of notice on RW2, who is the managing director of the company, RW4, who ceased to be the director of the company and RW1 who is not one of the shareholders of the company does not satisfy the statutory requirement u/s 434(1)(a) of the Act in order to invoke the deeming provision u/s 434(1)(a) of the Act. The Delhi High Court also held in *Kalra Iron Stores v. Faridabad Fabricators (P) Ltd.* (1991) 1 Comp LJ 177 : (1991) 73 Comp Cas 337 . That in a petition filed for winding up on the ground of inability to pay debts, the condition precedent for filing of the petition is that the statutory notice must be served on the company. It is held that for invoking the provisions of section 434(1)(a) of the Act, it was incumbent upon the petitioners to serve upon the respondent company, by causing to be delivered at its registered office, by registered post or otherwise, notices of demand requiring the company to pay the sum due to the petitioners and that where no proof was filed in token of service of notice in spite of the fact that the service of the notice was seriously disputed by the respondent company, the petitioners were not entitled to invoke the winding up jurisdiction of the court. To the same effect is a Division Bench decision of Bombay High Court in *N. L. Mehta Cinema Enterprises (P) Ltd. v. Pravinchandra P. Mehta* (1991) 70 Comp Cas 31, wherein it is held that the legal fiction created by failure of company to pay the debt in response to a notice of demand is not available where the notice is not strictly in compliance with the requirements of section 434 of the Act. The learned Judges held that section 434 of the Act contains a legal fiction available against a company which may not respond to a notice of demand made by the creditors and that in order to raise the legal fiction u/s 434 of the Act, the requirement of section 434 has to be strictly complied with. The Division Bench

categorically held that section 434 clearly requires the notice of demand to be sent to the company at its registered office and that the service of notice at the administrative office of the company was not sufficient to raise the presumption u/s 434. Consequently, the learned Judges held that a petition for winding up is liable to be dismissed. Even assuming that the notice sent to RWs 2 and 4 can be considered as the notice issued to the respondent-company, Exh. A-306 shows that the notice was sent to the address at 8-3-320/A/1, Yellareddiguda, Hyderabad, whereas registered office of the company is situated at 3-6-309, Basheerbagh, Hyderabad. Exhs. A-111 and A-116 give distinctly addresses of both the administrative office and the registered office. It is not as if the petitioners issued the notice to the address of the administrative office in ignorance of the address of the registered office of the respondent-company. Paragraph 4 of the company petition clearly shows that the registered office of the company is situated at No. 3-6-309, Basheerbagh, Hyderabad. RW2 in his evidence asserted that the notices were not received by the company.

74. The learned counsel for the petitioners argued that it is only a technical error. But, following the decisions of Madras, Delhi and Bombay High Courts referred to above, it follows that when the petitioners in Company Petition No. 11 of 1983 seek to invoke the deeming provision u/s 434 of the Companies Act, there should be strict compliance with the statutory notice, and the petitioners in C.P. No. 11 of 1983 cannot get over that requirement on the ground that it is a technical error. I accordingly, find on this issue that the petitioners have no doubt made a demand requiring the respondent to pay the sum of Rs. 6,56,306.45 as due to the petitioners; but they have not served the said demand on the company by causing it to be delivered at its registered office requiring the company to pay the said sum due to the petitioners. Consequently, I hold that the company petition filed u/s 434 read with section 433(e) of the Companies Act is liable to be dismissed in limine.

Issues Nos. 10 and 13 in C.P. No. 11 of 1983

75. O.S. No. 1065 of 1984 on the file of the Court of the 11 Additional Judge, City Civil Court, Hyderabad, is not a suit filed against the petitioners in C.P. No. 11 of 1983, but is one filed against PW1 in his individual capacity. I, therefore, find on these issues that the Company Petition No. 11 of 1983 is maintainable in spite of the pendency of the aforesaid suit and other legal proceedings pending in the lower courts.

76. However, in view of my finding on issue No. 3 which is fatal for the main tenability of C.P. No. 11 of 1983, I hold that there is no necessity to deal with the other issues in C.P. No. 11 of 1983.

Issue No. 8 in C.P. No. 6 of 1983

77. In view of my finding on issue No. 3, I allow Company Petition No. 6 of 1983 with costs by passing a preliminary decree for dissolution of partnership and settlement of accounts of the respondent-company among the partners of the

firm PEC as per the shares enumerated in Exh. A-5 Partnership Deed. The petitioner shall be at liberty to file a petition for passing of final decree.

Issue No. 15 in C.P. No. 11 of 1983

78. In view of my finding on issue No. 3, this company petition is dismissed as not maintainable. I direct each party to bear its costs in C.P. No. 11 of 1983.