

(1989) 08 DEL CK 0034

In the Delhi High Court

Worldwide Agencies (P) Ltd. and another

APPELLANT

Vs

Margaret T Desor and others

RESPONDENT

Date of Decision : 31-08-1989

Acts Referred:

Citation : (1990) 67 CompCas 589

Hon'ble Judges : P.K. Bahri, J;Leila Seth, J

Bench : Division Bench

Advocate : Arun Jaitley, for the Appellant; Vinoo Bhagat, for the Respondent

Judgement

Leila Seth, J.—Two interesting points of law arise in this appeal:

(i) Whether the legal heirs of a deceased shareholder can be regarded as members of the company for the purpose of maintaining a petition under sections 397 and 398 of the Companies Act, 1956, and

(ii) Whether a composite petition under sections 397, 398 and 433(f) of the Companies Act, 1956, is maintainable.

2. The admitted facts are briefly set out. As per a certified copy of the annual return made out up to February 15, 1984, the shareholders of Worldwide Agencies Pvt. Ltd. were as follows :

Mr. S. Desor 600 shares Mrs. Amrit Kaur Singh 545 " Mr. Yash Pal Malhotra 250 "
Mrs. Amrit Gupta 200 " Mrs. Savitri Devi Kohli 5 " Mr. A. S. Saluja 5 " Mr. Balwant
Singh 405 " ----- " 2,010 -----

3. Mr. S. K. Desor was the largest single shareholder and the managing director of the said company. He died on March 5, 1985. The office of Worldwide Agencies Pvt. Ltd. was closed on 5th, 6th and 7th March, 1985.

4. A petition under sections 397 and 398 of the Companies Act, 1956 (hereinafter referred to as "the Act"), and, in the alternative, for winding up, was filed by Ms. Margaret T. Desor and her children on March 25, 1985.

5. It is asserted in the said petition that on March 12, 1985, Mr. S. K. Desor's widow, Mrs. Margaret T. Desor, who is a British subject, applied as a legal heir to the board of directors for transmission of 850 shares held by her husband. (Mr. Yash Pal Malhotra's shares having been bought by Mr. S. K. Desor). She also furnished an affidavit of her daughter Ms. Kim Paul, relinquishing her claim to the shares of her late father. It is further asserted that, in view of this application, the board of directors resolved that they had no objection to the transmission of the shares held by Mr. S. K. Desor, but that the actual transfer would take place on Mrs. Margaret T. Desor obtaining the Reserve Bank of India's permission and a succession certificate. Further, Mrs. Margaret T. Desor's application for allotment of five shares as per her letter of the same date was allowed and it was resolved that in view of the allotment of these shares and her interest in the shares of her late husband, she be appointed a director of the company, subject to the Reserve Bank of India's permission. At the said meeting, the board of directors also recorded their deep appreciation of the services rendered by the late Mr. S. K. Desor as managing director-cum-chairman of the company and mourned his passing away. The quorum of this meeting was of two, Mrs. Amrit Gupta and Mrs. Savitri Devi Kohli.

6. On March 23, 1985, the board of directors held another meeting. The minutes of the meeting of March 12, 1985, were confirmed by the two abovementioned directors. The third director, Mrs. Amrit K. Singh, however, objected, as she stated that she had not been informed of the last meeting.

7. Various averments have been made in the said petition with regard to oppression and removal of certain valuables by Mrs. Amrit K. Singh and illegal operation of the bank account, etc.. It is also asserted that Mrs. Amrit K. Singh is holding the 545 shares benami and that these in fact belonged to Mr. S. K. Desor.

8. A preliminary objection was raised on behalf of Mrs. Amrit K. Singh regarding the maintainability of the petition on the ground that the petitioners were not members of the company as their names had not been recorded in the register of members. A further objection was taken that a composite petition under sections 397 and 398 of the Act with an alternative prayer for winding up the company is not maintainable.

9. The learned company judge dealt with these contentions and after referring to the various decisions cited, came to the conclusion that the petitioners, who were the wife and children of the late Mr. S. K. Desor and had obtained letters of administration u/s 290 of the Indian Succession Act read with section 273 of the said Act as also permission of the Reserve Bank of India, must be treated as members for the purpose of maintainability of a petition under sections 397 and 398 of the Act. He also held that a composite petition was maintainable.

10. Mrs. Amrit K. Singh filed an appeal for herself and, as she alleges, as "working director" for the company, against the judgment and order of the company judge dated September 21, 1988. The appeal was admitted on October

13, 1988.

11. The Supreme Court, on a SLP filed by Mrs. Amrit K. Singh and the company against an interlocutory order, directed, inter alia, by its order dated January 16, 1989, stay of proceedings before the single judge, expeditious disposal of the appeal and consideration by the Division Bench of applications for directions.

12. During the pendency of the appeal, without prejudice to the rights and contentions of parties, an emergent meeting of the board of directors was directed to be held on January 28, 1989, to consider the question of registration of 450 shares belonging to the deceased Mr. C. K. Desor in the name of Mrs. Margaret T. Desor and her son, Sameer K. Desor, respondents Nos. 1 and 3 respectively. As per the directions of the court dated January 27, 1989, the court-appointed chairman, Mr C. K. Mahajan and Mrs. Margaret T. Desor were not permitted to vote at the said meeting. By a majority, it was resolved not to register respondents Nos. 1 and 3 as members. Nothing really turns on this resolution as the court, by its order dated January 27, 1989, had directed that no effect would be given to this resolution, but that these facts are being mentioned for the purpose of the record.

13. Mr. Arun Jaitley, learned counsel for the appellant, has urged that the legal heirs of a deceased shareholder do not become members unless their names are entered in the register of members and only those persons whose names are entered in the register of members can maintain a petition u/s 397 and 398 of the Act. He further contended that there is no automatic transmission and the board has a discretion and can refuse to register the shares and consequently the legal representatives have no locus standi to maintain such a petition.

14. In order to appreciate the rival contentions, it is necessary to examine certain provisions of the Act. Section 2(27) of the Act gives a negative definition of a member and says "member" in relation to a company does not include a bearer of a share- warrant of the company issued in pursuance of section 114 of the Act.

15. Section 41 of the Act, however, reads as follows :

"(1) The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be member of the company."

16. Section 26 of the English Companies Act, 1948, is substantially the same.

17. Section 109 of the Act reads :

"A transfer of the share or other interest in a company of a deceased member thereof made by his legal representative shall, although the legal representative

is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer."

18. Articles 25 to 28 of Table A of Schedule I to the Act, which deal with transmission of shares, are as follows :

"25. (1) On the death of a member, the survivor or survivors where the member was a joint holder, and his legal representatives where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares.

(2) Nothing in clause (1) shall release the estate of a deceased joint holder from any liability in respect of any shares which had been jointly held by him with other persons.

26. (1) Any person becoming entitled to a share in consequence of the death or insolvency of a member may, upon such evidence being produced as may from time to time properly be required by the Board and subject as hereinafter provided, elect, either, -

(a) to be registered himself as holder of the share ; or

(b) to make such transfer of the share as the deceased or insolvent member could have made.

(2) The Board shall, in either case, have the same right to decline or suspend registration as it would have had, if the deceased or insolvent member had transferred the shares before his death or insolvency.

27. (1) If the person so becoming entitled shall elect to be registered as holder of the share himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects.

(2) If the person aforesaid shall elect to transfer the share, he shall testify his election by executing a transfer of the share.

(3) All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or insolvency of the member had not occurred and the notice or transfer were a transfer signed by that member.

19. A person becoming entitled to a shares by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the shares, except that the he shall not, before registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company :

Provided that the Broad may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the is not

complied with within ninety days, Board may thereafter withhold payment of all dividend, bonuses or other moneys payable in respect of the share, until the requirements of the notices have been complied with."

20. Article 28 is in pari materia with article 32 of Table A of the English Companies Act.

21. Section 210 of the English Companies Act, before its amendment in 1980, is substantially the same as section 397 of our Act.

22. It is the admitted case of parties that the regulation for management of the company as contained in Table A of Schedule I to the Act apply to World Wide Agencies Pvt Ltd. on this aspect The relevant provision in the articles of association of the company regarding transfer of shares is article 17, which reads :

"No share shall be transferred to any person other than a share holder of the company so long as any member of the company is willing to purchase the same at fair value. This clause shall not apply to the executor or administrator or a deceased shareholder, if there is a will or to the heir or lineal descendants where no letter of administrator of a deceased shareholder ,if there is a will or to the heir or lineal descendants where no letter of administration has been taken."

23. It is also admitted that letters of administration were issued to respondents No. 1 and 3 and the Reserve Bank of India granted permission to respondent no. 1 to acquire 850 shares belonging to Mr. S. K. Desor, on non-repatriation basis.

24. Mr. Jaitley submits that, in view of the provision of section 397 of the Act, only a member is entitled to move a petition u/s 397 and 398 of the Act and only a person whose name is in the register of members is a member in view of section 41 of the Act. He also relies on the decision of the Supreme Court in *Balkrishna Gupta v. Swadeshi Polytex Ltd.* [1985] 58 C C 563. The particular observation on which he lays emphasis is (headnote) :

"The privileges of a member can be exercised by only that person whose name is entered in the register of members. A receiver whose name is not entered in the register of members cannot exercise any of those rights unless in a proceeding to which the company concerned is a party and an order is made therein."

25. In the abovementioned case, the point in issue before the Supreme Court was whether a shareholder ceases to be entitled to exercise a right to attend a meeting and vote and /or issue a requisition notice u/s 169 of the Act when a receiver has been appointed with certain powers under Order XL of the Code of Civil Procedure. The court observed therein whatever "advantages a man may have as a result of the ownership of a right may be curtailed by the disadvantage in the form of burdens attached to it", and he may be left with no "immediate practical benefit", but he remains the owner because his interest will outlast that of other persons in the thing owned.

26. The Supreme Court referred to its earlier decision in the case of *Howrah Trading Co. Ltd. v. CIT* [1959] 29 C C 282 and observed that even where the holder of a share whose name is entered in the register of members hands over his share with blank transfer forms duly signed, the transferee would not be able to claim the rights of a member as against the company concerned until his name is registered in the register of members.

27. After examining various decisions, the Supreme Court came to the conclusion that mere appointment of a receiver in respect of certain shares of a company, without more, cannot deprive the holder of the shares whose name is entered in the register of members of the company of the right to vote at the meetings of the company or to issue a notice u/s 169 of the Act.

28. In the present case, the issue is not as between the registered owner and some one else whose claim is opposed to him, but what is to be examined here are the rights of the legal representatives of the registered owner who is no longer alive.

29. It is no doubt true that section 399 of the Act gives the right to "members of a company" to apply u/s 397 and 398 of the Act ; further, section 41 provides that a member of a company is a person who has applied in writing and "whose name is entered in the register of members". It is correct that the names of respondents Nos. 1 and 3 are not yet entered in the register of members, but the name of Mr. S. K. Desor is still on the register on members and the requisite shareholding for moving a petition u/s 397 and 398 was held by him.

30. Counsel are agreed that there is no decision of our courts directly on the point, but there is a decision of the English courts dealing with this issue.

31. In *Jermyn Street Turkish Baths Ltd., In re* [1970] 3 ALL ER 57 (Ch D) Pennycuik J. held on the facts that the petitioners were duly registered as members of the company because a note had been made in the register regarding letters of administration and he observed that there was no particular form required for registration. But the learned judge held that even if it was not so, the personal representatives of a deceased member must be regarded as members of a company for the purpose of section 210. Relying on a decision of Buckley J. in *Bayswater Trading Co. Ltd., In re* [1970] 1 ALL ER 608 (Ch D), he opined that section 210 requires that "member" must include representatives of a deceased member. Consequently, he held that the petitioners had locus standi to present the petition. Though this judgment of Pennycuik J. was reversed in appeal on other points, the decision was not set aside of this point.

32. Mr. Jaitley, however, contended that the observation made in the abovementioned case are obiter. It would appear to us that this contention is not correct. Our opinion is fortified by the observations in various text books dealing with company law which have taken the same view.

33. In the 1972 edition been settled that the personal representatives of a

deceased member, even though they are not registered as members, are entitled to present a petition u/s 210. In *Jermyn Steet Turkish Baths Ltd., In re* [1970] 3 All ER 57 (Ch D), Pennycuik J., held that on its true construction, section 210 required that the word "member" should include the personal representatives of a deceased member, on whom title to his shares devolved by operation law."

34. At page 491 in *Buckley on the Companies Acts*, 14th edition, the abovementioned decision in *Jermyn Street Turkish Baths Ltd., In re* [1970] 3 ALL ER 57 (Ch D) is also referred to and it is observed that, for the purpose of a petition under this section, "member" includes the personal representatives of a deceased member. It is further mentioned that the decision was reversed by the Court of Appeal without affecting this point.

35. Similar observations have been made in *Halsbury's Laws of England*, fourth edition, volume, 7, para 1010, at page 604.

36. The view expressed in *Jermyn Street Turkish Baths Ltd., In re* [1970] 3 ALL ER 57 also finds indirect support from various other decisions of English courts.

37. In *James v. Buena Ventura Nitrate Grounds Syndicate Ltd.* [1896] 1 Ch D 456, it was held that the legal representatives of the deceased member whose name still remained on the register could require an allotment of shares which the latter would, if living, have been entitled to have offered him, these shares not yet having been disposed of by the company ; consequently, "member" in article 27 of Table A of the Schedule to the Companies Act, 1862, which provides that, on the increase of the capital of a company, the new shares, shall be offered to the "members" in proportion to their existing shares, would include a deceased member so long as his name is on the register.

38. In *Llewellyn v. Kasintoe Rubber Estates Ltd.* [1914] ALL ER 558 ; [1914] 2 Ch 670, it has been held that notwithstanding that the executors of a deceased member of a company have not caused themselves to be registered as the owners of his shares, they have the same right to dissent from the scheme for the reconstruction of the company and to restrain the liquidator from carrying that scheme into effect without purchasing the deceased member's interest as the deceased member himself would have had if he had been still living.

39. In *New Zealand Gold Extraction Co. (New brevet in Process) Ltd. v. Peacock* [1894] 1 QB 622, it was held that the liability for calls existed despite the fact that notice could not be given to a dead man because it may be given to his legal representatives.

40. Article 25 and 28 of Table A of Schedule I to the Act deal with transmission of shares. Article 28 specifically says that a person becoming entitled to a share by reason of the death of the holder will be entitled to the same dividends and "other advantages" to which he would be entitled if he were the registered holder of the share, except that he would be entitled to the same dividends and "other advantages" to which he would be entitled if he were the registered holder of the

share, Except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company. The proviso indicates that the board may, at any time, give notice to such members to elect either to register himself or transfer shares and if the notice is not complied with within 90 days, the board may withhold payments of dividends, etc., until compliance with the notice.

41. What emerges from the abovementioned decision and the provisions of the Act and Table A is that the legal representatives are entitled to what the deceased shareholder whose name is on the register would be entitled to, except to course with regard to attending meetings and being counted for the purpose of a quorum, etc. as if, the estate of the deceased becomes entitled to the subsequent benefits, such as allotment of new shares or, in the event of reconstruction, the statutory right to dissent or, the locus standi to present a petition to wind up a company or institute proceedings u/s 397 of the Act and the disadvantages of call, etc. To put it metaphorically, it is as if the "estate" is "personified" and treated as a member.

42. The crux of the matter, Therefore, appears to be, whose name is on the register ? If A's name is on the register, he is the member, even if his ownership rights have been curtailed by the appointment of a receiver. But if the register bears the name of a member and he is since deceased, then surely his legal representatives can act for him, for, how else will the deceased member act ? This is borne out by the provisions of section 109 of the Act and other provisions pertaining to transfer.

43. It is well-settled that succession is not kept in abeyance and the property vests in the legal representatives on death and they can act for the deceased member for the purpose of transfer of shares etc., as is provided in section 109 of the Act.

44. In the present case, admittedly, the legal representatives have been more than anxious to get their names put on the register of members in place of the deceased member, who was the managing director and chairman of the company and had a controlling interest. It would be patently unfair to insist that their names must be first put on the register, before they can move an application u/s 397 and 398 of the Act, as admittedly, this is dependent on the board of directors. The board of directors can delay or even mala fide refuse to register the legal representatives of the deceased members and thus completely frustrate the filing of an application under sections 397 and 398 of the Act. Would it then be proper to insist that the legal representatives who have applied for registration must wait till their names are first put on the register of members either u/s 155 of the Act or otherwise before they can move an application and let the oppression continue in the meantime ?

45. The contention of learned counsel for the appellant that if legal

representatives who are only potential members or persons likely to come on the register of members are permitted to file an application under sections 397 and 398 of the Act, it would create havoc, as, then, persons having blank transfer forms signed by members, and as such having a financial interest, could also claim to move an application under sections 397 and 398 of the Act, contains a clear fallacy.

46. The fallacy in the argument is that, in the case of persons having blank transfer forms signed by members, it is the members themselves who are shown on the register of members and they are different from persons with the blank transfer forms ; whereas, in the case of legal representatives, it is the deceased member who is shown on the register and the legal representatives are in effect exercising his right, a right which has devolved on them through the death of the member whose name is still on the register. Thus, in the case of persons holding blank transfer forms, the legal and beneficial title is different, whereas in the case of legal representatives, it is the same.

47. Consequently, we are of the view that legal representatives of the deceased member whose name is still on the register of members are entitled to present a petition under sections 397 and 398 of the Act as if they are in the shoes of the deceased member.

48. Mr. Jaitley has contended that from a perusal of article 26 of Table A, it is clear that automatic transmission of shares cannot take place on the death of the member in view of the fact that the board of directors has a discretion to decline or suspend registration. He has relied on the decision of the Gauhati High Court in the case of *Bina Barua v. Dalowjan Tea Co. (P.) Ltd.* [1981] 51 C C 660, where the court held that the board of directors were right in the facts and circumstances of the case in refusing to register the shares in the name of the widow of the deceased.

49. He also relied on the decision of the Madras High Court in the case of *M. G. Amirthalingam v. Gudiyatham Textiles Pvt. Ltd.* [1972] 42 C C 350, where the court had upheld the decision of the board not to register shares. In the said case, the petitioner applied after his father's death to the company to transmit the shares held by his father to his name. The board of directors, after considering various factors, came to the conclusion that the activities of the petitioner were against the interests of the company and consequently declined to do so holding it was not in the interests of the company.

50. The discretion of the board of directors to refuse registration bonafied is not disputed. But, in the facts and circumstances of the case as above indicated, we are of the view that the legal representatives have an immediate legal interest and as long as the deceased member's name remains on the register, they act for and on his behalf as it were, even though their own membership may be in abeyance. It is in the context of pursuing the right of the deceased member that we have construed the word "member" to conclude that a petition under sections

397 and 398 of the Act can be moved by the legal representatives.

51. Mr. Jaitley next contended that the position whether a person is a member has to be seen as on the date of filing of the petition under sections 397 and 398 of the Act and not subsequently. He relied on the decision of the Supreme court in the case of Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, wherein it has been observed that the validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation.

52. In reply, Mr. Vinoo Bhagat, learned counsel for the respondents, has submitted that in the facts and circumstances of the case, the grant of the letters of administration and the permission of the Reserve Bank of India relate back to the date of the deceased and, consequently, the petition was validly initiated.

53. The application to the Reserve Bank of India for permission with regard to five shares was dated May 1, 1985, and granted on the same date. But the letters of administration u/s 290 of the Indian Succession Act were granted only on April 28, 1987. It was only after the letters of administration had been obtained, that the application with regard to transfer of 850 shares was made on June 26, 1987, and the permission was granted on July 20, 1987.

54. Since we have already decided, as indicated above, that the legal representatives of a deceased member, whose name is still on the register, have locus standi to move a petition u/s 397 and 398 of the Act, it is not necessary for us to decide whether in view of section 220 of the Indian Succession Act, 1925, the letters of administration and the Reserve Bank of India permission which is linked with it will relate back to the date of death of the deceased.

55. Mr. Jaitley, next contended that in the facts of this case, the Reserve Bank of India permission has been erroneously obtained and consequently, amounts to no permission.

56. In the present appeal, which is only against the judgment and order dealing with the preliminary objections as abovementioned, this point does not appear to have been raised before the learned company judge. In any case, it would appear to us that neither the facts are before us, nor is it proper or necessary to deal with this aspect at this stage. However, the observations of the Supreme Court in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, are pertinent. Mr. Justice O. Chinnappa Reddy, speaking for the court, has pointed that once permission is obtained whether before or after the purchase of the shares, it is not open to the company or any other authority or individual to take upon itself or himself, the task of deciding whether the permission was rightly granted by the Reserve Bank of India and ordinarily, it is not open to go behind the permission.

57. Coming to the second questions, whether a composite petition under sections , 397 398 and 433(f) of the Act is maintainable, Mr. Jaitley has relied on the decision in Kilpest Private Ltd v. Shekhar Mehra [1987] 62 C C 717 and urged that it is not maintainable.

58. Mr. Bhagat, on the other hand, supported the contrary stand taken by him by placing reliance on the decision in Navnitlal M. Shah v. Atul Drug House Ltd. [1977] 47 C C 136 and the decision of this court in Bhaskar Stoneware Pipes P. Ltd. v. Rajinder Nath Bhaskar [1988] 63 C C 184.

59. In Kilpest Private Ltd. [1987] 62 C C 717, the Madhya Pradesh High Court held that if a petition is initially made under sections 397 and 398 of the Companies Act for relief against mismanagement and oppression, it cannot be converted into a winding up petition u/s 433(f), because there are many distinguishing features and in view of these distinguishing features, a composite petition also cannot be filed. the distinguishing features mentioned by the court were, first, the different rules and forms applicable to the petition pertaining to oppression and mismanagement and the petition for winding up ; second, whereas a notice to the Central Government is necessary u/s 400, it is-not required in the case of a winding up petition ; third, share qualification is required for an application under sections 397 and 398 as per section 399 but no minimum share qualification is required for a petition for winding up ; fourth, u/s 401, the Central Government can apply whereas in the case of a winding up petition, it is the Registrar of Companies who can apply u/s 439 of the Act ; fifth, the nature of reliefs as indicated in section 402 is much wider whereas in a winding up petition, the nature of reliefs is narrow as is apparent from section 443 ; sixth, in a petition pertaining to oppression and mismanagement, the remedy is of a preventive nature and provides for continuity of the company whereas winding up results in civil death of the company.

60. In the case of Navnitlal M. Shah [1977] 47 Comp Cas 136, the Gujarat High Court noticed the history of the introduction of the provisions of sections 153C and 153D of the Indian Companies Act, 1913, and section 210 of the English Companies Act, 1948 (which is substantially the same as section 397 of the Act). It referred to the fact that, in the absence of provision under sections 153C and 153d of the Indian Companies Act, 1913 (which are in pari materia with sections 397 and 398 of the Act), the court had "either to wind up the company under the `just and equitable" clause or dismiss the petition, both of which alternative courses may not do full justice to the case". The provisions were introduced to remove this lacuna. Consequently, it concluded that "it is reasonable to believe that relief under sections 397 and 398 is alternative to an order for winding up".

61. The observations of the Supreme Court in Shanti Prasad Jain v. Kalinga Tubes Ltd. [1965] 35 C C 351 on this point were noticed. After noticing another observation of the Supreme Court that "the power conferred on the court to grant a remedy in an appropriate case appears to envisage a reasonable discretion vested in the court in relation to the order sought by a complainant as

the appropriate equitable alternative to a winding-up order ", the court concluded that it thus appears well settled that relief under sections 397 and 398 is alternative to an order for winding-up.

62. Mr. Justice D. A Desai went on to opine that if a relief can be granted as an alternative, then parties "seeking one can simultaneously ask for an alternative relief in order to avoid multiplicity of proceedings. When one relief can be given as alternative to the other, it is indisputable that both such reliefs, one as alternative to the other, can be claimed in the same in the same proceeding, a composite petition would certainly be maintainable. Otherwise, it might lead to a startling situation, where a party must first seek one relief, go through the entire gamut of the proceedings and then come with a second petition saying that as the first relief has been refused, the party is now entitled to the alternative relief". The learned judge rejected the contention that the procedure prescribed for presentation and hearing of a winding up petition and the procedure prescribed for presentation and hearing of a petition for reliefs under sections 397 and 398 and the averments to be made in the two cases are so materially different that the court cannot proceed with them simultaneously in the same petition.

63. While noticing that, u/s 397, grievances may be individual to the complaining members, whereas a petition for winding up is a representative action, the court held that a composite petition praying for winding up and relief under sections 397 and 398 would be maintainable if winding up is sought on the ground that it is just and equitable to wind up the company. If the company is sought to be wound up on the ground that it is just and equitable, the petitioner must allege and the court must be satisfied that it is just and equitable to wind up the company. Similarly, if relief is sought u/s 397, the court must first be satisfied that it would have been just and equitable to wind up the company. That conclusion will have to be reached, can the court proceed to decide whether to wind up the company or if it is satisfied that winding up would unfairly prejudice the member or members, give relief u/s 397 instead of winding up the company.

64. The observations of the Bombay High Court in *Bilasraj Joharmal v. Akola Electric Supply Co. P. Ltd.* [1958] 28 C C 549, with regard to a composite petition being presented and which were referred to by Desai, J. are pertinent, specially in respect of notice to the Central Government, Chagla, C. J., speaking for the court, opined that it would be open to the court or the company judge to dismiss the composite petition "summarily and not to admit it at all. That would apply both with regard to the prayer for winding up and with regard to the directions under sections 397 and 398. But the court may not want to dismiss it summarily and the court may want it to be admitted at least for the purpose for giving notice to the company so that the company should be heard. If the company judge takes that view at that stage, then we will direct that not only a notice should be given to the company, but also to the Central Government, so that all difficulties with regard to section 400 would be obviated. It would also lead to

this useful result that, when the petition comes up before the company judge after it has been accepted, not only the company will be before the company judge, but also the Central Government. At that stage, the learned judge will give such directions as he thinks proper. With regard to winding up, if he wishes to go further into the matter, he would have the petition advertised as required under the High Court Rules. If, on the other hand, he thinks that there is no case for winding up, he may dispose of that part of the petition and with regard to sections 397 and 398, he would out, after hearing both the company and the Central Government."

65. In *Bhaskar Stoneware Pipes*" case [1988] 63 C C 184, this court dealt with a petition u/s 397, 398 and 433(f) of the Act. The appellate court noticed the allegations of the petitioner that there are circumstances which rendered it "just and equitable" that the company be wound up. It observed that section 397 read with sections 433(f) and 434(2) of the Companies Act make it clear that a court will not proceed to wind up a company merely because it is just and equitable to do so, particularly where the occasion for winding up is mutual lack of confidence and understanding between the various groups of shareholders, if some way could be found for continuing the company as a running concern after removing the misunderstanding and setting right the "oppressive" acts. The court has, Therefore, to consider, in all such cases, whether, short of winding up, it is possible for the company's affairs to be remedied by recourse to section 397 or section 398.

66. Though the question whether a composite petition could be moved was not in issue in that case, the court noticed that section 397 requires two conditions to be fulfilled before an order can be passed under that section : (i) there must be acts of oppression and mismanagement ; and (ii) the affairs of the company must be such that it is just and equitable to wind up the company. It is only in a case where a winding up is otherwise peremptory under the just and equitable clause that the court decide that short of winding up, a remedial procedure should be adopted u/s 397. It further held that even petitions other than winding up petitions have to be posted for admission in their first instance.

67. The decision of the Madhya Pradesh High Court in *Kilpest Private Ltd.* [1987] 62 C C 717, holding that a composite petition is not maintainable appears to have been arrived at only because there are certain distinguishing feature in respect of the two petitions, i.e., the one under sections 397 and 398 and the other for winding up. It does not appear to have considered the background of the introduction of the precursor to section 397 and/or whether the distinguishing features can be reconciled with the question of multiplicity of proceedings. With all due respect, we are not inclined to follow that decision but prefer to rely on the decision in *Navnitlal M. Shah* [1977] 47 C C 136 and the observations of the Supreme Court in *Shanti Prasad Jain* [1965] 35 C C 351 and the Bombay High Court in *Bilasrai Joharmal* [1958] 28 C C 549 and this court in *Bhaskar Stoneware Pipes Private Ltd.* [1983] 63 Comp Cas 184, as above

indicated.

68. From what has been noticed above, it appears to us that the averments which a petitioner would have to make to invoke the jurisdiction under sections 397 and 398 are not destructive of the averments which are required to be made in a case for winding up u/s 433(f) on the just and equitable ground, though they may appear to be contradictory.

69. With regard to procedure, it appears to us that the petitioner must proceed up to a certain stage which is common to both and though there might be some difference in the procedure to be adopted, it is not such which is irresponsible and cannot be simultaneously gone through.

70. It also appears to us that a discretion is conferred on the court and if the court is satisfied that the facts justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up but the court is of the opinion that it would be remedy worse than the disease, then the court can examine whether the alternative relief by way of a direction u/s 397 can be granted.

71. Consequently, we are of the view that a composite petition under sections 397 and 398 and 433(f) is maintainable.

72. For the reasons outlined above, we dismiss the appeal with costs. Counsel's fee Rs. 2,000.