

(1974) 05 MP CK 0006

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 P. Ltd.

RESPONDENT

Date of Decision : 03-05-1974

Acts Referred:

Companies Act, 1856 — Section 397, 398, 439, 450

Citation : (1978) 23 MPLJ 834 : (1978) 23 MPLJ 772

Hon'ble Judges : A.P. Sen, J

Bench : Single Bench

Advocate : P.P. Khambata and Harbansingh, for the Appellant; G.I. Mehta and R.G. Waghmare, for the Respondent

Judgement

A.P. Sen, J.

This is a contributories" application for appointment of a provisional liquidator u/s 450 of the Companies Act, 1956, filed on October 18, 1973, during the pendency of their petition for compulsory winding up under Sections 397 398 and 439 of the Act.

The material facts, in brief, are as follows :

The erstwhile joint Hindu family trading under the name and style "M/s. Nandlal Bhandari & Sons" held 5,836 shares and 1 scrip of "M/s. Nandlal Bhandari Mills Ltd. ", a public limited company incorporated on March 1, 1922 (hereinafter referred to as "the Mills Ltd."). On March 29, 1949, there was a partition in the family and the separated members formed " M/s. Nandlal Bhandari & Sons Ltd.", which was incorporated as a company limited by shares, and ultimately converted into a private limited company styled as " M/s. Nandlal Bhandari & Sons (Pvt.) Ltd. " (hereinafter referred to as " the company") and incorporated as such under the Companies Act, 1956. By a division of the capital account, which included shares, the 5,836 shares and 1 scrip of the Mills Ltd., which had by then increased to 11, 772 shares and 1 scrip by reason of issue of bonus

shares, were transferred to the company. Subsequently, in the year 1969, the company purchased 6,327 shares of the Mills Ltd. from one Shrikishan Chandmal at Rs. 325 per share. Thus, the company held 17,099 shares and 1 scrip, i.e., 85 percent, of the share capital of the Mills Ltd. By virtue of the company being the holding company, it is the sole selling agents of the Mills Ltd. Under an indenture dated November 10, 1970 (R-14) the selling agency is to continue till December 31, 1975.

The company has three sources of income : (i) the selling agency commission ; (ii) guarantee commission ; and (iii) rental income. The sole selling agency is the main source and yielded by way of commission Rs. 2,67,993, Rs. 3,08,132 and Rs. 3,35,195 in the years 1969, 1970 and 1971, respectively. The guarantee commission is about Rs. 5,000 per month from the Mills Ltd. whereas the rental income is to the tune of Rs. 3,000 per month from the properties owned by the company.

The other lines of business were manufacture of vanaspati and a flour mill under the name and style " Nand Vanaspati" and "Dewas Flour Oil and De-oiled Cake Factory ". These two units, which were placed with the petitioner, Virendrasingh Bhandari, as the director-in-charge have, however, been closed.

Incidentally, the Bhandaris also floated M/s. Gajendrasingh Randhira-singh Oil Mills (P.) Ltd., which was incorporated on August 24, 1950, as a private limited company (hereinafter referred to as " the G. R. Oil Mills") to carry on the business of ginning cotton. It has a paid up capital of Rs. 2,00,000, and three directors, the petitioner, Virendrasingh Bhandari, and his two brothers, Bhanwarsingh Bhandari and Surendarsingh Bhandari.

The case presents a sorry state of affairs. Out of the 17,099 shares and 1 scrip of the Mills Ltd., 3,350 shares were pledged with the State Bank of Indore, and 1,600 shares with the Bank of India, in the year 1970. In 1971, 4,000 shares were pledged with the State Bank of Indore as additional security. The balance-sheet and the profit and loss account 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 largest creditor was the State Bank of Indore. The statement filed by the bank shows that a sum of Rs. 75,85,638.13 was due. Out of this, Rs. 50,20,790.40 were due on account of the " Dewas Flour Oil and De-oiled Cake Factory" and the " Nand Vanaspati", secured on equitable second mortgage of lands, buildings, plants and machinery at Dewas. The Bank of India, in its statement, has disclosed that it had given credit facilities to the company in respect of these two units to the extent of Rs. 1,25,000 and a sum of Rs. 1,13,619.14 was due thereon. The company was also indebted to the Madhya Pradesh Financial Corporation under two mortgage deeds dated July 28, 1962, and March 25, 1969, on the strength of which (which were English mortgages on its lands, buildings, plants and machinery at Dewas) it had borrowed two sums of Rs. 5,00,000 and Rs. 6,50,000, respectively, for the establishment of " Nand Vanaspati". It had already defaulted in payment of instalments in respect of both

the loans. The Madhya Pradesh Financial Corporation in its statement has disclosed that it has already obtained a decree for Rs. 9,11,648.91 against the company and applied for its execution, and the executing court has issued a notice under Order 21, Rule 66, of the Code of Civil Procedure, on the company.

The directors' report shows that during the year in question, the company incurred a net loss of Rs. 6,63,182. Its Income Tax assessment for the assessment year 1970-71, the corresponding accounting year of which is the year 1969, had been completed ; but the assessments for the subsequent years were still pending. So also, the assessments under the Madhya Pradesh General Sales Tax Act and the Central Sales Tax Act from the accounting year 1968 onwards were still pending. It further divulges that there was an outstanding demand of Rs. 24,10,817 from the Rajasthan sales-tax authorities and recovery proceedings were pending. The company's factory and house properties have been attached for the realisation of this demand. The balance-sheet also shows that the company had sundry creditors to the extent of Rs. 12,14,752.68. The financial picture was therefore, very dark.

The Mills Ltd. had also fallen upon hard times, and was in serious financial difficulties. During the year ending December 31, 1970, it incurred a loss of Rs. 12,10,826 as per balance-sheet and profit and loss account published on May 1, 1971. For the year ending December 31, 1971, its loss had increased to Rs. 31,34,184 as per balance-sheet and profit and loss account for that year published on May 10, 1972. The result was that the shares of the Mills Ltd. were quoted on the stock exchange at Rs. 250.

Matters took a serious turn when the State Bank of Indore detected actual shortages and irregularities noted below :

(i) On physical verification of the stocks listed in the Stock Statement dated May 31, 1971, it was revealed that stocks of the value of Rs. 4,83,000 declared therein as having been stored in the Indore Mandi actually did not belong to the two Dewas units. ;

(ii) A surprise verification of the stocks in the two units at Dewas by the officers of the bank on June 30, 1971, followed by an inspection on July 23, 1971, revealed shortage in the stock. That was because stocks of the value of Rs. 13,99,000 from Dewas Flour Oil and De-oiled Cake Factory and of the value of Rs. 10,87,000 from Nand Vanaspati, had been removed without making payments in respect thereof. The stocks were thus disposed of clandestinely without paying into the company's account with the bank the full price thereof as stipulated, resulting in deficit in the cash-credit account.

(iii) A foreign bill for Rs. 1,29,000 issued by one of the Dewas units, discounted by the State Bank, was not honoured and at the request of the company, the documents were delivered to the drawees against payment of 50 per cent. of the amount thereof and the remaining amount of Rs. 69,148.78 had to be debited to the cash-credit account.

(iv) Two bills aggregating Rs. 97,382 drawn by M/s. Maniar Narrot-tamdas Dharamsi, Rajkot, on Nand Vanaspati and received for realization by the State Bank on June 16, 1971, were taken delivery of by the petitioner Virendrasingh, against two blank cheques drawn by him on behalf of the company with the promise that the amount would be deposited by him with the bank. On his failure to deposit the amount, one of the cheques duly completed for Rs. 97,900.90 was dishonoured, when presented, for lack of funds. The amount together with interest had also to be debited to the cash-credit account.

(v) Bills aggregating Rs. 8,00,000 drawn by the company on various parties and discounted by the State Bank of Indore, Prince Yeshwant Road Branch, from time to time on behalf of the company's two units were received back unpaid. Inquiries revealed that the relative consignments were never delivered to, or carried by the transporters, or that the amounts were received directly by the company and utilized for purposes other than for adjustment of its account.

The board of directors, at a meeting held on July 24, 1971, accordingly, resolved that 4,000 shares of the Mills Ltd. be pledged with the State Bank of Indore as collateral security for the enjoyment of the credit facilities which the two units at Dewas were having (R-6, p. 1). On the same day, the chairman called an extraordinary general meeting of the shareholders (vide notice R-6, p. 7), along with an explanatory statement (R-6, p. 8). The shareholders were given notice that it was proposed to pass the following three resolutions :

(1) To execute an equitable mortgage for a sum not exceeding Rs. 53,00,000 and create a second charge (first in favour of the Madhya Pradesh Financial Corporation) in respect of properties at Dewas.

(2) To authorise the board of directors to sell the buildings of the company known as " Nandanvan Kothi " and " Rampurawala Building " to such person or persons and on such terms and conditions and at such price as they may think fit.

(3) To sell 8 to 10 thousand shares to G.R. Oil Mills at the price ruling in the market, as quoted on the stock exchange.

The notices of the meeting were duly served on the petitioner, Virendra-singh, and his wife, Smt. Shantabai. They, however, abstained from the meeting, the minutes of the extraordinary general meeting dated August 20, 1971 (R-6, p. 11), record not only that the petitioners were served with notice, but they were also contacted on phone and apprised of the desirability of their attending the meeting. The three resolutions were unanimously passed. In respect of the resolution relating to disposal of " Nandanvan Kothi " and " Rampurawala Building ", the chairman stated that he had discussed the matter of allotment of these buildings informally with the petitioner who expressed that he was not interested in those buildings and that he was interested in " Yeshwant Niwas Palace" which was in his occupation, and if the question of allotment of that building is taken up he would be interested in securing a portion thereof.

In accordance with the resolution of the board of directors, duly ratified by the general body of the shareholders, the company pledged 4,000 shares of the Mills Ltd. (vide letter dated August 5, 1971, R-20, p. 2). The chairman, Suganmal Nandlal Bhandari, and the other director, Bhanwar-singh Bhandari, also executed a second equitable mortgage by deposit of title deeds of the Dewas properties on August 16, 1971 (R-20, p. 3). The State Bank of Indore, by letter dated November 17, 1971, addressed to the directors, stated that there was still a shortage to the tune of Rs. 9,38,000, and called upon the company as guarantors of the advances to the two units of Dewas, to clear off the outstandings and, in the meantime, to secure them by their personal movable and immovable assets without delay. The chairman, Suganmal Nandlal Bhandari, and the other director, Bhanwarsingh Bhandari, accordingly, executed the mortgage deed dated November 23, 1971, in respect of Yeshwant Niwas Palace.

Then followed a series of transfers. On August 21, 1971, the company transferred 8,299 shares to G.R. Oil Mills at the rate of Rs. 250 per share for a sum of Rs. 20,74,750. To complete the transaction, the directors controlling the majority shares had a sum of Rs. 20,74,764.02 belonging to the members of their respective families, lying in deposit with the company, withdrawn and had the same deposited with the G.R. Oil Mills. The G.R. Oil Mills, with a paid up capital of Rs. 2,00,000 could not have purchased the shares except by borrowing capital from the depositors. The company has placed on record the statement of account of the G.R. Mills with the Bank of Baroda showing the deposit of Rs. 2,07,464.02 and the payment of Rs. 20,74,750 by cheques. On August 27, 1971, the company sold Nandanvan Kothi for a sum of Rs. 11,00,000 to Gajendrasingh and Rajen-drasingh, sons of Suganmal Nandlal Bhandari, and Surendrasingh and Mahendrasingh, brothers of the petitioner, Virendrasingh Bhandari. On the same day, the Rampurawala Building was sold to Randhirsingh, Tej-singh and Ajitsingh, sons of Bhanwarsingh Bhandari, for a sum of Rs. 6,86,000. These sales were by adjustment of deposits lying to their credits in the books of the company. This was in consonance with the decision taken by the shareholders in the extraordinary general meeting held on August 20, 1971, to the following effect :

" The chairman further elucidated the explanatory note in extenso discussing the present position and impending legislation regarding ceiling of urban immovable property and propriety of dividing properties to members of the company keeping in view the equitable distribution.....After exchanging the views of all the members in attendance it has been considered, expedient, proper and in the interest of the company to allot the aforesaid buildings or their portions. Such an allotment would also liquidate considerably the deposits of such members, which are with the company. Such an allotment would also endeavour to maintain a goodwill amongst the shareholders who are members of the same family." (R-6, pp, 11 & 12).

It is noteworthy that in the resolution of the board of directors dated July 26, 1971, the chairman was authorized to get the buildings valued by an approved

valuer. As per valuation report of Shri P. G. Joglekar (R-7), the value of Nandanvan Kothi was put at Rs. 11,00,000 while that of Ram-purawala Building at Rs. 6,86,000. The petitioners contest this. Their case is that the properties have been grossly undervalued to facilitate the fraudulent sales. They have filed a valuation report of S. V. Puranik & Company (P.) Ltd. (annexure "B-2") showing the value of Nandanvan Kothi and Rampurawala Building at Rs. 20,80,000 and Rs. 16,00,000 respectively. The company has, however, placed on record the sale deed executed by Maharani Ushadevi Holkar dated March 24, 1972, in respect of Shiv Vilas Palace, which is in the heart of the city, for a sum of Rs. 20,00,000 (R-23). Besides the sale of these two buildings, the company also sold various other items of property as per a statement (R-5, p.1). It appears from the various resolutions (R-4) of the board of directors that the company decided as a matter of policy consistently, since 1956, to dispose of its immovable properties. The petitioner, Virendrasingh himself, was one of the executants of some of the sale deeds till 1971.

There now followed a spate of suits brought by the petitioner, Virendrasingh, and his wife, Smt. Shantabai Bhandari, jointly or severally, claiming the following amongst other reliefs :

(i) For a declaration that the sale of 8,299 shares of the Mills Ltd. by the company to the G.R. Oil Mills, the sale of Nandanvan Kothi and Rampurawala Building including the transfer of management of the Central Hotel, was fraudulent, illegal and void, and for grant of perpetual injunctions to restrain the transferees from dealing with the properties.

(ii) For a declaration that the notice calling the annual general meeting of the company on June 27, 1972, was not legal, and for a perpetual injunction to restrain the company from conducting the meeting.

(iii) For a perpetual injunction to restrain the company from effecting any change in the constitution of the board of directors and from transferring any of the properties,

(iv) For a declaration that the resolution passed at the meeting of the board of directors on January 25, 1972, was illegal, void and inoperative and for a perpetual injunction to restrain the company from giving effect to it.

(v) For a declaration that the meeting of the board of directors held on April 28, 1972, was illegal and, therefore, the minutes recorded, including the resolutions passed, were void and of no effect and for a perpetual injunction to restrain the company from taking any steps in compliance of any resolution passed in the said meeting.

They have also brought a suit against the G. R. Oil Mills for a declaration that the purchase of 8,299 shares was illegal, unauthorized, null and void.

There are now 11 suits pending in different courts right from the civil judge, class II, to that of the district judge.

In Civil Suit No. 6434 of 1971, the first civil judge, class II, Indore, granted a temporary injunction to the petitioner, Smt. Shantabai, under Order 39, Rule 1, of the Code of Civil Procedure, to the following effect :

" It is hereby ordered that the defendant is hereby permitted only to use the funds of the company for the purpose of making payments towards salary, wages, rents and also to other creditors excluding the shareholders and the directors of the company. The directors can be paid only the remuneration they are entitled to. The defendant is further allowed to do the purchase and sale of the movable trading commodities, in regular business of which the defendant company is engaged, and they are allowed to enter into contracts and make payments to the concerned parties from whom the purchase is being made. However, the sale of shares owned by defendant company to any of the companies, is restrained. Payment to the tune of Rs. 1,000 per month for office and other miscellaneous expenses is also permitted."

From a narration of these facts, it is apparent that there is a complete discord between the petitioners on the one hand, i.e., the minority shareholders, and the directors controlling the majority shareholders in the company on the other. The petitioners filed the petition under Sections 397 398 and 439 of the Act on August 16, 1972, But they appear to be in two minds. The relief in fact sought is for redress under Sections 397 and 398, i.e., the directors controlling the majority of shares should be ordered to purchase the petitioners' shares, and other ancillary reliefs that, in the meantime, the petitioner, Virendrasingh, should not be removed from the board of directors and allowed to draw his remuneration of Rs. 2,000 per month and enjoy the other rights and privileges as such. But in the relief clause, the main relief sought is for a winding-up order, and alternatively, for orders under Sections 397 and 398 of the Act.

The petitioners alleged that the directors controlling the majority of shares have used their power to defraud or oppress them, i.e., the minority shareholders, with a view to obtain improper advantage to themselves and the members of their respective families. They further alleged that they are guilty of fraudulent conduct and machinations, and have made bogus entries with a view to transfer the assets of the company to themselves or to the members of their families. This is, therefore, according to them, a blatant case of both fraud and oppression.

During the pendency of the petition on February 8, 1973, the G. R. Oil Mills sold the 8,299 shares of the Mills Ltd., to the 21 depositors at the rate of Rs. 251 per share and cleared off the debt borrowed from them. In their turn, the 21 depositors, on October 12, 1973, sold the shares to M/s. Sabari Textiles (Pvt.) Ltd., i.e., a concern of the Potdars of Calcutta, at the rate of Rs. 350 per share. The result of this was that the 21 depositors, i.e., the members of the families of the directors controlling the majority shares, made a clear profit of Rs. 8,00,000 in this deal.

Meanwhile, on October 9, 1973, the State Bank of Indore as pledgee of 7,350

shares of the Mills Ltd., served a notice upon the company making a demand for payment of Rs. 75,85,638.13 failing which it intimated that it would sell the shares for realisation of the debt. The company, by its letter dated October 16, 1973, stated that it was making every endeavour to liquidate the liability, but expressed its helplessness due to the injunction granted by the civil court. In reply, the bank, by its letter dated October 18, 1973, stated that in the circumstances there was no alternative but to sell the shares and realize the dues and take further proceedings for the balance. Incidentally, the bank intimated that there was a prospective purchaser of the shares at the rate of Rs. 350. It also informed the company that if it had any higher offer it should intimate within seven days of the receipt of the notice. The company by its letter dated October 19, 1973, stated that it had no further comments to make. Eventually, the bank, by its letter dated November 12, 1973, conveyed that the 7,350 shares pledged had been sold for Rs. 25,72,500. The purchaser was M/s. Sabari Textiles (Pvt.) Ltd. Thus, the control of the Mills Ltd. has passed on to the Potdars of Calcutta.

The petition is based upon a claim that it is just and equitable that the company should be compulsorily wound up. The petitioners' main complaints fall under three heads 3

First, the substratum of the company has disappeared. All the income-yielding assets have been disposed of. The company had 80 per cent. holding in the Mills Ltd., i.e., 17,099 shares and 1 scrip, which is now reduced to 1,481 shares. The control having passed to the Potdars, the sole selling agency is not likely to be continued. The main object with which the " company was formed was to carry on the sole selling agency of the Mills Ltd. The income of the company is being frittered away and the directors controlling the majority of shares are helping themselves. They have brought the company to a state of commercial insolvency. In short, it is inevitable that the company would be wound up.

Second, the petitioners complain that they have a justifiable lack of confidence in the conduct and management of the company's affairs, resting on a lack of probity on the part of the directors controlling the majority of shares. They, in addition to their share capital of Rs. 2,51,000, also have Rs. 4,35,732.22 as investment by way of deposits in the company. They are entitled to have the company's business properly managed according to law. The directors controlling the majority of shares are guilty of fraud and oppression. They camouflaged the deal with the Potdars in respect of the 8,299 shares in such manner, i.e., making use of the G.R. Oil Mills, and have thereby enabled the 21 depositors, i.e., the members of their respective families, not only to withdraw their deposits totalling Rs. 20,74,764.02, but have also helped these relations of theirs to derive profits of Rs. 8,00,000. Furthermore, the sales of Nandanvan Kothi and Rampura-wala Building by the directors controlling the majority of shares, to their own near relations at gross undervalue shows complete lack of probity and want of fair dealing.

Third, the petitioners fear that unless a provisional liquidator is appointed to take possession of and protect the assets of the company, i.e., take charge of the income and disburse the moneys under the directions of the court, it would be impossible to liquidate the liabilities of the company. Attention was also drawn to the list of creditors repaid (R-22, p. 1). It is pointed out that Ajaykumar S. Dhakad, to whom Rs. 43,000 had been paid is a grandson of the Chairman, Suganmal Bhandari, while "Rajbahadur S. Dhakad " and " Laxmi Oil Mills ", which names are mere camouflages for the two daughters-in-law of Suganmal Bhandari, have been paid Rs. 5,000 and Rs. 71,700, respectively. So also, Smt. Chandrashashi S. Dhakad and Smt. Sushiladevi M. Dhakad, to whom Rs. 40,000 and Rs. 10,000, respectively, have been paid, are his daughters. As against this, the State Bank of Indore has been paid Rs. 42,000 only and the Bank of India Rs. 3,500. This inevitably shows that the collapse of the company is imminent.

These contentions rest on the hypothesis that this is a case of a partnership carried on in the guise of a company and so falls within the doctrine of *In re Yenidje Tobacco Company Ltd.* [1916] 2 Ch 426 (CA), and there being such a lack of confidence between the two groups of directors, it is inevitable that the company would be wound up on the ground that it was just and equitable to do so. Accordingly, it was necessary that a provisional liquidator should be appointed and an order to this effect should be made.

Section 450 of the Companies Act, 1956, reads :

"450. Appointment and powers of provisional liquidator.--(1) At any time after the presentation of a winding up petition and before the making of a winding-up order, the court may appoint the official liquidator to be liquidator provisionally... "

Appointment of a provisional liquidator is a drastic measure and should not be resorted to except in special circumstances, i.e., in cases of urgency. Though the section does not lay down any criteria, the principles governing the subject are well settled. In *re London, Hamburg and Continental Exchange Bank* : *Emmerson's case* [1866] LR 2 Eq 231, 236, Lord Romilly, in a much quoted passage, stated :

" It is perhaps convenient that I should state what my practice is with reference to the appointment of provisional liquidators. Where there is no opposition to the winding-up, I appoint a provisional liquidator as a matter of course, on the presentation of the petition. But where there is an opposition to it, I never do, because I might paralyse all the affairs of the company, and afterwards refuse to make the winding-up order at all. But when the directors themselves apply, or do not oppose the winding-up, then I appoint the provisional liquidator."

The dictum of Lord Romilly has stood the test of time and is taken to be the law on the subject (*Pennington's Company Law*, 3rd edn., pp. 682-83, *Buckley on the Companies Acts*, 13th edn., p. 505, *Datta on the Company Law*, p. 598, *People's Bank of India Ltd. v. Narain Das* AIR 1916 Lah 117, *Punjab Pictures Ltd. v. Jhabbar Mal Chokhani* [1948] 18 Comp Cas 274 (East Punj), *In re Northern*

Airways Ltd. [1947] 17 Comp Cas 210 (Lah), In re Gaya Sugar Mills Ltd. [1950] 20 Comp Cas 151 (Pat).

Both, on authority and principle, a provisional liquidator is not, in general, appointed before the hearing of the petition for winding up unless the company is shown to be insolvent or unless the petition is presented by the company itself or shown to be unopposed. In In re Gaya Sugar Mills Ltd. [1950] 20 Comp Cas 151 (Pat), Shearer J. observed (p. 154) :

".....it may be that that would justify the making of a winding-up order even if a majority of the shareholders are opposed to it.

But a finding of fraud cannot be come to on the basis of affidavits. Moreover, what I am now concerned with is not the making of a winding-up order but the application for the appointment of a provisionalliquidator. Such an application is not ordinarily allowed except on the petition of a creditor who has been unable to obtain payment of his money, or unless the company asks for or agrees to the appointment. The dangers involved in appointing a provisional liquidator and then finding that there is no justification for making a winding-up order are obvious. The consequences to the company of the making of a wrong order in such a matter are far more serious than the granting of an injunction which has ultimately to be dissolved."

The principle that emerges is this: Before the court takes such a drastic step it must be satisfied that such an order is absolutely necessary. The appointment of a provisional liquidator for a company which is carrying on business and functioning, as in the present case, would in effect put a stop to the business, though ultimately the court may refuse to wind up.

In my view, this is not a fit case for appointment of a provisional liquidator. It is wrong to say that the substratum of the company has disappeared. Today, the company is still carrying on business and has three definite sources of income : (i) the sole selling agency ; (ii) the guarantee commission ; and (iii) the rental income. The appointment of a provisional liquidator will automatically lead to the termination of the board of directors. Though the company is no longer the holding company of the Mills Ltd., there is no change in the sole selling agency. The present arrangement still stands and no one has chosen to terminate the agreement which is to last till December 31, 1975. The appointment of a provisional liquidator would suspend the powers of the board of directors. The principals, that is the Mills Ltd., as now controlled by the Potdars, may, in that event, be justified in terminating the agreement under Clause 24. It is, therefore, not in the interest of any one to have a provisional liquidator. The guarantee commission is also being paid by the State Bank on the footing that the company is solvent. The appointment would put a stop to two of the main sources of income.

There is no allegation that the assets of the company are being frittered away or any misappropriation, of funds. The petitioners have themselves sought relief

under Sections 397 and 398 of the Act. These provisions are designed to salvage a company. The term "just and equitable" has undergone a change in connection with the radical change in the socio-economic conditions in the country. The term has lost its technical meaning and has acquired a more meaningful and pragmatic one. Unless the court is compelled by circumstances, an order directing winding up of a company should not be made. That being so, the court should be extremely vigilant in appointing a provisional liquidator.

It is not a proper approach to look at the balance-sheet or profit and loss account of the year ending December 31, 1972, and say that fixed and other assets, i.e., land and buildings, particularly, Nandanvan Kothi and Rampurawala building, and 15,649 shares of the Mills Ltd., having been sold, the company was unable to pay its debts and, therefore, a winding-up was inevitable. A company may have liabilities more than its assets, but still may have, in particular circumstances, the capacity to meet demands from its creditors : A.C.K. Krishnaswami Vs. Stressed Concrete Constructions Pvt. Ltd., , S. Krishnamurthy v. Rohtak Hissar Transport Company (P.) Ltd. [1966] 36 Comp Cas 9 (Punj). The test laid down in these cases is that the company should be commercially solvent, i.e., it should be in a position to meet its liabilities as and when they arise. It is well known that business is now usually run on borrowed capital.

The appointment of a provisional liquidator would also clearly be against public interest. The company is indebted to the State Bank of Indore to the tune of Rs, 50,20,790.40 secured by two second equitable mortgages (the first being held by the Madhya Pradesh Financial Corporation). The Madhya Pradesh Financial Corporation has secured a decree for Rs. 9,11,648-91. The Bank of India has still to recover Rs. 1,15,000 as an unsecured creditor. The State Bank of Indore contends that its welfare lies in standing outside the winding up and in realizing its security by bringing the mortgaged property to sale. That submission rests on the decision of their Lordships in M.K. Ranganathan and Another Vs. Government of Madras and Others,). The contention of the Madhya Pradesh Financial Corporation is that it has already secured a decree and put it into execution. The appointment of a provisional liquidator would stand ;in their way and they would have to obtain the leave of the court u/s 446 of the Act. Besides, the provisional liquidator would try to take into custody or possession the properties of the company u/s 456 of the Act. At any rate, this would certainly impede or retard the process of recovery. So far as the Bank of India is concerned, there is still a chance of recovery which may disappear.

There is another reason why the petitioners' prayer for a provisional liquidator should not be granted. No doubt, if a company is a private company and its share capital is held wholly or mainly by its directors and the members of their respective families, it may partake of a partnership in the corporate form, and the court may order its winding up in the same situation as it would order the dissolution of a partnership on the ground that it is just and equitable to do so. In *In re Yenidje Tobacco Company Ltd.* [1916] 2 Ch D 426 (CA), Lord Cozens-

Hardy M. R. enunciated the principles in a celebrated passage thus (page 430) :

" In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position ? I think it is quite clear under the law of partnership, as has been asserted in this court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership for the reasons which are stated by Lord Lindley in his book on Partnership at p. 657 in the passage which I will read, and which, I think, is quite justified by the authorities to which he refers : "Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it". "

That is the leading case on the subject and the subsequent decisions are a mere application of the principles.

In *re Westbourne Galleries Ltd.* [1970] 3 All ER 374, Plowman J. has reviewed the law. The Court of Appeal, however, in *In re Westbourne Galleries Ltd* [1971] 1 All ER 561 differed; but its decision has been reversed by the House of Lords in *Ebrahim v. Westbourne Galleries Ltd.* [1972] 2 All ER 492. According to the learned Law Lords, the dictum of Plowman J. that for an order u/s 210 of the Companies Act, 1948 (corresponding to Section 397 of the Act), a petitioner must, in relation to his position as a shareholder, establish some lack of probity on the part of the respondents and a course of oppressive conduct continued up to the date of the petition, lays down the correct law. The test is clearly not fulfilled in the present case.

The partnership principle was also considered by A. N. Ray J. (as he then was) in *Raghunath Prasad Jhunjunwala and Another Vs. Hind Overseas (Private) Ltd.,*), who took the same view as Plowman J. in *Westbourne Galleries'* case [1970] 3 All ER 374 (Ch D), On appeal, D. N. Sinha C.J. and A. K. Mukherjea J., however, in *Ragunath Prasad Jhunjunwala and Another Vs. Hind Overseas Private Ltd.,*) struck a discordant note. With respect, their Lordships' view that in applying the principles of dissolution of partnership to companies as laid down in *re Yenidje Tobacco Company Ltd.* [1916] 2 Ch D 426(CA), the fact that the company was a partnership in disguise by itself was sufficient and there was no need to prove lack of probity, does not seem to be correct.

That brings me to the dictum of Lord Cozens-Hardy in *Yenidje Tobacco Company Ltd.* [1916] 2 Ch D 426 (CA). Emphasis must be laid on the last words, namely :

"and that such impossibility has not been caused by the person seeking to take advantage of it."

That would bring in the principles of Section 44 of the Partnership Act, the relevant portion of which reads :

" 44. At the suit of a partner, the court may dissolve a firm on any . of the following grounds, namely :--.....

(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....."

The question is, whether the court would, in a suit brought by a partner in circumstances similar to the present case, order dissolution merely because the partnership is in a state of hostility rendering mutual confidence impossible. In such circumstances, the court would not interfere in a suit by a partner who is himself guilty of misconduct. In *Harrison v. Tennant* [1856] 52 ER 945, Lord Romilly said :

" No party is entitled to act improperly and then to say that the conduct of the partners and their feelings towards each other are such that the partnership can no longer be continued, and certainly this court would not allow any person so as to act and thus to take advantage of his own wrong. "

The directors controlling the majority of shares have squarely placed the entire blame on the petitioner, Virendrasingh Bhandari, for the present state of affairs. They have placed on record a statement (R-2) specifying various acts of malfeasance, misfeasance, misappropriation and breach of trust on his part. The truth or otherwise of the allegations must, necessarily form the subject-matter of an inquiry.

In the result, the application filed by the petitioners for appointment of a provisional liquidator u/s 450 of the Companies Act, 1956, is rejected, with costs. Counsel's fee Rs. 500 (five hundred) if certified.