
(1981) 04 MP CK 0012

In the Madhya Pradesh High Court

Case No : Company Petition No. 4 of 1972

Virendra Singh Bhandari and Others

APPELLANT

Vs

Nandlal Bhandari and Sons Ltd.

RESPONDENT

Date of Decision : 27-04-1981

Acts Referred:

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

Partnership Act, 1932 — Section 44

State Financial Corporations Act, 1951 — Section 31

Citation : (1981) 04 MP CK 0012

Hon'ble Judges : K.N. Shukla, J

Bench : Single Bench

Advocate : Kapadia, Dhuruva and S.R. Phadnis, S.R. Joshi, Government Advocate for the State, A.K. Chitle and Puntambekar, for State Bank of Indore, R.C. Mukati, for the State of Rajasthan, Kokje, for the M.P. Financial Corporation, for the Appellant; Nain Sanghvi and R.G. Waghmare, for the Respondent

Final Decision : Allowed

Judgement

K.N. Shukla, J.—This is a contributories" petition under s. 439 of the Companies, Act, 1956, for a direction to wind up the respondent-company, namely, M/s. Nandlal Bhandari and Sons P. Ltd., Indore. Petitioners have, in the alternative, prayed for directions u/s 397 and 398 of the Act for other reliefs specified in the petition. Their petition was admitted on September 22, 1972, and notice was issued to the respondent-company. The company entered appearance, opposed advertisement of the petition and applied for revoking the order of admission.

2. In the meantime, the petitioners also applied for the appointment of a provisional liquidator under s. 450 of the Act. The petitioner"s application for the appointment of a provisional liquidator was dismissed by this court (Sen J.) by order dated May 3, 1974 ([1979] 49 Comp Cas 532) (SC). The respondent-company"s application for revoking the order of admission and dismissing the petition was also rejected by this court (J. S. Verma J.) on April 23, 1976 ([1980] 50 Comp Cas 54) (SC). In both the above orders, the court has, in some detail,

narrated the facts leading to the disputes between the parties.

3. A few material facts may be reproduced now. A joint Hindu family under the name and style of " M/s. Nandlal Bhandari and Sons" held 5,836 shares and one scrip of " M/s. Nandlal Bhandari Mills Ltd." (Mills Ltd.), a private limited company incorporated on March 1, 1922. On March 29, 1949, there was a partition in the joint Hindu family and the separated members formed " M/s. Nandlal Bhandari, and Sons Ltd. " and incorporated it as such under the Companies Act, 1956. Thereafter, this company was converted into a private limited company styled as " M/s. Nandlal Bhandari and Sons Pvt. Ltd. " (hereinafter referred to as " the company "). By a division of the capital account, which included its shares, the 5,836 shares and one scrip of M/s. Nandlal Bhandari Mills Ltd., which had by then increased to 11,772 shares, and one scrip by reason of the issue of the company's shares, were transferred to the company. In 1969, the company (respondent), purchased 6,327 shares of the Mills Ltd. from one Shri Shrikrishna Chandmal and thus the company held 17,099 shares and one scrip, i. e., 85% of the share capital of the Mills Ltd. Consequently, the company held the sole selling agency of the Mills Ltd. under a contract which was to continue till December 31, 1975. It was not disputed that the sole selling agency came to an end on the expiry of the aforesaid period and the same has not been renewed thereafter.

4. Though the objects of the company, vide its memorandum of association (annex. I-i of the petition) were wide and diverse, it was not in dispute that the businesses actually carried on by the company till the date of petition were as follows:

(i) Sole selling agency of the Mills Ltd. which was the major source of income of the company ;

(It may be noted that this agency stood terminated by expiry of time on December 31, 1975, and the same was not renewed);

(ii) Central Hotel located in Rampurawala building, Indore;

(This was closed in September, 1971);

(iii) A yarn shop at Siyaganj, Indore ;

(This was closed in 1971);

.(iv) " Dewas Flour Mills and De-Oil Cake Factory" and "Nand Vanaspati", both at Dewas. These were closed down in 1971 ;

(Both these units were sold in execution of a decree obtained by the M. P. Financial Corporation for recovery of its loan and the sale proceeds have been deposited in court for disposal as per this court's final order) ;

(v) Two ginning factories ; " one at Hatod near Indore and the other in Indore;

(Both factories were closed long before the filing of the petition);

(vi) Rental income from buildings owned by the company.

(The main buildings, namely, Rampurawala building, Indore, and Nandanwan, Indore, ceasing to be company's properties as a result of transfers made in August, 1971, thus substantially reducing the rental income).

5. It was also admitted that out of 17,009 shares and one scrip of the Mills Ltd., 3,350 shares were pledged by the company with the State Bank of Indore and 1,600 shares with the Bank of India in the year 1970. Again in 1971, 4,000 shares were pledged with the State Bank of Indore as additional security. The balance-sheet for the year ending December 31, 1972, shows that the total liabilities of the company were to the tune of Rs. 1,36,84,585. The biggest creditor of the company is the State Bank of Indore and the statement filed by the bank shows that a sum of Rs. 75,85,638.13 was due out of which about Rs. 50 lakhs were secured on equitable second mortgage of lands, buildings, plants and maphinery at Dewas.

6. The company is also indebted to the M.P. Financial Corporation and, as already observed, the Corporation has obtained a decree against it which has been executed and the sale proceeds of the properties at Dewas are kept in deposit for disposal in accordance with the order of the court. The State Bank of Indore and the M.P. Financial Corporation are interveners before this court.

7. It was also admitted that the State of Rajasthan has raised a sales tax liability on the company and the amount claimed is about Rs. 24 lakhs. The State of Rajasthan has also intervened in this petition and has supported the petition for winding up the company. Besides, the Income Tax dues for the assessment year 1970-71 and subsequent years are also outstanding against the company.

8. As indicated earlier, all the members of the company belong to the Bhandari family and the directors thereof are petitioner No. 1, Virendra Singh Bhandari and Sukanlal Bhandari. Petitioner No. 2 is the wife of Virendra Singh Bhandari and petitioners Nos. 3 & 4 are his sons. The dispute is now between petitioner No. 1, Virendra Singh Bhandari and the members of his family on one side and the other two brothers, namely, Bhanwar Singh Bhandari and Sukanmal Bhandari and members of their families on the other.

9. The winding up of the company has been sought on grounds contained in Clause (e) and Clause (f) of Section 433 of the Companies Act. It has been alleged by the petitioners that in addition to their share capital they have also invested a sum of Rs. 4,35,732.22 by way of deposits in their names, but no interest has been paid on these deposits in spite of demand. Winding-up is, therefore, sought under Clause (e) of Section 433 of the Act. Under Clause (f) of Section 433, it is claimed that the company should be wound up on "just and equitable grounds" because:

(i) The majority group led by Bhanwar Singh Bhandari and Sukanmal Bhandari has taken complete control of the company and it is being worked only for their

own personal gain and those of the members of their family, friends and relatives.

(ii) There is complete exclusion of the petitioners from the working of the company which is being carried on according to the whims of the majority group so that normal benefits to which the petitioners are entitled are not given to them.

(iii) The entire business of the company has come to an end and its continuance is only to enable the majority group to procure for itself the properties of the company by transfers or otherwise.

(iv) There is lack of probity in the majority group on account of acts of malfeasance and misfeasance by them. The substratum of the company has disappeared.

10. In reply, the company has strongly opposed its winding up. A preliminary objection was taken about the maintainability of the petition. It was not disputed that the petitioners were entitled to move a petition u/s 439 of the Companies Act as contributories. It was, however, contended that it would not be proper to admit the petition by a contributory unless it was pleaded that the company had (not ?) enough assets for disbursement to creditors and members. Reliance for this was placed on *In re Othery Construction Ltd.* [1966] 1 WLR 69 [reported also in [1966] 36 Comp Cas 350 (Ch D)]. The matter has further been discussed with advertence to Indian law in *V.V. Krishna Iyer Sons v. New Era Manufacturing Co. Ltd.* [1965] 35 Comp Cas 410 (Ker). It is clear from both the decisions that there is no legal bar for a contributory to bring a petition for winding up, but it is open to the court not to act on an application of a contributory when it finds that the petitioner has no interest left in the company due to its commercial insolvency. A petition by a contributory in such circumstances may be dismissed not because he was not competent to file it, but because it is not a bona fide application and amounts to an abuse of the process of the court.

11. It may be noted that the objection about the competence of the petitioners to file this petition was decided by this court, vide its order dated April 23, 1976, while disposing of the company's interlocutory application opposing the advertisement of the petition and seeking revocation of the order of admission. I, therefore, hold that in view of the law on the subject as also in view of the earlier order wherein this question was impliedly disposed of, this preliminary objection about the competence of the petitioners to file a petition u/s 433 of the Companies Act has to be rejected.

12. The main points made in the company's reply to the allegations contained in the petition are :

(i) There was a bona fide dispute about the debts outstanding against the company and, therefore, the company could not be wound up u/s 433(e) of the Companies Act.

(ii) The Civil Court had issued an injunction dated December 22, 1971, at the

instance of the petitioner restraining the company from making payments.

(iii) There was an undertaking by Virendra Singh Bhandari, petitioner No. 1, to keep a deposit of Rs. 10 lakhs of the members of his branch and, therefore, the deposit could not be repaid.

(iv) So far as petitioners Nos. 2 to 4 are concerned, the petition was barred by *res judicata*.

13. On the grounds laid under Clause (f) of Section 433, the company pleaded that on the date of the petition, the company was financially sound and had a good future. The market value of the Dewas Oil Mill was more than Rs. 70 lakhs and it was a going concern. Losses had occurred due to normal trade conditions and also due to the misconduct of the petitioner No. 1, Virendra Singh Bhandari, in the management of this unit. The financial condition of the company was, therefore, not desperate and there were fair chances of the company carrying on its numerous objects as per the memorandum of association. The substratum of the company had not disappeared and the company could revive.

14. It was then alleged that the purpose of the petition was ulterior and oblique. In fact, petitioner No. 1 himself was responsible for the difficulties in which the company landed itself and, therefore, to direct winding up at his instance would be an abuse of the process of the court.

15. In reply to allegations about the lack of probity and the various transfers of the shares and the company's property, it was submitted that the transfers were made on proper commercial considerations with the knowledge of petitioner No. 1, who was one of the directors of the company.

16. It was pleaded by the company that the state of financial difficulties in which the company landed itself was entirely due to the mismanagement of the Dewas units by petitioner No. 1, Virendra Singh Bhandari, and when these facts were brought to the notice of the other directors through the Bank of Indore and action was taken to take over the management from the hands of Virendra Singh Bhandari, a spate of suits was unleashed by Virendra Singh Bhandari, his wife and children. Petitioners Nos. 2, 3 and 4 even made separate applications for winding up before this court, but the petition filed by petitioner No. 2 was dismissed while the one filed by Nos. 3 and 4 was withdrawn. It was pleaded that petitioner No. 1 was himself the cause of these difficulties and could not be allowed in equity to take advantage of his own misdeeds and seek winding up of the company to the detriment of the majority shareholders. In this line of argument, a plea of *res judicata* was also taken in respect of petitioners Nos. 2 to 4.

17. As regards disappearance of the substratum of the company, it was pleaded that the company was incorporated to do diverse businesses and even if some of them were closed, the object of the company had not failed and the company had the necessary capacity for its revival on the date of the petition. It was also

contended that merely because liabilities exceeded the assets, a direction for winding up could not be given.

18. In reply to the allegation about lack of confidence in the majority shareholders by the petitioners, it was pleaded that even though it was a family business and to some extent the principles of the Partnership Act may be extended in respect of the dissolution of a firm, keeping in view the law in Clause (c) of Section 44, a partner or a member who is himself guilty of misconduct cannot seek the assistance of the court for a dissolution or winding up.

19. As already observed, in response to the advertisement of the petition, the State Bank of Indore, the State of Rajasthan and the M.P. Financial Corporation, who are admittedly the creditors of the company, intervened. On behalf of the State Bank of Indore, though initially no definite stand was taken on the question of winding-up, at the stage of arguments, Shri A. K. Chitale, learned counsel for the bank, stated at the Bar that the bank would support the winding-up of the company because the company which had cash credit facilities and pledge and hypothecation as also discounting facilities with the bank, had not done any business nor operated its account after 1973. The business was, therefore, closed and there was no possibility of renewal of the company in view of the crushing financial liabilities and its internal squabbles. The units on which loans were advanced had already been closed and were during the pendency of the petition sold in execution of a decree secured by the M.P. Financial Corporation. It was submitted that though the loan was secured by property mortgaged with the bank, the sale proceeds of the said property could not satisfy the debts of the bank and of the M.P. Financial Corporation. The total loan of these two bodies was more than Rs. 90 lakhs. On these sale proceeds, there were further demands of the sales tax Dept., the State of Rajasthan and the I.T. Dept. for capital gains amounting to about Rs. 21 lakhs. Thus, the security of the company was far too deficient to satisfy the debt and, therefore, the company should be wound up.

20. For intervener, the State of Rajasthan, learned counsel, Shri Mukati, submitted that the sales tax liability amounted to Rs. 24 lakhs which was the first charge on the sale proceeds. He also supported the winding up of the company.

21. The intervener, the M.P. Financial Corporation, which is a secured creditor and which had obtained a decree against the company in execution of which the Dewas units were sold by auction, expressed that it was interested only in recovering the debts out of the sale proceeds and not in the winding-up.

22. u/s 433, the power of the court to wind up a company is discretionary and there is authority for the proposition that normally courts should be slow in directing the winding up of a company unless it becomes inevitable. Keeping this general principle in view, I will now proceed to examine the ground u/s 433(e) of the Companies Act which refers to the company's inability to pay its debts. In this connection, a few facts may be recalled briefly. The company had taken

enormous loans for its various businesses. This is a normal commercial activity and every entrepreneur has to depend upon loans for his business. In the instant case, it was clear that the debts which the company had taken from the banks and the financial corporation were not repaid, though demands were made for the same. So much so that, acting u/s 31 of the State Financial Corporations Act, the financial corporation had filed a suit for the recovery of the loan and, admittedly, in execution of the decree thereof, the Dewas units have been sold by public auction. The sale proceeds are in deposit with this court.

23. Learned counsel for the company laid great emphasis on his stand that for determining the question of the company's inability, the court should confine its enquiry to its financial health as on the date of the petition and should not look to the facts which had taken place subsequently. This is a correct proposition of law and is supported by the Supreme Court in *Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others*, . The observation was made by the court while dealing with the "just and equitable ground " u/s 433(f) of the Act. However, the above rule is not inflexible and the court is not precluded from looking into the circumstances developing later, as evidence in support of the allegations made in the petition. The cause of action must be laid in the petition itself and the court will confine its enquiry to those facts and allegations, but if subsequent events constitute relevant circumstantial evidence to reinforce the allegations made in the petition, the court is not shut from examining those facts and circumstances. In *Fildes Bros. Ltd.* [1970] 1 All ER 923, 927 ; [1970] 40 Comp Cas 998 (Ch D), this point has been considered. It was observed by Megarry J., as follows :

" The petitioner is confined to the heads of complaint set forth in his petition. His evidence may no doubt amplify and explain these complaints, but I do not think that he can rely upon any new head not fairly covered by his petition."

Again at p. 927 of the report:

" If on the facts existing when the petition was presented it was then just and equitable to wind up the company, but subsequently it has ceased to be so, I do not think a winding-up order should be made."

24. It was not in dispute that the petitioners had a deposit of more than Rs. 4 lakhs with the company and the company did not repay this amount when demanded. On behalf of the company, it was pleaded that there was a bona fide dispute with respect to this demand and, therefore, the refusal of the company to make payment did not, in law, constitute its " inability to pay ". As regards the so-called bona fide dispute, it was contended that petitioner No. 1, Virendra Singh Bhandari, as the person in-charge of the Dewas units, had bungled with the management and had caused enormous damage to the company's business by his acts of malfeasance and misfeasance. The company was entitled to recover damages and, therefore, it was within its rights to refuse repayment of the deposit on demand by the petitioners.

25. Clearly, the company had no claim on the basis of any contract. The company actually sought to raise a claim for unliquidated damages. It was held by the Madras High Court in *Newfinds (India) Vs. Vorion Chemicals and Distilleries Ltd.*, thus (headnote):

""Debt" as defined in Section 434(1)(a) of the Companies Act, 1956, means a definite sum and hence it cannot be contended that "debt" also includes any unliquidated damages or a sum of money capable of being ascertained. "

26. The alleged acts of malfeasance and misfeasance of petitioner No. 1 which, according to the company, made him liable for damages, had yet to be established. Though it was alleged that such acts which made petitioner No. 1 liable for damages were committed before July, 1971, no action was ever taken before the filing of the petition or even till date to set up a claim for a specified amount as damages. Any such claim now would obviously be barred by limitation. This indicated that there was no bona fide dispute which entitled the company to decline to pay the debt and, therefore, a presumption u/s 434(1)(a) of the Companies Act could be drawn against the company that it neglected to pay the same on demand by petitioner No. 1, *Virendra Singh Bhandari*.

27. Balance-sheets for the year 1970-71 onwards (Annexs. R-X, D-1, etc.) with the directors' reports appended thereto clearly indicated that the company's assets were dwindling very fast and its liabilities had outstripped its total assets. Even on the date of the petition, the company was on the brink of disaster and further developments during the pendency of the petition indicated that instead of revival, its economy was in shambles. Losses wiped out the initial capital of Rs. 20 lakhs and also the reserves. Actually on the date of the petition, none of the various businesses were yielding any profit except the sole selling agency of the Mills Ltd. and this also expired in 1975 during the pendency of the petition without any chance of its renewal. Clearly, the company was engaged in the futile exercise of cliff-hanging without any reasonable chance of its survival. Its commercial insolvency was complete. Its fixed assets including Dewas units had been sold or transferred, there was enormous sales tax and Income Tax burden and the debts of the principal creditors, namely, State Bank of Indore and M.P. Financial Corporation, were still outstanding. Keeping all these factors in view, it becomes clear that the company is unable to pay its debts. In these circumstances, a winding-up order can be properly passed under Clause (e) of Section 433 of the Companies Act.

28. The petitioners sought the winding-up of the company under Clause (f) of Section 433 also. This clause empowers the court to wind up a company if it is of opinion that it is "just and equitable" that the company should be wound up. Gower in his *Principles of Modern Company Law*, 4th Edn., at p. 662, refers to the situation in which the "just and equitable" position may be invoked. They are :

(a) Expulsion from office.,

(b) Justifiable loss of confidence.

(c) Deadlock.

(d) Failure of substratum.

29. The petitioners in this case have relied on two acts : (i) loss of confidence, i.e., lack of probity in the majority shareholders and directors; and (ii) Failure of substratum.

30. For proving their allegation about lack of probity, the petitioners referred to the various transfers of immovable properties and businesses of the company, Besides, it was also urged that the company was mainly a family business and, therefore, the principles governing an application for the dissolution of a partnership firm should be applied in the case of the company as well.

31. The company owned Nandanwan and Rampurawala buildings which were transferred to the majority members. Besides the question of actual valuation, it appears that these buildings were allotted to the majority members and the consideration therefore was their deposits with the company. The result was that the company's fixed assets were liquidated without any benefit by sale of these properties to augment its resources. It appears that ostensibly the immovable assets, were sold under various resolutions of the company to meet the financial stringency faced by it. In effect, however, no such benefit was acquired because the fixed assets were lost to the company and, in the process, the deposits of the majority members, which the company had with it, were also liquidated.

32. To meet this factual position, it was contended for the company that the sales were effected under a resolution dated August 20, 1971, in a general meeting, of which notice had been issued to the petitioners, though they chose to remain absent. This contention, that the transfers were made under a seemingly valid resolution, of which notice was duly served on the petitioners; will not change the nature of the transactions and its effect on the financial health of the company.

33. The company was running a hotel known as Central Hotel in the Rampurawala building. This business was carried on till September 20, 1971. After the sale of the Rampurawala building, the hotel business was stopped and it was carried on in the name of director Bhanwar Singh Bhandari's daughter-in-law. Thus, according to the petitioners, a profit, earning business was stopped and transferred in a clandestine manner to the relatives of one of the majority members. Similar allegation was made in respect of the yarn shop.

34. It was alleged that the company was holding 85% shares of the Mills Ltd. and because of this it was the sole selling agent of the products of the Mills Ltd. It was earning substantial amounts as sales commission. However, the majority group sold 8,299 shares of the Mills Ltd. to another company, G. R. Oil Mills Pvt. Ltd. The G. R. Oil Mills Ltd. is controlled by the majority group of the respondent-company and details of its constitution have been given in annex. " K ". The G.

R. Mills Ltd., which ostensibly purchased the shares sold by the company in the Mills Ltd., had no money to do so and only hawala entries were passed by the majority group so that, the company's assets were depleted without relieving it of its liability to the main creditors. Details of this hawala entries have been given in the petition, but it is not necessary to refer to them because the factual position was admitted that payments were shown and received only by adjustment of entries, more or less in a circular manner so that actually no cash passed and no profit came to the coffers of the company.

35. On the basis of these facts, it was alleged that the majority group had manipulated these transfers and sales to the detriment of the minority group and thus the minority group had lost confidence in the majority group.

36. I have already discussed the nature of the transfers of Nandanwan and Rampurawala buildings and I am clearly of the view that these transfers were not made in good faith and the company was a great loser as a result of these transfers. As regards the sale of shares of the Mills Ltd. to G.R. Mills Ltd., it was submitted on behalf of the company that the petitioners also had 15% interest therein and they also benefited by this transaction. This obviously is to oversimplify the nature of this peculiar transaction. The company sold its shares to G.R. Oil Mills and G.R. Mills wherein the majority members of the respondent-company were also in majority, sold the same shares at a higher rate to members of the majority group. Later, the majority group sold the shares to an outsider, M/s. Sabari Textiles (Pvt.) Ltd., a concern of the Poddars of Calcutta. Because of this transaction the majority members deprived the company of the sole selling agency of the Mills Ltd. This was indeed not a transaction which was in the interest of the company or of the minority members represented by the petitioners. In these circumstances, the petitioners had justifiable lack of confidence in the working of the majority members and they were entitled in the circumstances to claim the winding-up of the company.

37. For the petitioners, it was further pleaded that though the company was incorporated in a formal manner, it was for all intents and purposes a partnership business among the members of the same family. If, therefore, conditions were present warranting dissolution of a partnership, on the same principles the company could also be wound up.

38. In *In re Yenidje Tobacco Company Ltd.* [1916] 2 Ch 426 , the following observations are significant:

" If this were a case of partnership there would clearly be grounds for a dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private company. The position amounted to a company deadlock, and it was " just and equitable " that the company should be wound up."

39. In the cited case, two persons who were formerly partners of the firm later incorporated a private limited company for carrying on their business. Disputes

arose and the hostility reached a stage that the members were not even on talking terms. A complete deadlock had arisen and, therefore, it was held by the court that on the principles analogous to dissolution of a firm, the company ought to be wound up. The law stated still holds the field.

40. The narration of facts made earlier clearly indicated that relations between the minority and majority members had reached such a stage that there was no mutual confidence left. The petitioners representing the minority members have alleged that the majority members have deliberately acted to cause harm to their interests and to squeeze them out from the management of the company while the majority members have been insisting that all their ills are attributable to the misconduct of petitioner No. 1, Virendra Singh Bhandari, who was one of the three directors and was exclusively in charge of the Dewas units. Actually in 1971, Virendra Singh Bhandari was removed from the management of the Dewas units and the same was taken over by Bhanwarsingh, who belongs to the majority group. The consequences of this squabble are apparent inasmuch as all the businesses carried on by the company have come to a grinding halt.

41. The company was in fact a family concern and the principles of a partnership can be applied in such a case. Section 44(f) of the Partnership Act permits dissolution when the business of a firm cannot be carried on save at a loss. Clause (g) of Section 44 is analogous to Clause (f) of Section 433 of the Companies Act and empowers the court to dissolve a firm if it is "just and equitable". The material brought before this court, a good deal of which is no more in dispute, clearly points to the fact that the business of the company cannot be carried on save at a loss and in view of the deadlock created by the hostility between the members it will be just and equitable to wind up the company.

42. Lastly, the petitioners alleged that the substratum of the company had gone and, therefore, it was liable to be wound up on the "just and equitable" ground. 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.

[In re Cine Industries and Recording Co. Ltd. [1942] 12 Comp Cas 215 (SC) ; AIR 1942 Bom 231 and Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., ; Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., .]

43. In Gower's Principles of Modern Company Law, 4th Edn., at p. 663, the learned author describes failure of substratum as under :

" Where the company is no longer able or has never been able to carry on the business for the purpose for which it was formed, any member may petition for winding up order on the "just and equitable " ground.....

Where, for example, a company has sold its business or divested itself of its major assets, then even though the majority may wish to keep the company in existence and invest the proceeds under some valid power to do so, dissenting shareholder may be entitled to say " put an end to it, pay me my money ".

44. Applying these principles, when the state of affairs which have been stated in the affidavits and are not in dispute are examined, it will be seen that on the date of the petition all other businesses which the company was carrying on, except the selling agency business, had stopped or were running in loss. During the pendency of the petition the selling agency business also came to an end after the expiry of its term. Dewas units of the company were sold. Though under the memorandum the company had enumerated numerous businesses, in fact it carried on only those businesses which have been described in the earlier part of this order. The balance-sheets of the company from 1970-71 onwards present a dismal picture where the liabilities far exceed the assets of the company.

45. On behalf of the company it was argued that the company under the memorandum of association could embark on other trades and businesses even though the businesses carried on had failed or had run into loss. Thus, according to the learned counsel for the company, the subject-matter of the company still existed. It was further argued that petitioner No. 1.Virendra Singh Bhandari, was himself responsible for the situation in which the company finds itself and, therefore, it is not open to him in equity to get an advantage out of his own misconduct.

46. Both these arguments have to be rejected. Once conceding that the financial affairs of the company had reached their nadir, which fact was apparent on the face of the record, it is not possible to subscribe to the pious hope held out by the company that it is still capable of retrieving its present business or venturing on new ones. It was not shown, even when counsel for the petitioners pointedly questioned during his arguments, as to from where the company could secure finance's when its fixed assets had already been transferred and it had no liquid assets worth the name. Further, in spite of the clear allegations in the petition and later during arguments, learned counsel was unable to show any concrete scheme for resuscitating the company. Howsoever sanguine the company's majority members may be, the condition of the company is so anaemic that no reasonable person can expect its revival in the present circumstances.

47. The allegation that the company has come to this state because of Virendra Singh's acts, does not help the company in proving that its substratum still

exists. Firstly, the material on record does not show positively that Virendra Singh is the villain, responsible for the company's troubles. Had this been so, there would have been some action by the company to seek damages from Virendra Singh. Virendra Singh was in charge of the Dewas units up to July, 1971, and, thereafter, the management of these units had been taken over by Bhanwar Singh of the majority group. There is nothing to indicate that these units started to function more efficiently after July, 1971, or the affairs of the company had been made straight. On the contrary, the acts of the majority members showed that they were in a hurry to appropriate the assets among themselves. In view of the above facts, I hold that the substratum of the company has failed and the company deserves to be wound up on the " just and equitable " ground.

48. In the light of the discussion above, I hold that:--

- (1) the company is unable to pay its debts ; and
- (2) it is just and equitable that the company should be wound up.

49. I, therefore, order that the respondent-company be wound up. A copy of the winding-up order shall be drawn by the Additional Registrar as per company rules and shall be forwarded to the official liquidator and also to the Registrar of Companies as required u/s 444 of the Act. The official liquidator shall forthwith take into his custody all the property and effects, books and papers of the said company. The official liquidator shall also cause a sealed copy of this order to be served on the company as also to the directors thereof by registered post. The petitioners shall get advertised within fourteen days a notice in the prescribed form of the making of this order in one issue each of, (1) Daily Naiduniya, Indore, (2) Daily Indore Samachar, and (3) Daily Hitwad, an English daily of Bhopal. The official liquidator shall take all other necessary steps in the winding-up proceedings of the said company, in accordance with the provisions of the Companies Act, 1956. Costs of this petition shall be borne by the company. Advocate's fee Rs, 500.