IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 16 of 1997

with

COMPANY APPLICATION No 7 of 1997
with
COMPANY APPLICATION NO.58 OF 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE
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1. Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether their Lordships wish to see the fair copy of judgment? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge? NO

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KAPIL N. MEHTA,SURAT.

Versus

SHREE LAXMI MOTORS LTD.

Appearance:

1. COMPANY PETITION No. 16 of 1997
MR HM BHAGAT for Petitioners
MR GN SHAH for Respondent No. 1

2. COMPANY APPLICATIONNo 7 of 1997

MR HM BHAGAT for Petitioners
MR GN SHAH for Respondent No. 1

3. COMPANY APPLICATION NO.58 OF 1997
MR BB OZA WITH MR VANRAJ PARGHI FOR PETITIONER

CORAM : MR.JUSTICE H.L.GOKHALE
Date of decision:31/07/98

CAV JUDGEMENT

This petition filed under section 439 of the Companies Act, 1956, (hereinafter referred to as 'the Act') principally invokes the ground under section 433(f) of the Act, namely, that it is "just and equitable" that the respondent-company be wound up. The petition also mentions the ground as provided under section 434(1)(C) of the Act, namely, inability of the company to pay "its debts" but nothing is pleaded in support thereof in the petition nor argued across the bar.

2 Respondent-company is a private limited company. It is a "deemed limited company" by virtue of the statutory fiction introduced by section 43-A of the Act. The registered office of the company is situated at Umarwada, near Surat. Its principal business is that of agency or dealership in selling Tata Diesel Vehicles. It also has a petrol/diesel pump and a service station. It employs around 30 employees. The authorised subscribed capital of the company is Rs.15 lakhs divided into 15,000/- equity shares of Rs.100 each.

3 The main objects of the company for which the company was formed, as stated in the object clause of the Memorandum of Association are as follows:-

"(1) To acquire and take over the business formerly carried on in partnership between Virendrasingh of Chhota Udaipur, Jamshedji P. Panthaki and Mukund Amratlal Shah in the firm name of Messrs Laxmi Motors, now taken over by Mukund Amratlal Shah together with its assets properties and subject to all liabilities and with a view thereto to enter into the agreement referred to in Article 4 of the Articles of Association and to implement and carry out the same with or without modification.

(2) To acquire the agency or dealership of

Tata Diesel Vehicles for Gujarat and/or any other territory and to act as agents and dealers of Tata Diesel Vehicles and to carry out all such functions and things as are usually carried out by an agent or dealer of vehicles."

4 Prior to the incorporation of the respondent-company His Highness Maharaja of Chhota Udepur, Virendrasinhji and one Shri Jamshedji Panthki and one Shri Mukund Amrutlal Shah ran a business in partnership in the name and style of M/s Laxmi Motors and this firm was the authorised dealer in South Gujarat for sale of vehicles and spare parts manufactured by TELCO. The said firm established a service station at Surat. The partners of the firm appointed the first petitioner as the Manager of the said firm and put him in-charge therof. Sometimes in January 1972 the Maharaja of Chhota Udepur retired from the firm and in February 1972 Jamshedji Panthki died and the business became vested in Shri M.A.Shah subject to the liabilities payable to the heirs of Jamshedji Panthki. In July 1972 said Shri M.A. Shah, Shri Homi, son of Shri Jamshedji Panthki, and the first petitioner formed the respondent Private Limited company. The company took over the business formerly carried on by the above firm together with its assets, properties and liabilities.

5 In pursuance of Article 11 of the Articles of Association of this company the shares of this company were allotted amongst the three groups equally. Thus, Shri M.A.Shah and persons constituting Shah group have 33-1/3 % shares; Homi J Panthki and persons constituting Panthki group have 33-1/3% shares and the first petitioner and his relatives constituting the Mehta group have 33-1/3% share. The second and third petitioner are sons of the first petitioner. Shortly after the registration of this company, the agreement of agency or dealership between TELCO and this company was executed in August 1972 and the agreement was renewed from time to time.

6 It appears that in the year 1990-91, on coming to know that the company was in financial difficulty, Homi Panthki and Dinesh Shah, son of M.A. Shah went to Surat from Mumbai (where they normally reside) and started looking into the financial position of the company. It is the case of the respondents that they were prevented from examining the books of accounts and records of the company by the first petitioner. Thereafter having found that the brother of the first petitioner one Natwarlal Mehta (who was working as spare parts manager) was

responsible for some of the mismanagement, he was removed from his services in 1994. The sales of petrol and diesel during 1986-87 to 1991-92 were looked into by one Agarwal Kailash and Associates, a firm of Chartered Accountant which found that sale of large quantity of petrol and diesel during those six years was not accounted for. Another firm of Chartered Accountant namely, Natwarlal Vepari & Co. was appointed to look into the financial affairs and they submitted three separate reports dated 18.3.1996 certifying that due to the difference in credit sale, the company had suffered substantial losses in the three years.

7 The respondent-company received a letter dated 31.1.1996 addressed to the Chairman by the Manager (Sales) of TELCO asking them to inform as to who was in the management of the respondent-company. Two circular resolutions came to be passed by the majority directors on 5.2.1996 and 8.2.1996 appointing Homi Panthki and Dinesh Shah as the Managing Director and Joint Director respectively in spite of the opposition by the petitioners. On 8.5.1996 TELCO was informed that the Mehta group was without any management or administrative power in the company. The petitioners by their letter of 9.8.1996 protested against their removal from management by contending that the same was violative of Article 65 of the Articles of Association.

8 M/s Natwarlal Vepari & Co. further submitted a report dated 7.8.1996. One significant aspect of the report was that the payee receipts for rebate allowance received from the company to the tune of Rs.1,98,000 during 1988-1992 were not available. The Chartered Accountants also pointed out that in respect of rebate pertaining to Daman office amounting to Rs.6,44,150 for the year 1990-91 the payments amounting to Rs.6,10,650 were made in cash after three years in February-March 1994 and the receipts of the payees were not available. The Chartered Accountant expressed opinion that the veracity of these payments appeared to be doubtful since it does not stand to reason that the customers would wait for three years for receiving the rebate.

9 The said report was sent to the petitioners and their explanation was sought. That led to further correspondence between the parties. It appears that the petitioners started another company in the name of Auro Motors Private Limited in the meanwhile with the object of acquiring dealership of Tata Diesel vehicles. The respondents alleged that petitioners made frantic efforts to obtain dealership from TELCO though they did not get

it. Thereafter, further correspondence between the lawyers of the parties has ensued. Criminal proceedings were filed against the petitioners. The petitioners challenged the same by filing Special Criminal Application No.491 of 1997 in this Court. This Court directed that the investigation be properly done by another officer and it appears that thereafter charge sheet has been filed against the petitioners.

10 The submission of the petitioners is that the respondents have made efforts to exclude them from the management. In para 19 of the petition it is averred as follows:-

> "The formation of the company was based on personal relationship and mutual confidences amongst partners. There are breaches of the basic understandings that the petitioners will participate in the conduct of the business. The respondent-directors are guilty of oppression and mismanagement. They have mismanaged, misconducted and misappropriate to the detriment of the petitioners who are oppressed by the said directors in management. The structure of the company only comprise of 3 group of directors who are equal partners in business of Telco dealership. The petitioners are one of the equal partners who have been vested with the management by the Articles of Association and by contracts at the outset. However, the other group of directors have misconducted to oust the petitioners from their vested right to control and manage the affairs of the company. Petitioners state that this has brought about total loss of confidence and lack of mutual faith and understanding. It is submitted that the petitioners are sought to be excluded from the management, and therefore or otherwise, principles of dissolution of partnership are required to be invoked. This is a case of irretrievable and irreversible deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern. In the circumstances, it is just and equitable that the Company is wound up, particularly on the principle of dissolution of partnership"

11 On behalf of the respondents, an exhaustive reply

has been filed by Homi J Panthki, affirmed on 10th March 1997. It is submitted therein that the petitioners have not come to the Court with clean hands and that they are themselves responsible for the deterioration in the financial affairs of the respondent-company which was prevented by timely intervention by himself as well as by Mr Shah. It is submitted that when one is invoking just and equitable clause, firstly, one must come to the Court with clean hands.

12 It is submitted that the petitioners are facing criminal proceedings for misappropriation and they have themselves set up a rival company to do the very business which the respondents are doing. It is further submitted that none of the petitioners were partners of the erstwhile partnership firm which was the predecessor of the respondent company and hence they cannot invoke the principles of partnership for dissolving a private limited company. It is denied that there is any contravention of Article 65 of the Articles of Association or that there is any deadlock in the management. It is submitted that appointment of Managing Directors is outside the scope of the restrictive clause of Article 65. It is denied that the company has no business now and it is submitted that the sale of vehicles by the respondent-company has again picked up after the period when the difficulties were created by the petitioners. Thereafter the petitioners have filed a rejoinder and then a supplement affidavit. The respondents have filed a sur-rejoinder and additional affidavit showing the amounts of commission received in recent times from TELCO as also enclosing therewith a copy of the chargesheet filed by Crime Branch against first and third petitioners, the earlier mentioned Natwarlal Mehta and some other charging them under sections 409, 465, 467, 468, 471, 477A, 411 and 120-B of the IPC. The charge sheet makes allegation of misappropriation with respect to :-

(1) Not accounting for the amount of Rs.2,47,139 in the books of account of the company earned by sale of petrol and diesel during 1986-87 to 1991-92.

(2) Not accounting for sale of diesel and petrol to the tune of Rs.57,164.01 during 1992-93 to 1994-95.

(3) Not explaining the payment of rebate to 1097 customers to the tune of Rs.21,51,300.

Petitioner no.3 has thereafter filed one more affidavit on 7.4.1998.

13 The petitioners have also filed a separate company application bearing no.7/97 praying for appointment of provisional liquidator and to restrain the respondents from dealing with assets of the company and from operating the bank account etc. Mr Homi Panthki has filed a reply opposing the prayers therein. One Shri Shaukat Saiyed and one Gopal Patel who claim to represent the employees have filed another Company Application No.58 of 1998 to join in the company petition. The affidavit in support thereof states that there are 30 employees in the respondent no.1-company who are affected by this petition. The matter was heard at length since serious consequences follow from the admission of a company petition. However, before the matter was heard, in the beginning itself efforts were made to see to it that if possible a compromise is arrived at between the parties or it is resolved by Arbitration. That effort however did not succeed. Shri S.N. Soparkar with Shri H.M. Bhagat have appeared for the petitioners. Shri B.J. Shelat with Shri G.N. Shah appeared for the respondents and Shri B.B.Oza with Vanraj Parghi have appeared for the workmen.

14 The learned advocates have ably assisted me in going through the record of the case as also the relevant statutory provisions and case law. Shri Soparkar, learned counsel appearing for the petitioners, as well as Shri Shelat, learned counsel appearing for the respondents, laid great emphasis on the judgement of the Honourable Supreme Court in the case of Hind Overseas Private Limited v. R.P. Jhunjhunwalla reported in AIR 1976 SC 565. Mr Soparkar submitted that under the Articles of Association as they existed in the respondent company a kind of veto power was given to each of the three groups when it came to taking decisions on certain matters. Article 65 of the Articles of Association of the respondent-company is very much relevant for our purpose and hence it is reproduced herein-below:-

"65. All decisions of the Board whether taken at a meeting of the Board or by resolutions passed by circulation shall be passed by a majority vote of the Directors and in the event of a tie the Chairman shall have a casting vote provided that in respect of the matters enumerated hereinbelow such majority vote shall include the affirmative vote of at least one Director of each Group of shareholders namely :-

(i) materially deviating from or materially changing the objects or activities of the Company or substantially expanding any such activities;

(ii) otherwise than in the ordinary course of business, selling, leasing or dealing with the whole or any part of the Company's undertaking, property or assets;

(iii) pledging any capital, shares, bonds or debentures of the Company or mortgaging the same as security for such loans;

(iv) authorising projects for the acquisition, addition, replacement, sale, lease or disposal of any items of tangible or intangible property of the Company in excess of Rs.15,000/-

(v) investing any of the funds of the Company otherwise than in trust, securities or in fixed deposit with the Company's Bankers;

(vi) fixing or increasing salaries or other remuneration of any employee or officer including any Director of the Company whose total monthly salary is Rs.1,500 or more;

(vii) becoming a guarantor or surety for obligations of third parties except for the purpose of the Company's business exceeding Rs.5,000;

(viii) becoming a party to any merger or amalgamation;

(ix) making any loan not being in the nature of an advance or deposit of the funds of the Company or credit facility to customers where the sum to be loaned or facility granted would, together with any other sum already loaned, exceed Rs.5,000/-;

(x) the appointment of any Director in excess of six Directors and Committee of Directors, and the powers and authorities to be vested in such Committee;

(xi) entering into contracts with parties other than Telco and Esso for the purchase of goods by the Company which contracts extend over a period of more than one year or exceed in value the sum of Rs.10,000/-;

(xii) mortgaging or otherwise encumbering any of the assets or properties of the

Company;

(xiii) taking legal proceedings which go beyond the ambit of the usual business;

(xiv) increase in share capital and/or issue or shares in pursuance of such increase."

15 Mr Soparkar submitted that with respect to the items provided under these Articles, for every decision to be taken by the management an affirmative decision of at least one director of each of the three groups was necessary. He submitted that circular resolutions outsting the petitioners from management and entrusting the same to Shri Panthki and Shah were therefore illegal inasmch as the petitioners never consented to that. Mr Soparkar submitted that essentially respondent no.1 was a quasi-partnership. The real nature of the relationship between the parties was necessary to be seen by piercing the corporate veil and if the management of the company was not possible in accordance with the Articles of Association, it was just and equitable that the company be wound up. He further submitted that as held in Needle Industries (India) Limited v/s Needle Industries Newey (India) Holdings Ltd. reported in AIR 1981 SC 1298 (with particular reference to the observations made in para 46, 47 and 48 thereof) that in a situation like this, one had to remember that behind each Corporation there are individuals. He laid emphasis on the following observations made by House of Lords in the case of Ebrahimi v. Westbourne Galleries Ltd. (1973) AC 360 (HL) (briefly, Ebrahimi's case):

"The foundation of it all lies in the words `just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure."

16 Mr Soparkar further submitted that in the facts of the present case the relations having been spoiled between the parties, under the structure as it exists in the Articles of Association if the Directors were not on talking terms the so called meetings of the Board of Directors would almost be "a farce or a comedy" in terms

of phrase used in Yenidje's case (1916) 2 Ch 426. Mr Soparkar submitted that the principles laid down in Ebrahimi's case have been accepted as "sound principles" by the Honourable Supreme Court "depending upon the nature, composition and character of the company" as held in the case of Hind Overseas' (supra) in para 20 thereof. Mr Soparkar submitted that proposition of law emerging from Hind Overseas will squarely apply in the facts of the present case. In his view, in the facts of the present case, the right to active management is given to all the groups. All groups are having their shareholders. There is a dead lock in the management in their disputes. It is relevant to note that the apparent structure of the company is not the real one and in his view the company is nothing but a quasi partnership which can be seen by piercing through the corporate veil and therefore principles of partnership should apply. In a situation like this, as observed by the Honourable Supreme Court, in paragraphs 25 and 33 of Hind Overseas case, the equitable considerations must prevail over the legal rights.

17 Mr Soparkar submitted that as in the Hind Overseas case, in the present case also the business was earlier carried on as a firm and later on it was converted into a company. He accepts that otherwise the facts of that case were different. He submitted that in Hind Overseas case it was a case of starting a new business venture altogether and mainly there were no restrictive clauses in the Articles of Association or previleges given to any shareholders or special rights in favour of any party. It was also not a case of equal contribution by all the groups. Mr Soparkar therefore submitted that what is relevant are the propositions accepted by the Honourable Supreme Court in Hind Overseas case. In his view, facts of that case are clearly distinguishable from the facts of the present case and hence the ratio of that judgement needs to be applied to the present matter without being impressed as to how that case was decided on facts thereof.

18 As against the above submissions of Mr Soparkar, Mr Shelat, the learned counsel appearing for the respondents, submitted that what is material is to find out as to whether it is `just and equitable' in the facts of the present case that the company be wound up. Mr Shelat submitted that since it is a jurisdiction based in equity, it is necessary that the petitioner must firstly come to the court with clean hands. He submitted that there are serious charges of misappropriation against the petitioners and they are facing a charge sheet in the

court of law. He submitted that the active participation and practically the full control of the management by the petitioners was never disputed by the Panthki and Mehta group, right from the inception of the company in the year 1972 until 1991. It is only when it was found by Panthki and Shah groups that the petitioners are mismanaging the affairs and misappropriating the funds that they had to move into the matter. Mr Shelat asked, "Should the answer to such a situation be only winding up of the company?" Mr Shelat put it in the words of the learned company judge who decided in Hind Overseas case in Calcutta High Court as incorporated in para 14 of the Supreme Court judgement that the heart of the matter was that "the petitioners desire that they should be in power and the respondents would go on financing." Mr Shelat submitted that it is relevant to note that the petitioners have set up a rival company to do the very business which the respondent-company was doing. There are about 30 workmen employed in this company and the company has made a good name in South Gujarat and there is no reason why it should be wound up only because one group which is in management mismanages the company and misspropriates its earning to the exclusion of others. In a case like this, the other shareholders and Directors are bound to react and takeover the management which is what has happened.

19 Mr Shelat then submitted that as can be seen from para 17 of the petition, the petitioners are claiming mismanagement by Panthki and Shah groups since February 1991 in view of the complaints received by TELCO. The petition alleges oppression and mismanagement and exclusion of the petitioners from the management in para 19 thereof. Mr Shelat submits that for all these allegations appropriate remedy was available to the petitioners under section 397 of the Act. In fact, on 19th December 1996 in the letter addressed by petitioner's advocate on page 15 thereof he has in terms stated as follows:-

> "..... However, my clients desire me to inform you that this step of appointment of Managing Director, each one from two groups, to the total exclusion of the third group is an act of oppression within the meaning of the expression in Section 397 of the Companies Act, 1956. My clients reserve their right to seek appropriate relief in this behalf as provided in Sec.397, and in such an action, relief will also be sought for declaring the circular illegal and for removal of the two Managing Directors who are acting under

the spurious authority of such an illegal resolution, and for compelling my clients to resort to such an action, your clients shall be solely responsible both for the costs and consequences thereof."

As seen above, the said para is clearly about the circular resolutions removing the petitioners from active management. It is also relevant to note that on page 28 of this letter the learned advocate of the petitioners has recorded as follows:-

"With reference to sub-para (g), the allegation that my clients would co-operate and assist in the matter of the said investigation, is expeting the impossible."

Mr Shelat therefore submitted that the petitioners never cooperated in the investigation of the financial affairs as admitted by their own advocate and if they are aggrieved by their removal from active management in February 1996 they knew that they had a remedy under section 397 of the Act.

20 Mr Shelat then submitted that Section 443(2) of the Act clearly required that when a petition is filed on the ground of it being "just and equitable that the company be wound up", the Court was required to refuse the order of winding up if some other remedy was available to the petitioner and if they were acting unreasonably in seeking winding up instead of pursuing that remedy. The submission of Mr Shelat was of course without prejudice to his principal contention that if the financial affairs of the respondent-company had deteriorated for a certain period, the petitioners themselves were responsible for that and the Shah and Panthki groups were not responsible for mismanagement nor was there any oppression of the group of the petitioners.

21 With respect to submission of Mr Soparkar concerning the deadlock in the management, particularly, in view of the provision of Article 65 quoted above, Mr Shelat submitted that as of now there is no deadlock and the company is functioning. He submitted that Articles are to be read as enabling provisions and they are so worded to give democratic rights and not for creating a deadlock. He submitted that worse comes to worse, Articles can be amended and the help of Company Law Board can be sought in that behalf.

22 Mr Shelat then submtited that passing of the

Circular Resolutions was permissible under section 289 of the Act and the concerned Resolutions were not challenged all this time. He also pointed out that there was no restrictive article in the Articles of Association relating to the passing of Circular Resolutions.

23 The principal submission of Mr Soparkar, learned counsel for the petitioners, was that Articles of Association are worded in such a way that unless all the three groups cooperate and unless there is affirmative vote of at least one director of each group, there will be deadlock in the decision making process of the company. The provision of Article 65 regarding the meetings of the Board of Directors is noted above. With respect thereof, Mr Shelat pointed out that Article 1 of the Articles of Association provided that regulations incorporated in Table-A of Schedule-I to the Companies Act shall apply subject to what is provided in the Articles of Association. He therefore submitted that Articles of Association in Table-A will apply unless there is a provision in the Company's Articles contrary to the regulations contained in Table-A. As regards the proceedings of Board of Directors of the company, Mr Shelat states that some provisions in Articles 61 to 66 are contrary to the regulations in Table-A. Thus, for example, the provisions with respect to quorum for the Board meeting and the decisions at the Board meeting were as such. Then, Mr Shelat pointed out that Article 62 provides that quorum of Board Meeting shall be at least one Director from each of the three groups; Article 63 provides if a Board Meeting cannot be held for want of quorum, the meeting shall be adjourned to such day time and place as the Directors present decide but the adjourned meeting shall be subject to quorum mentioned in Article 62; Article 64 contains standard provisions and there is no restrictive provisions; and Article 65 provides that all decisions whether taken at a meeting of the Board of Directors or by circular resolution in respect of matters other than those specified in items nos. (i) to (xiv) at the end of Article 65, shall be taken by majority votes. The said Article 65, provides that the decision on those matters mentioned in items nos. (i) to (xiv) shall require affirmative vote of at least one Director of each of three groups.

24 Mr Shelat then submitted that Section 9 of the Act provides that it will over-ride the Memorandum and Articles of Association. Section 9(b) of the Act specifically provides that provisions contained in the Memorandum and Articles of Association, agreement or relations to the extent they are repugnant to the

provisions of the Act are void.

25 As far as Annual General Meeting is concerned, Mr Shelat pointed out that the provisions with respect thereto are made in Articles 32 to 44 of the Articles of Association of the company and that there are no provisions in Table-A which are contrary thereto. The Companies Act however contains specific provisions regulating general meeting which are made in Sections 170 to 186. The respondent-company being a deemed public company, the provisions relating thereto will apply. Articles 39 and 40 contained two restrictive conditions which are with respect to quorum. They provided that the minimum quorum shall be three members, each of whom should be from the three groups. Article 40 provides that no business shall be transacted at any general meeting unless the quorum as provided is present. Mr Shelat therefore submitted that there could be some difficulty under section 174(1) of the Act but the other mandatory provisions under sub sections 2 to 5 of Section 174 apply to all limited companies and there was no provision in the Articles of the respondent-company for excluding the applicability of these sub-sections. Mr Shelat therefore submitted that if one looks to the provisions of Section 174(2) to (5) and the provisions in Articles of Association of the company, one group can block business in the general meeting even by remaining absent but the meeting can be adjourned and in the adjourned meeting the members present would constitute the quorum under section 174(5) of the Act and thus there will not be a deadlock.

26 In short, the submission of Mr Shelat is that Circular Resolutions are not illegal under the provisions of the Articles of Association read with Section 289 of the Act. As far as regular business in the Board of Directors is concerned, if there are any restrictive clauses in the Articles of Association, they are repugnant and the provisions in Table-A of the Act will prevail as laid down in Section 9-B of the Act and when it comes to holding the annual general meeting even if it could be blocked initially by remaining absent, the adjourned meeting can proceed legally under section 174(5) of the Act.

27 With respect to above submission of repugnancy of Mr Shelat, Mr Soparkar has pointed out that what Section 9-B provides is that if there are provisions which are repugnant then, the provisions in the Articles of Association will give way in favour of the statutory provisions as contained in Table-A. The Act does not

prohibit for any additional or special provisions. Mr Soparkar submits that there was nothing repugnant in the provisions made in the Articles. They were merely additional or special provisions. Mr Soparkar has also relied upon the judgement of House of Lords in Gentel v. Rapps reported in (1902) 1 KB 160 at page 166 where it states as follows:-

"On the question of repugnancy I repeat what I have said before. A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication preofesses to alter the general law of the land."

Mr Soparkar also relied upon the judgement of the Honourable Supreme Court in Zaverbhai v. State of Bombay reported in AIR 1954 SC 752 at (para 10). In that judgement, the Honourable Supreme Court has considered as to what is the concept of repugnancy and in what situation a provision can be considered to be repugnant. Mr Soparkar submits that the present Articles cannot be considered to be repugnant. Relying upon the provisions of Section 31 read with Section 189(2)(a) of the Act Mr Soparkar submitted that amendment of the Articles is also not possible since requisite percentage of votes therefor will not be available. Mr Soparkar therefore prays for admission of this petition and for interim relief as prayed in Company Application No.7 of 1997.

28 Mr Oza appearing for the applicants in Company Application No.58 of 1998 drew my attention to the observations of the Honourable Supreme Court in (1983) 53 Comp. Cases 184 in the case of National Textile Workers Union v. P.R. Ramkrishnan and submitted that workmen were entitled to be heard in a matter concerning them and the applicants be permitted to be joined. Mr Soparkar opposed the request to join them as additional respondents and contended that the petitioner had nothing against the workmen. He submitted that what the Supreme Court has laid down is that the workmen ought to be heard. It does not mean that they ought to be made parties. In any event, Mr Oza has been heard on behalf of the applicants and workmen and he has submitted that the workmen should not be made to suffer in this dispute between the three different groups of directors. He submitted that the workmen are honestly and diligently working and that the company is making good profits. He submitted that a going concern should not be killed and

30 families should not be made to suffer unnecessarily only because one of the three groups wanted to control the management. Mr Oza therefore submitted that the petition be dismissed.

29 Both Mr Soparkar and Mr Shelat have also taken me through the jdugement of a single Judge of this Court in the case of Atul Drug House reported in 41 CC 352. In that case also it was laid down as under:-

> "The principle of dissolution of partnership would be applicable to a company only if the company is a domestic company. Further, there should be irresolvable deadlock in the administration of the company. By introducing sections 397 and 398 the legislature must be taken to have clearly indicated that the irresolvable deadlock should be because of something in the constitution itself."

In the facts of the case however the learned judge has held that there was no irresolvable deadlock in the admnistration of the company and therefore principles of partnership were not applicable to wind up the company.

30 Both the learned counsel also refer to a recent judgement of the Honourable Supreme Court in the case of Kilpest Private Limited v. Shekhar Mehra 87 (1996) Company Cases 615. The facts of this case are somewhat similar to the present case. In this case there were two groups which we can call as Mehra Group and Dubey Group. Mehra Group held 1500 shares and Dubey group held 1625 shares initially. Later on, the shares of Dubey group were increased to 2400 shares and one KP Mishra was appointed as an additional director. Initially, the Articles of Association of the company provided for the management of business by Dubey and Mehta groups for life with equal remuneration. That article was later on altered and the post of Joint Director was abolished. That led to a further litigation between the parties. Mehra sought a relief under section 397 and 398 of the Act but the single Judge of the Madhya Pradesh High Court found it appropriate to treat it as a winding up petition. The Commpany having appealed, Division Bench set aside that order and dismissed the petition and upon appeal to the Supreme Court, the matter was again remanded. On remand, the single Judge dismissed the petition. On Mehra group filing an appeal, the Division Bench found that the company need not be treated as a parternship and there was no ground to wind it up under

just and equitable clause. Still when it was found that Dubey had committed acts of breach of faith, the Division Bench directed Mehra to be appointed as Director. Being aggrieved by that order Mehra as well as company filed appeal to the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed both the appeals. It retained Mehra as a Director. It however dismissed Mehra's appeal against the judgement of the Division Bench refusing to wind up the company.

31 Apart from the facts of the aforesaid decision on almost similar facts we are more concerned with the propositions laid down therein. The principal argument on behalf of Mehra were on the basis of above said Ebrahimi's case. It was submitted that inasmuch as there were only two promoter directors who held 1500 and 1625 shares respectively initially and since they were to remain Managing Directors for life, the principles applicable to a partnership were relevant. The Hon'ble Supreme Court noted that Ebrahim's case has been considered in Hind Overseas case but also further noted that in the facts of Hind Overseas case the principles of partnership could not be extended though it further stated that in some cases the principles of dissolution of partnership may apply if the apparent structure of the company is not the real structure. Having noted as above, the Hon'ble Supreme Court again noted its earlier observations in Hind Overseas case that the Indian law though modelled on English Statute had developed on its own (as stated in para 31). Having noted the above, in Mehra's case the Supreme Court recorded as follows:-

"This Court observed that although the Companies Act was modelled on the English statute, the Indian law was developing on its own lines and making significant progress. Where the words used in both the Indian and English statutes were identical, English decisions might throw light and their reasons might be persuasive, but the proper course was to examine the language of the statute and ascertain its true meaning. It was apposite, having regard to the background, conditions and circumstances of the present Indian society and the needs and requirements of the country that somewhat different treatment be adopted. The courts would have to adjust and adapt, limit or extend the principles derived from English decisions, entitled as they were to great respect, suiting the conditions of Indian

> society and the country in general, always, however, with one primary consideration in view that the general interests of the shareholders should not be readily sacrificed at the altar of squabbles of directors for power to manage the company."

Thereafter the Hon'ble Supreme Court noted the provisions under section 397 and 398 and 402 of the Act and observed that section 397, 398 of the Act provide relief to shareholders against oppression and mismanagement. Thereafter having referred to the specific provisions of Section 402, the Hon'ble Supreme Court has observed as follows:-

> "The promoters of a company, whether or not they were hitherto partners, elect to avail of the advantages of forming a limited company. They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi partnership should, therefore, not be easily accepted. Having regard to the wide powers under section 402, very rarely would it be necessary to wind up any company in a petition filed under sections 397 and 398."

32 In the light of what is stated above though there is a good amount of force in the submissions of Mr Soparkar with respect to theoretical possibility of a deadlock in the meeting of the Board of Directors, yet, at the same time, it is material to note that so far a dead lock has not occurred and the company is continuing to function. If required, it may function by passing circular resolutions. What the petitioners are doing is to threaten creation of a deadlock in future. They are threatening to remain absent or to remain present and block any resolutions. In that context also, what is relevant is that it is only the particular kind of items which are mentioned in Article 65 that require one affirmative vote from each group. Mr Shelat states that nothing of the kind is being done by the respondent-company. If we look into every item specifically, there is no allegation whatsoever in the petition that any of those items are violated by the respondent-company. Mr Shelat also states that respondent do not plan to take any of those items mentioned in Article 65 as of now. That being the position, the argument of creating a deadlock in the Board of Directors is an argument of despair.

33 As far as general body meetings are concerned, as noted above, though some difficulties can certainly be created by the petitioners, yet the meeting can certainly be conducted after adjournment under section 174(5) of the Act. Then also what is material to note is that there are serous allegations of misappropriation of funds and mismanagement against the petitioners themselves. They are facing a charge in a criminal court. In a situation like this, in fact what was expected of them was that they voluntarily step down. They having not done so, if the Directors of the other group take over the management, they cannot be faulted for that. Besides, as held by the Honourable Supreme Court, normally the submission that a limited company be treated as a quasi partnership cannot easily be accepted. This is because, as again observed by the Hon'ble Supreme Court, the promoters of a company whether or not they were earlier partners when they elect themselves to avail of the advantages of forming a limited company, they voluntarily and knowingly agree to abide by the provisions of the Act. Besides, as observed by the Hon'ble Supreme Court, the Company Law Board has wide powers under section 402. In the present case, although there are allegations of mismanagement against the petitioners, it is the petitioners themselves who are alleging mismanagement and then oppression on account of their being removed from the management. That is what they have been saying right from the date of issuance of their notice by their advocate on 19.9.1996 by specifically referring to section 397 of the Act. If that be so, they have a remedy under section 402 of the Act.

34 Section 443 (2) of the Act lays down as follows:-

> "Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy"

The section mandates the court that if there is other remedy available and if the petitioners are acting unreasonably in seeking to have a company wound up, instead of pursuing that other remedy, the Court may refuse to make that order. Here the word "may" will have to be read as "shall". Thus, where these two conditions

are satisfied, the Court is not expected to make an order of winding up on the ground that it is just and equitable. The so called grivance of the petitioners is that they are removed from the management and as observed by the Honourable Supreme Court the general interests of the shareholders should not be readily sacrificed at the altar of squabbles of directors for power to manage the company as in Mehra's case. For the reasons which are stated above, it is difficult to exercise the powers under section 433 (f) of the Act in the present case.

35 Mr Soparkar submits that it is for the petitioners to examine and decide as to whether they have an alternative remedy and as to whether alternative remedy is equally efficacious. This submission of Mr Soparkar cannot be accepted. The respondents can always point out that the other remedy provided and available in the Statute is adequate and efficacious. The powers under section 402 are wide enough and if at all any example is required, Mehra's case provides for the same wherein on an appropriate application being made and a case being made out, a Division Bench of the Madhya Pradesh High Court exercised the power under that section and directed Mr Mehra to be appointed as a Director although he had been ousted earlier and that order was left undisturbed by the Honoruable Supreme Court.

36 In the circumstances, the petition is dismissed. Company Application No.7 of 1997 filed by the petitioner for interim relief is also dismissed. Inasmuch as the petition is dismissed, which was the submission of the applicants in Company Application No.58 of 1997, no separate order is passed thereon. The parties will bear their costs.

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