

(1973) 11 DEL CK 0014

In the Delhi High Court

Case No : Company Petition No. 57 of 1972

S. Manmohan Singh and Others

APPELLANT

Vs

S. Balbir Singh and Others

RESPONDENT

Date of Decision : 26-11-1973

Acts Referred:

Citation : (1975) ILR Delhi 427

Hon'ble Judges : Rajinder Sachar, J

Bench : Single Bench

Advocate : Daljit Singh, P.C. Khanna, Nand Kishore, G.R. Chopra, C.M. Kohli, S.S. Chadha, P.N. Sethi and S.N. Kumar, for the Appellant;

Judgement

Rajindar Sachar, J.

(1) This is a petition u/s 397 to 402, sections 539 to 544 read with Schedule Ii and Section 406 of the Indian Companies Act, (hereinafter called the Act) and Section 53 of the Transfer of Property Act. Respondent No. 6 is Northern India Goods Transport Company (P) Ltd. (hereinafter referred to as company). The authorised capital of the company is Rs. 5 lakhs divided into shares. The petitioners hold 19346 fully paid up shares of Rs- 10.00 each- The petitioner thus hold more than 1/10th of the issued share capital of the company and are competent to file the application under sections 397/399. The company was formed with the object of transporting goods and to carry passengers from place to place by motor lorries etc. It is alleged that the management of the company did not prepare and publish balance sheet tot the years and periods 31st October, 1966 onwards and it has also been alleged that some of the records of the company had been fabricated by the then officials of the company. The gross management and malpractices indulged in by the officers of the company and their oppressive conduct is stated to have led to the flittering away of the company's assets. Company Petition No. 1.6/69 was the first petition filed for the winding up of the company which is pending in this court.

(2) C.P. S9/69 had been moved by one Ganesh Lal Mohata for winding up the company. In that C.A. 323/70 was moved for the appointment of a liquidator. Pending the consideration of that application this court by its order dated August 28, 1970. directed that the company shall not surrender the tenancy rights in respect of any of the premises on rent with it which will include the office premises as well as the godowns. It is also alleged that in C.A. 434/71 the allegation was made that the New Patiala Goods Booking Agency (which is respondent No. 2 to the present petition) was going to take physical possession of the Naya Bazar Godown. An appointment of a Provisional Liquidator was sought. This court passed an order in C.P. 88/69 on 17-9-1971 wherein it was mentioned that the counsel on behalf of the company had stated that on instructions from Mr. K. L. Kapur (respondent No. 4 in the present petition), that the company is already under injunction not to part with or transfer possession of any of its godowns and the allegation that it has actually transferred the godown is not correct.

(3) In C-A. 448/71 in C-P- 88/69 wherein apprehension was expressed that the company was going to transfer its tenancy rights of Naya Bazar Godown, this court on 24-9-1971 passed an order restraining the landlord from terminating the tenancy of the company and restraining New Patiala Goods Transport Booking Agency (respondent No. 2 to the present petition) in presence of respondent No. 1 from in anyway dealing with. transferring or surrendering possession of this Naya Bazar Godown of the company bearing Municipal No- 4141 to anyone excepting the company or to attorn to the landlord. An interim Board of Directors was appointed by the order dated 20-3-1972 in C.A. 29/72 which was subsequently substituted by ad-hoc Board of Management appointed by this Court by its order dated 2-9-1972 in C.A. 434/72 in C.P. 89/69 which is still continuing. It is further alleged that the petitioners have come to know that an agreement dated 15th September, 1973 has been entered into between respondent No. 4, the old Managing Director of the company acting for and in the name of the company has appointed respondent No. 1, Balbir Singh, Managing partner of New Patiala Goods Booking Agency (respondent No. 2), an agent of the company and authorised him to carry on the company's business of the transport of goods in godowns situate in the ground floor of the building at Naya Bazar, where the business of the company i.e. booking of goods transporting outstations and receipt of the goods used to be run. The said agreement is alleged to have been entered to give undue preference by payment of amounts to certain persons. The respondent No. 1 has been appointed an agent of the company to carry on the company's business of transport and the profits from the said business are to be appropriated by him in consideration of an alleged loan of Rs. 85 thousands having been paid to the company. Agency agreement is for a period of two years and the company could terminate it only after payment of the loan. The alleged agreement is stated to have been authorised by the Board of Directors but the correctness and genuineness of the contents of minutes recorded in the Minute Book are suspected and disputed by the

petitioner. According to them the respondent 1 to 5 knew and expected that respondent No. 1 would earn huge profits from the business under the agreement and that further respondents 1 to 3 have in contravention of the agreement started running the business of respondent No. 2 in his own name.

(4) Respondent No. 4 is further stated to have made or got some entries made in the cash book of the company after the last entry dated 30th November, 1971, showing therein (from 30-3-1971 to 31-12-1971.) payments of Rs. 40,000.00 to Pritam Singh Director (respondent No. 5) and over Rs. 9000.00 to respondent No. 4 on account of salary from 8-3-1971 to 31-12-1971, out of this amount of Rs. 85,000.00. The agreement is alleged to be oppressive and void and against the interest of the members of the company and it is prayed that it be set aside for the reasons that the said agreement was entered into to give undue preference by payment of amount to certain creditors and was meant to defraud the other creditors and also because it was meant to defeat the interim injunction, issued by this court during the pendency of the various petitions for winding up of the company and further that the transaction was unfair and usurious. Respondents 1 to 3 are liable to render accounts of profits earned by respondents 1 and 2 in the godown of the company.

(5) Respondents 5 and 6 are alleged to have committed misfeasance and liable to make good the loss to the company. It is consequently prayed that as the affairs of the company have been conducted in a manner oppressive to most of the members of the company including petitioners and to the detriment of the interests of the company and that if the transaction is not set aside and if it is allowed to exist, the affairs of the company will be conducted in a manner prejudicial to the interests of the company. And though, it is just and equitable that the company should be wound up but to do so would prejudice the petitioners and the members of the company, it was prayed that the agreement be set aside and the respondents 1 and 2 be directed to render accounts of the profits earned from running business in the godown and pay the amount to the company. A copy of the agency agreement which has been filed along with it shows that it has been entered into between the company and the Respondent 1 because respondent No. 1 had offered to appoint him agent at booking godown for promoting business of the company and had also offered Rs. 85.00 thousands as non interest bearing loan in order to meet urgent liability of the Company in relation to creditors claims pending in the High Court. The company, in consideration of this gave agency to Respondent No. 1 Balbir Singh for a period of two years. Further Balbir Singh is to pay a sum of Rs. 150.00 every month beginning from 1st of September, 1971 and the company was to pay rent to the landlord out of this sum Clause 5 to the agreement further provides that if at any time Balbir Singh wishes without consent of the company to get the tenancy of the premises transferred in his name he will pay goodwill obtaining in the market to be jointly assessed by the arbitrators Shri K. L. Kapur representing the company and J. S. Sodhi representing respondent Balbir Singh. Replies have been filed by the respondent on behalf of respondent No. 2.

(6) Allegations made in the petition have been controverted. Preliminary objection has been taken that the petition as such is not maintainable not telling within sections 397 and 398 and also is abuse of the process of the court. Five issues have been framed, but issue No. 1 has been ordered to be tried as preliminary issue. Issue No. 1 reads as follows:---

1. Whether the petition is maintainable?" This order will dispose of this issue only.

(7) Mr. Daljit Singh counsel for the petitioner has clarified that the application be treated as application filed under sections 397, 398 to 402 of the Act, and not under other provisions mentioned in the petition. As the case is being argued on demurrer the facts mentioned in the petition have to be assumed to be correct. Mr. Khanna, the learned counsel for the respondent No. 1 fairly accepted this portion. His contention however is that assuming all that is said in the petition to be true the averments do not suffice to bring the case within the ambit of section 397 to 402 of the Act. Now the substance of the allegations in the petition amount to saying that respondent No. 4 who was managing director of the company has so conducted the affairs of the company that he has passed on the main business of the company i.e. booking agency to respondent No. 1 and has further so acted against the interests of the company that by the agreement dated 15th September, 1971 the company has been made to agree that,1 it would be open to respondent No. 1 to even without the consent of the company have the tenancy of the godown transferred in his individual name. The obvious suggestion is that this action of the respondent No. 4, who was managing Director of the company, has resulted in depriving the company of such a valuable asset of the tenancy of the godown, and will inevitably result in completely emasculating the company and will result in stoppage of its business and thus the petitioners who are shareholders and members would suffer irreparably and have their interests prejudiced gravely. 433 The allegation also is that the respondent No. 4 using his position of majority has for self interest and ulterior purpose so acted and has appropriated the assets of the company to his private benefit. Mr. Khanna learned counsel for respondent No. 1 however argues that at the vest the allegations tantamount to saying that the interests of the company have not been protected and have suffered at the hands of respondent No. 4 more especially by an agreement of 15th September, 1971. The counsel maintains that as no individual right? of the petitioners have been invaded it is not open to the petitioners to raise any grievance regarding conduct of respondent No. 4 as the grievance, if any, is of the company and it alone can come forward and the petitioners have no locus standing in the matter because their interests and that of the company are different and distinct. He in that connection seeks to invoke rule laid down by some of the early decisions by English courts that in order to redress a wrong done to company or to recover the money or damages alleged to be due to the Company the action should prima facie be brought by the company. (vide: 62 Revised Reports. 185, Foss V. Harbottle 65 RR 520, (1) Monzley v. Alston (2) and Macdougall v. Gardiner Law Reports 1875 1 Ch. D. 13. (3) But the strictness of this rule has always been

subject to exceptions.

(8) Thus in *Menier v. Hooper's Telegraphs Works* 1874 CA 350, (4) the court allowed a shareholder to maintain an action because the court took the view that the allegation being that the majority has divided the assets of the company between themselves to the exclusion of the minority is a shocking thing and assuming the allegations to be true the majority has put something in their pockets at the expense of the minority, it observed :

"If so it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the court can do it, and given to them."

(9) It was also observed that the majority of the shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them. It was Therefore held that the suit was properly brought in the name of the plaintiff on behalf of himself and all the other shareholders. In the present case also the allegations have been made that assuming some money was taken on loan by the company, the same has been mis-utilised and mis-appropriated by respondents 4 and 5 among themselves for their own private benefit and none of the benefits have gone to the company or to the minority shareholders. Similarly in *Bunland and others (defendants) v. Earle and others (plaintiffs)* 1902 AC 83, (5) their lordships observed that the cases in which minority can maintain an action in which the acts complained are of a fraudulent character or beyond the powers of the company and the example was given that where the majority are endeavoring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate.

(10) PALMER'S company Law. 21st Ed. at page 503(6) recognises the exceptions to the rule in *Foss v. Harbottle* (1) as follows :

"The following exceptions to the rule in *Foss v. Harbottle* are admitted; the majority cannot confirm : 1. an act which is ultra virus the company or illegal ; 2. an act which constitutes a fraud against the minority and the wrong-doers are themselves in control of the company; or 3. a resolution which requires a qualified majority but has been passed by a simple majority."

(11) In *Dr. Satya Charan. Law and others v. Rameshwar Prasad Bajoria and others* 1949 FCR 673, (7) the court stated the position thus :

"The correct position seems to us to be that ordinarily the directors of a company are the only persons who can conduct litigation in the name of the company, but when they are themselves the wrong doers against the company and have acted mala fide or beyond their powers, and their personal interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company the majority of the shareholders must in

such a case be entitled to take steps to redress the wrong."

(12) Gower in his Principles of Modern Company Law 3rd Ed. at page 583(8) comments that the rule in *Foss v. Harbottle* (1) greatly strengthens the position of the majority indeed, if there were not exceptions to it the minority would be completely in their hands. He notices the exceptions which the courts have recognised and at page 585 writes that there are certain judicial dicta which would add a further exception, to the well recognised exceptions a further exception, namely, "any other case where the interests of justice require that the general rule requiring suit by the company should be disregarded. " It is the contention of Mr. Khanna that the allegations in the petition do not being the case within any of the exceptions to *Foss v. Harbottle*, (1). It is contended that even if the allegations in the petition are accepted that the act of entering into an agreement on 15th September, 1971 is an act which constituted a fraud against the minority, the petition would still not be maintainable, unless it was shown that the wrong doers are at present in control of the company and as they will not take action on behalf of the company, minority may be permitted to take proceedings. It was emphasised as the agreement was stated to have been brought by previous board of directors of which respondent No. 4 was Managing Director and respondent No, 5 was Director, and as that board is no longer continuing (because an ad hoc board has been appointed by this court), the petitioners have no locus standi because it is nobody's case that ad hoc board of Directors was colluding with respondents 1, 4 and 5. I do not agree. In my opinion this case comes within exceptions to *Foss v. Harbottle* (1) case. The allegations are that respondents 4 & 5 have played fraud on the minority and the company and have enriched themselves at the cost of the company. The only ground against maintainability urged is that the ad hoc board being in control, it alone should take action. But this is an argument torn out of the context of the facts of the present case. Though respondents 4 & 5 are no longer functioning as directors in view of the order of this court, the present is not a case where in the normal course the old board has been substituted by the election of new board of directors which could be expected to devote time consuming energy to look into all these prejudicial deals. That case would be different. We cannot ignore the practical aspect of the matter. Petitions for winding up the company have been filed and are pending in this Court. During the pendency of these petitions court have appointed an ad hoc board consisting of the lawyers for the creditors. Such a board would necessarily look after routine matters. To expect the ad hoc board to function as a normal board of directors and to plan on long term litigation etc. will be putting great strain on it. If in that view of the situation, the petitioners who represent substantial number of the members of the company choose to invoke the jurisdiction of this court to relieve the company from the oppressive conduct of the previous board of directors, which act is claimed to be a fraud on the minority, it has to be held that this is one of those cases where in the interest of justice the members should be allowed to agitate the matter and it would be inequitable to non-suit them on the ground that the proceedings

should have been brought by the company, which is now managed by ad hoc board. In my view. however, the reliance on rule in Foss v. Harbottle is misconceived. After the enactment of section 397 of the Act which is analogous to Section 210 of the English Companies Act, a right to move the court to the persons authorised by section 399 is a statutory alternative remedy and it is unnecessary to rely on exceptions to Foss v. Harbottle to decide about the maintainability of the petition. When an application is moved under Section 397 of the Act the court has to see whether the averments may satisfy the conditions laid down in section 397 and that the petitioners have a right to apply in virtue to section 399. It is no longer, Therefore, necessary to invoke exceptions engrafted prior to 1948 to the rule of Foss v. Harbottle.

(13) It has been seen that the hardship of the rule in Foss v. Harbottle had been relaxed in deserving cases. But for these exceptions there would have been insuperable difficulties in the way of minority exercising their just grievances and getting relief. It was in recognition, of this difficulty and the peculiar position of the minorities that the English Companies Act 1948 introduced section 210 by which powers were given to the courts to impose a settlement on litigation parties and to provide for an alternative remedy so as to enable the minority to attach the action of the management if the affairs of the company were conducted in an oppressive manner. Palmer in his Company Law 21st Ed. page 501(4)(9) describes the right to petition for an alternative remedy u/s 210 as an outstanding example of individual membership rights.

(14) In India also a vital change was brought about when Section 153 C was introduced in the old Companies Act (the precursor to Section 397 in the present Act). In this connection reference may be made to Shanti Prasad Jain v. Kalinga Tubes Ltd. 1965 Company Cases 351 a; 363,(10) wherein the Supreme Court observed.

" THIS is a new provision which came for the first time in the Indian Companies Act. 1913, as Section 153C. That Section was based on section 210 of the English Companies Act, 1948. which was introduced therein for the first time. the purpose of introducing section 210 in the English Companies Act was to give an alternative remedy to winding up in case of mismanagement or oppression. The law always provided for winding up in case it was just and equitable to wind up a company. However, it was being felt for some time that though it might be just and equitable in view of the manner in which the affairs of a company were conducted to wind it up, it was not fair that the company should always be wound up for that reason, particularly when it was otherwise solvent. That is why section 210 was introduced in the English Companies Act i.e provide an alternative remedy where it was felt that, though a case had been made out on the ground of just and equitable cause to wind up a company, it was not in the interest of the shareholders that the company should be wound up and that it would be better if the company was allowed to continue under such directions as the court may consider proper to give. That is the genesis of the introduction of

section 153C in the 1913 Act and section 397 in the Act."

(15) In *Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao and others*, Tee S.C.R. 1066, (II) it was found that the Vice-Chairman" of the company had grossly mismanaged the affairs of the company and has drawn considerable amounts for his personal purposes. This was the ground to take action u/s 153C and the court rejected the argument that this amounted to interference with the internal management of the company.

(16) It is thus quite clear that section 397 is an alternative remedy and there is no necessity for the petitioners to justify that it falls within the exceptions to the rule laid down by *Foss v. Harbottle*. The maintainability of the petition Therefore has to be decided on the question whether the averment made in the petition are such that they satisfy the requirement laid down in section 397 of the Act. If the averments as alleged fall within section 397, objection as to the maintainability would fail; whether ultimately the petition succeeds or not is a question of merit and need not detain me at this stage.

(17) It was not disputed before me that the petitioners have right to apply in virtue of section 399. What is, however, strongly urged by Mr. Khanna is that the requirement of section 397, have not been fulfilled .

(18) Now postulates of section 397 are that any members of the company who complain (a) that the affairs of the company are being conducted in a manner prejudicial to public interest or (b) in a manner oppressive to any member or members may apply to the court, for an order under that section. The case of the petitioners in short is that respondents 4 & 5 by virtue of their powers as managing director and director of the company have conducted the affairs of the company in such a manner so as to oppress the minority in as much that they have entered into an agreement with the respondent Balbir Singh and made a virtual gift of the premises of the company to him. The further allegation is that no amount has been received from Balbir Singh and the entry in the account books of the company is suspicious. Not only that, the further allegation is that even if this amount was received it has been appropriated for the benefit of a few preferred creditors like the respondents 4 & 5 and in support of this allegation, it is alleged that a sum of Rs- 40,000.00 and Rs. 9,000.00 out of that amount has been kept for their benefit by respondents 4 and 5. The further allegation is that the agreement also provides that after a period of 2 years it will be open to the respondent Balbir Singh to have the tenancy of the godown transferred in his own name with the inevitable consequence that there will be no place for the company to carry on its business, and will thus have to close down. Mr. Khanna sought to show that the agreement was a business like transaction and that this was not the only godown which had been rented out, and referred to the fact that certain other godowns belonging to the company had also been given on rent. Counsel for the petitioner however controverted the allegation and maintained that those instances in which the other godowns had been let out were smaller ones and the premises still remain in the tenancy of the company,

and that in none of them was there a prejudicial clause permitting a third party to have the tenancy transferred in his own name and thus such agreement was obviously detrimental to the interest of the company. It is unnecessary for me to deal with these rival contentions, as they relate to the merits of the petition. All that I am indicating is that the allegations in the petition spell out that the agreement has been made by the respondents 4 and 5 by virtue of their power as directors of the company in such a way as to deny the benefits of the assets of the company to the minority of the shareholders like the petitioners and to appropriate the fruits of such a transaction to themselves. Now can it not be said that the allegations amount to saying that respondents 4 & 5 (the majority) have acted in an oppressive manner. The word "Oppressive" has been defined to mean as "burdensome, harsh and wrongful". In *Cook v. G. S. Deeks and others* 1916, A. C. 554, (12), the directors of a company obtained a contract in their own name to the exclusion of the company. Deprecating this their lordships observed at 563 ;

" MEN who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favor business which should properly belong to the company they represent."

(19) Their lordships having found that the contract in question was entered into in such circumstances that the directors could not retain the benefit for themselves, and that it belonged in equity to the company and ought to have been dealt with as an asset of the company went on to observe further at p. 564:

" EVEN supposing it be not ultra virus of a company to make a present to its directors, appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority.

(20) In (1959) 1 Wlr 62, the following observations of lord Cooper and lord Keith in the case of *Elder v. Elder & Watson Ltd.* (13) were cited with approval, lord Cooper said :

" THE essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions, of fair play on which every shareholder who entrusts his money to a company is entitled to rely;"

and Lord Keith said :

" OPPRESSION involves ,I think at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

(21) Referring to the observations in the above-mentioned case, their lordships of the Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.* (1956) Comp cases 351, (10), said :

" THESE observations from the four cases referred to above apply to section 397 also which is almost in the same words as section 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case."

(22) Mr. Khanna referred to this authority and contended that in order to succeed u/s 397, it requires that events have to be considered not in isolation but as a part of the conjunctive story and there must be continuous acts on the part of majority shareholders continuing up to the date of the petition, showing that affairs have been conducted in a manner oppressive to some part of the members. That undoubtedly is so. But the difficulty in the way of Mr. Khanna is that the conclusions cannot be arrived at unless opportunity is given to parties to lead evidence and it is thereafter only that a decision can be given whether all these requirements are fulfilled .This is not a matter which can be decided at the preliminary stage, as full facts have not yet come on record. Allegations have been made that respondents 4 & 5 by virtue of their power as directors have conducted the affairs of the company in such a manner that they have deprived the company of its biggest asset, and appropriated the action of respondents 4 & 5 is held bona fide or against the interest of the company, and whether it is one individual misfeasance action or is a part of a continuous action arc matters which can only be satisfactorily decided when evidence has been led and not at this preliminary stage, and it would be against the interest of justice to shut out enquiry when the full facts arc not before this court. Mr. Khanna sought to rely to the H. R- Harmer Ltd.'s case (1959) 1 W.L.R. 62. (14) In my view however the observation in that case rather with the meaning to be given to the word "oppression"

" THAT being so, it seems to me that the question which arises in this case, as, indeed, in almost any other case of this character, is a pure question of fact to be determined in accordance with the circumstances of the particular case."

His lordship further observed :

" THE first is that, in my judgment, it is quite impossible to lay down, a priori, certain categories of conduct which in all circumstances either are or are not capable in law of amounting to conduct which is oppressive within the meaning of the section; in other words, each case has to be examined in the light of its own particular facts and, I would venture to add, in the light of the personality of the individual persons concerned."

(23) This authority clearly recognises that each case has to be decided on particular facts and circumstances of each case. It is impossible to sustain the arguments of Mr. Khanna that this petition should be thrown out at the preliminary stage simply because in the fore front of the petition allegation relates to the agreement entered into by the respondents 4 & 5 with respondent No. 1 and Therefore it must be presumed that objection is only to an isolated act

and not to the oppressive conduct of the majority. In my view unless full facts have been allowed to be placed on record it would be hazardous and inappropriate to throw out the petition at this preliminary stage. Whether the allegation leads to the finding of a single act of misfeasance only or to an act which has finished almost the total asset of the company, and is thus fraud on the minority must be allowed to be investigated fully by going into merits of the allegations. To do otherwise would be to unnecessarily stifle the vast beneficial powers of this court for which purpose section 397 was enacted. Reference in this connection may be made to *Sindhri Iron Foundry (P) Ltd.* 1963-64, Vol. 68 Calcutta Weekly Notes 118 at page 130, (15) wherein it was observed :

"If the court is satisfied that the conduct arising from a single wrongful act such, that its effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act, this court is entitled to interfere by appropriate order u/s 397 of the Act."

(THIS was upheld in appeal in : *Ramashankar Prasad and others v. Sindhri Iron Foundry (P) Ltd. and others* 1966 16 CIJ 310, subject to certain modifications). Mr. Daijit Singh had Therefore sought to contend that even if the impugned agreement was taken as one incident its effect was so all comprehensive and its prejudicial effect in destroying the asset of the company so overwhelming, and its effect is a continuing one that it is a clear case of oppression of the petitioners as members. It is not necessary for me to give any finding on this point, as all these matters are such which only be examined when the matter is finally disposed of on merits. Reference was made to *Thakur Hotel (SIMLA) Co. Pvt. Ltd.* 1963 Com Cas 1029, (17). In that case application brought u/s 397 in the year 1959. The learned Judge found that there was no oppressive conduct proved for the last eight years, rather it was found that the affairs of the company arc being regularly maintained. It was in that context that the learned judge referred to the observations in *Re : Harmer Ltd.*'s. case. "the purpose of section 210 is not so much to rake up the past as io redeem the future." I do not see how that authority in any way assists Mr. Khdnna. In the present case there is no question but that the allegations in the petition relate to events right up to the filing of the petition. The instances given relate to the period even after the application for winding up had been filed in this court. There is no reference to previous acts unconnected with oppressive acts on the basis of which relief is being sought. Surely it is not Mr. Khanna"s suggestion that even if the allegations relate to the present oppressive conduct, the mere mention of events in past makes the petition incompetent. It is obvious that in order to show that the respondent directors are acting in an oppressive manner it is essential to show how they have over a period of years continuously mishandled the affairs of the company and are continuing to do so. It is not the law that an application u/s 397 is competent only in a case where some future act is sought to be restrained. As a matter of fact the whole basis of the application u/s 397 is to show that the affairs of the company have been managed in the past and are still being

managed in such an oppressive manner that it calls for interference by the court. In the case cited the reference to the previous conduct had no relevancy to the present conduct and Therefore the petition was thrown out.

(24) The next argument was that as section 397(2)(b) postdates as a condition precedent for interference by the court that the court must find that to wind up the company would unfairly prejudice such member but that otherwise the facts would justify the making of a winding up order on the ground that it was Just and equitable and that the company should be wound up, it necessarily means that it is only in a case where the company is running as a flourishing company that a court can interfere u/s 397. The argument being that if the company is in such circumstances that it can no longer function, there is no question of keeping this company alive and a winding up order must be passed. I cannot agree. Such an argument was raised and rejected by the House of lords in *Scottish Cooperative Wholesale Society Ltd. v. Mever and Another* 1958 3 All ER 66 (18) while considering the applicability of section 210 (similar to section 397). Dealing with such argument Lord Denning observe :

"NOWI quite agree that the words of the section do suggest, that the legislature had in mind some remedy whereby the company, instead of being wound up, might continue to operate. But it would be wrong to infer there from that the remedy u/s 210 is limited to cases where the company is still in active business. The object of the remedy is to bring "to an end the matters complained of" that is, the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so also it should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice destroying the value of his own shares with those of everyone else the injured shareholders have, I think, a remedy u/s 210."

(25) The next argument was that this was a matter which raised disputed questions of fact and Therefore should be let left to be tried in a civil court. This argument has no relevancy to the maintainability of the petition, because at the best this argument raises a question of discretion and not jurisdiction. That is not a matter relevant to issue of maintainability at this stage, and can be considered after the evidence has been led by the parties. Reference was made to *S. Bhagat Singh and Another Vs. The Piar Bus Service Ltd., Amritsar and Others*, , where it was observed that the object of section 155 of the Companies Act 1913 was to provide a summary remedy in non controversial matters or in matters where a quick decision was necessary in order to obviate an irreparable injury to a party. I do not think the said case has any relevancy to issues arising u/s 397 which is a special alternative remedy available to the shareholders of the minority. This case was followed in *Smt. Soma Vati Devi Chand Vs. Krishna Sugar Mills Ltd. and Others*, . I may note that M. H. Beg, J. (as his lordship then was) referring to the

latter case has held in *Raghunath Swarup Mathur and others v. Har Swarup Mathur and others*, (1970) 40, (21) Company Cases 282, that the case deals with the jurisdiction of the court u/s 155 of the Act. (Companies Act 1913) and the general principle contained therein is not applicable to sections 397 and 398 of the Act. His Lordship observed at page 289 :

"If the courts have refused to enter into contested questions of fact in proceedings under sections 397 and 398, it is not because there is a limitation upon the jurisdiction of the court confining to uncontested questions of fact. Indeed, such a restriction upon the powers of the court would defeat the very object of a remedial power which can rarely be exercised without contest of facts."

(26) Similarly reference by Mr. Khanna was made to *The Official Liquidator Majestic Financiers (P) Ltd. Vs. Hargurchet Singh Kandola and Others*, where S. N. Andley, J. (as his lordship then was) while dealing with an application filed by the Official Liquidator against directors for- recovery of money observed that such application was competent and it was not necessary to proceed by way of a suit particularly when the suits are not against strangers but persons who are directors of the company. This authority has no applicability. The next argument was that the present application was covered by section 402(f) of the Act for setting aside any transfer or any act relating to the property made or done by or against the company, and that an order for setting aside of any such transfer can only be passed within three months before the date of application under sections 397 and 398, and as admittedly the application was beyond three months from the execution of the agreement dated 15th September 1971, such a transfer could not be set aside. Mr. Daljit Singh joins issue and says the matter, is covered by clause (e) of section 402 as it asks for setting aside any agreement between the company and another person not referred to in clause (d). Respondent Balbir Singh admittedly is not a person covered by clause (d) and Therefore he would be person, under clause (c). I need not decide this point because I do not appreciate how this argument arises at this stage. Section 402 empowers the court to pass appropriate orders without prejudice to the generality of the powers u/s 397 or 398. Once I held, as I do that the application is maintainable u/s 397, the further question whether on merits clause (e) will apply or (f) are foreign to the scope of the present enquiry. That is a matter which will arise when the matter is to be finally disposed of.

(27) The result is that I would decide issue No. 1 against the respondent over rule the preliminary objection and hold that the petition is maintainable. The result will be that the petition will now proceed on merits. The matter may now be posted before the Company Judge on 29-11-1973 for further directions.