
(2000) 12 BOM CK 0014
In the Bombay High Court
Case No : Company Appeal No. 6-V of 1994

Vassant Holiday Homes Pvt. Ltd. and Others	APPELLANT
Vs	
Madan V. Prabhu	RESPONDENT

Date of Decision : 22-12-2000

Acts Referred:

Companies Act, 1956 — Section 397, 398, 428, 433, 439

Citation : (2001) 3 BomCR 493 : (2003) 116 CompCas 172 : (2004) 50 SCL 705

Hon'ble Judges : R.G. Deshpande, J; Pratibha Upasani, J

Bench : Division Bench

Advocate : S.K. Kakodkar and R.V. Kamat, for the Appellant; M.S. Usgaonkar and V.P. Thali, for the Respondent

Final Decision : Allowed

Judgement

R.G. Deshpande, J.—This is a company appeal by original respondents; u/s 483 of the Companies Act/ 1956 ; challenging the order dated September 30, 1994, passed by the single judge of this court in Company Petition No. 2-V of 1992 whereby the learned single judge of this court admitted the company petition and ordered to issue advertisement which was to be published on July 31, 1995, if in the intervening period the dispute was not settled between the parties. Needless to mention that the learned single judge by way of an interim arrangement appointed the parties themselves as receiver by rotation as is directed in the order.

2. The facts of the case as alleged in the petition, in short are as under :

3. The present appellants Nos. 2 and 3 are the husband and wife whereas respondent Madan is the real younger brother of appellant No. 2 Umesh. This is sufficient to suggest that this is a business initiated by the family members.

4. Initially both these brothers for service purposes were abroad for quite sometime. Umesh, appellant No. 2 lost his job there and he returned to India. However, the respondent Madan continued to stay and work abroad.

5. After appellant No. 2 returned to India, both the brothers thought of starting a hotel business or industry in India, and to be precise in Goa. Both the brothers originally belong to this State of the country. In furtherance of the idea which was entertained by the brothers, some land was purchased at Vagator, Bardez, Goa, whereon the necessary construction of the hotel building was started. According to the respondent, this business or industry was started with a clear understanding between the brothers that the shareholding was 50 per cent, each and the business would be in the shape of partnership. According to the respondent/petitioner since he was still continuing his service or job abroad, he was not in a position to take part and participate in the business directly nor was it expected from him. However, according to him, it was understood between the brothers that appellant No. 2 was to do all the needful in furtherance of the scheme. The parties agreed that the finance would be raised by sale of their two flats at Kalina, Santa Cruz, Bombay. The flats were standing in the name of the two brothers at Bombay. According to the petitioner it was agreed that the petitioner and respondent No. 2 would bring the cash realised from the sale of the flats in the business. The petitioner states that for the purposes of the sale of the flat, he had given a power of attorney in favour of respondent No. 2 and the flat of the petitioner was sold for Rs. 4,00,000. The petitioner further states that he remitted the following amount from abroad. Rs. 1,00,000 in the year 1985, Rs. 75,000 by draft on April 30, 1986, and Rs. 1,00,000 in the end of 1987. From the contribution of the petitioner and respondent No. 2, necessary land to which a reference is made above, was purchased on May 12, 1986. The land is purchased only in the name of respondent No. 2 for a consideration of Rs. 3,35,000. According to the petitioner there was a joint account bearing No. N. R. E. 29261 in the Canara Bank, Kalina Branch, Bombay, where the petitioner used to remit the amount which was subsequently, according to the petitioner withdrawn by respondent No. 2. According to the petitioner initially the said account stood only in the name of the petitioner. However, it appears that subsequently, the account was converted into joint account. It is also clear from the record that for the project which was undertaken, the parties approached the Economic Trading Corporation of Goa for finances. After completing the necessary formalities, respondent No. 1-company was incorporated on December 9, 1986. It is the case of the petitioner that since it was a joint venture the company was named in the memory of their father Vasant. The name of the company is "Vasant Holiday Home Pvt. Ltd."

6. Appellant No. 1/original respondent No. 1-company is a private company limited by shares under the Companies Act, 1956, having its registered office at Vagator, Bardez, Goa. The nominal capital of the company is Rs. 12,25,000 divided into 12,250 shares of Rs. 100 each. The objects being, to carry on the business of resort, motel, hotel, restaurant, flight kitchen, beer houses, refreshments and all other like activities and facilities for the customers to which a reference is made in details in paragraph 3 of the petition, and also in the memorandum of association.

7. Appellants Nos. 2 and 3 happened to be the subscribers to the memorandum of association of the company. Appellant No. 2 Umesh V. Prabhu is the managing director right from the beginning. Respondent No. 3 and respondent (original petitioner) Madan V. Prabhu also happened to be the directors of the company and members of the board of directors.

8. Since the petitioner was abroad, according to the petitioner, respondents Nos. 2 and 3, i.e., the wife of respondent No. 2 subscribed to the memorandum of the association of the company with ten shares each of Rs. 100. It is the case of the petitioner, though, for the purpose of business a company was to be formed but factually and in substance it remained a family business with a partnership of the petitioner and respondent No. 2 with equal shares. According to him, the intervention of respondent No. 3 was for the limited purpose of carrying out necessary formalities which the petitioner could not do due to his absence.

9. After the return of the petitioner to India, he independently started his other business in the name of Sai Trading and Contracting Enterprises. The petitioner further stated that for the purposes of obtaining financial assistance from the Economic Development Corporation (EDC) he stood as guarantor for the company and huge amount of Rs. 33,00,000 and subsidy of 25 per cent, on the project value was given by EDC. However, prior to that the EDC had imposed a condition that the promoters contribution should be Rs. 10,00,000. In short, after completing the other formalities and getting the necessary plan of the building approved, the construction work actually started. However, this was done by the Sai Trading and Contracting Enterprises of the petitioner. The petitioner had authorised respondent No. 2 to operate the accounts of the Sai Trading and Contracting Enterprises and also of respondent No. 1-company. According to the petitioner, since the construction company was an independent company of the petitioner, and though the petitioner had carried out the work of construction worth Rs. 40,72,756 he was actually paid Rs. 37,71,363. In short, according to him, respondent No. 1-company was still to pay the remaining balance to the petitioner. The petitioner further pointed out that from time to time, he contributed funds for respondent No. 1-company.

10. It is the case of the petitioner that after he returned from abroad, respondent No. 3 Pranothi had resigned from the directorship of the company by her letter dated June 8, 1989. According to the petitioner, the resignation was accepted. Necessary change was also communicated to the Registrar of Companies.

11. It is the grievance of the petitioner that he came to know that the partnership which was commenced on December 9, 1986, had the initial nominal capital of partnership which was shown as Rs. 10.25 lakhs. Rs. 10,00,000 being as the value of the property contributed by respondent No. 2 and Rs. 20,000 of respondent No. 3 and Rs. 5,000 of respondent No. 1-company. The petitioner further alleges that there was a deed of dissolution of partnership on February 4, 1987. According to the deed of dissolution, the petitioner alleges that respondent

No. 1 had taken over the running business along with all the assets and liabilities and the balance said to be due to respondents Nos. 2 and 3 was Rs. 10,00,000 and Rs. 20,000 respectively which was shown by way of loan in the book of respondent No. 1 till its settlement.

12. The petitioner further alleged that on April 30, 1987, allotment of equity shares was done, out of which 8,990 were allotted to respondent No. 2 i.e., Umesh and 990 equity shares were allotted to Smt. Pranoti. The necessary return of allotment in Form No. 2 u/s 75(1) dated May 5, 1987, was also submitted by respondent No. 2 Umesh. According to the petitioner, the record further indicated a further allotment of 2,250 shares to both respondents Nos. 2 and 3 equally. Since no allotment of shares was shown against the petitioner he was naturally enraged and his suspicion about the behaviour of respondents Nos. 2 and 3 by this act of non-allotment of shares to him was further confirmed. The petitioner initiated a civil suit for necessary allotment of 2,250 shares in his favour. The differences between the brothers took an ugly shape which compelled them to depart from each other. In the civil suit referred to above, it appears that respondent No. 2 did admit that the petitioner had paid Rs. 2,25,000 but according to respondent No. 2, it was on some different count. However, the fact remained that as admitted by respondent No. 2, 1, 125 shares had been subsequently allotted to the petitioner out of the cash consideration paid by the petitioner.

13. The petitioner having realised that respondents Nos. 2 and 3 were virtually driving out the petitioner from the business and was being totally oppressed, the petitioner withdrew all the authorities which he had given in favour of respondent No. 2. Necessary complaints were made to the Registrar of Companies by the petitioner. He also came to know that on the day the partnership was registered, it was only between respondents Nos. 2 and 3 and the company. According to him, he came to know that the land on which the hotel complex was constructed was shown to be belonging to respondent No. 2 alone and was brought to the business showing market value as Rs. 12,00,000 and this was as contribution towards the company. According to the petitioner, in the annual general meeting dated July 29, 1991 of the company, the petitioner was voted out and was shown to have retired by rotation from the post of director. The resolution having been taken by respondents Nos. 2 and 3 by majority. In short, it was shown that the petitioner was not re-elected.

14. The petitioner further alleged that having realised that the company was heavily indebted to EDC and after having realised that the petitioner has been totally excluded from the business and a deadlock has actually come into existence and further in spite of respondent No. 3 having resigned, respondent No. 2 alone was running the company, the petitioner was compelled to approach the concerned authorities, with various complaints against the respondents. The misdeeds on the part of the respondents prompted the petitioner to approach the High Court by filing a petition u/s 433(f) of the Companies Act, 1956 (hereinafter

referred to as "the Act" for the purpose of brevity). It is the case of the appellants/original respondents that the petitioner was not the promoter nor did he make any contribution towards the project. All the allegations made in the petition are totally denied by them.

15. When the matter came up for admission before the High Court and after hearing the parties at length, the learned single judge observed that he was convinced, on the facts and circumstances of the case, that it was a case for winding up of the company, else great prejudice was likely to be caused to the petitioner.

16. No doubt, the learned single judge also thought of any other alternative remedy, if it was available to the petitioner ; as was contended by the respondents before him. The learned single judge reached the conclusion that there was no efficacious and alternative remedy much less u/s 234/247 or under Sections 397 and 398 of the Act.

17. We have heard Sri Kakodkar, the learned senior advocate for the appellants and Sri M.S. Usgaonkar, the learned senior advocate for the present respondent in this appeal. Sri Kakodkar, the learned advocate vehemently contended that the facts as are disclosed indicate that the company was incorporated with ten shares each subscribed by respondents Nos. 2 and 3. Subsequently 8,990 shares were allotted to the respondent Umesh and 990 to respondent No. 3 Pranothi. These shares were allotted on April 30, 1987. Thereafter an allotment was made on April 3, 1989, showing 125 shares to respondent No. 2 and 1,125 shares in the name of the original petitioner. Sri Kakodkar argued that, in fact, an allotment of the shares in the name of the present respondent Madan was not entered in the register of members. There is no averment to that effect also in the company petition filed by the respondent. Sri Kakodkar further argued that the alleged resignation of appellant No. 3 Pranothi was not accepted by the board of directors. According to him, resolution was passed on February 19, 1990, by the board contending that Pranothi appellant No. 3 is the director, since her resignation was not accepted. Necessary communication through Form No. 32 was also given to the Registrar of Companies. The present respondent/original petitioner was voted out from the directorship on July 29, 1991, and the present company petition was filed by the respondent Madan on January 13, 1992.

18. Sri Kakodkar, the learned advocate, vehemently urged that the company petition, at the instance of the respondent, has been wrongly entertained as it was not maintainable at the instance of the respondent Madan. Sri Kakodkar pointed out that the petitioner appeared to have approached the company court in his capacity as a contributory of the company. But according to Sri Kakodkar, in fact, he failed to show that he is a contributory of the company so as to maintain the petition against the company. Sri Kakodkar scathingly assailed the judgment of the learned single judge, arguing that, but for the observations that prima facie the court felt that it was a fit case for winding up, in fact, according to him what was the prima facie case made out is not made clear in the

judgment. No reasons whatsoever for this view are given by the learned judge. According to Sri Kakodkar, the learned single judge appeared to have been swayed emotionally by the fact that the parties appear to be real brothers and appellant No. 3 to be the wife of appellant No. 2. Sri Kakodkar further argued that the advertisements which were published in the newspapers, to which a reference is made, indicating the names of the two brothers along with photographs were not sufficient to show that either the petitioner was a contributory or that he was a founder member and a signatory to the memorandum of association. Sri Kakodkar further argued that the pass book bearing Account No. N. R. E. 29261 to which a reference is made by the petitioner in fact is a duplicate pass book. According to Sri Kakodkar, the original pass book which was produced by appellant No. 2 showed in fact the correct picture that appellant No. 2 was the original account holder and the name of the respondent Madan was introduced subsequently on January 23, 1994. According to Sri Kakodkar, this important piece of evidence has been very lightly brushed aside by the learned single judge. Sri Kakodkar further argued that the learned single judge was wrong in reaching the conclusion that the petitioner was being excluded from the business and the management of the company and further that such exclusion entitled the petitioner to ask for winding up of the company. He further argued that the petitioner was neither a member nor a contributory of the company nor was he a subscriber. On the contrary, according to Sri Kakodkar, at the time of registration of the company, the petitioner was not at all in the country itself.

19. Sri Kakodkar further argued that the resignation tendered by appellant No. 3 in fact was not immediately after the return of the petitioner, but many months thereafter. The communication as regards the resignation of respondent No. 3 was communicated to the Registrar of Companies by the respondent Madan only, in spite of it having not been so accepted by the board of directors. He reiterated that the board of directors had not accepted the resignation of appellant No. 3 and this fact of non-acceptance was also communicated to the Registrar of Companies. According to Sri Kakodkar, the petition u/s 433(f) of the Companies Act was neither maintainable at the instance of the petitioner nor was it worth to be admitted by the learned single judge.

20. Sri Kakodkar further argued that in any case, the petitioner had alternative remedy open, if at all he had any grievance against the company and the appellants but definitely not the present petition. In fact, winding up of the company is not to be resorted to so lightly, particularly when a running business is there. According to him, it was likely to affect adversely and would be penal in nature for the company. The sum and substance of his argument is that the learned judge committed an error in taking such a harsh step of admitting the petition and directing to issue the advertisement which would have drastic effect on the company and its business. The further challenge of the learned advocate to the order is that, in spite of there being no compliance as regards the provisions of rules 18, 21 and 95, the learned judge admitted the petition which,

otherwise, was worth to be rejected. He, therefore, vehemently urged that no case is made out by the petitioner so as to attract provisions of Section 433(f) of the Act.

21. As against the argument of Sri Kakodkar, Sri Usgaonkar, the learned senior advocate, appearing for the respondent, argued that taking into consideration the mass evidence available on the record as regards the interest of the present respondent in the company, there is no point in the objection to the maintainability of the petition. Sri Usgaonkar contended that voluminous evidence is available on the record to suggest that the original petitioner had been constantly remitting amounts to the present appellants towards fulfilment of the idea of both the brothers of starting the hotel business at Goa. Sri Usgaonkar pointed out that there is no dispute at least that 1,125 shares were subsequently allotted in favour of the original petitioner, which makes him a shareholder of the company, thereby in any case he falls within the definition of a contributory as enumerated u/s 428 of the Act. Sri Usgaonkar further pointed out that though admittedly he is not a signatory to the memorandum of association or any other initial documents in the name of the company, that by itself, would not divest him of his rights of being at least a contributory and also a shareholder. Sri Usgaonkar therefore suggested that in any case since his client has interest in the welfare and prospects of the company, the petition at the instance of his client was definitely maintainable. He, therefore, argues that the learned single judge did not commit any mistake much less in law. Sri Usgaonkar further argued that the conduct of the present appellants was so irritating that even after having swallowed a huge amount from his client which is invested in the present business, the appellants are bent upon dragging him out gradually and in a most unpleasant manner. Sri Usgaonkar argued that, taking into consideration the attempt on the part of the appellants to exclude his client and an attempt to totally eliminate him from the business activities has virtually resulted in total oppression of the petitioner who is compelled to suffer the loss in spite of the handsome financial help having been extended by him to the appellants.

22. Sri Usgaonkar further pointed out that the present company is heavily indebted and the transactions indicate that it is not in a position to repay its debts. Stretching this argument further, Sri Usgaonkar argued that he is a guarantor for the company in the loan matters of EDC. According to his calculations, as on today the company is indebted to EDC for Rs. 1 crore and above.

23. Sri Usgaonkar further argued that, in fact, the resignation of Pranothi/ appellant No. 3 was accepted and the same was communicated to the Registrar of Companies. He further argued that his client was one of the first directors of the company and that is apparent from the record and the memorandum of association. According to Sri Usgaonkar since all other roads of settlement are closed, the petitioner had approached this court u/s 433(f) of the Act. He argued

that the order passed by the learned single judge is just and proper in the facts and circumstances of the case and also in the interest of justice.

24. After having heard the learned advocates at length, the first point which we would like to deal with is as to whether the petition, at the instance of the present respondent, was maintainable u/s 433(f) of the Act and if so, in what capacity of the respondent, whether as a shareholder or a contributory or in any other capacity including that of a member u/s 41 of the Act. The word "contributory" is defined in Section 428 of the Act. The said section reads as under :

"428. Definition of "contributory".--The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid-up ; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory."

25. It is, therefore, clear that one who has to be identified as a contributory, has to be either a person who is liable to contribute to the assets of the company in the event of its being wound up and he has to be a shareholder of fully paid-up shares. If we read the provisions of Section 439(4)(b) of the Act, the said provisions specifically direct that "a contributory shall not be entitled to present a petition for winding up of a company unless--(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up, or have devolved on him through the death of a former holder". Relying on the above said provision, Sri Kakodkar argued that in the instant case the petitioner cannot be said to be a contributory at all, and if at all he is so held even then the petition at his instance was not maintainable as he did not fulfil the conditions embodied in Clause (b) of Sub-section (4) of Section 439 of the Act. From the record we have noticed that none of the shares held by the petitioner were held by him as an original allottee. It is also clear that the same were not registered in his name, much less at least for a period of six months during the eighteen months immediately preceding the commencement of the winding up proceedings. On the basis of this as argued by Sri Kakodkar we feel that the very petition, at the instance of the petitioner in his capacity as a contributory, was not maintainable. The subsequent part of this Clause (b) of Sub-section (4) of Section 439 which deals with the devolving of shares on him on the death of a former holder, does not arise for consideration. If the provisions of Sections 428 and 439 are read together, it clearly shows that merely being a contributory as defined u/s 428 is not enough to maintain winding up proceedings unless the other conditions given in Section 439(4)(b) are fulfilled. We do not see any material available on the record to indicate that the petitioner either happened to be the original allottee of the shares or that he held any share as an original

allottee. If the doubt is there at the very inception, as regards the allotment being not the original allotment, the question of such shares having been registered in his name and that too for six months during the eighteen months immediately before the commencement of the winding up proceedings, does not arise. We definitely see a considerable force in this argument of Sri Kakodkar.

26. From the record we see that the respondent/original petitioner though is the allottee of the shares from the company itself, still it is clear that he cannot be held to be an original allottee and more so when he does not happen to be a signatory to the memorandum of association.

27. Attempts on the part of the respondent/petitioner to thrust himself in the company as a contributory taking the advantage of his being one of the directors, in our opinion, would not by itself make him a contributory entitled to have the advantage of Section 439(4)(b) to get the petition maintained at his instance. We have no hesitation in observing that merely because the allotment of the shares to the respondent/petitioner happened to be reported or registered in the office of the Registrar of Companies, that by itself, would not clothe him with the powers and authority of a contributory at whose instance petition can be maintained.

28. Sri Kakodkar, the learned advocate, argued that the very many complaints to various authorities to which a reference is made including the police authorities, the petitioner repeated the same story everywhere pointing out that the petitioner was being constantly either oppressed or systematically eliminated from participation in the affairs of the company and that he has been wrongly removed from the post of director. He further argued that the petitioner was, in fact, allotted the shares and he was participating in the management effectively. However, according to Sri Kakodkar, since he was involved in some misdeeds, the present appellants were required to remove the respondent/petitioner from the directorship and that cannot be a reason for filing the present petition for winding up the company. Such a petition at the instance of a removed director and on that ground is also not maintainable.

29. Sri Kakodkar argued that the respondent/petitioner also had initiated unnecessarily false suit alleging that the pending bills of Sai Trading and Contracting Engineers were not paid by the company. He argued that merely because the appellants have not cleared up the pending bills of the said construction company, would not straightaway entitle the respondent/petitioner to proceed with the winding up petition. We find no difficulty in accepting this argument of Sri Kakodkar and particularly when it pointed out that the work which was done by Sai Trading and Construction Enterprises since was not up to the mark and sub-standard material was used, the bills were withheld. In our opinion to get recovered that amount winding up of the company is not the solution.

30. Pertinent it is to note that though very many complaints were made by the

petitioner to the authorities concerned, but since no substance was there in those complaints, the authorities were also not in a position to proceed against the company under any of the provisions of law.

31. In our opinion, the substratum of the company is well intact, the business of the company is going on and merely because the business is in loss or may be in loss, that cannot be reason for moving the application u/s 433(f) of the Act, unless and until it is a case that the company in no case would be in a position to overcome this situation. From the record we see no such case is made out by the petitioners.

32. We cannot forget that winding up is the last resort to be adopted and only when there is no alternative remedy whatsoever available to the person claiming winding up of the company, only in that case and that too keeping in mind the principles of just and equity, the court may think of granting the relief of winding up. In our opinion, the remedies, but for this, are still available to the petitioner which he even otherwise could exhaust. These remedies can be even under the Sections 397, 398 or even u/s 235 of the Act. Sri Kakodkar assailed the order of the learned single judge pointing out that the learned single judge has not in details dealt with the aspect of alternative remedy available to the petitioner, which has resulted into miscarriage of justice. According to Sri Kakodkar, this is also one of the grounds as to why the order needs to be quashed and set aside.

33. In short, Sri Kakodkar argued that since the questions raised in the petition require the debatable issues to be framed and need the evidence to be produced and considered, the learned single judge committed an error in law in admitting the petition and further granting the interim relief in the terms as mentioned in the order. He further argued that the order of admission and issuance of advertisement needs to be quashed and set aside and the petition, according to Sri Kakodkar, deserves to be rejected.

34. With reference to the argument of Sri Usgaonkar, the learned senior advocate for the respondent, if the provisions of Section 428 are appropriately read, we have no doubt that the allotment of shares in favour of the respondent/petitioner would definitely have made the petitioner interested in the affairs of the company. In view of this, we find no difficulty in holding that the respondent/petitioner happens to be a contributory. However, that by itself, would not entitle the respondent/petitioner to move the winding up petition as he does not fulfil the conditions as are embodied in Section 439(4)(b) of the Act.

35. Sri Usgaonkar, the learned senior advocate invited our attention to the various documents such as his letter exhibit T at page 269 addressed by him to EDC, requesting to disburse the loan amount and to grant eight months' time to raise their own share. He also invited our attention to the documents at pages 239, 243, 231 and 229 which mostly, is the correspondence between the two brothers and the resignation letter of Smt. Pranothi. However, it is pertinent to note that no defaults or any shortcomings in the accounts of the company are

demonstrated by Sri Usgaonkar nor has he pointed out any tampering with the accounts or any defaults on the part of appellant No. 2. If all these documents are viewed with proper perspective, we do not find that any of these can be said to have made out a case for winding up of the company.

36. Sri Usgaonkar invited our attention to the decision reported in the matter of Shakuntala Rajpal and others Vs. Mckenzie Philep (India) P. Ltd. and others, . On the basis of this judgment, Sri Usgoankar wanted to suggest that there are only three methods by which shares can be acquired. Those are : original allotment, by transfer inter vivos and by transmission. According to Sri Usgaonkar, a contributory who acquires shares by the first and third methods is straightaway entitled to file a winding up petition. According to him, it is only in the second type of acquiring the shares, wherein the conditions of Section 439(4)(b) of the Act are applicable. In our view, in the instant matter, since the allotment in favour of the respondent/petitioner was not at the time of the starting of the company and since he does not happen to be a signatory to the memorandum of association, shares allotted to him subsequently, would definitely call for compliance with Clause (b) of Sub-section (4) of Section 439 of the Act. In our view, the judgment cited by Sri Usgaonkar of the Delhi High Court is not applicable to the present case. Sri Usgaonkar also invited our attention to a decision reported in the matter of Moolchand Gupta Vs. Jagannath Gupta and Co. (P) Ltd., . According to Sri Usgaonkar, when the court is already seized of the matter, at the instance of a party, the Central Government should refrain from taking the initiative even though it may appear to the Government from the report of the investigating inspectors appointed u/s 235/237 that it is expedient to move the court for winding up of the company, on the ground that it is just and equitable to wind it up. Sri Usgaonkar wanted to suggest that since the matter is already within the seisin of the court, remedy u/s 397 or 398 neither could be exhausted by him nor was it an efficacious one. We have to say that the reliance placed by Sri Usgaonkar on this case is not of any help to him as it is clear that the inquiry which is to be made under those sections is definitely different in nature, involving all the details which otherwise cannot be made in a petition u/s 433(f) the Act.

37. Relying on the decision in the matter of M/s. World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margarat T. Desor and others, , Sri Usgaonkar argued that the attempts on the part of the appellants are so eloquent as demonstrated through the record that the same can be considered for winding up of the company. According to him, application to the court for relief in cases of oppression, if it is shown that the conduct or the affairs of the company are in a manner prejudicial to public interest or in a manner oppressive to any member or members including any one or more of themselves, may apply to the court for an order u/s 397 and if, on such application, the court forms the same opinion, then the court may pass an order of winding up, it being just and equitable. So far as the proposition is concerned, there cannot be any dispute. However, in our opinion, the evidence which is tried to be brought on record through various

documents definitely fall short to draw such an inference in the instant matter. On this point, Sri Usgaonkar also invited our attention to yet another decision in the matter of Anisha K. Shah Vs. Fastenese Private Ltd. and etc., . However, after having gone through the facts of that case, we have to observe that the same also is of no help to Sri Usgaonkar as the facts in that case happened to be absolutely different.

38. We see that the respondent/petitioner has made much hue and cry about the alleged resignation of Mrs. Pranothi, the wife of appellant No. 2. However, from the record we see that appellant No. 2's resignation was not accepted and the office of the Registrar of Companies was informed that in the meeting dated February 19, 1990, the board had resolved not to accept the resignation dated June 8, 1989, submitted by Pranothi and further that she was to continue as a director without any interruption. The matter was accordingly communicated in Form 32 to the concerned office, i.e., the Company Registrar. The relevant document in this respect we find at pages 501 and 505, respectively.

39. We also see from the record that after the removal of the respondent/petitioner from the directorship, one Vernekar was taken as a director from March 31, 1989.

40. Sri Kakodkar, the learned senior advocate invited our attention to a decision of the Supreme Court in the matter of Hind Overseas P. Ltd, v. Raghunath Prasad Jhunjhunwalla [1976] 46 Comp Cas 91. Applying the principles as enunciated in this judgment, we have to observe that the allegations in the present petition fall too short to invoke the provisions of just and equitable clause. Relief based on that clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company. It is not that the interest of the applicant alone is of predominant consideration. It is necessary to bear in mind that if there is lack of probity, it has to have a prejudicial effect on the business of the company, affecting rights of the petitioner as a shareholder and not as a director. Disputes between directors cannot be a ground for winding up, unless their rights as shareholders are at stake and that too bringing a deadlock in the business of the company. We do not find that a case, much less prima facie, is made out by the petitioner/respondent.

41. Exercising our powers u/s 443(2) we observe that since the petitioner has remedies open under Sections 397 and 398 or even u/s 235 for causing investigation by the competent authority, a drastic step u/s 433(f) should not be a resorted to in the present matter. In our opinion, Sri Kakodkar rightly relied on the decision in the matter of V.V. Projects and Investments (P.) Ltd. v. 21st Century Constructions (P.) Ltd. [1997] 90 Comp Cas 346 ; [1997] 5 Comp LJ 525 (AP).

42. Relying on the decision in the matter of Malabar Industrial Co. Ltd. Vs. A. John Anthrapper, , Sri Kakodkar rightly argued that in the present case the

substratum cannot be said to have been disappeared, nor is it even prima facie shown to have been so lost and hence in our opinion also the learned company judge should not have exercised the discretion of giving the relief of winding up u/s 433(f) of the Act, which has to be used very sparingly and that too in exceptional cases.

43. We find, in the present case, very vague allegations are made as regards gross mismanagement, lack of probity and oppression, without there being any cogent prima facie evidence to that effect. Even otherwise, all of these allegations are squarely covered by Sections 397 and 398 of the Act. We therefore feel that the learned company judge should not have made haste in admitting the petition and directing to advertise the same.

44. From the facts of the case and the documents on record, there hardly remains any doubt that the domestic quarrels and differences between the brothers, misunderstanding and disputes over financial matters and contributions are the reasons for the present winding up proceedings. No doubt any one, prima facie is likely to be impressed and emotionally moved, taking into consideration the alleged finance extended by the petitioner. However, in our opinion, the courts should not be the victims of such emotions and sentiments. However long-drawn may be the dispute between the family members, unless that happens to be a cause of deadlock in the business, or that happens to be the reason for disappearance of the substratum, and if there is no other remedy left open in any law, only in such a case resort can be had to Section 433(f) of the Act. In our opinion, the present case definitely is not the one, where winding up should be resorted to.

45. However, imperative it might be for appellant No. 1 Umesh, not to have ignored the financial assistance extended by the respondent Madan, or the Registrar of Companies, on the complaints of the respondent Madan, might have searched and surveyed into the business activities and also might have bemoaned that the respondent was being kept out of the business screen, or that the parties to the petition are not desirous to alleviate their differences and the possibility of any rapprochement appeared to be remote to secure and ensure security and stability in the undertaking, that by itself, would not be the reason to wind up the running business.

46. In the result, we allow this appeal. The order of admission and direction to advertise the petition, passed by the learned company judge, which is under challenge, is quashed and set aside. The winding up petition stands dismissed. However, in the circumstances of the case, parties to bear their own costs. Needless to mention that nothing observed by us in this appeal may be taken as an expression or opinion on the merits of the allegations and counter-allegations of the parties. If the petitioner chooses to approach the appropriate forum under any other provisions of the Companies Act, 1956, or any other appropriate forum under any other law, the said proceedings, shall be decided on their own merits.