
(1993) 01 MAD CK 0022
In the Madras High Court

S. Sundaresan

APPELLANT

Vs

Plast-o-fibre Industries Pvt. Ltd.

RESPONDENT

Date of Decision : 01-01-1993

Acts Referred:

Companies Act, 1956 — Section 397, 398, 433, 439, 493

Citation : (1993) 76 CompCas 38

Hon'ble Judges : A.R. Lakshmanan, J

Bench : Single Bench

Advocate : Arvind P. Datar, for the Appellant; Mrs. Hema Sampath, for the Respondent

Judgement

Lakshmanan, J.—Company Petition No. 44 of 1989 has been filed u/s 433(f) of the Companies Act, 1956 (hereinafter referred to as "the

Act") for winding up of the respondent-company on the just and equitable ground. The respondent-company was incorporated on October 25,

1985, for manufacture of fibre glass reinforced plastic (FRP) light fittings. The authorised share capital of the respondent is Rs. 3 lakhs and the

amount paid up is Rs. 2.4 lakhs. Of this amount, the petitioner, his father, brother and wife and invested Rs. 1.05 lakhs. The managing director of

the respondent, Mr. P. Venkatasubramanian and his family have invested Rs. 1.25 lakhs and the balance Rs. 1,00,000 by a friend of P.

Venkatasubramanian, namely, Mr. Sivajothi. The respondent is a small private limited company in the nature of a partnership as the bulk of

the shares are owned by members of two families who are closely related to each other

2. After the incorporation of the company on October 25, 1985, Mr. P. Venkatarmaniam who was the initial subscriber and managing director

of the company wrote to the petitioner at Bombay, vide letter dated November 30, 1985, and sought his participation in the business venture. By

the said letter, the said P. Venkatasubramaniam proposed to have only relatives as shareholders and the share capital will be Rs. 1.10 lakhs.

Pursuant to the said request. The petitioner met the said Mr. P. Venkatasubramaniam on February 3, 1986, for a discussion and, in the meeting

held on the said date, the said Mr. P. Venkatasubramaniam, hereinafter called PV, agreed with the petitioner's family that the petitioner's family will

invest and hold 50 per cent. shares of the company and what the petitioner will be made a working director of the company. This was also

confirmed by the letter dated February 18, 1986 sent by PV stating that, for all practical purposes, the petitioner is deemed a director of the

company with immediate effect, the petitioner is deemed a director of the company with immediate effect. The petitioner is deemed a director of

the company with immediate effect. Upon this understanding, the petitioner and his family members contributed rupees one lakh towards share

capital between March and May 1986 and another Rs. 50,000 in December, 1986. But the said PV disappointed the petitioner by violating this

understanding for maintaining the 50 per cent. ratio of shareholdings or making the petitioner a working director of the company. The contribution

of PV and his family members was Rs. 1.35 lakhs being the value of shares taken on various dates between March, 1985 and April, 1987. Despite

the understanding for equal shareholding between PV and the petitioner's family, PV allotted more shares to himself, though PV states in his letter

dated February 10, 1986, that out of Rs. 1.10 lakhs meant for the petitioner, he had already allotted of Rs. 1.10 lakhs to his friend D. Sivajothi. By

May, 1986, PV and his family had subscribed Rs. 66,000 towards shares which includes Rs. 10,000 from Sivajothi, From March, 1986, to May

1986 the petitioner and his family contributed share capital of Rs. 1 lakh and another Rs. 5,000 in December, 1986. From May, 1986, to April,

1987, PV had allotted to himself and his family members Rs. 60,000 on various dates without reference to the petitioner and with a view to hold

majority shares contrary to the understanding and against the interest of the petitioner.

3. As the petitioner was not appointed as a wholetime director of the company as agreed upon, to took up the matter with the said PV and,

on May 19, 1986, at the residence of the petitioner at Bombay, PV declared that the petitioner was being nominated as a director note book calling it an "attendance register". PV said that the official appointment letter would follow after he reached Madurai. The petitioner states that the appointment was finally confirmed only on May 23, 1988. In between PV made several excuses for not confirming the petitioner as a director. The petitioner states that it became clear to him that PV had inducted him and his family members only for their money and that he had no real intention of involving the petitioner in the active participation and management of the affairs of the company. It is also stated that the petitioner was appointed as a wholetime director by a board resolution dated May 23, 1988, on a salary of Rs. 1,500 per mensem and that the appointment was for a period of three years from May 23, 1988 but till date the petitioner has not been paid his salary at all. The petitioner states that he consistently acted only for the benefit of the company. When the said PV and the company urgently required funds, the petitioner pledged his personal National Savings Certificates and obtained a short term loan of Rs. 18,650 on October 5, 1987, which was to be repaid within three months but PV has not paid the same till date. Besides the above amount, the petitioner's relatives have also advanced Rs. 36,000 to the company, which has not been repaid. The residence of the said PV and the registered office of the company are one and the same. Taking advantage of this, the wife of the said PV Mrs. V. Subbalakshi, who is also a director in the company, used to personally collect the mail and refused the petitioner any access to the same. This curtailed the right of the petitioner as a wholetime director to know about the day-to-day activities of the company. The petitioner's protest against this met with only further disregard shown to him. The petitioner was not apprised of the progress or problems of the company which, as a wholetime director, he was entitled to know. The said PV could not even answer the specific queries entitled to know. The said PV could not even answer the specific queries raised. PV was in charge of the company matters. The petitioner states that the said PV was in charge of the day-to-day affairs of the company and that the entire mismanagement by PV has seriously affected the operation of the company, some examples of which have been mentioned in the main company petition itself which will be dealt with by me while considering the arguments of Mr.

Arvind P. Datar. Another glaring example of bad management on the part of the said PV is that, as managing director, he fixed for himself and drew a salary of Rs. 2,000 per mensem, but fixed a salary of Rs. 1,500 per mensem, for the petitioner and even this amount was not paid.

whereas he appointed a manager on a salary of Rs. 2,500 per mensem and paid his salary for about a year. The contribution of this manager to the company was ""zero"" and when this was pointed out by the petitioner, he was literally abused and was asked to shut up on the issue. However, after continuous strong protests from the petitioner, the services of the so-called manager were terminated. Against the sum, of Rs. 10.90 lakhs of term loan and Rs. 1.25 lakhs of soft loan, the company availed of only Rs. 7.40 lakhs and Rs. 1.04 lakhs respectively. But in view of bad production loss. PV could neither repay the instalment of loans due nor interest therefor. As on the date of the company petition. the accumulated arrears on account of loan amount and interest should be to the order of Rs. 3 lakhs. The petitioner states and asserts that this critical situation is only due to the mismanagement and irregularities on the part of PV. The petitioner asserts that due to wrong and false information furnished by the said PV the State Bank of India, Kappalur, Madurai, rejected the application of the company made in the first week of August 1988, for cash credit facilities. The difference of opinion and the positive animosity of PV towards the petitioner is manifest in a letter dated October 11, 1988, by PV asking the petitioner to quit the company. On November 27, 1988, the petitioner was again asked by PV orally to leave the company unconditionally. The petitioner was told that this share amount of Rs. 1.05 lakhs, and the loans advanced by the petitioner and his relatives together with interest would be paid in due course. PV refused to commit this repayment in writing. PV refused to permit the petitioner to attend the factory and instructed the workers not to allow the petitioner into the factory premises. Indeed, by a letter dated February 28, 1989, the petitioner was instructed not to visit the factory without his consent. At the same time, the said PV made false and insinuating allegations that the petitioner had instigated the workers against the company. At the time, the said PV made false and insinuating allegations that the petitioner had instigated the workers against the company. These allegations were clearly contradicted by the statement of one R. Alagariswamy, who was also present at the

time when the petitioner sought to visit the factory. The petitioner further states, that, from the beginning. It has been the intention of the said PV to get money from the petitioner to the petitioner in the affairs of the company. The gross mismanagement on the part of the said PV has resulted in the company being financially crippled. The company has been unable to repay the loan/interest to the Tamil Nadu Industrial Investment or sales. The existing and possible liquid assets are insufficient to discharge its liabilities. In the circumstances, the petitioner submits that there is no alternative but to wind up the company. The company consists of two groups, consisting of the said PV and his family on the one hand and the members of the petitioner's family on the other. The company is really in the nature of a partnership business. The conduct of the affairs of the company by the said PV has resulted in a state of complete deadlock in which it is impossible to carry on the business of the company. The attempts on the part of PV to unjustly remove the petitioner from the board of directors has resulted in a state of irreconcilable animosity and loss of mutual confidence. By his letter dated December 15, 1988, the said PV wrote to the petitioner's father stating, inter alia, that differences existed between him and the petitioner and that he could not run the unit beyond December, 1986. The petitioner submits that these circumstances would justify the dissolution of a partnership and would also constitute just and equitable grounds to wind up the company. According to the petitioner, he is a contributory of the company and the shares held by him were originally allotted to him in his name and in the names of other members of his family and these shares have been held for a period of six months during the eighteen months immediately before the winding up. Consequently, the petitioner is entitled to file the present petition u/s 433(f) of the act. Thus, the petitioner has come forward with the above company petition to wind up the respondent company under the provisions of the Act.

4. The above company petition was resisted by the respondent company. They have filed a counter-statement, dated June 12, 1989. According to the respondent company, there was no agreement or undertaking that the petitioner would be appointed a director and that he would continue to hold the office of director as long as the shares were held by the petitioner and his family. When there is no undertaking or agreement, according

to the respondent-company, no question of violation would arise. According to the respondent-company, they were not aware of the various

contentions of the petitioner made in paragraph 6 of the affidavit regarding his qualification and experience. The respondent-company further

states that, at the time when the company was floated, the petitioner was without a job and that, therefore, the company chose to utilise his services.

The other allegations made in the company petition have also been denied. The allegations that the petitioner and his family members were inducted

only for their money and that there was no real intention of involving the petitioner in the active participation and management of the affairs of the

company are all imaginary and unsustainable. The respondent-company have, therefore, prayed that this company petition may be dismissed and

justice rendered to the,

5. On behalf of the petitioner, exhibits p-1 to p-19 were marked and on behalf of the respondent-company, exhibits R-1 and R-2 have been

marked. No oral evidence was let in by both parties in this case. Hence the matter was posted for arguments on October 3, 1991, and the

arguments were heard on various dates.

6. Mr. Arvind P. Datar, learned counsel appearing for the petitioner, submits that the respondent-company is liable to be wound up on the

following five grounds:

1. There is a complete failure of substratum and there is no hope of revival of the respondent company

2. If the shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of prohibition in the

management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern,

there may arise a case of winding up on the just and equitable ground.

3. The respondent-company is really in the nature of a partnership. The facts are such that they would justify dissolution of the firm and would,

consequently, justify winding up of the company.

4. There is no alternative remedy except to wind up the company, and

5. Majority of creditors/shareholders have supported the winding up.

7. Let me now deal with the above points in the same order.

8. Ground No. 1 : There is a complete failure of substratum and there is no hope of revival of the respondent company :

i. The substratum of the company has disappeared because the object for which it was incorporated. viz., manufacturing of FRP light fittings, has

completely failed and the respondent-company has not been able to manufacture and sell such products on a commercial basis.

As per exhibit P-1 (pages 1 and 2 of the typed set of documents) the company was to break even at 47.5 per cent, and the sales at 80 per cent.

capacity were to be Rs. 55 lakhs. Therefore, for the company to break even must have sales of Rs. 32.65 lakhs. However, from the balance sheet

for the last three years which have been filed as exhibits P-18 and P-19 (pages 35-45 of the typed set of documents), its financial position can be

summarised as follows :

31-3-1989 31-3-1990 31-3-1991

(In rupees)

Sales

per annum 1,57,680 81,246 90,508

Loss 3,02,807 2,53,058 2,76,913

Total carry

forward loss 3,50,309 6,03,367 8,80,280

Liability

(Loan) 12,10,634 13,78,162 15,53,478

B/E point 47.% - Rs. 32 lakhs.

Thus, the respondent-company has to repay loans of Rs. 13.5 lakhs and has carry forward loss of Rs. 8.8 lakhs whereas the gross sales per

annum is only Rs. 90,000. Therefore, the petitioner submits that there is no hope of reviving the respondent-company. In addition, at paragraph 12

of the reply affidavit (page 33 of the typed set of pleadings) the petitioners has specifically stated that there is no hope of revival of the respondent-

company. This is not been controverted by the respondent company in the pleadings by way of evidence. Thus, in the present financial state of

affairs, there is no hope whatsoever of the respondent company becoming a viable unit. In addition, the respondent has not paid any interest to the

financial institution particularly the Tamil Nadu Industrial Investment Corporation.

(iii) The activities of the respondent have virtually come to a standstill. The respondent-company has a press mould with installed capacity of

30,000 kgs. per annum and hand mould of 4,800 kgs per annum. The actual capacity utilisation is as follows :

Press mould	Hand mould
89 90 91	89 90 91
Production 168 10 Nil	1420 643 784
Kg. Kg. Kg.	Kg. Kg. Kg.
Capacity utilisation 0.56%	0.03% 0.00% 29.58% 13.39% 16.33%

9. This shows that the press mould machinery is lying unutilised whereas the same has been purchased for Rs. 12.32 lakhs by taking a term loan

from the Tamil Nadu Industrial Investment Corporation. The figures mentioned above have been taken from exhibits P-18 and P-19, namely the

balance-sheet filed by the respondent company itself.

10. Mr. Arvind P. Datar, in support of his contentions, has invited my attention to the following two decisions reported in :

1. Seth Mohan Lal v. Grain Chambers Ltd. [1968] 38 Comp Cas 543.

11. The Supreme Court, at page 557 of the said judgment, has observed as follows :

Substratum of the company is said to have disappeared when the object for which it was incorporated has substantially failed, or when it is

impossible to carry on the business of the company except at a loss, or the existing and possible assets are insufficient to meet the existing

liabilities.

12. The next decision cited by Mr. Arvind P Datar is reported in Verendra Singh Bhandari v. Nandalal Bhandari and Sons Ltd. [1982] 52 Comp

Cas 36. The Madhya Pradesh High Court, in the said decision at page 51, held as follows :

The substratum of a company disappears when -

(a) the subject-matter of the company is gone, or

(b) the object for which it was incorporated has substantially failed or,

(c) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of trading

at a profit could be attained, or

(d) the existing and probable assets are insufficient to meet the existing liabilities.

13. According to Mr. Arvind P. Datar, the principles enunciated in the above case would squarely apply to the present case. As the substratum,

of the respondent-company has failed and there is no hope of the reviving the same. it is submitted that the respondent company is liable to be

wound up on the first ground alone.

14. Per contra, Mrs. Hema Sampath submits that the petitioner must prove that -

(a) the subject matter of the company is gone

(b) the object for which it was incorporated has substantially failed and

(c) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of trading

at a profit could be attained.

15. The object of the company set out in paragraph 5 of the petitioner are wide. Thus, even according to the petitioner, the company has enough

assets and the profit is very good. The business grounded to a halt immediately after the inception due to paucity of funds. The bank refused to

extend facilities as the winding up petition was pending. If a business can go on and grow. winding up should not be resorted to. Referring to the

decision in *Kumarapuram Gopalakrishnan ananthakrishnan v. Burdwan Cutwa Railway Company Ltd.* [1978] 48 Comp Cas. 211 Mrs. Hema

Sampath submits that the petition merely states that the substratum has disappeared without any basis and with mala fide intentions. The balance-

sheets filed are subsequent to the filing of the above petition and the company can be restarted at any time if the Damocles sword of the petition is

removed. The decision in *Kumarapuram gopalakrishnan ananthakrishnan's* case [1978] 48 Comp Cas 211 deals exhaustively with the meaning of

substratum"" of business. The petitioner must prove the three things mentioned above. The petitioner has failed to prove the same as alleged.

According to the respondent, the company has enough assets and the project is very good and the business can go up and grow and winding up

could not be resorted to and the company can be restarted at any time if the

Damocles sword of the petition is removed.

16. I am unable to appreciate the contention of learned counsel for the respondent. In my view, the petitioner has made out a prima facie case in

the petition. If the averments in the petition are read with the documents, it will be seen that -

(a) it is impossible to restart the company or carry on the business except at a loss, as could be seen from exhibits P-1, P-18 and P-19.

(b) There has been complete lack of probity in carrying on the business of the company (as could be seen from exhibits P-6 and P-7);

(c) The principles of partnership apply to the present case and the facts justify dissolution and consequently winding up of the company.

(d) The petitioner has been removed from the board of directors and excluded from the management despite an understanding that he would be

ade a director and particular in the management ;

(e) The majority of the creditors/shareholders have supported the winding up.

17. While referring to the argument of Mrs. Hema Sampath to exhibit P-14, Mr.Arvind P Datar submits that it is misleading. The petitioner's stay at

Bombay was with reference to obtaining the loan from the Tamil Nadu Industrial Investment Corporation. The petitioner went to Madurai only to be a

director and participate in the management of the respondent company. The petitioner also strongly denies the allegations that he had made any

complaint to the bank. On the contrary, when the Punjab National Bank refused to extend any facility he pleaded his National Savings Certificate

and obtained a loan for the company as evidenced by exhibit p-7. The offer of quitting the company in exhibits p-8 and p-9 was never

implemented. On the contrary, steps were taken to remove the petitioner within two months thereafter. Exhibits p-7, p-9, p-10 and p-11 and p-12

do not reveal any subversive activity on the part of the petitioner. According to Mr.Arvind P. Dattar, these documents show the serious

misunderstanding/lack of confidence between the petitioner and the managing director of the respondent-company which culminated in the

expulsion of the petitioner and the filing of the present winding up petition. It is pertinent to note that, even after the removal of the petitioner, there

has been no effort to revive or properly manage the affairs of the respondent. Mr.Arvind P Datar once again strongly denies that the petitioner was

making any complaint to the bank or to the dealers or instigating the workers. The respondent has not let in any oral or documentary evidence to substantiate the serious allegations. The petitioner further submits that he and his family have invested almost Rs. 2 lakhs by way of shares, loans and that they would not indulge in any activity which would harm the interest of the company and that it is only the unreasonable conduct of PV the managing director of the company his financial irregularities with the banks, and expulsion of the petitioner that has led to the filing of the present winding up petition. Copies of the orders of the courts below referred to by the respondents have also been marked as documents, exhibits R-1 and R-2 before his court. Further, Mr. Arvind P. Datar says that a civil revision petition was filed before this court against an order in C.M.A. No 58 of 1989, but the same could not be pursued as the matter had become infructuous and that the petitioner decided to return to Bombay. Hence it is false on the part of the respondent to state that the petitioner filed the winding up petition only after these orders were passed. On the contrary, exhibit P-13 dated March 8, 1989, is a notice of the meeting to remove the petitioner and the petitioner has issued notice for winding up the company on March 9, 1989, itself and filed the present company petition soon thereafter. The petitioner, therefore, submits that the respondent is not correct in the status that no prima facie case has been made out.

18. In my opinion, the petitioner has established that the substratum has gone on the basis of exhibits P-1, P-18 and P-19. The grounds for winding up by the respondent-company on this aspect has been elaborated argued by Mr. Arvind P. Datar at the time of hearing. It is seen that the substratum of the company had disappeared because the object for which it was incorporated, namely, manufacturing of FRP light fittings, has completely failed and the respondent company has not been able to manufacture and sell such products on a commercial basis. As per exhibit P-1 the company was to break even at 47.5% and the sales at 80% capacity were to be Rs. 55 lakhs. Therefore, the company to break even must have sales of Rs. 32.65 lakhs. However, from the balance-sheets for the last three years which have been filed as exhibits P-18 and P-19, it is seen that the financial position of the respondent-company is not good and satisfactory. The respondent-company, as per the statements furnished

above in the paragraph supra, has to repay loans of Rs. 15.5.lakhs and has to carry forward loss of Rs. 8.8 lakhs,whereas the gross sales per

annum are only Rs. 90,000. Therefore, in my view,the submissions made by Mr. Arvind P. datar ont this ground are quite acceptable to this court

and, in my view, there is no hope of or scope for revival of the respondent company. In additiona, the petitioner has also stated in his reply-

affidavit that there is no hope of revival of the respondent-company which has not been controverted by the respondent in the pleading or byw ay

of evidence. Thus, in the presnet financial state of affairs, there is no hope whatsoever of the respondent-compny becoming a viable unit. In

addition, the respondent has not paid any interest to the financial instituion, particularly the Tamilnadu Industrial Investment Corporation. The

activities of the respondent have virtually come to a standstill. The perticulars given above inregard to the press mould and the hand mould in the

paragraphs supra show that the press mould and the hand mould in the pragraphs supra show that the press mould machinery is lying unutilised

whereas the same has been purchased for Rs. 12.32 lakhs by taking term loan from the Tamilnadu Industrial Investment Corporation. The figures

mentioned above have been taken from exhibits P-18 and P-19 namely, the balancesheet filed by the respondent-company itself. For the foregoing

reasons, I am of the view that the substratum of the respondent company had failed and that there is absolutely no scope or hope of revival of the

respondent- company and hence the respondent-company is liable to be would up on the first ground alone.

19. Ground No. 2: if the 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 is no hope or possibility of smooth and efficient continuance of the company as a commercial

concern, there may arise a case of winding up on the just and equitable ground :

20. The Supreme Court in the decision in Hind Overseas P. Ltd. v. Raghunth Prasad Jhunihunwalla [1976] 46 Comp Cas 91 has laid down the

above principles which have been made as ground No. 2. As mentioned above, ground no. 2 would, in my mind, apply to the present case as

there has been lack of probity, and there is no hope or possibility of continuance of business. The petitioner and his family invested inthe share

capital of the respondent-company on the basis that the would be made a director. Although the funds were invested in March/December, 1986, the petitioner was made a director only in May, 1988, vide exhibit P-5 Right from the beginning, the managing director of the respondent company, PV, treated the petitioner with discourtesy and a humiliating manner. Further, the petitioner's salary has never been paid till date and the managing director of the company, PV has, summoned and extraordinary general body meeting and removed the petitioner from the board of directors as could be seen from exhibits P-13 and P-14. Besides the above, PV was also responsible for serious financial irregularities with the Punjab National Bank which led the bank to threaten to instituting criminal proceedings as could be seen from exhibit P-6. The said exhibit also sets out serious irregularities, Thereafter, certain amounts were advanced by the New Bank of India, Madurai Branch, on the basis of the National Savings Certificate of the petitioner. These have also not been repaid till date. No attempt has been made to run the respondent-company in a proper manner even after the removal of the petitioner and there has been no revival of the company's business. The respondent has taken the stand that, due to the winding up proceedings, no financial institution is willing to advance money, in my view, this is an incorrect and unsubstantiated plea. No bank is willing to lend money because of serious financial irregularities with the Punjab National Bank and also because untrue documents were filed with the State Bank of India, Kuppam branch. The details are set out in the affidavit filed by the petitioner in Company Application No, 264 of 1989 in the above company petition and these allegations have not been denied in the counter-affidavit. Therefore, the manner in which the petitioner has been humiliated, his salary not being paid and the irregular dealings with the bank will all, in my opinion, clearly show lack of probity. There is no hope or possibility of continuance of business. The financial position has been set out in detail in ground No. 1 and the same will clearly establish that there is no hope of revival of the company.

21. Mrs. Hema Sampath submits that in a petition filed u/s 433(f), the allegations therein are all of primary importance and that a prima facie case

has got to be made out. According to learned counsel, the allegations mentioned in the reveal purely personal animosities and that too only because

the petitioner was constantly complaining to the banks about the running of the company of the company and, due to his feeding false information

to the banks, the company has to face financial constraints. When personal animosities cropped up, the managing director of the company showed

his bona fides by offering to quit the company, vide exhibits, P-8 and P-9 but the petitioner did not take up the offer for obvious reasons,

Referring to exhibits P-7, P-9 and P-10 to P-12 Mrs. Hema Samapath submits that these exhibits clearly reveal the subversive activities of the

petitioner. He was constantly in touch with the banks and the dealers and was spreading tales about the running of the company and he also tried

to turn the workers against the company and due to these, the company could not function smoothly. An extraordinary meeting was to be called to

remove the petitioner from the board under exhibit P-13. The petitioner filed O.S. No. 222 of 1989 in the sub-court, Madurai, for an injunction

restraining the company from passing any resolution removing the petitioner from the board. Injunction was refused. The appeal C.M.A. No. 58 of

1989 before the first Additional District Judge Madurai, was also dismissed. Copies of the orders have also been marked as exhibits R-1 and R-2

in these proceedings. As the petitioner could not achieve his end, he rushed to this court to file the above petition with a mala fide intention to

extract an eye for an eye and a tooth for a tooth. So, Mrs. Hema Sapath submits that a prima facie case not having been made out, the petition

may be dismissed. In my opinion, the argument of Mrs. Hema Sapathy is not tenable. No attempt has been made to run the respondent-company in

a proper manner even after the removal of the petitioner and there has been no revival of the company's business. No bank was willing to lend

money because of the serious financial irregularities with the Punjab National Bank and also because false documents were filed with the State

Bank of India. That apart, the amounts which were advanced by the New Bank of India, Madurai branch, on the basis of the National Savings

Certificate of the petitioner have also been not repaid till date. Hence there is a case of complete deadlock in the company on account of lack of

probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial

concern. The company in question, in my opinion, has got to be wound up the just and equitable ground.

22. Ground No. 3: The respondent company is really in the nature of a partnership. The facts are such that they would justify dissolution of the firm and would consequently justify winding up of the company.

23. Elaborating the said contention, Mr. Arvind P. Datar submits that, according to PV, and relatives will be its shareholders. The petitioner and

members of his family purchased shares and advanced loans only on the basis that the petitioner would be made a director and, for this purpose,

the petitioner left his residence in Bombay and settled down in Madurai. The company was run on the understanding that both PV and the

petitioner would be directors and participate in the management of the company. If the private limited company, which is in the nature of a

partnership, is based on an understanding that a certain person would be a director, his expulsion from office would be a ground for winding up.

The House of Lords in *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All ER 492 has laid down the following guidelines and guiding principles

for winding up of private companies which are in the nature of a partnership under the just and equitable clause :

(i) the company should be formed on the basis of personal relationship and mutual confidence.

(ii) There should be an agreement or understanding that some of the shareholders would participate in the conduct of the business as in the case of a partnership.

(iii) The exclusion of a director/members from management would justify the winding up even if removal of the director is in exercise of the powers

of the majority shareholders.

24. A similar view has been taken in *Lundie Bors. Ltd. In re.* [1956] 35 Comp Case 827. The House of Lord's Judgment has been followed by

the court of Appeal in *ABC Chewing Gum Ltd. In re.*, [1975] 1 All ER 1017. In this case, the relevant passage from the decision of the House of

Lords is quoted and a xerox copy thereof has been enclosed.

25. Under the Partnership Act, section 44 stipulates the clauses which would justify dissolution of the firm, it was submitted that the provisions of

clause (c), (d), and (g) of section 44 would squarely apply. The relevant clauses

are set out below :

44(c). that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard

being had to the nature of the business.

26. The petitioner submits that the serious irregularities committed by the said PV with the Punjab National Bank as per exhibit P-6 the New Bank

of India as per exhibit P-7 and the incorrect statement submitted to the state Bank of India, Kappalure branch, Madurai, have prejudicially affected

the business, In view of the above, no bank is willing to offer credit facilities to PV as could be seen from pleading and other documents.

44 (d) that a partner other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs

of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for

the other partners to carry on the business in partnership with him.

27. There was an understanding that the petitioner would participate in the management and function as a director. This understanding has been

violated and the petitioner was removed in a humiliating manner on the ground that he was indulging in activities against the interest of the company

as could be seen from exhibits P-13 and P-14 in the typed set of documents.

44 (f) that the business of the firm cannot be carried on save at a loss.

28. The facts have already been mentioned in ground No. 1 above which indicate that the company's business cannot be carried on without loss.

44 (g) on any other ground which renders it just and equitable that the firm should be dissolved.

29. There is a serious misunderstanding between the petitioner and PBV who were like to main partners of a firm. PV has made serious and

baseless allegations against the petitioner with the intention of removing him and keeping back the investments and loans given by the petitioner and

his family. Exhibits P-8, P-9, P-11 and P-12 and P-15 clearly show the bitter animosity between the two persons which has resulted in a complete

deadlock in the affairs of the company. Gower, his principles of Modern Company Law (IV Edition page 662), states that the just and equitable

clause can be invoked on the following four grounds.

- (a) expulsion from office,
- (b) justifiable loss of confidence,
- (c) deadlock
- (d) failure of substratum.

30. It is stated by Mr. Arvind . Datara that all the above four conditions are satisfied in the present case and that the facts would, therefore, justify the winding up of the respondent-company. I see much force in the contention of learned counsel for the petitioner.

31. Mrs. Hema Sampath, in reply to the above contentions, submits that the principles of dissolution of partnership cannot be liberally invoked in winding up petition. Learned counsel invited my attention to the judgment in Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, . In the said decision, at page 574 in paragraph 13, the Supreme Court held as under :

When more than one family or several friends and relatives together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked.

Besides, it is only when 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 is no hope or possibility of smooth and efficient continuance of the company as a commercial

concern, there may arise a case for winding up on the just and equitable ground. In a given case the 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. On the

allegations and submissions in the present case, we are not prepared to extend these principles to the present company.

32. But, in my view, the said decision is distinguishable on the facts and circumstances of the present case, Various other decisions of this court and

other courts, according to Mrs. Hema Sampath, have clearly laid down that a company cannot be wound up merely because the following

conditions exist:

- (i) company working at a loss;

- (ii) misconduct of directors;
- (iii) oppression of some shareholders ;
- (iv) expulsion of a director even if the company is in poor shape financially;
- (v) factions and quarrels among directors.

33. Mrs.Hema Sampath submits that a prima facie case has not been made out by the petitioner, that as he could not stall his expulsion from

the company through a civil proceedings, he rushed to the company court that winding up u/s 493(f) is a purely discretionary relief, that the

substratum of the company has not disappeared, that the principle of partnership cannot be applied to the present case, that personal animosities

between two directors cannot be permitted to bring about the closure of a company, and that, therefore, this court may not be used by the

petitioner to claim compensation for his real or imaginary losses and that the petitioner may be dismissed with exemplary costs She invited my

attention to the following two decisions in :

1. In Re: Sulekha Works Ltd., , wherein it was held as under (headnote;)

Companies Act [1956] s. 433(f) - Scope - "Just and equitable" is not ejusdem generis with the other clauses for winding up in the statute.

Companies Act [1956] S. 433(f) - Winding up petition by contributory - Petitioner not to be allowed to take advantage of his own wrong.

Companies Act [1956] ss. 433, 439 - Winding up petition presented not for bona fide object of obtaining winding up order but for an ulterior

purposes - petition held to be ill-advised."

2. G. Kasturi v. Marali [1990] 2 LW 177; [1992] 74 Comp Case 661

34. These two decisions have cited for this court to refer to them for a detailed analysis of the principles of winding up a company u/s 433(f) of the

act. I am unable to agree with the contention raised by Mrs. Hema Sampath on this point. The principles of dissolution of a partnership can be

involved if the company is in the nature of a partnership. The petitioner has specifically alleged that the present company is in the nature of a

partnership and liable to be dissolved as could be seen from paragraph 21 of the petition. This averment has not been denied in the counter-affidavit.

I have carefully analysed the reasons mentioned in the arguments of Mr. Arvind Datar on ground No. 3 mentioned above. I am of the view that the

principles of dissolution of a partnership would apply and justify the winding up of the respondent-company. The facts of the present case would

also justify this court in exercising its discretion and ordering winding up of the respondent-company. The petitioner had been thrown out of the

management of the company unjustifiable; and the winding up petition has been filed by the petitioner on the ground that it is just and equitable to

wind up petition to stall his expulsion from the company. The notice for this petition was given even before the notice for the extraordinary general

meeting was received under exhibits P-13 and P-16.

35. Referring to the decision in *In Re: Sulekha Works Ltd.*, referred to by learned counsel for the respondent, Mr. Arvind Datar submits that it is

not correct to say that the decision related to the power of the winding up court in reopening the balance-sheet and the court also decided the

effect of the dispute between the main company and the managing agency company. Similarly, the reference to the decision of our High court in *G.*

Kasturi v. N. Murali [1992] 74 Comp Case 661, is also not justified. This was a case of oppression and mismanagement between, the editors and

a director of the "Hindu". However the court specifically observed that, if the company is a small private limited company, the principles of

partnership would apply and, since the "Hindu", the principles of partnership, these principles were not invoked. On facts, it was held therein that there

was no oppression/mismanagement. In this case, *Mishra J. and Bakthavatsala, J.* held that "the principle of quasi-partnership is applicable to a

small private limited company founded on personal relationship involving mutual confidence among members".

36. The next ground urged by Mr. Arvind Datar is as follows:

37. Ground No. 4: There is no alternative remedy except to wind up the company.

38. u/s 433(2), it is stipulated that, if a petition is presented for winding up under the just and equitable clause, the court may refuse an order of

winding up if it is of opinion that some other remedy is available and the petitioner is acting unreasonably in seeking to have the company wound up

instead of pursuing the other remedy. Elaborating this contention, Mr. Arvind Datar submits that (i) Alternative remedy : The petitioner submits that

he has no remedy except to wind up the company. He has invested monies in the

remedy except to wind up the company. he has invested monies in the share capital and he and therelatives have advanced monies by way of loans. In view of the petitioner from the office of the respondent-company, expulsion of the petitioner from the office of the director and for other reasons mentioned above the petitioner would have not other effective remedy either under sections 397 and 398 or other provisions of th Act, or by filing a suit for recovery of the amount advanced. The company was started on the basis of mutual confidence for a particualr business objectives, viz. manufacturing of light fittings and that the same has completely failed. There no scope or scope of reviving the company. Hence, there is no alternative remedy except of wind up of the company. In such a situation, it has been held that the affiars of the company should be terminated as soon as possible, Reliance was placed on the decision in Yenidje Tobacco Co. ltd., In re [1916] 2 Ch. 426, wherein it was observed by Lord Cozens-hardy M.R. as under (at page 432):

If ever there was a case of deadlock I thing it exist here; but whether it exists or not I think the cirumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties whent the company was formed and which ought to be terminted as soon as possible.

39. This decision was quoted with the approval by apex court of our country in the decision inHind Overseas Pvt. Ltd. v. Raghunath Prasad Jhunjhunwalla [1976] 46 Comp Cas. 91:

In an application for the winding up of a company under the just and equitable clause, allegations in the petition are of primary importance, A prima facie case has to be made out before the court can take any action in the matter., Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the application has to be dismissed. The interest of the applicant alone is not of predominant consideration. The interest of the shareholders of the company as a whole , apart from those of other interests, have to be kept in mind at the time of consideration as to whether the application should be admitted on the allegations mentioned in the petition.

40. It was, therefore, submitted that the above passage will clearly apply to the facts of the present case. (ii) Acting unreasonably: The petitioner

further submits that he has not acted unreasonably and had even accepted to settle the matter in accordance with the directions of this court for Rs.

3 lakhs payable in two or three instalments. The matter was adjourned on two occasions to enable learned counsel for the respondent-company to

consider this proposal. But, however, this order was not accepted on behalf of the respondent-company. This is by the way.

41. In reply to the above submissions. Mrs, Hema Sampath submits that if the petitioner has another remedy to have the matter rectified, as for

instance an application u/s 397 or 398 or an injunction to restrain ultra vires or illegal acts, the court will not make an order u/s 433(f). She refers

to the decisions in *Lakenath Gupta v. Credits Pvt.Ltd.* [1968] 38 Comp Cas 599 I am unable to accept this contention. In my view, there is no

alternative remedy and in view of the submission made by Mr. Arvind Datar in ground No. 4 viz., there is no other option except to file the present

petition. In my event, there is no pleading on behalf of the respondent that any alternative remedy is available. This issue is answered accordingly.

42. Ground No. 5 : Majority of creditors/shareholders have supported the winding up.

43. Learned counsel for the petitioner has submitted that the supporting affidavit of three shareholders, three creditors and two shareholders cum-

creditors have been filed and that these are the majority of the shareholders/creditors and that they have filed affidavits to support the winding up of

the company and that there is no affidavit opposing the winding up.

44. I have given my deep and anxious consideration to the grounds raised by the both parties and the arguments advanced by both parties. The

financial position of the company is beyond redemption as the sales are only Rs. 90,000 per annum as against the outstanding loans of Rs. 15.3

lakhs and accumulated carry forward loss of Rs. 8.8 lakhs. The expensive machinery of Rs. 12 lakhs was not utilised during the year 1991 and the

affairs of the respondent-company have virtually come to a standstill. There is evidence to establish that banks have refused credit facilities because

of the present position. The reference to the decision of the Calcutta High Court in *Kumarapuram Gopalakrishnan Ananthakrishnan v. Burdwan-*

Cutwa /railway Co. Ltd. [1978] 48 Comp Cas 211, is not correct. In the case, the proposal to run a Railway could not be implemented as the railway business was taken over by the Government. However the company had no creditor or liabilities and had sufficient share capital to carry on other business specified in the memorandum of association. In the present case, the respondent is unable to repay even the interest and the share capital has been completely wiped out.

45. Replying to the arguments of Mrs. Hema Sampath, Mr. Arvind Datta submitted that the balance-sheet relates to a period after the winding up petition was filed and that, therefore, the same cannot be relied on by the petitioner. He further submits that although the balance-sheet relates to a period after the winding up petition was filed, this court is entitled to rely on the subsequent events which will support the grounds for the winding up.

For this proposition, he relied on the decision of our High Court in Ramakrishnan Industries (P) Ltd. Ramakrishnan [1988] 64 Comp Cas 425. In

the said decision, the Division Bench of our High Court has also relied on the judgment of the Supreme Court in the Needle Industries (India)

Ltd v. Needle Industries Newey (India) Holdings Ltd. [1981] 51 Comp Cas 743, whereunder the Supreme Court observed that there is no

prohibition to either rely on the subsequent events as a piece of evidence to sustain the grounds already alleged or where, having regard to the

question to be decided, if the court considers it necessary to base a decision on the altered circumstances in order to shorten the litigation or to do

complete justice between parties.

46. On a consideration of the entire facts and circumstances of the present case, I am of the view that there is complete failure of the substratum

and that there is absolutely no hope or scope of revival of the respondent-company. In my view, this ground alone is sufficient to order winding up

of the respondent-company. Accordingly, this company's petition is allowed and the respondent-company is ordered to be wound up under the

provisions of the act. However, there will be no order as to costs. The petitioner will deposit a sum of Rs. 2,500 with the official liquidator within

four weeks from today.