

WORLD WIDE AGENCIES PVT. LTD. AND ANR. A

v.

MRS. MARGARAT T. DESOR AND ORS.

DECEMBER 19, 1989

[SABYASACHI MUKHARJI, CJ AND B.C. RAY, JJ.] B

Companies Act, 1956—Sections 109, 397 and 398—Whether a person not registered as member of company entitled to move petition for winding up.

The appellant No. 1 is a private limited Company incorporated under the Indian Companies Act. The Company had at all relevant times 7 share-holders and the total number of shares subscribed and paid up was 2010 shares. The appellant No. 2 is a shareholder and a whole-time Director of the Company. Consequent upon the death of one share-holder, Mr. S.K. Desor, who had controlling interest in the Company, his legal representatives, wife and children respondents herein, filed a petition under Section 397 and 398 of the Act and in the alternative prayed for winding up of the company. A preliminary objection was raised on behalf of Mrs. Amrit K. Singh, appellant No. 2 regarding the maintainability of the petition on the ground that the respondents were not members of the company as their names had not been recorded in the register of members and as such they had no *locus standi* to file the petition in question. A further objection was also taken that a composite petition under Sections 397 and 398 of the Act with an alternative prayer for winding up of the company was not maintainable.

A company Judge of the High Court before whom the petition came up for hearing held that the respondents who were the wife and children of the deceased share-holder and who having obtained Reserve Bank's permission and letters of administration according to law should be treated as members for the purpose of maintaining a petition under Sections 397 and 398 of the Act. The company Judge also held that a composite petition was maintainable.

Appellant No. 2 preferred an appeal against the order of the Company Judge. The appellants also moved this Court under Article 136 of the Constitution against the order of the Company Judge. This court by its order dated 18th January 1989 stayed the further proceedings before the Single Judge and directed expeditious disposal of the appeal. The Division Bench dismissed the appeal holding that the petition under

Sections 397 and 398 was maintainable. Hence this appeal.

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The same two questions as stated above arose for determination by this Court.

Dismissing the appeal, this Court,

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HELD: Succession is not kept in abeyance and the property of the deceased member vests in the legal representatives on the death of the deceased and they should be permitted to act for the deceased member for the purpose of transfer of shares under Section 109 of the Act. [558D]

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In some situations and contingencies, the 'member' may be different from a 'holder'. A 'member' may be a 'holder' of shares but a 'holder' may not be a 'member'. [558E]

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To hold that the legal representatives of a deceased shareholder could not be given the same right of a member under Sections 397 and 398 of the Act would be taking a hyper-technical view which does not advance the cause of equity or justice. [558B]

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In the instant case, the legal representatives have been more than anxious to get their names put on the register of members in place of deceased member, who was the Managing Director and Chairman of the company and had the controlling interest. It would, therefore, be wrong to insist that their names must be first put on the register before they can move an application under Sections 397 and 398 of the Act. This would frustrate the very purpose of the necessity of action. [558F-G]

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The decision of the English courts are not binding on the courts in India. But the observations or the reasoning are of persuasive value. [555C]

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Re Jermyn Street Turkish Baths Ltd., [1970] 3 All E.R. 37; *Re Bayswater Trading Co. Ltd.*, [1970] 1 All E.R. 608; *James v. Quena Venture Nitrate Grounds Syndicate Ltd.*, [1896] 1 Chancery Division 456; *Re Dlewellyn v. Kasintoe Rubber Estate Ltd.*, [1914] 15 All E.R. 558; *New Zealand Gold Extraction Company, (Newberryautin Process) Ltd. v. Peacock*, [1948] 1 Q.B. 622; *Re Meyer Dougals Pty Ltd.*, [1965] V.R. 638; *Kedar Nath Agarwal v. Jay Engg. Works Ltd. and Ors.*, [1963] 33 Company Cases 102; *Rajahmundry Electric Supply Corp. Ltd. v. A. Nageshwara Rao and Ors.*, AIR 1956 SC 213; *Life Insurance Corporation of India v. Escorts Ltd. and Ors.*, AIR 1986 SC

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1370 at p. 1412; *Shanti Prasad Jain v. Kalinga Tubes*, [1965] 35 Company Cases 363 and *Bilasrai Joharmal and Ors. v. Akola Electric Supply Co. Pvt. Ltd.*, 20 Company Cases 549, referred to.

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CIVIL APPELLATE JURSIDICTION: Civil Appeal No. 5186 of 1989.

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From the Judgment and Order dated 31.8.1989 of the Delhi High Court in Company Appeal No. 35 of 1988.

F.S. Nariman, Ashok K. Mahajan and Subhash Sharma for the Appellants.

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Anil B. Devan and Vinoo Bhagat for the Respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, CJ. Leave granted.

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This is an appeal from the judgment and order of the Division Bench of the High Court of Delhi, dated 31st August, 1989. The appellant No. 1—M/s World Wide Agencies (P) Ltd. is a private limited company incorporated under the provisions of the Indian Companies Act, 1956 (hereinafter referred to as 'the Act') to which Table 'A' of Schedule 1 to the Act applies, as stipulated under the Articles of Association of the company. As per the memorandum of association the appellant company was carrying on the business of travel agents at G-40, Connaught Circus, New Delhi. The authorised Share capital of the company was to the tune of Rs.5 lakhs divided into 5000 equity shares of Rs. 100 each. The paid up capital as per the last annual return filed by the company with the Registrar of Companies, was Rs.2,01,000. The company had at all relevant times 7 shareholders and the total number of shares subscribed and paid up was 2010 shares.

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The appellant No. 2 Mrs. Amrit Kaur Singh, at all relevant times, was a shareholder holding 545 fully paid up shares in the share capital of the company, and was also the whole-time working Director of the company, holding the office from 1974 onwards. Late Mr. S.K. Desor was a British national. He held 600 shares in the said company, acquired by him from the Ex-Managing Director Mr. Amrik Singh Saluja and his family. The respondents Nos. 2 & 3 to this appeal are children of late Mr. S.K. Desor who died on 5th March, 1985. As per the certified copy of the annual return made up to 15th February, 1984

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A the shareholders of appellant No. 1 (company) were as follows:

Mr. S.K. Desor	600 shares
Mrs. Amrit Kaur Singh	545 shares
Mr. Yash Pal Malhotra	250 shares
Mrs. Amrit Gupta	200 shares
B Mrs. Savitri Devi Kohli	5 shares
Mr. A.S. Saluja	5 shares
Mr. Balwant Singh	405 shares

	2010 shares

C A petition under ss. 397 & 398 of the Act and in the alternative for winding up of the company was filed by the respondents on 25th March, 1985, wherein it was alleged that on 12th March, 1985 respondent No. 1, being the widow of late Mr. S.K. Desor, applied as a legal heir of late S.K. Desor to the Board of Directors of the appellant company for transmission of 850 shares held by her late husband. It is

D stated that the shares of Yash Pal Malhotra had been acquired by late Mr. S.K. Desor; and that respondent No. 1 filed an affidavit of her daughter Ms. Kim Paul, relinquishing her claim to the shares of her late father. The Board of Directors resolved that they had no objection to transmission of the shares held by Mr. S.K. Desor but the

E actual transmission would take place on respondent No. 1's obtaining Reserve Bank of India's permission and the succession certificate. The respondent No. 1's application for allotment of 5 shares as per her letter of the same date was allowed by the Board of Directors, and it was resolved that in view of allotment of these shares, her interest in the shares of her late husband, she be appointed as a Director of the company, subject to Reserve Bank of India's permission.

F It is stated in the judgment under appeal that at the said meeting of the Board of Directors, they recorded their deep appreciation for the services rendered by late Mr. S.K. Desor as Managing Director-cum-Chairman of the company, and mourned his passing away. The quorum of the said meeting was two—Mrs. Amrit Gupta and Mrs. Savitri Devi Kohli. It is recorded in the judgment under appeal that on 23rd March, 1985 the Board of Directors held another meeting. The minutes of the meeting of 12th March, 1985 were confirmed by the two above-mentioned Directors. The third Director, Mrs. Amrit K. Singh, however, objected as she stated that she had not been informed of the last meeting. Various averments had been made in the petition with

regard to oppression and removal of certain valuables of Mrs. Amrit K. Singh and illegal operation of the bank account etc. It was also asserted that Mrs. Singh was holding 545 shares benami and these in fact belonged to Mr. S.K. Desor.

A preliminary objection was raised on behalf of Mrs. Amrit K. Singh regarding the maintainability of the petition on the ground that the appellants 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 ss. 397 & 398 of the Act with an alternative prayer for winding up of the company was not maintainable.

C The learned single Judge of the High Court sitting as a Company Judge dealt with the application and held that the appellants who were the wife and children of late Mr. S.K. Desor and had obtained letters of administration. u/s 290 of the Indian Succession Act read with s. 273 of the Act, as also the permission of the Reserve Bank of India, should be treated as members for the purpose of maintaining a petition u/ss. 397 & 398 of the Act. The learned single Judge also held that a composite petition was maintainable.

D E F G H The appellant Mrs. Amrit K. Singh filed an appeal for herself and, as she alleged, as "Working Director" from the judgment and order dated 21st September, 1988 of the learned single Judge. It appears that the appellants, aggrieved thereby, had also moved this Court under art. 136 of the Constitution. This Court by its order dated 18th January, 1989 stayed the further proceedings before the learned single Judge and directed expeditious disposal of the appeal pending before the division bench of the High Court, from the said order of 21st September, 1988 which had been admitted on 13th October, 1988, for consideration by the Division Bench of the High Court of the application for directions. By a judgment and order delivered on 31st August, 1989 the Division Bench dismissed the said appeal and held that the petition u/ss. 397 & 398 was maintainable by the respondents in the facts and circumstances of the case, and that a composite petition u/ss. 397, 398 & 433(f) of the Act was maintainable. Aggrieved thereby, the appellants preferred this appeal to this Court.

We are concerned with two questions of law, namely, whether the legal heirs of a deceased shareholder can be treated as members of the company for the purpose of maintaining a petition u/ss. 397 & 398 of the Act, and whether a composite petition under ss. 397, 398 &

A 433(f) of the Act is maintainable. We had the advantage of hearing Mr. F.S. Nariman, counsel for the appellants and Mr. Anil Diwan for the respondents. It may be mentioned that during the pendency of the appeal before the High Court, without prejudice to the rights and contentions of the parties, an emergent meeting of the Board of Directors was directed by the High Court to be held on 28th January, 1989 to consider the question of registration of 450 shares belonging to the deceased Mr. S.K. Desor in the name of Mrs. Margarat T. Desor and her son Sameer K. Desor, being respondents Nos. 1 & 3 respectively. It further appears that as per the directions of the Division Bench, dated 27th January, 1989 the court had appointed Chairman Mr. C.K. Mahajan and Mrs. Margarat T. Desor were not permitted to vote at the said meeting. At a meeting held subsequent thereto, by a majority, it was resolved not to register the respondents Nos. 1 & 3 as members. It must, however, be noted that the Division Bench vide its order dated 27th January, 1989 had directed that no effect would be given to the said Resolution.

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D The question, therefore, which is material to be considered; is, whether the legal heirs of a deceased shareholder whose names are not entered in the register of members, are entitled to maintain petition u/s. 397 & 398 of the Act. It was contended on behalf of the appellants that ss. 397 & 398 of the Act must be strictly construed.

E Section 397 of the Act which is in chapter VI of the Act under the heading "Prevention of Oppression and Mismanagement", provides as follows:

F "Application to Court for relief in cases of oppression.—
(1) Any member of a company who complains that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members including any one or more of themselves may apply to the Court for an order under this section, provided such members have a right so to apply in virtue of section 399.

G (2) If, on any application under sub-section (1), the Court is of the opinion—
(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members, and

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(b) that to wind-up the company would unfairly prejudice such member or members, but that otherwise the fact would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up;

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.”

On behalf of the appellants it was contended that the right which is a specific statutory right, is given only to a member of the company and until and unless one is a member of the company, there is no right to maintain application u/s 397 of the Act. Mr. Nariman contended that there was no automatic transmission of shares in the case of death of a shareholder to his legal heir and representatives, and the Board has a discretion and can refuse to register the shares. Hence, the legal representatives had no locus standi to maintain an application u/ss. 387 & 398 of the Act. Mr. Nariman submitted that the rights under ss. 397 & 398 of the Act are statutory rights and must be strictly construed in the terms of the Statute. The right, it was submitted, was given to “any member” of a company and it should not be enlarged to include “any one who may be entitled to become a member”.

In order to decide the question involved, it would be necessary to examine certain provisions of the Act. Section 2(27) of the Act states that “member” in relation to company does not include a bearer of a share-warrant of the company issued in pursuance of section 114 of the Act. Section 41 of the Act provides as follows:

“(1) The subscribers of 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 agreed in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.”

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

Section 109 of the Act states as follows:

“A transfer of the share or other interest in a company of a

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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."

B In this connection, it would be relevant to refer to Articles 25 to 28 of Table A of the Act, which deal with the transmission of shares and which are in the following terms:

C "25.(1) On the death of a member the survivor 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.

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

E 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 herein-after provided, elect, either—

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

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

H (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 share before his death or insolvency.

G 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.

H (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 resulting 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.

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28. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends or other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, become 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:

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Provided that the Board 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 notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share, until the requirements of the notice have been complied with.”

Article 28 is more or less in *para materia* to articles 32 of Table A to the English Companies Act. It may also be mentioned, as it has been mentioned by the High Court, that s. 210 of the English Companies Act, before its amendment in 1990, was substantially the same as s. 397 of the Act.

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As mentioned hereinbefore, it is the admitted case of the parties that the regulation for management of the company as contained in Table A to the Act apply to appellant No. 1 and the said relevant provision in the articles of association of the company regarding transfer of shares is Article 17, which is as follows:

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“No share shall be transferred to any person other than a shareholder 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 of administrator of a deceased shareholder, if there is will or to the heir or lineal descendants where no letter of administration has been taken.”

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A Mr. Nariman submits that in view of the specific provisions of s. 397 of the Act only a member is entitled to move a petition under ss. 397 and 398 of the Act and that member is one whose name is in the register of members in view of s. 41 of the Act, as mentioned hereinbefore. In this connection, it is was emphasised that not only must the applicant be a member but in terms of s. 399 of the Act, he has to fulfil the conditions laid down under clauses (a) and (b) of s. 399 of the Act. These should be construed so as to mean what the words say. According to Mr. Nariman, a member is not, in view of the scheme of the Act, the representative of a deceased member.

C It is true that it must be a member and s. 41 of the Act 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" is entitled to move the petition. It appears in this case that names of respondent Nos. 2 and 3 had not then been entered in the register of members at the relevant time when the application was made. But the name of Late Shri S.K. Desor was still on the register of members and the

D requisite shareholding for moving a petition under ss. 397 and 398 of the Act was held by him. This question, though *res integra* so far as this country is concerned, has been considered in England, where Pennycuick, J. had occasion to consider this in *Re Jermyn Street Turkish Baths Ltd.*, [1970] 3 All E.R. 57. The Company there was incorporated in 1946 and represented a joint venture by L and S. In 1952, S

E transferred his shareholding to Mrs. P who became a director of the company. L died in 1953 and thereafter Mrs. P was mainly responsible for the company's affairs. The petitioners therein were appointed administrators in L's estate in 1960, and in 1961, at their request, the names of the petitioners therein were entered in the register of members of the company against the name of L as administrators of L.

F On the questions whether the entry constituted merely a note of the grant of administration or the registration of the petitioners as members, and whether the petitioners were members of the company for the purposes of presenting a petition under s. 210 of the English Companies Act at p. 65 of the report, Pennycuick, J. noted that it was contended before him that the petitioners therein were not members

G of the company and hence had no locus standi to present the petition bearing in mind that petition under s. 210 of the English Companies Act could only be presented by a member of the company. In the facts of that case, Pennycuick, J. held that the petitioners were duly registered as members of the company but he proceeded to hold that even if it were so, the personal representatives of a deceased member

H must be regarded as members of the company for the purposes of

s. 210 of the English Companies Act. In this connection, reference was made to the decision of Buckley, J. in *Re Bayswater Trading Co. Ltd.*, [1970] 1 All E.R. 608, where at p. 609 of the report, it was held that 'member' would include representative of a deceased member for the purpose of s. 353 of the English Companies Act. This judgment of Pennycuick, J. went up in appeal to the Court of Appeal and it was reversed. See *Re Jermyn Street Turkish Baths Ltd.*, [1970] 3 All E.R. 184. But on the point whether the representative of a deceased member can maintain an action under s. 210 of the English Companies Act, the views of Pennycuick, J. were not reversed or modified. Mr. Nariman submitted that the observations of Pennycuick, J. were obiter for the decision of the case. We are unable to agree. Indeed, this was a point specifically referred to by Pennycuick, J. as being raised and specifically decided. But we need not detain ourselves with this controversy because the decision of the English Courts are not binding in the courts of India. But the observations or the reasoning are of persuasive value. We are clearly of the opinion that having regard to the scheme and the purpose of ss. 397 and 398 of the Act, the reasoning on a *para materia* provision of the English Act would be a valuable guide. The said construction, appears to us, to further the purpose intended to be fulfilled by petitions under ss. 397 and 398 of the Act. It facilitates solution of problems in case of oppression of the minorities when the member is dead and his heirs or legal representatives are yet to be substituted. This is an equitable and just construction. This construction, as suggested by Pennycuick, J. does not militate against either equity or justice of the such situation. We would, therefore, adhere to that construction. In this connection, it may be mentioned that in the 1972 Edition of Gore-Browne on Companies, it has been stated as follows:

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"It has recently been settled that the personal representatives of a deceased member, even though they are not registered as members, are entitled to present a petition under s. 210. In *Re. Jermyn Street Turkish Baths Ltd.*, Pennycuick, 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 of his shares devolved by operation of law."

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In 1st Supplement January 1978 of Gore-Browne on Companies, at para 16, it is stated that "while the shares remain in the name of the deceased holder, his estate is *prima facie* entitled to any subsequent benefits deriving from the shares". At p. 491 of Buckley on Companies

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A Act, 1948, the decision of *Re Jermyn Street Turkish Baths Ltd.*'s case (supra) has also been referred to and it was observed that for the purpose of the petition under s. 210 of the English Companies Act, 'member' includes the personal representatives of a deceased member. Buckley also notes that this decision referred herein was reversed without affecting this point by the Court of Appeal. In *Halsbury's Laws of England*, 4th Edition, Vol. 7, para 1010, at p. 604, same view has been expressed. The division bench of the Delhi High Court also noticed that the view expressed in *Re Jermyn Street Turkish Baths* (supra) also finds indirect support from various other decisions of the English Courts. Reference was made to the decision in *James v. Buena Venture Nitrate Grounds Syndicate Ltd.*, [1896] 1 Chancery Division 456; *Re Dlewellyn v. Kasintoe Rubber Estate Ltd.*, [1914] 15 All E.R. 558 and *New Zealand Gold Extraction Company (Newbery yautin Process) Ltd. v. Peacock*, [1894] 1 Q.B. 622. These decisions do indicate that the right of members in similar, though not identical situations, should be construed as being belonging to the legal representative or heirs of deceased members.

D Our attention, however, was drawn to the decision of Supreme Court of Victoria in *Re Meyer Dougals Pty. Ltd.*, [1965] V.R. 638 by Gowans, J. Article 22 of Table A to the Victorian Companies Act, 1938 (4602) provides as follows that:

E "22. A person becoming entitled to a share by reason of the death, bankruptcy 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 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 meeting of the company."

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G Gowans, J. in that case found that there was a "careful distinction between members and persons entitled to share by reason of the death of a member but who are not registered appear to deny the status of a member to a legal personal representative who is not a member". On an analysis of various decisions, Gowans, J. was of the view that a deceased's estate and its representative may in a particular context have to be treated as not a member and in view of the provisions of s. 186(1) of the Victorian Companies Act, 1961 which provides "any member of a company who complains that the affairs of the company are being conducted in manner oppressive to one or more of

the members (including himself) may . . . apply to the court for an order under that section", Gowans, J. came to the conclusion that there was no reason for treating the word "members" in that section as not applying to a legal representative who is not entitled to be accorded the right which registration would give him to vote in regulating the conduct of the company's affairs. The object of the section, which is in *para materia* to s. 399 of the Act, was to provide a remedy for the case where, notwithstanding the fact that a person possesses the right of a member enabling him to participate in the conduct of the affairs of the company, he can claim that he as a member or as one of a number of members, is or are being oppressed by those who conduct the affairs of the company. According to Gowans, J., it should not be treated as applying to someone who is not so entitled and cannot so claim. With respect, we are unable to accept this view. Having regard to the purpose of the section as we conceive it, it would not be just construction to deny the legal representatives of the deceased member the right of maintain a petition under ss. 397 and 398. We would prefer to accept the view of Pennycuick, J. in *Re Jermyn Street Turkish Baths Ltd.*'s case (supra). It appears to us that this will be in consonance with the equity of the sections. In *Gower's Principles of Modern Company Law*, at p. 68, reference has been made to *Re Jermyn Street Turkish Baths Ltd.*'s, case (supra) and also to *Re Meyer Douglas Pty Ltd.*'s, case (supra), which, according to the learned author, seems to be more convincing. Mr. Nariman also referred us to the comments in *Hahlo's Casebook on Company Law*, 2nd Edition, p. 351, where in footnote, reference was made to *Re Jermyn Street Turkish Baths Ltd.*'s, case (supra), which have been followed in some decisions. It was noted as follows:

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"It appears doubtful whether personal representatives of deceased shareholders, who themselves are not, or cannot become, registered as shareholders, can be regarded as "members" for the purposes of s. 210 of the 1948 Act: *Re Cuthbert Cooper & Sons Ltd.*, [1937] Ch. 392 and *Re Meyer Douglas Ltd.*, [1965] V.R. 635 at 655."

We do not agree for the reason mentioned before. It further appears to us the Australian judgment does not reconcile to logic in accepting that legal representative can petition for winding-up, which is called the "sledge-hammer remedy", but would refuse the lesser and alternative remedy of seeking relief against oppression and mismanagement though the latter remedy requires establishment of winding-up on just and equitable grounds as a precondition for its

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A invocation. It would be rather incongruous to hold that the case for winding-up on just and equitable grounds can be made out by the legal representatives under s. 439(4)(b) of the Act but not the other. This does not appear to be logical. It appears to us that to hold that the legal representatives of a deceased shareholder could not be given the same right of a member under ss. 397 and 398 of the Act would be

B taking a hyper-technical view which does not advance the cause of equity or justice. The High Court in its judgment under appeal proceeded on the basis that legal representatives of a deceased member represent the estate of that member whose name is on the register of members. When the member dies, his estate is entrusted in the legal representatives. When, therefore, these vestings are illegally or wrongfully affected, the estate through the legal representatives must

C be enabled to petition in respect of oppression and mismanagement and it is as if the estate stands in the shoes of the deceased member. We are of the opinion that this view is a correct view. It may be mentioned in this connection that succession is not kept in abeyance and the property of the deceased member vests in the legal representa-

D D on the death of the deceased and they should be permitted to act for the deceased member for the purpose of transfer of shares under s. 109 of the Act.

E In some situations and contingencies, the "member" may be different from a "holder". A "member" may be a "holder" of shares but a "holder" may not be a "member". In that view of the matter, it is not necessary for the present purpose to examine this question from the angle in which the learned Single Judge of the Calcutta High Court analysed the position in the case of *Kedar Nath Agarwal v. Jay Engineering Works Ltd. and Ors.*, [1963] 33 Company Cases 102, to which our attention was drawn.

F Admittedly in the present case, the legal representatives have been more than anxious to get their names put on the register of members in place of deceased member, who was the Managing Director and Chairman of the company and had the controlling interest. It would, therefore, be wrong to insist their names must be

G first put on the register before they can move an application under ss. 397 and 398 of the Act. This would frustrate the very purpose of the necessity of action. It was contended on behalf of the appellant before the High Court that if legal representatives who were only potential members or persons likely to come on the register of members, are permitted to file an application under ss. 397 and 398 of the Act, it

H 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 ss. 397 and 398 of the Act. The High Court held that this is a fallacy, 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 the 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 has devolved on them though the death of the member whose name is still on the register. In our opinion, therefore, the High Court was pre-eminently right in holding that the legal representatives of deceased member whose name is still on the register of members are entitled to petition under ss. 397 and 398 of the Act. In the view we have taken, it is not necessary to consider the contention whether as on the date of petition, they were not members. In that view of the matter, it is not necessary for us to consider the decision of this Court in *Rajahmundry Electric Supply Corpn. Ltd. v. A. Mageshwara Rao & Ors.*, AIR 1956 SC 213. In view of the observations of this Court in *Life Insurance Corporation of India v. Escorts Limited & Ors.*, AIR 1986 SC 1370 at p. 1412, it is not necessary, in our opinion, to consider the contention as made on behalf of the appellant before the High Court that the permission of the Reserve Bank of India had been erroneously obtained and consequently amounts to no permission. In the present context, we are of the opinion that the High Court was right in the view it took on the first aspect of the matter.

The second question was whether a combined petition under ss. 397, 398 and 433(f) of the Act was maintainable. In view of the observations of this Court in *Shanti Prasad Jain v. Kalinga Tubes*, [1965] 35 Company Cases 363 and the reasoning of the Bombay High Court in *Bilasrai Joharmal & Ors. v. Akola Electric Supply Co. Pvt. Ltd.*, 28 Company Cases 549, we are of the opinion that the averments which a petitioner would have to make to invoke the jurisdiction under ss. 397 and 398 are not destructive of the averments which are required to be made in a case for winding up under s. 433(f) of the Act on the just and equitable ground, though they may appear to be contradictory. As *Halsbury's Laws of England*, 4th Edition, Volume 7, at p. 604-605, discusses that the prayer must be made stating that the affairs are such which fulfil the requirement of winding up but to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, the Court may, with a view to bringing to an end the

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- A matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future or otherwise. We are of the opinion that averments which a petitioner would have to make to invoke the jurisdiction of ss. 397 and 398 of the Act are not destructive of the averments which are required to be made in a case for winding up under s. 433(f) on the just and equitable ground, though they may appear to be rather conflicting if not contradictory. We are in agreement with the High Court that the petition must proceed upto certain stage which is common to both winding up and though there may be some difference in procedure to be adopted, it is not such which is irreconcilable and cannot simultaneously be gone into. Indeed these are made in the manner indicated before. It has to
- B be borne in mind that a discretion is conferred on the court and it is only when 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 if the Court is further of the opinion that it would be a remedy worse than the disease, then the Court can examine whether the alternative relief by way of a direction under s. 397 can be granted. This is a well accepted remedy exercised by the Courts. We are, therefore, of the opinion that the High Court was right in the view that a composite petition under ss. 397, 398 and 433(f) of the Act is maintainable.
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- E The appeal, therefore, must fail and is accordingly dismissed. We dismiss the appeal with costs, which is assessed at Rs.5,000.

Y. Lal

Appeal dismissed.